

Dr Craig Prescott, Centre for Parliament and Public Law, University of Winchester - written evidence (FPA0001)

I am a Senior Lecturer in Law, and Director, Centre for Parliament and Public Law at The University of Winchester. With Dr John Stanton (City University London), I am the author of *Public Law*, published by Oxford University Press. I regularly contribute to the national media discussing political and constitutional issues. As my research focuses on Parliament and the monarchy, I have considered the Fixed-term Parliaments Act 2011 ("the Act") in detail, having written a blog for the United Kingdom Constitutional Law Association,¹ evidence for the Public Administration and Constitutional Affairs Select Committee,² and, I am currently completing an academic journal article on the Act.³

Summary

- When deciding whether to hold an early general election, the Act appears to have empowered the opposition and backbench MPs. However, in practice, the opposition may struggle to convincingly argue against one. In any event, a determined government may seek to undermine the Act, through moving a vote of no confidence against itself or passing legislation to override the provisions of the Act.
- Despite the intention of the Act, it is questionable how many parliaments will serve out the full five-year term, and in practice, as the before the Act, the five-year period may become viewed as the maximum period.
- The Act was not intended to radically alter either the principles of government formation, or the concept of confidence as it existed before the Act. Consequently, the government can continue to lose the confidence of the House in the same ways as before the Act, including by making a particular vote a matter of confidence.
- Removing the option of an immediate dissolution following a loss of confidence has unintentionally clarified when the duty on the Prime Minister to resign arises, which is when it is clear that someone else has the confidence of the House. This is the same whether the provisions of the Act apply or not.
- Potentially, the 14-day period that follows a statutory vote of no confidence could be shortened.
- The two methods that trigger an early election could be replaced with a

¹ C. Prescott, 'A "Snap" General Election? It's Far from a Certainty', U.K. Const. L. Blog (13th Jul 2016) (available at <https://ukconstitutionallaw.org/2016/07/13/craig-prescott-a-snap-general-election-its-far-from-a-certainty/>)

² Written Evidence from Dr Craig Prescott, Public Administration and Constitutional Affairs Select Committee – Status of Resolutions of the House of Commons Inquiry (SRH 01) (available at <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Public%20Administration%20and%20Constitutional%20Affairs%20Committee%20Status%20of%20resolutions%20of%20the%20House%20of%20Commons/Written/91689.html>)

³ I would be happy to send a draft to the Committee once I have completed it.

simpler provision that requires an election if a majority of MPs vote for one. This would reflect the fact that governments still have extensive control over whether and when an early election is held, and that the Act did not, and does not alter the underlying concept of confidence.

Introduction

1. In some senses, the Act has worked entirely as intended. Since its enactment in 2011, the 2010 Parliament lasted the full five-year term, the 2015 Parliament was dissolved according to the terms of the Act, with 66% of MPs voting to hold an early general election. The 2017 Parliament is ongoing with the government surviving the first no confidence motion that complied with the Act.
2. However, this submission seeks to explain that the Act has had a more profound impact on politics than this headline approach implies. A further consideration is how to take account of the "Brexit factor", that since 2016, politics has been dominated by the unique task of withdrawing the UK from the European Union, which in turn has tested aspects of the UK's constitutional arrangements. In particular, the combination of MPs voting contrary to party lines within a hung parliament has drawn attention to the Act.
3. I have responded to all questions other than questions 3 and 7, and I have aimed to describe the situation as it stood on Friday 31st August.

Question One: To what extent has the Fixed-term Parliaments Act 2011 led to a meaningful transfer of power from the Prime Minister to the House of Commons, removing "the right of the Prime Minister to seek the dissolution of Parliament for pure political gain"?

4. As the long title of the Act states, the 2011 Act seeks to make '*provision about the dissolution of Parliament and the determination of polling days for parliamentary general elections*'. It achieves this by replacing the prerogative power of dissolution with a statutory scheme. Legally, this removed the ability the Prime Minister to "call" a general election at a time of their choosing, by requesting a dissolution from the monarch.
5. During periods of majority government before the Act, the Prime Minister might call a general election around four years into a parliament against the backdrop of favourable opinion polls. For example, Margaret Thatcher called general elections in 1983 (following the 1979 election) and 1987, while Tony Blair called elections in 2001 (following the 1997 election) and in 2005. Prime Ministers in weaker political positions, such as John Major and, Gordon Brown, tended to let Parliament to run its full course, as happened prior to the 1997 and 2010 general elections. Now Prime Ministers have this flexibility, it appears that they are bound by the five-year fixed term.⁴

