Losing Confidence

Policy Exchange

The Fixed-term Parliaments Act and the next election

Sir Stephen Laws

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Executive Summary

- There is a possibility that the Government may lose a vote of no-confidence. If so, it would be the first occasion on which the provisions of the Fixed-term Parliaments Act 2011 about such votes would be tested. The constitutional conventions that govern the situation have not developed and are unclear.
- The time has already passed when such a vote could trigger a general election on or before 24th October - the last Thursday before the UK is scheduled to leave the EU on 31st October - even if the earliest legally possible date for an election were recommended by the PM.
- The question has arisen of in what circumstances (if any) a PM losing such a vote would, constitutionally, have to give up office to allow someone else to take over.
- The 2011 Act did not say anything about this. It was the intention of Parliament, when passing that Act, that neither the operation of the Act in practice nor various matters omitted from it for just that reason should become matters for the courts.
- The purpose of the 2011 Act was to secure, so far as practicable, that elections only happen at regular 5-year intervals.
- Before the 2011 Act, a PM defeated on a vote of confidence had a choice of asking the Queen for a dissolution of Parliament and an election or of resigning to allow someone else to take over. It was assumed a PM would always take the first option.
- It was also widely accepted that the second option would be practicable only if the existing Parliament was "still vital, viable and capable of doing its job" and another candidate for PM was available who could "govern for a reasonable period with a working majority" in the Commons - the so-called "Lascelles principles".
- The 2011 Act changed the way in which the first option could be exercised, but it did not remove the option of a dissolution and election altogether.
- It would be legitimate for a PM losing a vote of no-confidence to argue that it is still open to him to use the available mechanisms of the constitution to secure a dissolution and an election. All the 2011 Act did was to create a window of 14 days as an "opportunity" for a workable alternative to be negotiated. The assumption was that, if there was an available alternative during the 14 days, that might create a political imperative for the PM to give up office and so avoid the early election that it was the purpose of the 2011 Act to

discourage. It did not turn that imperative int a rule.

- There is a good argument that PM might even pursue the election option under the existing procedures to the extent of remaining in office to let the 14-day period run out, if he could justify that in political terms.
- It seems inevitable that any alternative that would be proposed in current circumstances would fail to satisfy either of the Lascelles principles. Neither a government formed by Mr Corbyn nor one formed by anyone else would have a programme for governing the country "for a reasonable period" in a way that would command the support of a majority in the House of Commons.
- Each would be offering no more than to apply for and negotiate an Article 50 extension while an early election is held anyway. A government to hold a second referendum, rather than an election, would not be plausible because it would involve having a workable programme for government for the many months that a referendum would take to arrange.
- The suggestion about whether the Prime Minister should resign is really a question about whether an extension should take place if an election is held.
- It was never thought in the past that a PM who had lost a vote of confidence triggering a general election - as Mr Callaghan did in 1979 - should give up office to his opponents to caretake government through the election period. There is nothing about the 2011 Act that suggests things have changed for the case where, one way or another, an election is going to happen anyway.
- Some commentators have argued that the "purdah convention" requires the Prime Minister to apply to the EU for an Article 50 extension if an election is triggered. This is a contestable understanding of the convention. Others argue that when an election is triggered the legal status quo should not be changed - and the only outcome for which Parliament has already legislated is that the UK leaves the EU on 31st October.
- It is relevant that applying for an extension would involve the need to take active steps and give the EU27 a role in setting the agenda for a general election. The PM could not reasonably be criticised for adopting the view that the outcome provided for by the law as it stands should not be changed.
- The contestability of this issue means that it is equally legitimate for the PM to argue that he has no obligation to resign to make way for a new government the sole purpose of which would be to do something he believes would be a breach of convention if he did it himself.
- There would be other arguments available to a PM who chose to remain office after a vote of no-confidence and trigger an election in that way. There is nothing in the 2011 Act that suggests that it is to be impossible for any of the 14 days to be used by the

Government as an opportunity to restore its majority. Indeed, the context of the Act suggests that was a scenario that must have been contemplated.

- In current circumstances a PM who remained in office might legitimately think he had an opportunity to win a vote of confidence during the 14-day period once it became clear that the only alternative would be a general election with a no-deal exit in the middle of the campaign.
- The view on all sides when the the 2011 Act was being passed was that the courts should not be involved in what happens after a vote of no-confidence. The courts should not involve themselves in the political question of whether the PM should or shouldn't resign or the related "purdah question". These are not justiciable issues. It would be folly for judges to run the risk to the respect in which the judiciary and the rule of law are held by taking responsibility for deciding an issue likely determine the outcome of an imminent general election.
- Those who are seeking to thrust a role on the courts or indeed on the Crown in this matter cannot escape responsibility for drawing the courts and the Crown into political controversy. It is no answer that it would all be the fault of those who - with justification - dispute whether matters are really as clear as they say.
- Ultimately, all these questions are intensely political questions on which only the electorate can make a judgement - and now probably only in retrospect.
- The questions only arise because those who are opposed to the Government's policies have allowed time to run out on their opposition. They now want more time to give it another chance to succeed.
- It would now be a plausibly legitimate position for the Government to take, both politically and constitutionally, that as time has run out on discussion, it can make the political case for allowing its policy on Brexit to be implemented in accordance with the legislation and timetable already in place, and then, in due course, to ask the electorate for "forgiveness" – if it is forgiveness that turns out to be necessary – for not having sought any further "permission".

