



House of Commons
Political and Constitutional
Reform Committee

**Fixed-term Parliaments
Bill**

Second Report of Session 2010–11

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

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The Political and Constitutional Reform Committee

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Summary

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

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

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

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

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

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

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

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

1 Principle and process

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

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

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

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

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

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

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

2 See paragraphs 24 to 32

3 Qq 12–14

4 Professor Robert Hazell (FTP803), para 2.2. See also Hansard Society, para 26

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

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

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

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

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

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

5 Professor Robert Blackburn (FTP04), para 37

6 Professor Anthony Bradley (FTP05), para 5

7 Qq 33–34

8 Qq 58, 91

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

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

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

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

2 Clause 1: The length of the fixed term

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

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

Going with the constitutional grain

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

10 Qq 1–57

11 Qq 58–91

12 FTPB03

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

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

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

Precedent

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

The balance between four and five years is more even than folk memory might suggest. But those parliaments which lasted for five years did so because the government had become unpopular and did not want to hold an earlier election. The Prime Minister stayed on hoping that his or her party’s luck might change. It did not, save for the case of John Major, who scraped through with a narrow majority in 1992.¹⁶

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

Enough time to govern

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

14 HC Deb 21 February 1911 c1749

15 Professor Robert Hazell’s written evidence (FTPB03) provides a fuller analysis of the length of Parliaments since 1945. See figure 4.2.

16 Professor Robert Hazell (FTPB03), para 4.1

17 Q 63

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

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

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

Conclusion

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

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

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

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

18 HC Deb 21 February 1911 c1749

19 See also Professor Robert Hazell (FTP03), Summary, Professor Dawn Oliver (FTP02), para 3, Hansard Society, para 22, Scottish Youth Parliament, para 3.7.

20 Professor Robert Blackburn (FTP04), para 20

21 Professor Anthony Bradley (FTP05), para 7

Professor Blackburn also told us in oral evidence that there was an “irony”²² to a Government committed to making the country’s political systems more accountable²³ proposing five-year parliamentary terms, in that they would make general elections—in his words, “for most people, the one occasion when they participate in the political process”²⁴—less frequent than they are now.

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

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

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

3 Clause 2: Premature ending of a fixed term

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

22 Q 65

23 The Coalition: Our programme for government, p 26

24 Q 66

25 Professor Robert Hazell (FTP03), para 4.2

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

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

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

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

Impact on parliamentary privilege

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

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

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

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

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

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

26 Clerk of the House (FTPBO1), paras 17–18

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

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

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

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

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

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

27 Qq 19, 27

28 Professor Robert Hazell (FTP03), para 9.2

29 Professor Robert Blackburn (FTP04), para 28

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

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

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

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

Alternatives to a super-majority

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

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

Keeping the clock ticking following an early general election

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

30 Clerk of the House (FTP01), para 28

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

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

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

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

Ensuring cross-party agreement to an early general election

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

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

31 Professor Robert Blackburn (FTP04), para 27 (d)

32 Professor Dawn Oliver (FTP02), para 4

33 Professor Robert Hazell (FTP03), para 7.7

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

Motions of no confidence

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

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

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

45. Professor Hazell suggests an alternative scenario:

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

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

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

35 Professor Robert Hazell (FTP B03), para 7.3

36 Professor Dawn Oliver (FTP B02)

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

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

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

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

37 See House of Commons Standing Order No. 13.

38 Professor Robert Blackburn (FTP04), para 35

39 HC Deb, 5 July 2010, c32

4 Conclusion

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

Conclusions and recommendations

Principle and Process

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

The length of the fixed-term

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

Premature ending of a fixed term

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

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

Conclusion

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

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

Formal Minutes

Thursday 9 September 2010

Members present:

Mr Graham Allen, in the Chair

Mr Christopher Chope
Sheila Gilmore
Simon Hart
Tristram Hunt

Mrs Eleanor Laing
Catherine McKinnell
Mr Andrew Turner
Stephen Williams

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

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

Paragraphs 1 to 51 read and agreed to.

Summary agreed to.

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

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

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

[Adjourned till Tuesday 14 September at 9.45 am]

Witnesses

Tuesday 7 September 2010

Page

Dr Malcolm Jack, Clerk of the House of Commons

Ev 1

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

Ev 12

List of written evidence

1	Dr Malcolm Jack, Clerk of the House of Commons (FTPB01)	Ev 23
2	Professor Dawn Oliver, University College London (FTPB02)	Ev 27
3	Professor Robert Hazell, University College London (FTPB03)	Ev 29
4	Professor Robert Blackburn, King's College London (FTPB04)	Ev 58
5	Professor Anthony Bradley (FTPB05)	Ev 64
6	Professor Justin Fisher, Brunel University (FTPB06)	Ev 66

List of Reports from the Committee during the current Parliament

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

Session 2010-11

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