

FROM FLEXIBLE TO SEMI-FIXED: THE FIXED-TERM PARLIAMENTS ACT

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Abstract: The Fixed-term Parliaments Act 2011 provides for semi-fixed term parliaments in the United Kingdom, replacing the previously flexible terms within a statutory maximum limit. The genesis of the Act was political and the transition from proposal to Act was marked by significant changes. The Act translates, albeit imperfectly, a constitutional convention into legislative form and has significant constitutional consequences. It removes not only the power of the Prime Minister to seek an opportunistic election, but also the power to designate a vote as one of confidence in the government. Its provisions are not engaged if a government elects to resign without losing an explicitly worded vote of no confidence.

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Prior to 2011, the determination as to when the UK Parliament should be dissolved and writs issued for the election of member of the House of Commons¹ fell within the royal prerogative, that is, powers traditionally held by the Crown and not displaced by statute. The prerogative was limited inasmuch the maximum life of a parliament was determined by statute. The Meeting of Parliament Act 1694 stipulated that a general election must be held every three years. The Septennial Act 1715 extended the length of a parliament to a maximum of seven years. The Parliament Act 1911 (s.7) reduced the maximum period to five years. The decision as to when to call an election within that period was governed by convention. The sovereign acted on the advice of ministers. Prior to 1918, the advice as to when to hold an election was tendered by the Cabinet and thereafter by the Prime Minister.² In practice, Prime Ministers tended to request the dissolution of parliament after about four years in power, usually if the opinion polls indicated a favourable outcome for their party. If the polls were not propitious, premiers tended to let the parliament run a full five years.

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1 Membership of the second chamber, the House of Lords, was not determined by election. Peers continued as members irrespective of general elections.

2 See Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1984) 45–53; Lord Blake, *The Office of the Prime Minister* (Oxford University Press, 1975) 58–60; Joseph Jaconelli, “Continuity and Change in Constitutional Conventions” in Matt Qvortrup (ed), *The British Constitution: Continuity and Change* (Hart Publishing, 2013) 128–30; Vernon Bogdanor, *The Monarchy and the Constitution* (Clarendon Press, 1995) 81.

On occasion, a Prime Minister would request an early dissolution if the government was having problems governing, usually because of a small or non-existent majority.³ The Labour government of Clement Attlee re-elected in 1950 with an overall majority of five called fresh elections after 18 months in power. A similar gap was witnessed following the return of a Labour government in 1964 with a majority of four. The Labour government formed after the general election of February 1974 commanded only 301 seats in a 635-member House and lasted only just over six months before the Prime Minister requested fresh elections.

Elections that were the consequence of the Prime Minister seeking a fresh mandate at the time of his choosing were dubbed as opportunistic elections. However, it was possible for elections to be held consequent to another convention of the constitution. By convention, the government rested on the confidence of the House of Commons. If it lost the confidence of the House, then by convention it resigned or requested the dissolution of parliament. The precedent was set in 1841 and was maintained thereafter.

What constituted a vote of confidence took different forms. There were three distinct categories.⁴ One was an explicit motion of confidence, declaring that the House had or had no confidence in the government. A second was a motion made a vote of confidence by declaration of the government. A government may decide that a measure was so central to its programme that there would be little point in continuing in office if defeated on it. The Prime Minister would, therefore, make clear that, if defeated, this would trigger resignation or a general election. On Second Reading of the European Communities Bill in 1972, giving effect to the UK's membership of the European Communities, Prime Minister Edward Heath told the House that "if this House will not agree to the Second Reading of the Bill... my colleagues and I are unanimous that in these circumstances this parliament cannot sensibly continue".⁵ The third category comprised what were considered to be implicit votes of confidence, notably votes on the Queen's Speech and the Budget. The measures falling in this third category were small in number. In the 20th century, defeat on a particular aspect of supply would not necessarily be treated as a vote of confidence. (Prime Minister Arthur Balfour refused to treat such a defeat in 1905 as a vote of censure.) The same applied to amendments to the Queen's Speech. Lord Rosebery's government was defeated on an amendment to the Address in 1894 and did not treat it as a censure vote.

The 20th century witnessed three occasions when the government lost votes of confidence. The first was when the government of Stanley Baldwin, having lost the election of 1923, nonetheless followed the tradition of remaining in office and facing the new House of Commons. When it did so, it was defeated on a vote of confidence and resigned. The new government that was formed — the first Labour

3 See Vernon Bogdanor, *The Coalition and the Constitution* (Hart Publishing, 2011) 116–117.

4 Philip Norton, "Government Defeats in the House of Commons: Myth and Reality" *Public Law* Winter 1978, 363–365.

5 *House of Commons Debates (Hansard)*, 17 February 1972, col. 752.

government in UK history — was defeated in October 1924 on two votes that it deemed to constitute confidence votes and consequently requested the dissolution of parliament.⁶ The third and last occasion was on 28 March 1979 when an explicitly worded motion of no confidence, moved by opposition leader Margaret Thatcher, was carried by one vote against the Labour government of James Callaghan.

All other elections have been opportunistic elections. Given the discretion accorded to the Prime Minister, and which could be used for political advantage, there was some doubt as to whether a monarch would necessarily accede to the Prime Minister's advice in all circumstances.⁷ In a letter to *The Times* in 1950, the King's private secretary, Sir Alan Lascelles, writing under the pseudonym "Senex", identified three conditions where the Crown may refuse a request for dissolution. These comprised where parliament was still viable and capable of doing its job, an election would be detrimental to the national economy, and an alternative Prime Minister was available who could command a working majority in the House of Commons.⁸ Vernon Bogdanor argued that a monarch was not necessarily bound to grant dissolution where the Prime Minister lacked the support of his party or when a new government had not received the endorsement of the House of Commons and an alternative government could be formed.⁹ The claim that the monarch was not bound to accede to a request for dissolution in all circumstances was also made in Chapter 6 of the *Draft Cabinet Manual*, published in February 2010 ahead of the 2010 general election.

