

# Endangering Constitutional Government



**The risks of the House of Commons taking  
control**

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## Executive summary

The UK's political crisis is at risk of becoming a constitutional crisis. The risk does not arise because the constitution has been tried and found wanting. Rather, the risk arises because some MPs, with help from the wayward Speaker, are attempting to take over the role of Government. On Monday 25 March, MPs seized control of the parliamentary agenda, displacing the usual precedence accorded to Government business. This was the latest in a sequence of attempts by some MPs to exercise direct control over the formulation and implementation of policy in relation to negotiations with the EU. Wresting control of the parliamentary agenda may result in further attempts in the House of Commons to dictate how the Government is to act, using motions to hold the Government in contempt of Parliament and enacting legislation to compel certain actions.

This attempt to relocate the initiative in policy-making from the Government to an unstable cross-party coalition of MPs runs contrary to the logic of our constitution. It is unlikely to end well or to result in coherent, intelligent policy-making. Furthermore, it undermines political accountability and electoral democracy. The Commons is not itself able to govern. Governing requires coherence in responding to events and circumstances nationally and internationally. Therefore, for so long as the Commons is unwilling to withdraw its confidence, Her Majesty's ministers can and should insist on their responsibility to govern.

Legislation designed to usurp the Government's functions should be blocked, in the first instance by relying on the House's own procedures. If the Speaker were to subvert the normal rules, as events suggest he may well, the Government might legitimately prorogue Parliament, ending a session of Parliament prematurely to prevent a Bill from being passed by both Houses. Or the Government might legitimately treat its defeat as a matter of confidence by itself moving a motion under the Fixed-term Parliaments Act to trigger a general election. The process of Royal Assent has become a formality but if legislation would otherwise be passed by an abuse of constitutional process and principle facilitated by a rogue Speaker, the Government might plausibly decide to advise Her Majesty not to assent to the Bill in question: it would be MPs, not the Government, that had by unprincipled action involved the monarch.

## The balance of our democratic institutions

The fundamental principle of the UK constitution is that the Government stays in office so long as it maintains the confidence of the House of Commons, but no longer. In that way a general election determines who is in a position to form the Government, and the House of Commons is at the heart of our democracy. However, the management of public affairs can only work well in practice if there is a Government with the function (amongst other important, executive functions) of initiating policy-making proposals and any related legislative proposals needed to implement them. Parliament, and the House of Commons in particular, can then scrutinise the proposals and call the Government to account for the consequences of implementing them.

The management of public affairs is a multi-dimensional activity that requires co-ordination across the whole system; and Brexit itself is an issue that has influences right across the piece. Most politicians would like, of course, to be held responsible only for the parts of public policy that are popular: the new rights and entitlements, the public spending etc. But the management of public affairs also has downsides: new duties, increases in taxation etc. Government is about balancing the two across the board and then seeking to reconcile losers, as well as winners, to the balance that has been struck. The confidence principle is the mechanism that secures this means of working. It means that MPs, in the end, are accountable to the public principally according to whether they supported the balance that was struck, or opposed it.

The House of Commons is not equipped to decide policy for itself and should not take on the role of formulating and initiating it. The UK constitution requires, logically enough, that to be able to govern, you need to be the Government. Every new policy initiative needs to be fitted into the programme that represents the balance the Government has struck between the competing demands on it. That does not mean that the House of Commons is without influence. On the contrary, it can reject and delay different parts of the package; and it can exercise considerable influence over its content, partly through its capacity to withdraw confidence. But only a Government can accommodate the concessions it needs to make in response to Parliamentary opinion within a revised programme. Ultimately, if the House of Commons does not like the only programme on offer, it must withdraw its confidence and secure the appointment of a Government with a programme it can support.

This logic is reflected in section 13 of the European Union (Withdrawal) Act 2018: the Government would initiate a proposal for the final outcome of Brexit,



the House of Commons would have an opportunity to reject it and (if they did) the Government would have to make an alternative proposal. That logic has been subverted by the Speaker and by those whom his actions have allowed to determine what is included in the agenda of the House of Commons. This undermines a fundamental principle on which the constitution is based, because it allows the House of Commons to initiate policy proposals without taking responsibility for how they fit into the overall management of public affairs and without withdrawing its confidence in the Government.

