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Select Committee on the Constitution

8th Report of Session 2010–11

Fixed-term Parliaments Bill

Report with Evidence

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Q refers to a question in oral evidence;
FTP 1 refers to written evidence as listed in Appendix 2.

Fixed-term Parliaments Bill

CHAPTER 1: INTRODUCTION

Introduction

1. The Constitution Committee is appointed "to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution." In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.

2. In this report we consider the Fixed-term Parliaments Bill. The Bill would remove the Prime Minister's power to call an election at the time of his choosing, and sets a five year fixed term, subject to the possibility of early dissolution following a vote by the House of Commons. The Bill is of clear constitutional importance. We have therefore carried out enhanced scrutiny of the Bill by conducting a full inquiry into the policy and provisions contained in the Bill.

3. We launched this inquiry on 15 July 2010, shortly before the introduction of the Bill into the House of Commons, with the intention of producing a report in time for its second reading in the House of Lords. The Bill received its second reading in the Commons on 13 September. At the time of publication of this report, the Bill was awaiting report and remaining stages in the House of Commons.[1]

4. We have heard oral evidence from seven witnesses and received written submissions from a further 41 witnesses. Our witnesses included the Minister for Political and Constitutional Reform, Mark Harper MP, academic experts, campaigners, and international legislatures and academics to all of whom we are grateful. We have also taken account of the evidence given to us by the Deputy Prime Minister, the Rt Hon Nick Clegg MP, and by constitutional experts which we published in our 5th report, *The Government's Constitutional Reform Programme*.[2]

5. We have been assisted in this inquiry by the Committee's Legal Advisers, Professor Adam Tomkins, University of Glasgow, and Professor Richard Rawlings, University College London. We are grateful for their assistance.

The provisions of the Fixed-term Parliaments Bill

6. The Bill as introduced included the following main provisions:

   - the next general election to be held on 7 May 2015;
   - subsequent general elections to take place on the first Thursday in May at five year intervals;
   - a safety valve provision for an early election to take place in the event of the Speaker of the House of Commons certifying that a number of MPs

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[1] References in this report to the Bill or Explanatory Notes are references to the Bill as introduced in the House of Commons: 2010–11 Bill 64.

[2] Constitution Committee, 5th report (2010–2011): *The Government's Constitutional Reform Programme* (HL Paper 43).

equivalent to, or more than, two-thirds of the total number of seats have voted in favour;

- a second safety valve provision for an early election to take place in the event of the Speaker certifying (a) that the Commons has passed a motion of no confidence in the government, and (b) that 14 days have passed without the House passing any motion expressing confidence in any government of Her Majesty;
- a provision that Parliament cannot otherwise be dissolved.

The scope of this report

7. In this report we examine the key issues of the principle of fixed-term Parliaments, the length of the fixed term and the provisions enabling early general elections to be held. We also consider the process by which the Bill was brought forward.

8. We received little or no evidence on a number of other issues raised by the Bill's provisions. We therefore make no further comment on the following:

- the choice of the first Thursday in May as the appropriate day and time of year for holding general elections;[3]
- orders enabling the date of an ordinary general election to be brought forward or delayed by up to two months;[4]
- the length of time between dissolution and the polling date;[5]
- the restriction on the designation of public holidays and days of mourning being used to affect the date of dissolution;[6]
- the summoning of a new Parliament.[7]

The history of the fixed-term Parliaments debate[8]

9. The system by which Parliaments are dissolved and general elections held has remained largely unchanged for nearly a century. The current five year maximum term was introduced by the Parliament Act 1911. The Act did not affect the Crown's prerogative to dissolve Parliament. This equates to a prime ministerial power to call an election broadly at a time of his or her choosing. A former Chairman of this Committee compared this arrangement to "a race in which the Prime Minister is allowed to approach it with his running shoes in one hand and his starting pistol in the other".[9] In other words, the Prime Minister's power may give the governing party a significant advantage over opposition parties, particularly in terms of the organisation of an election campaign. One way of reducing this advantage, it has been suggested, is to introduce a system of fixed-term Parliaments.

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3 Clause 1(3).

4 Clause 1(5).

5 Clause 3(1).

6 Clause 3(6).

7 Clauses 3(4) and 4(2).

8 For more information see Constitution Unit, *Fixed Term Parliaments*, August 2010, ch 6 (also included in Political and Constitutional Reform Committee, 2nd Report (2010–2011): *Fixed-term Parliaments Bill* (HC Paper 436), Ev 43).

9 Lord Holme of Cheltenham, HL Deb 22 May 1991 col 245.

10. In recent times, there has been little public discussion of fixed-term Parliaments, though the issue has been on the constitutional reform agenda for the last twenty years. In 1991 the Institute for Public Policy Research argued that four year fixed terms should form one element of a written constitution.[10] The Labour Party's 1992 manifesto called for fixed-term Parliaments to be introduced.[11]

11. Whilst their 1997 manifesto contained no commitment to fixed-term Parliaments for Westminster, the newly elected Labour Government did introduce fixed four year terms for the devolved institutions in Scotland, Wales and Northern Ireland. Private members' bills providing for fixed parliamentary terms at Westminster were brought forward in 2001 by Labour MP and former Chairman of the Public Administration Committee, Tony Wright,[12] and in 2008 by Liberal Democrat MP David Howarth;[13] though neither Bill progressed beyond a second reading debate. The Liberal Democrat policy in favour of four year fixed terms was set out in the policy papers *Real Democracy for Britain* (2007)[14] and *For the People, By the People* (2007)[15].

12. In 2007, the then Prime Minister, Gordon Brown, announced a proposal to require the Prime Minister to seek the approval of the House of Commons before asking the Queen for a dissolution.[16] This would have been another method of addressing the fact that the Prime Minister can choose the election date. The proposal went no further.

The development of this Bill

13. Both Labour and the Liberal Democrats made commitments in their 2010 manifestos to legislate to introduce fixed-term Parliaments, though neither specified a length of term. The Conservative manifesto made no commitment to their introduction. The May 2010 election resulted in a hung Parliament. In the coalition negotiations that followed, fixed-term Parliaments quickly emerged as one element of the constitutional reform agenda. The resulting coalition programme for government included the following commitment:

> "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."[17]

14. The Government subsequently announced that the binding motion proposal had been dropped and the Fixed-term Parliaments Bill was introduced to the House of Commons on 22 July 2010.

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10 The Constitution of the United Kingdom, September 1991.

11 It's time to get Britain working again, Labour Party manifesto 1992.

12 Fixed-term Parliaments, Bill 54 (2001–2002); see also HC Deb 7 May 2002 col 46.

13 Fixed Term Parliaments, Bill 30 (2007–2008).

14 The Liberal Democrats, Real Democracy for Britain: 20 proposals to strengthen British democracy, July 2007.

15 The Liberal Democrats, *For the People, By the People*, September 2007, para 3.1.8.

16 The Governance of Britain, Cm 7170 (2007), paras 34–36.

17 HM Government, The Coalition: Our programme for government, p 26.

The Bill and the Government's aims for constitutional reform

15. The Fixed-term Parliaments Bill is just one part of a package of proposed reforms intended by the Government to make the political system "far more transparent and accountable."[18] In his evidence, the Deputy Prime Minister told us that: "it is an unambiguous judgment on our part that reducing the power of the executive, seeking to boost the power of the legislature, making the legislatures more accountable to people ... collectively introduces the mechanisms by which people can exercise greater control over politicians."[19] More recently, the Deputy Prime Minister has argued that "People expect to be given clear and transparent choices."[20]

16. Throughout this report we consider whether the Government have met these aims in introducing the Fixed-term Parliaments Bill. Although the principle of fixed terms reduces the power of the executive in one respect,[21] we discuss in Chapter Four various concerns over the drafting of clause 2 which mean that the executive's power to determine when elections should be called would not be entirely reduced.[22] Moreover, it is arguable that the Bill makes it less clear when and how that power may be exercised. We stress in Chapter Three that the Bill would lead to less frequent general elections; this would make the legislature less accountable, not more.[23] In Chapter Five we examine the lack of time given by the Government to development of its policies and the Bill's detailed provisions.[24]

17. The policy behind the Bill shows little sign of being developed with constitutional principles in mind. A prime example of this is the Government's decision to legislate for five year fixed terms, which we discuss in detail in Chapter Three. [25] There is a legitimate debate to be had about the length of the Parliamentary term. However, it is important to recognise the distinction between "the immediate concern of the Government that it should continue for five years" and "the long-term issue of fixed-term Parliaments":[26] the former is possible under the current constitutional arrangements; the latter constitutes a significant constitutional change.

18. The Minister for Political and Constitutional Reform told us that the proposed binding motion could have placed the Crown in a difficult position if any request for early dissolution were subsequently made, and that it was therefore judged more appropriate to introduce legislation at an early stage.[27] He added that "the House of Commons has effectively now said that in principle it supports fixed-term Parliaments, and the view is that that has already constrained the ability of the Prime Minister to seek an early dissolution if he was so minded."[28]

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18 *Ibid.*

19 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 55.

20 The Deputy Prime Minister, Political Studies Association/Hansard Society Annual Lecture, 16 November 2010.

21 See Chapter Two, paras 26 and 46.

22 See, especially, paras 115–119.

23 See Chapter Three, paras 49 and 62.

24 See, especially, paras 164–167.

25 See Chapter 4.

26 Q 3.

27 Q 117.

28 *Ibid.*.

19. The speed with which the policy was introduced, with no significant consultation, no green paper and no detailed assessment of the pros and cons of a five year term over a four year term, suggests that short-term considerations were the drivers behind the Bill's introduction. The Hansard Society argued that "political expediency appears to have taken priority over Parliament's right to properly scrutinise the executive."[29] Democratic Audit stressed that "this change is yet another piecemeal alteration, implemented with insufficient consultation, to the UK constitution".[30]

20. **We take the view that the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles or sustained public demand. We acknowledge the political imperative behind the coalition Government's wish to state in advance its intent to govern for the full five year term, but this could have been achieved under the current constitutional conventions.**

[29] FTP 16.

[30] FTP 10.

CHAPTER 2: THE PRINCIPAL OF FIXED-TERM PARLIAMENTS

The nature of fixed-term Parliaments

21. Before we examine the arguments for and against fixed-term Parliaments, it is necessary to define what is meant by that term. There is a spectrum between rigidly fixed terms, of which Norway is the prime example, and flexible systems such as in the UK, Australia,[31] New Zealand and Ireland where the Prime Minister broadly retains the flexibility to call an election at any point before the expiry of a maximum term.

22. In between, there are semi-fixed arrangements under which a fixed term is the norm, but where there are safety valve provisions which enable an early election to be called. Such arrangements operate in Germany, Sweden and the devolved institutions in Scotland, Wales and Northern Ireland. Such arrangements are generally referred to as fixed-term arrangements, though the terms of these Parliaments are not fixed in length in the pure sense.[32]

23. The Constitution Unit have set out a useful representation of this concept:[33]

TABLE 1

Continuum of fixed-term experience

Completely Fixed	Semi-Fixed	Nominally Fixed	Completely Flexible
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 the fixed term.

Completely flexible: Length of term, subject to an overall maximum, decided at the discretion of the executive.

24. Despite its short title, the Bill does not, strictly speaking, establish a fixed parliamentary term for the Westminster Parliament, but instead establishes fixed dates for future general elections (subject to any early dissolution). The current law, under the Septennial Act 1715, as amended, provides for a maximum parliamentary term of five years. Each term conventionally commences a number of days following the general election. Once Parliament is dissolved there is a period of around four weeks[34] until the next general election. Consequently, if each Parliament lasted for the maximum five year term, general elections would sometimes be held at less convenient times of

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31 At federal level.

32 Q 83 (Professor Bogdanor).

33 Constitution Unit, *op. cit.* Fig 5.1. See also Appendix 3 which sets out the election cycles for a number of Westminster-style international legislatures.

34 The timetable for this is set out in rule 1 in Schedule 1 to the Representation of the People Act 1983.

the year (such as Christmas). In order to establish a convenient election date, even those Parliaments which have lasted for close to the maximum term have been dissolved by the Prime Minister a few days or weeks early.[35]

25. As we shall see in Chapter Four, the Fixed-term Parliaments Bill, whilst removing the Prime Minister's power to choose when to request a dissolution of Parliament, includes provision for an election to be held before the fixed date. Accordingly, **the Bill establishes a semi-fixed arrangement and reduces the level of flexibility which exists in the current system.**

The case for fixed terms

26. As we have noted, one of the Government's aims is "reducing the power of the executive".[36] The Deputy Prime Minister set out the Government's case for the introduction of fixed-term Parliaments on this basis:

> "We are seeking to remove from the executive and the Prime Minister of the day the ability to play politics with the timing of the election. That is the basic motive of this. Governments have been distorted, paralysed, hobbled and handicapped over and over again by the capricious manner in which Prime Ministers have played cat and mouse with the British people and with the legislature about when elections should be held. ... That is debilitating to good government; it destroys good government. It is humiliating to the legislature and the Parliament. It makes a complete mockery of the relationship between the legislature and the executive."[37]

27. The Bill goes further than is strictly necessary to achieve this stated policy objective. It would have been possible to remove the Prime Minister's power to choose when to seek a dissolution simply by placing the power to determine the date of the next election in Parliament's hands through the two-thirds majority vote. However, we received no evidence setting out the policy details or implications of such an arrangement.

28. The central argument of proponents of reform, that the current system is unfair and that fixed-term Parliaments should be introduced as a matter of democratic principle, is a powerful one. The Government referred us to three opinion polls which demonstrated public support for the establishment of fixed terms.[38] A number of witnesses stressed that the Government were "proposing to give up what has been a very significant element of prime ministerial power".[39]

29. Whilst this is undoubtedly the central justification for introducing fixed-term Parliaments, witnesses suggested that the Bill would have a number of additional beneficial constitutional consequences such as maintaining public confidence in the democratic process,[40] forcing politicians to be more open about dissolution decisions,[41] stabilising coalition governments[42] and

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35 The 1992–1997 Parliament lasted from 27 April 1992 until 8 April 1997 (4 years, 11 months and 11 days); the general election was held on 1 May 1997, five years and 22 days after the previous general election which had been held on 9 April 1992. The 2005–2010 Parliament lasted from 11 May 2005 until 12 April 2010 (4 years, 11 months and 1 day); the general election was held on 6 May 2010, five years and one day after the previous general election. See also Table 2 (Chapter Three).

36 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 55.

37 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 54.

38 FTP 44 (Minister for Political and Constitutional Reform).

39 *Ibid.* Q 13 (Professor Hazell); FTP 40 (David C Docherty).

40 Q 46 (Professor Milner).

41 FTP 19, para 3 (David Howarth).

protecting the Crown from becoming embroiled in political controversy over dissolutions as has happened in other countries.[43]

30. Some argued that fixed-term Parliaments could also improve the policy-making and legislative process. The Deputy Prime Minister told us that the current system "prevents difficult, long-term decisions being taken, because everything is refracted through that short-term objective."[44] Dr Ruth Fox, Director of the Hansard Society's Parliament and Government Programme, argued that the introduction of fixed-term Parliaments should eliminate both the wash-up[45] and the "tidal wave" nature of the legislative process whereby the amount of legislation rises and falls at certain points in the calendar.[46] Officials of parliaments where fixed terms are in operation stressed that they allowed parliamentary business to be planned more effectively.[47]

31. Introducing fixed terms would create consistency with international experience. Democratic Audit argued that fixed-term Parliaments of some kind are a democratic norm.[48] Three quarters of the 41 democracies analysed in a 2005 study were found to have fixed terms.[49] Their introduction would also bring Westminster into line with practice in the devolved legislatures.

32. Several other, less direct, advantages of fixed terms were also suggested. Henry Milner, Visiting Professor of Political Studies, Umeå University, Sweden, argued that a fixed electoral cycle presented the opportunity to engage people in the democratic process more effectively.[50] Mark Ryan, Senior Lecturer in Constitutional and Administrative Law, Coventry University, suggested that fixed election dates "would help cement parliamentary elections in the psyche of the electorate", which could in turn encourage higher turnout.[51]

33. The Deputy Prime Minister argued that other parties had advocated fixed-term Parliaments in the past, that the previous Prime Minister had expressed his strong support for it, that it had been debated for decades, and that it was common practice in many other democracies: "I think the case has been made".[52]

The case against fixed terms

34. A number of our witnesses either opposed fixed-term Parliaments in principle, or expressed scepticism that their introduction would make any material difference or advance the Government's constitutional agenda.

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42 *Ibid.*, paragraph 4.

43 Constitution Unit *op. cit.*, para 3.1.5. See further, Ch 4 paras 139–143.

44 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 54.

45 This is where legislation is fast-tracked through its parliamentary stages by consensual agreement between the political parties at the end of a parliamentary session.

46 Q 111; FTP 16, para 8.

47 FTP 9 (Clerk to the Scottish Parliament); FTP 34, para 19 (Deputy Secretary General, Swedish Parliament).

48 FTP 10.

49 Constitution Unit, op. cit., para 5, citing Henry Milner, *Canada's Unfixed Election Dates: a 'Political Season' to reduce the Democratic Deficit*, Institute for Research on Public Policy Matters, December 2005, p 18.

50 Q 47.

51 FTP 32, para 4.

52 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 61.

35. It may be that the advantage accruing to a Prime Minister under the present system is in practice minimal. Vernon Bogdanor, Research Professor, King's College London, argued that on most occasions when a Prime Minister "went early", he or she would have won anyway.[53] Alistair Smith, Professor of Politics, New York University, agreed, suggesting that "electoral fairness, one of the major justifications for a move to a fixed term system, is greatly overstated."[54]

36. Some witnesses were sceptical about how much difference the introduction of fixed-term Parliaments would actually make to the policy-making process[55] whilst Christian Leuprecht, Associate Professor, Department of Political Science and Economics, Royal Military College of Canada, suggested that knowledge of when the next election would be could lead a government to seek to manipulate the economic cycle to their maximum advantage at the time of the next election.[56]

37. Several witnesses reflected on the difficulty of legally entrenching fixed term legislation in a system where no Parliament can bind another.[57] Some witnesses suggested that there could be ways of effectively entrenching legislation.[58] For instance, Raymond Youngs, Senior Lecturer, Law School, Kingston University, suggested that the legislation should be entrenched by a provision preventing its repeal or amendment without the consent of the House of Lords through use of the procedure in the Parliament Acts.[59] Others argued that legislation could be politically entrenched by making it so intrinsic to the UK's constitutional settlement that it would be politically impossible for a government to contemplate repealing the Act.[60]

38. The most cogent argument made against fixed-term Parliaments was that, far from enhancing the democratic process, fixed terms could actually undermine it since, in certain circumstances, it may be more democratic to call an early election than it would be to continue to the end of a fixed term. Thus, it was asserted, whilst removing the Prime Minister's power to call an election at a time of his or her choosing may sometimes be a democratic good, at other times the removal of the flexibility that the current system provides would be a democratic drawback.

39. Several witnesses made the point that earlier than anticipated elections are not "axiomatically a bad thing".[61] There are a number of historical examples of scenarios in which an early election might be deemed appropriate:

- where there is a change of Prime Minister (for example, the 1955 general election called after Eden had succeeded Churchill);

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53 Q 96.

54 FTP 33. See also FTP 22 (Christian Leuprecht).

55 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 14 (Peter Riddell); FTP 22 (Christian Leuprecht).

56 FTP 22.

57 FTP 13 (Professor Simon Evans, Professor Cheryl Saunders, John Waugh, University of Melbourne); FTP 19 (David Howarth).

58 FTP 19, summary and para 8, 14–15 (David Howarth).

59 FTP 38, para 13 (Raymond Youngs).

60 FTP 10, para 49 (Democratic Audit); FTP 33 (Professor Smith); Q 126 (Minister for Political and Constitutional Reform). See, however, FTP 42 (Lord Armstrong of Ilminster).

61 Q 83 (Professor Bogdanor).

- where there is a change in government formation (for example, the 1931 election called following the formation of the National Government);
- where a Parliament is unviable (for example, the October 1974 election held only eight months after the previous election had resulted in a hung Parliament);
- where a government is unable to govern effectively (for example, the 1951 election called just eighteen months after the previous election due to the Government having a slim majority and following a number of ministerial resignations);
- where a Prime Minister wishes to seek a mandate for a new policy (for example, the 1923 election called after the Baldwin Government adopted the policy of tariff reform).

40. Professor Bogdanor argued that such cases demonstrated the:

> "serious disadvantages of a fixed-term Parliament, which prevents Prime Ministers leading a government in an unviable Parliament from going to the country, which prevents a newly chosen Prime Minister between Parliaments from going to the country, which prevents a Prime Minister who has a new policy for which he may seek a mandate from going to the country. Most importantly of all, because we could be moving into that situation with our hung Parliaments, it means that coalitions can change in the middle of a Parliament without the people being allowed to pronounce on that."[62]

41. The Constitution Unit has suggested a number of reasons why early dissolutions have occurred in European countries, including increasing a government majority or following a constitutional or political crisis or a major policy change.[63] The case of a government seeking to increase its majority is clearly the kind of self-interested early dissolution that the Government have said they are seeking to prevent, but in each of these other cases an arguable democratic case for an early election could be made. Lord Armstrong of Ilminster, a former Cabinet Secretary, pointed out that "it is almost certainly impossible to define in the statute all the possible circumstances in which a premature dissolution should be permitted."[64]

42. Of these potential scenarios, the case of a change in Prime Minister was the one most frequently cited by witnesses, not least because the memories of the 2007 speculation[65] over whether or not Gordon Brown would call an election were still relatively fresh in the collective memory. Under the British parliamentary system, the Prime Minister remains in office for as long as he or she retains the confidence of the House of Commons. Accordingly, there is no constitutional reason why, if he or she can command the confidence of the Commons, a new Prime Minister should not succeed his or her predecessor without an election taking place.[66] However, Professor Bogdanor stressed that the 2007 situation demonstrated some public support for an

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62 Q 96.

63 Constitution Unit, *op. cit.*, Fig 7.2.

64 FTP 42.

65 See, for example, BBC reports that the election would not happen: http://news.bbc.co.uk/1/hi/7031749.stm.

66 Q 11 (Professor Bradley).

election in such circumstances,[67] and, indeed, the current Prime Minister, David Cameron, prior to the May 2010 election, argued that this should be the case.[68]

43. Professor Bogdanor agreed that the constitutional practice until now had been that there was no requirement to call an election after a change in Prime Minister, but that "it may be that opinion in the country is changing because people feel that we are moving towards a presidential system."[69] There is a case for saying that any new Prime Minister should at least have the opportunity to seek a fresh mandate in a general election.

Conclusion

44. The fundamental question is whether the principle of fixed-term Parliaments achieves the Government's stated aim of reducing the power of the executive whilst making the legislature more accountable to the people. The arguments are finely balanced. Whilst Professor Bogdanor asserted that "the disadvantages of fixed-term Parliaments are much greater than the disadvantages of our current system",[70] Democratic Audit argued that "the possible problems associated with fixed-term Parliaments are outweighed by the potential advantages".[71]

45. There is not a straight choice between fixed and flexible parliamentary terms. As we have seen, there is a spectrum between a fully fixed and a fully flexible system and the Bill would establish a semi-fixed arrangement. There is a trade-off between the potential gain in democratic accountability that would result from limiting the Prime Minister's power and the potential loss in democratic accountability that could result from an overly rigid fixed-term arrangement. The changes introduced by the Bill need to be considered in these terms.

46. **We recognise that, in promoting this Bill, the Prime Minister is prepared to relinquish an important prerogative power. This is a significant aspect of the Government's stated aim of reducing executive power. However, the balance of the evidence we heard does not convince most of us that a strong enough case has yet been made for overturning an established constitutional practice and moving to fixed-term Parliaments.**

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67 Q 105. See, however, Q 120 (Minister for Political and Constitutional Reform). A YouGov poll at the time indicated that around one third of voters believed that an election should be held that autumn: http://today.yougov.co.uk/sites/today.yougov.co.uk/files/YG-Archives-pol-ch4news-vi-071005.pdf.

68 See, for example, The Independent, *Tories propose six month limit for unelected PMs*, 24 April 2010.

69 Q 105.

70 Q 96.

71 FTP 10, para 6.

CHAPTER 3: THE LENGTH OF THE PARLIAMENTARY TERM AND ELECTION TIMING

Five year terms

47. Aside from the principle itself, arguably the most significant constitutional provision in the Fixed-term Parliaments Bill is the length of the term. Clause 1(3) of the Bill provides for fixed terms of five years.

48. This provision reflects the maximum term currently permissible under the Septennial Act 1715, as amended by the Parliament Act 1911. In introducing the 1911 Act, the Prime Minister, Herbert Asquith, told the House of Commons:

> "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."[72]

49. Asquith's expectation of four year parliamentary terms has been broadly borne out. There have been 18 post-war general elections, and the average length of time between general elections since 1945 is three years and ten months.[73] Had all Parliaments since 1945 lasted the full five year term, four fewer elections would have been held. Having said that, there have been three particularly short post-war Parliaments: 1950–51, 1964–66 and 1974. Parliamentary terms have been more uniform in length since 1979, principally because Governments since then have, more often than not, been returned with large overall majorities. Of the seven Parliaments since May 1979, four have lasted for roughly four years and three for roughly five years.

TABLE 2

Length of time between general elections post 1945[74]

1945–1950	4.6 yrs	1974–1979	4.6 yrs
1950–1951	1.7 yrs	1979–1983	4.1 yrs
1951–1955	3.6 yrs	1983–1987	4.0 yrs
1955–1959	4.4 yrs	1987–1992	4.8 yrs
1959–1964	5.0 yrs	1992–1997	5.1 yrs
1964–1966	1.5 yrs	1997–2001	4.1 yrs
1966–1970	4.2 yrs	2001–2005	3.9 yrs
1970–1974	3.7 yrs	2005–2010	5.0 yrs
1974–1974	0.6 yrs		

72 HC Deb 21 Feb 1911 col 1749.

73 Figure calculated from the general election on 5 July 1945 to the general election on 5 May 2010. There were 17 Parliaments during this period.

74 Source: HC Research Paper 10/54, *Fixed-term Parliaments Bill*, 26 August 2010 p 32. That paper also lists the lengths of the parliamentary terms as well as the time between elections (the latter is longer as it takes account of periods of dissolution). Only the latter are listed here since this reflects the Bill's provisions for a fixed election date.

The case for a five year term

50. The Deputy Prime Minister set out the Government's case for a five year term:

> "It is ... a length of time ... with which people are familiar ... [and] there is a pattern of five year Parliaments, at least recently ... Given the tendency for governments to be somewhat hamstrung and paralysed for a considerable period before a general election is held ... you are in practice talking about a government that can get on and do difficult things ... for about four years ... That provides a degree of stability and transparency to the political system which outweighs the self-evident fact that if you did that over a period of time, people would be voting less frequently ... I think that is a reasonable balance to strike. If one goes to four years, one is talking about a three-year period in which governments are not blighted by their own sense of mortality ... That strikes me as a rather short period. For all of those factors, we have tended to settle on five years."[75]

51. Dr Gary Levy, former Professor of Political Science at the University of Western Ontario and Ottawa University, submitted the only evidence which unambiguously backed the Government's case for a longer term. He observed that opinion polls suggest that voters "abhor elections", and that constant electioneering would mean it would not be possible to keep pace with China and other developing countries where elections "do not consume the time, energy, money and political capital of the western style elections that we hold so dear."[76] David Howarth, a former MP whose own private member's bill had set out a term of four years, saw "no obviously dispositive method for deciding between the two proposals ... fairness points more to four years, stability to five."[77]

The case against a five year term

52. The vast majority of witnesses who commented on the question advocated a shorter, four year term. Many did so in forceful terms[78] raising a number of specific objections to the Government's proposals.

53. Several witnesses argued that it was wrong in principle to reduce the frequency with which elections are held. The Hansard Society stressed the distinction between five years as an absolute maximum and five years as the norm;[79] Professor Dawn Oliver, Emeritus Professor of Constitutional Law, University College London, thought that the cumulative effect of successive terms would amount to a democratic deficit;[80] and Democratic Audit expressed alarm that a five year term would present "a reversal of a long struggle for more accountable government."[81]

54. A five year term does not reflect devolved and international experience. Appendix 3 shows the variety of experience in terms of the length of a term

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75 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 54; see also QQ 63–65. The Government emphasised their view during the Committee Stage debate in the Commons: HC Deb 16 November 2010 cols 837–841.

76 FTP 23.

77 FTP 19, summary and paras 5–7.

78 Q 7 (Professor Bradley); FTP 10, paras 11–18 (Democratic Audit); Q 50 (Professor Padgett).

79 FTP 16, para 7.

80 Q 7.

81 FTP 10, paras 11–18.

in international democratic institutions. Four years, whilst not universal, is clearly the norm.[82] Moreover, where fixed terms have been introduced or altered in recent years, legislatures have invariably opted for four year terms.[83]

55. Four years has also been the default option in terms of recent debate in the UK.[84] The devolved legislatures in Scotland, Wales and Northern Ireland all operate according to four year fixed terms. Recent private members' bills have proposed four year terms.[85] Liberal Democrat policy papers in 2007 were explicitly in favour of four year fixed terms.[86]

56. Professor Milner told us that "there seems to be a kind of natural rhythm around four years in other elections that the citizen might be participating in, such as municipal elections, Scottish elections and American elections if we are following them. The four year term is ... culturally established, even in Britain".[87] Professor Bradley argued that a four year term would be more consistent with voters' expectations.[88]

57. As we note in Chapter Five, there has been a lack of public debate on this issue. Professor Bradley told us that "if one is making the fundamental switch from the present situation to fixed-term Parliaments, then one needs a full debate on what the period should be."[89] When asked whether there should have been consultation on this point, the Deputy Prime Minister questioned whether "people are straining at the bit to vote in elections more frequently ... I have never met anyone who says to me, 'Well, I kind of like voting every four years.'"[90] This does not reflect the Government's stated view that the legislature should be made more accountable to the people.[91]

58. Democratic Audit dismissed the Government's reasoning, alleging that five years "seems to have been arrived at on a basis of the political calculations of the two parties involved in the Coalition ... It would be regrettable if short-term political calculations were ... to have a long-term negative impact upon political accountability in the UK."[92]

Conclusion on term length

59. Of all the issues arising from the Fixed-term Parliaments Bill, the proposal for a five year fixed term has created the most unease. Despite the Government's arguments in favour of a five year term, the consensus emerging from the evidence is that this is too long, and that a four year term would be preferable. The Government's central argument is that a five year term is necessary in order to allow an administration to govern effectively. This is an important consideration, yet it must not be viewed in isolation.

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82 QQ 50, 52 (Professor Milner). See also Constitution Unit *op. cit.*, Fig 4.1; FTP 10, Table 2 (Democratic Audit).

83 Including Sweden in 1994 and Canada in 2006. In addition, all Australian states and territories and Canadian provinces and territories that have introduced fixed terms in recent years now operate four year terms.

84 Q 87 (Dr Fox).

85 Fixed-term Parliaments, Bill 54 (2001–2002); Fixed Term Parliaments, Bill 30 (2007–2008).

86 The Liberal Democrats, *Real Democracy for Britain op. cit.*; *For the People, By the People op. cit.*.

87 Q 52.

88 QQ 7–8. See also FTP 31, para 6 (Richard Pond).

89 Q 7.

90 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 66.

91 See para 15.

92 FTP 10,para 17.

The need to deliver effective government must be balanced against the need to maintain democratic accountability.

60. The evidence we received did not support a term shorter than four or longer than five years. Neither do we believe that such a term would be appropriate. The question therefore is whether a four or five year term would provide the most appropriate balance between effective government and democratic accountability. The difference between a five year maximum and a five year norm should not be understated—the cumulative effect on democratic accountability of successive five year terms would be considerable.

61. The length of previous parliamentary terms in the UK has depended on a number of factors, including the popularity or success of each particular government.[93] There has, however, been no fixed-term principle under which governments would normally last for the full five year term. It is therefore not possible to judge from the UK experience whether governments required to last for five years would be any less popular or successful than they would otherwise have been.

62. **Whilst acknowledging the case made by the Deputy Prime Minister for a five year term, nonetheless the majority of the Committee consider that a four year term should be adopted for any fixed-term parliamentary arrangement at Westminster. In the view of the majority, the shift from a five year maximum to a five year norm would be inconsistent with the Government's stated aim of making the legislature more accountable, inconsistent with existing constitutional practice and inconsistent with the practice of the devolved institutions and the clear majority of international legislatures.**

63. Any change in the general election cycle is of the utmost constitutional significance. The strong views that witnesses have expressed on this question demonstrate the need to consult on and debate fully and openly the relative benefits and drawbacks of different term lengths. The Government have failed to do this. We consider these process issues further in Chapter Five.

Resetting the clock

64. We discuss in Chapter Four the ways in which Parliament may be dissolved early. One significant issue which has arisen from this is the question of the length of the ensuing term. There are two basic options: allowing any subsequent Parliament to last for a new full term (resetting the clock) or keeping the set election date so that the subsequent Parliament would only last for a part term.

65. Professor Bradley stressed that if you reset the clock:

> "you will not have made a real psychological change to your constitutional arrangements to the fixed-term system, because in the minds of major parties there will always be the view that if we do have an election now, will this give us what at the moment we would like, which is a four or five year period in office? That goes against what should be the spirit of a fixed-term system."[94]

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[93] Q 8 (Professor Bradley); FTP 16, para 7 (Hansard Society); Constitution Unit, *op. cit.*, para 4.1.
[94] Q 16 (Professor Oliver). See also Q 99 (Professor Bogdanor).

66. This issue must be examined in the context of the Bill's provision of a five year term. Were an early election to take place, the newly elected government could have a full five years in which to govern, creating a strong incentive to bring about an early election. The shorter the maximum term, the weaker that incentive. Professor Milner and Stephen Padgett, Professor of Government, University of Strathclyde, agreed that the shorter the term, the better the argument for resetting the clock.[95]

67. Professor Milner also noted that it is possible to agree to reset the clock in some circumstances, but not in others. He told us that:

> "Working on the premise that it would be four years, I would argue that the principle [of resetting the clock] is not wrong. I could imagine a compromise that said that if the dissolution was in the first two years of Parliament, the original date should be maintained, but if it was in the second two years of Parliament, the election should be four years from that date."[96]

68. Clause 1(3) of the Bill provides for the clock to be reset. However, ordinary elections must always be held on the first Thursday in May, therefore this provision is modified by clause 1(4) which prevents any subsequent Parliament lasting for more than five years. So, for example, the next ordinary election should take place on 7 May 2015. If this Parliament were dissolved early in October 2013, the next Parliament would last until May 2018: a term of four and a half years. This prevents an early election held at a less convenient time of year (for example, close to Christmas) resulting in all subsequent elections having to be held at that time of year. It should be noted that these provisions could result in a subsequent term of just over four years.

69. The Government justified their decision to reset the clock on the ground that "the public would think it odd if you were to have an early election and the public were to make a clear decision about a government—perhaps returning it with a good majority—and a very short time afterwards, you were to ask the public to go back and vote all over again."[97]

70. The Government also stated, in their response to the report of the Commons Political and Constitutional Reform Committee on this Bill,[98] that: "The people expect that when they go to the polls, they are being asked to elect a government which will last for a full term with a full programme. The proposals in the Bill will provide certainty as to the length of a Parliament and minimise the possibility of multiple elections happening in quick succession."[99]

71. These arguments are not conclusive. Firstly, what the people might expect under a fixed-term arrangement would be dependent on the provisions of the relevant legislation. Secondly, any Parliament which lasted only until a set election date would have a definite length. Indeed, the length of the parliamentary term might be more certain since it would be less likely that a Parliament with a shorter time left to run would itself be dissolved early.

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95 Q 56.
96 Q 48.
97 Q 161 (Minister for Political and Constitutional Reform).
98 Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*.
99 Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill, Cm 7951, November 2010, para 42.

Thirdly, it can be questioned just how likely multiple elections in quick succession would be. It is possible to modify arrangements so that a newly elected government does not have to return to the polls within a short period of, say, six months or a year. Consultation and pre-legislative scrutiny would have provided the opportunity for such arrangements to be properly considered.

72. It is also the case that the clock is not reset in the Scottish Parliament or the Welsh Assembly.[100] Although the Scottish and Welsh legislatures have been in existence only since 1999, it is notable that they have produced both minority and coalition governments and that no early elections have yet been held.