Though the monarch retained the power to decline the Prime Minister's request for dissolution, it was never exercised. King George V in 1924 did check that neither of the Conservative and Liberal leaders was prepared to form a government following MacDonald's decision to make a vote on an opposition motion one of confidence. "Neither Mr Asquith nor Mr Baldwin showed any desire either to assume office or to enter a coalition".¹⁰ When the government was defeated in the vote, the King acceded, albeit reluctantly, to the Prime Minister's request for dissolution. Throughout the era of modern British politics (ie, post-1832) the request for dissolution was never refused.

I. Arguments for Change

The flexibility accorded to Prime Ministers was challenged by some politicians in the latter half of the 20th century, but it was supported by successive governments. Those who challenged the existing provisions argued that the discretion accorded to the Prime Minister should be removed. The preference was for a fixed-term

6 Harold Nicolson, *King George the Fifth: His Life and Reign* (Constable & Co., 1952) 399–400.

7 Marshall, *Constitutional Conventions*, (n.2), pp.35–42.

8 "Dissolution of Parliament: Factors in Crown's Choice", *The Times*, 2 May 1950.

9 Bogdanor *The Monarchy and the Constitution* (n.2), pp.80–81. See also Geoffrey Marshall and Graeme C. Moodie, *Some Problems of the Constitution* (4th revised ed, Hutchinson & Co., 1967) 48.

10 Nicolson *King George the Fifth* (n.6), p.399.

for elections. This, it was contended, would remove an unfair advantage accorded to the leader of the party in power. Allowing the Prime Minister to choose the date of an election allowed him to select a time most favourable in terms of the opinion polls. It also enabled the premier to seek to disadvantage other parties, sending out false signals as to when an election may be held, thus prompting them to devote money and resources to a campaign that then does not take place. A fixed term would also deliver certainty, avoiding phoney campaigns, enabling parties to prepare effectively and on an equitable basis, and benefit the economy. According to one Member of Parliament (MP), the government's "coyness and flirtatiousness about the timing of the election has disastrous effects on the economy".¹¹ It denied business the opportunity to plan ahead. As one business leader in the House of Lords argued, "Uncertainty weakens confidence and therefore business operations suffer".¹² Uncertainty, said another, lowered the standards of democracy. "It is", he said, "a travesty of serious democracy when Messrs. William Hill and Ladbroke give odds not just on the result of the election – that is fair enough – but on the date of a general election. One can place a wager on the date upon which the general election will be held as if it had all the unpredictability and charm of a horse race".¹³

There was also a constitutional point in respect of the Crown. Providing a statutory fixed term formally limited the power of the Crown but would serve to protect the monarch from controversy. As we have seen, there was the potential for a situation to arise where the monarch may have to exercise a choice when faced with a Prime Minister's request for dissolution. Denying a request could be highly contentious. A fixed term determined by statute would remove the potential.

However, the principal and over-riding argument of those supporting fixed-term parliaments was that the existing system gave too much power to the Prime Minister. For them, fixed terms would constitute a shift of power from the Prime Minister to the voters. As one supporter declared in the House of Lords: "General elections are about renewing the power and re-establishing the legitimacy upon which democratic governments rests. So in a very real sense, elections should belong to the voters rather than in any sense belonging to or being manipulated by the Prime Minister and the Government".¹⁴

A number of Labour and Liberal Democrat MPs sought to achieve a change in the law through introducing Private Members' Bills. None was successful.¹⁵ In 1992, the Labour Party leader, Neil Kinnock, endorsed the idea of fixed-term parliaments. The proposal was included in the Labour Party and the Liberal Democrat Party manifestos in the 1992 general election. A Commission on the Electoral Systems set

11 Austin Mitchell, *House of Commons Debates (Hansard)*, 9 March 1983, col. 846.

12 Lord Ezra, *House of Lords Debates (Hansard)*, 22 May 1991, col. 251.

13 Lord Holme of Cheltenham, *House of Lords Debates (Hansard)*, 22 May 1991, col. 245.

14 *Ibid.*

15 Philip Norton, "Would Fixed-term Parliaments Enhance Democracy?" in Lynton Robins and Bill Jones (eds), *Debates in British politics today* (Manchester University Press, 2000) 122–123; Robert Hazell, *Fixed Term Parliaments* (The Constitution Unit, 2010) 22–24.

up by the Labour Party also reported in 1993 (the Plant Report) in favour of fixed terms. The Labour Party did not pursue the proposal when it was in office (1997–2010), though when Gordon Brown became Prime Minister in 2007 he expressed support for the Prime Minister having to obtain the agreement of the House of Commons before requesting a dissolution. (However, no progress was made on the proposal before the 2010 general election.) Fixed-term parliaments remained Liberal Democrat policy. Labour again endorsed the proposal in 2010 and it appeared in the election manifestos of both the Labour and Liberal Democrat parties.