Furthermore, the House of Commons is completely ill-suited to carrying out the function of formulating, initiating and implementing policy proposals. Not only does it lack access to and control of the machinery of government to provide it with the support needed for carrying out those functions, Parliament's structure and processes are incapable of accommodating the negotiation, reworking and compromise, and the exercise of leadership, which the policy-making function requires. However well or badly you think it is done in practice, those are things that the structures and processes of Government are specifically designed for.

The Government is formed from within, and relies on the continuing support of, Parliament and especially the House of Commons. Ministers work in constant partnership with others in the Houses of Parliament and the Government is not a foreign body which somehow awaits instructions from a Parliament in which it has no entitlement to speak or lead. It is therefore entirely misleading to take Parliament to be simply a legislature and to think of legislation as its tool for regulating the executive. That is a model based on the false premises that we have a system that gives Parliament priority in legislative matters and the Crown in executive matters, and that we have a coherent mechanism for distinguishing between the two. That is not how the relationship between Government and Parliament in the UK constitution is intended to work, nor how it has ever worked. In constitutional terms, legislation is a tool for implementing policy and change in a way that is authorised – and, of course sometimes limited – in accordance with a consensus reached between Government and the two Houses. In all aspects of the conduct of public affairs, including legislation, Parliament and the Government of the day are expected to act in partnership, and if they cannot, the partnership must be dissolved and a new one formed.

So, when it comes to the general management of public affairs or the public finances, or to matters with a crucial impact on those things, it does not follow that, if legislation is the only way, other than the withdrawal of confidence, in which Parliament could impose its will on the Government, Parliament must be given an opportunity to enact such legislation. The House of Commons is

entitled to try to persuade the Government to accept its view of the proper direction of public policy. If it succeeds, no legislation is needed to force the Government to comply. If it fails, its remedy is to withdraw its confidence, rather than to legislate.

## The sequence of attempts to take control

The attempts to enable the House of Commons to “take control” of the Brexit process have involved essentially two things: first, procedural manoeuvring to enable MPs who do not form part of the Government to seize the initiative in formulating and proposing alternatives to Government policy; and second, mechanisms, binding directions or Bills, to compel the Government to adopt and to implement the alternative proposals.

There were a number of obstacles that needed to be overcome to seize control in this way. The first obstacle is that Standing Order 14 of the House of Commons (SO 14) gives the Government the right, most of the time, to ensure that the business proposed by the Government has priority for consideration in the House. A rule of this sort has existed for a long time. The Government was entitled to two days a week as early as 1835. Today it makes it impracticable for other business to find time for consideration.

A second obstacle is contained in the rules of the House that give the Government the right to veto proposals giving rise to public expenditure or taxation. These go even further back to the medieval origins of the House of Commons and today reinforce the need for Government to co-ordinate the management of public affairs and finances. A third obstacle was contained in the procedure agreed and enacted in statutory form by the European Union (Withdrawal) Act 2018, although that procedure has also been the vehicle for the attempts.

The first attempts were made during the passage of the Bill for the 2018 Act. The Government had promised a “meaningful vote” at the end of the negotiating process. In the process of giving statutory effect to that promise, various amendments were proposed to give the Houses more control at that stage, but these were rejected. It was provided that if there was no deal or the House rejected one, the Government had to come forward with alternative proposals and the House be given an opportunity to debate them. The question whether that debate should be on an amendable motion was specifically considered and the Act was passed in terms that were intended to allow only an unamendable motion. One might have thought that that decision, once enacted, would have been regarded as final. It was always understood that the approval motion itself

would be amendable, although in practice any successful amendment was likely to be the equivalent of a failure to approve.

On 4 December 2018, the first debate under the 2018 Act to approve the proposed deal was begun in accordance with a “business motion” agreed by the House. The Speaker allowed Mr Dominic Grieve QC MP successfully to move an amendment disapplying Standing Orders of the House so that any motion on proposals from the Government if the deal was rejected would be amendable, contrary to the intention of the 2018 Act. This was surprising, not only because the amendment would normally have been disallowed as outside the scope of the motion, but also because it re-opened a question that had already been decided in the same Session during proceedings on the Bill for the 2018 Act and because it sought to use a motion of the House of Commons effectively to amend an Act passed by both Houses.

