

The Fixed-term Parliaments Act and Votes of Confidence

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The Government in the United Kingdom rests for its continuation in office on the confidence of the House of Commons. Until 2011, it was a convention of the constitution that a Government defeated on a motion of confidence resigned or requested the dissolution of Parliament. There were different categories of confidence votes. The Fixed-term Parliaments Act 2011 puts on a statutory basis the conditions for a general election following the loss of an explicitly worded motion of no confidence. Though not intended to do so initially, the provisions of the Act limit the options available to the Prime Minister in the event of a vote of no confidence and in so doing removed a significant power to maximise parliamentary strength in key votes.

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1. Introduction

In parliamentary systems of government, the executive normally rests on the confidence of the legislature for its continuance in office. If the legislature passes a vote of censure, the government goes, either by resigning or calling fresh elections. The United Kingdom is not unusual in this respect. However, in 2011 the capacity to force an election through voting no confidence in the Government almost was lost. In the event, the Fixed-term Parliaments Act 2011 modified the consequences of the House of Commons expressing its lack of confidence in the Government. Here, we analyse how this outcome was arrived at. It was the result of the distinctive basis of the convention governing votes of confidence in the UK, the formation of a coalition Government and a

failure on the part of those negotiating the coalition agreement to appreciate the nature of the convention.

We begin by establishing the significance in parliamentary systems of executives resting on the confidence of the legislature, the particular nature of the relationship in the UK and how it was challenged and then modified in the transition from coalition agreement to legislation. Under the coalition agreement negotiated in May 2010, the ability to force an election through passing a vote of confidence would have disappeared. Under the Fixed-term Parliaments Bill as introduced into the House of Commons, it would have continued in its existing form. Under the measure as enacted – the Fixed-term Parliaments Act – it is retained in limited form. The Act has notable consequences for Government, not least in removing the option available to the Prime Minister to maximise voting loyalty on the part of Government backbenchers; that is, by designating a vote as one of confidence, defeat on which would precipitate a general election. It was an option rarely employed, but its availability was a powerful weapon – the parliamentary nuclear option – in the Prime Minister’s arsenal. Other weapons remain, but nothing to match the immediacy and impact of triggering a general election.

2. The significance of parliamentary confidence

One of the defining characteristics of parliamentary systems of government is that the executive rests upon the confidence of the legislature for its continuance in office. ‘In parliamentary systems’, as Douglas Verney recorded, ‘the government is responsible to the assembly which may, if it thinks that the government is acting unwisely or unconstitutionally, refuse to give it support’ (Verney 1992, p. 36). It may refuse its support through, as he notes, a vote of censure or by not assenting to an important Government proposal. By so doing, it may force the Government out of office.

How confidence is expressed is therefore central to any parliamentary system. Practice varies, though it is common for confidence to be tested through a vote of the sole or principal chamber. Of the 158 nations listed by Fish and Kroenig (2009) in their *Handbook of National Legislatures*, no fewer than 97 have some provision for a vote of confidence. In all but two cases, the vote of confidence takes place in one chamber. In Romania, a motion of no confidence has to be carried by both chambers in joint session. Kazakhstan also has provision for a vote by a joint session.

As a parliamentary system, the UK is not unusual. The Government rests on the confidence of the elected House, the House of Commons, and that confidence is expressed through a vote of the House. However, the House of Commons is distinctive in that, until 2011, the provision for confidence votes was not embodied in a codified constitution or in statute. The situation was governed by convention.

Conventions are rules of behaviour designed to adapt the legal position to the political reality (see Marshall 1984). There was no legal requirement for a Government to resign or seek the dissolution of Parliament if it lost a vote of censure. However, it did so. There was a political sanction: it would be virtually impossible to continue governing, since it was unlikely it would be able to get the House to vote for supply. However, as David Feldman has argued, conventions are complied with because of a moral imperative: 'They are obeyed because they encapsulate right behaviour' (Feldman 213, p. 95). A practice develops, and becomes a convention, because it is accepted as the appropriate means of proceeding in the light of changed circumstances. The precedent was set in 1841 and followed thereafter that, if the House expressed its lack of confidence in the Government, the Prime Minister tendered the Government's resignation *or* asked the monarch to call a general election.