Supporters of the existing arrangements argued that fixed terms would inject too great a degree of inflexibility and encourage unduly long election campaigns. Parties, knowing the date of the next election, would campaign early and be subject to a ratchet effect. A party would start campaigning earlier than the others and other parties would respond by planning to begin campaigning even earlier next time around. The main objection, though, was the effect on government and, indeed, on electors. Governments could be forced to remain in office, even in conditions of political instability. What if a government had no overall majority and would prefer to seek a renewed mandate from the electors? Lord Waddington, the Conservative Leader of the House of Lords, asked in 1991: “Is it better for a government unable to govern to go to the country to try to obtain a new mandate or for the same government to spend their time fixing up deals in which the unfortunate electorate have no say whatsoever?... The people not the parties should decide who governs”.¹⁶ Rigid fixed terms would thus be undesirable. If one started to inject qualifications, he argued, it was not clear how far the change would differ from the system as it existed.¹⁷

Successive Conservative governments opposed any change to the existing arrangements. When a Liberal MP asked Prime Minister Margaret Thatcher if the government would introduce legislation to provide fixed-term parliaments, he got a sharp and succinct response: “No”.¹⁸ That remained the position of the British government for the rest of the century. It remained the case until 2010. However, within 16 months of the 2010 general election, parliament had enacted the Fixed-term Parliaments Act 2011. It was the most important constitutional reform of the parliament. The United Kingdom now has, subject to certain conditions, fixed-term parliaments of five-year terms. How did the measure get on to the statute books? And what are the constitutional consequences?

II. Genesis

The genesis of the Fixed-term Parliaments Act was essentially political. The 2010 general election produced an uncertain outcome. The Conservative Party emerged as

¹⁶ *House of Lords Debates (Hansard)*, 22 May 1991, col. 260.

¹⁷ *Ibid.*, col. 261.

¹⁸ *House of Commons Debates (Hansard)*, 4 December 1986, col. 729W.

the largest single party, but it lacked an overall majority. It won 306 seats in a 650-seat House. Labour, the party in government, won 258 seats. The balance of power was held by the Liberal Democrat party, which had won 57 seats. The Conservative leader, David Cameron, offered to enter into negotiations with the Liberal Democrats for the formation of a coalition government. The Liberal Democrats held negotiations with both major parties but agreed a deal with the Conservatives.¹⁹ The United Kingdom acquired, for the first time, a coalition government that was the product of the outcome of a general election. The nation had previously had elections in which no one party had achieved an overall majority. It had some experience of coalition governments. However, it had no experience of a coalition government being formed as a consequence of the electoral arithmetic of a general election.²⁰ Two parties had to come together in order to deliver a minimum winning coalition.

The negotiations leading to the formation of a coalition were unprecedented. They also took place within the context of a political system characterised by rapid transitions from one government to another following a general election. By international standards, the United Kingdom has a very short duration for government formation.²¹ Usually, within hours of the polls closing, the outcome of a general election is known and, if the incumbent party has lost, the Prime Minister goes to Buckingham Palace the day after polling in order to offer his resignation. The Leader of the Opposition is then called to the Palace and invited to form a government. Within 24 hours a new government is formed, the civil service briefs incoming ministers, and government continues in an almost seamless manner.

Given this, the imperative in negotiations was to reach agreement as quickly as possible. The Cabinet Secretary told negotiators that delay would cause uncertainty in the markets.²² There was also media pressure for a quick resolution. Within five days of the election, agreement had been reached between Conservative and Liberal Democrat negotiators and an interim “Conservative-Lib Dem deal” was published, followed by a fuller *The Coalition: our programme for government*.²³ The agreement included a section on political reform. “The Government believes that our political system is broken”, it began. The first item in the section was a commitment to “establish five-year fixed-term parliaments”. We will examine the detail shortly. In discussing the emergence of the Fixed-term Parliaments Act, the salient feature at this point is the haste in which the coalition agreement was constructed.

19 See Rob Wilson, *5 Days to Power* (Biteback Publishing, 2010); David Laws, *22 Days in May* (Biteback Publishing, 2010) and Andrew Adonis, *5 Days in May* (Biteback Publishing, 2013).

20 Philip Norton, “The Politics of Coalition” in Nicholas Allen and John Bartle (eds), *Britain at the Polls 2010* (Sage, 2011) 242.

21 See Lieven De Winter and Patrick Dumont, “Uncertainty and Complexity in Cabinet formation” in Kaare Strøm, Wolfgang C Müller and Torbjørn Bergman (eds), *Cabinets and Coalition Bargaining: The Democratic Life Cycle in Western Europe* (Oxford University Press, 2008) 148–153.

22 Norton, “The Politics of Coalition” (n.20), 251–252.

23 HM Government, *The Coalition: Our Programme for Government* (The Cabinet Office, 2010).

The agreement formed the basis for the coalition government's legislative programme. The two principal measures of constitutional reform introduced in the first year of the parliament were the Parliamentary Voting Systems and Constituencies Bill and the Fixed-term Parliaments Bill. The former provided for a referendum on introducing the Alternative Vote for elections to the House of Commons and for reform of constituency boundaries, providing for more equal-sized electorates. In the referendum, held on 5 May 2011, just over two-thirds (68 per cent) of those taking part voted "no". There was thus no change to the electoral system. In the event, there were no changes either in the parliament to constituency boundaries. The government in 2012 introduced a House of Lords Reform Bill, to provide for a largely elected second chamber. The Bill encountered substantial opposition on the Conservative benches and it was withdrawn.²⁴ This outcome so annoyed the Liberal Democrats that their leader, Nick Clegg, instructed his party, including ministers, to vote against the orders giving effect to the boundary changes, with the result that the orders were defeated. As a consequence, the only enduring major constitutional change emanating from the coalition agreement is the Fixed-term Parliaments Act.

