

Status of Resolutions of the House of Commons

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Introduction

1. I am the Director of the Centre for Parliament and Public Law and a Senior Lecturer in Law at the University of Winchester. I have previously taught Public Law at the University of Manchester and King's College London. I hold a PhD in Constitutional Law from the University of Manchester.
2. The call for evidence asked for written evidence on the following three questions relating to the Fixed-term Parliaments Act 2011 ('the Act'):
 - (1) What status do motions of no confidence have if they do not conform to the terms of the Fixed-term Parliaments Act 2011?
 - (2) What relationship might such motions have to a motion under the Act calling for a General Election?
 - (3) What implications does this have for our understanding of the Act, its effectiveness and how it works?
3. My evidence addresses questions 1 and 2 together and concludes by answering question 3 with more general comments about the Act and its possible replacement.
4. In summary, my conclusion is that an early general election under the terms of the Act is the most likely consequence of a successful no confidence motion that does not conform to the Act. Fundamentally, politics will prevail over any difficulties created by the Act. However, there is a genuine question over whether the Prime Minister is under a requirement to resign, and this may have implications for when motions under the Act calling for a general election can be moved. If the Prime Minister is required to resign immediately following a no confidence vote, then the Act has the potential to cause significant problems. Principally, these problems can be avoided if the situation is clarified so that the Prime Minister only becomes under a duty to resign when there is a viable, alternative government.

(A) THE EFFECT OF THE ACT

5. A no confidence motion of whatever form, that does not conform with the Act, does not, by itself, trigger a general election. Only the following two motions can trigger an early general election:
 - s 2 (3)-(5): *'That this House has lost confidence in Her Majesty's Government'*, and within the following fourteen days, the House of Commons does not pass the motion, *'That this House has confidence in Her Majesty's Government'*.
 - s 2 (1)-(2): If 66% of MPs vote in favour of the motion, *'That there shall be an early parliamentary general election'* ('the 66% method').
6. This means that a general election is not immediately triggered following a government defeat on either on a motion of confidence worded differently to that specified in the Act, or on a vote the government has decided to treat as a matter of confidence. The response to any defeat, or a series of defeats that call into question the viability of the government, is likely to be that either of the two methods provided by the Act will be used to hold an early general election.
7. However, the Act raises one important question, namely whether the Prime Minister is required to resign following a vote of no confidence? To answer this question, the old rules, the effect of the Act, and then how the Act operates following a successful vote of no confidence all need to be considered.

The Old Rules

8. The sole purpose of the Act is to regulate the timing of general elections while making provision for early general elections if needed. The concern is that the rules that regulate the timing of general elections are also intimately connected with the issue of government formation. This means that other considerations need to be taken into account. These include:

(a) the basic requirement that the Queen must not be left without a government,¹
(b) the authority to govern is dependent on enjoying the confidence of the House of Commons;²

(c) Historically, the Monarch had the reserve power to dismiss the government, but today should not be drawn into making an active political decision. It is the responsibility of the political parties to resolve any doubt as to who should form the next government.³

9. The pre-Act rules ensured that these considerations were always fulfilled. If the government loses a vote of no confidence, the Prime Minister can either resign on behalf of the government or seek an early general election.⁴ There has been some doubt over whether this was the position;⁵ however, it is drawn from the precedents. In 1979, when James Callaghan lost a vote of no confidence, he immediately sought a general election. In 1924, following a defeat on a vote of no confidence, the Prime Minister, Ramsay MacDonald was granted a dissolution of Parliament by George V. Both Callaghan and Ramsay resigned once defeated at the following general election. The last Prime Minister to resign following a no confidence defeat was Stanley Baldwin in 1924, who had exercised his right to meet the new Parliament following the general election in 1923, which saw the Conservative government lose their majority.⁶

¹ HM Government, *Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill* (Cm 7951, 2010) [57].

² HM Government, *Cabinet Manual* (1st edn, 2011)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf] para 2.7

³ *ibid*, para 2.9.

⁴ This operated through the prerogative power of the Monarch to dissolve Parliament, exercised upon the request of the Prime Minister. The Monarch would invariably grant the Prime Minister's request. The possibility of the Monarch's refusing a request has been much discussed but is outside the scope of the Committee's inquiry.

⁵ The government itself 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 (n 1) [58].

