



HOUSE OF LORDS

Revised transcript of evidence taken before
The Select Committee on the Constitution
Inquiry on
FIXED-TERM PARLIAMENTS

Evidence Session No.1. Heard in Public. Questions 1 - 43

WEDNESDAY 6 OCTOBER 2010

11 am

Members present

Baroness Jay of Paddington (Chairman)
 Lord Crickhowell
 Baroness Falkner of Margravine
 Lord Goldsmith
 Lord Hart of Chilton
 Lord Irvine of Lairg
 Lord Norton of Louth
 Lord Pannick
 Lord Renton of Mount Harry
 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 courts². 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

¹ Page 121

² Page 119

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.

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 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,

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

⁴ *Ibid*, para 12.

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?

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.