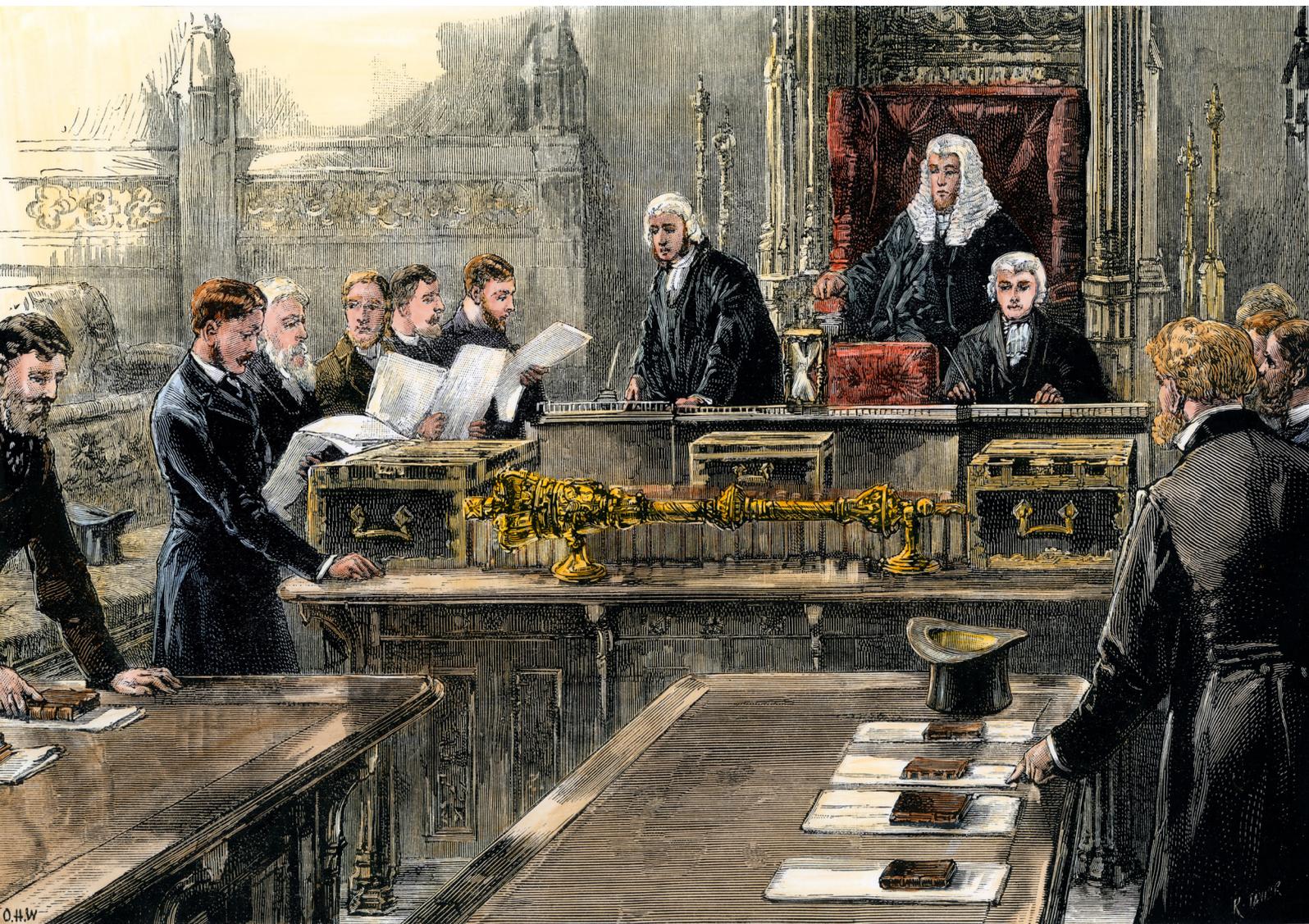


The risks of the “Grieve amendment” to remove precedence for Government business

A Policy Exchange Research Note

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About the Author

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Executive summary:

1. It is a mistake to assume that the House of Commons could engineer a change to the law to postpone or cancel Brexit without persuading the Government to acquiesce and participate in securing the change.
2. The risks to which an attempt to do so would give rise include the contravention of fundamental constitutional principles based on centuries of history.
3. They include the risk of involving the Queen in a legislative showdown between Parliament and the Government.
4. Changing the law to secure a postponement or cancellation of the repeal of the European Communities Act 1972 (which has already been set for 29th March 2019), or for holding a second referendum, would revive or create substantial commitments to public expenditure.
5. Provisions of a Bill giving rise to such commitments cannot pass the House of Commons unless they have been authorised by a resolution of the House, and the motion for such a resolution can only be moved if the Crown's recommendation of it has been signified by the Government.
6. If the Speaker chose to allow this rule to be dispensed with or ignored, that could have unpredictable, and potentially horrific, constitutional consequences.
7. It could raise a question whether the Government would be entitled or might feel required to reassert its constitutional veto by advising the Queen not to grant Royal Assent to the Bill.

The risks of the “Grieve amendment” to remove precedence for Government business

There are mistaken assumptions being made about what is now possible in relation to Brexit and about the amendment which, it is said, may be moved to remove the precedence for Government business on a day when there is motion on Brexit from non-Government members.

The main misconception appears to be that there is a way for a majority in the House of Commons to change the law on what happens next against the opposition of the Government. That is not the case. All the House can do is try to persuade the Government to initiate the required legal changes - albeit reluctantly. If that fails, it can use what in practice in the current situation is the only sanction it has for enforcing its wishes: passing a motion of no confidence which could in due course lead to the removal of the Government from office.

The idea that there must be some other way for a majority in the House of Commons to get its way is just wrong, and beyond the ingenuity of even the most cunning proceduralists.

Here is why.

Only changes to the law can stop the progress of the changes that have already been set in law by an Act of Parliament. The European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972 from “exit day” on 29th March 2019. The Government has a clear legal duty to ensure that the repeal comes into force on that day and that the UK does not remain a member of the EU after the domestic legislation giving effect to the UK’s obligations as a member have ceased to have effect in accordance with Parliament’s statutory intentions.

There are only two ways in which the repeal can be stopped from happening on that day.

The first is by an order under section 20(4) of the 2018 Act postponing that day. Only the Government has the power to make the order, and then only if it has agreed an extension of the Article 50 period with all the other members of the EU. The order then needs to be agreed by each House of Parliament.

The other way is by means of new primary legislation passed by both Houses that requires the Government either to secure the extension of the Article 50

notice period or to revoke the notice and then, as the case requires, consequentially either to postpone or to cancel the repeal.

It appears that there are some who think that the only obstacle to the passage of such legislation against the wishes of the Government is the rule (SO 14) that gives Government business precedence in the House of Commons. A draft has been published of an amendment that might be moved to some future Government “business of the House” motion so as to provide for a disapplication of SO 14. Reliance is apparently being placed, no doubt with justified confidence, on the Speaker’s allowing such an amendment to be moved in accordance with his “creative” interpretation of what is permissible. It will be interesting to see what, if any, amendments of the proposed amendment he would feel able to select.

The amendment that has been published does not, however, go so far as to allow a non- Government Bill to be passed. It only allows a non-Government motion to have precedence on a named day, if it has a defined level of support. Maybe it is intended for the subsequent motion to facilitate the passage of one of the Bills that have been introduced to produce a postponement or to secure a second referendum. But even a further motion could not succeed in doing that.

Incidentally, it is ironical that the proposed amendment does seem to contemplate that the subsequent motion it envisages will need, in order not to be filibustered, to be agreed using the closure under SO 36. That is one of the standing orders that requires a motion to be put “forthwith”. Using the “creative” interpretation of that word that was adopted by the Speaker earlier this month would, in this context, be distinctly unhelpful to those moving the motion.