73. Many of our witnesses were equivocal about this issue. Some argued that whilst only allowing the remainder of the term would act as a disincentive to abuse of the early dissolution provisions by an existing government, a different government elected with a fresh mandate should be allowed a full term.[101] The Government acknowledged that the arguments were balanced and that it was, in the end, "a judgment issue".[102]

74. **We agree that there is a case to be made for resetting the clock. Whatever the maximum term, we accept that an elected government should have a full term in which to develop their policies and take their legislative programme through Parliament.**

Election timing—the devolved institutions

75. Five year terms would create a clash with elections to the devolved institutions in May 2015 and every 20 years thereafter.[103] There was a widespread view that such a clash was undesirable.[104] Professor Padgett pointed to the dangers of a clash when he told us that in Germany, "Where state elections have coincided with the federal election, the federal election's issues and campaigns have totally engulfed the regional campaign."[105]

76. Once again, concerns were raised about the process by which the Government's proposals were announced, and in particular about the lack of consultation with the devolved institutions.[106] The Deputy Prime Minister told us that he had met the leaders of the devolved administrations and the Presiding Officers in two of the devolved legislatures. He conceded that:

> "there is undoubtedly some potential for overlap and some degree of confusion if one has two elections for legislatures on the same day. We are consulting people and trying to see whether there are workable or desirable alternatives ... whether people think that the issue is big enough that we need to take remedial action."[107]

77. This issue may not be resolvable in the Fixed-term Parliaments Bill. The Government have pointed out that if the Bill provided for a four year term, an early dissolution which resulted in a clash could lead to a clash occurring

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[100] It is reset for the Northern Ireland Assembly.
[101] Q 21 (Professor Oliver); Q 49 (Professor Padgett); Q 99 (Professor Bogdanor).
[102] Q 161 (Minister for Political and Constitutional Reform).
[103] On the assumption that the electoral cycle is not disrupted by early general elections.
[104] QQ 13–14 (Professor Bradley and Professor Oliver); Q 90 (Dr Fox); FTP 32, para 2 (Mark Ryan).
[105] Q 59.
[106] QQ 13–14 (Professor Bradley and Professor Oliver); Q 90 (Dr Fox); FTP 32, para 2 (Mark Ryan).
[107] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 63; see also Q 64.

every four years thereafter.[108] Only by providing for fully fixed four year terms, with the next Parliament due to commence in 2013, could a more satisfactory permanent cycle of biennial UK and devolved elections be established. The arguments we set out in the next chapter in favour of early dissolution arrangements mean that such an arrangement would not be acceptable. A different solution is therefore required.

78. A number of potential solutions were suggested to us, including allowing the UK Parliament to continue only until October 2014,[109] moving Westminster elections to take place just before or after the devolved elections,[110] or giving the Scottish Parliament the power to set its own election dates.[111]

79. The Minister for Political and Constitutional Reform has announced that he is consulting the Scottish Parliament and the Welsh Assembly about bringing forward amendments enabling these legislatures to avoid a potential clash by varying the election date by six months either way if two-thirds of members vote in favour. In relation to the Northern Ireland Assembly, the Government are proposing to wait until after the combined elections in May before deciding how to proceed.[112]

80. **A potential date clash with elections to the devolved institutions in May 2015 and every twenty years thereafter could occur if the Government's proposals are adopted. Ideally, this should be avoided in order to protect the integrity and separate identity of Westminster and devolved elections. We await the outcome of the Government's consultations with the devolved institutions, and stress the importance of ensuring that any proposed solution is broadly acceptable to all concerned.**

81. **It is regrettable that the Government did not seek to engage with the devolved institutions in order to find a satisfactory solution to the consequences of their proposals before the Bill was introduced.**

Sessional arrangements

82. Traditionally, parliamentary sessions have begun and ended in the autumn, with the exception of years in which there is a spring general election. In these instances, it is usual for the first session to last approximately eighteen months until the following autumn, with the final session of a Parliament lasting around six months. The Government have announced that future parliamentary sessions will last from spring to spring in order to bring them into line with elections on a fixed date in May.[113]

83. The Government have proposed the shift on the basis that it would form a common-sense corollary of their legislative proposals.[114] It should be noted, however, that this change is not a necessary corollary of the Bill's provisions:

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108 HC Deb 16 November 2010 col 844.

109 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 13 (Professor Hazell); see also Constitution Unit, *op. cit.*, para 4.2.

110 FTP 32, para 13 (Mark Ryan).

111 Q 90 (Dr Fox citing Professor John Curtice). This proposal could equally apply to the Welsh Assembly and the Northern Ireland Assembly.

112 HC Deb 16 November 2010 cols 841–845.

113 HC Deb 13 September 2010 cols 33–34WS.

114 HC Deb 13 September 2010 cols 614–619. See also Q 135 (Minister for Political and Constitutional Reform).

in recent times, the Queen's speech has been held in the autumn, despite elections being held in spring or summer.

84. The Government also announced that the current session would last for two years until spring 2012. The Minister for Political and Constitutional Reform told us that:

> "given that the first session in a new Parliament is traditionally a longer one anyway ... we thought that on balance it was better to extend the current session and then align the State Opening and the new sessions with the new fixed-term cycle ... I do not see that it changes the balance between Parliament and the Executive at all."[115]

85. Professor Bradley considered this to be "a rather remarkable situation. We are in an area of reworking a lot of aspects of the constitution that have been around for a long while ... to postpone [the State Opening] for a complete year is quite a major change."[116] He argued that it would strengthen the executive at the expense of Parliament, noting that "time and the need to get agreement by a certain date are a vital part of the power of the House of Lords."[117]

86. Conversely, the Clerk of the Parliaments stated that:

> "the long session may strengthen the power of the House. Use of the Parliament Act procedure requires the bill concerned to be introduced in the following session. If that session is not to begin until April or May 2012 then the House has a significant power of delay in relation to a bill which otherwise would be expected to complete its passage in 2011."[118]

87. **The Government's proposal to extend the current session until spring 2012 may increase the power of the House of Lords to delay legislation but it also affords the Government more time to get its legislative programme through both Houses, thus potentially increasing the power of the executive in relation to Parliament. This appears to be inconsistent with the Government's stated aim of reducing the power of the executive.**[119]

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[115] QQ 135–6.
[116] Q 4.
[117] Q 6.
[118] FTP 43, para 9.
[119] See above para 15.

CHAPTER 4: EARLY PARLIAMENTARY GENERAL ELECTIONS

Introduction

88. Clause 2 of the Bill provides for an early parliamentary general election to take place in two situations. First, where at least two thirds of MPs have voted in favour of a motion to that effect and, second, following the passing of a motion of no confidence in the Government. We have received a significant amount of evidence on both the central issues of policy—whether and how Parliament may be dissolved early—and on the detailed drafting of this clause.

The need for a safety valve

89. Despite the short title of the Bill, it is not the case that all future Parliaments would necessarily last for the full five year period. International comparisons show that absolute fixed terms are in fact rare. Amongst western democracies, only the Norwegian Storting cannot be dissolved early in any circumstance; all other western parliaments with fixed-term arrangements allow for at least one safety valve to provide for situations where it is regarded as necessary for an early general election to be held.

90. The Deputy Prime Minister told us that "there are circumstances in which the desire for a general election, to press the reset button, is so great that something needs to happen."[120] Professor Bradley agreed, arguing that the introduction of fixed terms was "a serious change" which justified the provision of a safety valve.[121] Robert Blackburn has also argued in favour of safety valves on the grounds that "the essence of the reform would be to replace the existing common law discretionary power of dissolution with a clear legal procedure for when an early dissolution and election should take place."[122]

91. However, the evidence we received was not unanimous on this point. Scandinavian experts argued that "The existence of fixed-term parliaments, *de jure* in Norway and *de facto* in Sweden means that governments have to find other means of resolving political crises than turning to the voters."[123] David Howarth argued that the only safety valve should be Parliament's power to repeal or amend the legislation on the ground that "Where sufficient political consensus exists that an early election should be called, an amending bill would go through quickly."[124] He stressed that a bill "intended to take advantage of short-run political conditions would inevitably fail to enjoy broad support" and "find itself making slow progress in the Lords."[125]

92. We noted in Chapter Two that an earlier than anticipated election is not "axiomatically a bad thing".[126] The Constitution Unit has compiled a list of 67 cases from across Europe where an early election was called, together with the reason for the early dissolution. These included:

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[120] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 58.
[121] *Ibid.* Q 16.
[122] *The prerogative power of dissolution of Parliament: law, practice, and reform* [2009] PL 766, p 788.
[123] FTP 36 (Anders Widfelt). See also FTP 28 (Norwegian Parliament).
[124] FTP 19, para 12.
[125] *Ibid.*, para 9.
[126] Q 83 (Professor Bogdanor).

- to increase a government majority;
- after a constitutional crisis or major constitutional change;
- after losing a vote of no confidence;
- after a major policy change;
- resignation of a Prime Minister—new mandate sought;
- collapse of a coalition or a loss of supply;
- post-war;
- after a political crisis or collapse of a government;
- after a new constitution;
- government split;
- dissolution before a no confidence motion;
- to form a united government.[127]

93. Many of these cases, in particular the loss of a vote of no confidence or a government split, provide a strong argument for allowing an early election. The Bill does not distinguish between the different situations by specifying under what circumstances an early election may be held. However, it would not be possible under the bill's provisions for a government to unilaterally dissolve Parliament in order to avoid a no confidence motion.[128] Moreover, whilst possible, it would not be appropriate for a government to use the Bill's provisions to seek an election simply in order to increase its majority.[129]

94. **We conclude that it is sensible for the Bill to contain some form of safety valve which would allow for an early election in circumstances such as the government losing the confidence of the Commons or where a political or economic crisis has affected the country. Such circumstances cannot be identified nor listed in advance and so the safety valve(s) chosen must be sufficiently flexible to deal with the various situations which might arise.**

95. In this context, we note Professor Bradley's warning that "if it is too easy to have an early election, you ... would get speculation very early on in the life of a fixed-term Parliament. ... How one can, as it were, get the safety valve so that it is there but not too easily used is a question of great subtlety."[130]

The need for two distinct mechanisms

96. We received very little evidence on the question of whether it is appropriate for the Bill to contain two different mechanisms by which Parliament may be dissolved early, though Professor Robert Hazell, Director of the Constitution Unit, University College London, told us that he was "slightly puzzled why the Government sees the need for a dual threshold".[131] The Minister for Political and Constitutional Reform told us that without the two-thirds

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[127] Constitution Unit, *op. cit.*, Fig 7.2
[128] Clause 3(2)
[129] See paras 131–135.
[130] Q 22.
[131] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 13; see also *ibid.* Q 21.

majority mechanism "you would force Parliament to have to engineer the loss of a confidence vote".[132]

97. Democratic Audit also submitted that the two-thirds majority mechanism was a necessary addition to the possibility of a vote of no confidence since: "in the event of an irresolvable deadlock, the Commons could vote for an immediate election without waiting for 14 days to lapse. It seems appropriate to leave open the possibility for Parliament to dissolve itself in exceptional circumstances."[133]

98. The purposes of the two mechanisms are different: the two-thirds mechanism provides for situations where there is cross-party agreement that an election should be called whereas motions of no confidence are likely to be passed in situations of great political dispute. **We therefore conclude that it is appropriate for the Bill to contain two different safety mechanisms as long as each one is workable and fulfils its purpose.**

The two-thirds majority vote

99. The coalition agreement stated that the legislation would provide for dissolution if 55 per cent of the House of Commons voted in favour.[134] This proposal was subject to significant criticism, both in the media and in Parliament,[135] particularly with regard to the suspicion that the percentage chosen was designed to enable the coalition Government, but not the opposition parties, to dissolve Parliament.[136] These concerns led to the Government raising the bar to a two-thirds majority vote when the Bill was introduced.[137] This is the same requirement as exists in the devolved institutions.

100. The Minister for Political and Constitutional Reform told us that:

> "the logic was to set a number that was sufficiently high that it was unlikely that a government could reach it ... it would have to be a cross-party decision with broad support across the House, which means that it would not be being done for partisan reasons but because of the general sense that an early election was in the interests of the country."[138]

We received no evidence arguing in favour of an alternative super-majority.

101. Professor Bradley agreed that this provision was appropriate, arguing that if the two major parties believed an election to be necessary they should be able to have one.[139] Professor Bogdanor disagreed, stating that the provision would enable a government with a landslide majority to secure an election whenever they liked: "I cannot see why a government with a landslide should have that extra privilege."[140] Conversely, Professor Blackburn has stated that the provision would make it too hard for a Prime Minister to call an election.[141]

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132 Q 137.
133 FTP 10, paras 35–36.
134 HM Government, *The Coalition: Our programme for government*, p 26.
135 Press Association, *Cameron faces backbench calls over confidence vote*, 14 May 2010; HC Deb 25 May 2010 cols 135–154.
136 The Guardian, *A giant gerrymander*, 19 May 2010 (Lord Falconer of Thoroton); The Telegraph, *This 55 per cent majority plan will taint the new politics*, 18 May 2010 (David Davis).
137 Second reading debate, HC Deb 13 September 2010 cols 628–629.
138 Q 138.
139 Q 18.
140 Q 96.
141 Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.* Q 81.

102. It is necessary to re-emphasise here that the Bill would establish a semi-fixed parliamentary term under which the government could persuade the House of Commons of the need for an early election. **In the light of our conclusion at paragraph 94 that there needs to be a safety valve mechanism in order to deal with possibly unforeseeable circumstances, we consider that the best way to do this is to enable Parliament to dissolve itself when there is a cross-party majority that an election should be called. Although it is not possible to determine the relative majority which might be held by governments in the future, a requirement of two-thirds of MPs voting in favour of a dissolution motion would most likely necessitate the agreement of cross-party MPs. We therefore conclude that this safety valve is appropriate.**

Motions of no confidence

103. Clause 2(2) provides for a two-stage mechanism under which an early dissolution may follow a vote of no confidence. First, the House of Commons must have "passed a motion of no confidence" in the government. Second, 14 days must have passed "without the House passing any motion expressing confidence in any Government of Her Majesty." These provisions have raised a number of issues.

104. When faced with criticism over the initial proposal for a 55 per cent threshold,[142] the Government responded that it had never been their intention to remove the traditional right of the Commons to pass a motion of no confidence by a simple majority.[143] The definition and use of votes of (no) confidence have been the subject of intense academic and political debate for many years[144] and the Deputy Prime Minister has claimed that the Bill would place these votes on a statutory footing:

> "no confidence motions have until now been a matter of convention. Although it has been widely accepted that a no confidence vote would require a Prime Minister either to resign or to call an early election, there has been nothing to date to enforce this. So for the first time, the Bill gives legal effect to a motion of no confidence passed by this House."[145]

105. The Minister for Political and Constitutional Reform argued that the Bill would not alter the existing conventions as to what happens when a government loses a confidence vote: in such cases the government would resign and there would either be an election or a new government would be formed.[146] David Howarth agreed that the loss of a vote of confidence would not necessarily lead to an election if a new government could be formed.[147] Whilst the Bill clarifies, to this extent, the position of what happens if a vote of no confidence is carried, it leaves open the question of what constitutes such a vote in the first place.

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142 Discussed above at para 99.
143 Speech given by the Deputy Prime Minister, 19 May 2010; see also HC Deb 25 May 2010 col 147.
144 See HC Library Standard Note, *Confidence Motions*, SN/PC/2873, 9 July 2010; Philip Norton, *Government defeats in the House of Commons: myth and reality* [1978] Public Law 360.
145 HC Deb 13 September 2010 col 629.
146 QQ 130 and 141.
147 FTP 19, para 19.

106. Clause 2(2) places on the Speaker of the House of Commons the onus of certifying whether the two stages specified in the Bill have been met. The Minister for Political and Constitutional Reform argued that this would not change the nature of the Speaker's role vis-à-vis the House.[148] However, he also stressed a number of times that "the Speaker would make it very clear before ... a vote took place whether it was a vote on which he would issue his certificate"[149] and that the Speaker would be guided by convention in making his decisions.[150]

107. The evidence we received suggested that the Government's certainty regarding clarity of the no confidence provision is misplaced. Firstly, it is not always clear what would constitute a motion of no confidence. Secondly, it is arguable that the Speaker's new role could bring him into conflict with the government and, possibly, the House.

Definition of a no confidence motion

108. Clause 2(2)(a) applies where "the House [has] passed a motion of no confidence in Her Majesty's Government". This is potentially a broad phrase but, depending on what it is meant to achieve, it may equally not be broad enough. There are three issues. Firstly, are the Bill's provisions limited to motions of no confidence tabled by opposition or backbench MPs, or might an early election be triggered by the loss of a motion of confidence tabled in the government's name? Secondly, do the Bill's provisions extend to votes on the Queen's Speech, on the Budget or on major items of government policy?[151] Thirdly, if the Bill is intended to extend to instances where the government lose a motion of confidence or an important vote, does the provision, as currently drafted, cover this?

109. In relation to the first issue, Dr Fox suggested that "it is hard to see how the government would bring forward a motion of no confidence in themselves. ... The wording of the Bill suggests that it would come only from the opposition."[152] We note that government backbench MPs may also, in theory, propose a motion of no confidence in their own party.

110. As discussed at paragraph 96 the Government's case for having two distinct mechanisms is at least partly dependent on the argument that without the two-thirds mechanism, it might be necessary to "engineer the loss of a confidence vote".[153] This would appear to suggest that, in order to preserve the distinction between the two mechanisms, a motion of no confidence should only be tabled by the opposition or backbench MPs. The wider the definition of a motion of no confidence, the easier it would be for a government to manipulate the provisions in order to call an early election.

111. In relation to the second issue, the Government told us that "there is a convention that certain kinds of votes, like votes on the Queen's Speech, are treated as confidence votes."[154] Although Dr Fox agreed that, under the current conventions, a vote of no confidence "is one of those things where

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148 Q 150.
149 Q 144; see also QQ 147–148.
150 QQ 149, 151–152.
151 Constitution Unit, *op. cit.*, para 7.3; Philip Norton, *Government defeats in the House of Commons: myth and reality* [1978] Public Law 360.
152 Q 103.
153 Q 137 (Minister for Political and Constitutional Reform).
154 Q 149 (Minister for Political and Constitutional Reform).

you know it when you see it"[155] this might not continue to be the case, since the current conventions would need to be considered in the light of the Bill's provisions.

112. The third issue was raised by the Commons Political and Constitutional Reform Committee:

> "It is hard to see ... 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." [156]

The Government did not refer to this question in their response to the report on this Bill of the Commons Political and Constitutional Reform Committee.[157]

113. The Deputy Prime Minister told us that:

> "we want to try to provide as much clarity as possible about what a no confidence motion and process looks like, but equally it is for the House and the Speaker to make his and its own determinations about what they consider to be a motion of no confidence. In a sense, we have provided the tramlines in this draft Bill, but at the same time, I clearly want to retain as much flexibility and autonomy as possible for the House to decide for itself how it then interprets that."[158]

The Deputy Prime Minister acknowledged that it may be necessary to strengthen or clarify this provision.[159]

114. **The Bill as drafted does not explicitly cover all motions of confidence (including defeats on key confidence issues such as the Queen's Speech or the Budget), nor situations where the government lose a vote. Nor does it distinguish between votes of confidence and no confidence. The Government should bring forward amendments to clarify its precise scope.**

The role of the Speaker

115. Broadly speaking, we understand the current convention is that it is for the government to determine what constitutes a vote of confidence (other than a motion of no confidence proposed by the opposition). Neither the House as a whole, nor the Speaker, have had a role in this. Clause 2(2) would appear to change this convention by making the decision to issue a certificate one for the Speaker. This provision appears to give the Speaker a constitutional role which he has not previously had. Moreover, although the Speaker would be likely to follow any direction of the House, it is not clear how any such direction would be given.

116. There would be no legal duty on the Speaker to clarify in advance whether a vote were one in respect of which he would issue his certificate. In most

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155 Q 103. See also Q 18 (Professor Oliver).

156 Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*, para 45.

157 Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill, *op. cit.*.

158 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 67.

159 *Ibid.*

circumstances it may be unlikely that a Speaker asked by the government, opposition or the House of Commons to set out whether a vote was one of confidence would refuse to do so. But it is possible that the government could unexpectedly lose a vote on a major item of policy and that the Speaker could then designate this as a motion of no confidence retrospectively. Although a majority government could then pass a vote of confidence in itself within 14 days,[160] this might inadvertently bring down a minority government, unless the opposition were willing to pass a motion of confidence in order to avoid holding an early election.

117. It is also possible to envisage situations in which the Speaker might be put under pressure to designate an issue as one of confidence. The Minister for Political and Constitutional Reform accepted that "the Speaker would take his direction from the House"[161] but he also argued that the government would be likely to indicate in advance how they wished to treat any significant issue.[162] Whilst it would be appropriate for the House explicitly to resolve that a particular motion was, or was not, one of confidence, it may be less appropriate under this legislation for the government to do so.

118. Whilst greater "transparency and clarity would be helpful for the House",[163] it is unclear what a Speaker might do were a government with a small majority (or a minority party governing with a confidence and supply agreement[164]) to start indicating that votes on minor issues should be treated as votes of confidence in order to ensure that they were passed. Such behaviour has been demonstrated in the UK in the past.[165] Were a government to do this, it could put the Speaker in the difficult position of trying to determine when and whether to accede to the government's requests.

119. **Greater clarity on the definition of a vote of no confidence, as recommended by paragraph 114, would reduce the potential for the Speaker to be drawn into political controversy. The questions of from whom, if anyone, the Speaker should take direction and of whether and when the Speaker should state his view on the effect of a particular vote should be procedural matters for the House of Commons to determine.**

Formation of an alternative government following a no confidence motion

120. Clause 2(2) of the Bill provides that once a motion of no confidence has been passed, an early dissolution will happen unless a motion expressing confidence in any Government of Her Majesty is passed within a period of 14 days. The Minister for Political and Constitutional Reform told us that this provision clarifies the existing convention:

> "The reality at the moment is that if the government does not have a working majority and loses a vote of confidence, there is no necessity for

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[160] Q 152; see also FTP 44.
[161] Q 151.
[162] Q 153.
[163] *Ibid.*
[164] An agreement that a minor party or independent member of parliament will support the government in motions of confidence and appropriation (supply) votes.
[165] See Philip Norton, *Government defeats in the House of Commons: myth and reality* [1978] Public Law 360, pp 373–375.

an election to be called already. It is perfectly possible under our existing arrangements for a new government to be formed without an election taking place, so I do not think we are doing anything new. But perhaps it is the case that, both in Parliament and among the public, expectation about what would happen in certain cases is not as clear as it ought to be."[166]

121. The provision does make it clear that an alternative government can be formed, the period in which that may be done and that if no such government can be formed there will be an early election. Whilst these are the major points which the Bill should determine, the provision leaves some consequential issues unclear or unaddressed.

Is 14 days the most appropriate length of time for government formation?

122. The Government "believe that a period of 14 days strikes the right balance, allowing enough time for an alternative government to be formed while ensuring that there is not a prolonged period without an effective government."[167] Whilst we note that the Scottish Parliament and Welsh Assembly[168] may be dissolved early following a period of 28 days after a vote of no confidence, we have not received any evidence suggesting that a greater length of time would be more appropriate for the Westminster Parliament.

123. The Minister for Political and Constitutional Reform told us that "I suspect it would become clear pretty quickly that the government could not put together an alternative government, or a different government could not be formed."[169] This begs the question of whether 14 days is too long. As Professor Oliver has said, "it is against the public interest for there to be no effective government of the country."[170]

124. In the most recent cases of the loss of a vote of confidence by the Government, a decision to call a general election has been taken quickly.[171] Whilst it would be open for the House of Commons, following a successful vote of no confidence, quickly to pass a two-thirds early dissolution vote, this may not be easy for the major parties to agree at a time of political crisis. The Deputy Prime Minister argued that this "limbo" would be avoided by means of automatic dissolution after 14 days.[172] This would, however, result in a two week period of uncertainty as to whether an election was going to take place.

125. **We recognise that the 14 day period for formation of a new government may result in a period of uncertainty. However, it is not possible to determine in advance the many different circumstances under which a vote of no confidence may be passed. We therefore conclude that 14 days is an appropriate period to allow for formation of a new government.**

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166 Q 130. See also Q 100 (Professor Bogdanor).
167 HC Deb 13 September 2010 col 629.
168 The relevant period for the Northern Ireland Assembly is six weeks.
169 Q 131.
170 Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*, Ev 28.
171 On the last two occasions (October 1924 and March 1979) the government announced the dissolution of Parliament on the following day: Constitution Unit, *op. cit.*, para 1.3.2. See further Q 100 (Professor Bogdanor).
172 Constitution Committee, 5th report (2010–2011), *op. cit.*, Ev 2.

How can the Commons pass a motion of confidence in a government which does not yet exist?

126. Dr Twomey, Associate Professor, Faculty of Law, University of Sydney, raised the question of what is meant in clause 2(2)(b) by any motion expressing confidence in "any Government of Her Majesty". Is it intended that Her Majesty would commission a new Prime Minister whose government would need a vote of confidence to survive? This raises the question of what would happen if it were not clear whether a prospective new government could achieve a vote of confidence. Or is it intended that:

> "the House may pass a motion indicating its confidence in someone else to form a government, even though it is not yet formally a 'Government of Her Majesty'. Query whether this would oblige Her Majesty to commission that person as Prime Minister? The Bill ought really be clearer as to what is intended."[173]

127. **The Government should bring forward an amendment to clarify this provision.**

May a government which has lost the confidence of the Commons reconstitute itself?

128. Minority governments will always be subject to the possibility of losing the confidence of the Commons. Following a vote of no confidence, a minority administration may decide to form a coalition with another minority party. Situations may also arise whereby a government which has a very slim majority loses a vote of confidence due to MPs having difficulties in attending the House.[174] In either situation, it would be open to the defeated government to table and seek to win a motion of confidence in itself (or the new coalition) in order to avoid an early dissolution.

129. The Minister for Political and Constitutional Reform told us that an election would be held if "the government could not put together an alternative government, or a different government could not be formed."[175] In supplementary written evidence, the Government also confirmed that "It is not our intention that the Bill should rule out the possibility ... of the House changing its mind within the 14 day period and deciding nevertheless to support the current government."[176]

130. In the light of the above statements, **we conclude that the Bill is intended to allow a government which has lost a confidence motion to reconstitute itself within the 14 day period. However, since this does not necessarily follow from the wording of clause 2(2)(b), we recommend that the Government bring forward an amendment to clarify this provision.**

Government manipulation of the no confidence process

131. Many of our witnesses referred to the possibility of a government manipulating a vote of no confidence in order to seek an early dissolution (for example, by proposing a confidence motion and then abstaining in order deliberately to lose it). Under this Bill, a government might be able, were

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[174] See, for example, Harold Wilson, *A personal record: the Labour Government 1964–70* (1971), p 30.
[174] See, for example, Harold Wilson, *A personal record: the Labour Government 1964–70* (1971), p 30.
[175] Q 131.
[176] FTP 44.

there a consensus for calling an early election, to persuade the Commons to dissolve itself under the two-thirds majority procedure. It is therefore arguable that such manipulation would not be within the spirit of the legislation.

132. Our witnesses agreed that votes of no confidence should not be engineered by the government.[177] The Deputy Prime Minister accepted that it was not possible to exclude this possibility but argued that:

> "if a government sought to do that it would be so transparent and so self-evidently grubby and self-serving that it would not do that government any good at all. The final court of opinion, of course, is what the electorate would do, and I think they would be very unforgiving. ... Can you exclude the theoretical possibility? I think it is pretty difficult to do that. Can you exclude it in practical political terms? I think you pretty well nigh can."[178]

133. International experience does not necessarily show that this argument is borne out in practice. In Canada where, as we note below,[179] the Prime Minister sought an early dissolution in 2008 through use of the Governor General's prerogative powers, the incumbent government was not punished in the ensuing general election.[180] In Germany where, in 2005, the Chancellor deliberately lost a confidence vote in order to hold an election (the only way in which an early dissolution can be brought about in Germany) the circumstances were "scrutinised very carefully by the President, a court and public opinion",[181] but it is not clear from the evidence whether the early dissolution had any significant effect on the subsequent election result.

134. Christian Leuprecht concluded that:

> "To disabuse a Prime Minister of this temptation, there would have to be a period of good faith whereby successive administrations would not indulge themselves in early elections merely to gain a political advantage. After this period a convention would be established, and the public would have become accustomed to having elections at regular intervals on a set date. In other words, any bill that fixes election cycles requires much broader agreement and political will than one mere majority vote."[182]

135. **We conclude that, if the Bill is passed, it would not be possible to prevent a government using a vote of no confidence to bring about an early election. To do so would be seen by many as an abuse of the Act's provisions and would undermine the fixed-term principle.**

Government resignation

136. Although unlikely, it is possible that a majority government could unilaterally resign without having lost a vote of confidence. Were this to happen at present, it would be expected that the Queen would consult other party leaders to see whether they wished to form a government and, if not, she

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[177] Q 20 (Professor Oliver), FTP 38, para 12 (Raymond Youngs).
[178] Constitution Committee, 5th report (2010–2011), *op. cit.*, Q 68.
[179] Para 140.
[180] FTP 41 (CES Franks).
[181] Q 66 (Professor Padgett).
[182] FTP 22.

would then dissolve Parliament. However, the prerogative power of dissolution is to be abolished by the Bill[183] so this course of action would no longer be available.

137. The Minister for Political and Constitutional Reform responded to our question on this point, noting that:

> "There is nothing in the Bill that prevents a government resigning ... If a government decided to resign when the Speaker had indicated that he was not minded to issue ... a certificate [under clause 2(2)(a)], then the 14 day period would not be triggered although ... a period of government formation would obviously follow. It would just not be time-limited. Because of the very firm convention that the Queen should not be left without a functioning government, in practice, the outgoing government would not resign until the Queen was in a position to appoint a replacement Prime Minister."[184]

138. It may be that the opposition were not in a position to form an alternative government (whether a single-party government or a coalition). If the government threatened to resign, Parliament would eventually be forced to dissolve itself through the two-thirds mechanism. Thus, the government could bring about an early election without having been said to have manipulated a vote of no confidence. **We believe that any manipulation of this kind would be an abuse of the Act's provisions.**

Abolition of the prerogative in respect of dissolution

139. Clause 3(2) abolishes the prerogative power of dissolution by stating that Parliament cannot be dissolved other than under the provisions of clause 1 or 2 of the Bill. Evidence we received on the experience of the Canadian Parliament throws light on the need for this provision.

140. The Canadian constitution sets the maximum parliamentary term at five years. However, in May 2007, legislation was passed which set fixed election dates for October 2009 and every four years thereafter. The legislation explicitly stated that the prerogative powers of the Governor General were not affected, including the power to dissolve Parliament at his or her discretion. This provision was described by Professor Milner as "a loophole big enough for a locomotive to drive through."[185] In September 2008, the Canadian Prime Minister requested an early dissolution under the Governor General's prerogative powers.[186] Dissolution was granted and an early election took place.

141. This experience would appear to suggest that the Queen's power to dissolve Parliament should be abolished. However, Dr Twomey has argued strongly that the power should be retained, describing the stipulation of a five year term without any possibility of removal of a majority government as "a courageous act".[187] She argued that "if there were some kind of public crisis of confidence in the government (for example, it was found to have engaged in systemic corruption or other forms of illegality) there would be no chance

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[183] Clause 3(2); see paras 139–143.
[184] FTP 44.
[185] Q 63.
[186] This was separate from his request for a prorogation later that same year, which we discuss at para 145.
[187] FTP 35, para 4.7.

of an election as long as the government controlled majority support in the lower House and did not want an election."[188]

142. Prerogative powers were used in Australia to dissolve the federal Parliament in 1975 and in New South Wales to dissolve the Legislative Assembly in 1932. The Clerk of the New South Wales Legislative Assembly stated that: "The existing conventions would only make that course available where the government is acting illegally or if the government did not resign or to seek to dissolve Parliament after it lost the confidence of the lower House."[189]

143. There are other ways to protect against the possibility of a government acting illegally or abusing its citizens' human and civil rights. Judicial review is the primary mechanism for controlling illegal, irrational or procedurally improper government actions.[190] The House of Lords has a significant role in revising and delaying legislative proposals. **Whilst the prerogative power of dissolution is an important constitutional longstop, the Canadian experience would indicate that it is necessary under a fixed-term arrangement to abolish that power.**

Retaining the prerogative in respect of prorogation

144. Prorogation is a prerogative act of the Crown, in practice acting on the advice of the Prime Minister, which brings to an end a parliamentary session. It has the effect of putting an end to all business before the House, subject to certain limited exceptions.[191] The new session of Parliament will then commence with the Queen's Speech. In recent times prorogations of the Westminster Parliament have lasted for short periods. Clause 4(1) of the Bill expressly preserves Her Majesty's power to prorogue Parliament.

145. We received further evidence from Canada on the controversial use of this prerogative power. Following his re-election, the Canadian Prime Minister requested in December 2008 that the Governor General prorogue Parliament in order to avoid losing a threatened vote of no confidence and being replaced by a proposed opposition coalition. By the time Parliament returned, almost two months later,[192] the principal opposition party had changed its leader and the threat to the government had subsided.[193]

146. We put the suggestion that a British government could similarly abuse this power to the Minister for Political and Constitutional Reform. He responded that:

> "That is theoretically possible now. The convention that if the opposition want to table a motion of no confidence the government make that time available has worked well in the past. Although it was a theoretical risk we did not think it was a practical risk. If a government were so minded, it would not prorogue the House for a significant period as they need the House's power to continue in government. ... Part of the check here is a political one. If the government were abusing

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188 *Ibid.*, para 4.6.
189 FTP 3.
190 For the grounds of judicial review, see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock).
191 See *Companion to the Standing Orders*, House of Lords 2010 paras 2.12–2.16.
192 Parliament was prorogued on 4 December 2008 and returned on 26 January 2009.
193 Q 78 (Professor Milner); FTP 41 (CES Franks); FTP 24 (Professor Mendes). Prime Minister Harper sought, and obtained, a second two month prorogation on 30 December 2009.

procedure to prolong its period in office artificially, there would be a reckoning when it eventually sought a mandate from the public."[194]

147. Professor Bradley agreed that such a possibility, whilst theoretically possible, "would be very unsatisfactory and British politics would have sunk to a new low."[195] Professor Bogdanor suggested that this be left to the discretion of a "wise constitutional monarch" who would not prorogue at the request of a Prime Minister who no longer had the confidence of the House.[196] Whilst the risk may be low, Dr Fox warned that "you can't know the views of future monarchs in a scenario 40 or 50 years down the line."[197]

148. However, Professor Milner stressed that:

> "The Canadian case was unique because prorogation saved the government, which it normally should not. ... [The] circumstances [were] so unusual that you could not imagine them. I would have to give you each of the steps in the Canadian case, all of which were unlikely and all of which fitted together. Frankly, I would not worry about it."[198]

149. **We agree that the risk of abuse of the power of prorogation is very small. We therefore conclude that Her Majesty's power to prorogue Parliament should remain.**

Judicial review of early dissolution arrangements

150. The Clerk of the House of Commons has identified a risk that the provisions of clause 2 could lead to a questioning of parliamentary proceedings in the courts. For this reason, he would prefer that the detailed provisions were contained in Standing Orders of the House on the basis that the courts would be even less likely to intervene.[199] Were the courts indeed to intervene to prevent Parliament from being dissolved early, "the impact, politically and constitutionally, would be very great."[200] It is therefore important to assess carefully the Clerk's submissions.

151. Clause 2 of the Bill provides for an early dissolution following one of two events (a two-thirds vote or a vote of no confidence followed by 14 days without a relevant vote of confidence). That one of these events has taken place is to be certified by the Speaker of the House of Commons. A certificate under clause 2 "is conclusive for all purposes."[201] The Clerk of the House argued that this certificate would be justiciable because the Bill would embody the internal proceedings of the House in statute so that they became questions ultimately to be determined by the judiciary.[202]

152. In his evidence to the Commons Political and Constitutional Reform Committee, the Clerk outlined some of the issues which he suggested the courts may call into question. "Not only might the Speaker's decisions involve difficult judgments—for example about what constitutes a confidence

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194 Q 162.
195 Q 30.
196 Q 108.
197 Q 107.
198 Q 78.
199 FTP 20; see also Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*, Ev 26, paras 28–29.
200 FTP 20.
201 Clause 2(3).
202 Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*, Ev 25, para 17.

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".[203] He also highlighted practical issues concerning divisions, such as mistakes in counting, members voting in both lobbies in order to cancel out their votes and conventions which allow sick members who are on the precincts to be nodded through.[204]

153. **We agree that it would be inappropriate to create a situation in which the courts might be called upon to assess the basis on which the Speaker had issued a certificate**. Indeed, on one view, the Clerk of the House's arguments provide the very justification for the courts to rule that a Speaker's certificate would not be justiciable. Professor Bradley told us that the judiciary would surely accept that this was "an area for political judgment which the courts were not qualified to make."[205]

154. Despite the weight of the evidence we received being against the view that a Speaker's certificate would be justiciable, few of our witnesses were prepared to argue that the courts would "announce a sweeping abstentionist rule"[206] preventing judicial intervention whatever the circumstances.[207] Nor have the Government entirely excluded the possibility that there may be some risk. The Minister for Political and Constitutional Reform told us that: "We took the view that on these very political matters, the risk of the courts straying into or getting involved with them was very small. ... On that basis, we were content to proceed."[208]

155. We also raised the question during our oral evidence sessions of whether a claim brought before the courts, even if dismissed by the judiciary, would lead to a period of delay which might impact on the subsequent election. The Clerk of the Parliaments, whilst not offering his view on the question of justiciability, did note the "risk of litigation to test [the] proposition" that the courts would not intervene.[209]

156. Court cases occurred following early dissolutions in Germany in 2005 and Canada in 2008. In neither case did the judicial proceedings delay the subsequent election.[210] Professor Bradley told us that: "the judiciary now in the public law field are very able and prepared to give a swift answer if circumstances require it. It would be scaremongering to say that the general election will be held up for six months or longer while the judges were deciding this."[211]

157. **The risk that the courts may intervene in any early dissolution of Parliament by questioning the Speaker's certificate is very small. Although the political and constitutional consequences of any such**

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[203] *Ibid.*, Ev 24, para 16.
[204] *Ibid.*, Q 10.
[205] Q 29.
[206] FTP 19, para 30.
[207] See also Q 24 (Professor Oliver), FTP 16 (Richard Gordon QC). The Supreme Court recently considered the question of exclusive cognisance in *R v Chaytor* [2010] UKSC 52.
[208] Q 159.
[209] FTP 43, para 12.
[210] The German Constitutional Court reached its decision on 25 August 2005, one month after the dissolution on 21 July and one months before the election on 18 September; the Federal Court of Appeal in Canada did not reach a decision until August 2010, two years after the election had been held: *Conacher v Canada* 2010 FCA 311.
[211] Q 27.

intervention would be very significant, we do not consider the risk to be sufficient to warrant a rejection of clause 2 of the Bill.

