



# HOUSE OF LORDS

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

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10.45 am

Witnesses: Dr Henry Milner, Professor Stephen Padgett

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## Members present

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

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## Examination of Witnesses

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

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

**Henry Milner:** Thank you very much for inviting me here. It is a great pleasure to have a chance to be in this building and to discuss this important subject with you. I am not a constitutional expert per se. My work has been on political participation, but at a certain point I realise that political institutions have much to do with political participation. I have written several articles and I have just written two books on the subject, drawing a link between certain aspects of institutions, electoral systems and so on, and political

participation. If I have a chance I want to make some arguments in relation to fixed voting dates. A link can be drawn between fixed voting dates and possibly higher levels of political participation in a period when that is a real issue. I have written about Canada in several articles, as was mentioned, but I am also a specialist in Scandinavia. Some Scandinavian experience is relevant here as well. Thank you again for having me.

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

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

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

**Stephen Padgett:** I think the German case is certainly relevant to your Lordships' considerations, but the design of the fixed-term Parliament in Germany was made in 1948-49, against a particular set of historical circumstances and the constitution-makers were motivated by those circumstances. Governments in the Weimar Republic, as I am sure your Lordships know, were highly vulnerable to negative parliamentary majorities. In large part, the constitutional arrangements that Germany adopted were designed to protect Governments from such circumstances.

I think the considerations that have motivated the proposals for a fixed-term Parliament in this country are rather different, so the particular processes that Germany has may not be ideally suited to the political circumstances. However, I think the processes and how they have worked in practice are relevant to the considerations of this House.

**Q46 The Chairman:** Professor Milner, drawing on your experience, do you believe that there are some absolute advantages to a fixed-term Parliament?

**Henry Milner:** I hate to use the term "absolute advantages", but on the whole, under current circumstances, there are two things that I would draw your attention to, neither of which are specific to the questions being raised here. Those are how you do that and how you deal with the particular technical aspects. I know that there is a lot to talk about but I am just talking about the general idea at this point.

My starting position is that if we agree that the general idea is good, we can find technical ways of doing it in the best possible way. It is good for two general reasons. One is that, given the rising cynicism towards politics, which we have all encountered and which is pretty universal, the very idea that an election should be the property of a politician, to call when he or she sees fit, rather than something that belongs to people and the laws of the nation so that the nation says, "This is when our election takes place. This is when we choose our Government", seems to me rather difficult to argue in principle, especially today. One may

go back to the constitutional tradition but people today do not think in the way that I have articulated. When you have a sense that politicians are calling elections for their own reasons, rather than as a genuine democratic exercise, whether that is true or not, it feeds into this kind of cynicism. We see that in lower turnout and the expressions of alienation. It is a minor point but the kind of point that makes a difference. On balance, countries that have fixed election dates are less likely to have this kind of cynicism.

**Q47 The Chairman:** We have seen some evidence, particularly from Australia, where the countervailing mood is that if you have a fixed-term arrangement it prevents the populace, who may be angry with the Government, having any chance of getting rid of them before a particular time.

**Henry Milner:** In Canada, we now have a situation where we would probably have elections more frequently except that the population really do not like the idea. Because the politicians have partisan disagreements among themselves, we have a minority Government, without a coalition such as you have. Every day there seems to be another moment of some disagreement that might result in an election. The population's attitude is quite the opposite. It is that, "You are there for a certain period of time: get along". It is one of the reasons why we are not having elections, despite the fact that there is all this desire to do so. So, on balance, I do not think so. When we get to length of term being five years, that is another matter, but if it was a four-year term, as it is almost everywhere, including Germany, that would not be very worrisome.

The second argument – I will be very quick – is quite specific, but it concerns an area I have been working in. Think of civic education, very widely defined, as a way to get young people interested in elections, and of helping teachers in schools, and making it easier for them to do their job. If you know the date of an election in advance, it is much easier to organise a whole series of activities around that election. In my last book I look at Norway, which is a

very good example of this because of the student vote process that happens in the schools and what goes on in civic education classes at the time of elections. None of these things would be easy to do, or even possible, if the date of the election was not known in advance by everybody in Norway. It is a small point, but it could make a difference.