⁴ It is not a fixed full five-year term because under s 1(3) Parliament is dissolved twenty-five working days before the next polling date, which if the term runs its course will be the first Thursday in May in the fifth calendar year following the previous polling date. If the existing Parliament runs its full term, then this Parliament which first met on 13th June 2017 (following the general election on 8th June 2017) will be dissolved

6. The position of prime ministers leading a minority government are addressed in the response to Questions 5 & 6.
7. However, if the Prime Minister wishes to hold an early general election, then the House of Commons needs to vote for one using either of the two methods provided for in the Act.
 - 1) s 2(3)-(5): If the House of Commons passes the motion, '*That this House has no confidence in Her Majesty's Government*', and within the following 14 days does not pass the motion, '*That this House has confidence in Her Majesty's Government*' ("statutory vote of no confidence").
 - 2) s 2(1)-(2): If 66% of MPs (calculated by the number of seats, not votes) vote in favour of the motion, '*That there shall be an early general election*' ("66% method").
8. This means that legally, the House of Commons, and not the Prime Minister, is responsible for deciding whether to hold an early general election and dissolving Parliament. In principle, this reflects the separation of powers in that, instead of the executive deciding when the legislature is dissolved, the democratically accountable half of the legislature now makes the decision.⁵
9. Consequently, there is clearly a transfer of power, but the issue is whether this more than merely formal or performative. As seen in April 2017, the Act did not pose an obstacle to Theresa May's wish to hold an early (and indeed surprise) general election, which was followed following a vote using the 66% method. Indeed, in December 2016, the Leader of the Opposition, Jeremy Corbyn indicated that should May wish to hold an early general election, Labour would vote in favour of one.⁶ Labour affirmed this intention shortly after May's announcement. Consequently, the outcome of the vote was not in doubt, and the 66% threshold was easily met with 522 votes to thirteen voting in favour of an early election.⁷
10. During the Acts passage through Parliament, the 66% method was described as a mere 'safety valve',⁸ and Bogdanor stated that in practice it would 'only [be] available when both the Conservatives and Labour favour' an early election.⁹ This would be most likely in a political crisis, because usually what would be in the government's interest would be

on 28th March 2022, allowing for a general election on 7th May 2022, which as required by s 1 (3) is the first Thursday in May in the fifth calendar year following the previous general election. This takes account of Good Friday and Easter Monday on 15th and 18th April and assumes that a Spring Bank Holiday on 2nd May will be declared under the Banking and Financial Dealings Act 1971.

⁵ John Stanton and Craig Prescott, *Public Law* (OUP, 2018) 226.

⁶ Ashley Cowburn, 'Jeremy Corbyn: If Theresa May wants an early election, Labour will vote for it' *The Independent*, 22nd December 2016, <https://www.independent.co.uk/news/uk/politics/jeremy-corbyn-general-election-theresa-may-prime-minister-progressive-alliance-liberal-democrats-a7489891.html>

⁷ HC Deb, 19 April 2017, vol 624, cols 681-712.

⁸ House of Lords Constitution Committee, *Fixed-term Parliaments Bill* (HL 2010-12, 69) paras 94 and 102.

⁹ Vernon Bogdanor, *Coalition and the Constitution* (Hart, 2011) 110.

unlikely to be in interest of the opposition.

11. Yet as described, in 2017, the underlying dynamic was different and the 66% threshold did not pose much of an obstacle. Corbyn, by saying that he would welcome an election had in effect surrendered any veto power he and the Labour Party had. In effect, this gave Theresa May considerable latitude over whether and when to go for an election.
12. Although, Labour performed better than many expected at the 2017 General Election, future leaders of the opposition may choose to be more reticent than Corbyn on the question of an election, just to keep the government on its toes. This would be a change from what sometimes happened prior to the 2011 Act, when leaders of the opposition 'challenged' the Prime Minister to call an election, in an attempt to capture political momentum.¹⁰ Of course, such a challenge would fall on deaf ears, or even dissuade the Prime Minister from seeking a dissolution. Now under the Act, making such an advance statement could create a trap for the opposition, for if the government experiences a bounce in the polls, and the Prime Minister chooses that moment to move for an election, the opposition may have little choice other than to agree.
13. At the other end of the scale, under the 2011 Act, a Leader of the Opposition could be as bold as to table their own motion for an early general election, challenging the government to agree to it. There is no requirement in the Act that the motion for the 66% method has to be moved by the government. Politically, the government may be able to fend this off, on the basis that they are 'busy governing the country', and that the 'time is not right' for an election. However, an important unresolved issue is when and how should a motion be tabled by the opposition be debated? Erskine May only requires that votes of no confidence tabled by the Leader of the Opposition are debated on 'a reasonably early day' and does not address how a motion required for an early election through the 66% method should be treated.¹¹
14. Conversely, if a Prime Minister tables a motion under the 66% method, is it politically sustainable for a Leader of the Opposition, who has not committed to support an early election when called to whip their party to vote against a government proposal for an early election? In principle, as an alternative government, the opposition should welcome the opportunity to get into office. Consequently, voting against an early election may make an opposition appear weak, unwilling to serve as the government, and in certain circumstances, perhaps even anti-democratic.

