

Lost in Transition?



The Conservative leadership contest and the confidence of the Commons

Robert Craig, Richard Ekins and Sir Stephen Laws



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Introduction

Whoever is elected the new leader of the Conservative Party, in just over a fortnight, is widely expected to be appointed as Prime Minister immediately. But in a recent note Professor Robert Hazell and Professor Meg Russell of the Constitution Unit of University College London argue that matters are not so simple. They suggest that the Conservative leadership election raises six key constitutional questions for the winner, his party, the Palace and parliament.¹

The note from the Constitution Unit contains a balanced and helpful account of some of the issues that may arise. However, this paper challenges some of the claims Hazell and Russell make about the constitutional obligations of Her Majesty the Queen ('HMQ'), the current Prime Minister and the next Prime Minister, whoever that might be. We address two questions in particular.

The first is whether the new leader of the Conservative Party should be appointed Prime Minister. The second is whether constitutional convention would require a Government that loses a vote of no confidence ('VoNC') in the autumn to apply to the EU for another Article 50 extension. The context for such an application would be that the Article 50 deadline would expire before a new government could be formed following a general election after the VoNC.

1. R Hazell and M Russell, 'Six constitutional questions raised by the election of the new Conservative leader', Constitution Unit Blog, 30 June 2019; reported in M Savage, 'Boris Johnson "might never enter No 10" if MPs withdraw support', *The Guardian*, 29 June 2019

Appointment of the next Prime Minister

The resignation of Theresa May as leader of the Conservative party has resulted in an internal party leadership election which is now down to the final two candidates: Boris Johnson MP and Jeremy Hunt MP. It is generally thought that at the conclusion of that process, the current Prime Minister would resign with a recommendation to HMQ to invite the winner to form a government as the person ‘best placed’ to do so. Hazell and Russell cast doubt on this notion, suggesting that the appointment of the new leader of the Conservative Party as Prime Minister would ‘not necessarily’ follow.

The crux of Hazell and Russell’s argument is that ‘[w]hether the new Conservative Party leader can command parliamentary confidence is clearly in some doubt given comments from Conservative MPs that they may not be able to support the new government’. Hazell and Russell note that the current government only has a majority of three, even including the DUP MPs who have a confidence and supply agreement with the Conservative Party, which means that ‘only a very few rebels is enough for it to lose its majority’. They envisage a scenario in which:

‘a group of Conservative MPs is so concerned about the winning candidate that they declare their withdrawal of support as soon as the result of the leadership contest is known – before the new PM is appointed.’

This scenario, they say:

‘would pose a serious dilemma for the Queen and those advising her, because it would not be clear that the new Conservative leader could command confidence. If the appointment went ahead regardless, the new PM could (as discussed below) face an immediate no confidence vote, and be brought down. So if such a rebel declaration was made, how should the Queen respond?’

The scenario is not far-fetched, Hazell and Russell imply, referring the reader to an article in the Guardian, from 8 August 2018, which reports Dominic Grieve MP’s stated intention to leave the Conservative Party if Boris Johnson MP becomes its leader.²

Hazell and Russell propose that in the event of ‘a rebel declaration’, as they put it, Mrs May should continue in office, as the incumbent Prime Minister, to allow the House of Commons to ‘determine who is best placed to command confidence’, possibly by means of a process involving repeated votes, which they describe as ‘equivalent to an investiture vote’. It is clear that their proposal is dependent on Mrs May being convinced

2. J Elgot, ‘Dominic Grieve: I will leave party if Boris Johnson becomes leader’ *The Guardian*, 8 August 2018

that she is duty-bound to delay her promised resignation and in effect to reject the result of the Conservative leadership election, by refusing to recommend that HMQ appoint the winner as her next Prime Minister.

Blurring the distinction between appointment and a VoNC

Hazell and Russell risk conflating two quite different questions. The first question is who is 'best placed' to form a government that will command the confidence of the House of Commons, on which it is the responsibility of the outgoing Prime Minister to make a recommendation to HMQ. The second question is whether the new Prime Minister would have sufficient support to defeat a VoNC if one were brought by the Opposition either immediately or at some point later in the autumn.