Introduction

1. It is still possible that a motion for the purposes of section 2 of the Fixed-term Parliaments Act 2011 will be put down in the House of Commons at some stage before 31st October, "That this House has no confidence in Her Majesty's Government". If such a motion is tabled, the Government is required by convention to give it time on the floor of the House, and to allow a vote on it - but only if it is in the name of the leader of the opposition.
2. As Professor Richard Ekins and I said in our paper "Endangering Constitutional Government", published in March by Policy Exchange: "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."
3. This paper addresses what should happen to secure that the process of government is brought into conformity with that fundamental principle, once a vote of no-confidence under the 2011 Act has indicated that the incumbent Government has lost the confidence of the House. A very lively debate is proceeding, in the press and elsewhere, about what the constitutional position is, or should be. That debate has also raised a question about what would happen if the House of Commons sought to indicate its loss of confidence in some other way. The paper also deals, in passing, with that situation."
4. The particular questions that arise are about whether the principle set out above requires the incumbent Prime Minister to resign immediately upon the loss of the vote and, if not, what steps he might legitimately take to secure that the principle is vindicated through the mechanism of a general election, rather than by the formation of a new government led by someone else. It will argue that neither the law nor established constitutional practice gives unequivocal answers to these questions, and that they can ultimately have only the answers which are reached through the political process, and for which accountability will ultimately lie to the electorate.

The legal requirements of the 2011 Act relating to no-confidence votes

5. The legal position after a government defeat on a no-confidence motion for the purposes of the 2011 Act is clear. But the Act does not seek comprehensively to codify the constitutional position, and so does not contain any express provisions for answering the other constitutional questions that have been raised about how the

Prime Minister and Government can or should respond to a defeat on a no-confidence vote for the purposes of that Act.

6. The Act provides that a general election must be held unless another motion is passed within the 14 days (in this case "calendar days") after the day of the vote. The terms of the later motion must be "That this House has confidence in Her Majesty's Government". The Act does not specify what is to happen during the 14 days. Nor does it require the Government, at the end of the 14 days, to be either the same or different from the one that was the subject of the earlier vote. The reference to "Her Majesty's Government" does, though, make it clear that the subject of the second motion does have to be the government appointed by Her Majesty that is in office when it is passed.
7. If an election is triggered, the date of the election is chosen by the Prime Minister. The earliest date that can be chosen is one which (ignoring the possibility of a no-confidence vote on a Friday) is the 27th working day after the end of the 14-day period. There must be 25 working days (so not counting Saturdays or Sundays, or bank holidays - of which there is none in September or October) between (so excluding the days themselves)—
   (i) the day immediately following the end of the 14-day period (a day between the end of that period and the start of the 25 working days is needed for the issue of the Royal Proclamation fixing election day); and
   (ii) election day itself.
8. Parliament is dissolved at the beginning of the first of the 25 working days. It ceases to exist with its dissolution and is unable to make decisions during that period, or until it meets again after the election. The date for that is also fixed by the Government. Parliament cannot be recalled during a dissolution. Once an election has been triggered, it would be usual, but not essential, for the Government to delay the dissolution of Parliament to enable it to finish off pending Parliamentary business, and also to secure the expiry of the 25 days with a Wednesday: for an election on a Thursday, which is the traditional day for a UK general election.
9. As a motion for a vote of no confidence can be tabled only while the House is sitting and the House next sits on 3rd September 2019, that means - no motion having been tabled before the House rose in July - that the earliest date on which a vote of confidence could now be moved against the current Government is 4th September. The timetable set out above gives the earliest possible date the Prime Minister could recommend for any general election resulting from a Government defeat on 4th September as Friday 25th October.
10. The default time for the UK to leave the EU is 11pm GMT on Thursday 31st October.
11. Even if the Government decided it did want the election resulting from a no-confidence defeat on 4th September to be before 31st

October 2019, it could do so only by departing from the Thursdays tradition, which has been followed since 1931. The Prime Minister might plausibly argue that he is under no obligation to depart from that tradition just because the movers of the motion had left it too late to get a Thursday election in before 31st October. Every working day after 4th September for which a no-confidence vote is delayed postpones the earliest date for any resulting election by a further working day.

12. There is, in theory, no limit on the delay that a Prime Minister might choose to recommend before election day; but it is quite obvious that a Prime Minister who defied the fundamental principle of the constitution to stay in office for an unjustifiably long period would expect to be punished, when the election eventually came, at the ballot box. Furthermore, it is conventional wisdom that shorter campaigns favour incumbents. So, there is every incentive for a Prime Minister to fix an early date, but not necessarily one that is any earlier than tradition might suggest could reasonably be expected.
13. Even if an election were held on Friday 25th October, an inconclusive result might delay the formation of a new government. In 2010, a Thursday election with an inconclusive result did not produce a new Prime Minister until the following Tuesday, and there was no Cabinet fully appointed until later in the day on the Wednesday. Junior government appointments followed in the subsequent days. Moreover, Parliament itself would probably not be expected to meet for normal business, or for confidence in a new Government or in a continuing one to be tested, until the week beginning Monday 4th November.
14. On 28th August it was announced that Parliament would be prorogued until 14th October from a date no earlier than 9th September and no later than 12th September. For reasons explained later in this paper, that now makes a no confidence vote in October more likely than one in September.

Inherent uncertainties about the principles

1. Some of the debate about the appropriate response from the Prime Minister and Government to an Autumn defeat in a no-confidence vote has been intemperate and extravagantly hyperbolic, to the extent even of invoking 17th century Civil War analogies.
2. Anyone asserting that there is only one clear-cut answer to any of the various questions at stake either has no understanding of the UK constitution or, more likely, is making a political case in favour of their own particular political point of view. Their assertions need to be treated sceptically.
3. The principles of constitutional propriety and legitimacy in the UK constitution depend very largely on "convention". There is room

for plenty of debate about the usefulness and parameters of that concept; but everyone agrees that for there to be a constitutional convention there must be an established and accepted practice.