If the Prime Minister requested a dissolution following the loss of a censure vote, there was no legal requirement for the sovereign to accede to the request. In 1924, King George V did check that neither of the Conservative and Liberal leaders was prepared to form a Government after Prime Minister Ramsay MacDonald decided to make votes on an opposition motion and Liberal amendment matters

of confidence (Nicolson 1952, p. 399). In 1993, Downing Street contacted Buckingham Palace to make sure that dissolution would be granted if the Government were defeated on a vote expressing confidence in the Government's policy on adoption of the social chapter of the Maastricht treaty (Norton 1998, p. 85). In the former case, after the leaders indicated no willingness to form a Government, MacDonald's request for dissolution was granted when the Government was defeated in the House. In the latter case, confirmation was given. Although there were occasions when some authorities contended that it would be in order for a request to be denied (Norton 2014, p. 3) in practice no sovereign in the era of modern British politics denied a request for dissolution.

The key point for our purpose is that it was a convention that if the Government lost the confidence of the House of Commons, it either resigned or requested the dissolution of Parliament. Though there were some occasions of resignation, the more recent practice was to request dissolution and there was no occasion when that request was denied by the monarch.

The House of Commons was taken as having confidence in the Government by virtue of agreeing its programme and enacting the measures placed before it. There was no requirement for a vote of confirmation upon taking office, though agreeing the Queen's Speech was generally taken as fulfilling that purpose. Confidence was taken as continuing unless and until a motion expressing no confidence was passed. The ways in which the House could express its lack of confidence in Her Majesty's Government varied. There were three distinct categories (Norton 1978a, pp. 363-5).

a. Explicitly-worded motions

This category comprises situations where the House either passed a motion declaring its lack of confidence in the Government or defeated one stating that the House had confidence in the Government. The first of these could be a straightforward motion, 'That this House has no confidence in Her Majesty's Government', as moved for example by Labour leader Neil Kinnock, on

2 November 1990 (*HC Deb.* 22 Nov. 1990, cols. 439-519). It could also incorporate a reason for the lack of confidence. Thus, for example, Kinnock on 27 March 1991 moved the motion, ‘That this House has no confidence in Her Majesty’s Government in the light of its inability to rectify the damage done to the British people by the poll tax’ (*HC Deb.* 27 March 1991, cols. 964-1053). Most motions of no confidence moved by the Leader of the Opposition fell in this second category. The salient point is that there was explicit reference to a lack of confidence. In the 1950s and 1960s, it was not unusual to have motions, ‘That this House deplores...’ and in 1985 Neil Kinnock moved a motion ‘That this House censures Her Majesty’s Government for its gross mismanagement of the British economy...’, but subsequent motions referred explicitly to confidence. As the House of Commons Library note on Confidence Motions observed, a ‘censure’ motion ‘can also apply to a broader category of motion which may have some of the characteristics of a confidence motion... but which does not appear from all the circumstances to have the intention of bringing about directly, by its passing, the removal of the Government’ (House of Commons Library 2013, p. 5). Expressing explicitly no confidence in the Government removed ambiguity as to the purpose of the motion.

A motion of no confidence would usually be tabled and moved by the Leader of the Opposition, though it was open to any Member to table such a motion. It was, as *Erskine May* expressed it, established convention that the Government always acceded to the demand of the Leader of the Opposition to allot a day for discussion of the motion, with a reasonably early day invariably being found. ‘This convention is founded on the recognized position of the Opposition as the potential Government, which guarantees the legitimacy of such an interruption of the normal course of business. For its part, the Government has everything to gain by meeting such a direct challenge to its authority at the earliest possible moment’ (Jack 2011, p. 344).

In the 20th Century, there were two occasions when a motion of no confidence was carried. After the Baldwin Government lost the December 1923 general election, it maintained the old practice of facing the new House of Commons: it was defeated on 21 January 1924 on an amendment to the loyal

address expressing no confidence in the Government. On 28 March 1979, Conservative leader Margaret Thatcher moved the motion ‘That this House has no confidence in Her Majesty’s Government’. The motion was carried by 311 votes to 310 (*HC Deb.* 28 March 1979, cols. 461-590). This was the only occasion when a vote of no confidence was carried where the outcome was unclear until the result was announced.