⁶ These precedents are outlined in Richard Kelly, 'Confidence Motions' House of Commons Library, (SN/PC/2873, 13 May 2013) 10-11. When the Act was going through Parliament, the government also believed that the position was that the government could either resign or contest a general election see HM Government (n 1) [57]. However, as stated in the previous footnote, the government was unclear as to precisely when the Prime Minister was under a duty to resign.

10. These precedents also show that the Prime Minister remained in office following a no confidence vote until it was clear that someone else was able to command the confidence of the Commons, following the general election result. This is also consistent with how, when standing down as party leader, prime ministers only resign following the conclusion of their party's leadership election.

When does the Prime Minister come under an obligation to resign?

11. The Act has placed into doubt the operation of the pre-existing conventions regarding the resignation of the Prime Minister. This ambiguity applies to all no confidence motions, not just those that are not covered by the Act. There are two main possibilities - either to resign immediately following the defeat, or when there is an alternative government. The argument that the Prime Minister should resign immediately is simple; the Act has removed the ability to call a general election, meaning that an immediate resignation is the Prime Minister's only option.

Arguments Against Immediate Resignation

12. The argument that the Prime Minister must immediately resign potentially misunderstands the relationship between statute and convention. Simply stated, the purpose of the Act is to regulate when general elections are held. The Act achieves this purpose by introducing new legal rules, which preclude the operation of any existing non-legal rules such as conventions because it has become illegal to follow any convention that contravenes the new legal rules. However, if an Act abolishes only certain conventions, then other, related, conventions remain to the extent that they do not conflict with the statute in question. In this context, the Prime Minister can no longer 'call' an early general election as the Act has removed this power. On the face it, it may appear that this simply leaves the convention of the Prime Minister's immediate resignation.

13. However, the other consideration is that the conventions that remain following statutory intervention may need to change in order to take account of the new legal rules introduced by statute. Although the government's intention was otherwise,⁷ the

⁷ The government stated that, 'the aim of the Bill is not ... to interfere with the conventions which govern the position where the Government loses the confidence of the House'. HM Government (n 1) para 56.

Act may have indirectly changed the convention of the Prime Minister's resignation.⁸ Not only is this consistent with the nature of constitutional conventions themselves which are inherently capable of changing, but it is also consistent with the broader constitutional context that gives rise to their very existence in the first place. The Jennings' test for the existence of a constitutional convention includes considering whether there is a good reason for the rule.⁹ This means that if the reasons for a convention to exist differ because of a new legal and constitutional context, then it follows that the convention may need to change to take account of the new rules.

14. The following considers that the Act, in removing the ability of the Prime Minister to 'call' a general election has had the effect of clarifying when the Prime Minister is under an obligation to resign, which is when an alternative government can be found.¹⁰ The constitutional 'reason' is that this formulation of the convention is flexible enough to ensure that a Prime Minister does not unjustifiably cling onto office while ensuring that there is always a government.¹¹ As explained below, it also creates little room any manipulation of the rules provided by the Act and has the benefit of simplicity as it applies to no confidence motions that do or do not comply with section 2(3) of the Act. It is also consistent with the approach following a general election that results in a hung parliament.¹² The one exception are votes that the Prime Minister has made an issue of their own personal authority, although as discussed below, that would result in a Prime Minister resigning in their own right, rather than on behalf of the government.

15. The other 'reason' in favour of this approach is that the option of the Prime Minister's immediate resignation under the old rules arose because the alternative was to seek

⁸ This also reflects a peculiar feature of the Act, which is that sought to legislate only some of the relevant rules within this area, seemingly without any consideration of the broader constitutional context in which the new rules will operate. This is different to the Constitutional Reform and Governance Act 2010, ss 20-23 which provides a (relatively) comprehensive scheme for the ratification of treaties.

⁹ The full test is, 'first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by the rule; and thirdly, is there a good reason for the rule'. Sir Ivor Jennings, *The Law and the Constitution* (5th edn, London University Press 1959) 136.

¹⁰ It is arguable to what extent this is even an amendment to the existing rules.

¹¹ The government may then operate under caretaker principles until it becomes clear that someone has the confidence of the Commons.

¹² HM Government, *Cabinet Manual* (n 2) paras 2.16, 2.27-2.34.

a dissolution of Parliament. A Prime Minister would have acted entirely unconstitutionally if they did not call an election or resigned, but instead continued as if nothing had happened following a loss of confidence. By removing one of the two options, the Act has changed the operation of the one remaining option.