As is well known, the debate on the deal was abandoned before reaching a conclusion and was resumed in January. On the resumption of the debate, the Speaker again allowed Mr Grieve successfully to move another amendment changing the timings for the stages of the 2018 Act proceedings. This was open to all the same objections as his previous amendment and also, on the normally understood wording of the House’s previous resolution, was expressly forbidden by it. Against official advice, the Speaker refused to apply that prohibition.

Since then a number of attempts to “take control” have been made using the amendability of the approval motion or, as a result of the Grieve amendments, of the motion relating to the Government’s proposal in response to the votes rejecting the deal. These attempts have consisted in amendments proposing the disapplication of SO 14 to certain business, together with the introduction of Bills which could have formed the subject-matter of that business. Until last Monday, those attempts were unsuccessful or had been withdrawn, although the attempt scheduled for 27 February was directed at the introduction of a Bill to prescribe a timetable for votes on various matters similar, but not identical, to the timetable the Government conceded on 26 February for 12-14 March.

Some of the Bills to back these attempts fell foul of financial procedure, which cannot be disapplied except on the recommendation of the Government; and attempts to avoid those rules have been largely unsuccessful. No Bill mandating a referendum should be able to bypass that obstacle. At one stage, one of the Bills proposed that the Liaison Committee should take over policy making on Brexit, but that proposal did not last long and was rejected by the Chair of the Liaison Committee herself, amongst others.

Monday's vote mandated the indicative votes that took place on Wednesday. A further motion on Wednesday then disapplied SO 14 on 1 April for further proceedings arising from the indicative votes. It is suggested that this might involve another Bill to mandate the Government to implement decisions made on that day.

## The impracticality and unconstitutionality of these attempts

The impracticability of Monday's decision to relocate policy-making initiative from Government to Commons was illustrated clearly by the indicative votes on Wednesday. The House sought to decide policy on the basis of number of different proposals – all of which lacked any significant degree of precision or detail – by a “yes” or “no” vote for one or more of the options. However chaotically Government does policy making, there is no doubt that it does it better than that.

The level of criticism that can justly be laid against the imprecision in the substantive alternatives to the Government's deal would match any criticism that could be laid against the uncertainty in the “Leave” question in the 2016 referendum.

One of the most startling aspects of the lack of precision in the subject-matter of the indicative votes was the absence of any clarity about the way out of any of the options that went beyond merely postponing or delegating a substantive decision. It has been clear since July, has probably always been obvious, and is even more obvious now (after three months of discussion of an exit from the backstop), that the factor that is most likely to produce a majority for a given solution, and to reconcile others to accepting it, is the reassurance that, whatever it is, it need not necessarily be permanent. There was no significant discussion of that, except perhaps to the extent it became clear that “Norway for now”, which did address the point, has become “Norway 2 for ever.”

Further, the options gave little or no attention to the crucial relationship between the Withdrawal Agreement and the Political Declaration, despite the significance of the EU's intentions not to reopen the former but to be open to negotiating changes to the latter.

The indicative votes were always going to be incapable of providing a mechanism that would produce an outcome that could command wider acceptance and respect. Nonetheless, more votes are likely to follow on 1 April.



Monday's vote confirmed that many MPs are willing to upset the constitutional balance by displacing the Government's initiative in policy-making. This may lead to further attempts to govern, whether by way of legislation requiring the Government to act in certain ways, or by the Commons itself somehow purporting directly to take on the Cabinet's role, as Sir Oliver Letwin MP envisaged on 14 February. His remarks in the Commons are worth quoting in full:

*"...when this House comes to legislate, as I hope it will and fear it must, it will be, so to speak, a Cabinet. We will be making real-life decisions about what happens to our fellow countrymen—not just legislating in the hope that many years later, subject to further jots and tittles, the law, as administered by the system of justice, will work better. We will be making a decision about the future of this country. How can we possibly make those decisions unless we are properly informed? The process of which we are now at the start will require the fundamental realignment of the relationship between the civil service, Government and Parliament. There is no way we can continue to act as though we were merely a body to which the Government were accountable; for a period, for this purpose, we will have to take on the government of our country."*

By those words, Sir Oliver announced his intention to create a constitutional crisis, and invited MPs to join him in a flagrant and destructive attack on our current constitutional settlement. However, even if many MPs resile from the conclusion that the Commons must become the Cabinet, the course of action MPs have now set in motion, with help from the Speaker, is one which undercuts the Government's capacity to govern and its freedom to set the agenda – to propose policy which Parliament might then choose to resist, adopt or adapt.