**Q48 Lord Norton of Louth:** Coming to the detail, because you are looking at the principle of whether we should have a fixed-term Parliament, if one does there is the issue of whether it should last for five years, four years or whatever. The other element that we are looking at is, if there is a premature dissolution of Parliament, whether the remainder of the term should be served out by whoever is then elected, or whether, after the premature dissolution, the clock is reset and the Government then serves for the set period thereafter. Drawing on your experience, which of those do you think is the desirable option?

**Henry Milner:** I will start on that. I guess one of the reasons I was invited here is that I wrote a paper several years ago, looking at the experience of different countries. I do not think it makes all that much difference. The case of Norway is the most extreme. Essentially, you cannot even have a premature election. Typically the choice is between keeping the original next election date as it is, as in Finland, or as in the proposal here, for it to be five years later. Working on the premise that it would be four years, I would argue that the principle here is not wrong. I could imagine a compromise that said that if the dissolution was in the first two years of Parliament, the original date should be maintained, but if it was in the second two years of Parliament, the election should be four years from that date. That would be a technical compromise but it not one about which I have a strong opinion either way.

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

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

**Q50 Lord Powell of Bayswater:** I seem to remember that it was Britain that drafted the German constitution, so perhaps some would say that it is another example of our knowing how to run other countries better than our own. Coming to the issue of five years versus four years, we would be interested to know both of your views on which is more appropriate for the UK. One can see advantages either way. Five years is familiar and enshrined in practice. It gives the Government plenty of time to get its legislation through. On the other hand, people vote less frequently and, speaking as a former civil servant, the last year of the five is wasted by politicians getting ready for elections. What would your view be?

**Stephen Padgett:** First of all, it is not quite correct to say that Britain drafted Germany's constitution; Britain and the Allies oversaw the drafting but it was Germans who drafted it, with German historical memories.

In relation to the term of a fixed-term Parliament, I feel very strongly that five years is too long and there would be a serious danger that a Government would come to the end of its useful life before the end of a five-year term. If there were no safety valves or if they were tightly constrained, that could lead to a period of hamstrung Government towards the end of its term. Alternatively, if there were safety valves, it could lead to frequent premature

dissolutions, which would not be a positive thing and would really defeat the object of the fixed-term Parliament.

**Henry Milner:** Very few countries comparable to Britain have five-year terms. Very few democratic countries, period, have terms that long for their legislature.

**Q51 The Chairman:** Do any of the fixed-term Parliament countries have five-year terms for central Government?

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

**Q52 Lord Powell of Bayswater:** We tend to be a bit different from others. What would you say was the disadvantage of four-year terms?

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

**Q53 Baroness Falkner of Margravine:** As I recall, the European Parliament has five-year terms. That has a much bigger electorate than any of the individual countries. What would your comment about that be? Is that not a perfectly workable model?



**Henry Milner:** Unfortunately, as I don't have to tell you, the European Parliament is – what do we call it in political science? – a second-level Parliament. It is not one that people identify with primarily. You can see that in turnout numbers. Frankly, I would not start from the European Parliament. I think it is a real problem to have a Parliament where the turnout is always less than 50%. It is very difficult for that institution to claim legitimacy. I am not saying that it would make a difference if its terms lasted four years rather than five, but an illegitimate institution is not a good example for others.

**Q54 The Chairman:** Professor Padgett, do you have a comment on that?

**Stephen Padgett:** I think the critical difference between the European Parliament and any national Parliament is the absence of that direct link between the Parliament and the Government. The five-year Parliament does not imply a five-year term of Government.

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

**Henry Milner:** Actually, somewhat more often than we think. Denmark has had more frequent elections than Italy, but Italy has had much more frequent changes of Government. That is the major difference.

**Lord Goldsmith:** And France?

**Henry Milner:** In France, the President can dissolve Parliament pretty much as he wishes. I am not an expert on France per se, but my impression is that it has happened reasonably frequently. Again, that is not a model applicable to the British constitution.

**Q56 Lord Norton of Louth:** I wanted to link the answers to both questions. It strikes me that there is a possible relationship between the length of the term and whether, if there is a premature dissolution, the Government should fulfil the rest of the term or the clock should start ticking again. Presumably, the longer the term, the stronger the argument for

fulfilling the remainder of the term. If the fixed term is shorter, arguably the clock should be reset. Would you agree with that?