The important point to note is that the appointment of a Prime Minister by HMQ does not require that such a person can command an overall majority of the House of Commons. If it did then there could never be any minority governments. The test does not require someone who can *actually* command a majority vote in the House of Commons in a putative vote of confidence. The test is who is 'best placed' to command the confidence of the House of Commons.

In addition, the thinness of the Government's majority does not necessarily mean, even if a few Conservative MPs do rebel, that the new Government would inevitably lose its majority and be defeated in a VoNC. As Hazell and Russell themselves rightly note, the 'parliamentary arithmetic is not necessarily that simple, because some pro-Brexit Labour rebels could conceivably decide to support the government'. We agree and would add that many such MPs, or other MPs, might alternatively decide to abstain, which could mean that the new Government is not defeated in a VoNC.

Whether such MPs decided in the end to abstain or to vote for the Government might not be known until a VoNC were in fact held. The uncertainty of the parliamentary arithmetic undermines Hazell and Russell's claim that 'comments from Conservative MPs that they may not be able to support the new government' mean that it could face an immediate VoNC and that this fact creates a quandary for HMQ.

Importantly, the crucial test for whether there continues to be confidence in the Prime Minister and the Government is whether a VoNC is brought and won by the Opposition. In a sense, the test is a negative one rather than a positive one. Until and unless a VoNC is brought by the leader of the opposition, there is a continuing presumption that the person 'best placed' to command the confidence of the House of Commons does in fact do so.

In the absence of political arrangements already in place that clearly identify an alternative candidate,³ the first port of call is *always* the person who leads the largest party, especially when it is in power already. That person should be given the first opportunity to form a government, although that government could of course face a VoNC at any time.

In those circumstances, the question of whether a VoNC is brought the

3. The last person to serve as Prime Minister but not as leader of his party was Winston Churchill from May 1940 until October 1940 (the leader from May to October continued to be Neville Chamberlain, who of course died of cancer in November that year). Ramsay MacDonald remained Prime Minister in 1931, as the head of the National Government, despite not being the leader of the largest political party, because the largest party (the Conservative Party, which enjoyed a sizeable absolute majority of seats in the House of Commons) was willing to support an administration he led.

next day, the same week or at some later point is absolutely not the concern of HMQ. Once it is clear who is best placed to command the confidence of the House of Commons, the outgoing Prime Minister should recommend that HMQ invite that person to form a government. It is impossible to imagine any plausible situation in which HMQ should not act on that recommendation.

The lack of discretion in modern times contradicts the precedent cited by Hazell and Russell of the appointment of Alec Douglas-Home in 1963, where there was a genuine exercise of discretion by HMQ. Crucially, that appointment predated the modern internal party selection processes, which in effect remove any residual discretion for HMQ in virtually all imaginable circumstances. It also predates the Fixed-term Parliaments Act 2011 ('FtPA') which removed the possibility that a Prime Minister, once appointed, might seek a dissolution of Parliament and an immediate election.

In those circumstances, the Douglas-Home precedent is irrelevant to the modern situation. Modern Prime Ministers must work within the confines of the FtPA and in the context of the procedures of all the parties for the selection of their leaders. The FtPA provides the only route to a general election if no government can be formed that enjoys the confidence of the Commons. It is pointless to form such a government otherwise than by appointing a Prime Minister to form it. It would then be up to the leader of the opposition, if they wish, to test the confidence of the House in the new government, once formed, with an FtPA no confidence motion. Any other procedure would result in unnecessary delay, because, if it is unsuccessful, a reversion to the procedures of the FtPA would be required. There could be no excuse for prolonging the process of appointing a new Prime Minister. Furthermore, there must be no vacancy at any point. If a general election ensues, so be it.

Investiture votes

Hazell and Russell go even further, however, in suggesting that there could be a series of votes to 'test' whether the new leader 'could command parliamentary confidence'. They say that HMQ should wait for 'clear evidence' that the new leader 'could command confidence'. This suggestion is misguided, unprecedented and could draw HMQ into a highly damaging political controversy.

The suggestion made by Hazell and Russell that Theresa May should repudiate the leadership election of the party she so recently led and run a series of votes to identify someone else who could command the confidence of the House of Commons is extraordinary.