No Confidence Votes Under the Act

16. If the House of Commons passes the motion, 'That this House has no confidence in Her Majesty's Government',¹³ then there are fourteen days within which the House of Commons must pass the motion, 'That this House has confidence in her Majesty's Government',¹⁴ otherwise a general election will be held.¹⁵ The Act is entirely ambiguous as to what should happen within that fourteen-day period. However, as the Cabinet Manual describes, the government 'can seek to regain the confidence of the House' during this period,¹⁶ presumably through conducting negotiations with other parties.¹⁷ It follows from this that the Prime Minister is under no immediate duty to resign and indeed could wait for the fourteen-day period to end if attempts to regain the confidence of the House failed. In addition, as the Cabinet Manual states, the Prime Minister is 'expected to resign where it is clear that he or she does not have the confidence of the House of Commons and that an alternative government does have the confidence'.¹⁸ If the opposition parties had agreed to form a government, then the Prime Minister would have to resign. All together this approach would be partly analogous to the position before the Act, albeit subject to the fourteen-day period.

17. In addition, if the main parties agree, there appears to be no obstacle to using the 66% method to dispense with the fourteen-day period (or what remains of it) and hold a general election more immediately.¹⁹ During the fourteen-day period, and any

¹³ As specified in s 2(4).

¹⁴ As specified in s 2(5).

¹⁵ As required by s 2(3).

¹⁶ HM Government, *Cabinet Manual* (n 2) para 2.19.

¹⁷ This is similar to the negotiations that may follow a general election that results in a hung parliament. Also, during this time, the similar restrictions on government activity would apply, *ibid* paras 2.27-2.31.

¹⁸ *ibid*, para 2.19.

¹⁹ Experience in Canada has also shown that the Prime Minister could seek to use the prerogative power of prorogation, which is explicitly preserved under s 6(1) of the Act, to prevent a confidence motion being passed under s 2(5) which would end the fourteen-day period and avoid an early general election.

following general election campaign, the government would remain in office, subject to the usual caretaker rules.

18. If it was otherwise, with the Prime Minister being required to resign immediately - because the old rules were left unaffected by the Act - then in theory, the provisions of the Act could be gamed or manipulated. The Monarch would be required to appoint the Leader of the Opposition as Prime Minister, who, depending on the results of the last election, could be considerably short of a majority and lack the ability to call a general election in the way that Harold Wilson did in 1974, when he led a minority Labour government to call the October election.²⁰ Whether a general election would be held would be dependent on the Opposition, and how they voted on the government on the motion 'That this House has confidence in Her Majesty's Government' or any proposal by the new government to hold an immediate election under the 66% method. The Opposition parties, particularly the party that had just left office, could seek to re-group in opposition,²¹ moving a motion of no confidence as required by the Act to start the fourteen-day period at a time of their choosing. Theoretically, the new government could be forced to remain in office for the remainder of the Parliament, unable to get its legislation through or govern effectively. This, second, government could even resign in office, leaving the monarch no alternative other than appointing the leader of the party that was first appointed into government at the start of the Parliament.

19. It would be expected that the 66% method would be used to resolve any such situation with an early general election. However, this analysis highlights the theoretical difficulties that could emerge if the structure of the Act was combined with a duty on the Prime Minister to resign immediately. More realistically, an immediate resignation is likely only to be another step towards an inevitable general election. Overall, unless a viable alternative government emerges, it is difficult to see the benefits of requiring an immediate resignation, as opposed to allowing the Prime Minister to remain in office until the end of the fourteen-day period and to contest the early general election.

No Confidence Motions Outside the Act

²⁰ Similarly, the new Prime Minister could not seek their own mandate as Anthony Eden did on becoming Prime Minister in 1955.

²¹ Potentially, this could include holding a new leadership election.

20. If the analysis outlined above is accepted as regards no confidence motions under the Act, then it also applies to no confidence motions outside of the Act. Generally, it is difficult to see why a Leader of the Opposition would wish to move a vote of no confidence that did not comply with the Act. The Prime Minister could interpret any failure to move a motion that complied with the Act as an indication that they did not want to contest an election, meaning that the Leader of the Opposition did not view themselves as an alternative Prime Minister. The Prime Minister could advance the argument that in the interest of maintaining a government, they should remain in office. Indeed, the Prime Minister could call the Leader of the Opposition's bluff by seeking to hold an early general election via the 66% method as provided by the Act. Politically, it would be odd for the Leader of the Opposition to call a vote of no confidence, succeed, but then prevent a general election and denying themselves the chance of gaining a majority and entering government themselves.