**Henry Milner:** Yes.

**Stephen Padgett:** I think I would, too.

**The Chairman:** One of the other issues that has been raised in debates about our proposals is the question of how you combine an election at the national level with one at the devolved level, as in Canada and Germany. I know Lord Crickhowell wanted to raise this point.

**Q57 Lord Crickhowell:** Sticking with political participation, what is the experience in Canada, Germany and other countries in respect of federal elections being held at the same time as provincial or local elections? Do dual elections increase turnout or not? What is the experience if the electoral system is different at one level from the other? For example, in Wales, if we had the proposed system it would be different from that of the Assembly election on the same day. Does that cause confusion and spoilt ballot papers? There are two issues, really. I was hoping to start with Professor Milner because you said you were the great participation expert. Are we likely to get more or less turnout by combining the elections at each level?

**Henry Milner:** Neither Canada nor Germany are especially relevant in this case because the provinces set their own dates for elections and now several of them have become fixed, so we cannot take that into consideration. There is no case of a fixed date of a provincial and federal election coinciding exactly. We have not reached that point. At some point I will talk about the experience, or failed experience, of the fixed election date law in the federal Parliament of Canada. We do not really have any experience of that in Canada. I think it is pretty much the same in Germany.

To compare Sweden and Norway, neither is a federal country but they have regional and local governments. In Sweden, all elections take place on the same date every four years. That is when all three levels are elected. In the case of Norway – this is more common – there is a mid-term election halfway through the term, which is when the local and regional levels are chosen. My preference is for the Norwegian system. The advantage of the Swedish system is that you get higher turnout in the local and regional elections, because once people show up to vote in national elections, they will also vote in local and regional elections. However, they do not pay much attention to them. Local issues really disappear from political discussion.

Secondly, four years without elections is a long time for the kind of things that I am talking about, such as getting people interested and involved, and use in civic education. So my general tendency is to try to find a way in which elections take place every two years, with national elections taking place on a given date and other-level elections taking place two years later. I am not saying that applies in this case, because you have specific rules regarding Scotland, Wales and Northern Ireland but, if possible, moving towards that system is the most effective compromise.

**Q58 Lord Crickhowell:** On the confusion issue, if you are being asked to vote on an AV system, while on the same day you are voting to elect people to the Welsh Assembly on an entirely different system, is this likely to cause confusion, or do you think not?

**Henry Milner:** There really are not many examples of that that I can think of, so I cannot give you a very informed answer. My guess is that it would probably be something of a problem, so it would be worth avoiding if possible, but people do learn and adjust. I would not throw the whole thing out because at one point you end up with people voting in two different kinds of system.

**Stephen Padgett:** The German case does give some examples of this, but relatively few. Three state elections took place on the same day as federal elections in 1994. There was also one in 2002. The 1994 case was quite interesting because it was a period when participation in the eastern part of Germany was very low. The turnout in the state election in the two eastern states was 10 to 15% higher than in Land elections that had taken place in eastern Germany previously that year. There is clear evidence there of increased turnout. Generally, the German state electoral systems are rather similar to the federal electoral system with the one exception of Saarland, which coincided in 1994. As far as I recall, there was no widespread confusion over different electoral systems, though it has to be said that the federal system is well known and the Saarland system is rather simple, with just one ballot being cast, so it is understandable that there was little confusion. I think the UK provides the example of confusion in the Scottish elections.

**Q59 Lord Crickhowell:** It is very easy for an elector to distinguish between purely local government issues and central government issues. It may be more difficult to distinguish between Scottish Government and Welsh Assembly issues and central government issues. Therefore, I think there is a real fear among Assembly Members, for example, that their election may be decided by the popularity or otherwise of the UK Government, rather than by their own performance.

**Stephen Padgett:** The German case would certainly suggest that that is the case. Where state elections have coincided with the federal election, the federal election's issues and campaigns have totally engulfed the regional campaign.

**Q60 The Chairman:** Is there a determination by people within the German system to try to avoid this potential conflict, or is it something that is not discussed? It is already being discussed here, as you say, particularly in relation to the Scottish example from 2007.

**Stephen Padgett:** I do not think it has been a major issue either way. It has occurred almost randomly through the terms of Land Parliaments, which are fixed, drifting towards the federal elections because of premature dissolutions or whatever else. If a Land election was going to be timed very close to a federal election, it would probably take place on the same day for, I would guess, administrative convenience. Politically it is not a major issue in Germany.