The second type under this heading was where the Government invited the House to pass a motion declaring that it had confidence in Her Majesty’s Government and the motion was defeated. On occasion, a Government may lose an important vote and the defeat give rise to doubts as to whether the Government retained the confidence of the House. In such circumstances, the Prime Minister could ask the House to pass a motion expressing its confidence in the Government. Prime Minister James Callaghan moved a motion on 14 December 1978 expressing confidence in the Government in its determination to strengthen the economy, control inflation, reduce unemployment, and secure social justice (*HC Deb.* 14 Dec. 1978, cols. 920-1049). This followed defeat in two votes on the Government’s counter-inflation policy the previous day. On 23 July 1993, Prime Minister John Major moved ‘That this House has confidence in Her Majesty’s Government on the adoption of the Protocol on Social Policy’ (*HC Deb.* 23 July 1992, cols. 627-725), following the Government’s defeat the previous day on the social chapter. On both occasions, the Government secured a majority. There have been no occasions over the past century when a Government has moved a motion of confidence and lost.

b. Confidence attaching to votes on substantive issues

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. Attaching confidence to a vote was a means of maximising the Government’s voting strength, its supporters not wishing to cause the

Government's resignation or, more especially, an election that could result in its opponent party being elected to office.

In 1944, the Government was defeated on an amendment to the Education Bill, something that apparently annoyed Prime Minister Winston Churchill: it was reversed in a vote made one of confidence (*HC Deb.* 30 March 1944, cols. 1605-54; see Cazalet-Keir 1967, pp. 143-5). 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' (*HC Deb.* 17 Feb. 1972, col. 752). In 1993, John Major made passage of the European Communities (Finance) Bill 'in all its essentials' as an issue of confidence. In March 1976, an adjournment motion was treated as a confidence vote, primarily because there was not time to table a substantive motion of no confidence in time for the debate following a Government defeat the previous day.

The Government on these occasions secured a majority. However, the first Labour Government was not so fortunate. In October 1924, the Cabinet decided to treat a Conservative motion of censure on the Campbell case, and a Liberal amendment calling for the appointment of a select committee, as issues of confidence (Cook 1975, p. 276). The Liberal amendment was carried by 364 votes to 199 and Prime Minister Ramsay MacDonald was granted dissolution (Nicolson 1952, pp. 399-400, Cook 1975, pp. 276-7).

c. Implicit votes of confidence

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 category were small in number and, indeed, as the House of Commons Library Note put it, 'speculative' (House of Commons Library

2013, p 8, see also Norton 1978a, pp. 364-5). There was no certainty that the Government would regard defeat as demonstrating that it had lost the confidence of the House. *The Times* in 1977 opined that ‘there is no constitutional principle that requires a Government to regard any specific policy defeat as evidence that it no longer possesses the necessary confidence of the House of Commons’ (cited in Marshall 1985, p. 56). In 1905, Prime Minister Arthur Balfour refused to treat a defeat on a specific estimate as a vote of censure. Lord Rosebery’s Government was defeated on an amendment to the Address in 1894 and did not treat it as a censure vote (Norton 1978a, p. 366).

These instances exemplify the extent to which determination of what constituted a vote of confidence was not watertight. A Government defeat in the division lobbies did not by itself constitute a vote of no confidence. The Government could suffer defeats on motions that raised no issue of confidence and these did not engage the convention (Norton 1978a, pp. 360-78). Between 1972 and 1979, the Government suffered no fewer than 65 defeats in the division lobbies of the House of Commons.¹ Only the last of these – the defeat on an explicit vote of no confidence on 28 March 1979 – triggered a general election.

The Government may decide, or decline, to treat a particular vote (other than one on an explicitly worded motion of confidence or no confidence) as one of confidence. If it decided that confidence attached, or if a motion was explicitly worded, then defeat led to resignation or dissolution. However, beyond that, there was some element of ambiguity. Government and Opposition may disagree as to the status of a vote. In such cases, it was always open to the Opposition to move a motion of no confidence if it believed that it raised an issue of confidence. It was thus possible for both Government and Opposition to test whether the Government retained the confidence of the House. Although votes of confidence, whether explicit or designated as confidence votes, were rare, there

¹ There were six in the 1970-74 Parliament, 17 in the Parliament of Feb.-Oct. 1974, and 42 in the Parliament of 1974-79. On those in the 1974 and 1974-79 Parliaments, see Norton 1980, pp. 491-3.

was an element of ambiguity as to the contours of such votes. The convention, though, was clear: a Government defeated in a vote of confidence either resigned or requested dissolution.