21. If the Prime Minister was required to resign immediately, with the Leader of the Opposition appointed in their place, then the difficulties described in paragraph 18 also apply in these circumstances. For any new government, there is the additional difficulty, that because the provisions of the Act are not engaged there would be no general election by default at the end of the fourteen-day period.

No Confidence Motions Outside the Act - Matters Treated As Confidence Motions

22. Fundamentally, confidence motions test whether the government continues to have the confidence of the Commons. It has always been open to the government to make a particular vote a matter of confidence. Prime Ministers have used this as a method to secure the support of recalcitrant backbenchers. The threat was that if the vote were lost, they would call a general election and their seats could be at risk.²²

23. The Act does not preclude a Prime Minister from doing this, but now it no longer contains the threat of a general election as that is no longer in their gift.²³ However, the question as to whether the Prime Minister must resign remains. Should a Prime Minister resign immediately, without a viable alternative government, then the

²² This proved an effective way for John Major to secure the support of backbenchers on the Social Chapter which was part of the Maastricht Treaty, HC Deb 1 Dec 1993, vol 550, cols 544-554.

²³ See also Philip Norton, 'The Fixed-term Parliaments Act and Votes of Confidence' (2016) 69(1) Parliamentary Affairs 3.

problems described in paragraph 18 would apply to any government led by the Leader of the Opposition. Given these difficulties, if it is accepted that the Prime Minister should resign only if there is an alternative government, the removal of the power to call a general election makes it constitutionally questionable for the Prime Minister to float the possibility of their resignation if there is no viable alternative government. This risks breaching the convention that the Monarch is not left without a government, and requiring them to make an active choice.

24. The obvious alternative is that the Prime Minister could promise that, if they are defeated on any specific vote, they will seek an election under either of the procedures allowed by the Act. The difficulty is that it is entirely possible for backbench MPs to vote against their government on a crucial vote, but with their government on any confidence motion that complied with the Act to trigger the fourteen-day period, or against an early general election via the 66% method.

25. Given that backbench MPs could still support the government on any vote of confidence, the Prime Minister could choose to make a particular vote a matter about the support for their *leadership* personally, making the political promise that if they lose a particular vote, they will resign as Prime Minister and trigger a party leadership contest. This would not be a confidence motion in any traditional sense. This does not threaten the position of backbench MPs in the same way but may encourage some to vote with the government and their Prime Minister. The effect of any such threats appears weak, as this does not create an opportunity for the Opposition to take office. Indeed, if the relationship between backbench MPs and the Prime Minister becomes so strained, then some backbench MPs may view such a vote as a mechanism to circumvent their internal party leadership rules and quickly remove a Prime Minister and party leader.²⁴

26. In turn, this shows how the Act has fostered a different dynamic between the Prime Minister and their backbench MPs, particularly during the present period of minority

²⁴ Potentially, an interim Prime Minister would have to be appointed, pending the appointment of a new party leader. The Labour Party rule book makes clear that the Cabinet shall choose one of its members to serve as party leader until the conclusion of a leadership contest. Labour Party, *Rule Book 2018*, Chapter 4, Clause II(E)(i). The Conservative Party does not appoint a formal deputy in the same manner. Although recently both David Cameron and Theresa May have used the title 'First Secretary of State' to indicate a de facto deputy amongst their Cabinet, this title is currently not in use.

government. Before the Act, backbench MPs (especially those in marginal constituencies) *needed to support* the Prime Minister on votes of confidence in order to remain an MP. Now, under the Act, the Prime Minister *requires the continuing support* of their own backbenchers to be able to govern, as they can block government legislation knowing that in practice an early general election can only be held with their agreement.

Other Votes

27. Ultimately, the same analysis applies to votes on the budget and the Queen's Speech - to the extent that they are votes of confidence. This has been the matter of some debate, with the House of Commons Library describing the categorisation of these votes as confidence motions as 'speculative'.²⁵ This is because a confidence motion directly tests the confidence of the House, which the Queen's Speech or the Finance Bill do not. However, a government may choose to resign following a serious defeat or a series of defeats,²⁶ but similar problems arise as to the alternative government as when a Prime Minister was under a requirement to resign following a vote of no confidence because the Act provides an obstacle to an early general election.

(3) What implications does this have for our understanding of the Act, its effectiveness and how it works?