Further drafting issues relating to clause 2

158. Clause 2(3) provides that "A certificate under this section is conclusive for all purposes." We note that it does not contain the additional words contained in the equivalent provision in the Parliament Act 1911: "and shall not be questioned in any court of law."[212] We questioned the Minister for Political and Constitutional Reform on the reason for the difference. He responded that: "[clause 2(3)] simply uses a more modern drafting style, using the more recent precedent ... There was no particular policy decision."[213] The wording in clause 2(3) is the same as that used in the Representation of the People Act 1983,[214] an Act which is closely related to this Bill.[215] The wording is also more expansive than that used in relation to a certificate by the Clerk of the Parliaments in the House of Lords Act 1999 which merely states that the certificate shall be "conclusive."[216] **On this basis we are content to accept the Minister's assurance as to the most appropriate form of words.**

159. The Clerk of the House raised one further issue with the drafting of clause 2. Clause 2(4) imposes a duty on the Speaker, before issuing a certificate, to "consult the Deputy Speakers (so far as practicable)". The Clerk of the House considered that the question of whether consultation was "practicable" would become a legal question.[217] Whether or not this would be the case, **we agree that the question of whom the Speaker should consult is a matter of internal House of Commons procedure and should not be contained within the Bill's provisions. Clause 2(4) should therefore be omitted.**

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[212] Section 3.
[213] Q 160.
[214] See, for example section, 174(3) of that Act.
[215] Clause 1(1) of the Bill refers explicitly to the 1983 Act.
[216] Section 2(6).
[217] Political and Constitutional Reform Committee, 2nd Report (2010–2011) *op. cit.*, Ev 25, para 19.

CHAPTER 5: THE PROCESS OF SCRUTINY

160. We have repeatedly emphasised the importance of proper process with regard to constitutional reform.[218] Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policy-making process. Moreover, we believe that a proper process is the foundation upon which successful policy is built: the lack of a proper process makes an ineffective outcome more likely.

161. There is strong evidence to suggest that the Government's proposals have not been properly thought through. Of three commitments made in the Coalition's programme for government in relation to fixed-term Parliaments, two were quickly dropped. The Government's original proposal that dissolution should occur when 55 per cent of MPs voted in favour created much debate and controversy on the ground that it would have allowed only the current coalition Government to dissolve Parliament.[219] The proposal was subsequently changed to a two-thirds majority, as set out in the Bill.[220]

162. Dr Fox, Director of the Hansard Society's Parliament & Government Programme, summarised the flaws of the process:

> "If you chart from the summer the way in which [the Government] have brought forward various announcements on how things have changed about this legislation, that reflects the fact that it is ad hoc and ill thought-out and goes to the point that there ought to have been pre-legislative scrutiny. There ought to have been a much more extended timetable given the implications and consequences that would arise."[221]

163. In his evidence to us, the Deputy Prime Minister claimed that "there is an emphasis in everything that we are proposing on greater accountability in the manner in which we conduct ourselves and the way in which politics is conducted, greater legitimacy in the political institutions that seek to represent people, and breaking up excessive concentrations of power and secrecy."[222] We assess in this chapter whether these principles have been demonstrated in the manner in which the policies contained in the Fixed-term Parliaments Bill have been brought forward.

The development of the Government's policies

164. The Government's original intention was for a binding motion to be put before the House of Commons stating that the next general election would be held in May 2015, and that legislation to make a permanent change to fixed terms would be introduced at a later date.[223] In the event, the binding motion proposal was dropped, and the Government proceeded straight to introducing the Bill.

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[218] See, for example, Constitution Committee, 15th Report (2008–2009): *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 116); 17th Report (2008–2009): *Parliamentary Standards Bill* (HL Paper 130); 11th Report (2009–2010): *Constitutional Reform and Governance Bill* (HL Paper 98); 6th Report (2010–2011): *Public Bodies Bill [HL]* (HL Paper 51); and 7th Report (2010–11) *Parliamentary Voting Systems and Constituencies Bill* (HL Paper 58).

[219] See, for example, HC Deb 25 May 2010 cols 135–154.

[220] See Chapter Four.

[221] Q 95 (Dr Fox).

[222] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 53.

[223] QQ 116–117, 124–129 (Minister for Political and Constitutional Reform).

165. The Deputy Prime Minister told the Commons Political and Constitutional Reform Committee that a binding motion had been proposed "on the assumption that the legislation would then come much further down the track ... Initially, we thought we needed the motion to show the political commitment to a fixed-term Parliament and then, on a more leisurely timetable, produce the legislation."[224] The withdrawal of the binding motion proposal therefore meant that the Bill was brought forward much more quickly than was originally envisaged.

166. The Deputy Prime Minister justified this change on the grounds that "we were given the strong advice that this would create a limbo situation with, in effect, a non-binding, non-statutory commitment to the 2015 date and that it was better to proceed towards legislation straight off."[225] Indeed he admitted to us that there had been flaws in the process:

> "We did not entirely appreciate the knock-on effects on different parts of our constitutional arrangements, which created understandable nervousness that one is then consigning everybody, not just this Government and this Prime Minister, but everyone else involved, into a slightly ambiguous territory, which made people feel uncomfortable."[226]

167. **We accept that constitutional reform proposals will rarely, if ever, be wholly apolitical and may not always proceed by consensus. It is therefore necessary to ensure that, in relation to such proposals, constitutional principles should be constantly borne in mind and clear for all to see.**

Interrelationship with other reform proposals

168. The Deputy Prime Minister, in a speech given on 16 November 2010, said that the Government "have set out a sweeping programme of political reform, a programme that we can set against a single test: do these measures, together, help ... [give] people the choice and control they—rightly—now expect."[227] As one of the Government's key political reforms, do fixed-term Parliaments fit with the other parts of the political reform programme?

169. The other part of that programme to be introduced into Parliament quickly was the Parliamentary Voting System and Constituencies Bill. As we noted in our recent report on that Bill, the Government have not determined how the cycle of five year Parliaments which would be set by this Bill would be synchronised with the five year boundary reviews to be established under that Bill, especially if an early election changed the cycle.[228] Nor have the Government explained why they have chosen to hold a referendum on the voting system, but not on the key principle of fixed-term Parliaments nor on the question of the length of the parliamentary term.

170. The Bill could also impact on proposals for reform of the House of Lords. It is expected that the forthcoming draft Bill on Lords reform will provide for at least a part-elected House.[229] The Government have not yet stated whether they consider that the election cycle for this House should be timed to coincide with general elections, nor how the House might be affected by early dissolutions.

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[224] Evidence taken on15 July 2010; see also Q 65.
[225] Constitution Committee, 5th report (2010–2011), *op. cit.*, Q 59.
[226] *Ibid.*, Q 62.
[227] The Deputy Prime Minister, Political Studies Association/Hansard Society Annual Lecture, 16 November 2010.
[228] Constitution Committee, 7th Report (2010–2011): *Parliamentary Voting System and Constituencies Bill* (HL Paper 58).
[229] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 82 (Deputy Prime Minister).

171. The Government have also announced that there will be a third bill on political and constitutional reform to be introduced in 2011. That bill will include a new power of recall of MPs and provisions relating to individual voter registration.[230] The bill may well be consistent with the provisions of the Fixed-term Parliaments Bill, but it is not possible for us to assess how early dissolutions, for example, might impact on the recall of MPs or on the timetable which might be introduced relating to voter registration.

172. **We are concerned that the constitutional relationship between the provisions of this Bill and the Government's other proposals for constitutional reform have not been adequately thought through.**

Pre-legislative scrutiny and consultation

173. In our recent report on the Parliamentary Voting System and Constituencies Bill, we reiterated our view that it is a matter of principle that proposals for major constitutional reform should be subject to prior consultation and pre-legislative scrutiny, unless there are good reasons for departing from this principle.[231]

174. The Minister for Political and Constitutional Reform told us that "if you look at public opinion, as expressed in opinion polls and things, they are broadly welcoming of the view that we should move to fixed-term Parliaments."[232] However, the detailed policies of the Bill were not subjected to any form of consultation. Indeed, we were told that in 2007 there was some public support for the contradictory principle that an early election should be held in the event of a mid-term change in Prime Minister.[233]

175. Nor was the Fixed-term Parliaments Bill subject to pre-legislative scrutiny. The Deputy Prime Minister justified this on the ground that "the closer we looked at it given its constitutional importance we thought it better and more proper to move to legislation on a quicker timetable."[234] Yet he conceded that "the principle should be to time these things in a way that allows for proper pre-legislative scrutiny."[235] He also "unambiguously" agreed that such reform proposals should be brought forward in a more measured way in future.[236]

176. The need for pre-legislative scrutiny on this Bill is demonstrated by the serious concerns about the content of the Bill which we discuss in this report, and by the late consideration given to avoiding clashes with elections to the devolved institutions.[237] Pre-legislative scrutiny would have ensured that these issues were considered in a thorough and more measured way than is possible with a Bill already introduced and part-way through its Parliamentary passage.

177. The Minister for Political and Constitutional Reform argued that pre-legislative scrutiny was less appropriate in the first term since, "if the whole programme was subject to pre-legislative scrutiny ... you would not get on

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230 The Deputy Prime Minister, Political Studies Association/Hansard Society Annual Lecture, 16 November 2010.

231 Constitution Committee, 7th Report (2010–2011): *Parliamentary Voting System and Constituencies Bill* (HL Paper 58), para 12.

232 Q 126; FTP 44.

233 Q 105 (Professor Bogdanor).

234 Constitution Committee, 5th report (2010–2011), *op. cit.* Q 69.

235 *Ibid.*, Q 69.

236 *Ibid.*.

237 See Chapter Three, paras 75–81.

and do very much."[238] The Deputy Prime Minister also sought to justify the Bill's early introduction on the basis that:

> "the principle of fixed-term Parliaments has been argued and made over a very long period. ... If we were to say that we were going to informally commit to having a fixed-term Parliament but not introduce it in a belt-and-braces fashion until later, I would probably be sitting here answering questions such as, 'Well, hang on a minute, aren't you going to end up breaking the very rules that you are piously declaring lie behind the Fixed-term Parliaments Bill?'."[239]

178. The Deputy Prime Minister told us that "what matters now is the degree of scrutiny that it is subject to as the legislation passes through both Houses. On that we are very clear. We want to make sure that it is subject to the greatest possible scrutiny, which it rightly deserves."[240]

179. **Save where there are justifiable reasons for acting more quickly, the proper way to introduce a constitutional reform proposal is to publish a green or white paper or a draft bill, and to take the comments and concerns raised in the process of consultation and pre-legislative scrutiny into account in the legislation that follows.**

The Parliament Acts

180. Clause 1(5) of the Bill provides that the Prime Minister may by order move the polling date two months earlier or later than the first Thursday in May. The Explanatory Notes state that the reason for this is to deal with sudden crises such as the outbreak of foot and mouth disease in 2001 which caused the local elections to be postponed.[241] The Notes also state that "parliaments, under this Bill, may extend a short period beyond five years".[242] This is a result of the date of an ordinary dissolution being dependent on the polling date. The Bill as introduced also repeals the Septennial Act 1715 which provides for the current five year maximum.[243]

181. The procedure contained in the Parliament Act 1911 which enables Parliament to pass a bill without the consent of the Lords does not apply to any bill passed by the Commons which contains "any provision to extend the maximum duration of Parliament beyond five years".[244]

182. The Clerk of the Parliaments stated that:

> "It is ... clear that the [Fixed-term Parliaments] Bill does contain provision to extend the maximum duration of a Parliament beyond five years, and that it cannot, therefore, be passed under the Parliament Acts procedure unless, before it leaves the Commons, the [relevant] provisions ... are amended."[245]

Professors Bradley and Oliver agreed that this was the case,[246] **as do we**.

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[238] Q 116.
[239] Constitution Committee, 5th report (2010–2011), *op. cit.* Q 60.
[240] *Ibid.*, QQ 59, 62.
[241] Para 11.
[242] Para 32.
[243] The Schedule, para 2.
[244] Section 2(1).
[245] FTP 43, para 5.
[246] Q 36.

CHAPTER 6: SUMMARY OF RECOMMENDATIONS

Introduction

183. We take the view that the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles or sustained public demand. We acknowledge the political imperative behind the coalition Government's wish to state in advance its intent to govern for the full five year term, but this could have been achieved under the current constitutional conventions. (Para 20)

The principal of fixed-term Parliaments

184. The Bill establishes a semi-fixed arrangement and reduces the level of flexibility which exists in the current system. (Para 25)

185. We recognise that, in promoting this Bill, the Prime Minister is prepared to relinquish an important prerogative power. This is a significant aspect of the Government's stated aim of reducing executive power. However, the balance of the evidence we heard does not convince most of us that a strong enough case has yet been made for overturning an established constitutional practice and moving to fixed-term Parliaments. (Para 46)

The length of the parliamentary term and election timing

186. Whilst acknowledging the case made by the Deputy Prime Minister for a five year term, nonetheless the majority of the Committee consider that a four year term should be adopted for any fixed-term Parliamentary arrangement at Westminster. In the view of the majority, the shift from a five year maximum to a five year norm would be inconsistent with the Government's stated aim of making the legislature more accountable, inconsistent with existing constitutional practice and inconsistent with the practice of the devolved institutions and the clear majority of international legislatures. (Para 62)

187. We agree that there is a case to be made for resetting the clock. Whatever the maximum term, we accept that an elected government should have a full term in which to develop their policies and take their legislative programme through Parliament. (Para 74)

188. A potential date clash with elections to the devolved institutions in May 2015 and every twenty years thereafter could occur if the Government's proposals are adopted. Ideally, this should be avoided in order to protect the integrity and separate identity of Westminster and devolved elections. We await the outcome of the Government's consultations with the devolved institutions, and stress the importance of ensuring that any proposed solution is broadly acceptable to all concerned. (Para 80)

189. It is regrettable that the Government did not seek to engage with the devolved institutions in order to find a satisfactory solution to the consequences of their proposals before the Bill was introduced. (Para 81)

190. The Government's proposal to extend the current session until spring 2012 may increase the power of the House of Lords to delay legislation but it also affords the Government more time to get its legislative programme through both Houses, thus potentially increasing the power of the executive in

relation to Parliament. This appears to be inconsistent with the Government's stated aim of reducing the power of the executive. (Para 87)

Early parliamentary general elections

191. We conclude that it is sensible for the Bill to contain some form of safety valve which would allow for an early election in circumstances such as the government losing the confidence of the Commons or where a political or economic crisis has affected the country. Such circumstances cannot be identified nor listed in advance and so the safety valve(s) chosen must be sufficiently flexible to deal with the various situations which might arise. (Para 94)

192. We conclude that it is appropriate for the Bill to contain two different safety mechanisms as long as each one is workable and fulfils its purpose. (Para 98)

193. In the light of our conclusion at paragraph 94 [191] that there needs to be a safety valve mechanism in order to deal with possibly unforeseeable circumstances, we consider that the best way to do this is to enable Parliament to dissolve itself when there is a cross-party majority that an election should be called. Although it is not possible to determine the relative majority which might be held by governments in the future, a requirement of two-thirds of MPs voting in favour of a dissolution motion would most likely necessitate the agreement of cross-party MPs. We therefore conclude that this safety valve is appropriate. (Para 102)

194. The Bill as drafted does not explicitly cover all motions of confidence (including defeats on key confidence issues such as the Queen's Speech or the Budget), nor situations where the government lose a vote. Nor does it distinguish between votes of confidence and no confidence. The Government should bring forward amendments to clarify its precise scope. (Para 114)

195. Greater clarity on the definition of a vote of no confidence, as recommended by paragraph 114, would reduce the potential for the Speaker to be drawn into political controversy. The questions of from whom, if anyone, the Speaker should take direction and of whether and when the Speaker should state his view on the effect of a particular vote should be procedural matters for the House of Commons to determine. (Para 119)

196. We recognise that the 14 day period for formation of a new government may result in a period of uncertainty. However, it is not possible to determine in advance the many different circumstances under which a vote of no confidence may be passed. We therefore conclude that 14 days is an appropriate period to allow for formation of a new government. (Para 125)

197. The Government should bring forward an amendment to clarify whether clause 2(2)(b) is intended to apply to a government which has already been formally constituted by Her Majesty or whether it may apply to a government not yet so constituted. (Para 127)

198. We conclude that the Bill is intended to allow a government which has lost a confidence motion to reconstitute itself within the 14 day period. However, since this does not necessarily follow from the wording of clause 2(2)(b), we recommend that the Government bring forward an amendment to clarify this provision. (Para 130)

199. We conclude that, if the Bill is passed, it would not be possible to prevent a government using a vote of no confidence to bring about an early election.

To do so would be seen by many as an abuse of the Act's provisions and would undermine the fixed-term principle. (Para 135)

200. We believe that if a government were to resign in order to force a parliamentary vote for an early dissolution under clause 2(1), such manipulation would be an abuse of the Act's provisions. (Para 138)

201. Whilst the prerogative power of dissolution is an important constitutional longstop, the Canadian experience would indicate that it is necessary under a fixed-term arrangement to abolish that power. (Para 143)

202. We agree that the risk of abuse of the power of prorogation is very small. We therefore conclude that Her Majesty's power to prorogue Parliament should remain. (Para 149)

203. We agree that it would be inappropriate to create a situation in which the courts might be called upon to assess the basis on which the Speaker had issued a certificate. (Para 153)

204. The risk that the courts may intervene in any early dissolution of Parliament by questioning the Speaker's certificate is very small. Although the political and constitutional consequences of any such intervention would be very significant, we do not consider the risk to be sufficient to warrant a rejection of clause 2 of the Bill. (Para 157)

205. We are content to accept the Minister's assurance as to the most appropriate form of words for clause 2(3). (Para 158)

206. We agree that the question of whom the Speaker should consult is a matter of internal House of Commons procedure and should not be contained within the Bill's provisions. Clause 2(4) should therefore be omitted. (Para 159)

The process of scrutiny

207. We accept that constitutional reform proposals will rarely, if ever, be wholly apolitical and may not always proceed by consensus. It is therefore necessary to ensure that, in relation to such proposals, constitutional principles should be constantly borne in mind and clear for all to see. (Para 167)

208. We are concerned that the constitutional relationship between the provisions of this Bill and the Government's other proposals for constitutional reform have not been adequately thought through. (Para 172)

209. Save where there are justifiable reasons for acting more quickly, the proper way to introduce a constitutional reform proposal is to publish a green or white paper or a draft bill, and to take the comments and concerns raised in the process of consultation and pre-legislative scrutiny into account in the legislation that follows. (Para 179)

210. We agree that, as introduced in the House of Commons, the Bill could not be passed under the Parliament Acts procedure. (Para 182)

APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee that conducted this inquiry were:

Lord Crickhowell
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Declaration of Interests

No relevant interests have been declared.

A full list of Members' interests can be found in the Register of Lords' Interests: http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

APPENDIX 2: LIST OF WITNESSES

Oral Evidence

6 October 2010
Professor Dawn Oliver and Professor Anthony Bradley
Written Evidence, Malcolm Jack, Clerk of the House of Commons (FTP 20)
Written Evidence, Professor Anthony Bradley (FTP 39)

20 October 2010
Dr Henry Milner and Professor Stephen Padgett

27 October 2010
Professor Vernon Bogdanor and Dr Ruth Fox
Written Evidence, Hansard Society (FTP 16)

2 November 2010
Mark Harper MP
Written Evidence, (FTP 44)

Written Evidence

Evidence marked * is associated with oral evidence and is printed. Other evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (020 7219 5314).

Numerical Order

Arter, David (FTP 1)

Clerk of Australian Senate (Rosemary Laing) (FTP 2)

Clerk of the Legislative Assembly, New South Wales (Russell Grove) (FTP 3)

Clerk of the New South Wales Legislative Council (Lynn Lovelock) (FTP 4)

Clerk of New Zealand Parliament (FTP 5)

Clerk to the Northern Ireland Assembly (Trevor Reaney) (FTP 6)

Clerk of the Legislative Assembly of the Northern Territory (FTP 7)

Clerk of the Legislative Assembly of Saskatchewan (Gregory A. Putz) (FTP 8)

Clerk to the Scottish Parliament (P E Grice) (FTP 9)

Democratic Audit (FTP 10)

Dodek, Professor Adam (FTP 11)

Electoral Commission (FTP 12)

Evans, Professor Simon; Saunders, Professor Cheryl and Waugh, Professor John (FTP 13)

German Bundestag (FTP 14)

Gordon QC, Richard (FTP 15)

* Hansard Society (FTP 16)

Heard, Professor Andrew (FTP 17)

Hepner, Timothy Kingston (FTP 18)

Howarth, David (FTP 19)

* Jack, Malcolm, Clerk of the House of Commons (FTP 20)

Kildea, Paul; Lynch, Andrew; Williams, Professor George (FTP 21)

Leuprecht, Professor Christian (FTP 22)

Levy, Dr Gary (FTP 23)

Mendes, Professor Errol Patrick (FTP 24)

Milliken MP, Peter (FTP 25)

National Assembly for Wales (FTP 26)

Newell, Professor James L (FTP 27)

Norwegian Parliament (FTP 28)

Oliver, Professor Dawn (UCL) (FTP 29)

Palmer, Anne (FTP 30)

Pond, Richard J (FTP 31)

Ryan, Mark (FTP 32)

Smith, Alastair (FTP 33)

Swedish Parliament (Ulf Christoffersson, Deputy Secretary General) (FTP 34)

Twomey, Dr Anne (FTP 35)

Widfeldt, Anders (FTP 36)

Wiseman, Professor Nelson (FTP 37)

Youngs, Raymond (FTP 38)

* Bradley, Professor Anthony (FTP 39)

Docherty, David C (FTP 40)

Franks, CES (FTP 41)

Lord Armstrong of Ilminster (FTP 42)

Clerk of the Parliaments (FTP 43)

* Harper MP, Mark (FTP 44)

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Docherty, David C (FTP 40)

Dodek, Professor Adam (FTP 11)

Electoral Commission (FTP 12)

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German Bundestag (FTP 14)

Gordon QC, Richard (FTP 15)

* Hansard Society (FTP 16)

* Harper MP, Mark (FTP 44)

Heard, Professor Andrew (FTP 17)

Hepner, Timothy Kingston (FTP 18)

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Levy, Dr Gary (FTP 23)

Mendes, Professor Errol Patrick (FTP 24)

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Widfeldt, Anders (FTP 36)

Wiseman, Professor Nelson (FTP 37)

Youngs, Raymond (FTP 38)

APPENDIX 3: COMPARISON OF ELECTORAL CYCLES OF SELECTED LEGISLATURES[247]

Country	Maximum length of term	Average duration between elections since 1945[248]	Fixed-term arrangements
UK: House of Commons	5 years	3.8 years	Flexible
UK: Scotland	4 years	4 years	Semi-fixed Provisions for an early dissolution in the event that two-thirds of members vote in favour of dissolution, or if the legislature fails to nominate a First Minister within 28 days.
UK: Wales	4 years	4 years	Semi-fixed Provisions for an early dissolution in the event that two-thirds of members vote in favour of dissolution, or if the legislature fails to nominate a First Minister within 28 days.
UK: Northern Ireland	4 years	N/A[249]	Semi-fixed Provision for an early dissolution in the event that two-thirds of members vote in favour of dissolution. The Secretary of State may by order propose a date for an election in the event that the Assembly does not fill the posts of First and Deputy First Minister within seven days.
Australia: House of Representatives	3 years	2.6 years	Flexible

[247] Presidential (such as the USA) or semi-presidential (e.g. France) systems have not been included because of the difficulties of direct comparisons with the UK's parliamentary system. Instead, "Westminster-style" legislatures as well as a number of European case studies on which the Committee has heard evidence have been included.

[248] Or since the establishment of the legislature if more recent than 1945. Figures include the last completed term, e.g. 2005–2010 in the UK.

[249] The Northern Ireland Assembly has yet to sit for a full term because of repeated suspension of the devolved institutions in the light of setbacks in the peace process.

Australia: States and Territories	4 years except Queensland (3 years)	Variable	Semi-fixed in five states or territories. In New South Wales, for instance, early dissolution can occur if: a) a motion of no confidence in the government has been passed; b) the Legislative Assembly has rejected or failed to pass an Appropriation Bill for the ordinary annual services of government; c) the election date needs to be moved forward because of a clash with a federal election, holiday period or some similar inconvenience; or d) where the Governor could otherwise do so in accordance with established constitutional conventions. Flexible in three states or territories
Canada: House of Commons	4 years	3.2 years	Nominally fixed In 2006 legislation was passed fixing parliamentary terms at four years, though the Governor General's prerogative power to dissolve was retained. This power was used to bring about an early dissolution in 2008.
Canada: Provinces and Territories	4 years in eight provinces and territories. 5 years in the other five	Variable	Nominally fixed in eight provinces and territories on the same model as operates at federal level. The fixed electoral cycle has thus far been adhered to. Flexible in the remaining five provinces and legislatures.
Denmark	4 years	2.6 years	Flexible
Germany	4 years	3.8 years	Semi-fixed Dissolution can take place by order of the Federal President in the event of the Government losing a vote of no confidence, or in the event of an unsuccessful election of the Federal Chancellor.

Ireland	5 years	3.5 years	Flexible
Italy	5 years	3.9 years	Nominally fixed. 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.
New Zealand	3 years	3 years	Flexible Only one post-war Parliament has been dissolved substantially early.
Norway	4 years	4 years	Fixed
South Africa	5 years	4.1 years	Semi-fixed The National Assembly can be dissolved early in the event that three years have passed since the last election and where a majority of the Assembly vote for dissolution, or where there is a vacancy in the office of President and the Assembly fails to elect a new President within 30 days.
Sweden	4 years	3.3 years	Semi-fixed The Riksdag is elected for four year fixed terms (increased from three years in 1994), but with the provision of an early dissolution by Prime Ministerial decree, or where the Speaker's proposal for a new Prime Minister is rejected four times. There have been no premature dissolutions since Sweden adopted a unicameral legislature in 1970.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 6 OCTOBER 2010

Present	Baroness Jay of Paddington (Chairman)	Lord Irvine of Lairg
	Lord Crickhowell	Lord Norton of Louth
	Baroness Falkner of Margravine	Lord Pannick
	Lord Goldsmith	Lord Renton of Mount Harry
	Lord Hart of Chilton	Lord Rodgers of Quarry Bank

Examination of Witnesses

Witnesses: PROFESSOR DAWN OLIVER, [Emeritus Professor of Constitutional Law, University College, London], and PROFESSOR ANTHONY BRADLEY.

Q1 The Chairman: Professor Oliver, Professor Bradley, thank you both very much for coming. This is our first evidence session specifically on the Fixed-term Parliaments Bill, on which I know you both gave written evidence to the Commons Committee. The Commons Committee had a fairly short time in which to conduct its inquiry and as you know it published a report but has not been able to cover everything. We hope we are going to cover some of the things that they mentioned in the report but also delve a bit more deeply now that we have seen the Second Reading, and of course the Commons have now moved on to Committee stage. It is very kind of you both to come. It would be helpful to mention at this point that of course this is being sound recorded. It will be very helpful for the record if you could both identify yourselves and you may wish to make a short opening statement. Professor Oliver, shall I begin with you?

Dawn Oliver: Thank you very much. I am Dawn Oliver, Emeritus Professor of Constitutional Law at University College, London. I sent in some evidence to you and I do not feel that I need to expand on that.

Anthony Bradley: I am Anthony Bradley, former Professor of Constitutional Law at Edinburgh University, now a visiting fellow at the Institute of European and Comparative Law at the University of Oxford. Like Professor Oliver, I sent in written evidence to the House of Commons Committee.

Q2 The Chairman: Which we have read, thank you very much. May I just plunge straight in with the question, which I think has come up several times, about whether, given that the coalition Government has already announced that this will be a five-year Parliament, there was a need to rush this legislation, as is being perceived by many people in both Houses, or whether it would have been much more satisfactory to conduct pre-legislative scrutiny or perhaps publish a Green Paper or some preliminary work of that kind?

Dawn Oliver: I think ideally there should have been more time for consultation and so on, but on the other hand I understand the urgency brought about by the fact that there is a coalition Government which needs some security for its first term. So I suppose my answer is yes, more consultation would have been a good idea but I still think that there would need to be quite a quick process before an actual Bill had got to the House rather than a draft Bill.

Q3 The Chairman: Are there specific areas that you feel should have been teased out?

Dawn Oliver: I find the arguments around votes of confidence triggering an early election and that sort of thing very complex and I cannot quite see through the fog myself, so those are matters which need to be teased out by someone. I do not know that I am the right person.

The Chairman: I am reassured to hear you say that, because having spent some time trying to see through the fog, I thought perhaps that simply being a lay person made it difficult, so I am rather relieved to hear that you found that so as well. Professor Bradley, did you have any view on that?

Anthony Bradley: As I stated to the House of Commons Committee, undoubtedly this has been rushed. My response is to distinguish the immediate concern of the Government that it should continue for five years, which seems to me a perfectly respectable position to adopt given the circumstances of the last general election, from the long-term issue of fixed-term Parliaments. Whether one needs a Bill to deal with the position of this Parliament and the life of the present coalition, I do not know, but if that is what the Government wishes, then let it go through. But those arguments should not be confused with the rather different and very strong

arguments for change in our constitution of a fundamental kind to fixed-term Parliaments.

The Chairman: There has of course been what one might describe as a subsidiary announcement since the Second Reading and your earlier evidence, which is about moving the Queen's Speech, which is obviously relevant to that. Lord Norton, did you want to come in on that?

Q4 Lord Norton of Louth: This is really just a consequence of what has been suggested. The Government now proposes that the session should run from May to May. We will probably come back to cover that aspect, but one specific proposal announced by the Leader of the House of Commons was that the present session should run until May 2012. Do you have a view on that?

Anthony Bradley: To me that is a rather remarkable situation. We are in an area of reworking a lot of aspects of the constitution that have been around for a long while. I happened to notice last night that Ivor Jennings said in one of his writings on Parliament that he thought the State Opening of Parliament each year by the Sovereign was a very good example of the British constitution in action. If that is right, to postpone it for a complete year is quite a major change. Maybe the Jennings view is even greater now that we have televising of the State Opening of Parliament. It is a significant change and it is to meet the immediate awkwardness of the election in May because it is always a long session running along until November in the year following.

Dawn Oliver: I agree that it sounds too long to wait until 2012 for the next session to start.

Anthony Bradley: To that one could add that in some Parliaments they do not have annual sessions at all, so the Parliament that is elected at a general election has four years or so, whatever the period is, to run through all its legislative programme. I think it is quite clear to anyone who has been concerned with the legislative process—everyone around this table will have had a greater connection with it than I have—that the annual session and the need to bring things to a climax and get a resolution on a Bill is a fundamental part of the way that Parliament hitherto has conducted its legislative duties.

Q5 Lord Crickhowell: On that very point, the Deputy Prime Minister and others keep saying that one of the reasons for the Bill that we have before us is to strengthen the position of Parliament. We may come later to the question of whether strengthening the position of Parliament or strengthening the position of the electorate should be the priority, but surely the proposition that has just been put can only weaken the role of Parliament, not strengthen it. To lengthen the session so that you cannot have a proper review of the legislative programme promptly is to weaken the position of Parliament, isn't it?

Anthony Bradley: It is possible that Bills can be carried over. This is an exceptional course. In an ideal world, longer time for scrutiny of legislation should lead to better legislation, but I have never been persuaded that a Government needs to get through into law all the items in its legislative programme. The ending of a session has a value in cutting down that programme to a size that is acceptable. The Government can then start afresh with a continuing but new programme for the coming year.

Dawn Oliver: I agree there is a lot to be said for not ending up with a whole lot of stale bills that have been hanging around uncompleted for two years and that it is a good idea. That seems to me to be the argument in favour of dividing Parliament into sessions and normally trying to get through the business quite rapidly.

Q6 Baroness Falkner of Margravine: On this point, as I understand it, your concern relates to the fact that giving us more time will make us lazier, in effect, and we will take longer to get Bills through and they will lie around, as you put it. Could not the other argument apply that when you have a brand-new Government, unusually a coalition, and the programme therefore is not representative of any of the manifestoes, so the Queen's Speech is cobbled together rather than being a more coherent one that would have been anticipated some time ago, and when you have, for example, bills that carry over because they have sunset clauses and things—at the moment we are dealing with the Terrorist Asset-Freezing etc. Bill, which we should not be because it was not part of the Queen's Speech—in those cases it makes sense not to stick to an 18-month timetable and to give yourself the additional time, because you are bedding down to a new situation?

Dawn Oliver: I am rather answering off the cuff because I have not thought this through much, but I think the possibility of carryover is a solution to that, and in principle a copable amount of legislation should be introduced in each session and got through sensibly rather than an excessive number of Bills that cannot reasonably be dealt with without having a very long session.

Anthony Bradley: I had not meant to suggest that extending the session would let people be lazy, but it removes the particular political impetus and the political need to reach a conclusion. This is very important to the House of Lords as a revising Chamber. A former member of this Committee, Lord Elton, reminded me very strongly when I was advising the Committee that time and the need to get agreement by a certain date are a vital part of the power of the House of Lords.

The Chairman: Absolutely. There is of course the broader question in this Bill about the length of a Parliament as such. The Bill proposes a five-year term. Lady Falkner, I think you had a question you wanted to put on that.

Q7 Baroness Falkner of Margravine: The Deputy Prime Minister has justified his proposal for a five-year term on the grounds that it goes with the grain of the founding texts of the unwritten constitution and follows the precedent set by the immediate past Government. How would you respond to proposals for five-year terms? Do you consider them appropriate?
Anthony Bradley: I said very clearly in my evidence to the Commons that I think it would be wrong. I do not usually go quite as strongly as that, but if one is making the fundamental switch from the present situation to fixed-term Parliaments, then one needs a full debate on what the period should be. I am afraid I am not persuaded by the particular point that you quoted from the Deputy Prime Minister. The five-year maximum has come into being for quite different reasons. I do not have an academic basis for what I am saying; I am speaking now as a voter. I want to be able to vote more frequently than every five years for a fixed-term Parliament. If one looks at the history of political practice since 1945, politics has gone better when elections have been held every four years.
Dawn Oliver: I agree. The other point is that one five-year term for one Government might look quite acceptable, but if you have only five-year elections and the same party is elected to Government then you have 10 years or even 15 years and it strikes me that the British public get bored with Governments after a while and Governments get tired. I am not making a partisan point. The thought that it might be impossible for a change of Government to take place for 15 years once elected is unappealing. Four, eight and 12-year terms seem to me to be more acceptable.

Q8 Lord Goldsmith: I want to ask Professor Bradley to elaborate a little bit on what he has just said about history showing that four-year terms have been better for politics. I wonder what historical precedent you had in mind there.
Anthony Bradley: Professor Blackburn of King's College, who gave oral evidence to the Commons Committee in July, has studied fixed-term Parliaments for a long while and his view is that it should be four years. He makes the point that in recent history Governments seem to get into trouble in the fifth year and this is an unsatisfactory period for politics. Maybe the answer to that is that if everyone knows that we are in the final year of a Parliament then it is going to be difficult whether it is the fourth year or the fifth year, but if one looks at the way that the Thatcher Government or the Blair Government were re-elected in their first four-year periods, it seemed to work. If one voted in May 1983, by 1987 the commentators were saying that there may be an election, and why not in May 1987? That seems to me to be a cycle that the electorate would like.

Q9 The Chairman: Am I right that internationally where there are fixed-term Parliaments that is the usual experience, that three or four years is common?
Anthony Bradley: I think both Professor Blackburn's paper and Professor Hazell's evidence to the Commons Committee show that four years is the norm. There are exceptions, as in France and as he Professor Hazell in the statistical tables.
The Chairman: Lord Goldsmith, I am sorry, I interrupted you.
Lord Goldsmith: No, that is very helpful, thank you.