**Q61 Lord Renton of Mount Harry:** I apologise for arriving late. I am not certain how relevant my question is. If it has already been answered, forgive me. What is your view about compulsory voting, particularly for parliamentary elections? I remember that when I went to Australia there was compulsory voting. You were fined if you did not vote. I was always interested in how little Australians resented this. If anything, they were rather for compulsory voting. What are your views?

**Henry Milner:** I looked at this issue in my last book and I tried to find evidence of compulsory voting, beyond getting more people to vote than otherwise would. We know that it has that effect in Australia, Belgium and so on. The question is, does it make those people who vote because of compulsory voting more likely to seek more information, so that they vote in an informed manner? There is some evidence from simulations and experiments that we have tried. We have not really found that to be the case. It seems to be that you get more voters but not necessarily more informed voters. So I tend to be sceptical.

I do not oppose it under all circumstances. If democratic legitimacy reaches a point where fewer than half the people are voting regularly, to the extent that the legitimacy of the entire system is called into question, just getting more people to vote is something valuable. I do not like it as a general solution to the existing situation because it papers it over. It does not get us more active and interested citizens; it just gets us more people who vote because

they have to. We have to look at how we get more active and interested citizens who will vote not because they have to, but because they are interested and attentive to what is going on. That is what my book is about. In a sense, compulsory voting is a band-aid solution.

**Stephen Padgett:** I defer to Professor Milner on that. I have no expert experience.

**The Chairman:** Going back to the question of the fixed term, the whole issue of early dissolution is obviously relevant.

**Q62 Lord Shaw of Northstead:** I wonder if you could briefly describe the processes under which the Canadian and German federal Parliaments may be dissolved before the fixed term has expired. In particular on that point, to what extent do the Governor-General in Canada or the federal President in Germany retain a discretion to dissolve Parliament early? And one more question, if I may: where there is more than one process for dissolving Parliament early, is one regarded as more constitutionally appropriate? Is either process regarded as more straightforward from the point of view of the PM, the Chancellor or the Parliament?

**Stephen Padgett:** In the German case there is, strictly speaking, only one process by which Parliament can be dissolved prematurely, and that is triggered by the failure of Parliament to support a confidence motion that is put to it by the Chancellor. Constitutionally, such motions can only be put by the Chancellor. The House does not have the prerogative to raise a motion of confidence. So there is no provision for Parliament to trigger a premature dissolution in the German case. Following the failure of a confidence motion, the Chancellor may, but is not obliged to, dissolve Parliament. If he proposes that Parliament be dissolved, the President acts on that proposal and has the discretion to dissolve Parliament or not. So yes, the federal President has that discretion.

The federal constitutional court has no constitutional prerogative to give a judgment on the dissolution unless it is petitioned to do so. That has occurred twice. In theory, at least, a

dissolution under Article 68 of the German constitution requires the concurrent consent of the Chancellor, the Parliament to deny the Chancellor the vote of confidence, the President and, if it is so petitioned, the federal constitutional court. There are several checks and balances there. While Parliament does not have the constitutional right to dissolve itself, it has the right to move a constructive vote of no confidence. I should add that it is obliged, simultaneously in proposing the vote of no confidence, to elect a new Chancellor.

**Q63 The Chairman:** Is the constructive vote of no confidence defined in the constitution?

**Stephen Padgett:** It is, yes, quite explicitly. In that event, though, Parliament is not dissolved. The new Government simply continues to the end of the parliamentary term. Having said that, the only time that the constructive vote of no confidence has been successfully deployed, by Chancellor Kohl in 1982, it was followed the next year by a dissolution on the initiative of the Chancellor, who contrived to lose a confidence vote that his party had put to trigger new elections.

**Henry Milner:** The Canadian situation is very different. As far as the federal Parliament is concerned, a law on fixed elections has only been in effect for, I think, four years. It is written in such a way and has been interpreted – correctly, I think, by the federal court – to create almost a dead letter, so that the actual law is almost without effect. This is even more the case because of the events that took place. Let me give you a brief summary of those. The Canadian law is very short. Clause 1 in three ways reaffirms the position of the Governor-General. Nothing in this law shall in any way affect the power of the Governor-General to dissolve at his or her discretion. The second clause, the last part of which states that elections will take place on the second Monday in October every fourth year, begins with “subject to Clause 1”. In case we were unclear, it reminds us.