¹⁰ See for example, David Cameron challenging Gordon Brown to call an election on becoming Prime Minister in 2007, Philip Webster and Sam Coates, 'Brown wants unions to accept reduction in party influence', *The Times*, 26 June 2007 (available at <https://www.thetimes.co.uk/article/brown-wants-unions-to-accept-reduction-in-party-influence-x6b9hgb52r8>) and his party conference speech in 2007, BBC News, 'Cameron Speech in Full', 3 October 2007, (available at <http://news.bbc.co.uk/1/hi/7026435.stm>).

¹¹ Sir David Natzler and Mark Hutton (eds), *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament* (25th edition, 2019, accessed online at erskinemay.parliament.uk), para 18.44. In addition, as the motion would be a proceeding under an Act of Parliament, Standing Order No 16(1) would apply, meaning that the vote would be put after 90 minutes of debate. This was the case in April 2017. This could be disapplied by a business motion, but (at least ordinarily) this would require the consent of the Government.

15. A Prime Minister, faced with an intransigent opposition is determined to hold a general election, could seek to manipulate the no confidence procedure. The Government could move a vote of no confidence itself, use its majority to pass it, and, then remain in office throughout the 14-day period to force an election.¹² Such shenanigans may be controversial in the short-term, but this is likely to dissipate during the ensuing election campaign. This would be the case when the Prime Minister's desire for an election could be wrapped up within a viable justification. For example, if a new Prime Minister takes office following a leadership election and seeks their own mandate from the electorate. This justification will be stronger towards the end of the five-year fixed term.¹³
16. Alternatively, the government could pass legislation requiring a general election 'notwithstanding' that an election is not due under the Act, or amending section 1 of the Act itself.¹⁴ As the Act is not subject to any form of entrenchment, its provisions can be overridden using the ordinary legislative process. This highlights the paradox with the 66% method. For if 66% of MPs support a general election, then there is sufficient support for legislation.
17. Clearly, before the Act, the decision to go for an early election was for the Prime Minister, and to a lesser extent the Cabinet. The opposition had no substantive role. Now, the use of the 66% method requires the active co-operation of the opposition. The opposition can, perhaps willingly, surrender much of their influence by making an advance statement that they would support an early election, in practice restoring the Prime Minister to a similar position as they were before the Act. Should the opposition wish to avoid a general election, then if they do not support the 66% method, then the government may seek to manipulate the no confidence method, or enact legislation to set the date of the next election.

Question Two: Is five years the appropriate length for fixed-terms between general elections?

18. I have no particular view as to whether four years or five years is appropriate. However, I query how often Parliaments will run for their full five-year term. It has to be remembered that the five-year period is the maximum length of a Parliament, as was the case before the Act. Effectively, it has carried over the pre-existing maximum length of a Parliament as provided for by the Septennial Act 1718, as amended by the Parliament Act 1911. Whereas before Parliament could be dissolved earlier by the Prime Minister exercising the prerogative, now the provisions of the Act have to be used to hold an early general election.

¹² Raymond Youngs and Nicklaus Thomas-Symonds, 'The Problem of the 'Lame Duck' Government: A Critique of the Fixed-term Parliaments Act' (2013) 66 *Parliamentary Affairs* 540-566.

¹³ For example, when Anthony Eden sought an election on becoming Prime Minister in 1955.

¹⁴ The Conservatives considered introducing legislation setting the date of the next election to June 2017 had Labour not supported the motion for an immediate general election, see Philip Cowley and Dennis Kavanagh (eds), *The British General Election of 2017* (Palgrave Macmillan, 2018) 13.