28. The Act has operated as intended and the theoretical problems highlighted above have yet to occur in practice. In 2015, It served its purpose for the coalition government, as Parliament was dissolved following the expiry of the five-year fixed period. The Act worked as intended in 2017 when Theresa May announced that she intended to hold a general election and the House of Commons voted for one via the 66% method. May was reasonably confident of Labour's response as Jeremy Corbyn had already stated that Labour would vote for an early general election if a vote were called.²⁷ The political reality could be that if a Prime Minister proposes to hold a

²⁵ Richard Kelly (n 6) 8.

²⁶ *ibid.*

²⁷ 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>].

general election, then the opposition parties may find it difficult to prevent it. This may mean that the theoretical problems continue to remain matters of theoretical interest only.²⁸

29. The structure of the Act, with Parliament being dissolved automatically after the five-year period unless an 'early' general election is held may make a five-year term the norm, rather than Prime Ministers with working majorities seeking a general election around four years into a term.²⁹ That definitive endpoint can make people accustomed to the idea that Parliament lasts five years, which is helpful for planning both within government departments and in Parliament.³⁰ In this context, it may seem odd for a government with a healthy majority to voluntarily seek an early general election.

30. However, politics does not always work according to such rhythms. Indeed, whatever happened as regards Brexit, David Cameron had indicated that he did not want to seek a third term as Prime Minister, and at some point would have stepped down during the 2015-2020 Parliament.³¹ A new Prime Minister may well have wanted to have sought their own mandate which could only be acquired by an early general election. Particularly towards the end of the parliamentary term, the opposition parties are less likely to block an early election.

31. Yet, it remains the case that the Act is inferior to the old rules it replaced. The vase has been broken, and it is difficult to put it back together. There are doubts about whether this could be achieved by merely repealing the Act, although the repealing statute could revive the old rules.³² However, it might be thought to be odd to return to a system that could allow a hereditary monarch to prevent a general election. One

²⁸ This point has been made by AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (17th edn, Pearson 2018) 253.

²⁹ Robert Hazell, *Fixed Term Parliaments* (UCL Constitution Unit, 2010) 12-13.

³⁰ House of Commons Political and Constitutional Reform Committee, *Fixed-term Parliaments: the final year of a Parliament* (HC 2013-14, 976).

³¹ BBC News, 'David Cameron 'won't serve third term' if re-elected' (BBC News, 24 March 2015) [<https://www.bbc.co.uk/news/uk-politics-32022484>].

³² A. Horne and R. Kelly, 'Prerogative Powers and the Fixed-term Parliaments Act' UK Const. L. Blog (19th November 2014) [<https://ukconstitutionallaw.org/2014/11/19/alexander-horne-and-richard-kelly-prerogative-powers-and-the-fixed-term-parliaments-act/>]; Robert Craig, 'Restoring Confidence: Replacing the Fixed-term Parliaments Act 2011' (2018) 81(3) *Modern Law Review* 480, 505-6.

benefit of the Act is that by placing the power to dissolve Parliament in the hands of Parliament itself, away from the government, it better reflected the separation of powers.³³

32. An alternative would be to allow the Prime Minister to call an election subject to the approval of a vote of the House of Commons.³⁴ Following the approval of the Commons, the Prime Minister could seek the dissolution from the Monarch who would have no ability to refuse.³⁵ Clearly, a majority government could hold an election whenever they wished, but arguably this is already the case under the Act. The benefit is that it would greatly simplify the situation with minority governments by making it easier to hold an election. The dynamic would, as was the case in 2017, be towards a Commons vote in favour of an early election. On the Prime Minister's initiative, Opposition parties would find it difficult to avoid an early general election, particularly if they have just defeated the government on a vote of no confidence.³⁶ Requiring the consent of the House of Commons would also prevent a Prime Minister who had just lost their majority at an election from immediately seeking another election if an alternative government is available.

³³ John Stanton & Craig Prescott, *Public Law* (OUP 2018) 226.

³⁴ This could be based on the number of seats rather than the number of votes, as is the case with the existing 66% method.

³⁵ Robert Craig, 'Restoring Confidence: Replacing the Fixed-term Parliaments Act 2011' (2018) 81(3) *Modern Law Review* 480, 505-6.

³⁶ In addition, in an alternative scenario, if the threshold for the 66% method provided by the Act could not be met, there is no need for the government's backbenchers to subvert the Act by voting in favour of a no confidence motion against their own government to trigger the fourteen-day window under s 2(3)-(5).