3. The Fixed-term Parliaments Act

The coalition agreement negotiated by the Conservatives and Liberal Democrats in May 2010 committed the Government to introducing a Fixed-term Parliaments Bill (HM Government 2010, p. 26). During the negotiations leading to the agreement, there was a thirty-minute debate on the procedures for an early dissolution. As one of the Liberal Democrat negotiators, David Laws, recorded, ‘William Hague soon realised that the main risk lay with the Conservatives. Without a super-majority for dissolution being required, the smaller party could leave the coalition and dissolve parliament almost at will’ (Laws 2010, p. 183). In other words, the junior partner to a coalition could walk away, leaving the Government vulnerable to defeat by a combination of opposition parties. The implication was that this would be through a vote of no confidence. To protect the position of the Conservatives, it was agreed that there should be a super-majority for dissolution. Agreement was reached on 55 per cent of MPs having to vote for an early election. This figure was reached on the basis that this would be a sufficiently high bar to prevent the Labour and other opposition parties combining to trigger an early election against the wishes of the Conservatives (Laws 2010, p. 184).

Had the Government legislated on the basis of the agreement as worded, it would have made it unusual for having no provision for an early election to be triggered by the House expressing a lack of confidence in the Government. It would also have rendered the UK unusual in having a threshold (55 per cent) for triggering an early election that was similar to provisions employed in Lithuania, Mongolia, Tajikistan and Turkmenistan (see *HL Deb.* 21 March 2011, col. 573). It is more common to have a threshold of two-thirds of members, as indeed is the case in the devolved legislatures of the UK.

Between publication of the agreement and introduction of the legislation, the Government changed its mind over the provision for a super-majority, changing the threshold from 55 per cent to two-thirds of all MPs. There was also pressure to maintain provision for an early election in the event of the Government losing a vote of confidence. The reason for its exclusion was logical in terms of wanting dissolution to be possible only in the event of a super-majority, but the reasoning behind the exclusive provision in the agreement was flawed in that, if the junior partner to a coalition left the Government and joined with opposition parties, the combined forces could defeat government on a range of key votes, making it effectively impossible for the Government to govern. The use of a no confidence vote was the cleanest, rather than the only, way of demonstrating that the Government lacked the confidence of the House.

Pressure to include provisions for an early election in the event of the loss of a vote of confidence resulted in a Bill notably different to that envisaged in the coalition agreement. As the Advocate General for Scotland, Lord Wallace of Tankerness, conceded during debates on the Bill in the Lords, 'it will be obvious that the proposals in the Bill are not the ones described in the [Laws] book' (*HL Deb.* 21 March 2011, col. 568). The Bill was designed to maintain the existing convention that the Government rested on the confidence of the House for its continuation in office and that the House could withdraw that confidence (Constitution Committee 2010a, p. 27), a point reiterated by Nick Clegg in the Second Reading debate on the Bill (*HC Deb.* 13 Sept. 2010, col. 630). A simple majority would be sufficient to carry a motion of no confidence.

There was a variation from existing practice in that, following the loss of a confidence vote, the Government no longer had an option of requesting dissolution. Under the Bill, a general election did not necessarily follow if a new (or reconstituted) Government was formed within fourteen days and achieved a vote of confidence from the House. That was not that dissimilar from the previous situation if a Government defeated on a vote of confidence opted to resign. The sovereign would invite the Leader of the Opposition or whoever was felt capable of commanding a majority in the

House of Commons to form a Government. The new Prime Minister may request dissolution. Under the provisions of the Bill, this process was heavily compressed into the period of fourteen days, with dissolution being automatic if a vote of confidence in a new Government was not secured within that period. This two-step procedure is also exceptional, though not unique, in international comparison. A similar procedure is adopted in Albania, Armenia and Serbia.

The Bill did not define what constituted a vote of no confidence. Rather it adopted the approach taken under the convention that, as Ruth Fox told the House of Lords Constitution Committee, it ‘is one of those things where you know it when you see it’ (Constitution Committee 2010a, pp. 28-9). The Government wished to retain the flexibility of the previous system. ‘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’ (Memorandum from the Deputy Prime Minister to the House of Lords Constitution Committee, July 2010). Though there may have been little doubt, there was nonetheless the potential for some doubt. It was necessary for someone to determine what constituted ‘a motion of no confidence’. The Government felt that this task was most appropriately vested in the Speaker of the House of Commons.