4. There is no established and accepted practice for the situation that is envisaged. It is a situation that would arise entirely out of the effect of the 2011 Act, and in the new context created by that Act. There has been no opportunity for any practice in relation to that Act to become established or for any assumptions about what should happen after a vote of no-confidence for the purposes of that Act to become generally accepted.
5. The best that can be done is to infer principles from the pre-2011 Act practices. But there is always going to be room for different views about whether, and to what extent, the changes made by the 2011 Act have made the previous practices and assumptions irrelevant. In addition, even the pre-2011 practices involve issues involving considerable uncertainty, as well as significant ambiguities.[1]
6. Furthermore, the relevance of the 2011 Act has to be assessed for these purposes in the context of its broad purposes. Given that the discussion would be about their relevance to constitutional principles and practice (rather than legal rules), identifying those purposes is not confined to what would be taken into account by lawyers determining its legislative purposes for use in statutory construction. Any notion that, if there is no practice, the answer must be in the Act is without any sound foundation, and in fact contradicts the clear intentions of Parliament for the Act.

The pre-2011 Act position

7. The accepted constitutional position before the 2011 Act was that a Prime Minister could always ask Her Majesty for a dissolution of Parliament, and so a general election. If a request was made, it was expected, in modern times, that it would always be granted. There was an exception to this that had come to be thought of as relevant in practice only in the immediate aftermath of a recent general election. It was widely assumed that it was only in that case that the Sovereign might reasonably think that the situation required the options available within the recently elected House of Commons to be exhausted before another election was held.
8. The conditions required to be satisfied before the Sovereign might refuse a dissolution were articulated in the "Lascelles principles", after Sir Alan Lascelles, who is thought to have been the author of a letter to the Times in May 1950 setting them out at a time when he was private secretary to King George VI.
9. The letter specified the only circumstances in which a "wise" Sovereign might be expected to deny a request for a dissolution. The specified cumulative conditions were—

1. See the helpful blog post on the website for the History of Parliament Trust. "Votes of No-confidence" by Paul Seward 20 August 2019.

(i) if the existing Parliament was still vital, viable, and capable of doing its job,
(ii) if a general election would be detrimental to the national economy, and
(iii) if the Sovereign could rely on finding another prime minister who could govern for a reasonable period with a working majority in the House of Commons.

10. The potential of these principles to have continuing relevance rests in the fact that the first and third conditions set out requirements that would have to be satisfied before common sense would suggest that it would be wise to make an attempt to resolve a confidence crisis with the appointment of an alternative government, rather than with a general election. It is worth noting, too, that the conditions were never intended as a list about when the Sovereign should refuse a dissolution, only about when that might be justifiable. And there was always some question whether the second condition was an essential requirement. There was, though, good reason for thinking that something more than just the other two would be required except in the case already mentioned, viz when the last election had taken place only very recently.
11. In the case of a pre-2011 Act defeat for a government on a motion that was, in terms, a motion of no-confidence (as was the defeat of the Callaghan government in 1979), it was accepted that the Prime Minister had the option either of requesting a dissolution and so an election (which Her Majesty would grant, as in 1979) or of resigning and recommending to Her Majesty that the person best placed to form a government that would command the confidence of the House of Commons should be invited to form a government. The understanding was that a Prime Minister was constitutionally required to do one or the other.
12. In practice, it was also assumed, in modern times, that it would be the leader of the opposition who would receive the invitation if it needed to be issued. This was on the practical assumption that no government led by the incumbent could be replaced by another workable government unless it had the support to the next largest party. More importantly, it was also assumed that any Prime Minister would always prefer the dissolution option.
13. If a government were defeated on a motion that was not an express motion of no confidence but, instead, on an **issue** of confidence (such as its budget or a Queen's speech or, as in the case of the Major government's defeat on the Social Chapter in 1993, a major item of policy), the Prime Minister could either proceed as if the defeat had, in fact, been on a motion in terms or, as in 1993, could submit the government to an express "vote of confidence" and, as the Major government did in 1993, continue in office if successful.
14. It is important to emphasise that, both under the pre-2011 Act practice and under the Act, relevant questions relate to whether

the House of Commons has, or is likely to have, confidence in **a government**. Only indirectly does that involve the identity of a Prime Minister.

The purposes of the 2011 Act

15. It is well known that there were two principal purposes of the 2011 Act.
16. The immediate need for the Act was created by a mutual desire to reinforce a relationship of trust between the partners in the coalition government formed after the 2010 election. The junior partner in the coalition needed reassurance that the senior partner would not be tempted to conduct the business of government on a day-to-day basis with the short-term objective of manoeuvring their junior partner into an early general election in circumstances that would be favourable to the senior partner and unfavourable for the junior partner.
17. So, the first purpose of the Act was to strengthen the hand of the junior partner in the event of a rupture in its relationship with the senior partner, and to give it confidence that it could not have an election sprung on it without such a rupture.
18. The assumption was that reinforcing the basis for that relationship of trust would be conducive to stable and effective government over the lifetime of the coalition, and so be in the national interest. It was assumed that the same benefits of "fixed-term Parliaments" would accrue to any future coalition government made necessary by an inconclusive result in a later general election. Such governments would have become more likely if the proposal for a system of election by proportional representation had been adopted - as the coalition agreement made possible; but that proposal was subsequently rejected in a referendum.
19. Section 1 of the Act set out the main provision of the Act requiring general elections at fixed five-year intervals.
20. Section 2 set out the exceptional cases where an election was still to be possible between those dates.
21. The main provision of section 2 required the Prime Minister to secure a two-thirds majority in the House of Commons before an election could be called. This gave a junior partner in a coalition, an opportunity effectively to veto an election called by its senior partner. It was recognised, though, that an alliance of the largest party and an official opposition (which would find it politically difficult to shy away from an election - at least if it had no immediate prospect of forming a stable government without one) would usually be sufficient to produce an election. In this way, the two-thirds rule was not an obstacle to the holding of the 2017 election.