Q10 Lord Rodgers of Quarry Bank: I know this may stray a little towards Clause 2, but there was a reference to better politics. It is certainly relevant whether it is four years or five or whatever the case may be. There may have been a discussion in the Second Reading in the Commons, or I may be wrong, but it raises a question that wraps around this of whether, as we are moving or have moved to a much more presidential Government, a new Government happens not simply after a general election but on the appointment of a new Prime Minister. We could find a situation where we had a five-year or four-year Parliament, or whatever it might be, and one year after the election, one Prime Minister goes and another takes his place. It is arguable that the matters that the new Prime Minister sets out in his own programme and agenda could be very different, so we have not had a general election covering that. Might we not possibly consider deciding that elections should occur once a new Prime Minister has been chosen? If you go back, it happened with Eden, I think, or certainly when Macmillan succeeded Eden, and if you go back, with Callaghan after Wilson, much later. It all feeds into the question, why do we not have an election once a new Prime Minister has been chosen?
Dawn Oliver: We don't because we don't. It is just not required and it has not seemed appropriate to parliamentarians for there to be one. I am not really keen on there being too frequent elections. One does occasionally have a change of Prime Minister in the middle of the Parliament, as happened in the last Parliament. I do not think that that fact should in itself trigger an election. Once MPs are elected it is their job to do their best to see that Government is conducted in a responsible and responsive way and not run to the electorate too often. That is my gut feeling

Q11 Lord Rodgers of Quarry Bank: Why not? I have not heard, forgive me, the argument against. Once you have changed Prime Minister, why do we not have an election?

Anthony Bradley: I have in my notes the heading "Presidentialism versus Parliamentarism". True presidentialism, as in the United States, has a separate election for President and a separation of powers and the elections continue on separate channels. The essence of parliamentarism is that the Prime Minister is in office so long as he or she has the confidence of the House of Commons. The converse of that is that if the Prime Minister dies, there is no reason why his or her successor should not, if they can command the confidence of the House of Commons, follow without an election. Given majority parties, if it is the new leader of the party I can see no reason why a general election is needed. If the Labour Party chose Mr Gordon Brown or the Conservative Party chooses a new leader for any reason, to me that does not justify a general election and one would not expect a new Prime Minister elected by the same party to have a totally different programme.

The Chairman: In a sense this was tested by John Major's resignation as Prime Minister during his administration, when there was no issue that he was calling for a dissolution; he was just calling for a change of Prime Minister.

Lord Renton of Mount Harry: Could I just say, against the background of 23 years in the House of Commons, I would go for five years. I do not think, like many of my colleagues, that that is a bad thing. I think it would be stable and it is an acceptable time and so forth. What is perhaps much more valid is what Lord Rodgers has just taken us into, which is the position of Prime Minister. I remember well that when Margaret Thatcher went—I was Chief Whip at the time—it was not irritation with the Tory Party in Parliament, it was irritation with Margaret Thatcher. She was then succeeded by John Major and then the Tories rather surprisingly won the next election. I think therefore that the relevance in this of the Prime Minister is tremendously important. Within that, I am not settling that issue, but I would not have a problem with five years.

Lord Rodgers of Quarry Bank: This is a very parliamentary view, if I may say so. We are all talking to each other, because we like Parliament, but what about the public? You are excluding the opportunity for the public to take a view on whether they like Brown or Blair. Surely that is the essence of the relationship of Parliament to the public?

Q12 Lord Pannick: Maybe it would be most unfortunate if the rules deterred a parliamentary party from changing their leader because they would know that the consequence would be a general election.

Dawn Oliver: It seems rather odd to me to think of having an election after you have got a new Prime Minister. The normal point of a general election is to get a new Prime Minister, or to have the opportunity to get one, so I am rather surprised by this.

The Chairman: I am not sure that we are going to advance this, because it is clearly dependent on people's personal experience and their perception, as you said Professor Oliver, as either a voter or an expert, which may be slightly different. There is the question, whether we go for four or five years, and particularly if we go for five years, of this potential conflict with elections be held in the devolved Assemblies and the Scottish Parliament.

Q13 Lord Hart of Chilton: After the five-year term was announced it became apparent that that would clash with elections to the devolved institutions in 2015, and thereafter every 20 years. Some see that as a big problem. I would like to know what your views are. If you think there are problems, do you categorise them as merely practical problems or do they involve constitutional problems?

Dawn Oliver: It does not seem to me to raise constitutional issues and I do not know what the practical problems would be. I have not looked into that.

Anthony Bradley: It is difficult sitting in London to be certain what the views would be in Scotland, Wales or Northern Ireland. If there were devolution to an English Parliament, that possibly suggests that you would not want elections at one and the same time, but that is not the case. I agree with Professor Oliver that this is not a serious constitutional problem, but it is a very practical problem with political significance in Scotland and Wales in a way that cannot easily be assessed in England.

Q14 Lord Crickhowell: As a former Secretary of State for Wales, I think there is no doubt that a simultaneous election taking place nationally could have a profound impact on an election taking place for the Assembly. I think you might get a different result as a consequence. Whether that is a good or bad thing I would not know, but I think it could have an impact in that way. Therefore, it is a factor that needs to be considered. I think it is felt in the Welsh Assembly, certainly, and I believe in Scotland, that it would probably be a bad thing for that to happen because they would like to be judged on their performance as an Assembly and not have their record caught up in the, perhaps at that moment, poor performance of the Government or other factors.

Anthony Bradley: I would wish to keep a very open ear to that kind of proposition, remembering that there was a difficulty in Scotland not so long ago with simultaneous elections for local government and the Scottish Parliament with different voting systems. We are now talking about a somewhat similar case in which there would be a general election on the first-past-the-post system for Westminster and an election on a separate basis, with I think two votes, in Scotland and Wales, leaving aside Northern Ireland. I think there will be difficulties not just of a practical kind from the organisational side, but I think for the voters too in expressing their views.

Q15 The Chairman: I think there were indications in the Second Reading debate in the Commons that the Deputy Prime Minister thought this was worth looking at again. I take the point that you have both made that this is not a constitutional issue, but it seems to be regarded as a sufficiently difficult administrative and political issue. I think the suggestion was to try and get the elections to the Assembly and the Parliament moved, which I thought would cause some political difficulty. Does anybody want to make any further comment? Can we then move on to the central point that we have touched on, but which you were saying at the beginning, Professor Oliver, was clouded in some difficulty, which is the whole question of the safety valve for an early general election, however long the fixed term is agreed?

Q16 Lord Norton of Louth: The first element of the safety valve is the two-thirds requirement for triggering a dissolution. How appropriate do you regard that?
Dawn Oliver: I do not see the need for it. The implication is that if there is pretty broad consensus in the House of Commons that there should be an early election, then there should be one. I do not see why that of itself should trigger an election. If the Government still has support and things are meandering along, I do not see the point of an early dissolution. My own sense, jumping ahead a little, is that abuses of early elections could be avoided if the newly elected Parliament only served for the rest of what would have been the term of the dissolved Parliament. The main thing to do is to avoid giving the incumbent or groups within Parliament partisan advantages in triggering an election. That would be an abuse of power, so we need to find ways of preventing that.
Anthony Bradley: I have been able to read the written evidence that Mr Howarth has put in to this Committee, and he says very strongly that you do not need a safety valve because you could always have a rapid bill go through to make the election happen and amend the Fixed-term Parliaments Act. I am not persuaded by that argument. It would not be nearly so easy, save in the event of a world war or something, for a bill of that kind to go through the House of Lords, which would definitely have a view to consider. It would not necessarily go through as rapidly and it might be a bit like entering a marriage but saying that you can always get a divorce at 24 hours' notice. If one is moving to fixed-term Parliaments, that should be for real. It is a serious change and in my view it does justify a safety valve to enable an early election. That is necessary, but I agree with Professor Oliver that if the clock starts to tick again and the four-year or five-year term begins to run, then you will not have made a real psychological change in your constitutional arrangements to the fixed-term system, because in the minds of major parties there will always be the view that if we do have an election now, will this give us what at the moment we would like, which is a four or five-year period in office? That goes against what should be the spirit of a fixed-term system.

Q17 Lord Norton of Louth: Just to follow up, if one takes the premise of a fixed-term Parliament, say for five years, and if there is an election within that it is for a remaining term, your point, Professor Bradley, is that there should be some extraordinary triggering mechanism. Am I right, Professor Oliver, that you are not suggesting that?
Dawn Oliver: I am not in favour of the two-thirds majority point. The other safety valve, if you like, is if the Government loses a vote of confidence and one is left with the problem of perhaps not having a functioning Government. That needs to be dealt with. That is the point that I assume we are coming on to in a moment. I am not in favour of the two-thirds majority requirement.

Q18 Lord Renton of Mount Harry: I think that the detail of Clause 2(1) and (2) is very difficult and that comes over particularly in what Professor Bradley has been saying. You can envisage a situation in which it was not two-thirds of the total number of MPs who voted in favour, but it was two-thirds minus one. That could very easily become very agonising. The advantage of the present situation, and one remembers it from the late 1970s, is that "no confidence" are the words used in the motion and if there is a majority of only one, the "no confidence" wins. The advantage of that in a way is the clarity and certainty. If you are going to add in other words such as questions of supply or Queen's Speech and you did not quite get two-thirds, this is in danger of becoming a very hostile and a very bad event in Westminster. What is the alternative?
Dawn Oliver: The two-thirds majority requirement would be a bad event?

Lord Renton of Mount Harry: And then looking on to the second safety valve of the Speaker certifying that the House of Commons had passed a motion of no confidence. You would not have thought that was necessary. It is either the right number of Ayes or it is not.

Dawn Oliver: Yes, I can accept that. It ought to be obvious whether a no confidence vote has been passed or not passed. I do not see the need for the Speaker's certificate.

Anthony Bradley: If I can add the view that if the majority required is as much as two-thirds—I have not done the arithmetic and gone back to see—it would really require both major parties to agree. If the two major parties in Parliament believe that a general election is needed then why should they not have it? They will not be making that decision without regard to the state of affairs and public opinion in general and there will be this disincentive if they are only going to have the rest of the period that is provided for in the legislation. On the question of motions of confidence, I have not developed an analysis in detail on this, but if we simply look at Clause 2, if the Speaker certifies that on a certain day the House of Commons passed a motion of no confidence, what if the Government had wanted a motion of confidence and it is defeated? Does that come within the clause? That is a very simple example and one can think of many other examples of the difficulty of deciding in certain circumstances when confidence exists or not.

Q19 Lord Pannick: On the point you were making, Professor Bradley, can I see if I have understood you correctly? Are you saying in relation to both the safety valves, that is the no confidence motion and the two-thirds majority, that if there is an early election, the new Parliament should last only for the residue of the four or five years? Are you distinguishing between the two safety valves?

Anthony Bradley: I have not fully thought this out, I am afraid. I was not distinguishing between the two at that point.

Lord Pannick: Maybe you could let us have the answer in writing.

Anthony Bradley: It depends on how deep one's conviction is that the fixed-term system is better than what we have at the moment and whether one should make a permanent change to that, which takes root. If it were to help out a particular set of circumstances and it was a way of possibly enabling the House of Commons to exercise a bit more authority vis-a-vis the Government, maybe it does not matter whether after an election they take over the full period or not. I was not distinguishing between the two when I answered the question.

Q20 Lord Crickhowell: We have got firmly into the complexities of Clause 2(2). I am going to come back on the 14-day question, but as we are on the Speaker's certificate and so on, there has never been any real difficulty in the past, as far as I know, of Parliament knowing that it has got a vote of confidence and what it was voting about. The more you define what a vote of confidence is, the more likely it is that someone will challenge it. The very fact that you have to have a Speaker's certificate puts the Speaker in a position that could be open to criticism. Do you have a view? Do we need to have a precise definition of what a vote of confidence is and a Speaker's certificate? Cannot we continue, as Parliament has done as far as I know—I have lived through several such situations in Parliament—with an understanding by Parliament that it knows perfectly well when it is on a vote of confidence? Maastricht is a very good example of one and the vote of confidence that resulted, among other things, in me becoming a Cabinet Minister on Jim Callaghan's resignation is a clear case. We knew exactly what was happening.

Anthony Bradley: If I may say so, that question goes to the heart of the methodological problem in this Bill. For several centuries one has had the British constitution unwritten and uncodified, based on constitutional convention and an understanding of what happens. If one is trying to replace that totally, you have to be more specific than is the case here. Whether that is desirable or not is another matter. There was the example of Canada, which I imagine the Committee knows about, where they switched to fixed-term elections but for constitutional reasons could not alter the power of the Governor-General to order a dissolution and very soon after introducing the fixed-term system the Prime Minister advised the Governor-General to have a dissolution. What would be worrying is to have doubt of this kind. If one looks at some of the writers on motions and issues of confidence, such as Sir William Anson and Ivor Jennings and others, it is not always clear whether in the past it has been an issue of confidence. Governments have sometimes said, "This is an important Bill and this is therefore an issue of confidence". That has often been an exaggeration. A Government would be unlikely to say that today, but it could. It may be that within the walls of Westminster everyone knows that the Government has had it and no longer has the confidence of the majority, but I am not sure that that is going to be a sufficient answer in the changed circumstances brought about by the Bill.

Dawn Oliver: The political implications of a vote of no confidence under this Bill would be different from the political implications under the present system, because under the present system it normally means there is going to have to be an election and there will

be an election. The implication if this Bill is passed in its present form is that a vote of no confidence would not be passed unless the homework had been done by the Opposition or by somebody in advance, knowing perfectly well that if they do bring down the Government on a vote of no confidence they are going to be put on the spot about whether they can form a new Administration within 14 days, or however long it is. I would not like the vote of no confidence to be engineered by the Government. That is something we need to talk about, because it might suit a Government to have an election. One would also have to think about the implications for the Opposition or the possible new Government that might be formed during this period after the Government has come down.

Q21 Lord Goldsmith: I wanted to go back to the point that both of you have made about the rump of the fixed-term, or whatever it may be. I am having some difficulty understanding the benefit of that. If one assumes that a consequence of the early election, whatever the cause of that would be, is that another party then gets into power, having succeeded in pulling down the Government and then winning the election, why would one want to subject it to another election relatively shortly thereafter, which it might have to start campaigning on straight away? What if the circumstances were that the Government was not dealing with a really serious problem and we needed time to handle it and needed a full term? I do not see the benefit.
Dawn Oliver: I see your point and I think if there were safeguards preventing an early election being triggered by the Government, which wanted an extra term, in other words if the motion of no confidence can only be introduced on the instigation of Opposition Members, for example, then I would not have a problem with the new Parliament running for the full four or five-year term. From my point of view, the benefit in some circumstances of giving the new Parliament only the residue of the first term is to provide disincentives for the Government to manufacture a trigger for an early election. I might be in a fog; I suspect I am.
The Chairman: Did you want to pursue that?
Lord Goldsmith: There is not time.

Q22 Lord Norton of Louth: I have a question on the same point. I understand the point about the disincentive, but I was thinking that at the end of the fourth Session in a Parliament where the two parties are evenly balanced, the Government is in office courtesy of a minor party, the minor party withdraws its support, there is a motion of no confidence which is passed, the minor party does not support the Opposition, a Government cannot be formed within 14 days and there is an election. The party is elected with an overwhelming majority, it serves 10 or 11 months in office and has to have a new election.
Anthony Bradley: I would not wish to overemphasise the need to go to a full-blooded fixed-term system on the American lines or whatever, but if it is too easy to have an early election, you will have the political commentators very soon saying, "Yes, we are here for five years, but is Mr Cameron thinking maybe that the coalition is not". You would get speculation very early on in the life of a fixed-term Parliament. If the term were four years, one would not have achieved very much because you would have reduced a five-year maximum to a four-year maximum. How one can, as it were, get the safety valve so that it is there but not too easily used is a question of great subtlety. I am not sure that I have given enough thought to it.
The Chairman: No, but what you have illustrated very clearly, if I may say so, is the complexities of this part of the Bill, which Professor Oliver referred to at the beginning, and whether it is appropriately drafted.

Q23 Lord Crickhowell: I suppose in asking my question I am challenging the whole desirability of a fixed-term Parliament, because I am going to press a little on this 14 days in which you can form a new Government and sail on. Perhaps I am influenced by the fact that, with Lord Renton and others, I sat in the House of Commons on that very dramatic evening when the Callaghan Government went down by a single vote and he got up immediately and said that he would go to the country as soon as it was possible to wind up the necessary proceedings. The country then has a chance to have a view about the new Government. With this arrangement for 14 days, I can envisage a scene in which there was only a one-vote defeat. We no longer have smoke-filled rooms, but their nice clean equivalent. There would have been a sitting down with the minority parties, including the Irish, the Scots and the Welsh. I can see the possibility of some kind of alternative Government being cobbled together and instead of the normal wash-up with the proceedings completed as quickly as possible and then giving the British electorate a chance, you carry on with a minority, and probably pretty feeble, Government in those circumstances, not a very strong Government by the nature of things. Why is all that supposed to be a benefit? Perhaps I am influenced because I immediately found myself as a Minister as a result of the vote of confidence and we won the election. But it was the electorate who decided, not a cobbling together of the minority parties deciding, possibly for a number of years, the fate of the Government.
Anthony Bradley: Those are very cogent arguments, but let me try and respond. If, say, a Government is elected with a majority for its party but there is a big issue on which that party is divided, the governing

party may break up for that reason, but a third party may be able to agree that issue of great importance and form a coalition Government in place of whatever the former Government was. Possibly this is not very far from the 1931 scenario, which is not a particularly happy one I think. That is a suggestion. I am not persuaded that this 14-day rule would always be a disaster, but it is difficult, as you have said, to see that it is necessarily an improvement on what we have.

Dawn Oliver: I do not think I have much to say. I think it is very complicated and it involves an understanding of the political psychology, if you like, of parliamentarians, and I do not think I understand that. The insiders are much better at speculating about how the different blocs of MPs would function and what they would do given a certain scenario. I find it very difficult to imagine.

The Chairman: Lord Crickhowell or Lord Renton, did you want to come back on that?

Lord Crickhowell: No, I am left with a sort of anxiety that we do not actually create a better situation and we possibly create a worse one.

Lord Renton of Mount Harry: Professor Bradley referred to 1931, but one has to remember February/March 1974, which was three days of negotiation and Ted Heath finally decided that he could not form a Government and therefore there was a minority Labour Government. These things happen and I think that Lord Crickhowell has a good point in saying that we do not want them to go on for 14 days.

The Chairman: This brings us to the basic issue, which has been debated in the Commons and has been the subject of a letter from the Minister of State, Mark Harper, on the basis of the debate and the concerns that were raised by the Clerk of the Commons about the necessity for statute in this area and the potential for judicial review if there is statute. Many Members want to raise this. I know that Lord Norton and Lord Pannick have both mentioned this before.

Q24 Lord Pannick: Can I kick off on this? As you know, Clause 2 provides that each of the safety valves depends on a certificate from the Speaker. Clause 2(3) tells us that, "A certificate under this section is conclusive for all purposes". The Clerk to the House of Commons has expressed concern that there is at least a real risk that the courts may be involved. You may have a view on the practical reality of that, but I am particularly interested in your views, as very distinguished constitutional lawyers, on whether the courts would have jurisdiction over a certificate issued by the Speaker in the light of parliamentary privilege.

Dawn Oliver: I think frankly you can never be entirely sure what the courts will say when faced with very eloquent advocates with good arguments both ways, but the question really is the justiciability of the particular question. Whether an issue is justiciable does not depend on whether the source of the power is statutory or common law or Royal Prerogative; it depends on the nature of the power that is being exercised. That was the case of *Council of Civil Service Unions v Minister for the Civil Service* . Given that this is to do with the exclusive cognisance of Parliament over its own matters, that is with a non-justiciable category of decisions and functions, I think it is extremely unlikely that the court would entertain a challenge. In a common law system, you cannot be dead sure what the courts are going to say, but I think it would be contrary to the well-established principles of parliamentary privilege and exclusive cognisance and concepts of justiciability for the courts to want to have anything to do with this. That is just my feeling.

Anthony Bradley: I have had very little opportunity to read Mark Harper's paper, but I found myself reacting positively to that and reacting rather unfavourably to what Malcolm Jack had been saying. His argument, it is probably oversimplifying to say, is that if you put it into statute therefore it is judicially reviewable. That to me is a very poor argument. First of all it omits the leading case of *Bradlaugh v Gossett*, when Charles Bradlaugh tried to rely on a statute to claim that he had a right to take the oath or whatever it was in the House of Commons. Mr Justice Stephen, in a fine judgment that has been approved recently in a different context by the Court of Appeal, said, "The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of statute law which has relation to its own internal proceedings. The House of Commons has exclusive power of interpreting the statutes so far as the regulation of its own proceedings within its own walls is concerned." It quotes Blackstone and others to the same effect. It is, of course, a rather elderly case, 125 years or so ago, and it would be very interesting as an advocate to take part in a discussion on whether the situation has changed, but there is no doubt that the recent extension of judicial review into the area of the prerogative has excluded certain matters as being non-justiciable. Lord Roskill did this in the GCHQ case and he included the dissolution of Parliament among the areas that are inherently not suitable for decision by the court. There has been quite a lot of the same kind. The advance of judicial review into many areas of executive action means that issues of justiciability do not often arise in the administrative court today, but if one is getting to a review of parliamentary proceedings or a review of what the Speaker may have decided under legislation such as this, I think one would have a huge discussion about justiciability and I think there are very strong arguments that even if the Speaker's certificate were subject in a primary way to the jurisdiction of the

courts, in a secondary sense the court would be very loath to apply intensive judicial review to the Speaker's certificate.

Q25 Lord Pannick: That is very helpful. You would accept, would you, that *Bradlaugh v Gossett* is plainly the relevant case and there are much more recent cases that apply it? There is no authority that you can think of, is this right, that would suggest that *Bradlaugh v Gossett* is not still the governing law?
Anthony Bradley: Indeed, and one has Pickin and the British Railways Board in the 1970s that would confirm that. The point is that "some issues are inherently unsuited to adjudication", which I have taken from the current edition of *De Smith's Judicial Review*[1]. That text says firmly that decisions regarding the internal procedures of Parliament are outside the jurisdiction of the courts[2]. These are not eccentric views.

Q26 Lord Pannick: It would be very surprising indeed were the courts to exercise jurisdiction in this area.
Anthony Bradley: Yes, I suppose just putting the other argument for a moment, there may be arguments of a broader or different kind that could not be raised in *Bradlaugh v Gossett* which would have to be addressed, but to say that the court would go into this as if it were reviewing a planning decision by a local authority or whatever is a very poor argument.

Q27 The Chairman: This is not so much a legal point as going back to the politics of this sort of situation, but it has been raised that although obviously what you have said is immensely authoritative in terms of the ultimate decision of the courts, the delay of the process which might be involved in terms of an appeal being made for judicial review within this strange 14-day context, et cetera, might have political relevance.
Anthony Bradley: The court has a discretion in granting interim relief as well as giving remedy. I notice that in the Canadian case, the *Conacher v Prime Minister of Canada*, the substantive decision was made a whole year after the holding of the general election. The Federal Court had already decided not to postpone the general election for that reason. To that one could add that the judiciary now in the public law field are very able and prepared to give a swift answer if circumstances require it. It would be scaremongering to say that the general election will be held up for six months or longer while the judges were deciding this.

[1] Page 121
[2] Page 119

The Chairman: Does anybody else want to make a point about that?

Q28 Baroness Falkner of Margravine: Just a brief one. On the US election in 2000, the Supreme Court made a very speedy judgement. Everyone has forgotten that was fairly recent and the world did not cave in.
Anthony Bradley: Indeed. Well, not everyone agrees with the outcome of the case.
Baroness Falkner of Margravine: The decision itself is what I was talking about, not the outcome.
Anthony Bradley: Could I say, I do not want to be too dismissive of the Clerk of the House of Commons, because I have much respect for his role in very many ways, but I think in this respect he is pursuing a line which is simplistic, to put it at its best, and the realities would be very different. It is the case that aspects of self-regulation have been taken away from the House of Commons, as with this House. The House of Commons no longer decides election petitions and it no longer deals with expenses and allowances. There could be other inroads. The Speaker's certificate to me would be an internal proceeding of Parliament, even if it is provided for in a statute.

Q29 The Chairman: One of the other cases from another jurisdiction, as it were, which has been drawn to our attention—it would be interesting to have your comment on this—is the Northern Ireland case of *Robinson v the Secretary of State for Northern Ireland*, which we have a note about from one of our legal advisers. This has been considered. I do not know whether you have a comment on the relevance or otherwise of that.
Anthony Bradley: I had a chance to look at this last night, but I am afraid I have not given longer thought than that. There was disagreement within the House; it was a 3-2 decision. Lord Bingham, whose judgments I respect enormously, said that the Act they were interpreting was in effect a constitution, and while it was for the courts to interpret those provisions, "they should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions were intended to embody"[3]. He pointed out in the same judgment that "matters of potentially great importance are left to the judgement either of political leaders, whether and when to seek a dissolution for instance, or even if to a diminished extent of the Crown, whether to grant a dissolution". Where constitutions retain scope for the exercise of political judgement, they "permit a flexible response to differing and unpredictable events in a way which the application

[3] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, Para 11.

of strict rules would preclude"[4]. If those are the principles with which the judiciary would approach an issue of this kind, it would surely be to accept that this was an area for political judgement which the courts were not qualified to make. The minority judges took a much more precise view and said that the power could not be found in the Act and therefore could not be exercised.

The Chairman: That is helpful. A slightly lateral point in this whole area, but one which I think Lord Pannick wants to raise, is about the whole issue of prorogation powers and the prerogative.

Q30 Lord Pannick: Clause 4(1) says, "This Act does not affect Her Majesty's power to prorogue Parliament". I would be very interested in both of your views on whether there is any danger that the existence of that power might be abused by the Government advising Her Majesty in order to undermine the substance of the Bill. You have already mentioned the Canadian example.

Dawn Oliver: I am afraid I have not had time to think about this much, so I cannot help.

Anthony Bradley: I would go back to the point about a sea change in this area of the British system of Government, from conventions that everybody understands and are well known, to a new world. Prorogation could be used abusively to prevent a motion of no confidence, but is it likely? There is a very strong convention that the two Houses should sit so many weeks of the year. A prorogation for two months with that obvious motive would do no good to the Government or the Prime Minister that advised it. If you are thinking of a world in which anything can happen, however unthinkable, then prorogation could theoretically be used to avoid a no confidence debate, as possibly in Canada, but it would be very unsatisfactory and British politics would have sunk to a new low.

The Chairman: I fear, however, that we cannot necessarily legislate against that.

Q31 Lord Norton of Louth: Coming back the Clerk of the House of Commons' proposals, he raised the possibility of judicial review. Even if we accept your point in terms of what will be likely to happen, would you have a problem with his proposal that it could be simply incorporated in the Standing Orders of the House of Commons?

Anthony Bradley: I felt that if the present Government believes that fixed-term Parliaments are an improvement and that we should, as it were, convert to them, Standing Orders is not an adequate way of meeting that policy decision. I understand the significance that Standing Orders have played in the past, and Speaker's decisions and so on. This is absolutely at the heart of the British parliamentary system, but if one wishes to make a change, such a change is needed beyond Standing Orders, which can easily be set aside, as I understand it, by a vote. I rather share Mark Harper's criticism of that.

Q32 Lord Norton of Louth: Surely the argument is that a bill can be set aside. If you pass an act, you can repeal it by a vote. The difference is that it would give the House of Lords a stronger role.

Dawn Oliver: I agree. I think there needs to be a statutory provision. I do not think that Standing Orders alone will do.

Q33 Baroness Falkner of Margravine: To support that, your earlier argument was that in any event they would be justiciable.

Dawn Oliver: No, they would not be justiciable. You mean Standing Orders? My position, and I think Professor Bradley's position, is that they would not be justiciable. That is to say the courts would not entertain any complaints about whether the Standing Orders had or had not been properly observed. They would not be justiciable. This would be something that the court would consider it inappropriate to adjudicate on.

Anthony Bradley: I found very helpful a recent article by a young lawyer called Daly in the 2010 edition of the journal *Public Law*. He distinguishes between primary justiciability and second justiciability. Primary justiciability is where the court simply says, "This is nothing to do with us" and it is thrown out. Secondary justiciability is where the court will look at it, but when it comes to what is being alleged and the grounds, the answer is the same. It seems to me that if the Speaker has consulted Deputy Speakers and has issued a certificate that intends sincerely to give effect to the situation, in no way is a court going to reject this, even if they have said that they would be prepared to look and see what the arguments were. When a court has an unusual case before it, it sometimes finds it more convenient to deal with, as it were, the merits, assuming there is jurisdiction, rather than simply throwing it out on jurisdiction without looking at the merits at all. I do think it is possible that one would have a case on justicability and raising this and there might need to be a judicial decision on it, but I do not feel that this is a fear that should hold up a change of this kind if it is otherwise desirable.

Q34 Lord Pannick: Do you think the fear and the risks of delay are sufficiently strong that it would be desirable to say on the face of the Bill that such a certificate shall not be open to challenge or review in the courts by reason of parliamentary privilege? Can you think of other examples of where Parliament has said that?

[4] Ibid, para 12.

Anthony Bradley: I believe the Parliament Act 1911 equivalent provision goes somewhat further. Certainly there have been decisions on legislation like the *Anisminic* case, where a decision "shall not be questioned" in any other proceedings. And there was the ill-fated proposal to exclude judicial review altogether on immigration decisions, not so long ago, which provoked a constitutional argument. The legal profession and the judiciary and this House were all very concerned with this attack on judicial review. If that were added in the terms that Lord Pannick has said, it would be difficult on constitutional grounds to say that that is improper, but it surely would influence the judges.
Dawn Oliver: I note that Clause 2(3) at the moment provides, "A certificate under this section is conclusive for all purposes". I suppose that could be expanded to refer to Parliament's exclusive cognisance of its own procedures.

Q35 Lord Pannick: The concern about the existing provision, as Professor Bradley says, is that it might be said, as in *Anisminic*, that it does not mean an invalid certificate. A valid certificate is challengeable.
Anthony Bradley: There are certainly other statutory instances of recent times when you get the word "purporting" included, which help to give extra effect and inclusiveness. My view is that one could strengthen this particular part of the Bill without running into a whole set of constitutional arguments about destroying judicial review.
The Chairman: That is very helpful. We are coming almost to the end of our time with you. I know that Lord Hart wanted to raise a question about the Parliament Acts.

Q36 Lord Hart of Chilton: It is a very short question. The Parliament Acts, which circumscribe the powers of the House of Lords, expressly exclude that circumscription for any bill that extends the life of a Parliament for beyond five years. The Government has acknowledged that Parliaments under this Bill may extend a short period beyond five years. If that is so, do you consider that the House of Lords will have a right of veto?
Dawn Oliver: My gut feeling is yes.
Anthony Bradley: It is a difficult one to answer rapidly, but it should be yes. The House of Lords' consent would be needed if there is any possibility of going beyond five years. It is difficult to think of a satisfactory alternative argument to that. It raises another question of whether the House of Lords should be involved in decisions about the length of a Parliament if there is a fixed-term system, but that is not what your question was about.

Q37 Lord Hart of Chilton: If that veto were to happen, the Bill could not be Parliament Acted?
Anthony Bradley: It is possibly worth mentioning that the Parliament Act is drafted in terms of sessions, and if one is having unusually long sessions or altering the customary framework, the operation of the Parliament Act will be somewhat different.

Q38 The Chairman: Only, presumably, after this session, if you see what I mean. After that it will revert to a year, it will just be a different year.
Anthony Bradley: Yes
The Chairman: Has any other member of the Committee got a point that they would like to raise or a question that they feel has not been covered in the way that they had hoped?

Q39 Lord Crickhowell: I have a point under Question 14, about the timing of the sitting of Parliament after an election and whether it should be in the hands of the Electoral Commission. It is quite an important point. If the sitting of Parliament is for any reason delayed, it is quite a handicap to an incoming Government in completing important legislation before the House rises for the summer recess. The actual timing of the sitting of Parliament does have significance and I wondered if there was a view about how it should be decided.
Dawn Oliver: I do not have a view on that, I am afraid.
Anthony Bradley: I agree that the point is an important practical one. I think the time has been lengthened after the most recent general election, when there was a longer period before the House of Commons began to sit again.
Lord Crickhowell: And it created a great pressure during that first session ending in July.
Anthony Bradley: I would not necessarily have been in favour of that extension of time, but I certainly do not have a view on that point.

Q40 Lord Goldsmith: Could I just ask one question, if it is not unfair? Professor Bradley, you have very clearly explained your view that you would distinguish between this Government's desire to have a five-year term, which you can deal with in one particular way, and the question of fixed-term Parliaments for the future. You have distinguished between those two and think we should spend more time considering the second question. I wonder, if it is not unfair, whether Professor Oliver has a view on that as well. You are already teasing out the Bill into two parts and I wonder whether Professor Oliver shares that view or sees it really still as a single question, not two.
Dawn Oliver: I do see it as a single question. Professor Bradley and I have not discussed that and I have not thought it through, but my approach has

been that you cannot really separate those two issues; this has to be dealt with in one bill.

Q41 Lord Goldsmith: For the future as well as for this Parliament?
Dawn Oliver: Yes. I do not understand how one could have some one-off arrangement for this Parliament and then an entirely separate bill along these lines dealing with future Parliaments. But I am probably in a fog.

Q42 The Chairman: But if we did distinguish between those short-term and long-term objectives as Professor Bradley is suggesting, you could achieve what you wanted to do for the purposes of the present Government by doing precisely what they have done, which is to say that the next general election will be on May the whatever 2015.
Dawn Oliver: Yes, but you never know what is going to happen between now and then, do you?

Q43 The Chairman: Professor Bradley, did you want to come back on that?
Anthony Bradley: I think not. I realised when I wrote my view to the House of Commons Committee that I was probably being unrealistic in political terms, but I repeat my view that there is a different dimension between deciding what this Government wishes to do after the general election we have just had and the changes in the system of Government that should be made for the long term.
The Chairman: Thank you, that is very clear. Is there any other member of the Committee who wants to raise any further points? Well, I am most grateful to you both. It has been extremely interesting and most helpful.

Further evidence from Professor Anthony Bradley, in response to the written evidence submitted by the Clerk of the House of Commons, Malcolm Jack (FTP 39)

Paragraph numbers relate to the relevant paragraph's in the Clerk's written evidence.

(Para 3) I do not wish to add anything of substance to what the Clerk says in discussing the "risk" under the Bill of parliamentary proceedings being questioned in the courts, since the nature of our disagreement over that risk is clear. There is, in my view, nothing in the Fixed-term Parliaments Bill that could be said expressly or impliedly to restrict the scope of Article 9 of the Bill of Rights.

(Para 4) In commenting on the case of *Bradlaugh v Gossett*, the Clerk refers to section 3 of the Parliamentary Oaths Act 1866, and its requirement that the oath should be taken under directions laid down by the Standing Orders of each House. While this may provide a precedent for what the Clerk proposes should now be done by Standing Orders, I observe that neither Stephen J (save for a passing reference at page 282 of his judgment) nor the other judges in *Bradlaugh v Gossett* mention this provision. They deal with the matter on the basis, as argued by *Bradlaugh*, that the order given to the Serjeant at Arms was contrary to the Act itself.

(Para 4) While there have indeed in recent years been several interventions by the Speaker of the House of Commons to protect parliamentary privilege in the courts, it has not always been obvious that there was a need for such an intervention, and I am doubtful whether those interventions have achieved a great deal. So far as the European Court of Human Rights is concerned, in the case of *A v United Kingdom* in 2002, the Court by a majority of 6-1 upheld the absolute immunity of MPs from being sued in defamation for what they say in debate in the House, and the United Kingdom's successful defence of this position was supported by eight other European governments.

October 2010

Further evidence from Malcolm Jack, Clerk of the House of Commons (FTP 20)

I have read, with interest, the evidence taken by your Committee last week (6 October 2010) on the Fixed-term Parliaments Bill. I would be grateful if the Committee permitted me to make a few, brief comments on the specific matter of Clause 2 and its effects on parliamentary privilege (in which my opinion was cited) in order to clarify the issue as I see it.

I should preface my remarks by saying, as your Committee will be aware, that in submitting evidence to the Political and Constitutional Reform Committee of this House, I made it clear that I was not challenging the principle of the Bill or in any way commenting on the merits of a fixed-term Parliament which are issues for Parliament itself to consider.

What I am saying, in essence, is that I identify a risk that the provisions of Clause 2 of the Bill could lead to a questioning of parliamentary proceedings in the courts. That risk was, in fact, acknowledged by both your witnesses albeit that their view is that the risk is not a great one. Dawn Oliver admitted that one could not be

certain of what the courts would say in the face of "good arguments both ways".[1] Anthony Bradley talked of "a huge discussion about justiciability" arising in such a case but his view was that the matter was unlikely to go beyond a "primary" stage of jurisdiction in the courts.[2] An important aspect of risk not mentioned in that discussion was that of impact. There may be little risk of an accident if one drives up the motorway on the wrong side at four in the morning but the impact, if there were an accident, is likely to be very serious. The risk of a dispute about a vote to dissolve Parliament, argued out in the courts, might be small but were it to happen its impact, politically and constitutionally, would be very great. Taking stock of the evidence you have received does not, therefore, lead me to revise my view that incorporating the provisions of Clause 2 in the Standing Orders of the House remains the safest course of action.