The reason the legislation is on the statute book is because of the unique circumstances of coalition formation. Had there been a Conservative government, it is almost certain that there would not have been fixed-term parliaments. As we have seen, the party historically had been opposed to change. It was wedded to the existing arrangements both on grounds of principle (it believed in existing arrangements where they were deemed to work) and political benefit: the party had been the "in" party of government for most of the 20th century and was unlikely to rush to embrace change that may work to its disadvantage.

However, the Liberal Democrats were committed to fixed-term parliaments. For the Conservatives, it was a concession they were prepared to make in order to reach agreement on a coalition. Indeed, according to one source, the Conservative leader, David Cameron, required little persuasion, seeing it as a means of locking in the Liberal Democrats to the coalition. "The stability of a five-year government was what the markets wanted and the Tories needed. For that, it was worth trading the traditional right of the Prime Minister to decide the election date".²⁵ Agreement was thus reached on a permanent change to the nation's constitutional arrangements on the basis of what was seen as a short-term political fix.

III. Legislating

The transition from the coalition agreement to the statute book was not especially smooth, in that the provisions of the Fixed-term Parliaments Act deviated notably

24 See Philip Norton, "The Coalition and the Conservatives" in Anthony Seldon and Mike Finn (eds), *The Coalition Effect, 2010–2015* (Cambridge University Press, forthcoming).

25 Matthew D'Ancona, *In It Together: The Inside Story of the Coalition Government* (Viking, 2013) 16.

from what was agreed by the parties' negotiators in May 2010. We can identify three separate elements: the agreement, the Bill, and the Act.

A. *The agreement*

The coalition agreement stated, thus: "We will establish five-year fixed-term parliaments. We will put a binding motion before the House of Commons stating that the next general election will be held on the first Thursday of May 2015. Following this motion, we will legislate to make provision for fixed-term parliaments of five years. This legislation will also provide for dissolution if 55% or more of the House vote in favour".²⁶

The proposal for fixed-term parliaments was thus qualified, in that provision was included for an early election if MPs voted for it by an enhanced majority. There was recognition that some mechanism was needed in case a parliament became unviable. The proposal was thus for a semi-fixed rather than a completely fixed term.²⁷ The requirement for 55 per cent of MPs to vote for dissolution was derived from no comparative study. Rather it was the product of a quick calculation by a member of the Conservative team, George Osborne, that 55 per cent was enough to prevent a combination of Labour and Liberal Democrats combining against the Conservatives to force an early election.²⁸

The agreement also envisaged two stages: a motion put before the House of Commons, followed by a bill. In the event, no motion was ever brought forward. The reason for this was conceded by the minister for political and constitutional reform, Mark Harper, when he appeared before the Constitution Committee of the House of Lords:

The Chairman: I think you are saying that, in terms of a binding motion, it was discovered that nobody could be bound by the motion.

Mark Harper: Correct, yes, and the other thing is that the motion would only be a House of Commons motion and by having an act of parliament you have better control by having both Houses having passed it.²⁹

The latter part of the minister's answer is largely irrelevant to the fact that the motion would have no effect. The prerogative cannot be constrained by a declaratory motion of the House of Commons. There was thus no one to be bound by such a "binding" motion.

²⁶ The Coalition (n.23), 26.

²⁷ Constitution Committee, House of Lords, *Fixed-term Parliaments Bill*, 8th Report, Session 2010–2011, HL Paper 69, 10; Hazell, *Fixed Term Parliaments* (n.15), p.21.

²⁸ David Laws *22 Days in May* (n.19), p.184.

²⁹ Constitution Committee, House of Lords, *Fixed-term Parliaments Bill*, Evidence, Q129, 40. The author declares an interest as he was the chairman who put the question.

The other notable aspect of the paragraph in the agreement was what was omitted. There was no reference to votes of confidence as mechanisms for triggering an early election.

B. *The Bill*

The Fixed-term Parliaments Bill was introduced without any pre-legislative scrutiny, even though, as the Political and Constitutional Reform Committee of the House of Commons noted, there was no urgency given that the Prime Minister had volunteered not to call an election before May 2015.³⁰ It described the Bill, presaging the debate in both Houses, as “ill-thought through, rushed and does not appear to provide a satisfactory solution”.³¹

The Bill implemented the agreement inasmuch as it stipulated five years as the term for a parliament. It deviated from the coalition agreement in two significant respects (*see* Figure 1). First, the super majority necessary for forcing an early election was stipulated not as 55 per cent of MPs but instead as two-thirds of all MPs. The government recognised that there needed to be a clear hurdle, limiting a government with a large majority from unilaterally triggering an election. In effect, the coalition reversed the thinking in the negotiations that had favoured a 55 per cent rather than a 60 per cent threshold. “I think the logic”, declared the minister, Mark Harper, “was to set a number that was sufficiently high that it was unlikely that a government could reach it”.³² It thus brought the measure into line with much international practice and indeed practice in other parts of the UK, the two-thirds provision also applying in the devolved legislatures of Scottish, Wales and Northern Ireland.

The other change was that it made provision for an early election if the House “passed a motion of no confidence in Her Majesty’s Government (as then constituted)”. The Bill thus sought to translate into statute the convention governing votes. As the Deputy Prime Minister, Nick Clegg, declared in the House of Commons, “traditional powers of no confidence will be put into law”.³³ It left open the prospect for all three types of confidence votes to apply. The arbiter as to what constituted a vote of confidence would be the Speaker of the House of Commons. An early election was to take place if the Speaker certified that the House had passed a motion of no confidence and that a period of 14 days had then passed in which the House had not expressed confidence “in any Government of Her Majesty”. It thus modified the convention in that it created a two-step process, the government resigning if defeated in a confidence vote, but an election taking place only if a new government could not quickly be formed and win a vote of

30 Political and Constitutional Reform Committee, House of Commons, *Fixed-term Parliaments Bill*, Second Report, Session 2010–2011, HC 436, 5.

