

Political reality vs constitutional aims

Theresa May's ability to call a snap general election highlights the inbuilt tensions of the Fixed-term Parliaments Act, write **Alison Foster QC** and **Tom Tabori**



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On 18 April, the prime minister announced her intention to hold a general election on 8 June 2017. The next day, MPs voted overwhelmingly in support by a margin of 509. The practical implications include:

- The usual 'wash-up' procedure by which the government and opposition agree on essential or non-controversial bills to be expedited before parliament is dissolved – whereupon non-enacted public bills will fail.
- Select committee chairs elected after the 2010 election may have their terms foreshortened, as none may serve for more than two parliaments (or eight years continuously, if shorter).
- The Manchester Gorton by-election on 4 May will

likely be cancelled, otherwise the winner would be elected to a parliament that had ceased to exist the day before.

- Purdah, restricting civil service action pre-election, began at midnight on 21 April.

The constitutional implications are more problematic. If the Conservatives strengthen, then, as with any large majority, parliament's constitutional role of keeping the executive in check will necessarily diminish – the government will have the numbers to resist challenge in the chamber.

Parliamentary intent

The question of how the prime minister was able to call a snap election, despite section 1(3) of the Fixed-term Parliaments Act 2011 scheduling polling day for the first Thursday in May every five years, is readily answered. Section 2 provides that early parliamentary general elections will take place if the House of Commons passes a motion 'that there shall be an early parliamentary general election' by a two-thirds majority of MPs. It did so.

Less easily answered is how the parliamentary intent behind the Act is furthered by the prime minister's use of it to achieve her stated aim of increasing her power. The legislative intent was stated at the second reading of

the bill, by then deputy PM Nick Clegg: 'The bill has a single, clear purpose: to introduce fixed-term parliaments to the United Kingdom to remove the right of a prime minister to seek the dissolution of parliament for pure political gain. This simple constitutional innovation will nonetheless have a profound effect because for the first time in our history the timing of general elections will not be a plaything of governments.' (Hansard, 13 September 2010)



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In permitting an early general election where two-thirds of the House support such a motion, the promoter might be thought naive in their understanding of human nature in government. Where poll ratings are high, but a small parliamentary majority does not reflect that, political reality was likely to lead to exactly the mischief at which the Act was aimed: election for

pure political gain. For a government this presents an irresistible opportunity to increase power; for the opposition, the hope of a surprise surge in popularity, coupled with the fear of otherwise looking weak.

Inbuilt tensions

As drafted, the only way to avoid section 1 (fixed terms) being rendered nugatory by section 2 (early elections) is for both sides to respect the constitutional place of a strong legislature, enabled by fixed terms, allowing the opposition to scrutinise and not be on permanent electoral footing.

If, rather, the executive's priority is always to increase its power within the legislature, and the opposition's priority is to become the executive, then the inbuilt tension within the Act will invariably mean that its bold constitutional aims will be foiled.

If politicians cannot resist motions on early elections, perhaps the only way to ensure the aims of the Act are achieved would be removal of the power to decide even from parliament, and its commission to the charge or supervision of a non-political body. To suggest such a self-denying step may be another folly of naivety, but it does appear the high aims of the Act require some protection from that very political expediency it was designed to obviate. **SJ**