22. It was also recognised that the two-thirds rule could not be allowed to let a "zombie Government" remain in office after having lost the confidence of the House - and so the capacity to muster the simple majorities needed to govern on a day-to-day basis - but without the combined opposition parties being able to muster a two-thirds majority for an election. So, the provisions of section 2 of the 2011 Act also provided a mechanism for that scenario that would not lead inevitably to an election, but would allow one to happen if it was needed. That mechanism is the one described above under the heading "The legal requirements of section 2 of the 2011 Act relating to no confidence votes".
23. The assumption appears to have been that the 14-day period could be used for one of two purposes. It might be used to repair a rupture in the coalition relationship. There had been a recent example in Canada where a prorogation had been used to allow a short period for that purpose. Alternatively, or if repair was impossible, it might be used to enable a junior partner that had decided to switch its support to the official opposition (and if the numbers worked and maybe other minor parties joined in) to enter into either an agreement for a different coalition - or perhaps a "confidence and supply" agreement - with other parties. If that happened the possibility would open up of government continuing in conformity with the decisions made by the electorate at the previous election, but without the need for another election outside the" fixed-term" timetable. In the words of the explanatory notes for the Act (which have been subjected to much imaginative extrapolation in the current debate) the 14 days would provide "an *opportunity* for an alternative government to be formed *without an election*".
24. The other less specific purpose of the Act was to provide a "nudge" towards a more general acceptance of the idea that a Parliament would continue for its full 5-year term as the default expectation. The previous assumption had become that a Prime Minister would normally look for an opportunity to have an election in the government's fourth year in office, or as soon as expedient thereafter. Many thought this was an unhealthy constitutional phenomenon that provided a distraction from the proper business of government, and resulted in a degree of short-termism that reduced government effectiveness over the last two and half years of a Parliament.
25. The important thing about the two main purposes of the Act, including in particular section 2, is that they were both directed at reducing, but without eliminating, the likelihood of a general election at times other than every five years in accordance with section 1 of the Act.

The form of the 2011 Act provisions

26. The current controversy relates to what would be the first ever effective use of the no-confidence procedure for "early general elections" in section 2 of the 2011 Act.
27. Clause 2 of the Bill for the 2011 Act, as originally presented to Parliament, was replaced by a very differently worded clause during the Bill's passage through the House of Lords. Both the original clause and the eventual form of section 2 of the Act, as replaced, are set out in an Appendix at the end of this paper.
28. The provisions in the Bill for the Act, as introduced in the House of Commons, looked much closer to something that recalled the 1993 events. In the original, the first vote for which the Bill provided was a vote designated by the Speaker as a vote of no-confidence. So, it was capable of covering a vote on "an issue of confidence", as well as a motion in express terms (which the final version made the only option). Both versions, though, contained a two-vote process and thus a mechanism for reversing the effect of the first no-confidence vote with a subsequent vote of confidence.
29. In addition, in the original clause, the provision for the subsequent vote of confidence that would stop an election was at least ambiguous as to whether it allowed an "investiture vote" - a vote in which the House of Commons would indicate by whom the new government should be led. An investiture vote is the mechanism used for establishing the confidence of the devolved legislatures in the devolved governments (see, for example, sections 3 and 46 of the Scotland Act 1998). That had been the model many commentators had expected the Bill to follow; but it is clear that, in the event, it was rejected as the appropriate precedent, perhaps because of the hiatus it would have allowed in the tenure of the office of Prime Minister[2].
30. The amendment made in the House of Lords had three main objectives[3].
31. The first, which is perhaps ironic in retrospect, was to protect the Speaker from having to make decisions involving any intense political controversy, including one in which it would be for him to determine whether a general election would be take place.
32. The second was to protect the legislation from the risk of being the subject of litigation. If there was a universal consensus on anything during the passage of the Bill, it was that that should not happen.[4]
33. Indeed, the Bill is perhaps a paradigm for the chilling effect of judicial activism on policy formulation. Even though it was acknowledged at the time that it was just about inconceivable that the courts would wish to get involved in the issues that might arise under the Act, it was also thought important, nevertheless, to frame the Bill in a way that left the least possible scope for judicial intervention - at the expense, even, of not allowing the

2. Sections 3 and 46 of the Scotland Act 1998, for example, allow the post of First Minister to remain unfilled for a period of at least 28 days and conceivably much longer if the failure to appoint a First Minister results in an election.
3. See the debates at Report Stage in the House of Lords on 16 May 2011
4. The Clerk of the House of Commons had raised specific concerns that the Bill as presented "could allow the courts to question aspects of the House's internal proceedings". See the report on the Bill of the House of Commons Select Committee on Political and Constitutional Reform Committee, 9th September 2010. He reiterated this advice and it is referred to in col 1050 of the Lords Report Stage debate mentioned in the previous footnote.

Bill's provisions to take a form that might otherwise have been more appropriate, or covered more ground.

34. In that way, it is clear that Parliament specifically decided that the price of avoiding any intervention in its proceedings by the courts was that the circumstances in which the confidence principle would trigger its traditional constitutional consequences ("resign or dissolve") had to be confined to the case where the express words set out in the Act were used.
35. The third purpose of the replacement clause was to remove the ambiguity mentioned above, and so to eliminate any suggestion that there might be "an investiture vote", rather than just a retrospective vote confirming the confidence of the House in a government already appointed by Her Majesty and in office.
36. In that way, it is also clear that it was not the intention of the Act to provide for, nor did it set out to suggest, what the process should be if, for example, arrangements for carrying on government were in fact made between a defecting junior partner in a coalition and the official opposition, whether before the vote or subsequently as a result of negotiations during the 14 days. So far as the statute was concerned, that was left entirely to political factors, although that did not stop those who spoke in the debates on the Bill from speculating about it.
37. It is reasonable to infer that it was assumed that the political factors would have the practical effect that, if it became clear during the 14 days that there was a potentially stable coalition waiting in the wings to take over (as, for example, where the official opposition and the Prime Minister's previous junior coalition partner were ready to make an alliance and had the numbers), an incumbent Prime Minister would feel it appropriate to resign and to recommend to Her Majesty that the alternative be given a chance to govern. That would then avoid the need for an election. Nevertheless, that was not what the Act required or provided.
38. It was obvious that a Prime Minister in those circumstances would wish to be seen to be "doing the right thing" and not "clinging to office" past his "due date". In a country that boasts an unwritten and political constitution - but ~~also~~ maybe also with democratic systems elsewhere - it is foolish to underestimate the normative force of the short-term prospect that political decisions will be judged by the electorate, or the long-term prospect that they will be judged by history. It is, in my view, equally foolish to think that the norms that result can be adequately encapsulated in law, or that any law or quasi-law that sought to prescribe different decisions could effectively compete with those considerations.
39. Everything about the Act and its legislative history suggests that the 2011 Act represents a conscious attempt to leave the decisions about how a Prime Minister and government should respond to its operation to be made under the influence of the political