I would also like to comment on the reference made to the case of *Bradlaugh v. Gosset* (1884). While I acknowledge the importance of Judge Stephen's judgment in that case, I do not think it would be difficult to show that the circumstances which it dealt with, well over 100 years ago, were very different from the circumstances that would arise in a modern dispute about the workings of Clause 2 of the Bill, for example in the area of human rights. There is also an important point of context to the case not mentioned in the evidence to you: the Parliamentary Oaths Act (1866), under section 3, while stipulating that that the oath must be taken in the Chamber of each House nevertheless specifically provides for regulation of the process according to directions laid down by way of Standing Orders of each House. Such a manner of dealing with the provisions of Clause 2, rather than setting out detailed procedure on the face of the Bill, is a precedent for what I am suggesting.

I should add a few further points of clarification which make me, unfortunately, more sceptical than Anthony Bradley about the self-restraint of the courts and have persuaded me of the desirability of a Parliamentary Privileges Act. The first is the not infrequent need in recent years for interventions by the Speaker of the House of Commons to protect parliamentary privilege in the courts. The second is in the attitude of the European Court of Human Rights, which has heard cases that British courts would not consider on the grounds that they fell within the area of parliamentary jurisdiction.[3] Furthermore, in the case I have just cited, two of the judges expressed reservations about the lack of remedies against the exercise of parliamentary privilege in the UK system.[4]

The last point I would like to put to the Committee is this: given that a draft Parliamentary Privileges Bill has now been announced, why deal in advance and separately with a matter affecting the proceedings of the House of Commons in legislation?

11 October 2010

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1 Q 24.
2 Ibid.
3 See *A v United Kingdom* (2002) (35373/97).
4 Ibid.

WEDNESDAY 20 OCTOBER 2010

Present	Baroness Jay of Paddington (Chairman)	Lord Norton of Louth
	Lord Crickhowell	Lord Powell of Bayswater
	Baroness Falkner of Margravine	Lord Renton of Mount Harry
	Lord Goldsmith	Lord Rodgers of Quarry Bank
		Lord Shaw of Northstead

Examination of Witnesses

Witnesses: Dr Henry Milner, [Political science, Umea University, Université de Montréal], and Professor Stephen Padgett, [University of Strathclyde].

Q44 ***The Chairman:*** Good morning to both of you and thank you very much for coming to the Constitution Committee. The procedure is that we are recording this for the transcript and the purposes of the archive et cetera, so everything is on record. We will first invite you simply to identify yourselves and give a brief statement of both your positions. We are very interested in the overseas experience of fixed-term Parliaments because until now all our evidence has been concerned with the details of the Bill that is now before the House of Commons but will come to the House of Lords fairly soon. We are the revising Chamber and it is always extraordinarily valuable to us to have overseas experience to compare and contrast with our own domestic arrangements. Would you like to start, Professor Milner?

Henry Milner: Thank you very much for inviting me here. It is a great pleasure to have a chance to be in this building and to discuss this important subject with you. I am not a constitutional expert per se. My work has been on political participation, but at a certain point I realised that political institutions have much to do with political participation. I have written several articles and I have written two books on the subject, drawing a link between certain aspects of institutions, electoral systems and so on, and political participation. If I have a chance I want to make some arguments in relation to fixed voting dates. A link can be drawn between fixed voting dates and possibly higher levels of political participation in a given context. I have written about Canada in several articles, as was mentioned, but I am also a specialist in Scandinavia. Some Scandinavian experience is relevant here as well. Thank you again for having me.

The Chairman: Thank you very much. We are particularly fortunate that, although you are Canadian and your background is in Canada, you are working in Sweden at the moment, so we have, as it were, the double approach.

Stephen Padgett: I am a professor of politics in the School of Government and Public Policy at the University of Strathclyde. I have worked in German and European politics for more than 20 years. I have written around 10 books on German politics and policy. I am not a constitutional expert; I would say that I am an expert in German politics. I do not have a prepared statement, but I am happy to respond to your Lordships' particular concerns. I am interested in and have done some work on policy transfer and institutional transfer, and learning lessons from abroad. It is very positive that the institutions of one country should learn from those of another. I add one caveat that emerges from the study of policy transfer and institutional transfer: countries have very different cultures and legal systems, so the type of institution or institutional device that works well in one country does not necessarily work well in another. Looking abroad is positive but I suggest a note of caution.

Q45 ***The Chairman:*** That leads in very easily to the first very general question that I would like to put to both of you, which is do you think that the experience of fixed-term Parliaments that you know about, specifically in the countries that you have studied, is relevant to this country? Do you think you learn something about the fixed-term Parliament process that is valuable or not so valuable overall? Are fixed-term Parliaments a good thing, to put it at its simplest?

Stephen Padgett: I think the German case is certainly relevant to your Lordships' considerations, but the design of the fixed-term Parliament in Germany was made in 1948–49, against a particular set of historical circumstances and the constitution-makers were motivated by those circumstances. Governments in the Weimar Republic, as I am sure your Lordships know, were highly vulnerable to negative parliamentary majorities. In large part, the constitutional arrangements that Germany adopted were designed to protect Governments from such circumstances. I think the considerations that have motivated the proposals for a fixed-term Parliament in this country are rather different, so the particular processes that Germany has may not be ideally suited to the political circumstances. However, I think the

processes and how they have worked in practice are relevant to the considerations of this House.

Q46 ***The Chairman:*** Dr Milner, drawing on your experience, do you believe that there are some absolute advantages to a fixed-term Parliament?
Henry Milner: I hate to use the term "absolute advantages", but on the whole, under current circumstances, there are two things that I would draw your attention to, neither of which are specific to the questions being raised here, namely how you do that and how you deal with particular technical aspects. I know that there is a lot to talk about these matters but I am just talking about the general idea at this point. My starting position is that if we agree that the general idea of fixed election dates is good, we can find technical ways of doing it in the best possible way. It is good for two general reasons. One is that, given the rising cynicism towards politics, which we have all encountered and which is pretty universal, the very idea that an election should be the property of a politician, to call when he or she sees fit, rather than something that belongs to people and the laws of the nation so that the nation knows, "This is when our election takes place. This is when we choose our government", seems to me rather difficult to argue in principle, especially today. One may call upon the constitutional tradition but people today think rather in the way that I have articulated. When you have a sense that politicians are calling elections for their own reasons, rather than as a genuine democratic exercise, whether that is true or not, it feeds into this kind of cynicism. We see that in lower turnout and the expressions of alienation. It is a minor point but the kind of point that makes a difference. On balance, countries that have fixed election dates are less likely to have this kind of cynicism.

Q47 ***The Chairman:*** We have seen some evidence, particularly from Australia, where the countervailing mood is that if you have a fixed-term arrangement it prevents the populace, who may be angry with the government, having any chance of getting rid of them before a particular time.
Henry Milner: In Canada, we now have a situation where we would probably have elections more frequently except that the population really does not like the idea. Because the politicians have partisan disagreements among themselves, we have a minority government, without a coalition such as you have. Every day there seems to be another moment of some disagreement that might result in an election. The population's attitude is quite the opposite. It is that, "You are there for a certain period of time: get along". It is one of the reasons why we are not having elections, despite the fact that there is all this to do so. So, on balance, I do not see this as a problem. When we get to the length of term being five years, that is another matter, but if it were a four-year term, as it is almost everywhere, including Germany, that would not be very worrisome. The second argument—I will be very quick—is quite specific, but it concerns an area I have been working in. Think of civic education, very widely defined, as a way to get young people interested in elections, and of helping teachers in schools, and making it easier for them to do their job. If you know the date of an election in advance, it is much easier to organise a whole series of activities around that election. In my last book I look at Norway, which is a very good example of this through the student vote process that happens in the schools and what goes on in civic education classes at the time of elections. None of these things would be easy to do, or even possible, if the date of the election was not known in advance by everybody in Norway. It is a small point, but it could make a difference.

Q48 ***Lord Norton of Louth:*** Coming to the detail, because you are looking at the principle of whether we should have a fixed-term Parliament, if one does there is the issue of whether it should last for five years, four years or whatever. The other element that we are looking at is, if there is a premature dissolution of Parliament, whether the remainder of the term should be served out by whoever is then elected, or whether, after the premature dissolution, the clock is reset and the government then serves for the set period thereafter. Drawing on your experience, which of those do you think is the desirable option?
Henry Milner: I will start on that. I guess one of the reasons I was invited here is that I wrote a paper several years ago, looking at the experience of different countries. I do not think it makes all that much difference. The case of Norway is the most extreme. Essentially, you cannot even have a premature election. More typical, the choice is between keeping the original next election date as it is, as in Finland, or as in the proposal here, for it to be five years later. Working on the premise that it would be four years, I would argue that the principle here is not wrong. I could imagine a compromise that said that if the dissolution was in the first two years of Parliament, the original date should be maintained, but if it was in the second two years of Parliament, the election should be four years from that date. That would be a technical compromise but it is not one about which I have a strong opinion either way.

Q49 ***The Chairman:*** Professor Padgett, do you have anything to add? I know the point about a four or five-year term is something that we want to raise, but do you have a point on that about coming to a conclusion or moving back to the original timetable?

Stephen Padgett: I think there is an argument for sticking with the original timetable and simply running to the end of the Parliament's term where a government has called a dissolution and that has resulted in the return of that government, because that arrangement would act as a disincentive for governments to behave opportunistically and dissolve Parliament to reap the benefits of favourable polling circumstances. If, on the other hand, the dissolution results, one way or the other, in the formation of a new government, it would seem anomalous to deny that new Government its full term. It would rather depend on the circumstances.

Q50 ***Lord Powell of Bayswater:*** I seem to remember that it was Britain that drafted the German constitution, so perhaps some would say that it is another example of our knowing how to run other countries better than our own. Coming to the issue of five years versus four years, we would be interested to know both of your views on which is more appropriate for the UK. One can see advantages either way. Five years is familiar and enshrined in practice. It gives the government plenty of time to get its legislation through. On the other hand, people vote less frequently and, speaking as a former civil servant, the last year of the five is wasted by politicians getting ready for elections. What would your view be?
Stephen Padgett: First of all, it is not quite correct to say that Britain drafted Germany's constitution; Britain and the Allies oversaw the drafting but it was Germans who drafted it, with German historical memories. In relation to the term of a fixed-term Parliament, I feel very strongly that five years is too long and there would be a serious danger that a government would come to the end of its useful life before the end of a five-year term. If there were no safety valves or if they were tightly constrained, that could lead to a period of hamstrung government towards the end of its term. Alternatively, if there were safety valves, it could lead to frequent premature dissolutions, which would not be a positive thing and would really defeat the object of the fixed-term Parliament.
Henry Milner: Very few countries comparable to Britain have five-year terms. Very few democratic countries, period, have terms that long for their legislature.

Q51 ***The Chairman:*** Do any of the fixed-term Parliament countries have five-year terms for central government?
Henry Milner: France does, but France is a semi-presidential system. Italy does. After that you reach Luxembourg and Malta. Pretty much all the European countries with fixed terms, which is the large majority, have four-year terms, as do the provinces in Canada that have adopted fixed terms and, as you know, the Scottish Parliament, and so on.

Q52 ***Lord Powell of Bayswater:*** We tend to be a bit different from others. What would you say was the disadvantage of four-year terms?
Henry Milner: I am trying to place myself in the position of an informed citizen. It seems to me that it would be difficult to justify a five-year term to an informed citizen when there seems to be a kind of natural rhythm around four years in other elections that the citizen might be participating in, such as municipal elections, Scottish elections and American elections if they are following them. The four-year term is now, I think, culturally established, even in Britain, where it has been a little different. You have had some five-year governments and some four-year governments, though I think slightly more four-year ones. In Canada we have almost never had five-year terms, even before fixed terms. That is just people's expectation. It is incumbent on those who want five years rather than four to make the argument. That is how I would put it.

Q53 ***Baroness Falkner of Margravine:*** As I recall, the European Parliament has five-year terms. That has a much bigger electorate than any of the individual countries. What would your comment about that be? Is that not a perfectly workable model?
Henry Milner: Unfortunately, as I don't have to tell you, the European Parliament is—what do we call it in political science?—a second-level Parliament. It is not one that people identify with primarily. You can see that in turnout numbers. Frankly, I would not start from the European Parliament. I think it is a real problem to have a Parliament where the turnout is always less than 50%. It is very difficult for that institution to claim legitimacy. I am not saying that it would make much of a difference if its terms lasted four years rather than five, but an illegitimate institution is not a good example for others.

Q54 ***The Chairman:*** Professor Padgett, do you have a comment on that?
Stephen Padgett: I think the critical difference between the European Parliament and any national Parliament is the absence of that direct link between the Parliament and the Government. The five-year Parliament does not imply a five-year term of government.

Q55 ***Lord Goldsmith:*** I wanted to ask exactly that question, but you have answered it. I will go back to the experience in France and Italy. Do you know how often Italy has succeeded in getting to a five-year term?

Henry Milner: Actually, somewhat more often than we think. Denmark has had more frequent elections than Italy, but Italy has had much more frequent changes of government. That is the major difference.
Lord Goldsmith: And France?
Henry Milner: In France, the President can dissolve Parliament pretty much as he wishes. I am not an expert on France per se, but my impression is that it has happened reasonably frequently. Again, that is not a model applicable to the British constitution.

Q56 ***Lord Norton of Louth:*** I wanted to link the answers to both questions. It strikes me that there is a possible relationship between the length of the term and whether, if there is a premature dissolution, the Government should fulfil the rest of the term or the clock should start ticking again. Presumably, the longer the term, the stronger the argument for fulfilling the remainder of the term. If the fixed term is shorter, arguably the clock should be reset. Would you agree with that?
Henry Milner: Yes.
Stephen Padgett: I think I would, too.
The Chairman: One of the other issues that has been raised in debates about our proposals is the question of how you combine an election at the national level with one at the devolved level, as in Canada and Germany. I know Lord Crickhowell wanted to raise this point.

Q57 ***Lord Crickhowell:*** Sticking with political participation, what is the experience in Canada, Germany and other countries in respect of federal elections being held at the same time as provincial or local elections? Do dual elections increase turnout or not? What is the experience if the electoral system is different at one level from the other? For example, in Wales, if we had the proposed system it would be different from that of the Assembly election on the same day. Does that cause confusion and spoilt ballot papers? There are two issues, really. I was hoping to start with Dr Milner because you said you were the great participation expert. Are we likely to get more or less turnout by combining the elections at each level?
Henry Milner: Neither Canada nor Germany are especially relevant in this case because the provinces set their own dates for elections and now several of them have become fixed, so we cannot take that into consideration. There is no case of a fixed date of a provincial and federal election coinciding exactly. We have not reached that point. At some point I will talk about the experience, or failed experience, of the fixed election date law in the federal Parliament of Canada. We do not really have any experience of that in Canada. I think it is pretty much the same in Germany. To compare Sweden and Norway, neither is a federal country but they have regional and local governments. In Sweden, all elections take place on the same date every four years. That is when all three levels are elected. In the case of Norway—this is more common—there is a mid-term election halfway through the term, which is when the local and regional levels are chosen. My preference is for the Norwegian system. The advantage of the Swedish system is that you get higher turnout in the local and regional elections, because once people show up to vote in national elections, they will also vote in local and regional elections. However, they do not pay much attention to them. Local issues disappear from political discussion. Secondly, four years without elections is a long time for the kind of things that I am talking about, such as getting people interested and involved, and use in civic education. So my general tendency is to try to find a way in which elections take place every two years, with national elections taking place on a given date and other-level elections taking place two years later. I am not saying that applies in this case, because you have specific rules regarding Scotland, Wales and Northern Ireland but, if possible, moving towards that system is the most effective compromise.

Q58 ***Lord Crickhowell:*** On the confusion issue, if you are being asked to vote on an AV system, while on the same day you are voting to elect people to the Welsh Assembly on an entirely different system, is this likely to cause confusion, or do you think not?
Henry Milner: There really are not many examples of that that I can think of, so I cannot give you a very informed answer. My guess is that it would probably be something of a problem, so it would be worth avoiding if possible, but people do learn and adjust. I would not throw the whole thing out because at one point you end up with people voting in two different kinds of system.
Stephen Padgett: The German case does give some examples of this, but relatively few. Three state elections took place on the same day as federal elections in 1994. There was also one in 2002. The 1994 case was quite interesting because it was a period when participation in the eastern part of Germany was very low. The turnout in the state election in the two eastern states was 10 to 15% higher than in Land elections that had taken place in eastern Germany previously that year. There is clear evidence there of increased turnout. Generally, the German state electoral systems are rather similar to the federal electoral system with the one exception of Saarland, which coincided in 1994. As far as I recall, there was no widespread confusion over different electoral systems, though it has to be said that the federal system is well known and the Saarland system is rather simple, with just one ballot being cast, so it is understandable that there was little confusion. I

think the UK provides the example of confusion in the Scottish elections.

Q59 ***Lord Crickhowell:*** It is very easy for an elector to distinguish between purely local government issues and central government issues. It may be more difficult to distinguish between Scottish Government and Welsh Assembly issues and central government issues. Therefore, I think there is a real fear among Assembly Members, for example, that their election may be decided by the popularity or otherwise of the UK Government, rather than by their own performance.
Stephen Padgett: The German case would certainly suggest that that is the case. Where state elections have coincided with the federal election, the federal election's issues and campaigns have totally engulfed the regional campaign.

Q60 ***The Chairman:*** Is there a determination by people within the German system to try to avoid this potential conflict, or is it something that is not discussed? It is already being discussed here, as you say, particularly in relation to the Scottish example from 2007.
Stephen Padgett: I do not think it has been a major issue either way. It has occurred almost randomly through the terms of Land Parliaments, which are fixed, drifting towards the federal elections because of premature dissolutions or whatever else. If a Land election was going to be timed very close to a federal election, it would probably take place on the same day for, I would guess, administrative convenience. Politically it is not a major issue in Germany.

Q61 ***Lord Renton of Mount Harry:*** I apologise for arriving late. I am not certain how relevant my question is. If it has already been answered, forgive me. What is your view about compulsory voting, particularly for parliamentary elections? I remember that when I went to Australia there was compulsory voting. You were fined if you did not vote. I was always interested in how little Australians resented this. If anything, they were rather for compulsory voting. What are your views?
Henry Milner: I looked at this issue in my last book and I tried to find evidence for compulsory voting, beyond getting more people to vote than otherwise would. We know that it has that effect in Australia, Belgium and so on. The question is, does it make those people who vote because of compulsory voting more likely to seek more information, so that they vote in an informed manner? There is some evidence from simulations and experiments that we have tried. We have not really found that to be the case. It seems to be that you get more voters but not necessarily more informed voters. So I tend to be sceptical. I do not oppose it under all circumstances. If democratic legitimacy reaches a point where fewer than half the people are voting regularly, to the extent that the legitimacy of the entire system is called into question, just getting more people to vote is something valuable. I do not like it as a general solution to the existing situation because it papers it over. It does not get us more active and interested citizens; it just gets us more people who vote because they have to. We have to look at how we get more active and interested citizens who will vote not because they have to, but because they are interested and attentive to what is going on. That is what my book is about. In a sense, compulsory voting is a band-aid solution.
Stephen Padgett: I defer to Dr Milner on that. I have no expert experience.
The Chairman: Going back to the question of the fixed term, the whole issue of early dissolution is obviously relevant.

Q62 ***Lord Shaw of Northstead:*** I wonder if you could briefly describe the processes under which the Canadian and German federal Parliaments may be dissolved before the fixed term has expired. In particular on that point, to what extent do the Governor-General in Canada or the federal President in Germany retain a discretion to dissolve Parliament early? And one more question, if I may: where there is more than one process for dissolving Parliament early, is one regarded as more constitutionally appropriate? Is either process regarded as more straightforward from the point of view of the PM, the Chancellor or the Parliament?
Stephen Padgett: In the German case there is, strictly speaking, only one process by which Parliament can be dissolved prematurely, and that is triggered by the failure of Parliament to support a confidence motion that is put to it by the Chancellor. Constitutionally, such motions can only be put by the Chancellor. The House does not have the prerogative to raise a motion of confidence. So there is no provision for Parliament to trigger a premature dissolution in the German case. Following the failure of a confidence motion, the Chancellor may, but is not obliged to, dissolve Parliament. If he proposes that Parliament be dissolved, the President acts on that proposal and has the discretion to dissolve Parliament or not. So yes, the federal President has that discretion. The federal constitutional court has no constitutional prerogative to give a judgment on the dissolution unless it is petitioned to do so. That has occurred twice. In theory, at least, a dissolution under Article 68 of the German constitution requires the concurrent consent of the Chancellor, the Parliament to deny the Chancellor the vote of confidence, the President and, if it is so petitioned, the federal constitutional court. There are several checks and balances there. While Parliament does not have the constitutional right to dissolve itself, it has the right

to move a constructive vote of no confidence. I should add that it is obliged, simultaneously in proposing the vote of no confidence, to elect a new Chancellor.

Q63 ***The Chairman:*** Is the constructive vote of no confidence defined in the constitution?
Stephen Padgett: It is, yes, quite explicitly. In that event, though, Parliament is not dissolved. The new government simply continues to the end of the parliamentary term. Having said that, the only time that the constructive vote of no confidence has been successfully deployed, by Chancellor Kohl in 1982, it was followed the next year by a dissolution on the initiative of the Chancellor, who contrived to lose a confidence vote that his party had put to trigger new elections.
Henry Milner: The Canadian situation is very different. As far as the federal Parliament is concerned, a law on fixed elections has only been in effect for, I think, four years. It is written in such a way and has been interpreted—correctly, I think, by the federal court—to create almost a dead letter, so that the actual law is almost without effect. This is even more the case because of the events that took place. Let me give you a brief summary of those. The Canadian law is very short. Clause 1 in three ways reaffirms the position of the Governor-General. Nothing in this law shall in any way affect the power of the Governor-General to dissolve Parliament at his or her discretion. The second clause, the last part of which states that elections will take place on the third Monday in October every fourth year, begins with "subject to Clause 1". In case we were unclear, it reminds us. The intent, I think, of the government lawyers when they wrote that was to give the government a loophole big enough for a locomotive to drive through. That is exactly what happened. The minority government were at a point where they thought they had a chance of winning a majority. Parliament had not been getting along very well; it was quite ineffective. The Prime Minister went to see the Governor-General. The Governor-General, interpreting the clause, I think, correctly, essentially brought us back to the previous position, which was that the Governor-General would follow the Prime Minister's recommendations for dissolution. So that is what happened. This was later, as I said, tested in the Federal Court, which said that courts can act and its jurisdiction could apply in this case, because it is a federal law, but the government acted in accordance with the law. We had another election. To the disappointment of the government, we ended up with another minority. The additional problem is that practically nobody in Canada realises that we still have this law on the books. Even I have not thought of the date of our next election because it is a meaningless concept. No one is aware of this any more and it does not affect anyone's thinking. Every journalist talks about whether there will be an election in the fall or in the spring, but nobody says that this would violate the law, which is still there—nobody bothered to repeal it—about fixed election dates. The Prime Minister has the ability to use this simply to go back to the old system and ignore the idea of fixed election dates. If we—and you—are serious about this, that should not happen. As far as I can see, that is not the case here. Once this law is passed, the Prime Minister could not go to the Queen and simply ask for the dissolution.

Q64 ***The Chairman:*** Is that because of the distinction between retaining the prerogative, as in your case, and not in what is being proposed here?
Henry Milner: I think so. I am not a constitutional lawyer but I would assume that, with the law as it is written, if it went to court the court would say that the Prime Minister could not, under the law, simply go to the Queen and ask for a dissolution, especially since it has an alternative mechanism—the two-thirds vote. With an alternative mechanism, it seems to me that any court would say that since you could not use the mechanism provided by the law, it simply is not legal to try to get around it. There are lawyers here who are probably better positioned to answer than I am that that is the case. But I assume it is the case and it would be a definite improvement on the Canadian situation.

Q65 ***Lord Goldsmith:*** I wanted to clarify one thing. The Governor-General's view and, as I understand it, the court's view of the power is that there is a general discretion. Or it is similar to a situation where a head of state would rely on the advice from his or her Ministers? So if the Prime Minister says, "I want a dissolution", would the Governor-General say, "That's the answer. That's what I have to do"? Taking into account other considerations, what has happened?
Henry Milner: That is a good question. We have only one case. Before this law was passed, the precedent was very clear. Even if, three months after an election, the Prime Minister went to the Governor-General and said, "I want a new election", the Governor-General, would not say, "Why don't you give the Opposition leader a chance? It has only been three months". For the Governor-General, the precedent was clearly established. This would be the Prime Minister's call and he would have to answer to the people for it. It would not be for the Governor-General to intervene. The new law changed that. As far as I can tell—I was not privy to the discussion between the Prime Minister and the Governor-General—in this case the Governor-General's advisers would have said, "On what basis could you refuse the Prime Minister, since the way that the law

is written allows you to do everything that you could have done before and act in exactly the way you would have acted before the law was passed?". If a Governor-General, in her wisdom, had said, "No, we have fixed election dates and I refuse to dissolve Parliament", that would have been an interesting development but no one in Canada anticipated it.

Q66 ***Lord Shaw of Northstead:*** Going back to the German case, when Chancellor Kohl deliberately decided to lose a vote of confidence, did that result later in an alteration to the law or some further change?
Stephen Padgett: No. I should add that in all three cases when a premature dissolution has occurred in Germany, it has occurred through the deliberate contrivance of the Chancellor. That is an issue. Unlike in Canada, the expectation is that a Parliament will run for its full term. Exceptions are treated as such and are scrutinised very carefully by the President, a court and public opinion. The court was called upon to rule on the Kohl case in 1983. The usual way in which the court is called upon is by Members of Parliament petitioning the constitutional court that the early dissolution is a breach of their constitutional right to a four-year term. The court has regarded that as justiciable and given a judgment on it. What the court tried to do in 1983 was tighten the circumstances in which a Chancellor could contrive his own defeat, and therefore dissolution, by saying that, in addition to the formal procedural requirements of the constitution—that is, failing the vote of confidence—the Chancellor should be able to meet a further material requirement. That material requirement was that the Chancellor should be able to demonstrate that continuous government is no longer possible. The court expanded on that by saying that the material condition would be a political crisis.

Q67 ***Lord Shaw of Northstead:*** Who would decide?
Stephen Padgett: Despite that judgment, the court upheld Kohl's dissolution and there was no political crisis in that instance. Kohl moved the dissolution because he had come to power the previous year through the constructive vote of no confidence—that is, a vote in Parliament—and therefore lacked a popular mandate. So he was asking for a popular mandate, but there was no sense of political crisis. In 2005, which was the most recent premature dissolution, by Chancellor Schröder, the court gave some consideration to exactly that question: what constituted a political crisis and how should it be adjudicated? The circumstances were that arguably there was a political crisis because the Government was deeply unpopular, had lost a series of state elections and Schröder had lost the confidence of large sections of his own party through a programme of economic reform. Arguably there was a political crisis, but the government had a workable majority.

Q68 ***Lord Shaw of Northstead:*** Do you believe that the courts should intervene? This is a political matter.
Stephen Padgett: The end of this—sorry—rather prolonged response will, I hope, answer that question. The court sought to define how a political crisis should be defined. It concluded that a political crisis could not be determined by a court and that the definition of a political crisis should be within the broad administrative competence of the Chancellor. That judgment is broadly interpreted as meaning that a future court would be unable, following that precedent, to subject that question to judicial interpretation.
The Chairman: This is very much a point in the internal conversations that we have been having in the Houses of Parliament, with evidence from the Clerk of the House of Commons, about the potential judicial role in fixed-term Parliament legislation. Of course, it also impacts on the nature of the vote of confidence.

Q69 ***Lord Norton of Louth:*** The Fixed-term Parliaments Bill provides the triggering mechanism—a vote of confidence—for dissolution. Then there are the safety-valve provisions. One of the things that is being discussed here is the definition of a vote of confidence. As I understand the German case, that is not really an issue because there is an explicit vote of confidence, which the government can move. I think I am right in saying that if it is lost by a simple majority, that is fine. Then you have the constructive vote of no confidence, which you say is defined in the constitution, so there is no issue about what constitutes a vote of confidence. I wonder, Professor Milner, whether there is an issue, in your experience, of what defines a vote of confidence. Does it have to be an explicit vote? With us, you can have the passing of a vote of no confidence but, as in the German case, you can have a vote of confidence moved by the Government, which is then lost. There is that issue of what constitutes a vote of no confidence. In our case, of course, it can go wider because the Government can say that it is a matter of confidence and that if they lose the vote they will resign.
Henry Milner: I am not sure that the Canadian experience is all that helpful. I am not enough of a constitutional expert to give you the final word. Governments fall on, for example, budgets and so on; there are certain conventions. Sometimes, if a bill is defeated and the opposition says that the government should resign because this is a matter of confidence, the government has been known to, and can, ask for a vote of confidence. It can then stay in office if it gets it. I am not sure that that is a significant issue. I did

not see this in the Bill—maybe I missed it—but if a vote of no confidence takes place, does it need the majority of those voting or a majority of Members?

The Chairman: A majority of Members.

Lord Norton of Louth: There is a difference between a vote of confidence and a dissolution.

The Chairman: I am sorry. I am slipping between the two.

Henry Milner: So there is a separate dissolution vote? I checked and most places with fixed election dates do that. The two-week period seems to me to make good sense as well, as does having an explicit dissolution vote so that everyone knows exactly what the rules are, and so on. This seems to me a reasonable way of operating. In Canada we do not have that. Nothing in the law attempted to be explicit. There is the question of whether, rather than having to get two-thirds, a government that wanted to dissolve Parliament would trigger a vote of non-confidence in itself, followed by a vote of dissolution. I assume that would be possible, under the way the law is written. Having thought about that, I guess that perhaps that should be possible. It would be an extreme case. The government would have to go to the people and say that it was such an extreme case that it absolutely could not continue to govern and the opposition would not give it the two-thirds of votes needed to dissolve. The government would have to make its case before the people and justify voting non-confidence in itself. I know the German case is a bit uncertain but perhaps it is not such a bad safety valve if it is understood in that way. Nothing in the Canadian experience helps to clarify that.

The Chairman: Thank you. Lord Crickhowell has a question about support from opposition parties.

Q70 ***Lord Crickhowell:*** I thought I was going to be asking about how frequently the Canadian and German federal Parliaments have been dissolved early over the last 50 years. How frequently has it happened?

Henry Milner: In Canada, when we have had majority governments they have almost always lasted four years and sometimes five. Only two have not. Only minority administrations have never lasted the full term. Even under this so-called fixed-term election law that we have now, they were not able to last the full term. That is our experience. If we had a better law, there would be a much better chance. I am hoping that you will produce a better law and perhaps inspire us to amend our law in such a way that it will be more effective.

Q71 ***Lord Crickhowell:*** We have already heard why in each case the action was taken. I will not follow that up a second time. I come back to a question I have asked in previous sessions and pick up on your point about the cynicism of the electorate. If a government that has been staggering on loses a vote of confidence—I have cited the example of the Callaghan Government which lost such a vote by one vote, with some of us becoming Ministers as a consequence—under the arrangements proposed here, there are 14 days in which someone can try to cobble together an alternative government. You can imagine that on the occasion of the Callaghan vote, it would have been possible, perhaps with offers to the Irish, the Scots or the Welsh, to have cobbled together a weak government which would then, under this provision, have gone on to the end of the fixed term. It seems to me that if we are seeking to remove cynicism, the electorate might well feel that, the government having fallen in those circumstances and a new government been cobbled together in this way, they ought to have a say in choosing the new government. I find it hard to see that a fixed-term Parliament in such a situation removes the cynicism of the electorate. Callaghan said: "I'm going to wind things up as quickly as I possibly can and we will have an immediate election". We all knew exactly where we were. In this situation, that might not have happened. Would that not have rather upset the view of the electorate that they were being treated seriously?

Henry Milner: I guess this idea was put in because you could imagine a defeat that was not as clear-cut, and it was not so clear exactly where everyone stood and whether it indicated a real desire for a new government and a whole new election. When you think of all the possibilities that could trigger such a vote, on balance it is probably a good idea. I think people understand that. Perhaps it is not the case in Britain, but the attitude in Canada, close to universally, is: "We elect you to run the country. Yes, you have political differences. You are liberals, conservatives, NDP, Bloc or whatever, but you are there to run the country. We made a choice—now try to do it. Don't lose sight of that and just care about your own particular partisan goals and so on". I am talking about perception, not objective reality, but this is a very strong perception. It is very important to demonstrate to the people that this conforms, as much as possible under reasonable circumstances, to what they want. Institutions should encourage that. I would guess that, on balance, the two-week period would more often than not have that effect. I agree that there probably will be cases where people will ask what they are doing and say that they are wasting time, but it is just two weeks. I do not think it is that serious a problem.

Q72 ***The Chairman:*** We have a problem when it takes five days to form the Government, as it did in May, so we are possibly in a different position.

Stephen Padgett: My understanding is that the purpose of the 14-day period following a dissolution, which Germany also has, is not to allow the incumbent government to make adjustments to itself or reconstitute itself, but to give the opposition the opportunity to put together a government as an alternative to calling new elections. As such, it serves as a disincentive to a government to contrive a no confidence motion to get a dissolution and fresh elections because it might be pre-empted by the opposition. It probably serves a useful purpose in that regard but it has never been put into operation in Germany.

The Chairman: Lord Goldsmith, do you want to raise an additional point about judicial intervention?

Q73 ***Lord Goldsmith:*** Yes, we have said quite a lot about this already. As I understand it, the German constitutional court felt able to adjudicate on the question, particularly of Chancellor Kohl's contrivance, but then devised a way of dealing with it that meant it did not interfere at all. So far as Canada is concerned, I presume it was the Supreme Court –

Henry Milner: It was the Federal Court.

Lord Goldsmith: It never went to the Supreme Court?

Henry Milner: I do not think it did. I do not think the group that brought the case decided there was any value in going to the Supreme Court.

Q74 ***Lord Goldsmith:*** But so far as justiciability was concerned, there was no issue because it was a question of what the statute meant. The court could look at that but, as it happens, the court's decision was that it was not a decision for it but for the Governor-General. Is that right?

Henry Milner: Yes, but unlike in Germany, if a similar situation happened again it could go to the court, which would probably say the same thing. However, the court did not rule in such a way as to say that it should never have come to the court.

Q75 ***Lord Goldsmith:*** We have a different situation, because of our Bill of Rights, which creates a clear distinction between what courts do and what the legislature does. That is a matter of great sensitivity. It does not sound as though that sort of principle applies in either Germany or Canada, although the German constitutional court recognises that it should be careful not to tread in political matters.

Stephen Padgett: It falls clearly within the court's jurisdiction constitutionally, but the court is trying to square the circle. It has tried to retain some constraints on the way that Chancellors use these devices by establishing general principles, but has ultimately felt unable to deny a Chancellor a right to terminate his or her government. It is a question of timing as well. In the Schröder case, it was August when the court made its judgment and the election was timed for the end of September, so by the time the court made its judgment the election campaign was in full swing. It was almost inconceivable that the court would have said: "No, stop. This is unconstitutional".

Q76 ***Lord Goldsmith:*** That leads me, in a sense, to my final question. From the point of view of the electorate and the public, what role does the court play in this process? Is it really an irrelevance, or is it a Gore v Bush matter and at the top of the agenda for winning an election?

Stephen Padgett: It is quite difficult in the German case, because generally German citizens hold the constitutional court in high regard. It is one of the most respected of the political institutions. Certainly, in 2005 they regarded the court's judgment and the whole process of dissolution and the premature election as political theatre. I think the public welcomed the election because the Government was deeply unpopular and arguably no longer effective. The way in which the election was brought about was regarded as theatre.

Q77 ***Lord Goldsmith:*** What about Canada, which is closer to Washington?

Henry Milner: My sense is that we have a law that almost invited this kind of situation. If we had drafted the law more carefully, there would not have been this situation. That is the solution to this, in a sense. If you draft a law where Clause 2 says something but clause 1 makes Clause 2 essentially ineffective, somewhere along the line some group will say that the Government has violated Clause 2. If you push hard enough, somebody will have to say that Clause 1 applies. Good law-writing, where the intent is clear, reduces or potentially removes the need for the courts to intervene.

Lord Goldsmith: As a general proposition, many British Governments would wish that had been true. Thank you very much.

The Chairman: Thank you. You have both been extremely generous with your time. We are coming to a conclusion but Lord Norton wanted to raise another point about the prerogative.

Q78 ***Lord Norton of Louth:*** Yes, this is probably directed to Dr Milner in the light of his experience. The Fixed-term Parliaments Bill states that the monarch's power to prorogue Parliament is not affected. In the Canadian case we have seen the power to prorogue used to prevent a vote taking place on a motion of confidence. Should we be worried about that retention and, if so, is there anything we can do about it?

Henry Milner: The Canadian case was unique because prorogation saved the government, which it normally should not. If the government cannot survive before

prorogation, it should not be able to survive afterwards. It happened because the outgoing opposition leader was already on his way out when this very quick opposition coalition was put together. It allowed him, even though he was about to be replaced, potentially to save his career but it had to happen right away. After prorogation, the process in his own party was going to continue and the new leader, since everyone knew who it would be, was someone who was far less ready to take the risk of bringing down a government that had just been elected, even if it as a minority government. Everyone knew that prorogation actually saved the government. That is why in this particular circumstance there was a connection between the two. These circumstances are so unusual that you could not imagine them. I would have to give you each of the steps in the Canadian case, all of which were unlikely and all of which fitted together. Frankly, I would not worry about it. Leave the power of prorogation as it is and do not mention it in the law. I think it will be all right.