If we consider, just for the sake of argument, that someone other than the new Conservative leader were to be identified by such a process, Hazell and Russell must believe that HMQ should ask him or her to form a government. If so, that new government would still be vulnerable to a VoNC, given that its programme for government will not have been collectively agreed when the PM was identified. No doubt, the defeated new leader of the Conservative Party would immediately resign the leadership.

In those circumstances, there can be little doubt that HMQ would be drawn into public controversy and potentially attract public criticism for preventing the person who was otherwise best placed to command confidence – as the leader of the largest party in the House of Commons – from being appointed. It is worth mentioning that the process might be fruitless in any event because no actual alternative candidate may exist.

The process proposed by Hazell and Russell is, as they point out, based on the procedures in the devolved assemblies, specifically in section 46 of the Scotland Act 1998 for the Scottish Parliament, that cover the appointment of a First Minister. However, those procedures, unlike the ones proposed by Hazell and Russell, make provision for a general election if they are unsuccessful (section 3(1)(b) of the 1998 Act). Moreover, those procedures were available for duplication in 2010-11 for the UK Parliament but were specifically rejected in favour of the provisions actually passed in the FtPA. This was partly, it must be assumed, because of the risks involved in requiring HMQ to have to await decisions in Parliament about who should be her primary adviser and other ministers.

What would happen next if the Russell/Hazell investiture process went ahead?

It is also very unclear what would happen if the duly elected leader of the Conservative Party resigned as party leader as a result of not winning a vote of confidence in the House. Hazell and Russell appear to assume that other candidates would somehow emerge without specifying how this could happen. They also disregard the fact that all the major parties now have strict and sometimes lengthy procedures for choosing new leaders. Is it proposed that the Conservatives go through the whole leadership selection process again - immediately? That would take weeks, if not months. If not, how is any other candidate to be chosen on the hoof?

Furthermore, how could any putative alternative candidate who holds the Conservative whip command the support of any Conservative MPs when the party members have already decided whom they want to lead their party? Or are Hazell and Russell suggesting the leader of the opposition is called upon in the alternative when, according to their novel test, he would almost certainly also be ineligible because he cannot command an overall majority? Or are they suggesting a candidate from outside the two main parties?

In short, the attempt to shoehorn the bold innovation of a de facto investiture vote procedure, which would be a major constitutional reform, into the current process is not only inappropriate but in fact demonstrates why the idea is itself a bad one. In most situations, such an investiture vote would be a formality and thus entirely pointless, but on some occasions it would be actively destructive to good governance and certainty, as well as being much more likely to drag HMQ into the political arena directly. If a proposed reform is either completely pointless or potentially deeply damaging, it is difficult to understand why it should be adopted.

What it would take for HMQ to have a genuine dilemma?

It is possible to construct some extreme scenarios where HMQ might have a genuine dilemma. One hypothetical, but in truth implausible, scenario is if there were clear arrangements in place for a coalition of a majority of MPs of different parties, by 24 July, who were willing to support a government formed by some named individual other than the newly chosen Conservative leader. In those circumstances Mrs May might feel it would be her duty to recommend that person to be called upon by HMQ.

One other unlikely scenario in which Mrs May might properly believe she had a duty to recommend a different appointment would be if a large number of Conservative MPs had already resigned the whip and were sitting as independent MPs so that the Labour Party had a greater number of MPs than the remainder of the Conservative Party MPs. In those circumstances, it would be the case that HMQ would be expected to call upon the leader of the Labour party to form a government, because it would have the largest number of MPs.

Seeking an extension to the Article 50 process

Hazell and Russell also consider what might happen if a VoNC was brought and won by the leader of the opposition at a date in September or October that is too late for a General Election to be held before exit day (the process would take at least seven weeks). They point out that the new Prime Minister 'might be reluctant to seek an extension' to the Article 50 process during the election period. Seeking such an extension would be the only way to avoid a No Deal exit at the end of October if an election were taking place.

It is important, first of all, to scotch a common mistake made by many commentators. It is that there is no way that a future Prime Minister could 'get No Deal through parliament'. It is a serious mistake to think that anything needs to be 'got through' parliament for No Deal to happen at the end of October. In particular, there is no further legislation that needs to pass through parliament in order for No Deal to occur.