pressures to which they would be subject. Those pressures, in the case primarily in contemplation, were likely to shift the balance in favour of a change of government, and away from the inevitability of an election. It was enough to provide a remedy for the mischief at which the Act was aimed to create a perception that that shift had occurred.

40. It is also reasonable to assume that this approach, of not attempting comprehensively to codify the process of government formation, was adopted because it was also recognised that there are an infinite variety of circumstances that would affect the strength of the political incentives in operation, and that they could not all be legislated for. So, for example, the time remaining until the next regular 5-year election might be a relevant variable in the force of any supposed political imperative to resign. In addition, in the circumstances primarily in contemplation, it would also be reasonable to assume that a defecting junior partner negotiating arrangements with the official opposition would want, for tactical purposes, to keep open for a while the possibility of returning its support to the largest party, and therefore would produce a delay in any resignation by the incumbent. There was recent evidence for the validity of this assumption in the events of May 2010.
41. In 2011, the assumption now found in paragraph 2.10 of the Cabinet Manual was already current, following the events around the formation of the government in 2010. That assumption is that there is, perhaps, a developing convention that a Prime Minister should not resign office until there is clarity about whom Her Majesty should ask next to form a government. That paragraph does clearly state that "it remains a matter for the Prime Minister, as the Sovereign's principal adviser, to judge the appropriate time at which to resign, either from their individual position as Prime Minister or on behalf of the government".
42. It is the responsibility of every Prime Minister to his Sovereign to ensure that She is not left without a politically accountable first minister, and that She is not required to select one in a situation that could only draw Her into political controversy. There was further evidence for this developing convention in the way both Mr Cameron and Mrs May delayed their resignations until their successors had been selected by the Conservative party.

The issues now the subject of controversy

43. So, what are the controversial issues that have now arisen around the hypothesis that the Government might be defeated on a vote of no confidence in the Autumn?
44. Essentially, they relate to the question of at what stage following the defeat (if at all) there is an obligation on the Prime Minister

to resign to enable another government to be formed by someone else. The developing convention mentioned above means that this necessarily also involves the question of at what stage (if at all) the Prime Minister is able to make a recommendation to Her Majesty to invite someone else to form a Government. He should not resign before he can do that. It is not that She needs his advice, or has to comply with it. The point is that he should stay until She can decide the question without controversy, and, for that, he has to make a judgement on whether that would be possible.

45. The important political context for this controversy is that the Government's defeat on the no-confidence motion would now, for all practical political purposes, be too late to trigger an election for a date before the time when the UK is due to leave the EU in accordance with both international and domestic law. The only way that withdrawal could be prevented from happening before any election would be if the UK Government and the EU27 together agree to a further extension until a date falling at some time after the election.
46. In the circumstances, what this question most certainly does not involve is how best to fulfil the purposes of the 2011 Act, as explained above. There is no serious or realistic suggestion that anything that is done following the vote of no-confidence could lead anywhere other than to an early election. The fundamental purposes of the 2011 Act, which are about putting inhibitions on early general elections within the normal 5-year timetable, are just not in play.
47. It is accepted that the resignation of the Prime Minister following a vote of no-confidence could lead, in present circumstances, only to the formation of a government (whether by the leader of the opposition or by a leader of a so-called coalition for "national unity") which would itself need to trigger an early election. It is equally obvious that the date for that election would be not long after what would have been election day as a result of the expiry of the 14-day period after any no-confidence defeat.
48. The House of Commons numbers and other political factors would make an early election inevitable, not least because it is clear that neither the leader of the opposition nor anyone else could maintain the confidence of a majority of the House of Commons in any programme for government that went beyond seeking a further extension from the EU27 to allow an election to take place before UK withdrawal. An extension for a second referendum would not be practicable because it would take months before it could be held, and would thus require an, in practice unachievable, consensus by a majority in the Commons for a more extensive programme for government in the meantime. The leader of the opposition made it clear in his 14th August letter that any government he formed would be for the purpose only of applying for an extension and

immediately proceeding to an election.

49. A scenario in which the Prime Minister would resign in favour of a government that would then continue in office until the current Parliament completes its 5-year term in 2022 would, perhaps, engage the underlying purposes of the 2011 Act provisions. But it is for all practical purposes only a fantasy. It is intellectually incoherent to suggest that the fact that that scenario is capable of being fantasised is a reason why a Prime Minister must behave in an entirely different scenario in the same way as he would be expected to behave in the fantasy. The scenario that would exist this Autumn would be entirely different because of the fundamental distinction: that a general election would be bound to happen anyway.
50. Moreover, those[5] suggesting, that that or any other scenario purportedly engaging the underlying purposes of the 2011 Act could be the basis for litigation to force the resignation of the Prime Minister are promoting an idea that defies the unequivocal wishes of Parliament when passing that Act: not to address the issue of resignation, not to provide for an investiture vote, and not to allow the Act to become the subject of proceedings in the courts.
51. It is clear that the only reason there is an issue at all is because of the understanding that, if an election is triggered (however that is done) for a date after 31st October 2019, the current Government, while remaining in office, would not seek a postponement of UK exit from the EU but would allow that to happen on that date by default. But for that factor, there could be no plausible or sustainable constitutional or political argument for delaying an election that is inevitable in any event just to allow a different government to be formed to hold the reins of power until its result is known.
52. There are no grounds at all for supposing that there has been a change to the pre-2011 constitutional position: that a government defeated on a no-confidence vote resulting in a general election would remain in office (subject to the purdah/caretaker restrictions – hereafter "the purdah convention") until the question whether it could command the confidence of the newly elected House of Commons can be tested in the light of the election result. It would have been regarded as complete nonsense in 1979, had anyone suggested that Mr Callaghan's defeat required him to hand over power to Mrs Thatcher pending the election triggered by the defeat. There is nothing to suggest that it was the intention or understanding of anyone in 2011, or at any time since, that something different is now required.
53. It follows that the real issue at stake, and the only reason something different is now being suggested as appropriate, is the same as the one on which Prof Richard Ekins, Robert Craig and I have already opined in our earlier Policy Exchange paper "Lost in Transition".