Q79 ***Baroness Falkner of Margravine:*** What mechanisms do you have in place when there has been a general election that results in an unclear verdict and a new government cannot be formed? Could you explain briefly for either country?
Stephen Padgett: 2005 was a case in point in Germany. The provisions for a case where the Bundestag cannot elect a Chancellor allow for a person who has the highest number of votes in a Bundestag vote to be elected Chancellor—in other words, a Chancellor without a majority. There is a provision for forming a minority government but it has never been used. In practice, the incumbent Chancellor remains in office until a new government is formed. There is provision for that in the constitution. The parties simply negotiate with each other to try to come to terms. In 2005 it proved impossible for either of the main parties to form a coalition in the usual way with smaller parties. The last resort is that the main parties form a grand coalition.

Q80 ***Baroness Falkner of Margravine:*** Was that open-ended in duration?
Stephen Padgett: There is no constitutional cut-off that makes provision for something happening after a period of incomplete negotiation.
Henry Milner: In Canada, again, this is the tradition, but it has not been a problem. As in Germany, if there is no obvious successor government, the existing government stays in office until some kind of alternative is formed. If there is no alternative, the existing government, which would be a minority government, will rule for as long as it can and we could end up with another election. If we had real fixed elections, it would make it a bit tighter but the existing system seems to have worked fairly well. Where we have had that case, you would get a second election relatively early in the term but everybody expects it. I think we are probably even less likely now to get the kind of scenario that you picture than we were in the past. I think almost every election will produce some logical configuration of a government. It might not be obvious that the existing government will be there. However, the scenario is hard to imagine under our circumstances.

Q81 ***Baroness Falkner of Margravine:*** Coming back to Germany, I notice that you did not mention anything to do with the Bundesrat. What role do you imagine the House of Lords would have in a fixed-term parliamentary system if there was an early dissolution?
Stephen Padgett: As you say, I have not mentioned the Bundesrat. That is because the upper Chamber has no constitutional role in matters of dissolution or a constructive vote of no confidence, and has not been involved in either. There is no precedent in the German case. It is quite difficult to imagine this House playing the role of arbiter because of its composition and the party political nature of that composition. Whatever arbiter is chosen for issues that arise in dissolution, it has to be demonstrably insulated from politics, as is the federal President in Germany.
Henry Milner: I tend to agree. The Canadian Senate is an entirely appointed body, so it could not easily be imagined playing a role in such a circumstance. My guess is that what Professor Padgett said applies to this House but there are, I guess, changes anticipated in terms of elections and so on.
The Chairman: Thank you both very much indeed. You have been enormously helpful and it is very valuable for us to have a broader perspective, particularly from both sides of the Atlantic. Does any member of the Committee feel that something they wanted to raise with either Dr Milner or Professor Padgett has not been covered? Do either of you have anything that you feel we have ignored or that you particularly wanted to say?
Stephen Padgett: No, I think the discussion has been very comprehensive and I thank you all for an interesting discussion.
The Chairman: Thank you very much for giving us so much of your time.
Henry Milner: I congratulate you on putting this kind of effort into these questions. Very often, if we get things right at the beginning, it has a long and useful effect. This is the way to go about doing it.
The Chairman: Thank you very much for coming.

WEDNESDAY 27 OCTOBER 2010

Present	Baroness Jay of Paddington (Chairman)	Lord Irvine of Lairg
	Lord Crickhowell	Lord Norton of Louth
	Baroness Falkner of Margravine	Lord Pannick
	Lord Goldsmith	Lord Renton of Mount Harry
	Lord Hart of Chilton	Lord Rodgers of Quarry Bank
		Lord Shaw of Northstead

Memorandum by the Hansard Society (FTP 16)

1. "Time is the oxygen of Parliament". So said the now Leader of the House Sir George Young MP in a speech to the Hansard Society in March 2010, setting out his party's agenda for parliamentary and legislative reform and the need for improvements to enable MPs to "undertake scrutiny in a measured and considered manner".

2. Good scrutiny is an essential prerequisite of good law-making and good governance. However, with the Fixed Term Parliaments Bill political expediency appears to have taken priority over Parliament's right to properly scrutinise the executive. Tackling important constitutional issues in such a rushed manner is not a recipe for good government and high quality legislation.

3. There has been no prior consultation process—green and white papers—to examine the policy implications prior to presentation of the bill and there has been no pre-legislative consideration of the bill in draft form. Given the key issues of constitutional concern the legislation would benefit from greater time and scrutiny. We recognise that there are serious time pressures with regard to implementation of the government's proposals for a referendum and the equalisation of constituencies. However, no such time pressures exist with regard to the Fixed Term Parliaments Bill and this legislation should therefore have been subject to pre-legislative scrutiny.

4. This lack of consultation is important and has potentially damaging longer term consequences because the Fixed Term Parliaments Bill has implications that link to the outcome of the proposals to reform the constituency boundary review process, to reform the House of Lords and the review of parliamentary privilege. Consultation and a less accelerated timetable for implementation would have provided for more coherent consideration of the related constitutional issues and questions that these policy changes throw up.

5. The Hansard Society's *Audit of Political Engagement* demonstrates that public interest in and understanding of the concept of a Fixed Term Parliament and its implications is limited. When asked how well, if at all, they felt they understood how the date of a general election is chosen, 60% of the public reported either only a limited level or no understanding at all of the issue, 39% of the public reported being "satisfied" with the concept of letting the government decide the date for a general election, 23% were "dissatisfied" with the arrangement, and 38% either had no preference either way or had no view at all on the matter.[1]

6. However, as a matter of principle, the proposed reduction in the prerogative power and the constraining of a Prime Minister's freedom of action with regard to the calling of a general election is to be welcomed.

7. Nonetheless, we have concerns about the Bill as follows:

(a) The fixed parliamentary term should be for four not five years.

(i) Setting the term at five years will turn what has hitherto been the absolute maximum length of a parliament into the norm. Parliaments which have lasted into a fifth year have tended to be ones where the Government has, in reality, run out of steam but is waiting on the turn of events in the hope that something will turn around their flagging poll ratings and likely electoral fortunes.

(ii) Fixing the term at five years rather than four will create a periodic timetabling problem with regard to elections to the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. This could be avoided with a different term length. Alternatively, a polling date later in the year than May might be chosen; however, this is a less attractive option than having just one national election in any given year.

(b) Members of the governing party might at some future time subvert the spirit of the bill's intention by laying down a motion of confidence in themselves in order to trigger an early dissolution. This might

[1] Hansard Society (2008), *Audit of Political Engagement 5*, pp 53–54.

be prevented by a restraining measure, such as, for example, providing that such a motion can only apply to members of an opposition party.

(c) In the event of a no confidence motion being passed there will be a 14 day period when an alternative government might be formed before a general election is otherwise called. The legislation in effect will create a new "caretaker" period when the incumbent government that has lost the confidence of the House nonetheless remains in office until an alternative government can be formed or an election has to be called. In this 14 day period the same constitutional conventions, particularly in respect of "purdah", that apply following the calling of an election or following an uncertain election result, should apply. This need not be enshrined in the legislation but will necessitate changes to the Cabinet Manual. At present this falls under the purview of the Cabinet Secretary but should be a matter for which a minister at the Cabinet Office is held accountable.

8. The introduction of a fixed term should allow for better planning of the legislative timetable and improved electoral administration.

(a) If a fixed term is introduced then the onus should be on the Government to ensure better management of the legislative timetable thus avoiding the need for the "wash-up" at the end of each session. Changes to the parliamentary sessions to better align them with the fixed term should facilitate this but assurances should be sought from the Government about the management of business in the final session in order to avoid the problems of the "wash-up".[2]

(b) The bill as currently drafted misses an important opportunity to address some of the concerns about the administration and management of elections, particularly with regard to the statutory timetable, as set out most recently by the Electoral Commission in its report on the administration of the 2010 general election.

1 October 2010

Examination of Witnesses

Witnesses: Professor Vernon Bogdanor [Research Professor, King's College London], and Dr Ruth Fox, [Director Parliament and Government Programme, Hansard Society].

Q82 ***The Chairman:*** Good morning, and thank you both very much for coming. As I said when we met outside, we have approximately one hour for this session, in which we obviously need to get through a great deal of material. Thank you both for your background papers, which are very helpful indeed. As you will be aware—you are both old hands at this process—this session is being recorded so everything will be on the record and we will conduct the business from the start as a recorded session. I know that we have an understanding about the publication of the paper submitted by Professor Bogdanor—I was about to say Lord Bogdanor, so excuse me for that—but we understand that point. Given that you have both kindly already provided written remarks, I do not know whether either of you want to make opening statements. Perhaps for the record you could introduce yourselves.

Vernon Bogdanor: I am Vernon Bogdanor. I am a research professor at King's College London.

Ruth Fox: I am Dr Ruth Fox. I am Director of the Parliament and Government Programme at the Hansard Society.

Q83 The Chairman: Thank you. I will kick off by asking you both—from your written submissions, I think that you have slightly different views on this—what you see as the potential advantages and disadvantages of having a fixed-term Parliament. I was rather interested in Professor Bogdanor's remarks in paragraph 22 of his paper, where he says, "it is not clear to me that it would make a beneficial difference."

Vernon Bogdanor: Let me begin by saying how glad I am that the Committee is considering this very important constitutional issue. As is well known, the proposal for fixed-term Parliaments was in the Liberal Democrats election manifesto—and, I think, in the Labour Party manifesto—and its next manifestation was in the coalition agreement, where the proposal was not given a constitutional status but implied that the coalition would not dissolve itself without the support of both parties. In my view this proposal raised no constitutional issues. But the Fixed-term Parliaments Bill seeks to introduce an important change in the constitution. I think it fair to say that one reason why the fixed-term Parliaments proposal was included in the election manifestos of two parties was as a reaction to the expenses problem. A number of constitutional proposals were produced in response to that issue, some of which were perhaps ill thought out. My first reaction was that such a proposal is a somewhat perverse response to the expenses scandal, because the main popular concern

[2] For an analysis of reform of the parliamentary "wash-up" see R Fox and M Korris, "*Reform of the wash-up: managing the legislative tidal wave at the end of a Parliament*", Parliamentary Affairs, Vol 63, No 3, 2010, pp 558–569.

about expenses was that there ought to be more popular control over Members of Parliament, who had become perhaps too insulated from public opinion. Proposals such as the recall of MPs were designed to deal with that. However, the fixed-term Parliaments proposal would achieve the opposite effect, because it would tend to insulate Members of Parliament from popular pressures. That seems to me a point worth noting. Another point worth noting is whether the constitution should be changed in this rather hurried way without very much discussion. As I say in my written submission, the only Western European country with a parliamentary system that has a pure fixed-term Parliament is Norway. Any change to that system in Norway requires that one first produce a proposal and then, following a general election, secure a two-thirds majority on it. That is, of course, very different from our own procedures. It may be that we need a change in our constitutional rules or a change in our constitution in general if, as is possible, we are moving away from a period of having a single-party majority government, which has been the norm since the war but was not the norm between the wars, when we had minority governments and coalitions. It is possible that we may be moving towards a multi-party system. If that is the case, we will have regular hung Parliaments and it may be that we should develop new constitutional rules. However, I am not clear that the current proposal is the way to do that. I cannot see that the proposals that have been produced, which are fairly ambiguous in some ways, will necessarily provide much in the way of improvement.

The Chairman: We will certainly come back to the process of achieving constitutional change. However, I want to ask Dr Fox first for her overview on fixed-term Parliaments, however those might have been introduced.

Ruth Fox: Building on Vernon Bogdanor's point about the fixed-term Parliaments proposal being a response to the broader political crisis post the expenses issue, I would endorse that and point out that many of the constitutional, political and parliamentary reforms that have been proposed have had very little to do with resolving the expenses crisis. The link between the two issues has been somewhat tenuous. Certainly, looking at priorities of the public for political and constitutional reform—as I highlight in my written submission to the Committee—I think that our annual *Audit of Political Engagement* study suggests that there is little public interest in addressing fixed-term Parliaments as a priority. On the general principle of fixed-term Parliaments, I think that there is something to be said for introducing a restraint on the prerogative power and on the ability of a partisan Prime Minister to fix the date of the election. However, I am not sure that moving to a system in which Parliaments are generally fixed for a four or five-year period means that having an earlier election is necessarily a bad thing. I do not think that having an earlier general election needs to be seen as axiomatically a bad thing. My problem with the Bill—and with the approach that has been taken to a large extent—is that, in some ways, the proposal is a missed opportunity because it focuses the mind very much on the end of the term and on ways to bring about an early dissolution if such a thing is required. However, a term has both a beginning and an end. If the Bill had been handled differently with a different timescale to allow for greater consideration, an awful lot more could have been done to address some of the planning and timetabling issues that having a fixed term would enable us to fix. Having that planning capacity would enable us to address some of the issues that arise at the beginning of the term. The current Bill does not do that.

The Chairman: Thank you. Lord Rodgers wants to pursue the question about the process of introducing the proposal.

Q84 ***Lord Rodgers of Quarry Bank:*** If I may, I would like to look back at the history of the issue and at previous practice. In paragraph 3 of his written submission, Professor Bogdanor suggests why the coalition might have dreamt up—although he does not use that phrase—the idea of introducing fixed-term Parliaments. Will he say a word or two about the history of that? When the proposal suddenly popped up, I assumed that it had been discussed frequently in the past, but I cannot remember that. I have never read manifestos, but I do not think that it has featured in many manifestos in the past. Some history on that would be helpful. In the same context—again, this is not mentioned in the written submission, so I may be putting words in his mouth—the coalition argues that we should move from the Executive to Parliament and from Parliament to people. The written submission points out that there have been 18 Parliaments since 1945. If we had had fixed-term Parliaments of five years, we would only have had 14. How would that be reconciled? I have a further specific two questions, if I am allowed, the first of which is on the consequences of having fixed-term Parliaments. Given the reference in Professor Bogdanor's paper to "hypothetical circumstances", I wonder if we had had a fixed-term Parliament in 1950 or 1951—it is very difficult to tell, of course, but the submission reflects on this—what would have happened at that time. As the paper says, the early dissolution in 1951 was a very unusual case in that Attlee resigned and gave up. If a Prime Minister gave up in that way, could an early general election happen? My second question, if I may, is on the reference that the written submission makes to Prime Ministers seeking a "personal mandate". Why do we

not have a fixed—that is, obliged—personal mandate and always have an election whenever a Prime Minister changes? As the submission points out, there may be a change not only of individuals but of policies, which may undergo very significant changes. Why do we not have a new Parliament when we change Prime Minister?

Vernon Bogdanor: There were a number of questions there, which I will do my best to answer. On the history of the proposals for fixed-term Parliaments, I understand that the Liberal Democrats have long taken the view that there should be fixed-term Parliaments, which they see as a corollary of proportional representation something that they have favoured for a long time. Of course, the issue came up after the general election because the Liberal Democrats were naturally worried that, if they entered into a coalition with the Conservatives, a Conservative Prime Minister might dissolve the coalition at an unwelcome time for the Liberal Democrats in the hope that the Conservatives could then win an absolute majority. Therefore, part of the coalition agreement was that Parliament could be dissolved only if 55 per cent of the MPs agreed, which in practice would require the agreement of both the Conservative and Liberal Democrat MPs, because if the Liberal Democrats switched to a different coalition, the Liberal Democrats and the Labour Party would not be able to achieve the necessary 55 per cent. In effect, the coalition agreement gave the Liberal Democrats and the Conservatives the choice of when to dissolve Parliament and included an assurance to the Liberal Democrats that the coalition could not be dissolved against their wishes. However, after various criticisms, that became transmuted into the form in which it now appears in the Bill. That is the history of it. On the issue of the 1950–51 Parliament, which raises a very fundamental question, I think that Attlee took the view that the Parliament was not viable. He had an overall majority of five, and his position had been weakened by the resignation of two Cabinet Ministers, Aneurin Bevan and Harold Wilson, who disagreed with the spring 1951 budget. He dissolved the Parliament in the hope, obviously, that he would get a working majority, but he was doubtless aware that he might be defeated. With a fixed-term Parliament, it is not clear that he could have done that. Therefore, a lame-duck Parliament and government would have had to have hobbled on. That is the danger of provisions that would make it more difficult to dissolve Parliament. I believe that this is a fundamental point: the more difficult it is to dissolve Parliament, the more likely it is that there will be a lame-duck government, which, even if it can survive in Parliament, cannot govern very effectively. I think that was the problem in 1951. On the question of having a personal mandate, I think that issue arose among the public—not quite a majority of the public but nearly a majority—when Gordon Brown replaced Tony Blair as Prime Minister in 2007. I do not think that the issue arose when John Major replaced Margaret Thatcher in 1990 or when James Callaghan replaced Harold Wilson in 1976. Perhaps the issue arose in 2007 because our politics has become more presidential than it was. People seem to think that the colour of a government depends much more on the Prime Minister than was the case formerly. It is interesting to note that shortly before the election, David Cameron put forward a proposal similar to what Lord Rodgers has suggested when he said that a new Prime Minister ought to be required to go to the country within six months of taking office. Of course, there is no provision in the Bill for that suggestion, but I think that it is well worth considering. Another issue, of course, was that some people thought that the Labour Party might do better under a different Prime Minister than Gordon Brown between 2007 and 2010, but they were deterred from securing that change because it was argued that, if there is to be a second non-elected Prime Minister within the same Parliament, one really ought to go to the country to get approval for it. That has never happened in the 20th century, apart from during the odd conditions of wartime in 1940, when there was a second change of Prime Minister in the same Parliament. However, if we are moving into a hung Parliament situation, it is much more likely that we will get a change of Prime Minister within the same Parliament. As I said, a deterrent to changing the leader of the Labour Party was the idea that the Government would have to go to the country immediately, perhaps at a time when the Labour Party was not very popular. I think that the proposal that a new Prime Minister should seek a mandate deserves further consideration.

Q85 ***Lord Rodgers of Quarry Bank:*** I have a further brief question on the pre-history of the proposal. In effect, until the past six months, has there been no serious constitutional discussion on fixed-term Parliaments over the past, say, 50 years or more?

Vernon Bogdanor: That is right. Primarily, the proposal has been made by the Liberal Democrats, which has been the minority party, and the idea has been associated with proportional representation, which has not really been at the forefront of the political agenda.

Ruth Fox: I slightly disagree with that. The Liberal Democrats have been at the forefront in promoting the proposal, but my understanding is—I do not have the dates to hand—that the proposal has been in the Labour Party manifesto previously. I do not think that the proposal appeared in the 1997 manifesto, but it has appeared previously. I think that I am also right in saying that the idea was an aspect of major study of the Plant commission in the late 1980s or early 1990s.

Therefore, fixed-term Parliaments has been a running issue in Labour Party discussions, although it did not make it into Labour's constitutional programme when the party was in government. I understand that the Labour Party is supportive of the idea in principle. The Conservative Party has previously resisted the proposal, although, as Vernon Bogdanor has alluded to, David Cameron expressed an interest in the constitutional position of the Prime Minister in the context of the politics of the previous Parliament.

Q86 ***Baroness Falkner of Margravine:*** In addition to what Dr Fox has said, there have also been private members' bills on the subject in Parliament. For example, Dr Tony Wright was not a Liberal Democrat. He was a senior constitutional expert. I seek a bit of clarification. As I understand the Liberal Democrats' policy, the fixed-term Parliaments proposal was not tied into proportional representation as closely as has been suggested by Professor Bogdanor. As I saw it, there was a constitutional bundle, of which fixed-term Parliaments was one aspect. On that basis, there has been an unbundling and a take-what-you-like or take-what-is-feasible approach has been taken. Of course, there is also movement towards a different electoral system.

Vernon Bogdanor: Of course I accept that point, but the notion of a fixed-term Parliament takes on a very different character in the context of proportional representation. That is why I think that analogies from Norway and Germany are not terribly relevant. With proportional representation, a dissolution offers much less advantage because it is very unlikely that a party will win an overall majority. Overall majorities are not very likely with proportional representation—for example, there has never been a party with an overall majority in the Scottish Parliament—so the advantage to be gained from an early dissolution is much less. With a majoritarian system, such as our current first-past-the-post system or even possibly the alternative vote system, there may be much greater advantage to be gained from a dissolution. I think that the idea takes on a different colouring with proportional representation.

The Chairman: That brings us to the question of the length of time of the fixed-term Parliament.

Q87 ***Lord Renton of Mount Harry:*** Dr Fox's evidence on behalf of the Hansard Society makes the following point very strongly: "Parliaments which have lasted into a fifth year have tended to be ones where the Government has, in reality, run out of steam but is waiting on the turn of events". Speaking as someone who, in the House of Commons over many years, saw both four-year and five-year Parliaments, I confess that I take a totally different view. With a four-year Parliament, the Government start worrying about the election at the end of the third year and already start to think at that time about which bills should be introduced in the third year and which should be kept until the fourth year that might be attractive to the electorate and do the party some good at the last moment. For that reason as much as any, I would go—probably contrary to many of my colleagues around the table—with a fixed five years. In the third of its five years, a Government will feel absolutely safe and will introduce bills that it knows will be difficult and unpopular and it need not start worrying about the election and about introducing popular bills and so forth for another year. I think that that is a very valid argument for having a fixed five-year Parliament. Your comments, please.

Ruth Fox: On the length of the term, my preference is for four years. Since 1945, there have been a number of Parliaments of four years and of five years, as well as a number that have been for four and a half years. I do not get too hung up on the issue. I take that point, which arises from experience in government, but I suspect that the perception from outside would probably be somewhat different. I also think that the issue probably matters less than it would have done 20 years ago because, to all intents and purposes, we live in the age of the permanent campaign. Election campaigns do not kick off just a month before the election date in the way that might have been the case 20, 30 or 40 years ago. The nature of campaigning has changed and the nature of how parties approach those things has changed, so I think that the issue is possibly less important. I think that there has been a consensus around terms of four years. For example, the history—I refer to previous private members' bills, the Plant commission and so on—suggests a general consensus around four-year terms. In addition, other parliamentary systems around the world tend to have a term of four years rather than five. To my mind, the deciding factor, in the event of a split in political opinion over whether the term should be of four years or five, is the danger that people might perceive five years as being in the partisan interests of the current Government, because of what the Government want to achieve in getting through their economic measures and establishing stability and so on. There is a risk that, if there is no political consensus on the issue, the length of the term could become a driving point for future reform of the legislation and would actually create the opportunity for Members to revisit the issue quite quickly. My preference would be that such constitutional matters should be introduced on a consensual basis, so that we do not create those strategic driving points to which Members can keep coming back to the issue for further revision. I am not too hung up on the length of the term—there are pros and cons either way—as it comes down to a matter of

preference. However, for those reasons, I would go for four years.

The Chairman: Professor Bogdanor, do you want to add anything?

Vernon Bogdanor: No, I share Dr Fox's view.

Q88 ***Lord Renton of Mount Harry:*** I want to ask about one other point first. Does the availability of information on the internet make a difference? With the internet, it is very much easier for the ordinary citizen to find out what is happening. I am not necessarily saying that that makes a five-year Parliament more likely than a four-year Parliament. I am interested in your view about how the internet will affect, for example, what constituents think about their MP.

Ruth Fox: The question probably ought to be put to my colleague who is head of the digital democracy programme at the Hansard Society—he would be able to advise better than I can—but I would not overstate the influence of the internet on politics, elections and so on. Parliament's website is very good, but who it reaches is perhaps an issue. The reality is that that most people still get their political news via the TV, newspapers and so on. In a sense, one problem that we will come up against in responding to the attitudes of the public is that the media and communications mechanisms are driving a very personalised and therefore presidential style or approach to politics, which requires a robust chief executive leader figure at the head. That might come increasingly in collision with the realities of parliamentary politics in an age of hung Parliaments. Culturally and politically, there is the potential for clash there. I do not think that the internet and other media mechanisms necessarily provide ways in which that can be resolved.

The Chairman: Coming back to the present Bill and the proposal for five-year terms, we have received evidence about issues such as the clash of dates. I think that Lord Crickhowell wants to ask about that.

Q89 ***Lord Crickhowell:*** Before I ask my two questions on that issue, I must say that the most important issue from all the evidence that I have heard so far is the point that is raised in the final paragraph of Professor Bogdanor's paper, which asks whether the proposal will make Government more answerable to the people. Professor Bogdanor cites the example of the Attlee Government; in previous witness sessions, I have cited the event that made me a Minister in 1979, following the defeat, by one vote, of the Callaghan Administration. Callaghan immediately said, "I am going to have an election". Under the Fixed-term Parliaments Bill, we will have 14 days for someone to try to cobble together an alternative. One pictures deals being done with the Irish or the Welsh or the Scots, in various combinations, to allow a weaker government—of the kind to which Professor Bogdanor refers in Attlee's situation—to soldier on without allowing the people to have their say. To me, the simple issue with the Bill is that it could weaken, rather than strengthen, the role of the people.

Vernon Bogdanor: Yes, I very much agree with those comments. In the event of a hung Parliament, there can be a conflict between two principles: the principle of parliamentary government whereby the government is accountable to Parliament and the principle of democracy whereby a government is accountable to the people. Normally, in the single-party majority governments that we have had since the war, those principles coincide. Where there is a conflict—my perspective is very similar to Lord Crickhowell's—I think that accountability to the people should be the prime factor. We ought to be careful before doing anything that weakens the ability of a government to govern effectively.

Q90 ***Lord Crickhowell:*** Thank you. That strengthens the view that I have been forming throughout. Let me come to my specific question. A five-year term will result in a clash with the elections of the devolved Administrations in 2015 and every 20 years thereafter. That is an interesting clash in respect of involving the people. Certainly, the view of the devolved Administrations is that discussion of their performance, their record and their policies will be overwhelmed by the arguments about the national situation. Is it desirable to separate those out to deal with that linkage?

Ruth Fox: Ideally, yes. The danger is that we could end up in a situation in which—although to put the matter in perspective, this would happen only every 20 years—a number of different elections take place on different dates within the same year. Although I am all in favour of accountability to the public, I am not sure that the public would be terribly in favour of having to go to the polls for a general election, for a Scottish Parliament election and for Scottish local elections. Clearly, some political and administrative difficulties could arise. The electoral returning officers have already made clear that, from their perspective, running two elections on the same day with different timetables and different constituencies would cause some problems. Another issue is how the Scottish Parliament and the Scottish people perceive the respect that this place has, and that the Government has, for the devolved settlement. I have difficulties with some solutions that have been suggested. For example, it has been suggested that the general election date could be moved to October, but I am not convinced that that is a great idea. I cannot claim any credit for this, but I know—from

chairing a fringe meeting at the Scottish National Party conference in Perth a couple of weeks ago—that Professor John Curtice has suggested that the issue of respect for the Scottish Parliament elections, which has come up in the context both of this Bill and of the Parliamentary Voting System and Constituencies Bill, could be dealt with by allowing the Scottish Parliament to agree to the general election date that the Bill proposes if, in return, the Scottish Parliament could hold the Scottish Parliament elections on a date of its choosing. At the moment, under the Scotland Act 1998, the date of Scottish Parliament elections is determined by Westminster. A small amendment could be made to the Bill to insert a new clause amending the Scotland Act to enable the Scottish Parliament to determine the date of its elections. Professor John Curtice made a fairly compelling case that the Scottish Parliament elections could be moved to October because of the nature of that Parliament's arrangements. Given that the Scottish Parliament elections in May can be followed by a period of up to 28 days for the formation of a government, and given that the school holidays—and, therefore, the recess dates—are earlier, there is currently a very constrained period before the summer recess.

Lord Renton of Mount Harry: It is snowing in Scotland by October.

Ruth Fox: Well, there seemed to be some enthusiasm for the proposal. However, that would require an amendment to the Scotland Act. There are pros and cons either way. At some point, there will be a clash of elections unless the dates are separated out.

Q91 ***Lord Crickhowell:*** Professor Bogdanor, do you have a view?

Vernon Bogdanor: I agree very much with what Dr Fox has said. I do not feel as strongly as she does that we should not have general elections in October, if that is what the politicians opt for. When general elections have coincided with local government elections, some people in local government have welcomed that because it means that turnout for the local government elections is higher than it would be otherwise.

Q92 ***Lord Crickhowell:*** That takes us very neatly to my next question. The proposal is that the general election should have a fixed date of the first Thursday in May, which we would all need to get used to. Is that a good idea? I have not worked this out, but would an election in May followed by a summer recess have some practical implications for Government, given that MPs need to go into a long period of recess before they come back? What are the pros and cons of having a fixed election date of the first Thursday in May?

Q93 ***Vernon Bogdanor:*** The premise behind the question, if I may say so, is that the Bill is the Fixed-term Parliaments Bill, but the title is really a misnomer. If in a particular Parliament—I admit that this is unlikely—there is a two-thirds vote in favour of dissolution or a vote of no confidence, the cycle would be upset unless the Swedish system is adopted, as in Scotland, whereby such an election is deemed an extraordinary general election so that the cycle is still maintained. There is some ambiguity about whether that is what should be achieved. The title "Fixed-term Parliaments Bill" is a misnomer—I do not know what would be a good title—for that would mean that, as in Norway, the Parliament simply could not be dissolved at any time. As I said, Norway is the only country in Western Europe that has that.

Q94 ***The Chairman:*** An additional question is whether the Bill is a normal piece of legislation that does not bind a future Parliament.

Vernon Bogdanor: Indeed. My understanding is that the legislation could be repealed by a simple majority. I do not know whether the constitutionalists would agree with that. Otherwise, one could presumably repeal the legislation in two stages by first repealing the requirement for the two-thirds majority for dissolution and then dissolving by simple majority. I cannot believe that in practice the legislation would necessarily bind another Parliament.

Q95 ***Lord Crickhowell:*** The present Government have extended the current session until Easter 2012. Do you have any comment on the constitutional implications of that?

Ruth Fox: On the sessional arrangements, I am quite relaxed about that. Scrutiny is needed when there is a tidal wave of legislation as a result of the pressure of cut-off. As we do not have a culture of sessional carryover—although carryover is available to the Government, it has not happened on the scale anticipated—there is a sense that legislation is rammed through because of the sessional cut-off. Enabling better planning and longer-term thinking would be one advantage of having fixed-term Parliaments, so I have no problem with facilitating that. Clearly, moving to a five-year timeframe would require some regularisation of the sessional pattern. Clearly, the first Queen's Speech is important, but there is an argument to be had about whether successive Queen's Speeches are an effective tool for scrutinising the Government's legislative programme, given that the Government will bring forward legislation that was not in the Queen's Speech. In addition, we know from our research that Government will often treat the Queen's Speech simply as a communications tool to establish a narrative about the Government, with the actual legislation in the speech being to some extent

secondary. Certainly, in research that we did last year, in which Lord Norton was involved, we heard tales from special advisers that a Government department that did not have legislation in the Queen's Speech was called up and told, "Where is your bill? You must have a bill in the Queen's Speech". It then had to create a bill. In terms of good planning, of good approaches to legislation and of improving the quality of law, I think that there are some advantages to what the Government have suggested. I would be quite radical and ask why we need to have a sessional approach. Why do we not take the approach of, say, Scotland, where the session runs through?

Vernon Bogdanor: If I may, let me say that the constitution and procedures of Parliament do not belong to any particular political party or government, and it is not clear that they should be altered in this way. There is a great contrast between the constitutional reforms after 1997, which were by no means the product of consensus in the sense that all parties agreed with them, but had nevertheless been the product of a long period of debate and discussion. Partly that was because the Labour Party had been so long in opposition, but even after 1997 there was a period of gestation before the proposals reached the statute book. The one case in which that did not happen was the Constitutional Reform Bill of 2005, but there were nevertheless many amendments made to the original provisions precisely because they were criticised as being knee-jerk proposals. In my judgment—I hope that I am not making a party-political point here—the procedure of constitutional reform after 1997 was better thought through than some of the things that we are seeing today.

The Chairman: Could I just go back to Dr Fox's point about the extension of the session? Some of the implications in terms of the House of Lords are the ability to use the Parliament Act.

Ruth Fox: I accept that. That would need to be resolved. It goes to Vernon's point about the fact that these matters do not belong to one political party and the need for greater consideration. In a critique of the Government from an administrative point of view, in a position of improving the quality of law, there are some advantages to the longer session. But I take the point that, in terms of how these things are developed and thought-out, there needs to be a more consensual approach. The fact that the Government announced the changes in the sessional arrangements much later than when they announced the Bill suggested an ad hoc and ill thought-out approach to the consequences of what they had brought forward initially. They had not thought it through at the beginning and set it all out. If you chart from the summer the way in which they have brought forward various announcements on how things have changed about this legislation, that reflects the fact that it is ad hoc and ill thought-out and goes to the point that there ought to have been pre-legislative scrutiny. There ought to have been a much more extended timetable given the implications and consequences that would arise. Parliament Act implications would obviously have to come into that.

The Chairman: We have briefly touched on the safety valve mechanism of early dissolution, but do you want to pursue that, Lord Pannick?

Q96 ***Lord Pannick:*** Can I follow up on Professor Bogdanor's point that the title of the Bill is a misnomer? Can I ask you both about the purpose of the two-thirds provision for early elections? Plainly, if the opposition wish to secure an early election, they will use a 50 per cent + 1 mechanism, which is easy to achieve. If we believe in fixed-term Parliaments, and I appreciate that we may not for all the reasons that Professor Bogdanor has eloquently given, is it really right that the government should be able to secure an early election when they retain the confidence of Parliament?

Vernon Bogdanor: The two-thirds provision allows a government with a landslide majority, such as the National Government of 1931, to secure an election whenever they like. I cannot see why a government with a landslide should have that extra privilege. It seems very peculiar that a normal government, if you call it that, cannot dissolve when it likes, but the National Government of 1931 could dissolve when they wished. The argument against a government dissolving when they wished to do so is that they can somehow manipulate the economy or choose a favourable moment when they are doing well in the opinion polls to go to the country early. As I said in my evidence, that has arguably occurred on six occasions since the war. On one, in 1970, the Government miscalculated and lost the election. On the other five occasions it is difficult to argue that, even if the Government had gone on to the end of their term, they would have been defeated, though obviously that is a matter of speculative judgment. In my view, that disadvantage to dissolving early is outweighed by the serious disadvantages of a fixed-term Parliament, prevents Prime Ministers leading a government in an unviable Parliament from going to the country, and prevents a newly chosen Prime Minister between Parliaments from going to the country, which prevents a Prime Minister who has a new policy for which he may seek a mandate from going to the country. Most importantly of all, because we could be moving into an era of hung Parliaments, it means that coalitions can change in the middle of a Parliament without the people being allowed to pronounce on it. Some criticise the present coalition because it was not endorsed by the voters in the election. The voters had no chance to endorse it. The voters might be even more annoyed if at some time the Liberal Democrats decide to join with the

Labour Party to form a different coalition which, again, the voters under these proposals would have no chance of endorsing. In my judgment, the balance of argument is against fixed-term Parliaments. The disadvantage of our current system is that it allows Prime Ministers to choose a moment for dissolution, but the benefits that it gives the Prime Minister are exaggerated and the disadvantages of fixed-term Parliaments are much greater than the disadvantages of our current system. I hope that meets the point that you were seeking to clarify.

The Chairman: We then move on from the dissolution point to the vote of confidence point.

Q97 ***Lord Renton of Mount Harry:*** This is a totally fascinating conversation. You just said that you actually prefer not to have fixed-term Parliaments, but something else. Having been in the Commons for quite a long time, one realises that it all depends on the Prime Minister and the team around him, because the strength of feeling at that point is so great. We come to Clause 2 and the second safety valve. What you think about that? Is there a danger of it being manipulated by governments seeking to bring about an early election, as occurred in Germany in 2005, for instance? How can that be prevented? I doubt that it can be prevented.

Vernon Bogdanor: I doubt that it can be prevented. Governments have dissolved early in that way in Germany on three occasions. In 2005, the Government miscalculated because they called an early election and lost. On the other two occasions, it worked and the Government won the election.

Q98 ***Lord Renton of Mount Harry:*** You were quite right in saying that the Labour Government miscalculated in 1970. They certainly expected to win and didn't.

Vernon Bogdanor: It is difficult to prevent manipulation, but you can make it less advantageous by adopting what you might call the Swedish or Scottish model, by which any election that comes about between terms is an extraordinary general election and does not affect the timetable. In Sweden, you have four-year elections. If there is an election between then it does not affect the cycle, and that is the case in Scotland also. As I said earlier, the advantage of calling an early election is much less in a proportional system than in the system that we have.

The Chairman: Lord Hart, I think you were concerned about early dissolution.

Q99 ***Lord Hart of Chilton:*** Let us assume that we have a fixed-term Parliament and there is a dissolution. There will either be a dissolution on a vote of no confidence or on the two-thirds vote. This question, which you touched on earlier, relates to what the subsequent term should be. Should it be the rump of what is left or should we reset the clock and have another five-year term, or whatever the fixed term is?

Vernon Bogdanor: That depends on what you think the advantages of fixed-term Parliaments are and your own judgment of the balance of advantage. If you are sympathetic to fixed-term Parliaments, you will say that the clock should not be reset. If, like me, you are not very sympathetic, you would say that the clock should be reset.