Under the Bill as introduced, the determination that a vote of no confidence had been passed was by way of a Speaker’s certificate. Under clause 2 of the Bill, it was for the Speaker to certify that ‘the House had passed a motion that there should be an early parliamentary general election’ *or* if ‘on a specified day the House passed a motion of no confidence in Her Majesty’s Government (as then constituted)’. In the case of no confidence votes, the Speaker had to certify that the period of fourteen days after the specified day has ended without the House passing ‘any motion expressing confidence in any Government of Her Majesty’.

There was a precedent for the Speaker to issue a certificate. Under the Parliament Act 1911 (section 1 (2)) the Speaker is required to certify Money Bills (see Jennings 1957, pp. 415-22). However, there is

a statutory definition of a Money Bill. Furthermore, certification only takes place when the Bill has completed its passage through the Commons. With confidence votes under the Fixed-term Parliaments 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. The Government's response to the Constitution Committee report states: 'Where there is doubt about whether a motion is a no-confidence motion, we would expect the Speaker to inform Members before they vote on it whether, if it were it to be passed, he would certify it as a no-confidence motion' (HM Government 2011, para. 33).

The Speaker was thus seen as the person to apply the previous understanding of what constituted a confidence vote. However, this approach gave rise to two problems. The first was that it could bring the Speaker into the realms of political controversy. The Government may decide that a vote on Second Reading of a Government Bill was one of confidence. The Speaker potentially could take a different view and refuse to certify it. The vote on a Second Reading of major Government Bill may be considered by the Opposition to be one of confidence, but not be treated as such by the Speaker. Though it would be open to the Opposition subsequently to table an explicitly worded motion of no confidence, doing so would be tantamount to criticising the decision of the Speaker. Would defeat on the Queen's Speech, or a central provision of the Budget, constitute the House expressing its lack of confidence in the Government? Some authorities had previously adopted a fairly expansive definition of a confidence vote, viewing any defeat as an issue of confidence (Radice 1977, p. 4), or one on a three-line whip (de Zulueta 1971). Although these views found no basis in practice (Norton 1978a, pp. 360-1), there was nothing to prevent a Speaker adopting a definition that went beyond what was seen previously as the boundary between confidence votes and those not entailing issues of confidence.

This leads to the second problem, one that was raised by the Clerk of the House of Commons following introduction of the Bill. He submitted a memorandum to the Political and Constitutional

Reform Committee of the House of Commons contending that the provisions for the Speaker to certify that either condition for an early election had been met meant that the Speaker's consideration of confidence motions and the House's practices became 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' (Political and Constitutional Reform Committee 2010, Ev. 20).

Grounds for challenge could be found in the clause as worded. Clause 2 (2)(a) stipulated that a motion of no confidence had to be passed. As the Political and Constitutional Reform Committee of the House of Commons (2010, p. 14) recorded:

It is hard to see... how a Speaker could certify that the House had 'passed a motion of no confidence in Her Majesty's Government', as the Bill requires, if it had voted down a motion designated as a matter of confidence by the Government, even a motion 'That this House has confidence in Her Majesty's Government', but not in fact 'passed' a motion at all.

The flexibility that was possible under a convention clashed with the need for certainty in legislative drafting. The Deputy Prime Minister made clear that he was 'absolutely confident' that the Bill as drafted was not amenable to judicial review (*HC Deb.* 13 Sept. 2010, col. 629), a view supported by other authorities (Hazell 2010, p. 38, though see also Youngs and Thomas-Symonds 1013, pp. 540-56), but nonetheless acknowledged that it may be necessary to strengthen or clarify the position (Constitution Committee 2010b, Q67).

Despite this acknowledgement, ministers initially responded to the concerns raised, not least by the Constitution Committee in the House of Lords (Constitution Committee 2010a, pp. 29-30), by declaring that they were not persuaded of the case to specify in the Bill the wording of motions of no confidence. Doing so, it said, would ‘have needlessly interfered in the House of Common’s [sic] internal arrangements’ (HM Government 2011, para. 36). The Government did not see a problem in respect of the Speaker’s certificate. ‘We do not believe that this will in any way risk bringing the Speaker into political controversy’ (HM Government 2011, para. 34).