31 Political and Constitutional Reform Committee, House of Commons, *Fixed-term Parliaments Bill* 5.

32 Constitution Committee, House of Lords, *Fixed-term Parliaments Bill*, Evidence, Q138, 43.

33 *House of Commons Debates (Hansard)*, 5 July 2010, col. 23.

confidence. The Speaker's certificate was also to apply in the case of a motion that there should be an early parliamentary general election.

Figure 1: Clause 2 of the Fixed-Term Parliaments Bill

2 Early parliamentary general elections

- (1) An early parliamentary general election is to take place if the Speaker of the House of Commons issues a certificate —
 - (a) certifying that the House has passed a motion that there should be an early parliamentary general election,
 - (b) certifying whether or not the motion was passed on a division, and
 - (c) if it is certified that the motion was passed on a division, certifying that the number of members who voted in favour of the motion was a number equal to or greater than two-thirds of the number of seats in the House (including vacant seats).
- (2) An early parliamentary general election is also to take place if the Speaker of the House of Commons issues a certificate certifying that —
 - (a) on a specified day the House of Commons passed a motion of no confidence in Her Majesty's Government (as then constituted), and
 - (b) the period of 14 days after the specified day has ended without the House passing any motion expressing confidence in any Government of Her Majesty.
- (3) A certificate under this section is conclusive for all purposes.
- (4) Before issuing a certificate, the Speaker of the House of Commons must consult the Deputy Speakers (so far as practicable).
- (5) Subsection (6) applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.
- (6) If a parliamentary general election is to take place as provided for by subsection (1) or (2), the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister (and, accordingly, the appointed day replaces the day which would otherwise have been the polling day for the next election determined under section 1).

C. *The Act*

The Bill ran into considerable criticism during its passage and the measure that received Royal Assent was notably different from the Bill as introduced. It was the subject of intra-party dissent in the division lobbies of both Houses. One or more Conservative MPs voted against the government in 16 votes on the Bill, though only four MPs could be characterised as consistent opponents.³⁴ Some Conservatives were opposed to the Bill on principle (11 voted against on Second Reading) and many voted for it reluctantly. Despite reservations, many voted for it on the grounds that the party leadership had committed the party to it as part of the coalition agreement.

³⁴ Philip Cowley and Mark Stuart, *The Bumper Book of Coalition Rebellions* (University of Nottingham/revolts.co.uk, 2012) 97.

However, some provisions also encountered cross-party criticism. The most notable was in respect of the length of term and the provisions for votes of no confidence.

The Liberal Democrats had made the case in their election manifesto for a four-year fixed-term. The Private Members' Bills introduced in previous decades had also mostly provided for four-year terms. (The Labour Party's Plant Commission in 1993 had also recommended four years.) This was seen as being closest to the usual length of a parliament. The average length of the 18 parliaments since and including 1945 had been 3 years and 10 months. Proponents of a four-year term argued that five years would reduce voter choice and introduce what amounted almost to a democratic deficit. Four-year terms were not only common in other nations, not at least most of the nations of continental Europe,³⁵ but they were also the terms stipulated for the legislatures in Scotland, Wales and Northern Ireland. Most members of the House of Lords Constitution Committee shared the view of the majority of their witnesses that a four-year term was more appropriate than five years.³⁶

Five-years had been agreed by the negotiators in 2010 on the grounds that it gave the government time to implement its programme before turning its attention to the electoral cycle. The government stuck to the five-year provision. In introducing the Bill, Deputy Prime Minister Nick Clegg sought to justify it on the grounds that the last year of a parliament was essentially given over to electioneering, so that a four-year term would probably allow only three years for the government to govern effectively.³⁷ Despite the objections to five years, the government achieved majorities for the provision in both Houses.

The more persistent objections arose in respect of the provisions governing votes of confidence. Members raised concerns as to the definition of a vote of confidence. The Bill did not define the term. Instead, the government took the view that, on the basis of past practice, what constituted such a vote would be clear. "In practice", declared the Deputy Prime Minister, "there is little doubt about what constitutes a motion of no confidence in a government, and there is no need to limit the flexibility of Parliament unnecessarily".³⁸ It could thus be left to the Speaker to determine what was, and what was not, a "motion of no confidence". Some MPs and peers did not share the Deputy Prime Minister's confidence. The wording, it was argued, was ambiguous. If the Bill, as the Deputy Prime Minister had claimed, retained the "traditional powers" of no confidence, a defeat on a motion declaring confidence in the government would constitute the House demonstrating its lack of confidence in the government. However, the provisions of cl.2(2)(a) stipulated that a motion of no confidence had to be passed. If a motion of confidence is defeated, then no motion has been passed.³⁹ This clashed with what the Deputy Prime Minister had claimed was the purpose of the clause.

35 Hazell *Fixed Term Parliaments* (n.15), p.12.

36 Constitution Committee, House of Lords, *Fixed-term Parliaments Bill*, Evidence, 17–19. See also Political and Constitutional Reform Committee, House of Commons, *Fixed-term Parliaments Bill* 9.

37 *House of Commons Debates (Hansard)*, 13 September 2010, cols. 625–626.