If the Commons continues down this path unopposed, the Government will end up in office but unable to govern. The Commons would nominally have confidence in the Government but would in practice not extend to the Government the freedom that such confidence would otherwise entail to carry out any policy initiative. Again, the constitution does not require that Parliament should accept the Government's proposals. But unless the Government enjoys the initiative in formulating and proposing policy, the country cannot be effectively governed; and the relationship between the political authorities and the people will break down if MPs act in mutually inconsistent ways in performing their dual role both as an electoral college for government and in exercising oversight over the conduct of public affairs.

The pursuit of incompatible agendas by the Government, enjoying the confidence of a majority, and by a different majority across the House of Commons is contrary to the logic of the constitution. It introduces incoherence into our arrangements and frustrates electoral democratic accountability. It also makes it inevitable that there will be continuing conflict between the Government and an alternative competing government exercising a rival policy-making initiative. This conflict is foreign to our constitution – it is nothing like the role Her Majesty's Loyal Opposition occupies – and may result in an unwillingness on all sides to conform to other constitutional norms.

This departure from constitutional practice and principle has not arisen because of the difficulties of minority government. Our constitution has existed and worked satisfactorily during many periods in which there were shifting alliances and unstable majorities in the House of Commons. Such times obviously involve, and have involved, more political turmoil and uncertainty; but that is very far from saying that the system is therefore dysfunctional in those circumstances.

In fact, the system that enables a minority government, by virtue of having the initiative, to carry on government until the House of Commons withdraws its confidence is an essential and thoroughly healthy mechanism that ensures that the maximum possible stability is given to the governance of the country where no party has a working majority in the House of Commons. A minority government will have to take account of Parliamentary opinion, but cannot be uncontrollably blown in many different directions by contradictory and uncoordinated instructions on individual issues from the House of Commons.

Likewise, the Fixed-term Parliaments Act is not to blame, save in one respect. Under that Act it is still possible for a PM to say to her party that, if a motion she proposes is not accepted, she will take steps to trigger an election. The credibility of this threat in practice now needs substantial support from the Cabinet and the governing party. The Opposition can usually be relied on to vote for an election, even if they do not really want one. That casts the constitutional responsibility to secure that the nation is not left in limbo, with a Government in office but not in power, not only on the PM but also on the Cabinet and members of the governing party. It is a responsibility they need to accept.

Instead, the temptation for MPs to attempt to govern is the result of the fact that the opportunity (within the timetable provided for by Art 50) for the House of Commons to exercise influence over events was not taken earlier. That may be regrettable, but it is not a justification, or an excuse, for inflicting damage on the constitution at this stage. Further, many MPs are failing to take responsibility for earlier decisions, not only in enacting the Withdrawal Act but also in making

provision for the original referendum, in voting to trigger Art 50, and in contesting a general election on manifesto commitments concerning Brexit. These MPs have not yet been able to secure the formation of a Government that takes a position on Brexit which they are eager to support. But this is no reason for them to attempt to govern other than by way of constitutional forms, especially since this alternative competing Parliamentary government distances them from responsibility to the electorate for the policies in question.

## The prospects for further institutional conflict

More indicative votes may be held on Monday. The Government has not committed to acting on the outcome of those votes, assuming one option ends up enjoying the support of a majority of the House. It has, however, undertaken to “engage constructively” with the process. The parliamentarians who led the proposal to wrest control of the parliamentary agenda from the Government, including Sir Oliver Letwin, have made it clear that they anticipate that the Government may not comply with the outcome of the process. It seems likely that further parliamentary time will be wrested to attempt to force the Government to comply. Two means are likely: first, motions holding the Government in contempt of Parliament, and second, legislation that imposes a legal duty on the Government.

The Government has been found in contempt of Parliament only once in the UK’s history, in the current session of Parliament. The motion concerned the Government’s failure to comply with an earlier motion requiring publication of the Attorney-General’s legal advice. This earlier motion was itself constitutionally questionable or at best deeply unwise. However, in view of the contempt motion, the Government decided it was untenable to continue to withhold its legal advice.