Q100 ***Lord Goldsmith:*** I want to press a little on the 14 days. Professor Bogdanor, you have said something about this already. There are two extreme situations about what happens during the 14 days. One is that the government of the day manage to do a bit more in terms of offers of jobs, promises or deals on policies and therefore get back to a position where broadly the same government can come back in and get a no confidence vote reversed, as it were. That would work under the Act, so we would not have a dissolution. The other extreme is that that can't be done, and you have an entirely different grouping—Liberal Democrats and Labour or whatever it may be—producing an entirely different coalition that the people have not voted for. How does that fit within the concept that this is all designed partly to give more power back to the people?

Vernon Bogdanor: I don't think that it does fit with that idea. I share Lord Crickhowell's earlier reservations about the 14-day clause. My understanding is that if the government are defeated on a vote of confidence they can only be a caretaker government until they have parliamentary confidence again, if they secure it, and therefore could not undertake controversial measures. Of course, it means that for 14 days you do not have an effective government while parliamentary manoeuvring is going on to see if some alternative combination is possible. I much prefer the situation, as in 1979, when James Callaghan was defeated on a vote of confidence. He immediately said, "We will take our case to the country and let the country decide". Under the current situation, it is possible for an alternative government to be found in those circumstances. That happened in 1924, when the first MacDonald minority Labour Government were defeated. The King's private secretary enquired of the other parliamentary leaders whether they were prepared to form a government and only when he was told that they weren't was a dissolution granted. If one of them had been, that alternative would have been perfectly possible under our present constitution.

Q101 ***Lord Goldsmith:*** Thank you. Can I just pursue the question of what happens in those 14 days? Dr Fox, you say that during that period the same

constitutional convention should apply as in the run-up to an election. What would you see happening during that 14 days in terms of government managing to operate?

Vernon Bogdanor: My understanding of our system is that if a government has lost the confidence of Parliament, they can only undertake non-controversial matters. Anything that has any controversial flavour must be agreed with the opposition.

The Chairman: A purdah requirement.

Vernon Bogdanor: Precisely.

Ruth Fox: I agree that that is the constitutional convention, but this is where we may rub up against some potential difficulties vis-à-vis the constitutional status of the *Cabinet Manual*. Chapter 6 of the *Cabinet Manual*, which was published in draft form before the election, makes clear that convention, but there is no reference to that in terms of what would happen in the event of an early dissolution or this 14-day scenario. In my view, if that is going to be the operational document in government and Whitehall, the *Cabinet Manual* will have to be amended very clearly to that effect. In practice, yes, the caretaker convention should apply. What would that mean? The government could not sign large financial contracts or make major public appointments. In the five-day period after the general election in May, Alistair Darling went to the ECOFIN meeting about the Greek economic situation and Lord Adonis consulted the Opposition about air traffic control problems. There would have to be inter-party consultation about any decisions that Ministers felt they had to take in order to manage what was deemed to be essential business. All non-essential business would effectively be put on hold. It needs to be clarified in the *Cabinet Manual*.

Q102 ***Lord Pannick:*** Do you think that the Bill needs to define more precisely what is a vote of no confidence? For example, does it cover defeat on the Queen's Speech, defeat on a matter that the government have designated a question of confidence or do you understand it only to apply to an express motion of no confidence?

Vernon Bogdanor: I suppose it is always possible for a government, when defeated on a major issue—the Budget, for example—to demand a vote of confidence from Parliament. That is what John Major did in 1993, when defeated, I think, on the social chapter of the Maastricht Treaty. He then demanded a vote of no confidence, which he secured. That would always clarify the position.

The Chairman: A vote of confidence.

Vernon Bogdanor: Yes, a vote of confidence.

Q103 ***Lord Pannick:*** Does it cover a motion of confidence? It says here, a motion of no confidence.

Ruth Fox: That is the difficulty. How do you define a confidence motion in the sense that there is no formal definition of it? It depends on political context. It is one of those things where you know it when you see it. The wording of the Bill very clearly defines it as no confidence. Therefore, it is hard to see how the government would bring forward a motion of no confidence in themselves. I do not know enough procedurally about whether this would be possible, but a government back-bencher could bring forward a motion of no confidence in their own government, but that would seem perverse. The wording of the Bill suggests that it would come only from the opposition. The danger of the situation is that if the Queen's Speech, the Budget or the second reading of a manifesto bill were perceived to be an issue of confidence, and then a no confidence vote came forward. It would not necessarily come from the opposition because it might be in their political interest to maintain the perception of a lame duck government for an extended period.

Q104 ***The Chairman:*** Professor Bogdanor, do you want to comment on the constructive no confidence arrangements in Germany?

Vernon Bogdanor: Yes. It seems to me not very helpful and has been used on two occasions in Germany for purposes quite different from those imagined by the founding fathers of the German constitution. The constructive vote of no confidence provides that you cannot simply have a no confidence vote in the government, but must propose an alternative Prime Minister. The purpose of that was to meet the situation that occurred at the end of the Weimar Republic, particularly after 1930, when governments were removed by an unholy opposition combination of Nazis and Communists, who themselves would not get together to form a government. The notion is somewhat confused, because you either have a two-party or bipolar situation in a Parliament, in which case the alternative government is obvious; or you have a multi-party system in which there is no obvious alternative government. In a multi-party system, the effect of the constructive vote of no confidence is to allow a weak government to hobble on when it hasn't got the support of Parliament. In that situation, I prefer a dissolution of Parliament to let the people decide what the alternative government should be. I don't think that the idea of a constructive vote of no confidence has as much value in Germany as the founding fathers would have hoped, and I don't think it would have much value here either.

Q105 ***Lord Shaw of Northstead:*** In the Professor's report, at paragraph 27, he says that the Fixed-term Parliaments Bill, "indicates a conflict between two fundamental principles, the principle of parliamentary government and the principle of

democratic government. The former principle provides that parliament shall choose the government, the second that the people should choose the government". I take issue on the subject of the election of the Prime Minister. I can see the point of going to the country if it is a realignment of a multi-party government, but that is very different from a change of leader. Surely it is right that the people elect Members of Parliament to govern and the party there chooses its own leader. That should be paramount. You should not have to go to the country every time you want to change a leader. Is that not a clear distinction and should it not be drawn in the Bill itself?

Vernon Bogdanor: Your question reflects the constitutional practice until now. That is of course correct. But as I said earlier, there was some feeling in the country—opinion polls suggested that it was not a majority feeling—that Gordon Brown ought to go to the country in 2007, having become leader. That was not felt on previous occasions when, for example, John Major succeeded Margaret Thatcher or James Callaghan succeeded Harold Wilson. It may be that opinion in the country is changing because people feel that we are moving towards a presidential system and that we are voting not for a Labour, Liberal Democrat or Conservative government but for David Cameron, Nick Clegg or Ed Miliband for Prime Minister. This is a difficult matter to resolve, because the mood may be changing. On the broader point, at every general election since the war except this one and February 1974, the people have voted for a government and Prime Minister. In 2005, they voted for a Labour government led by Tony Blair rather than a Conservative government led by Michael Howard. It is difficult to say the same about the election of 2010. Were you to have a change of coalition partners it may be even more difficult to say that. There is a difference between a general election that does not yield a majority for a single party and a general election that does yield such a majority.

Q106 ***Lord Shaw of Northstead:*** But that is not clear in the Bill.

Vernon Bogdanor: No, indeed.

The Chairman: Lord Norton, would you like to ask about the constitutional Monarchy and the question of the prerogative?

Q107 ***Lord Norton of Louth:*** This is really on the power of prorogation, because there is nothing in the Bill. There was the incident in Canada, where prorogation was used to prevent a vote of no confidence occurring. We have been told that that was a one-off and we should not worry about it, but should we worry about it?

Ruth Fox: I don't think you need worry about it in the context of the current Monarch, but you can't know the views of future Monarchs in a scenario 40 or 50 years down the line. It is something that could be addressed. The fear is that you have a no confidence motion and then you have these 14 days. I have issues about where the 14 days came from. I haven't seen anything from the Government that explains exactly how they came up with 14 days, but there we are. In the 14-day period, you have the opportunity for a government to try to be formed and then there would have to be another confidence motion in that government. It seems to me that you could put in the Bill a restraining power to the effect that if a no confidence motion has been approved, in that 14-day scenario that prerogative power could not be applied. You could not use it, so the Monarch would not have the discretionary power to take up the request from the Prime Minister to prorogue. It would not be on the table.

Q108 ***Lord Norton of Louth:*** The problem would not necessarily be who the Monarch was, but who the Prime Minister was.

Ruth Fox: Indeed. A combination of both, potentially.

Vernon Bogdanor: In the circumstances outlined by Lord Norton, a wise constitutional Monarch would wait, if asked for prorogation. A wise constitutional monarch would say, "My Prime Minister has the authority to advise me or to ask for a prorogation as long as he has the support of Parliament, but not otherwise".

The Chairman: Does that answer the point that you wanted to make Lord Norton? Was there an additional question on the House of Lords?

Q109 ***Lord Norton of Louth:*** Separate from that, do you envisage a role for the House of Lords in any parliamentary fixed term or, for that matter, any early dissolution arrangements?

Vernon Bogdanor: The Wakeham Royal Commission, if I remember rightly, was against any such role for the House of Lords. I'm not sure that it was correct about that. The House of Lords already has a constitutional role in preventing the Commons from extending its own life. The Parliament Acts do not apply in relation to such a provision. There might well be one or two other fundamental constitutional provisions that you should not allow a majority in the House of Commons to override. That obviously raises large questions because the matters in this Bill might not be the only ones. It seems to be a matter for further consideration whether we need stronger constitutional protection than we have on matters other than extending the life of the House of Commons.

Lord Norton of Louth: Presumably, the only role the House would have if this were passed would be an attempt by a future government to amend the legislation. Obviously, the Lords would have a role in the normal legislative process, but that would be it.
The Chairman: In the substantive questions that the Committee indicated that it wanted to talk to you both about, we have probably covered most of the ground. Do other members of the Committee have points that they feel have not been addressed?

Q110 ***Lord Norton of Louth:*** I just want to pick up on a point that Professor Bogdanor made in his submission, because it raised an interesting spectre. In paragraph 5, you say at the end: "It is, however, not clear whether the two-thirds provision can bind a future parliament such that if a majority smaller than two-thirds in a future parliament were to vote for dissolution and the Prime Minister then asked for one, the Queen would be entitled to refuse it". That is an issue for constitutional lawyers but it strikes me as quite a profound issue because you can see what would happen in those circumstances if someone sought to challenge that. Would you like to expand on that?
Vernon Bogdanor: Constitutional lawyers have argued for many years on whether Parliament can bind itself, without reaching any conclusion. I am far too careful. It would be like a bull in a china shop to tread in an area which constitutional lawyers have debated in such a sophisticated manner for so many years without reaching a conclusion. One has to call it a grey area of our constitution—whether Parliament can bind itself by a special majority. It has not happened before.

Q111 ***Lord Crickhowell:*** I want to go back to the extension of the session, and something that Dr Fox said about departments being asked to produce bills because they hadn't. I sat for quite a long time under Willie Whitelaw on the Legislation Committee. It was very important, particularly as many of us feel that there is too much legislation. But the pressure there was quite the reverse. It was extremely difficult to come forward with a bill because there were a limited number of bills that you could get into a session. That was rather an important factor. There was another feature, too. Am I not right in thinking that by extending the session, the pressure that this House particularly has towards the end of a session to get legislation altered is removed for quite a lot of bills? Governments have to stop and think towards the end of a session. Amendments get carried by this House that probably would not otherwise get carried. It seems to me that there are some quite significant consequences from this change and I am not at all sure that they have been thought through adequately. Any further comment?
Ruth Fox: I agree. It goes to the heart of the problem with the legislation, the way that it is being pushed through and the timetabling. An awful lot more time and detailed consideration could have been given to it. I said at the beginning that I think there is a missed opportunity in this Bill in thinking through the nature of the term. So much of the focus of the Bill is on the end of the term—the date of the end of the term and the emergency valve for dissolution. One of the core advantages of having a term is that you can plan and have a longer-term approach. You also need to think about issues right from the beginning of the term. One issue we have not mentioned is that the dissolution power is a prerogative power, but the Bill does not address the summoning power for the date of the first meeting of the Parliament. You then have issues from that point of how you plan a legislative programme through the various years of that five-year term. It would, in my view, remove the need for wash-up at the end of a Parliament. Obviously, in the event of an early dissolution it wouldn't and things would be pretty much as now, looking at the 1979 scenario for example, but in my view it would remove the need for wash-up. I take your point about there being pressure to get bills into the Queen's Speech from Departments and Ministers. It depends. In Robin Cook's memoirs, he talks about when he became Leader of the House; he looked in the legislative cupboard and it was bare. They very quickly had to come up with legislation. It depends from government to government and on the political context. The reality is there is too much legislation. It is a tidal wave approach. I think it is unavoidable, whatever parliamentary arrangements you have, that at the beginning of the term you are going to have a lighter legislative workload because parliamentary counsel have to have time to draft legislation properly. The beginning of the term is going to be quite light, but inevitably the middle and the end of the session or Parliament are going to be heavier. It seems to me that if you have some sense of when the end date is, business managers through the usual channels should be required to work backwards from that in planning the legislative programme, either across the term or across the sessions. It should be possible to avoid some of the problems of the tidal wave, banging up against the deadlines and the fact that whole sections of bills go through with very limited scrutiny. If the public were aware of some of the bills that go through and the amounts of money that are voted on with limited—or sometimes even no—scrutiny, they would be appalled.
Lord Rodgers of Quarry Bank: Are we moving towards an end?
The Chairman: We are, but both you and Lord Renton wanted to make comments.

Q112 ***Lord Renton of Mount Harry:*** If I could speak about the wash-up, as an ex-Chief Whip, you have to think of realism rather than totally of idealism. The

whole point of the wash-up is to do deals with the other side that enable you to get through bills that would not otherwise get through. It is a remarkable occasion, because suddenly the Whips who were arguing with each other are working together to make certain that bills get through. I don't think you can avoid that element in the running of the House of Commons. It will always be there, because bills will take longer than expected. There are events happening that demand debate which had not been thought about and therefore timetables get, not lost, but very, very squeezed. It is out of that that the wash-up happens. In a way, it is a very good example of parties who are opposing each other working together to get legislation through at the last time. I am not saying it is all properly argued through. The general view is that when an MP turns up and says to the Whip, "What's this all about?" the Whip says, "Don't bother about that; just get into the Yes Lobby." That's life, and I suspect it will go on. It is another element.

Ruth Fox: I accept that there may be instances where some of it may go on because of events arising. You might need legislation that you had not anticipated earlier in the Parliament, or whatever, but we should look at the wash-up at the end of the last Parliament, in March/April. I submitted with our written evidence an article that I and colleague, Matt Korris, had written for Parliamentary Affairs on a quick analysis of the wash-up. I took a fairly pragmatic view on the pros and cons of it, but I don't think in a fixed term you should ever end up in that situation, as the last Parliament did, with bills such as the Constitutional Reform and Governance Bill and the Digital Economy Bill. There may be instances on the margins where, at the end of the fixed term, there is some pressure and it is not as ideal a situation as you would like, but a fixed-term should eradicate those examples where the government was really stretching the bounds of acceptability, if I can put it politely.

Lord Norton of Louth: I should have declared an interest at the beginning as Director of Studies for the Hansard Society.

The Chairman: Thank you for doing so. Thank you both very much. You have been very generous with your time and this has been a very valuable session. Lord Rodgers would like to make one final point.

Q113 ***Lord Rodgers of Quarry Bank:*** We have discussed this very fully. I have already asked about a summary of the balance of merit for a fixed-term Parliament. Could I ask both of you, what is the difference, if any, between a first-past-the-post Parliament, which we have now, and AV, if we find that we have AV or some other form of PR?

Vernon Bogdanor: The alternative vote makes a hung Parliament slightly more likely. At the last election, according to various calculations, it would have given the Liberal Democrats about 20 more seats, primarily at the expense of the Conservatives. So in that sort of situation, a hung Parliament would be more likely.

Lord Rodgers of Quarry Bank: I was really asking for your judgment on the merits of a fixed-term Parliament against those two prospects.

Vernon Bogdanor: If you are moving into an era of hung Parliaments, the issue of fixed-term Parliaments arises for this reason. On the continent, which does not have the alternative vote, but proportional representation, the aim is to persuade or even force the political parties to work together in the way that Lord Renton was describing sometimes occurred in the wash-up period. That is the purpose of the fixed-term Parliament, to alter the culture of Britain from its current, fairly adversarial culture, if I can put it like that, to a more consensual culture. Countries such as Germany and Norway operate in practice in terms of grand coalitions. Even if they don't have formal grand coalitions, you often have the consent of the opposition for legislation, which obviously is rarely the case here. Your question about the alternative vote raises a very important general point that, if we are moving into a period of hung Parliaments, there is a large issue that perhaps this Committee might consider of how our constitution might need to change. I repeat that I think this Bill is not very well thought out. In my judgment, this session has revealed two very important ambiguities in it. One was pointed out by Lord Norton, on whether Parliament can bind itself. The second, pointed out by Lord Hart, was whether the intention is to have an extraordinary general election if you dissolve early, as in Scotland or Sweden, or not. It seems to me that these issues are not yet clarified in the Bill, and perhaps not in the Government's mind either. I think they need to be clarified.

Ruth Fox: I don't think I would add anything to that other than to go back to my earlier comments that there is a looming difficulty in terms of the relationship between politicians and the public, and understanding and knowledge of how our political system operates, which is seen partly in the issue about voting on the identity of the Prime Minister. In the context of where we are, whether it is under first past the post or AV, as Vernon has indicated, we are moving into a scenario where hung Parliaments are more likely. We are going to have a clash between the perception that we ought to have a more presidential system, and therefore our constitutional and political arrangements should reflect that, alongside a culture of hung Parliaments, which does not facilitate that. It seems to me that there is a potential major political problem looming on public understanding and engagement around those issues. I simply make a plea that one area that needs to be addressed, and has not been addressed sufficiently yet, is public understanding and education about these issues—political literacy and so on, which the Hansard Society is very much an exponent of.

27 October 2010 Professor Vernon Bogdanor and Dr Ruth Fox

The Chairman: Thank you both again. You have been enormously helpful and this has been a very valuable session. I am really grateful to you and thank you, too, for highlighting the ambiguities, as Professor Bogdanor has just expressed them, within the Bill, not least, as I understand it from what you have both said, about the title of the Bill, which is a fairly basic point. I am very grateful indeed for your time and for the written evidence that you have sent to us. Thank you very much indeed for coming.

WEDNESDAY 3 NOVEMBER 2010

Present	Lord Norton of Louth (Chairman)	Baroness Jay of Paddington
	Lord Crickhowell	Lord Powell of Bayswater
	Lord Goldsmith	Lord Renton of Mount Harry
	Lord Hart of Chilton	Lord Rodgers of Quarry Bank
	Lord Irvine of Lairg	Lord Shaw of Northstead

Examination of Witness

Witness: MARK HARPER MP, [Minister for Political and Constitutional Reform].

Q114 ***The Chairman:*** Mr Harper, good morning, and thank you very much for being with us. As you will appreciate, I am not Baroness Jay. She has to get away early, so I will be presiding over the proceedings this morning. Before we get under way, you will appreciate that we are not being televised, but we are being sound-broadcast. For the record, could I ask you to identify yourself?
Mark Harper: I am Mark Harper, Minister for Political and Constitutional Reform.

Q115 ***The Chairman:*** Thank you very much. Is there anything you want to say by way of opening or are you happy for us to proceed with questions?
Mark Harper: Very briefly, this is a short Bill, but one with broad effect. It is right that the Government, the Prime Minister, give away the power to call an election early. Two provisions in the Bill allow for an election to be held earlier than the five-year cycle, and looking at the evidence and the questions that have been put, I am sure that that is what we will focus on. The Government think that this is right and broadly there is cross-party support for the principle of fixed-term Parliaments, although there is some debate about the length. Most of the evidence with, I think, one exception, shows broad support, although obviously there will be debate about the details. So, this is broadly supported, and we look forward to the debate both in the Commons and in your Lordships' House in due course.
The Chairman: Thank you very much. It is a short Bill that gives rise to several constitutional questions. Baroness Jay will put the first question.

Q116 ***Baroness Jay of Paddington:*** We have had quite a few representations, not least from our colleagues in the other place, about the way in which the Bill has been produced. We have been asked whether there should have been some more formal pre-legislative scrutiny and whether the public should have been consulted more. As I say, we have had a certain amount of evidence showing that people feel that a constitutional measure of this kind, which is substantial even though it is a short Bill, should have been subject to proper pre-legislative scrutiny.
Mark Harper: Two things drove us on this. The first is a general one about things that governments do early in their first term of office. If the whole programme was subject to pre-legislative scrutiny—a question that obviously has been raised about the other Bill that will shortly be brought before the House of Lords—frankly, you would not get on and do very much. With this Bill particularly, there was another question. Given that the Prime Minister had said that he did not intend to use the power he has to ask Her Majesty for an early dissolution at any point in the Parliament, and we said in the coalition agreement that we would look to put a motion before Parliament to that effect, and having looked at the practicalities, it was felt that it would be better to put it beyond doubt and not lay open opportunities during the Parliament to cause the Palace any difficulties. This will make things clear. We are not rushing this Bill through. It was published on 22 July and, while it has had its second reading in the Commons, it has not had its committee stage. We are taking this Bill at a far slower pace than the Parliamentary Voting System and Constituencies Bill, so we have some time. The Political and Constitutional Reform Committee in the Commons has had a chance to take evidence and comment on the Bill, and clearly this committee has carried out a considerably thorough investigation as well.

Q117 ***Baroness Jay of Paddington:*** You raise the other Bill. I think the point is the one that has been broadly put to us, which is that constitutional changes of this kind need to be handled in a slightly different way from instant government, as it were, by Parliament at the beginning of a term. You have raised a point about the Palace, but there is a question of why it was necessary to go ahead so quickly with fixed-term Parliaments, particularly with the provision of terms of five years.
Mark Harper: Having said in the coalition agreement what the Government planned on doing, with a motion and then a bill, we looked into what kind of motion we could have that would be binding. If the House had passed a motion that was not binding, it would have left open the theoretical possibility that

the Prime Minister could call an election. Potentially, that could have put the Palace in a difficult position. The Government felt it was better to put matters beyond doubt by publishing the Bill and giving it a second reading. The House of Commons has effectively now said that in principle it supports fixed-term Parliaments, and the view is that that has already constrained the ability of the Prime Minister to seek an early dissolution if he was so minded. The Government felt that on balance that was the best way to proceed, but we have not sought to rush further scrutiny of the Bill. We have allowed time for both Houses to scrutinise it properly.

Q118 ***Lord Rodgers of Quarry Bank:*** Were you personally familiar with the issue before you became a Minister? Had you discussed it over many years either personally or within your party?
Mark Harper: I had not. I am broadly familiar with the issue, but not with constitutional matters prior to being a Member of Parliament. I did take a fair degree of interest in constitutional matters when I was a backbench Member in opposition because I am a great lover of Parliament. I am pleased to have this job, whose role is to look at how we can reform Parliament for the future. I very much support the measures in this Bill, which effectively move powers from the Executive and put them in the hands of the House of Commons.

Q119 ***Lord Rodgers of Quarry Bank:*** Yesterday, one of our colleagues in the House of Lords referred in the context of the big society to the fact that it was important to put more power in the people's hands. But if we were to have five-year Parliaments, we would have fewer elections than we had in the past. As you well know, there were 18 between 1945 and today, but with five-year Parliaments there would have been only 14. Are you concerned about that? How do you reconcile the two ideas? With your experience of Parliament, are you not slightly suspicious when all parties vote the same way on a second reading? It is easy to see that it is a comfortable approach for Members of Parliament and future governments, but Parliament will not be better off.
Mark Harper: We thought carefully about this. If you look at the history and take out the very short Parliaments, the average is over four years. What must be factored in is that many previous elections were called before the end of a five-year Parliament at a time when the incumbent Prime Minister thought he was best positioned to win an election. There is an argument about whether that was in the interests of the country. Effectively, this is looking back and asking what would have happened if we had not had those constitutional arrangements. The other point, which I know the Deputy Prime Minister put to you, is that if you have a five-year Parliament, you have four years during which you can crack on with serious work, and as you get to the end, Members' thoughts turn inevitably towards being re-elected. With a four-year fixed term, you would have three years in which to crack on with serious work, and then Members' thoughts would turn to an election. On balance—of course it is an issue of judgment—we thought that five years is the right term. It is the period that we have as a maximum term for a Parliament, and of course the last Parliament ran for five years, although that was damaged, I think, by the fact that the last two years of it were full of speculation about whether we would or would not have an early election.

Q120 ***Lord Rodgers of Quarry Bank:*** In your own constituency, is this matter discussed at all? I come back to the question of whether people have really thought about it.
Mark Harper: I have to say that on the doorstep there was not a great clamour for this Bill to be brought forward, but there was concern and discussion about when the previous Prime Minister took office. There was a lot of speculation about whether we would or would not have an election, and members of the public did not think that that whole debate and the uncertainty was very healthy. Certainly from conversations I have had with people in my own constituency, having a fixed term so we know when the election will be, and getting rid of the ability of Prime Ministers to choose the date for political reasons, has been broadly welcomed. However, given the other issues facing the country at the moment, it is fair to say that this is not at the top of people's list of immediate priorities.
The Chairman: Lord Powell, did you want to follow up on that?

Q121 ***Lord Powell of Bayswater:*** No, Lord Rodgers has shot at my fox, even if he has not quite demolished it. The majority of our evidence has been in favour of four-year Parliaments. It has been pointed out that the great majority of fixed-term Parliaments are for four years. Did you take that into account and decide that, none the less, it would be better to have five-year terms? Was that not also partly for political reasons? Was it convenient for the coalition Government to have a nice long stretch ahead of them without an election?
Mark Harper: If we had been starting with a clean sheet of paper, we might have reached a different conclusion, but we started from our existing position where the length of a Parliament is up to five years. As I have said, when they are shorter than that, it is usually because the Prime Minister judged not that a

shorter Parliament was good for the country, but that an election at that point was good for the governing party. On balance, we thought that starting from a five-year term was right for the UK Parliament.

Q122 ***Lord Powell of Bayswater:*** And you are not moved by the argument that four-year Parliaments allow people to vote rather more often, given that your intention is to increase public participation?
Mark Harper: I think there are countervailing pressures as well. There is an awful lot of debate, particularly given some of the tough decisions we have taken on the economy, about whether people want governments to be able to take difficult decisions for the long term. There is clearly a balance between giving governments time to take difficult decisions and see them through, and giving voters the opportunity to give their verdict on the government. It is not an exact science, but a matter of balance. We think that we have struck the right balance, albeit that I recognise that your evidence came up with a different view.

Q123 ***Lord Goldsmith:*** On that last point, you have not actually asked the public, have you?
Mark Harper: No, we haven't.

Q124 ***Lord Goldsmith:*** Can I go back for a moment to Lady Jay's question about something other than a Bill? You said that there were practicalities. Perhaps I may get some clarification on this. You have identified the practicality of not wanting to put the Palace in a difficult position. Was there any other reason?
Mark Harper: We had said in the coalition agreement that we were going to have two stages. We would bring a motion before Parliament and then we would legislate. So the question before us at this early stage of the Parliament is whether that two-stage process still makes sense. We think it does not and that it would be better to legislate, setting the principle out in statute.

Q125 ***Lord Goldsmith:*** Was there any reason you identified other than the concerns about the Palace? I still do not understand what these practicalities are.
Mark Harper: We talked in the coalition agreement about a binding motion being put before the House of Commons, but there isn't really an appropriate type of motion which would have that effect. Having considered the options, it seemed that legislating early would be the best solution in order to put into effect what the Government said they wanted to do in the coalition agreement.

Q126 ***Lord Goldsmith:*** An Act of Parliament can be repealed as well, can't it?
Mark Harper: Yes, it can. The view that we have taken—and the evidence that you have taken sets this out—is that it changes the nature of the political debate. If you have legislated and there is broad support for what the Government have done, it is of course theoretically possible for Parliament to repeal that Act but it becomes very difficult if the settled view of both parliamentarians and the public—and of academics and those who take a great interest—is: that is the constitutional settlement.
Lord Goldsmith: You mentioned the public again, but you haven't asked the public.
Mark Harper: No, we haven't formally asked the public in a consultation or something like it but the sense is that if you look at public opinion, as expressed in opinion polls and things, they are broadly welcoming of the view that we should move to fixed-term Parliaments. I do not think the public were ever very keen on the idea that Prime Ministers could dissolve Parliament at their political convenience.

Q127 ***Lord Goldsmith:*** I don't want to pursue this, but I just want to be clear. The concern about the Palace—and the sensitive report they were talking about—is simply that the Palace might be in a difficult position if Mr Cameron said that he wasn't going to have an election and then said that he wanted to call one. Is that it?
Mark Harper: That is part of it, yes. That wasn't the only reason for the decision but it was something we took into account.

Q128 ***Lord Goldsmith:*** Forgive me, but what is the other reason? I just want to understand.
Mark Harper: Well, as I said, in the coalition agreement, we had said that the process was set out to be a motion followed by an act of Parliament. There isn't actually a very satisfactory parliamentary device for a binding motion. We felt that the best binding method was to have an act of Parliament—passed by both Houses, of course, not just the House of Commons.

Q129 ***Lord Goldsmith:*** But so far as the concerns about the Palace are concerned, have I correctly identified the concern?
Mark Harper: Yes, you have.
The Chairman: I think you are saying that, in terms of a binding motion, it was discovered that nobody could be bound by the motion.
Mark Harper: Correct, yes, and the other thing is that the motion would only be a House of Commons motion, and by having an act of Parliament you have better control by having both Houses having passed it.

Q130 ***Lord Crickhowell:*** You have been basing your case for a fixed-term Parliament, whether for four or five years, on the disadvantage that in the past the Prime Minister has been able to choose the date of the election. I expect that you have read Vernon Bogdanor's pretty compelling piece of evidence from when we saw him a week ago, in which he argued that the, "disadvantage to dissolving early is outweighed by the serious disadvantages of a fixed-term Parliament, which prevents Prime Ministers leading a government in an unviable Parliament from going to the country"—he had cited the Attlee example earlier in his evidence—"which prevents a newly chosen Prime Minister between Parliaments from going to the country, which prevents a Prime Minister who has a new policy for which he may seek a mandate from going to the country. Most importantly of all, because we could be moving into that situation with our hung Parliaments, it means that coalitions can change in the middle of a Parliament without the people being allowed to pronounce on that." He concluded: "the balance of argument is against fixed-term Parliaments". He argued that what you are actually doing is taking power away from the people when you are arguing that you are trying to give it to them.
Mark Harper: Yes, I did read Vernon Bogdanor's argument. It may interest the Committee to know that, in the same way as he taught the Prime Minister, he also taught me politics at Oxford. It is fair to say that he and I did not always see eye to eye in tutorials either, about Europe or electoral reform, so the fact that he and I are disagreeing on this subject isn't new; perhaps he won't be surprised. What he outlines is not, I think, a change in reality from the current position. Certainly, in some of the debate that we had on this Bill at second reading in the Commons, people's views about what happens when a government does not have a majority in the House of Commons or loses a vote of confidence is very much shaped by recent events, because it has not happened very often. They immediately think of the 1979 example and the loss of a vote of confidence automatically triggering an election. There are older examples when that was not the case. The reality at the moment is that if the government does not have a working majority and loses a vote of confidence, there is no necessity for an election to be called already. It is perfectly possible under our existing arrangements for a new government to be formed without an election taking place, so I do not think we are doing anything new. But perhaps it is the case that, both in Parliament and among the public, expectation about what would happen in certain cases is not as clear as it ought to be. The debate on this Bill, the evidence you have taken and the evidence that the committee in the Commons has taken is actually a good opportunity for explaining the current position both to Members of both Houses and to the public, where perhaps some of them are not as clear as they could be.

Q131 ***Lord Crickhowell:*** Some of us feel that the 1979 example is a particularly good one. I declare an interest, in that I became a Minister because of it. But there was no doubt. The Prime Minister of the day immediately said that he would go to the country and the country had the choice. Although there may be circumstances—we will come to examine them—in which this may happen, the fact is that this Bill will make it much more difficult. We could have had a situation in the way this Bill is drafted in which, over 14 days, every sort of effort was made to encourage the Scots, the Welsh, the Irish, or someone else to form a new coalition. It might have dragged on with a weak government for a time with the people having no say. It is not self-evident to me that we are in a better position as a result of this Bill.
Mark Harper: I think the reality would be that if you were in that position, a great deal of effort would have taken place prior to any key vote taking place to get the smaller parties that you are talking about on side anyway to avoid the loss of a vote of confidence. A lot of that work would have taken place beforehand. If the government lost a vote of confidence, you would have your 14-day period. I suspect it would become clear pretty quickly that the government could not put together an alternative government, or a different government could not be formed. Indeed, there would then be a general election, but I do not think that that should necessarily be automatic. If a government can be formed with a majority to get a vote of confidence in the House of Commons, particularly if it takes place early in a Parliament, we are not necessarily depriving the public of something by not having a general election as a matter of course. That isn't what would happen in the current situation anyway. I don't think we are changing huge amounts by the way we have laid down the procedures in the Bill.

Q132 ***Lord Crickhowell:*** We will come to that on later questions. The fixed term will result in a clash with elections to the devolved institutions in 2015 and every 20 years thereafter. What do you propose to do to alleviate that situation? It has been suggested, for example, that the Scottish Parliament, and possibly the Welsh if the situation changes there, might be allowed to decide on the date of their own elections. You could avoid a clash by implementing automatic four-year fixed election dates. What are you proposing to do about what is considered by the devolved administrations as a drawback in the present proposals?

Mark Harper: The first thing to say is that our Bill, if anything, highlights the potential problem but does not actually cause it. It is perfectly possible without our Bill. If this Parliament ran its full term you would have had the clash anyway. Indeed, what would likely have happened is you would have got to 2014 and once you got past May or June 2014 without an election, immediately speculation would start about the likely date. We would have had exactly this debate, but it would have been taking place at a point when, frankly, we could not have done anything about it. In a sense, we have crystallised the issue so that everyone is aware of it. We have made it very clear. We think that the coincidence of dates next year with elections and the referendum is one situation which we do not think is problematic. But we accept that there is a bigger question when elections clash—the UK general election and the general elections in the devolved nations—partly for practicalities and partly for the arguments taking place about who should govern at the various different levels. We are considering within Government what the appropriate solutions might be. We then intend to have a proper consultation process with all the parties in each of the devolved administrations to come up with an agreed way forward. We hope that that will be implemented in the Bill before it leaves the House of Commons and gets to your Lordships' House.

Lord Crickhowell: I welcome the fact that we are going to have consultation. It is what we are pressing for.

Q133 ***The Chairman:*** So the proposed length of the consultation will be the normal consultation period. Is that the intention?

Mark Harper: We want to do two things. We want to make sure that we get the chance to make the changes in the Bill while it is still in the House of Commons, but we will have full consultation with the parties in each of the devolved administrations to see the level that there is a consensus. We are just thinking in Government at the moment about what might work across the three devolved nations. But we recognise that it is an issue and we have said that clearly in debates in the House of Commons. We very much hope that we can get to an agreed solution.

The Chairman: So that could produce amendments to the Bill before it had concluded its process?

Mark Harper: Yes.

Q134 ***Baroness Jay of Paddington:*** I want to ask about the timing. I am sorry to come back on this, but if you are going to do the consultation before you bring the Bill here based on your conclusions in the other place, does that suggest that the Bill may well be delayed in being introduced in this House?

Mark Harper: As I have said, we have not yet set the parliamentary timetable for the Bill. Unlike the Parliamentary Voting System and Constituencies Bill, where clearly the timetables link to the choice of date for the referendum next year, this Bill is being taken on a much more considered timetable. We are not in any sense trying to rush it, and we would rather get it right before it exits the Commons and gets to your Lordships.

Baroness Jay of Paddington: If I may say so, you have rather illustrated the point that I was trying to make in my earlier question about how it would have been helpful to have prospective rather than retrospective consultation.

Mark Harper: One of the issues—and we did get this a little bit in the Commons—is that there is a balance here. There is also the issue about the Government announcing their policies and positions to Parliament before they go out and talk quite widely. If you are going to talk to each of the parties in the devolved Parliament Assemblies, in effect you are putting your proposals in public. There is of course an argument about announcing the Government's proposals to Parliament first. That was the balance that we struck. The territorial Secretaries of State then engaged in negotiations with each of the parties in the devolved nations and their First Ministers about how we might solve the obvious clash.

Q135 ***The Chairman:*** As a consequence of the proposal to have fixed term Parliaments with elections in May, Sir George Young has announced the move to a May-to-May parliamentary session, so we have the unusual position that the current session will be a long one. Some have argued that having a two-year session rather than finishing it next May strengthens the Executive rather than Parliament. What is your response to that?