19. In the three Parliaments in existence since Act came into force, the 2010 Parliament lasted for the full five-year term and the 2015 Parliament was the shortest Parliament since 1974 (February). As regards the current Parliament, the combination of Brexit and a hung parliament means that a general election is being frequently discussed, and it is unlikely to last the full term. It could be that the 2015 and 2017 Parliaments are unusual, and that future parliaments may run their full term if the more regular politics of majority governments from 1979 to 2010 returns.
20. Although, even within the context of a majority governments, parliaments may be dissolved before the end of the five-year term. During the 2015 General Election campaign, David Cameron announced that he would not seek a third term and would stand down as Prime Minister during his second term (as it turned this happened far sooner than anyone expected).¹⁵
21. Despite being a surprise to many, Cameron's intentions should have been more obvious when considering the Act. Serving three full terms would mean fifteen years in office, which only Walpole and Pitt the Younger have done. Even two full terms is a ten year period, which has only been achieved by Thatcher and Blair since 1945. If it is patently obvious that a Prime Minister will not serve a full third term, then it begins to make sense for the party of government to have a Prime Minister that will, and, take office in time for that election. If on taking office, the polls appear favourable, and a general election is due in a mere matter of months, the new Prime Minister may well seek an early election.¹⁶
22. Of course, if as discussed below, there is a succession of hung parliaments or governments with very small majorities, then Parliaments will be less likely to run their full five-year term in any event.

Questions Five & Six:

What impact has the Act had on the notion of the House of Commons having "confidence" in a Government? Is it still possible for the Government to make a vote in the House of Commons on a matter of policy a "confidence" issue?

What challenges arise for the political parties, the House of Commons and the civil service in the 14-day period following the passing of a motion of no confidence in the Government? Is there a risk of the monarch being drawn into the political debate during this period and, if so, how should this be mitigated?¹⁷

¹⁵ BBC News, 'David Cameron 'won't serve third term' if re-elected', 24 March 2015 (available at <https://www.bbc.co.uk/news/uk-politics-32022484>).

¹⁶ There is also a potential, if marginal, disadvantage to this. If an election is held before the May in which a general election is due, the following election would take on the first Thursday in the May of the fourth calendar year afterwards. This means that an election in, for example, February 2022, would be followed with an election in May 2026 and not May 2027.

¹⁷ Much of my reply to Questions 5 and 6 is drawn from my evidence to the Public Administration and Constitutional Affairs Committee as detailed in footnote 2.

23. To answer these two questions, it is important to consider government formation more generally, and place the Act in its constitutional context. There are three key considerations, which underpin the constitutional conventions that operate in this area;

- 1) That the monarch is not left without a government;
- 2) That the authority to govern rests on having the confidence of the House of Commons;
- 3) Although the monarch has the reserve power to dismiss the government, today, she is not expected to be drawn into making an active political decision. If there is any doubt about whether the government of the day has the confidence of the House of Commons, or it is unclear as to who should form the next government, the political parties are expected to resolve the situation.

24. For example, when the Prime Minister chooses to resign in their own right, they announce their intention to resign as party leader, and then, once the new party leader has been chosen, they then tender their resignation to the monarch, and is replaced by the new party leader. Similarly, after a general election, once it is clear that they have lost their majority and that someone else does they are expected to resign as they are no longer 'best placed' to command the confidence of the Commons. As was seen in 2010, if the position is more complex, the Prime Minister remains in office until the situation is resolved.

25. As stated in paragraph 4, the Act specifically intended to introduce new rules for the dissolution of Parliament, and for setting the date for general elections. There is no indication that the Act intended to fundamentally alter pre-existing concepts of confidence or the key considerations as outlined in paragraph 22 above. However, the Act, by removing the option of dissolution following a loss of confidence, has at least clarified, the operation of other constitutional rules, in particular when the duty on the Prime Minister to resign arises.

Non-Statutory Loss of Confidence Following the Enactment of the 2011 Act

26. Before the Act, confidence could be lost in a several different ways;

- 1) An explicit motion of no confidence;¹⁸
- 2) An amendment to the Loyal Address expressing no confidence in the government;¹⁹
- 3) A defeat on a vote that the government states that it intends to

¹⁸ As in 1979, on the motion, 'That this House has no confidence in Her Majesty's Government', HC Deb 28 March 1979, vol 965, cols 461-590.

¹⁹ As in 1924, 'But it is our duty respectfully to submit to your Majesty that Your Majesty's present advisors have not the confidence of the House', HC Deb 21 January 1924, vol 169, col 532-685.

treat as a matter of confidence.²⁰

- 4) Potentially other votes, such as the budget or the Loyal Address itself could be a matter of confidence, although the House of Commons Library has described this as 'speculative', as it does not directly test confidence.²¹ Furthermore, a government could choose to resign following a serious defeat or series of defeats.