The intent, I think, of the government lawyers when they wrote that was to give the Government a loophole big enough for a locomotive to drive through. That is exactly what happened. The minority Government were at a point where they thought they had a chance of winning a majority. Parliament had not been getting along very well; it was quite ineffective. The Prime Minister went to see the Governor-General. The Governor-General, interpreting the clause, I think, correctly, essentially brought us back to the previous position, which was that the Governor-General would follow the Prime Minister's recommendations for dissolution. So that is what happened. This was later, as I said, tested in the federal court, which said that courts can act and its jurisdiction could apply in this case, because it is a federal law, but the Government acted in accordance with the law.

We had another election. To the disappointment of the Government, we ended up with another minority. The additional problem is that practically nobody in Canada realises that we still have this law on the books. Even I have not thought of the date of our next election because it is a meaningless concept. No one is aware of this any more and it does not affect anyone's thinking. Every journalist talks about whether there will be an election in the fall or in the spring, but nobody says that this would violate the law, which is still there – nobody bothered to repeal it – about fixed election dates.

The Prime Minister has the ability to use this simply to go back to the old system and ignore the idea of fixed election dates. If we – and you – are serious about this, that should not happen. As far as I can see, that is not the case. Once this law is passed, the Prime Minister could not go to the Queen and simply ask for the dissolution.

**Q64 The Chairman:** Is that because of the distinction between retaining the prerogative, as in your case, and not in what is being proposed here?

**Henry Milner:** I think so. I am not a constitutional lawyer but I would assume that, with the law as it is written, if it went to court the court would say that the Prime Minister could not,



under the law, simply go to the Queen and ask for a dissolution, especially since it has an alternative mechanism – the two-thirds vote. With an alternative mechanism, it seems to me that any court would say that you could not use the mechanism provided by the law. It simply is not legal to try to get around it. There are lawyers here who are probably better positioned to answer than I am that that is the case. But I assume it is the case and it would be a definite improvement on the Canadian situation.

**Q65 Lord Goldsmith:** I wanted to clarify one thing. The Governor-General's view and, as I understand it, the court's view of the power is that there is a general discretion. Or it is similar to a situation where a head of state would rely on the advice from his or her Ministers? So if the Prime Minister says, "I want a dissolution", would the Governor-General say, "That's the answer. That's what I have to do"? Taking into account other considerations, what has happened?

**Henry Milner:** That is a good question. We have only one case. Before this law was passed, the precedent was very clear. Even if, three months after an election, the Prime Minister went to the Governor-General and said, "I want a new election", the Governor-General, would not say, "Why don't you give the Opposition leader a chance? It has only been three months". For the Governor-General, the precedent was clearly established. This would be the Prime Minister's call and he would have to answer to the people for it. It would not be for the Governor-General to intervene. The new law changed that. As far as I can tell – I was not privy to the discussion between the Prime Minister and the Governor-General – in this case the Governor-General's advisers would have said, "On what basis could you refuse the Prime Minister, since the way that the law is written allows you to do everything that you could have done before and act in exactly the way you would have acted before the law was passed?". If a Governor-General, in her wisdom, had said, "No, we have fixed election

dates and I refuse to dissolve Parliament”, that would have been an interesting development but no one in Canada anticipated it.

**Q66 Lord Shaw of Northstead:** Going back to the German case, when Chancellor Kohl deliberately decided to lose a vote of confidence, did that result later in an alteration to the law or some further change?

**Stephen Padgett:** No. I should add that in all three cases when a premature dissolution has occurred in Germany, it has occurred through the deliberate contrivance of the Chancellor. That is an issue. Unlike in Canada, the expectation is that a Parliament will run for its full term. Exceptions are treated as such and are scrutinised very carefully by the President, a court and public opinion.

The court was called upon to rule on the Kohl case in 1983. The usual way in which the court is called upon is by Members of Parliament petitioning the constitutional court that the early dissolution is a breach of their constitutional right to a four-year term. The court has regarded that as justiciable and given a judgment on it. What the court tried to do in 1983 was tighten the circumstances in which a Chancellor could contrive his own defeat, and therefore dissolution, by saying that, in addition to the formal procedural requirements of the constitution – that is, failing the vote of confidence – the Chancellor should be able to meet a further material requirement. That material requirement was that the Chancellor should be able to demonstrate that continuous government is no longer possible. The court expanded on that by saying that the material condition would be a political crisis.