The necessary legislation for No Deal was passed in 2017 when parliament conferred the power to trigger the Article 50 process on the Prime Minister in the European Union (Notification of Withdrawal) Act 2017. No further action is required from Parliament in order for the UK to leave the EU, which would be without a deal unless a deal was agreed and ratified. The effect of the 2017 Act is statutorily reinforced by the implementation of its effect in domestic law by the European Union (Withdrawal) Act 2018.

The decision whether there is a No Deal exit currently rests, therefore, with the UK government and the EU27 as a matter both of international law and of domestic law. Parliament now has, at best, only indirect influence over the timing of the UK's exit. Nothing more needs to happen in parliament for a No Deal exit. No Deal is now the legal default position.

What happens if a VoNC is lost in the autumn?

Governments are expected to exercise caution during election periods, particularly in initiating any new policies. This is because during such periods the Government's continuing mandate is necessarily less than fully robust and will remain so until a new set of MPs are elected to the House of Commons.

The 'purdah' conventions referred to by Hazell and Russell as 'the caretaker convention' are set out in the Cabinet Manual, and are applicable if the Government is defeated on a motion of no confidence under the FtPA (para 2.31). The principal purpose of the conventions

is to prevent those with their hands on the levers of power from taking unfair advantage of those levers, during an election, in order to change the status quo at a time when there is an open question about who should have control of those levers.

It should be noted that this rule obviously must also logically apply to the provisions of any Bill that might pass through parliament proposed by backbench MPs acting as a quasi-executive, against the will of the actual government.

Hazell and Russell rightly assert that these conventions mean that ‘major policy decisions’ should be ‘deferred’. They then boldly claim that ‘convention would demand that the Prime Minister’ must ‘seek an extension’ if a VoNC occurred just before exit day in October and this would be true ‘even if he chose to go into the election campaigning for “No Deal”’.

Hazell and Russell’s analysis is questionable. It is of course *arguable* that refusing to seek an extension to prevent a No Deal exit would constitute ‘initiating [a] new action of a continuing or long-term character’ (Cabinet Manual, para 2.27) or that ‘deferring major policy decisions’ (para 2.29) requires the Prime Minister actively to seek an extension from the EU27.

It is, however, equally as arguable that a decision to seek an extension would itself be a major policy decision. It could also be argued that since parliament has legislated in such a way that No Deal is the legal default position, a decision by the Prime Minister to seek a further extension from the EU27 would itself constitute a major policy decision and would be to initiate an action of a continuing or long-term character. Changing the default position is undoubtedly changing the status quo in one sense. This is a more convincing and likely argument if the stated policy of the incumbent Prime Minister is not to seek an extension.

Both remaining candidates for the Conservative leadership have stated that they would not be seeking any further extension, if an attempt at renegotiation is unsuccessful. Seeking another extension would be contrary to the platform on which both candidates have stood for election to leadership of the Conservative Party.

Under normal circumstances, it would be understandable if the Prime Minister went to the country for a direct mandate on such a central policy question. It seems slightly odd to suggest that *constitutional convention* requires him to reverse the government’s central policy before or during an election campaign, especially when doing so could have major political consequences in the ensuing general election.

If the possibility of No Deal was genuinely unacceptable to parliament, then perhaps an earlier VoNC should have been brought, given the policy would have been clear for some months and would also be the central policy of the administration if any renegotiation failed. In other words, the early September deadline for a VoNC should in reality be seen as etched in stone.

It might further be thought that a failure to bring a VoNC in time to prevent a No Deal exit at the end of October should be seen as acquiescence by parliament to the possibility of that outcome. Or to put the point

differently, parliament may simply run out of time. As Monsieur Barnier is fond of saying, the clock is ticking.

Whatever the reader's view on the proper application of the conventions in this scenario, reasonable observers may perhaps accept that both seeking an extension and refusing to seek an extension are reasonably arguable applications of the relevant principle. Either view could be legitimately held by people acting in good faith on different sides of the Brexit debate, depending on what the reader thinks is the 'default' position at this stage in the process.

It is unhelpful to present one side of this controversy as obviously correct and to allege that the new Prime Minister would be 'flouting' constitutional conventions if he failed to seek an extension. It is by no means clear, constitutionally, that a refusal to seek an extension would mean flouting any relevant norms or constitutional conventions, and it is at least equally arguable that seeking an extension would itself be flouting those conventions.