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

39 Political and Constitutional Reform Committee, House of Commons, *Fixed-term Parliaments Bill* 14.

Relying on the Speaker's certificate also generated considerable controversy. MPs were exercised especially as to whether relying on the Speaker to issue a certificate may create the prospect of judicial review. The Clerk of the House of Commons had submitted a memorandum to the Political and Constitutional Reform Committee of the House of Commons drawing attention to the prospect of the Speaker's certificate coming within the purview of the courts. On the subsection empowering the Speaker to certify that either condition for an early election had been met, he contended that the provisions made the Speaker's consideration of confidence motions and the House's practices justiciable questions for determination by the ordinary courts. "Not only might the Speaker's decisions involve difficult judgements – for example about what constitutes a confidence motion, the selection of amendments to such Motions and the consequences of their being carried", he wrote, "but they would be made in a potentially highly charged political situation which could also lead to challenge in the House. As these would become justiciable questions, the courts could be drawn into matters of acute political controversy".⁴⁰

The government was pressed on the issue when the Bill was introduced and the Deputy Prime Minister made clear that he was "absolutely confident" that the Bill as drafted was not amenable to judicial review.⁴¹ This view was supported by other authorities and, as Robert Hazell observed, by international experience.⁴² However, the government was sensitive to the issue. MPs and peers have been extremely protective of the exclusive cognisance of each House, that is, the right to be the sole judge of their own proceedings and procedures. The need to keep the courts out of the affairs of each House was essentially taken by parliamentarians as given. The prospect of the courts interfering in the rights of the House to determine its own procedures was described by the MP — a barrister — questioning the Deputy Prime Minister on the issue as an "awful nightmare".⁴³

There was also the practical problem that the Speaker was given no guidance as to what constituted a vote of confidence. Under the Parliament Act 1911, the Speaker is required to certify money bills, but there is a clear statutory definition as to what constitutes a money bill. Furthermore, certification only takes place when the bill has completed its passage through the Commons. With confidence votes under the Bill, the Speaker would be in a position of having to certify in advance whether or not a motion was a vote of confidence and to do so without any statutory stipulation or guidance. That could bring the Speaker — a neutral presiding officer, free of political affiliations — into political controversy. The government may deem a motion as one of confidence, only for the Speaker to refuse to certify it as such, or the Speaker may certify a motion that the government does not accept raises an issue of confidence.

40 Political and Constitutional Reform Committee, House of Commons, *Fixed-term Parliaments Bill*, Evidence, 20.

41 *House of Commons Debates (Hansard)*, 13 September 2013, col. 629.

42 Hazell *Fixed Term Parliaments* (n.15), p.38. Though see also Raymond Youngs and Thomas Thomas-Symonds, (2013), "The Problem of the 'Lame Duck' Government: A Critique of the Fixed-term Parliaments Act" (2013) 66(3) *Parliamentary Affairs* 540–556.

43 *House of Commons Debates (Hansard)*, 13 September 2013, col. 629.

Despite their confidence in the drafting, ministers nonetheless responded to the concerns raised and moved to amend the Bill. During its report stage in the House of Lords, the government accepted a backbench amendment to replace cl.2. Under the new clause, there was no requirement for a Speaker's certificate. Instead, it provided that the two circumstances under which an early election was triggered were:

- (1) if the House passes the motion: "That this House has no confidence in Her Majesty's Government" and, if within 14 days, a new government has not achieved passage of the motion: "That this House has confidence in Her Majesty's Government".
- (2) if the House, by a two-thirds majority of all MPs, passes the motion: "That there shall be an early general election".

These provisions created greater clarity and are the provisions now in the Fixed-term Parliaments Act (*see* Figure 2).

Figure 2: Section 2 of the Fixed-Term Parliaments Act 2011

2. Early parliamentary general elections

- (1) An early parliamentary general election is to take place if —
 - (a) the House of Commons passes a motion in the form set out in subsection (2), and
 - (b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).
- (2) The form of the motion for the purpose of subsection (1)(a) is —
"That there shall be an early parliamentary general election".
- (3) An early parliamentary general election is also to take place if —
 - (a) the House of Commons passes a motion in the form set out in subsection (4), and
 - (b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).
- (4) The form of the motion for the purposes of subsection 3(a) is —
"That this House has no confidence in Her Majesty's Government"
- (5) The form of the motion for the purposes of subsection 3(b) is —
"That this House has confidence in Her Majesty's Government"
- (6) Subsection (7) applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.
- (7) If a parliamentary general election is to take place as provided for by subsection (1) or (3), the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister (and, accordingly, the appointed day replaces the day which would otherwise have been the polling day for the next election determined under section 1).

Some other amendments were also made during the Bill's passage. As introduced, the Bill made provision for the Prime Minister by statutory instrument to provide

that polling day may be brought forward by, or delayed by, up to two months.⁴⁴ The purpose of this provision was to allow for some change to the date in the event of an emergency, such as happened with an outbreak of foot-and-mouth disease among animals in 2001. An instrument containing such an order required the approval of both Houses of Parliament. The government was pressed in the House of Lords as to why the provision for bringing an election forward was necessary. There were circumstances in which delay could be envisaged but not bringing the date forward. As a result, the Bill was amended to provide only for a delay of up to two months.

The Bill was also amended to include provisions to prevent elections to the Scottish Parliament or the National Assembly for Wales falling on the same day as a parliamentary general election. These provisions were inserted during the Bill's passage following motions passed by the two assemblies requesting such changes. The government had told both that if such motions were passed, it would bring forward such amendments.