**Q67 Lord Shaw of Northstead:** Who would decide?

**Stephen Padgett:** Despite that judgment, the court upheld Kohl’s dissolution and there was no political crisis in that instance. Kohl moved the dissolution because he had come to power the previous year through the constructive vote of no confidence – that is, a vote in

Parliament – and therefore lacked a popular mandate. So he was asking for a popular mandate, but there was no sense of political crisis.

In 2005, which was the most recent premature dissolution, by Chancellor Schröder, the court gave some consideration to exactly that question: what constituted a political crisis and how should it be adjudicated? The circumstances were that arguably there was a political crisis because the Government was deeply unpopular, had lost a series of state elections and Schröder had lost the confidence of large sections of his own party through a programme of economic reform. Arguably there was a political crisis, but the Government had a workable majority.

**Q68 Lord Shaw of Northstead:** Do you believe that the courts should intervene? This is a political matter.

**Stephen Padgett:** The end of this – sorry – rather prolonged response will, I hope, answer that question. The court sought to define how a political crisis should be defined. It concluded that a political crisis could not be determined by a court and that the definition of a political crisis should be within the broad administrative competence of the Chancellor. That judgment is broadly interpreted as meaning that a future court would be unable, following that precedent, to subject that question to judicial interpretation.

**The Chairman:** This is very much a point in the internal conversations that we have been having in the Houses of Parliament, with evidence from the Clerk of the House of Commons, about the potential judicial role in fixed-term Parliament legislation. Of course, it also impacts on the nature of the vote of confidence.

**Q69 Lord Norton of Louth:** The Fixed-term Parliaments Bill provides the triggering mechanism – a vote of confidence – for dissolution. Then there are the safety-valve provisions. One of the things that is being discussed here is the definition of a vote of confidence. As I understand the German case, that is not really an issue because there is an

explicit vote of confidence, which the Government can move. I think I am right in saying that if it is lost by a simple majority, that is fine. Then you have the constructive vote of no confidence, which you say is defined in the constitution, so there is no issue about what constitutes a vote of confidence. I wonder, Professor Milner, whether there is an issue, in your experience, of what defines a vote of confidence. Does it have to be an explicit vote? With us, you can have the passing of a vote of no confidence but, as in the German case, you can have a vote of confidence moved by the Government, which is then lost. There is that issue of what constitutes a vote of no confidence. In our case, of course, it can go wider because the Government can say that it is a matter of confidence and that if they lose the vote they will resign.

**Henry Milner:** I am not sure that the Canadian experience is all that helpful. I am not enough of a constitutional expert to give you the final word. Governments fall on, for example, budgets and so on; there are certain conventions. Sometimes, if a Bill is defeated and the Opposition says that the Government should resign because this is a matter of confidence, the Government has been known to, and can, ask for a vote of confidence. It can then stay in office if it gets it. I am not sure that that is a significant issue. I did not see this in the Bill – maybe I missed it – but if a vote of no confidence takes place, does it need the majority of those voting or a majority of Members?

**The Chairman:** A majority of Members.

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

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

**Henry Milner:** So there is a separate dissolution vote? I checked and most places with fixed election dates do that. The two-week period seems to me to make good sense as well, as does having an explicit dissolution vote so that everyone knows exactly what the rules are,

and so on. This seems to me a reasonable way of operating. In Canada we do not have that. Nothing in the law attempted to be explicit. There is the question of whether, rather than having to get two-thirds, a Government that wanted to dissolve Parliament would trigger a vote of non-confidence in itself, followed by a vote of dissolution. I assume that would be possible, under the way the law is written. Having thought about that, I guess that perhaps that should be possible. It would be an extreme case. The Government would have to go to the people and say that it was such an extreme case that it absolutely could not continue to govern and the Opposition would not give it the two-thirds of votes needed to dissolve. The Government would have to make its case before the people and justify voting non-confidence in itself. I know the German case is a bit uncertain but perhaps it is not such a bad safety valve if it is understood in that way. Nothing in the Canadian experience helps to clarify that.