27. Whichever way confidence was lost, the Prime Minister could either resign on behalf of the government or seek a dissolution of Parliament.²² Consequently, all three key principles outlined in paragraph 22 above would always be met. If the Prime Minister resigned, the monarch would ask the person best placed to command the confidence of the House to form a government. This would most likely be the Leader of the Opposition. If they went on to lead a minority government, then they could call an election at a time of their choosing.²³ Alternatively, the Prime Minister would seek a dissolution of Parliament, and remain in office until the outcome of the general election was clear.²⁴

28. Given that the Act did not seek to provide more generally about confidence, then it follows that a government can continue to lose the confidence in the same ways as before the Act. What the Act changes is the consequence of loss of confidence. If confidence is lost, the Prime Minister cannot seek a dissolution, or if confidence is lost by the House of Commons voting in favour of the motion that "This House has no confidence in Her Majesty's Government", then the 14-day period begins as outlined in the Act. What happens during those 14 days is discussed in the next section.

29. Given that existing concepts still apply, it remains open to the government to make a specific vote on a matter of policy (or legislation) a vote of confidence, and stating in advance that if it was lost, the government would resign. Yet, due to the Act, it is now difficult to see why a government would do this. Governments used to make a specific vote a matter of confidence in order to wield the threat of a general election over its backbenchers who were reluctant to support the government. MPs were

²⁰ As on 11th March 1976, when the adjournment motion was treated as a matter of confidence following the defeat the previous day on a vote on the government's White Paper on expenditure, HC Deb 11 March 1976, cols 634-758. Similarly, in 1993, when, the day after a close vote, John Major held an explicit confidence vote on the Social Chapter of the Maastricht Treaty, on the motion 'That this House has confidence in the policy of Her Majesty's Government on the adoption of the Protocol on Social Policy', HC Deb 23 July 1993, vol 229, col 625-724.

²¹ Richard Kelly, 'Confidence Motions' House of Commons Library, (SN/PC/2873, 13 May 2013) 8.

²² The government itself has stated that '[i]t is not easy to define precisely whether after the passing of a motion of no confidence in it, a Government should resign or remain to contest a general election'. HM Government, *Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill* (Cm 7951, 2010) [58].

²³ For example, when Sir Henry Campbell-Bannerman called the 1906 General Election immediately after taking office following Arthur Balfour's resignation in 1905.

²⁴ It used to be a matter of debate as to whether the monarch could refuse a request from the Prime Minister, but these circumstances are largely irrelevant to this discussion.

mindful that their seats could be at risk at any election caused by a government defeat. Now due to the Act, if the government lost a vote it would not necessarily lead to an early election. Backbench MPs could vote against the government, safe in the knowledge that should the government (or indeed the opposition in response to the defeat) seek an early election they could vote against either a statutory vote of confidence, or any motion to call an early election using the 66% method.²⁵ This shows how despite not legislating about the concept of confidence, the Act has indirectly affected how the concept operates in practice.

Effect on the Prime Minister's Duty to Resign

30. The Act leaves unanswered a key question, which is what effect does it have on the Prime Minister's duty to resign, given that it has removed the option of seeking a dissolution? Before the Act, if the Prime Minister did not either seek a dissolution or resign, then manifestly, they would be acting unconstitutionally, and in theory could be dismissed by the monarch. Yet this highlights how the two options ran alongside each other, it was an either/or question, rather than being two independent options.
31. One view is that as the Act has left untouched the option of resigning; the Prime Minister is required to resign following a loss of confidence. Unless any other figure emerges, the monarch would most likely appoint the Leader of the Opposition as the new Prime Minister, as they are best placed to command the confidence of the Commons. What this argument fails to consider is that the pre-Act requirement to resign was contingent on deciding against seeking a dissolution of Parliament. Indeed, the argument that the Act imposed no change can be turned on its head. If the Act did not intend to change the concept of confidence, then maintaining an immediate duty to resign would be going beyond the position before the Act.
32. Even within the scheme of the Act, requiring immediate resignation could create considerable uncertainty. The opposition by definition, would be short of a majority, (perhaps even more so than the government that has just left office) and so they could find it difficult to govern effectively. But now, they would be unable to call a general election. Indeed, the party that had just left government could seek to hold the new government to ransom, choosing when to move a statutory motion of no confidence to start the 14 day period, or announce that it would support an early general election called under the 66% method (and possibly even table the motion itself). Furthermore, if the new government also lost confidence they would also then be required to resign. Presumably, the monarch would then have to reappoint the first Prime Minister.
33. Such political instability could be avoided if the Prime Minister is placed under a duty to resign when it is clear that someone else has the

²⁵ Such differential voting can be seen when 118 Conservative MPs voted against the Withdrawal Agreement and Framework for the Future Relationship (HC Deb 15 January 2019, vol 652, cols 1020-1125). However, no Conservative MP went on to vote against the Government on the vote of confidence the following day (HC Deb 16 January 2019, vol 652, cols 1171-1273).

confidence of the House. This approach is also consistent with the principles outlined in paragraph 22. The Prime Minister continues in office, in a caretaker capacity, while negotiations between the parties take place.²⁶ If negotiations do not yield an outcome, a general election under the Act is likely to follow. Given that the government has already lost the confidence of the House, they would be likely to lose a statutory vote of confidence tabled by the Leader of the Opposition. Similarly, the government might sense that possibility and so seek to hold an early election using the 66% method. For the reasons suggested in paragraph 14, it would seem difficult for the Leader of the Opposition to block an early election.