One further amendment was agreed. The Bill had a difficult passage through the House of Lords, with some peers pressing for it to apply for only one parliament or for a limited duration. To stave off the possibility of more radical changes, the government agreed a provision providing that the Prime Minister must make arrangements for a committee to carry out a review of the operation of the Act. It has to do so no earlier than 1 June 2020 and no later than 30 November 2020. The Prime Minister is also required, "if appropriate in consequence of its findings, to make recommendations for the repeal or amendment of the Act" and to arrange for the publication of the committee's findings and recommendations (if any). The amendment also stipulated that a majority of the members of the committee were to be MPs.

The Bill as amended took effect upon Royal Assent on 15 September 2011. The United Kingdom thus has semi-fixed-term parliaments. What, then, are the constitutional consequences of the Act?

IV. Consequences⁴⁵

The most obvious and intended consequence of the Act was to remove the Prime Minister's capacity to request the dissolution of parliament. The prerogative power of dissolving parliament was ended. The Queen retains no residual power to dissolve parliament. Dissolution is automatic under the provisions of the Act.

The measure thus achieved the principal, but not the only, purpose for which it was introduced. In introducing the Bill, the Deputy Prime Minister emphasised that

⁴⁴ Because of the inclusion of this provision, the Bill could not be enacted under the provisions of the Parliament Act 1911, which excluded from its provision any Bill designed to extend the life of a Parliament.

⁴⁵ This section draws on the author's paper, "The Constitutional Implications of the Fixed-term Parliaments Act 2011", delivered at the Public Law Conference, *Process and Substance in Public Law*, University of Cambridge, 15–17 September 2014.

it was designed to rid the Prime Minister of the power to call an election at the time of his choosing. He continued: “This simple constitutional innovation will none the less have a profound effect because for the first time in our history the timing of general elections will not be a plaything of Governments... [E]veryone will know how long a Parliament can be expected to last, bringing much greater stability to our political system. Crucially, if, for some reason, there is a need for Parliament to dissolve early, that will be up to the House of Commons to decide”.⁴⁶

The problem with this statement is that the last part negates the first. The fact that the Act provides for a semi-fixed term means that there is the potential for government to employ its provisions to its advantage. It is unlikely that a government would enjoy a two-thirds majority in the House of Commons that would enable it to achieve passage of a motion calling for an early election. However, a government with an overall majority would be able to engineer passage of a motion of no confidence. The 14-day timetable is then triggered to allow time to see if a new government can be formed, but a government that can mobilise a majority to pass a vote of no confidence would likely be able to mobilise that same majority to prevent a motion of confidence in the new ministry being passed.

There is no formal constraint on a government seeking to achieve that outcome. The restraint is purely political. A government would risk political opprobrium if it were responsible to pursue such a path. It may decide that it was prepared to risk such opprobrium if it nonetheless looked likely that it would win the ensuing general election. Practice elsewhere suggests that manipulating the loss of a confidence vote may deliver political dividends.⁴⁷ That experience also suggests that success is not guaranteed and is clearly a high-risk manoeuvre.⁴⁸ Some politicians clearly believed that government would seek to use the provisions to its advantage and ensure that calling the date of an election remained the “plaything of Governments”. One MP voted for the Bill on the grounds that “the best reason for voting for it is that it is pointless”.⁴⁹ It remains to be seen whether a government does seek to generate a vote of no confidence. Failure to do so would help build a culture of not manipulating the provisions of the Act. The salient point for our purposes is that there is no statutory prohibition on a government seeking to utilise the provisions for an early election to its advantage. One means of limiting it was variously suggested during the Bill’s passage — namely that the motion of no confidence had to be tabled by the Leader of the Opposition or members of the opposition party — but this was not pursued by the government.

There is another provision of the Act that may also constitute something of an encouragement, or at least not act as a discouragement, to the government for seeking an early election. If an early election is held, then, under s.1, the clock is

46 *House of Commons Debates (Hansard)*, 13 September 2010, col. 621.

47 See Youngs and Thomas-Symonds ‘The Problem of the “Lame Duck” Government: (n.42), pp.540–556.

48 See *ibid.*, 548–549.

49 *House of Commons Debates (Hansard)*, 13 September 2010, col. 675.

reset. The new parliament lasts for five years. (Or, under s.1(4), for just over four years if the election occurs before May in the calendar year in which it is held. In that case, the parliament lasts from May of that year until May four years later.) An early election does not produce a new parliament lasting only to serve out the remainder of the five-year term in which the early election fell.

It could be argued that the amendments to the Bill in the House of Lords reduced the likelihood of a government seeking to use the provisions of the Act to precipitate an early election at a time to suit it. Under the Bill as drafted, a Speaker, relying on past practice, may have certified a vote of no confidence to include a vote of confidence that was negated, the House being deemed implicitly to have “passed” a motion of no confidence. That would have allowed a government to ask for a vote of confidence from the House and then not contest the motion. That would likely be regarded as more politically acceptable than a government inviting its own supporters to vote for an explicitly worded motion of no confidence. The amendments to the Bill stipulating in terms the wording of the motion that had to be passed in order to force an early election may thus be seen as reducing, though not eliminating, the prospect of being used by the government.

The amendments made in the Lords may also reduce, but not eliminate, the prospect of judicial review. The removal of the need for a Speaker’s certificate and the inclusion of the precise terms of the motions to be passed reduce the prospect for challenge.