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

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

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

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

**Henry Milner:** I guess this idea was put in because you could imagine a defeat that was not as clear-cut, and it was not so clear exactly where everyone stood and whether it indicated a real desire for a new Government and a whole new election. When you think of all the possibilities that could trigger such a vote, on balance it is probably a good idea. I think people understand that. Perhaps it is not the case in Britain, but the attitude in Canada, close to universally, is: “We elect you to run the country. Yes, you have political differences. You are liberals, conservatives, NDP, Bloc or whatever, but you are there to run the country.

We made a choice – now try to do it. Don't lose sight of that and just care about your own particular partisan goals and so on". I am talking about perception, not objective reality, but this is a very strong perception. It is very important to demonstrate to the people that this conforms, as much as possible under reasonable circumstances, to what they want. Institutions should encourage that. I would guess that, on balance, the two-week period would more often than not have that effect. I agree that there probably will be cases where people will ask what they are doing and say that they are wasting time, but it is just two weeks. I do not think it is that serious a problem.

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

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

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

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

**Henry Milner:** It was the federal court.

**Lord Goldsmith:** It never went to the Supreme Court?

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

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

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

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

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

**Q76 Lord Goldsmith:** That leads me, in a sense, to my final question. From the point of view of the electorate and the public, what role does the court play in this process? Is it



really an irrelevance, or is it a Gore v Bush matter and at the top of the agenda for winning an election?

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

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

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

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

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

**Q78 Lord Norton of Louth:** Yes, this is probably directed to Professor Milner in the light of his experience. The Fixed-term Parliaments Bill states that the monarch's power to prorogue Parliament is not affected. In the Canadian case we have seen that used to prevent

a vote taking place on a motion of confidence. Should we be worried about that retention and, if so, is there anything we can do about it?

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

**Q79 Baroness Falkner of Margravine:** What mechanisms do you have in place when there has been a general election that results in an unclear verdict and a new Government cannot be formed? Could you explain briefly for either country?

**Stephen Padgett:** 2005 was a case in point in Germany. The provisions for a case where the Bundestag cannot elect a Chancellor allow for a person who has the highest number of votes in a Bundestag vote to be elected Chancellor – in other words, a Chancellor without a majority. There is a provision for forming a minority Government but it has never been used. In practice, the incumbent Chancellor remains in office until a new Government is formed. There is provision for that in the constitution. The parties simply negotiate with

each other to try to come to terms. In 2005 it proved impossible for either of the main parties to form a coalition in the usual way with smaller parties. The last resort is that the main parties form a grand coalition.

**Q80 Baroness Falkner of Margravine:** Was that open-ended in duration?

**Stephen Padgett:** There is no constitutional cut-off that makes provision for something happening after a period of incomplete negotiation.

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

**Q81 Baroness Falkner of Margravine:** Coming back to Germany, I notice that you did not mention anything to do with the Bundesrat. What role do you imagine the House of Lords would have in a fixed-term parliamentary system if there was an early dissolution?

**Stephen Padgett:** As you say, I have not mentioned the Bundesrat. That is because the upper Chamber has no constitutional role in matters of dissolution or a constructive vote of no confidence, and has not been involved in either. There is no precedent in the German case. It is quite difficult to imagine this House playing the role of arbiter because of its composition and the party political nature of that composition. Whatever arbiter is chosen

for issues that arise in dissolution, it has to be demonstrably insulated from politics, as is the federal President in Germany.

**Henry Milner:** I tend to agree. The Canadian Senate is an entirely appointed body, so it could not easily be imagined playing a role in such a circumstance. My guess is that what Professor Padgett said applies to this House but there are, I guess, changes anticipated in terms of elections and so on.

**The Chairman:** Thank you both very much indeed. You have been enormously helpful and it is very valuable for us to have a broader perspective, particularly from both sides of the Atlantic. Does any member of the Committee feel that something they wanted to raise with either Professor Milner or Professor Padgett has not been covered? Do either of you have anything that you feel we have ignored or that you particularly wanted to say?

**Stephen Padgett:** No, I think the discussion has been very comprehensive and I thank you all for an interesting discussion.

**The Chairman:** Thank you very much for giving us so much of your time.

**Henry Milner:** I congratulate you on putting this kind of effort into these questions. Very often, if we get things right at the beginning, it has a long and useful effect. This is the way to go about doing it.

**The Chairman:** Thank you very much for coming.