A Statutory Vote of No Confidence

34. A statutory vote of confidence requires the words, "That this House has no confidence in Her Majesty's Government", if the House of Commons passes this motion, then there are 14 days to pass the motion "That this House has confidence in Her Majesty's Government". If this second motion is not passed within the 14 days, then a general election will be held. The Act is silent on what should happen during this 14-day period.

35. The main possibilities as to what might happen during this period are;

- 1) The government could regain the confidence of the House following negotiations with other political parties.²⁷
- 2) It is clear that someone else is best placed to command the confidence of the House. Typically, this might be the Leader of the Opposition, whose party has reached an agreement with other parties to support it in office. For example, if the junior partner of a coalition government decides to support the main opposition party.²⁸
- 3) No agreement is possible between the parties, and the 14-day period elapses without the Commons passing the motion, "That this House has confidence in Her Majesty's Government".
- 4) 66% of MPs vote for an immediate early general election, and so dispensing with the remainder of the 14-day period.

36. Given that the Act did not intend to change pre-existing notions of confidence it would be odd if it introduced an entirely different concept of confidence to non-statutory confidence motions. From this, it surely follows that there was no intention for the Act to create a special category of no confidence that placed a prime minister under a different duty to resign under a statutory vote of no confidence to when confidence is lost in other ways. This means that unless as provided for by the Act, i.e. the 14-day period, the consequence of a statutory no confidence motion

²⁶ HM Government, *Cabinet Manual* (1st edn, 2011) para 2.31.

²⁷ *ibid*, para 2.19.

²⁸ This could be through creating a new coalition, reaching a confidence and supply agreement, or, a more informal arrangement. See *ibid*, para 2.17.

should be the same as losing confidence under other methods.

37. Framing the Prime Minister's duty to resign in this way means that a loss of confidence is more likely to lead to a general election than an alternative government, and connectedly, it makes it more difficult, but not impossible, for the alternative government to govern as a minority. This is because the Act imposes an extra hurdle, that the new government must win the vote of confidence motion required to end the 14-day period and prevent a general election. This is a move towards a more positive conception of confidence, when usually it is considered more negatively, as confidence is assumed, and can be lost.²⁹

Specific issues during the 14-day period

Prorogation and Setting the Election Date³⁰

38. The Act makes clear that the prerogative power to prorogue parliament is unaffected by the Act.³¹ As recent events have shown, the monarch exercises this power on the advice of the government.

39. Before the Act, Parliament was usually either prorogued or adjourned prior to dissolution.³² This would allow for parliamentary business to be concluded and to follow the practice of a general election taking place on a Thursday. For example, in 2010, Parliament was prorogued from Thursday 8th April until Monday 12th April before being dissolved on Tuesday 13th April. The general election then on Thursday 6th May.³³ Since the Act, Parliament was dissolved automatically for the 2015 election, and was prorogued for three days before dissolution, and for the 2017 election Parliament was prorogued for six days.

40. There is no precedent as to what should happen during the 14-day period provided for by the Act. If a general election is required following the 14 day period, the Prime Minister has the power to set the election date.³⁴ Presumably, as has been the practice, this would be set for a Thursday, with Parliament being dissolved twenty-five working days beforehand as required by the Act.³⁵ Parliament could then be prorogued for a few days

²⁹ Governments did, and still could, move positive motions of confidence. If successful, it would confirm the assumption that it had confidence, but if lost, would be a loss of confidence, and treated in the normal manner.

³⁰ This written evidence was written on 29th August 2019. On the 28th August, the Queen approved an Order in Council providing for Parliament to be prorogued from a day between Monday 9th and Thursday 12th September until 14th October.

³¹ FTPA 2011, s 6(1). Elsewhere I have suggested that given that, given the Act, this seems increasingly anomalous, and the power to prorogue Parliament should be decided by the House of Commons, and not the Government. Craig Prescott, 'Modern Monarchy: State and Nation' (March 21, 2018) [<http://dx.doi.org/10.2139/ssrn.3222556>]

³² Cabinet Manual (n 23) para 2.24.