5. Prof Mark Elliott in his blog "Public Law for Everyone" 8 August 2019, points out (citing a Tweet) that Tom Hickman of UCL has suggested this.

54. That issue is whether, if an election is held, there is a constitutional requirement, based on the purdah, convention, for an attempt to be made to secure an extension of the Art 50 exit date until after the election.
55. The Cabinet Manual states that the convention should be understood as restricting government activity from the moment of a government defeat on a vote of no-confidence for the purposes of the 2011 Act (para 2.31). It also says that the restrictions should continue after the election if its result is inconclusive and there is any doubt about whether the Government has or retains the confidence of the House of Commons (para 2.30). Significantly, it further suggests that the restrictions may have to continue until Parliament reassembles after the election and the capacity of the Government to command the confidence of the House of Commons is tested in a vote.
56. The issue we discussed in our earlier paper is whether the restrictions imposed by the convention require the Government to retain the legal status quo at the time they start to apply (viz with the UK leaving the EU on 31st October 2019) or would require it instead, while subject to the restrictions, to apply for, negotiate, and agree a further postponement of UK withdrawal. The precise formulation of this "duty to agree" and its implementation during the purdah period is very problematic. There would be issues about the length of the extension and, perhaps, about the conditions to which it would be subject.
57. Our conclusion on the purdah issue was that there are legitimate arguments that could plausibly be made both for and against a requirement to seek an extension, and that the incumbent PM and Government would be in a position to choose which arguments they found the more convincing. The advice of the Cabinet Secretary will be significant. The principal Law Officer of the Crown, the Attorney General - the ultimate source of authoritative legal advice to Government - might be expected to give his confidential advice; and no Prime Minister could be faulted for following it.
58. In fact, the arguments in favour of regarding UK departure from the EU as the status quo position to be preserved during a purdah period have since been strengthened by the making of the commencement regulations for section 1 of the 2018 Act, which repeals the European Communities Act 1972. There was always a strong argument for saying that there was a legal duty to make the regulations before whatever is "exit day", even if that day fell in an election period. It was an anomaly that section 1 of the 2018 Act had two mechanisms for determining its commencement - an express date, exit day, and the provision for commencement regulations.
59. Making the regulations has removed a potential complication. It is usual to treat the making of commencement orders as *prima facie*

incompatible with the purdah convention. No one, though, has ever seriously suggested that purdah requires commencement orders that have already been made to be revoked. In any event revocation is only legally possible before the date appointed by the order, and so would be impossible in this case because the order fixed the day after the making of the regulations, 17th August 2019, as the commencement date. That, of course, does not affect the power of the Government, if an extension is agreed with the EU 27, to exercise the power conferred on it to change the date and time at which the section that came into force on 17th August would currently have effect in practice . Neither, though, does it answer the question whether steps should be taken towards exercising that power during a purdah period.

60. It is in this situation that it seems that the argument in favour of resignation seems to amount to no more than an attempt to find a mechanism to "enforce" a particular view of the purdah convention. Presumably, this is on the false logic that, if such a mechanism does not exist, it must be invented. The objective for demanding the Prime Minister's resignation would be to enable the government to be replaced by one which takes a different view of what the convention requires, and which would, while accepting the need for an election but itself temporarily relieved of the requirements imposed by the convention, reopen negotiations with the EU27 about an extension and, if one is agreed, make the regulations needed to implement it under the European (Withdrawal) Act 2018.
61. There do seem to me to be considerable difficulties about construing the 2011 Act as creating a missing mechanism for enforcing the purdah convention. The first is the fact that the Act, quite obviously, was never intended for that purpose. The second is that the convention is a self-imposed rule of propriety in the vaguest possible terms and with no foundation in law whatsoever. Hitherto, it has been clear that the only potential for "enforcing" the convention lay in making a request for an "accounting officer direction" (see paras 2.32 and 2.33 of the Cabinet Manual). This unequivocally demonstrates that compliance with the convention is to be achieved exclusively through the "sanction" that a political price might have to be paid by anyone seen to have disregarded it. Any suggestion that the convention might itself be justiciable is plainly absurd. So too, therefore, is any suggestion that a need to enforce the convention would justify a reading of the 2011 Act that would make the resignation issue justiciable.
62. Perhaps, though the true nature of the purdah-related argument in favour of resignation should be seen as a response to an impending no-deal exit, rather than just as a response to an impending election that would make that inevitable. In those circumstances, it would be being used as a contrivance for securing delay for its own sake,

rather than just a delay allegedly made necessary by the election. That would give rise to a different question: whether it would be constitutionally and politically legitimate to exploit the 2011 Act no-confidence procedure, by delaying its use until it is too late to have an election before exit day, exclusively for the purpose of then triggering the supposed obligation under the purdah convention to apply for an extension.

63. It follows, of course, that whichever way you put it, the answer to any new question about resignation following a 2011 Act no-confidence vote in current circumstances is wholly dependent on the question about what the purdah convention requires; and, to that extent, must have the same answer. There are legitimate arguments on both sides, and the Prime Minister is in a position to choose which he finds the more convincing, but will have to justify it politically.