In those circumstances, it seems to us that the Prime Minister would be entitled to take whatever course of action seems appropriate to him in the circumstances, knowing that direct democratic accountability to the electorate for his decision would be immediate.

Cooper II

Hazell and Russell also consider what could be done by MPs if the Prime Minister refused to seek an extension. They suggest that parliament could 'issue clear instructions (ideally through legislation)'. This perhaps misstates what would be necessary. Binding instructions could be issued only through fresh legislation, not just 'ideally'. (And there are good reasons for Parliament not to attempt to govern in this way.⁴) Furthermore, any quasi-executive should respect the *purdah* convention to the same extent as the Government, particularly if such a shadow executive chose to propose their bill in the teeth of governmental opposition.

As is well known, parliamentary instructions were issued earlier this year through what is commonly known as 'Cooper I' (European Union (Withdrawal) Act 2019). This was a bill mandating Theresa May to seek an extension that was passed through parliament against the wishes of the government by backbenchers taking control of the order paper. It is worth noting, perhaps, that in that case the House of Lords did not permit any of the provisions to impose obligations on Government that the Government had not already indicated its willingness to accept.

Many commentators appear to believe that the passage of a second such bill ('Cooper II') would be likely because it is claimed that the majority of the House of Commons is staunchly opposed to No Deal. The reality is more nuanced. A recent attempt on a Labour Opposition Day to take control of the business of the house on various future dates was defeated. Incidentally, this may have had the further side effect of reducing the likelihood of more opposition days this autumn because the allocation of such days is controlled by the government.

4. R Ekins and S Laws, *Endangering Constitutional Government: The risks of the House of Commons taking control* (Policy Exchange, March 2019)

Another ingenious attempt to impose some control on the process was recently attempted by Dominic Grieve and Margaret Beckett through consideration of the financing of government departments as part of the Estimates procedure in the House of Commons. This idea was logically flawed because if their bluff been called, no one would have wanted supply actually to be halted in due course. In any event, this attempt was not permitted by the Speaker.

It should be noted that the procedure under section 13 European Union (Withdrawal) Act 2018 that was used to pass Cooper I will not be available unless a new deal is successfully negotiated. Given that fact, and given the failure of the two attempts cited above, even Oliver Letwin MP (one of the architects of Cooper I) has recently stated on radio that he could think of no way to get Cooper II through parliament.⁵

One remaining possible method could be an emergency debate under Standing Order No. 24. It has not historically been possible to use this for substantive debate but if the Speaker were to take an expansive view of the meaning of the terms of that Standing Order, it might be possible to use such a procedure to suspend Standing Order No. 14. This is the crucial first step to taking control of the business of the House in order to pass legislation against the will of the government. Whether this gambit would be successful is by no means certain.

Finally, the possibility cannot be ruled out that if a reluctant Prime Minister were legally mandated to seek an extension, he might ask for it in such a way that the motivation of the EU27 leaders to grant it is seriously diminished, if not entirely dissipated. If parliament is concerned that the government might pursue policies, or the execution of policies, in ways with which it fundamentally disagrees, the remedy is to use a VoNC to secure the formation of a new and different government with a different approach.

5. <https://www.express.co.uk/news/politics/1140241/brexit-news-remain-no-deal-brexit-WTO-oliver-letwin>

Conclusion

There is no reason to doubt that whoever is elected as the new leader of the Conservative Party should be appointed Prime Minister. The latter appointment follows inevitably from the fact that the leader of the Conservative Party is virtually certain to be the person best placed to command the confidence of the House of Commons at the current time. An exception is possible only in highly implausible circumstances such as, for example, if an enormous number of Conservative MPs resign the whip so that the leader of the Labour Party could contend that he is in fact best placed to form a government.

In the event of a VoNC that is so late that a No Deal exit could occur after the vote and before a new government could be formed after the resulting election, the relevant conventions are legitimately susceptible of two competing readings. These are that the Prime Minister should seek a further extension from the EU27 and alternatively that the Prime Minister should not seek such an extension. In these circumstances, it would be for the Prime Minister to decide where his constitutional duty lay. The only way to force a Prime Minister to seek an extension would be via fresh legislation, and there are very substantial difficulties in getting that enacted by the Crown-in-Parliament.



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