³³ At that time Parliament was dissolved 17 working days before polling day. Now the period is 25 working days.

³⁴ FTPA 2011, s 2(7).

before dissolution to enable pre-existing parliamentary business to be concluded in the 'wash up'.

41. Currently, as the Act stands, the Prime Minister has considerable latitude over setting the election date, and given the highly political context, prime ministers will be tempted to exercise this power in a manner that best suits them, in deciding the length of the election campaign.³⁶
42. Here the Act could be amended so that the power of the Prime Minister to set the polling date is limited to setting it as the first Thursday following the expiry of twenty-five working days, as calculated from the date an early election is triggered under either of the methods provided for by the Act. This would mean that a Thursday is chosen as the polling date, Parliament would, as required, be dissolved twenty-five working days from this date. Then, if necessary, Parliament could then be prorogued for a few days before dissolution as is normally the case. If that is too restrictive, the Prime Minister could have the power to choose a date within a two-week window that starts twenty-five working days after the early election has been triggered.
43. The other risk is that the government could seek to exercise the prerogative power of prorogation so that the House of Commons does not sit during some or all of the 14-day period. The immediate effect of a prorogation for the rest of the 14-day period would be to make a general election inevitable.
44. How controversial such a prorogation would be depends on the underlying circumstances.³⁷ Particularly, if no viable alternative government is likely to emerge, it is possible that prorogation could be a stage in a broader process agreed between the parties that leads to the election, particularly if they seek time to prepare for the unexpected campaign.
45. Clearly, it would be more controversial if prorogation was used to prevent a new government from moving a statutory motion of confidence, which if passed, would prevent early an election. In these circumstances, the existing government would have lost and not regained the confidence of the House. Requesting a prorogation in this context would be unprecedented in modern times. As the House of Commons Library states, '[t]here are no modern examples of a UK Prime Minister asking the Crown to prorogue Parliament against the wishes of the Commons where confidence is absent or in question'.³⁸ The monarch would be placed in an extremely difficult position. Effectively, they would be faced with the choice of either granting the request and so guaranteeing an election, or refusing, and appointing a new Prime Minister. Whatever the true

³⁵ FTPA 2011, s 3(1).

³⁶ In the Brexit context, there is potential for controversy should a general election be held, as the Prime Minister could set the election date for after 31st October.

³⁷ This is of course assuming that a 14-day period is not entangled with Brexit between now and 31st October.

³⁸ Graham Cowie, House of Lords Library <https://researchbriefings.files.parliament.uk/documents/CBP-8589/CBP-8589.pdf#page14>

constitutional position is or should be, a popular perception that the Monarch has intervened in politics would be impossible to avoid.

46.If the duty on the Prime Minister to resign has arisen because a clear alternative has emerged, then that duty to resign must take precedence over any request from that Prime Minister to prorogue Parliament. The new Prime Minister and government could then decide whether to allow an election at the end of the 14-day period or prevent one by passing a statutory motion of confidence. A more complex situation is when the incumbent Prime Minister seeks a prorogation while negotiations between the parties are ongoing. In these circumstances, as is the case after an election, the monarch should not be expected to intervene. The negotiations should be allowed to run their course, so that if necessary, a new Prime Minister would be appointed, or the incumbent remains in office during the rest of the 14-day period, and an election is held. This would reflect the third principle of government formation as expressed in paragraph 23, that the monarch does not make an intervention.³⁹

How can an alternative government manifest itself?

47.The wording of the motions required by the Act indicate that the pre-existing government has lost the confidence of the House, and that a government already in office now has the confidence of the House. As explained above, this could be the same government regaining the confidence of the House.

48.However, a greater difficulty is how a new government can emerge and then be appointed. Once the government has lost confidence, it would be expected that negotiations and discussions will take place between the political parties, and perhaps individual MPs.

49.If it is clear that party A and party B will work together and have a majority, then, as is the case after a general election, the Prime Minister will be expected to resign. As is the case following an election, there is no requirement for this to be a parliamentary process. A joint announcement from the two-party leaders could be sufficient. Indeed, this was not necessary in 2010, Gordon Brown resigned, when it was clear that he had lost the confidence of the House, and that David Cameron had gained it, but that it was still unclear as to whether he would lead a coalition or minority government. No formal announcement of any agreement between the Conservatives and the Liberal Democrats was made prior David Cameron's appointment as Prime Minister. It was the following morning that the two party leaders held their first joint press conference at Downing Street.