However, the changes made in the House of Lords do raise important constitutional implications. The Bill as drafted was designed to enable the three categories of confidence votes that existed previously to continue, subject to the Speaker’s endorsement. However, as amended, the Bill eliminated all but the first of the three categories. Under the Act, only an explicitly worded motion of no confidence will result in an early election, subject to no new government being formed within 14 days and gaining the confidence of the House. The other two categories no longer fall within the terms of the Act. A Prime Minister cannot repeat the words of Edward Heath in 1972. In other words, a Prime Minister can no longer designate a vote on a motion, other than an explicitly worded motion of no confidence, as one to which confidence attaches. The Prime Minister has thus lost a powerful tool of party control. The power to designate a motion as one of confidence, stipulating that if lost the dissolution of parliament will follow, has been deployed by Prime Ministers. It ensures their parliamentary supporters vote for the government on motions which they otherwise would oppose. The fate of the government is put as a higher priority than a particular issue of policy.

There is one other potential constitutional conundrum that follows the amendments made to the Bill. The Prime Minister may be denied the power to trigger an election in the event of losing an important vote. However, there is nothing to stop a Prime Minister tendering the resignation of the government. It would thus be open to a Prime Minister to say that such significance attaches to a vote that, if defeated, the government will resign. In those circumstances, the provisions of the Act are not engaged. There

is, as the minister Mark Harper conceded in evidence to the Constitution Committee of the House of Lords, no 14-day clock running within which a new government must obtain a vote of confidence: “a period of government formation would obviously follow. It would just not be time-limited”.⁵⁰ Following such a route may entail a high risk politically, but there is an attraction to it from the perspective of the government’s business managers: it retains the capacity to maximise voting strength on the government side: “vote for us or risk putting the other side in office”.

There is also nothing to stop the Prime Minister tendering the resignation of government even if it has not lost a vital vote. A government may, in effect, implode, riven by internal conflicts, or may simply have problems governing because of a small or non-existent parliamentary majority. What would happen in those circumstances? In his evidence to the Constitution Committee, the minister Mark Harper said that there was “the very firm convention that the Queen should not be left without a functioning government”. Therefore, a government would not resign until the Queen was in a position to appoint a new Prime Minister.⁵¹ However, *The Cabinet Manual*, drawn up by government and published in 2011, is less clear that there is such a convention: “Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. It remains to be seen whether or not these examples will be regarded in future as having established a constitutional convention”.⁵²

There are two possible outcomes to a government deciding to resign. The first would be that it would accept that it would be incumbent on it to remain in office until a successor government was found. The UK has experience of forms of caretaker governments. The wartime coalition under Winston Churchill came to an end in 1945 and Churchill presided over a Conservative caretaker government from May to July, while preparations for a general election were made.⁵³ One could also describe the Labour government in office at the time of the 2010 general election as constituting a caretaker government, albeit only for five days while the negotiations were under way, some ministers remaining formally in post even though no longer MPs. In such a situation, a government is in place, but it is best described as an administration than a policy-making government. No major policies could be generated. It would be a case of keeping the wheels of government turning until such time as a new ministry was formed. Given that the provisions of the Act would not be engaged, there would be no time limit on how long such an administration would exist. If the outgoing government and the Opposition felt that they would not benefit from an early general election, then the process could be a lengthy one.

50 Constitution Committee, House of Lords, *Fixed-term Parliaments Bill*, Evidence, 52.

51 *Ibid.*

52 *Cabinet Manual* (The Cabinet Office, 2011), para.2.10.

53 In terms of legislation, it pursued measures already in progress under the wartime coalition. “The General Election of 1945”, *The Times House of Commons 1945* (The Times Office, 1945) 19.

The other possibility is that the government was not prepared to remain in office and insisted on resigning without waiting for a new government to be formed. In those circumstances, the most likely outcome would be that one of the provisions for an early election would be triggered. However, if an election was not favoured by any of the major parties, preferring instead to seek a deal to form a government, then the nation could be left without a government. This could be for a very short period — as mentioned, the likelihood is that an early election would be triggered — but theoretically it could be anything for up to five years.

The likelihood is that negotiations would result in a government being formed quickly, certainly by international standards, as in 2010, or an early election triggered. Nonetheless, the lack of flexibility accorded to the Prime Minister to call an election raises the prospect of uncertainty and possibly political instability. The provisions for early elections provide a safety valve, but it is not clear how efficiently they will be used or, for that matter, manipulated.

V. Conclusion

The Fixed-term Parliaments Act 2011 is a major constitutional measure of the United Kingdom. It repealed the Septennial Act 1715 and omitted s.7 of the Parliament Act 1911. It removes a major prerogative power. The UK now has semi-fixed-term parliaments. The Prime Minister can no longer determine when a general election will take place. Empirically, it is questionable whether the exercise of this power benefited the incumbent party other than on a limited number of occasions.⁵⁴ The principal effect of the Act is to provide a degree of certainty as to the date of general elections that was previously lacking. However, provisions for early elections mean that the certainty exists subject to the House of Commons not triggering an early election. In practice, “the House of Commons” for this purpose constitutes the party whips. It is unlikely that anything other than party voting will determine the outcome of a confidence vote or a vote for an early election.

The amendments made to the Bill during its passage through the House of Lords reduced the likelihood of the provisions being subject to judicial challenge but served to limit the contours of the previous convention governing votes of confidence. A confidence vote for the purposes of triggering an election is now one that is explicitly worded. The change removes from the Prime Minister an important tool of party control in ensuring the passage of contested key measures of the government. The changes leave untouched the power of the Prime Minister to tender, without any vote in the House, the resignation of the government. In those circumstances, the Act is silent on what happens next. It leaves open the prospect for extended negotiations, something not unknown in some other political systems, but notably alien to the British political culture.

⁵⁴ See Bogdanor *The Coalition and the Constitution* (n.3), p.114.