Is the argument for the PM to resign following a no confidence defeat clear-cut?

64. It seems to me that the arguments are very far from clear-cut as to in what (if any) circumstances, following a defeat on a 2011 Act no-confidence vote, any constitutional requirement on the Prime Minister to resign could or would arise, either immediately or before the end of the 14 days for which the Act provides.
65. An argument that there is an obligation to resign just because of the defeat is mistaken. As mentioned above, para 2.10 of the Cabinet Manual says that it is for the Prime Minister to decide when to resign. The argument that because, before the 2011 Act, he had the choice of resigning or asking Her Majesty for a dissolution and that, with the removal of the second option, he is left with no option except to resign is unsustainable. The 2011 Act did not remove the option for a dissolution from the equation, it merely changed the means of making it happen.
66. It seems to me that the Prime Minister could legitimately argue, both constitutionally and politically, that he remains entitled to pursue the dissolution and election option by the other means still available to him under the 2011 Act.
67. The same argument would also be available, maybe even more clearly, following a no-confidence motion in a form that did not satisfy the requirements of the 2011 Act, for example, because it had been amended to turn it into an investiture vote. In normal times, it would be extremely unlikely that it would be regarded as in order or appropriate for the Speaker to select an amendment that would turn a 2011 Act motion into something that would otherwise be possible, if at all, only in the form of a Humble Address. But maybe it could still happen.

68. In considering the force of the argument that the Prime Minister is entitled to pursue the dissolution option, it is important to take account of the practical political advantage that the Prime Minister would secure for justifying his position from being the person pursuing the submission of his decisions to the judgement of the electorate at the earliest possible opportunity.
69. It would be his opponents who would be arguing the case for postponing that judgement until they had settled the agenda for the election with the EU27. It is this factor that makes the analogy of a Stuart monarch look particularly silly when applied to a Prime Minister whose position would be in favour of an early judgement on his stewardship of government by an electorate selected on the basis of universal suffrage - something no Stuart Monarch would have thought appropriate.
70. So, for example, it seems to me that it would be possible for him to make a politically attractive and principled case for remaining in office with a view to putting down a motion to trigger an election under section 2(1) of the 2011 Act. He might be able to persuade a sufficient majority in the House to vote for that, if it would accelerate the election by removing the need to wait out the 14 days. Or he might even, if the calendar required and allowed it, bring forward and expedite legislation to have an election at an even earlier date after an abbreviated campaign.
71. In the case of a no-confidence motion that failed to count as a 2011 Act motion, an immediate move to bring the process within the 2011 Act, and to open up the possibility of a dissolution seems the only appropriate response for a Prime Minister and Government. A section 2(1) motion for a dissolution could be moved, or a motion in the form set out in section 2(5) could be moved and the House invited, if it wishes, to amend it to turn it into a section 2(4) motion. It could reasonably be argued that it was the intention of the 2011 Act to confine the confidence issue to motions in express terms, and that it was essential to clarify the effect of any non-statutory motion by testing it with a statutory one.
72. Presumably, though, a proposal from the Government to the House of Commons for an early election would be unlikely to be successful unless any proposed acceleration of the election would be to a date before 31st October (which might be practical), or unless the Government also agreed to apply for an extension (which it is committed not to do).
73. Nevertheless, there would still be a case, in the light of what it can be inferred was envisaged in 2011, for the Prime Minister to justify needing to spend at least some of the 14 days in an attempt to negotiate the restoration of his majority, either by convincing the rebels in his own party to return to the fold, or by seeking allies elsewhere. The relevance of the precedent in the 1993 events

to the structure of section 2 of the 2011 Act remains. In 1993 the vote of confidence that restored confidence was on the day after the defeat. There is a plausible argument that the effect of the 2011 Act was to extend the "period of grace" from one to 14 days.

74. If it is accepted as reasonable that at least some of the 14 days could be used by the incumbent to restore the Government's majority, there is then another rather awkward "Catch 22" argument that becomes available. It might be thought that it would be clear from the start that the Prime Minister would be unable to win a confidence vote within the 14 days if he just remains in office. However, a government that did hold on to office until towards the end of the 14 days, having indicated that it had no intention of resigning, might well justifiably think that it had a good chance of winning a vote of confidence on the 14th day.
75. Voting confidence in the incumbent government at that stage would be the only way of keeping Parliament in existence, and so of preserving the opportunity for the approval of a last-minute offer from the EU27. The effect of section 13 of the European Union (Withdrawal) Act 2018 is that an exit with a deal is made impossible once Parliament has been dissolved, until it is open again for business after the election.
76. Voting confidence in the incumbent government would also be the only way of enabling the opponents of a no-deal exit to take advantage of whatever other Parliamentary procedures might remain for preventing it and securing an extension. Moreover, once an exit on 31st October had become inevitable, there would be no other way of preventing the process of managing a no-deal from being disrupted and constrained by the purdah restrictions and the inevitable distractions of an election campaign.
77. Alternatively, in the case of an October no-confidence vote that meant the 14 days ran past 31st October, a Prime Minister might think loyalties might might change after that date.
78. These arguments might carry some political risks, but a Prime Minister might think that he would be able justify them to public opinion as a legitimate response to his opponents in a game in which they themselves were already treating the rules as no more than tools to be manipulated to get their own way, after the time for doing that with the accepted and established procedures had run out. It would also, paradoxically perhaps, be the only route to fulfilling the underlying purposes of the 2011 Act, at least in the short term. It would preserve continuity of government through a confidence crisis without requiring a general election outside the 5-year timetable.
79. These though are arguments subsidiary to the central question, which is whether and (if so) in what circumstance (if at all) a Prime Minister who wants to pursue the dissolution option is required at any time to abandon the pursuit and to resign to allow someone

else to form a government that might win the confidence vote the 2011 Act requires for preventing a dissolution and election. Could he continue to pursue the option just by waiting out the 14 days even if he had no hope of winning at the end of that period?