However, during the Bill’s passage in the House of Lords, the Government faced considerable pressure to amend the provisions for forcing an early election and there was the prospect of amendments being carried against the Government’s wishes. Although the Government moved no amendments of its own to remove provision for certification by the Speaker, it decided to accept at Report stage – in other words, at a late stage in the Bill’s passage – a backbench amendment to replace clause 2. As Lord Wallace of Tankerness put it, ‘We certainly have no desire to draw the Speaker of the House of Commons into political controversy, and therefore, given that the architecture for an early election is drawn up with a degree of certainty with no need of a Speaker’s certificate, the Government are willing to support the amendment’ (*HL Deb.* 16 May 2011, col. 1170). Under the new clause, there was no requirement for a Speaker’s certificate. Instead, it provided that the two circumstances under which a general election was triggered were by specified motions. One was ‘That this House has no confidence in Her Majesty’s Government’ and, if within fourteen days, a new Government has not achieved passage of the motion ‘That this House has confidence in Her Majesty’s Government’ an election was to take place. The other was ‘That there shall be an early general election’ and was to be carried if the motion was agreed without a division or, if in a division, two-thirds or more of all MPs voted for it. The new clause was agreed and forms section 2 of the Fixed-term Parliaments Act 2011.

4. Consequences

The provisions for triggering a general election through the House of Commons expressing its lack of confidence in the Government thus changed at different stages. It did so essentially as a result of those responsible for the coalition Government not appreciating the nature and significance of the convention governing confidence votes and having to adapt the Government's proposals in the light of pressure, not least from members of the House of Lords.

The effect of amending the provisions for calling an early general election was significant. It was not simply a matter of a drafting change that clarified what was intended. The changes altered fundamentally the relationship between the convention that previously existed and what was now provided by statute. The measure no longer embodied what was previously covered by the convention. Section 2 of the Act in effect sweeps away the possibility for Government to call an early election as a consequence of a defeat on a vote which it has declared to be a matter of confidence.

The Act also means that defeat on what were deemed implicit votes of confidence would not trigger an election. If the House votes down the Budget or rejects the Government's programme as embodied in the Queen's Speech, the provisions of the Act are not engaged. They only apply if, in consequence of such a defeat, a motion 'That this House has no confidence in Her Majesty's Government' is moved and carried. In short, the three types of confidence votes that could result in an early election under the convention are now confined to the first – an explicitly worded motion. The wording has to be precise. A motion deploring or censuring the Government would not qualify. Thus, it is not just a case of the first category alone, but a very clearly defined part of that category.

The change between the Bill as introduced and the Bill as enacted has notable implications for Government. The primary purpose of the Bill was to remove the Prime Minister's capacity to employ the prerogative to call a general election at a time of his or her choosing (an opportunistic election). However, the effects of the amendments to the Bill in regards to votes of confidence rob of him also of another power. The Prime Minister can no longer designate a vote as a confidence vote and say to

Government MPs that, if the vote goes against the Government, there will be a general election.

There is thus no longer any capacity to repeat the words of Edward Heath on Second Reading of the European Communities Bill in 1972.

Nor is there the capacity for the Prime Minister to move a motion of confidence following a defeat on a major issue of policy with the result that, if the motion is lost, an election is triggered. During debate on the Bill at Report stage in the Lords, some amendments were moved to provide for the Prime Minister to retain such a capacity (*HL Deb.* 16 May 2011, cols. 1146-76),² but the Government resisted them. The justification for opposing them was that, as Lord Wallace of Tankerness explained, ‘a Motion of confidence would be easier for the Government of the day to table and then have voted down than for the Government to lose a Motion of no confidence’ (*HL Deb.* 16 May 2011, col. 1170). To avoid manipulation of this sort, the Government arranging a defeat on a vote of confidence in order to engineer an election at a time of its choosing, the Act thus deprives the Prime Minister of an important political tool.

The Prime Minister, in short, has lost the capacity to trigger a general election through attaching confidence to a particular vote. The capacity to resign remains. The Prime Minister could still say that confidence attaches to an important vote and, that if defeated, the Government will resign. If the Government did tender its resignation, the provisions of the Act would not be triggered. We would thus be in novel, but not unprecedented, constitutional territory. There is a 20th Century precedent for a Government resigning without seeking dissolution. The Conservative Government of Arthur Balfour was falling apart in 1905 and Balfour tendered the Government’s resignation. The Liberal leader, Sir Henry Campbell-Bannerman, formed a Government and then sought dissolution (Adams 2007, p. 227, Russell 1973, pp. 34-5). Under the 2011 Act, seeking dissolution would no longer be possible.