The repeals that are to come into force under the 2018 Act on 29th March 2019 include the repeal of section 2(3) of the 1972 Act. That is the provision that provides for the UK’s financial obligations to the EU as a member to be a charge on the Consolidated Fund. This means that they have to be paid without the need to be voted for by Parliament on an annual basis. It follows that any legislation to produce a postponement of the repeal, or its cancellation, will revive that provision (if only temporarily) and so be changing the law in a way that potentially carries a very substantial financial burden on the exchequer. It may be that the expenditure would continue under the proposals for a transition period, but there is no legislation for that yet in place and it cannot be taken into account. Nor could a further referendum be held without significant further Government expenditure.

The constitutional position is clear and is contained in SOs 48 and 49. A Bill that contains provisions that give rise to expenditure cannot pass unless those provisions have been authorised by a resolution of the House, and the motion for such a resolution can only be moved if it has been recommended by the Crown. That means that the Government has to have approved it. Usually the recommendation is given by a Treasury Minister. Furthermore, Erskine May and the precedents are absolutely clear that any motion to disapply the requirements of SOs 48 and 49 itself requires the recommendation of the Crown.

Surely, you may ask, would not the Speaker's "creative" approach to the rules of the House allow the disapplication of SOs 48 and 49 without Crown recommendation?

In theory, I suppose it could; but it would be more than surprising and potentially horrific if it did so in practice. Those Standing Orders are fundamental elements of the constitutional relationship between Government and Parliament. Not only are they more than 150 years old, they actually derive from much longer ago than that: in the origins of the House of Commons as a body asked to respond to requests from the Crown for money, and to grant the requests in return for the redress of grievances.

This would not be like a quarrel over what "forthwith" means or about the modification of SO 14, which has been subject to reasonable reform proposals in the past. The electoral system itself, so far as it is a means of holding the Government accountable to the public, depends crucially on the ability of the public to hold the Government responsible for how it has used the principal lever of government - the use of public money. Removing that responsibility would undermine the whole UK constitutional system.

So, suppose the Speaker did allow an attempt to bypass the financial Standing Orders and allowed a Bill to pass that contravened them, and so to proceed to the House of Lords and be passed there. What would happen when the Bill then fell to be submitted for Royal Assent?

The question would inevitably arise whether the Government could reassert its wrongly denied constitutional veto on such a Bill by advising the Monarch not to grant Royal Assent to the Bill? Would it even, perhaps, think that it actually had a duty to ensure that a Bill that had been passed in contravention of fundamental constitutional principles did not reach the statute book?

It is a sacred duty of all UK politicians not to involve the Monarch in politics. They have a constitutional responsibility to resolve difficulties between themselves in accordance with the rules, and so as not to call on the ultimate

referee. However, might not a Government in that situation think that this was precisely the last resort for which the Royal Assent process is retained? How should the Monarch react to such advice? The answer is not straightforward, and the prospect of it needing to be considered in a real-life political crisis is unthinkably awful.

Furthermore, to what extent would the careless disregard by Parliament of its internal rules create a risk that the courts would then, themselves, feel a duty to disregard their own constitutional responsibility not to question proceedings in Parliament and would intervene to solve the crisis?

This analysis may be speculative but, in the context, it no longer appears implausible. Nobody involved in all this could possibly think that the creation of the sort of nightmare constitutional crisis I have described would be worthwhile. So, if there is a plan that would run even the slightest risk of precipitating it, it should be abandoned.

So where would that leave us? It leaves us where we started and where we have always been. If SO 14 is disapplied and members of the House of Commons pass a resolution on the day they claim for themselves, it can only be a resolution instructing the Government to do something to secure a change in the law. It can have only as much force as the House is willing to give it with the threat of a vote of no confidence.

Moreover, it needs to be recognised that the time for such a vote is very short and, once a vote of no confidence were passed, the scope for further action is severely limited. The Cabinet manual says that the purdah rules for elections apply after such a vote has been passed. That would stop further changes to the status quo. Thereafter if there is to be an election, Parliament is removed from the scene, and unable to act, from its dissolution for an election until, effectively, about ten days afterwards.