50.Yet, given that Parliament will be sitting, the lack of involvement may appear odd. The difficulty is that, until the Prime Minister resigns, the

³⁹ In addition, the use of the power to prorogue could also be subject to a legal challenge on the basis that it frustrates the intention of the Act; see *Laker Airways v Department of Trade* [1977] QB 643; *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513. In *Fire Brigades*, at 552, Lord Brown-Wilkinson stated, 'it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute...'

existing government remains in office during the 14-day period. This means that the government would have to allow time for a parliamentary process to approve the outcome of any negotiations (such as an informal investiture vote) before the appointment of the new Prime Minister.

51. The more challenging scenario is when there are competing claims to be the Prime Minister. However, as is the case following a general election, it is up to the political parties to resolve the situation.⁴⁰ This is another reason why the Prime Minister should only resign once it is clear that there is an alternative government, as it avoids the monarch from having to make an active political choice. The 14-day deadline may also concentrate minds, if they do not want a general election, then their negotiations must come to a conclusion.

52. Furthermore, to remove a Prime Minister, there is no obligation to use the statutory method. The opposition could move a no confidence motion to the effect that "This House has no confidence in Her Majesty's Government, but it would have confidence in a government led by X as Prime Minister". This would not trigger the 14-day period as the wording of the Act is not used.⁴¹ However, it would remove any room for manoeuvre from the Prime Minister, as if this motion is passed, it (1) proves that the government has lost the confidence of the House, and (2) that it is clear that someone else would have the confidence of the House. This further shows how the obligation on the Prime Minister to resign is the same however the no confidence motion is lost.

Is the 14-Day Period Too Long?

53. The motion in the previous paragraph shows how, in some circumstances, the 14-day period could be superfluous. In more ordinary times, the result of a no-confidence vote is dictated by the prevailing balance of the parties and is rarely a surprise. It is only ever in doubt if the underlying arithmetic is tight or there are significant internal divisions within parties. A motion that expresses no confidence in the Prime Minister, but confidence in their replacement makes explicit what is likely to happen before any loss of confidence. If a Leader of the Opposition (or a group of MPs from different parties) is serious about replacing the government then prior to tabling a no confidence motion, they will have worked with other parties to assess the chances of success.⁴² By that point, they will also have worked out whether they want to replace the government or have a general election. Similarly, the government is also likely to have worked out their position in advance of the vote, and the possibilities open to them are likely to be reasonably obvious.⁴³ Consequently, a ten or a

⁴⁰ Cabinet Manual (n 23) para 2.9.

⁴¹ There is the difficulty of the government allowing time for such a motion. When Leader of the House, Andrea Leadsom made clear that should the opposition wish to test whether the government has the confidence of the House, 'it is for them to test it via a motion under the terms of the Act', HC Deb, 10th December 2018, vol 651, col 89.

⁴² For example, after the 1923 General Election, Asquith indicated that Labour should form the next government as a minority, meaning that the outcome of the vote on the King's Speech was clear, see Roy Jenkins, *Baldwin* (William Collins, 1987) 78-79.

seven-day period is likely to focus minds on reaching an agreement (if they have not already), and if that is not possible, as shorter period would reduce the delay before an inevitable election.

Question Four: Are the mechanisms in the Act to trigger an early general election appropriate?

54. This discussion then leads on to a further point. Given that the Act was not intended to fundamentally alter the pre-existing concept of confidence, it can perhaps be questioned as to why the Act needs to mention confidence in the first place. Furthermore, despite its short title, the Act has never provided for fixed-terms in an absolute sense, and without any entrenchment, a single party majority government could pass an Act providing for a general election on a date of their choosing 'notwithstanding' the provisions of the Act.⁴⁴ Consequently, the Act could be amended to reflect the true constitutional position, by replacing the two methods for an early general election, with a simpler provision allowing for an early general election if a majority of MPs, based on the number of seats, votes in favour of one.

55. This would make clear that pre-existing concepts of confidence are unaffected, albeit that a loss of confidence does not enable the Prime Minister to call a general election. However, following a loss a confidence, the House of Commons could then proceed to vote for a general election. Having just defeated the government, it would seem unlikely that the opposition would vote against. Alternatively, the opposition could move straight for an early election, if that was its ultimate intention. If it sought to replace the government, it could move a two pronged motion that expressed no confidence in the government, but that the House would have confidence in a 'government led by X' as explained in paragraph 49.

56. This would be much simpler than the existing provisions, it would leave very little scope for the involvement of the monarch, the ambiguities of the 14-day period are removed, and it clear that any loss of confidence would lead to the same consequence, that if there is a viable alternative, the Prime Minister would be required to resign.

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⁴³ Although, unlike the opposition, the government would be less able to explicitly negotiate with other parties before the vote, as that would make the government look weak.

⁴⁴ See n 14.