² The author declares an interest as one of those moving one of the amendments.

The likelihood of a Government opting to resign in conditions where it has been defeated on a major issue may be small, though it remains an option.³ The essential point is that the option of resigning *or* seeking dissolution is no longer available to a Prime Minister in order to facilitate passage of a contested provision. Dissolution is no longer within the premier's gift.

When it did exist, it was not a power that was frequently used. As we have seen, it was rare for Governments to test the confidence of the House, as opposed to the Opposition pressing motions of no confidence, but the ability to declare that a vote was one of confidence enabled a Prime Minister to maximise the Government's voting strength and see a measure through that otherwise might not be passed. In 1972, Heath secured the Second Reading of the European Communities Bill by a majority of eight votes. Even with making it a vote of confidence, fifteen Conservative MPs voted against the Bill and a further five abstained from voting (Norton 1975, p. 406; see also Kitzinger 1973, Ch. 13 and appendix 1). Nonetheless, there is evidence that making it a confidence vote served to deflate the scale of cross-voting by Conservative MPs (Norton 1978b, pp. 73-4); they were not prepared to bring the Government down (Norton 1978b, p. 198).

In 1993, as we have seen, John Major employed a confidence motion to achieve adoption of the Maastricht Treaty social chapter, having previously been defeated on it the previous day. In the vote the previous day, 26 Conservatives had voted with the Opposition, the Government losing by 324 votes to 316 (*HC Deb.* 22 July 1992, cols. 606-10; see Seldon 1997, p. 388). As Major recalled, 'The Cabinet was aware that a Confidence Motion, if lost, could be a death warrant, but saw it as preferable to the European battle continuing unresolved over the summer' (Major 1999, p. 382). It had the desired effect. When it was made an issue of confidence, no Conservative voted against the Government. One abstained from voting. The motion was carried by 339 votes to 299. 'The Eurosceptics had made their point. They had blocked and humiliated the government, but they were

³ It also remains an option, as in the instance of the resignation of Balfour's Government, for the Government to resign without the action being triggered by the loss of a particular vote.

not ready, yet, to bring it down' (Seldon 1997, p. 388). Had Major not been able to make the vote one of confidence, and ensure that the social chapter was approved, it would not have been possible to bring into effect the provisions of the Act enabling the Maastricht treaty to be ratified.

The rationale for the Fixed-term Parliament Bill, according to Nick Clegg, was to transfer power from the Prime Minister to the House of Commons.

The Bill has a single, clear purpose: to introduce fixed-term Parliaments to the United Kingdom to remove the right of the Prime Minister to seek the Dissolution of Parliament for pure political gain.... 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. (*HC Deb.* 13 Sept.2013, col. 621).

The provision for an early general election by a vote of two-thirds of all MPs could be seen as putting power in the hands of the principal parties in the House. As Vernon Bogdanor observed, it would essentially be the party leaders getting together to agree that an election was justified. 'While the Act might conceivably alter the conditions under which political leaders can seek a dissolution, it is hardly likely to give more power to backbench MPs or to strengthen Parliament' (Bogdanor 2011, p. 119).

The provision for a motion of no confidence was somewhat different in that it essentially transferred power to the hands of recalcitrant backbenchers. It did not transfer power to the House as a whole, as it already held the power to bring down a Government on a vote of confidence. Rather, it strengthened the position of Government backbenchers in opposing substantive measures. The Prime Minister could no longer make it a vote in which one had to choose between opposing the measure or avoiding a general election. A Prime Minister could, as we have indicated, make it a choice between opposing the measure or avoiding the Government's resignation, but the capacity to trigger an election is gone. Threatening resignation is a powerful tool, but it is not equal to the threat of a general election. With an election, backbenchers are vulnerable to losing their seats. The resignation of the Government means the Government is out, but backbenchers are not. Dissident backbenchers

could be threatened with withdrawal of the party whip, but when the Major Government pursued that route it backfired – the whipless MPs used their status as a badge of honour, and the whip was soon restored (Norton 1998, pp. 86-9). There is little to match the impact of threatening a general election. In an era when Government backbenchers are willing to vote against their own side more often than before (Norton 1975, 1978b, 1980, 1985, Cowley 2002, 2005, Cowley and Stuart 2014), the removal of an important power of the Prime Minister to maximise voting support could prove to be crucial in the event of a party split on a major issue.

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