It is not clear how the Government would respond to future motions holding it in contempt for failure to comply with the House’s direction as to how it should govern, and specifically how it should represent the UK in negotiations with the EU. The Government might fittingly conclude that a majority in the House was improperly attempting to govern and that for so long as it continued to enjoy the confidence of the House it was constitutionally obliged, or at least wholly entitled, not to yield to such attempts. The Commons might insist that the Government is in contempt of Parliament, yet the Government might nonetheless properly refuse to comply. While it would be open to the House to withdraw confidence and instead to repose confidence in a new Government

more to its liking, if such could be formed, it would not be able to command obedience.

Legislation that imposes new legal duties on the Government would be potentially more effective. The Government would of course comply with any Act of Parliament. However, it is not obvious what form this legislation would take or how it could be enacted. It would be difficult, although not impossible, to craft legislation to require the Government to pursue a particular negotiating objective. The legislation could not of course guarantee that such negotiations would succeed. The legislation could also revive amendments that failed in 2018, providing for detailed, ongoing parliamentary control of the negotiations, which would terminate the Government's freedom to negotiate an agreement which it would then put to Parliament for approval.

Any Government would object strongly to such legislation, on the grounds that it would be an unconstitutional interference with its capacity to represent the UK in the international realm and would require the Commons to undertake a role for which it was unfit. These arguments might be unlikely to dissuade some parliamentarians from seeking to govern by legislating. The Government would not be helpless in this situation. It might be able to rely on Standing Orders to prevent a Bill proceeding, particularly if, as is likely, the Bill had significant financial implications.

It is possible that the present Speaker might subvert these Standing Orders, as he has done with other rules. In this case, if a legislative proposal would otherwise be enacted which the Government opposed as an unconstitutional interference in its capacity to govern, it might consider proroguing Parliament or even consider whether it should advise Her Majesty not to assent to the Bill, notwithstanding the Bill passing both Lords and Commons. This might prompt the Commons to withdraw its confidence in the Government, which is its right. Neither the Government's capacity to advise Her Majesty to withhold assent, nor Her duty in the event of such advice, is straightforward. The risk that the sovereign would be placed in the midst of political controversy, in which Her constitutional duty was disputed, is a strong reason to avoid advancing legislation in defiance of Standing Orders and established procedures that exist to protect the Crown's position.

If Parliament were to attempt to legislate, against the wishes of the Government, to dictate how the Government is to act, then the proper working relationship between our democratic institutions would have broken down. In such a case, the Commons would effectively have withdrawn confidence from the Government and should do so formally. In the event that they do not, it would

also be for Government to consider whether in practice it did not enjoy the confidence of the Commons, or rather that it was not able to govern in the way that any government that enjoyed that confidence should be able to govern. The Government might, in this case, conclude that it is duty-bound to move a motion under the Fixed-Term Parliaments Act and begin the process of moving towards a general election to restore the balance.

## Conclusion

Our constitution makes sensible provision for responsible government, accountable to the Houses of Parliament, especially the Commons, and to the public. The Government rightly has the initiative in policy-making, which involves precedence in the parliamentary agenda, and for so long as the Government enjoys the confidence of the Commons it ought to be able to govern. It would be deeply unwise for MPs to set about compromising these long-standing, fundamental constitutional arrangements for short-term advantage, regardless of how important one thinks Brexit is or how passionately one opposes the policies of the Government of the day.

Unfortunately, this is exactly what one sees in the ongoing sequence of attempts to “take control” of Brexit, attempts which this past week achieved a significant and worrying success in the Commons. It is doubly worrying that these attempts rely on the Speaker’s willingness to distort procedural rules. This course of action threatens to undermine the extent to which MPs, ministers, and others are able to rely on the constitution to settle how political power is to be exercised. This subversion of the UK’s scheme for constitutional government will not result in coherent, accountable policy-making. It seems likely to provoke damaging institutional conflict, with the Commons attempting to commandeer the power to govern, which, even if likely to fail, may prompt the Government to respond with counter-measures to defend its constitutional responsibilities. Once one side to a political dispute tries to depart from the constitution, there must be a strong risk that the other side will respond in kind. For these reasons, the attempts to take over government should stop.