Mark Harper: First, the reason for doing that is that, if we are to have a fixed-term Parliament and we know that the election is to be in May 2015, we want to avoid having a very short final session, where frankly you would not get a lot done. Given that the first session in a new Parliament is traditionally a longer one anyway and so we would have run through to next autumn, we thought that on balance it was better to extend the current session and then align the State Opening and the new sessions with the new fixed-term cycle. That was the judgment that we took, and I do not see that it changes the balance between Parliament and the Executive at all.

Q136 ***The Chairman:*** The issue is obviously specific to this session. I take the point about subsequent sessions.

Mark Harper: I think that you could argue that, pre carryover, there may well have been an issue but, as the Government have the power to carry Bills over

from sessions, I do not think that the longer session has changed the position in any significant way.

Q137 ***Lord Renton of Mount Harry:*** We now move on to Clause 2, "Early parliamentary general elections". Before we do so, perhaps I may say that, after many years in the House of Commons, I personally think that you are right to go, if possible, for five-year rather than four-year terms. Clause 2(1)—this goes against support for the fixed five-year term that you have been talking about and agreeing with rather strongly—sets out a safety-valve mechanism, whereby an early general election will take place if two-thirds or more of the total number of MPs vote in favour of an early dissolution of Parliament. In a strange way, this goes quite strangely with what you have been saying. What is the purpose of that mechanism and in what circumstances do you envisage it being used?
Mark Harper: There are two things. First, it clearly gives the power to Parliament. Setting the number at two-thirds is of course a change from what is in the coalition agreement and there was a fair bit of debate about that at the beginning of this session of Parliament. The purpose of setting the level at two-thirds is so that the government—either a single-party government or in this case two parties—do not have the power to call an election, so it would have to be a cross-party decision. I do not particularly want to speculate on hypothetical examples, but there may well be circumstances where there is a general view that an election is necessary and that is shared across parties. Without such a mechanism, you would force the Parliament to have to engineer the loss of a confidence vote, as has happened elsewhere. Clause 2(1) will give the Commons the mechanism that we gave to the devolved administrations for eventualities that may exist but that we cannot predict. However, the power very much belongs to the House and not to the government. It may be a power that is never used, but I think that it is right that it is there.

Q138 ***Lord Renton of Mount Harry:*** It sounds as though you are saying "Let's call it two-thirds because that is a reasonable number". There is not much more thinking behind that two-thirds other than, "We must have a target so this should be it".
Mark Harper: I think the logic was to set a number that was sufficiently high that it was unlikely that a government could reach it. If you look at the experience post-war, no government could have reached that target. The message that it sends out is that the government do not have the ability to get an early general election; it would have to be a cross-party decision with broad support across the House, which means that it would not be being done for partisan reasons but because of the general sense that an early election was in the interests of the country. That is why we chose that number. The obvious example that we had to go on is what Parliament decided to legislate for in terms of the devolved assemblies. We tested that against the experience of governments in the past and it seemed to be the right balance to hit our objective.
The Chairman: That is the practice in legislatures elsewhere. Where they have a threshold, the requirement is normally for a two-thirds majority.

Q139 ***Lord Goldsmith:*** You have referred to examples in other countries where governments have succeeded in engineering votes of no confidence. This Bill does not prevent the same thing from happening here, does it?
Mark Harper: No, it does not in technical terms, but it changes the view that the public would take of such behaviour by the government. The position to date, or the expectation, has been that it is perfectly reasonable for the Prime Minister to seek an early election. Once the Bill, which has been approved by the House on second reading, becomes law, the expectation will be that we have a fixed-term Parliament. It would then still be technically possible for a government to engineer the loss of the vote of confidence, but I think that the public would take a dim view of that and would make a judgment in the subsequent general election about whether they thought that that was the right way for a government to conduct themselves. Ultimately, the choice would be with the public.

Q140 ***Lord Goldsmith:*** Let us be clear about that. There is no other mechanism that you are considering putting in the Bill that would prevent a government from engineering a vote of no confidence other than the belief, or possibility, that the public would take a dim view of it. Is that the case?
Mark Harper: Yes, that is right. The backstop against a government behaving in that way is that it would be transparently obvious that that is what they had done and the public could take a view on that when asked for its opinion in the subsequent general election.
Lord Goldsmith: I suppose the government might be absolutely transparent about it and say, "This is the only way we can bring the country back into a position where we can govern it properly because for this or that reason we are not succeeding at the moment. We therefore want to go to you to ask you to reconstitute Parliament".
Mark Harper: If the government chose to do that, ultimately the public would be the ones who made the choice about whether the government were behaving appropriately. That is the right place for it to be. It is technically possible—we have been very open about that—but my view is that the public would take a very dim view of that and the government would be punished accordingly. I think that that is the best

control mechanism rather than coming up with some technical device.

Q141 ***Lord Goldsmith:*** I want to ask just one other point, although I will come back to another issue later. When you talked about the 14 days, you said that you did not think that we were moving much from the present position. However, the 14 days would allow a completely different composition of government. For example, we could end up with Labour and Liberal Democrats. That could not happen under the present system, could it?
Mark Harper: That depends on the way people conduct themselves, but I think that it could. It depends on a range of factors, including the balance of power of the parties in Parliament, where we are in the parliamentary term and the position of the Palace. If we were early in a Parliament and there was a viable alternative government and—prior to having published this Bill—a Prime Minister had sought a dissolution, it is perfectly possible that a dissolution would not have been granted and that an alternative person would have been sent for to form a government.

Q142 ***Lord Goldsmith:*** Is there a recent example of that?
Mark Harper: There is not a recent example of that, because there have not been very many examples over the past century when governments have been in that position. As I said, the narrative tends to be driven by the most recent example—where we were at the tail-end of a Parliament, and therefore, when the Prime Minister decided to seek an election, the dissolution was granted, but there was an earlier example in the 1920s when a Government went and a minority Government with a different Prime Minister and a different party were formed. You are right, there have not been very many examples; that is perfectly true.

Q143 ***Lord Goldsmith:*** I am a little bit surprised by the suggestion that this is not actually a very significant change. Do you think that it is not a significant change to the present position?
Mark Harper: No. I think the fact is that there have not been many examples in recent history where we have not had governments with majorities able to govern alone. If that isn't the case, the existing constitutional position, or the way we behaved, would have been different even if we had not brought the Bill forward,

Q144 ***The Chairman:*** Your reference to the 1920s leads us on neatly to votes of confidence, because in the past, a government could lose the confidence of the House without an explicit vote of no confidence being carried against the government. The Bill now seeks to put in statute the concept of a no-confidence vote, but the way it is drafted raises the question of whether it would have to be explicitly a vote of no confidence, as opposed to the government bringing forward a vote of confidence in themselves and losing it, or a major measure being brought forward by the government and their announcing, "Confidence attaches to this. If we lose, we cannot sensibly continue". Is the intention that the Bill as drafted would encompass those circumstances, or is it meant to be specific—that it must be, say, the opposition moving a vote of no confidence in the government?
Mark Harper: No, I think the intention is that the Bill would encompass those examples, not changing the current position. Ultimately, the Speaker is the person who has to certify that a confidence vote has been lost or passed. Our view is that the Speaker would make it very clear before such a vote took place whether it was a vote on which he would issue his certificate. If you think through the examples, I do not think that there would be any doubt in the minds of Members of Parliament voting that they were voting on something which would be treated as a confidence vote.

Q145 ***The Chairman:*** My concern would be that, if you look at past examples, the government said that confidence attached to it, but the problem for the Speaker would be the lack of guidance if just the words of the Bill, or the Act, were before him. If they referred to a vote of no confidence, it would be up to the Speaker to interpret that, and he may decide that it is not an explicit vote of no confidence.
Mark Harper: I think the important thing is the Speaker making that clear before the debate and the vote, and then everyone would be clear about what was going to happen as a result of it. If you think through examples in the past, I do not think that anyone has been in any doubt about the significance of what they were going to do. In practice, I do not think that that would be a serious problem.

Q146 ***The Chairman:*** I wonder whether it might make more sense to do it the other way round, so that the Bill is amended so that we get clarity, so that it does not leave it to the Speaker. There is always the prospect of a challenge to the Speaker's certificate.
Mark Harper: The reason we decided to use the device of the Speaker's certificate was exactly to deal with the issue that the Clerk of the House of Commons has raised with you about the potential to challenge in court. We decided to use the device of a Speaker's certificate without specifying in legislation any more detail of the procedures of the House for that very reason—to use a tried and trusted formulation. That was why we decided to do it the way that we have.

Q147 ***The Chairman:*** But it would presumably put pressure on the Speaker if, let us say, he did not make an announcement in advance.
Mark Harper: I think the Speaker would want to make sure that the House was clear about the nature of the debate and the vote attached to it. I am not sure that it would put pressure on him; I think there would be an expectation that he would set out clearly the nature of the debate and vote that was to take place, the consequences of the vote and what he would do as a result, so that people were clear about it. I think that there would be an expectation that that is what would happen.

Q148 ***The Chairman:*** Yes. Seeking clarification, the Speaker would have a role in making clear beforehand his interpretation of the situation.
Mark Harper: Yes, and I think if his interpretation was made clear beforehand, people wouldn't be left in any doubt about the consequences of their vote and what would happen as a consequence.

Q149 ***Lord Shaw of Northstead:*** Arising out of that, there is an argument that a defeat on a motion of no confidence should automatically be followed by a general election. That, I think, has been put on one side. But, arising out of the questions that follow now, it seems to me that the Speaker can only speak as a result of decisions taken in the House. By him deciding, without the agreement of the House necessarily, that this is a vote of confidence, it seems to me that that takes away some of the power of the House. The House should itself decide that this is a vote of confidence, not the Speaker.
Mark Harper: On explicit confidence votes, I don't think there's much doubt. The votes in more doubt are those that have been treated as confidence votes by the government. I don't think it's asking the Speaker to make decisions beyond those he should make if there is an expectation. If there is a convention that certain kinds of votes, like votes on the Address, are treated as confidence votes and are treated as those by the government, for the Speaker to make that explicit, effectively, it is a convention that exists and he is simply going to be setting out the consequences of that convention. He is not really creating any new rules. He is just making it more explicit about the effect of existing conventions that are already in place.

Q150 ***Lord Shaw of Northstead:*** I think this is an important principle. Who is to decide whether or not it is a vote of confidence—the House or the Speaker?
Mark Harper: On votes, for example, that convention suggests are confidence votes, like votes on the Address, it is convention that dictates that. Those are rules that have grown up. They are not hard and fast tied to the vote in the same way an explicit confidence vote is. It would just mean that the Speaker would be making those conventions more explicit. I do not think that it changes the nature of his role vis-à-vis the House.

Q151 ***Lord Shaw of Northstead:*** But, surely, if, at the beginning of the debate, the Speaker announces, "I am going to regard this debate and its result as a vote of confidence", if the House then has its debate and specifically says that it does not want this to be regarded as a vote of confidence, who is in the lead?
Mark Harper: If the House decided formally to amend the motion that was being put to the House to explicitly say that it was not a vote of confidence, clearly the Speaker would take his direction from the House. But that isn't what traditionally happens with those votes. They do not explicitly say one way or the other, but convention suggests that certain kinds of votes are votes of confidence. That is the way they have been treated.

Q152 ***The Chairman:*** You have touched on a grey area, because sometimes the government would regard it as a vote of confidence and at other times they would then follow that defeat by introducing a vote of confidence to get the confidence of the House. I am thinking of a situation where there is a vote on a central issue of government policy that is key to the government's programme, which is unexpectedly defeated. I think that yours is premised on an issue where the government might be in trouble, but the Speaker makes it clear that it is a vote of confidence. It might be one where, in the light of the debate, some Members vote against and it's an unexpected defeat of the government on a major bill. If there is a defeat, the Speaker would have to determine after the event whether it is a vote of confidence or not.
Mark Harper: Yes, but I think the Speaker, as is usual in these cases, would be guided by convention. I am not going to start suggesting and giving hypothetical examples about the way the Speaker should conduct himself, but I think he would be guided by convention in those cases. What would typically happen in cases where there was an unexpected defeat on a major area of government policy is the government would respond accordingly. As Lord Norton suggested, they would put forward an explicit motion to demonstrate that the Government still have the confidence of the House. I do not think that we would be leaping forward into new realms. We would use some of the existing conventions and processes to make it clear.

Q153 ***The Chairman:*** So in a way it would be up to the government to make representations to the Speaker that they didn't regard that as a vote of confidence and they would wish to seek an explicit vote of confidence from the House.

Mark Harper: I think that one of the things that would happen with this procedure is that there would be more clarity from the government beforehand about the nature of the way that they were conducting themselves, and I think that some transparency and clarity would be helpful for the House and the country.

Q154 ***The Chairman:*** So the government would indicate in advance how they wished to treat any significant issue.
Mark Harper: Yes.

Q155 ***Baroness Jay of Paddington:*** But if, as you say, the Speaker relied on convention if the hypothetical situation that you alluded to arose—and you have also alluded to the fact that we have received the opinion of the Clerk that this could go to the court—then there would be a potential difficulty in that the Speaker could be in an even more difficult situation. There would be a tension with the political imperative, with the government, as Lord Norton suggested, driving in one direction, and the convention would presumably depend on the advice being received by the Speaker from the clerks. If the clerks' position was the one that has been suggested to us by the current Clerk, there would be considerable difficulty.
Mark Harper: Perhaps I may deal first with the concern that the Clerk outlined, which we discussed with him prior to introducing the Bill, and then briefly explain why, having had that discussion with him prior to introducing the Bill, we still decided to proceed. His argument goes to the safety of the certification process—whether it is still robust and whether the courts would wish to challenge it. He was concerned that they might. Our view was that that is a tried and tested process which has held up in the past. We also felt that in the circumstances we are talking about, courts would not wish to trespass in those areas; they would hold to the traditions and powers in the Bill of Rights and stick to doing that. We had that conversation with the Clerk in advance. The reason that we wanted to put the certification procedure in the Bill rather than in Standing Orders of the House was that you simply can't achieve the policy effect—as we talked about in answer to earlier questions from Lord Renton concerning the two-thirds majority—by relying on Standing Orders in the House, because Standing Orders can be amended by a simple majority. It was really a debate about the fact that, if you want to achieve that policy effect, you have to legislate for it rather than use internal procedures. There is a disagreement with the Clerk about our view. We tested it a little bit at scond reading and I anticipate that we will have a pretty full debate on it in Committee in the House. Ultimately, the House will take a view on whether it thinks that the Clerk's arguments are more compelling than those of the government or vice versa, and we will see what view the House takes.

Q156 ***The Chairman:*** One thought occurs, coming back to the point about confidence and who determines it. If the government lost an important vote, even though it had not been certified as a vote of confidence but was clearly a critical vote—and there were circumstances in the 1920s in which the government, in a sense, retrospectively decided that it was a confidence vote and that they would go—but they none the less said, "Well, we can't carry on because we lost this important vote", and they resigned without losing a vote of confidence, would that trigger the 14-day provision?
Mark Harper: If the government resigned and we were without a government, you would then have to have a process of government formation. I believe that we think that would be the case.

Q157 ***The Chairman:*** In circumstances where they had lost a vote of confidence and the 14-day provision then kicked in under the Bill, would it be possible for that government to try to reconstitute themselves, perhaps in a slightly different way? Presumably they could carry on as the government, if a government were formed, with the same people.
Mark Harper: Rather than giving you a rushed answer, let me think about it and I will come back to you, either later in this evidence session or in writing, if that is all right.
The Chairman: Okay, we will move on to the consequences.

Q158 ***Lord Goldsmith:*** But would you please also consider, in the example that Lord Norton put to you, that you said that there would have to be a process of formation of government? If not now, perhaps you could help us with which provision in the Bill would enable that to happen because the Bill seems to say that you cannot have dissolution without one of the events taking place which has been identified. Could you help on that as well?
Mark Harper: Yes.

Q159 ***Lord Goldsmith:*** On the consequences, you have picked up already on what the Clerk has said and the disagreement. First, on the point that the Clerk raised about the risk that the courts might intervene, is it the Government's view that that is not possible at all or that the risk is slight?
Mark Harper: Looking at the precedents, there is always a theoretical risk, but we do not think it is realistic to think that the courts would intervene in these particular cases. The precedents and the other examples in law where you use the device of the

Speaker's certificate suggest that our judgment on that is correct and would be supported by the courts.
Lord Goldsmith: We have seen material, such as an opinion from Richard Gordon QC, who is pretty expert in the field of judicial review and who considers that in modern terms there is at least a risk that the courts might be prepared to intervene.
Mark Harper: The response that we made to the Clerk's memorandum, which we placed in the Library of the House, was on the argument about the risk. We took the view that on these very political matters, the risk of the courts straying into or getting involved with them was very small. I am not sure whether the Clerk disagreed and thought that the risk was high, but he felt it his duty to flag up the risk. The Government's view, which we have set out, is that looking at how this has worked in the past—using the device of the Speaker's certificate and the way that the courts have behaved, even in the relatively recent past—we thought it a very small risk and, on that basis, we were content to proceed.

Q160 ***Lord Goldsmith:*** Content, as it were, to take that risk. You have said more than once that you therefore went for the route of the tried and tested formula, but I do not believe that the language which is used in the Bill is the same as that, for example, in the Parliament Act, which specifically says that the certificate shall not be questioned in any court. Is there a reason why the language is not the same?
Mark Harper: It simply uses a more modern drafting style, using the more recent precedent where the same language was used in the House of Lords Act, which this Committee's Chairman steered through the House of Lords and which uses that formulation rather than the other one. There was no particular policy decision. It is simply that we have used a more up-to-date form of language from that which was in the Parliament Acts. We think it has the same policy effect.

Q161 ***Lord Hart of Chilton:*** Let's assume that there's a fixed-term Parliament and that it is dissolved by one of the two ways of doing that. Why should the clock be reset for a full and new five-year term rather than the rump of the term being served by that new Parliament? The latter would act as a disincentive for any contrived end of the government.
Mark Harper: We thought about this. There is no rule here; it was a judgment issue. We thought about the two options and both have their merits. We came down on balance for the view that you would reset the clock, for this reason: we felt that the public would think it odd if you were to have an early election and the public were to make a clear decision about a government—perhaps returning it with a good majority—and then, a very short time afterwards, you were to ask the public to go back and vote all over again. I recognise the point you make: you could argue that it would be an incentive for a government to have an early election and give itself another full term, but with the provisions in the Bill that make it very difficult for a government to do that, on balance we have taken the view that resetting the clock is the right one. It is arguable and it is a balance, but we felt that the balance was better in saying that if a government has been returned with a majority, it should get the full term and you should effectively reset the clock.

Q162 ***Lord Renton of Mount Harry:*** On other issues, Clause 4(1) states that the Monarch's power to prorogue Parliament is not affected. One slightly wonders why this clause has been included at all. What is the basis for not legislating on the prerogative part of the power to prorogue? One says that against the background that an incumbent government in Canada, in order to avoid facing a vote of no confidence, thought of proroguing their Parliament.
Mark Harper: I think that the reason was that the changes made to the Royal Prerogative in this Bill are the minimum changes necessary to achieve the policy effect; they do not change the prerogative more widely. In effect, we have kept the prorogation powers as they are now. The risk that you highlighted, which was also brought up in the debate, is what happened in Canada. That is theoretically possible now. The convention that if the opposition want to table a motion of no confidence the government make that time available has worked well in the past. Although it was a theoretical risk we did not think it was a practical risk. If a government were so minded, it could not prorogue the House for a significant period as they need the House's power to continue in government. Although that was a theoretical risk, we did not think it a practical one
Lord Renton of Mount Harry: In general terms, it would not go down at all well if the government tried to do this.
Mark Harper: No. Part of the check here is a political one. If the government were abusing procedure to prolong its period in office artificially, there would be a reckoning when it eventually sought a mandate from the public. As I said, there is a theoretical risk but we did not think it a realistic or practical one.

Q163 ***Lord Shaw of Northstead:*** The Parliamentary Voting Systems and Constituencies Bill provides for reviews of constituency boundaries every five years. How do the Government propose to ensure that the reviews are aligned with elections under the Fixed-term Parliaments Bill? Do the Government envisage amending the review period if the two cycles move out of synch in the future?

Mark Harper: We thought about this carefully when we were considering both Bills. We took the view that the present position is that boundary reviews under the current cycle are not synchronised with parliamentary terms. Sometimes boundary reviews have taken place very near to a general election and sometimes they have been much earlier in the Parliament. We did not think that it was absolutely necessary to synchronise them. You will know that the Parliamentary Voting Systems and Constituencies Bill sets out that we want boundary reviews once every five years—broadly once per Parliament—but I do not think that it is that important that they are absolutely synchronised. We will see how it works. We thought about it and did not think it necessary to synchronise the reviews in the two Bills.

Lord Shaw of Northstead: So it is open to discussion. We will see how it works.

Mark Harper: Yes. It is not currently the case that they are aligned, so we did not think it important to align them or make provision in this Bill or in the Parliamentary Voting System and Constituencies Bill to tie the two together.

Q164 ***The Chairman:*** Since it has been mentioned, we shall just raise one or two questions about the Parliamentary Voting System and Constituencies Bill. It has now cleared the Commons so we await it here. You are reviewing the boundaries in a very quick period of time. What is the justification for moving so quickly?

Mark Harper: First, we are reviewing the boundaries in a very quick period only compared to our present practice. It is not particularly quick internationally. The key reason is that the boundaries on which this year's general election was fought were based on electoral registration data dating from 2000, so they are a full decade out of date. The Government's view is that that is just too slow and we wanted to speed up the process. If the Bill gets Royal Assent, the boundary commissions will have to report by October 2013. They are confident that they can do a boundary review consistent with all the normal provisions in that period. That is why we have made changes to remove local inquiries but increase the amount of time available for people to submit written representations from one month to three months. We think that that strikes the right balance and enables a review to take place more quickly, and for subsequent reviews to happen once per Parliament, which will keep boundaries much more up to date and in line with where electors actually live.

Q165 ***The Chairman:*** So your argument would be that the current disparity in size would justify moving quickly in time for the next election rather than, say, making provision now but giving more time for the Boundary Commission, so that the changes took effect for the election after next, which would give Members themselves more time to prepare for changes?

Mark Harper: We think the process for boundary reviews should be quicker, but also that it should happen more frequently, so that boundaries are kept more in line with shifts in electors than has previously been the case. Clearly, the first review will be a significant one; partly because it is a reducing review, reducing the size of the House of Commons; but also, by making parity the primary determinant, we will be dealing with the areas of the country which are currently overrepresented. Subsequent to that, the trade-off for Members of the House of Commons is that boundary reviews will be more frequent but less disruptive, because we will be keeping boundaries more aligned with population moves, so the shifts will be smaller but more frequent.

Q166 ***The Chairman:*** So there will be fewer disappearances of constituencies once the big change has taken place?

Mark Harper: Yes, once the big change has happened, we will keep them aligned, so we will have more frequent, smaller changes, rather than saving them all up for a really significant change on a less frequent basis.

Q167 ***Lord Crickhowell:*** I understand that argument, but on this occasion some of the changes are going to be very substantial indeed. I mean, Wales, for perfectly understandable reasons, is facing a very large reduction of about 25 per cent in the number of seats—creating, incidentally, some extremely difficult alignments for the Boundary Commission to undertake if it is to keep the kind of connections which are thought to be desirable with social and historic boundaries. Candidates are going to find themselves with totally different constituencies and an extraordinarily short time to set up associations and organisations to fight elections. The Welsh Committee has already commented on this. Isn't it a terribly tight timetable for such a radical transformation of constituencies?

Mark Harper: You have picked up two issues there. The first one you alluded to was the significant change in the number of Members of Parliament who will represent Welsh constituencies. Yes, it is a significant change, but it is because Wales is currently the most overrepresented part of the United Kingdom. We have had a significant amount of debate in the House of Commons about this—and a significant amount of debate about Wales, among all the constituent parts of the UK, both because the Labour Front-Bench spokesman is a Welsh Member of Parliament and because the Welsh Members of Parliament have taken a considerable interest in the

debate. The fact is that it is about treating all parts of the United Kingdom fairly, and it is just not justifiable that there are significant number of seats in Wales where Members of Parliament represent only 50,000 constituents. That is an enormous disparity with the rest of the country. It is simply not justifiable. In fact, in the debate, we have not heard any good reasons, apart from sticking with the status quo, why that should be the case.

Lord Crickhowell: As a former Welsh Member, I am not going to press that case, so you need not argue with that.

Mark Harper: That is the view that we have taken. Clearly it is controversial, but I think it is treating all parts of the United Kingdom fairly. On your point that it is a significant change and about the timetable, the reason why we set the timetable for the Boundary Commission to report in October 2013 is that that will enable them to report by that date, for the Order in Council to be moved, the House to approve the boundaries so that they are final and to give the parties time to select candidates and get them in place in the early part of 2014, with a year or so to go before an election in 2015. That is a challenging timetable, but we think it is deliverable, which is why we have set the timetable that we have. I don't think there is any way of avoiding the fact that we are doing a reducing review, reducing the size of the Commons, and dealing with some of the significant disparities, making seats of more equal size across the country, is going to lead to a significant amount of change in those constituencies. I don't think there is any way you can avoid that significant change or make it easier by spreading it over a longer period of time. I think you have to accept that there is going to be a significant amount of change and get on and do it. I am sure that Members will rise to the challenge.

The Chairman: You mentioned that the change in the boundaries also ties up with reducing the size of the House. Lord Hart has a question on that.

Q168 ***Lord Hart of Chilton:*** What was the evidence base for choosing 600? Both parties to the coalition had different numbers in mind. Was this just a horse trade or was it rather a sophisticated process? There does not appear in any of the debates to be evidence for why 600 was chosen. Would it not have been better to have carried out a process of looking at MPs' functions, which would be a rather more focused view of what the House of Commons should be up to, rather than going for 600 on no evidence?

Mark Harper: The view was this. The Conservative Party had a proposal based on the existing electoral system to reduce to 585. That was not a scientifically calculated number because it represented a 10 per cent reduction in the size of the House. The Liberal Democrats had in mind a much sharper reduction to 500, but that was based on a change to the single transferable voting system. We didn't just take the two and come up with an answer. We looked at our own proposal—600 is not a magic number. There was a balance between the size of a constituency that would allow Members of Parliament to carry out the work they do. With a very much smaller House, constituencies would be significantly larger than traditionally we have been used to, and that would change the nature of the role. The size of House we have settled on comes out broadly in line with the numbers on the last electoral register, at an average size of 76,000. It means that a third of the House already represent constituencies of that size. On balance, we felt that that was about the right number. It would not qualitatively change the nature of the representative role that Members of Parliament carry out. I am not going to pretend that there is a magic science to this. It is a judgment. We felt that a reduction was necessary and, at just over 7 per cent, this is a fairly modest one. There was no scientific process to it because it was a matter of judging the balance between two competing forces. We think that we have the balance about right.

Q169 ***The Chairman:*** How do you respond to the concern that, by abolishing the local inquiries, the number of applications for judicial review of Boundary Commission recommendations might increase?

Mark Harper: The view we have taken is that we want local people to be able to express their views to the Boundary Commission and to give the commission evidence to consider. We think that a lengthened process of written representations makes it perfectly possible for that to happen. Quite a lot of the academic evidence on local inquiries makes the point that they are largely exercises in political parties putting forward their points of view. While there are exceptions, they are not generally vehicles for ordinary electors to be able to put forward their view. We feel that a longer period for written representations is a different process, but it is perfectly satisfactory for ensuring that the boundary commissioners have had people's views made available to them. It is a process that is used elsewhere. Although the timetable for the review sounds challenging in our context, if you look at what happens in other countries such as Australia, which by comparison is much pacier, we are still going at a fairly leisurely pace. The boundary commissioners are content, based on the provisions in the Bill and the resources they will have, that they can deliver what we have asked them to within the timetable.

Q170 ***Lord Renton of Mount Harry:*** If I understood you right, on the question of the number of MPs, you said that the Liberals were thinking of 500 MPs

because of the single transferable vote. What difference would that make?
Mark Harper: Lord Hart's question was about whether we had had a horse-trading exercise and I said that we had not, because although both parties in the coalition had set out proposals to reduce the size of the House, the Liberals' proposals were not just on the current arrangements but were about changing the system completely and moving to larger, multi-Member constituencies with the single transferable vote. The two systems could not be traded off against each other because they were qualitatively different.

Q171 ***Lord Renton of Mount Harry:*** I was really wondering why the single transferrable vote should mean fewer constituencies. What you are saying is that the Liberals had two things to say. It wasn't really that one meant the other.
Mark Harper: Not at all, no. I was making the point that both coalition parties thought that the number of Members of Parliament should be reduced. I raised the issue of the single transferable vote just to say that this was not about there being two numbers that, with other things being equal, we traded off against each other. It was not that kind of discussion. That was the point I was trying to make. I clearly didn't make it very well.

Q172 ***The Chairman:*** The other provision of the Bill provides for a referendum. How confident are you that there will be time, given that the Bill has yet to complete its parliamentary passage?
Mark Harper: It is not giving away a secret to say that the timetable is challenging. The Electoral Commission—obviously, it has an important role to play, because its chairman will be the chief counting officer—has set out in evidence to the Commons Constitutional Reform Committee that it wants the key important sense of the rules to be settled six months before the election. Obviously, that is before your Lordships get to consider the Bill, but I do not think that that fetters your ability to amend the Bill. All the key provisions around the date and the question have been debated and voted on by the Commons. The Electoral Commission has been working closely with our officials and will clearly take a very close interest in the parliamentary passage. If there are areas where the House of Lords, doing its usual excellent job of scrutiny and revision, thinks that there are things that would make the conduct of the referendum smoother or work better or in other ways could be improved, I am sure that the Electoral Commission will follow that as we go along. I do not think that that would be insuperable. The point that it made was that, if your Lordships made significant changes, it would have to consider those and come back and express a view about what that meant for the conduct of the referendum. We will have to see how the debate in the House of Lords proceeds.

Q173 ***The Chairman:*** When you say significant changes, do you have any examples of what would be significant as opposed to not so significant?
Mark Harper: Those are matters of judgment. The Electoral Commission has been working closely with our officials and will no doubt take a close interest in what goes on in this House. I know it will provide briefing for Members of the House of Lords as the debate proceeds at each of its stages. We will see what happens.

Q174 ***Lord Crickhowell:*** I have a different question. I am in favour of reducing the number of MPs, but if you don't reduce the number of Ministers and PPSs, you are actually strengthening the Executive. Clearly, at some point you will have to face this. There will be great pressure on you to do so. Are you going to face up to it while we are dealing with the legislation? What is the Government's position?
Mark Harper: I think your point is very well made. In one sense, the Government have a difficult argument. We accept that there is a problem that needs to be dealt with, but we do not think that this Bill is the right vehicle to do it in. I know that that provokes some cynicism. "Well, he would say that and they're not going to deal with it". I would say two things. First, I think that the Government have demonstrated, both by the previous discussion we have had where the Prime Minister has given up a significant power and by the steps we have taken in the Commons to pass power to the House—setting up the Backbench Business Committee, the election of Select Committee chairmen and carrying out a lot of the Wright committee recommendations—that we want to strengthen Parliament. The reason for looking a little wider is that the debate we had in the Commons and the clause we voted on affected only the number of Ministers. If you only look at it narrowly, it did not look at prime ministerial patronage as a whole. It would not, for example, have affected the number of PPSs. It would not have looked at the balance in ministerial ranks between those Ministers who are Members of the House of Commons and those who are Members of the House of Lords. So it would not have looked at that balance. There is also an argument on which, interestingly, I had a debate with Chris Mullin, who wrote in the first volume of his memoirs about how he felt as a junior Minister work was created in order to keep him busy. But he acknowledged that there are some parliamentary innovations which the last Government made which have been very valuable—for example, the Westminster Hall debates we have had, which have generally been a success. But they

impose a burden on the Government in terms of Ministers to respond to them and you have to take ministerial accountability into account. The Government's position is that we want to deal with this issue, but you have to look at the size of government and the balance between the two Houses. There is an argument that you do not just deal with Ministers, but you look at all the other positions. All you do if you deal only with Ministers and do not look at PPSs and other roles that might be created that are considered to be on the payroll is squeeze one part of the balloon and patronage will just appear elsewhere, perhaps in a less accountable form. The Government want to deal with it and recognise the issue. We will bring forward proposals during the Parliament, but we do not think that dealing with it in this Bill is the right vehicle.

Q175 ***The Chairman:*** The statute at the moment only deals with Ministers, so I am not sure how you can deal by statute with people such as Parliamentary Private Secretaries. You can devise any old status for a Member and say that it somehow binds you to government.
Mark Harper: That is one of the things we want to consider. If the concern of the House is about patronage—and that is the concern, rather than Ministers—but if there is a pressure, which may be for perfectly valid reasons, for people to carry out government business and you artificially constrain it in one area, all you do is to force something else to happen. During the period of the previous Government, we saw roles being created such as regional Ministers, assistants to regional Ministers and special envoys, all of whom were considered to be on the payroll—or they did not have any pay. There is an argument that, during this Parliament, we could have a debate about the size of the Government and the role of Ministers, looking at it in the round rather than focusing on one particular narrow aspect of it. There will be legislative opportunities during the Parliament. The Government don't have a closed mind on this. They recognise that there is a problem and want to solve it but did not think that just solving it in that narrow way, by looking at the number of Ministers in the Commons, was the right way to deal with it. There may well be a partly legislative and partly non-legislative solution. That is the long answer.

Q176 ***Lord Goldsmith:*** May I make a request rather than asking a question? Earlier, when members of the Committee were asking you about consultation, you referred to opinion polls. I, for one, would find it very helpful—it may be that others would not—to see what opinion poll or polls you had in mind, so that we can understand to what extent this has been the subject of public debate. Would you be able to provide us with the opinion poll?
Mark Harper: On which aspect—the fixed-term Parliaments?

Lord Goldsmith: On fixed-term Parliaments, I am not sure what it is that you say is to be found in the opinion polls. That is part of the reason I would like to see what it is.
Mark Harper: OK, fine.

The Chairman: The only other point I would make on the discussion we were just having, from a suggestion that was made to me, is that rather than referring to the payroll vote—because you have already indicated that quite a lot of the so-called payroll vote is not paid—it should be simply referred to as the jobsworth vote, which I think is more encompassing. Anyway, Minister, we are very grateful for the time that you have spent with us and for the ground you have covered. That has been extraordinarily helpful to us and, from what you were saying earlier, we will be hearing from you on one or two other points that we have raised with you as well. We are very grateful indeed for your being with us today. It has been extremely helpful for our purposes. Thank you very much.
Mark Harper: A pleasure, and thank you very much for the invitation.

Supplementary letter from Mark Harper MP, Minister for Political and Constitutional Reform (FTP 44)

At the evidence session on 3 November I undertook to respond in writing to points raised by Lord Norton and Lord Goldsmith.

Lord Norton asked about clause 2(2) of the Bill.

Clause 2 of the Bill sets out the circumstances in which an early parliamentary general election can be held. Those circumstances are:

— where two-thirds of all MPs vote for an early election (subsection (1)); or

— where a vote of no-confidence in the Government has been passed and a Government has not been able to secure the confidence of the House of Commons after 14 days (subsection (2)).

The purpose of clause 2(2) is to prevent the possibility of a Government having to continue in office where it cannot command the confidence of the House of Commons, but where the House refuses to dissolve Parliament.

Lord Norton asked whether a Government could resign following a vote which had not been formally declared to be a vote of no confidence, and whether if they did so, this would trigger the 14 day period. Following this point, Lord Goldsmith noted that in a situation where no certified motion of no confidence were passed but a Government still chose to resign, a process of Government formation would still have to take place, and wondered which provision in the Bill would enable that to happen. Under the provisions of this Bill, it is not for the Government to decide that a motion is a motion of confidence for the purposes of clause 2(2). The issuing of a certificate is a matter for the Speaker. There is nothing in the Bill that prevents a government resigning; the Bill is about the length of a Parliament. If a government decided to resign when the Speaker had indicated that he was not minded to issue such a certificate, then the 14 day period would not be triggered although, as I said to the Committee, a period of government formation would obviously follow. It would just not be time-limited. Because of the very firm convention that the Queen should not be left without a functioning government, in practice, the outgoing government would not formally resign until the Queen was in a position to appoint a replacement Prime Minister.

Lord Norton also enquired whether this clause would allow an incumbent Government to re-group and remain in office following a certified vote of no confidence.

Subsection 2(2) of the Bill does not rule out the possibility of an incumbent government which has lost a no-confidence vote and thus started the 14 day period from subsequently securing the confidence of the House within that period and so continuing to govern.

It is not our intention that the Bill should rule out the possibility, however unlikely, of the House changing its mind within the 14 day period and deciding nevertheless to support the current Government. Therefore it will be for the House of Commons to decide whether to endorse an incumbent Government following a vote of no-confidence.

I also undertook to write in response to Lord Goldsmith's query about opinion polls which showed public support for establishing fixed terms.

A survey conducted by Populus for *The Times* (published 30 May 2009) found that 74% of those surveyed supported the establishment of fixed terms.

A poll conducted by ICM research for *The Sunday Telegraph* (published 26 May 2010) found that 63% or those surveyed supported the establishment of fixed-terms.

A survey by the Scottish Youth Parliament (conducted in August 2010) found that 76.4% of young people surveyed were in favour of establishing a fixed term for the UK Parliament.

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