80. Of course the effect of the prorogation already announced on 28th August would make it unlikely, in any event, that a vote of no-confidence in September could have any effect except to trigger an election. The House of Commons would be sitting for only very few (if any) of the 14 days after the vote, during which only a vote of confidence in the House could stop an election. And a vote of no-confidence after the House resumes on 14th October would run the 14-day deadline very close to, or past, 31st October. If it runs past it, which now seems a more likely scenario, that would further strengthen the incumbent's position.
81. It is relatively uncontroversial to assert that, in all circumstances, a Prime Minister can legitimately remain in office at least until it is clear that there is someone else who is better placed to form a government capable of commanding the confidence of the House of Commons and who can be recommended to Her Majesty without drawing Her into political controversy. Indeed, there is a strong argument that he is constitutionally required to do so.
82. There is much more room for controversy and uncertainty about how clarity about the fulfilment of that condition might be achieved, and about what exactly would need to be clear before any constitutional imperative on the Prime Minister to resign would arise.
83. Various suggestions have been made as to how the fulfilment of the condition might be made clear. Suggestions have included adding names to an early day motion, an amendment of the initial vote of no confidence (which would put in question whether it was one that did or did not satisfy the requirements of the Act), and so on.
84. These suggestions seem to me to make the mistake – perhaps understandably induced by the form of the 2011 Act - of assuming that the question whether a person is best placed to be able to form a government that will command the confidence of the House of Commons is a matter of a form of words. It is not. It is instead a question of substance based in a reality which, only if it exists, needs to be ratified by a motion in the form required by the 2011 Act to prevent an Act-compliant no-confidence motion from triggering a dissolution and election.
85. No particular process or form of words is necessary; and equally, for the purpose of determining to whom an invitation to form a government should be issued, no mere form of words is enough. The search for a mechanism to articulate the substance is misguided and also risks running up against the consensus in 2011 against a formal "investiture vote".
86. On the other hand, irrespective the words or the substance, there

cannot possibly be an obligation on a Prime Minister to resign to allow the appointment of an alternative government that would have no prospect of winning the necessary, ratifying vote of confidence within the 2011 Act's 14-day period. It would be immaterial that the reason for that might be that the no-confidence vote had been timed in way that meant that the House would not be sitting to allow the subsequent confidence vote to be moved and passed in time.

87. So far as the substance is concerned, it can be assumed that the political state of opinion in the House of Commons will be obvious, not least privately to the Prime Minister and the Sovereign. It will not need to be articulated in a form that would run the political risk of appearing to force the hand of the Sovereign. Devising a form of words that appears to give Her no choice but also misrepresents the substance (by failing to acknowledge the inherent inadequacies in the nature of any government the individual in question would be able to form) would be neither appropriate nor legitimate.
88. The question is what the actual state of opinion in the House of Commons would have to be for there to be a constitutional and political imperative on the Prime Minister to resign.
89. As many commentators have pointed out, it is quite difficult to see how a clear alternative capable of forming a government that would command confidence could emerge after the passage of a vote of confidence necessarily moved by the leader of the opposition. He would have a claim, as the shadow Chancellor and Mr Corbyn's letter to other MPs on 14th August have recently made clear. The reply by Nick Bowles MP on 22 August to Mr Corbyn illustrates the problem with that. It seems likely, though, that there would be sufficient supporters for the claim by the leader of the opposition to make a claim by anyone else problematic. The Prime Minister could legitimately assert that he could and should remain in office until the political process had resolved any contest between competing claimants.
90. Moreover, there is a much more important question, namely, whether either claimant would really be proposing to form "a government". For the reasons already explained what they would each be proposing would be to become the caretaker Prime Minister through an inevitably imminent election campaign. In the case of the leader of a proposed government of "national unity" there might also be considerable further doubt about whether ministerial appointments could be made that would result in any form of effective, collective decision-making on the conduct of government.
91. In those circumstances, there would be a very strong case for a Prime Minister to argue for the continuing relevance of the Lascelles principles (discussed above under the heading "The

pre-2011 Act position") They helpfully identify, by default, two circumstances in which a general election, rather than a mere change of government, might be regarded as the only option in the national interest. It is highly likely that following the envisaged vote of no confidence, neither the first nor the third condition for insisting on a change of government, rather than a dissolution - and therefore on the resignation of the incumbent Prime Minister – would be satisfied in relation to any proposed alternative. A Prime Minister could argue that it was his constitutional duty, in those circumstances and in the national interest, to ensure that the election is held at the earliest possible opportunity.

92. To be clear, I do not think that, in practice, the same opportunity for a Prime Minister to argue against resigning would be available in the situation at the front of everyone's mind in 2011: where an alliance between a defecting junior partner in a coalition and the official opposition had the potential to produce a government with a working majority. In those circumstances, if (as the hypothesis suggests they would) the two unquestioned Lascelles conditions could be satisfied, there would be a political imperative for the Prime Minister to resign. The imperative would be reinforced by the historical precedents of 1974 and, now, 2017, which suggest that a Prime Minister who precipitates an election which the electorate thinks unnecessary is likely to be punished at the ballot box. The political realities would coincide with the assumptions about what they would be that were made during the passage of the 2011 Act. In conforming to them, and so resigning to make way for the new coalition, a Prime Minister would inevitably claim to be performing his constitutional duty, and in a political constitution, he would be.
93. However, as I suggested above, even in that situation as envisaged when Parliament was passing the 2011 Act, the position would be less than straightforward if, hypothetically, it arose in the dying days of a five-year term. Suppose the sole purpose of the no-confidence vote was to produce a short-lived government, temporarily free of purdah restrictions and with the limited intention of using that freedom to implement measures to influence the outcome of the forthcoming election? In those circumstances, it would be difficult to blame an incumbent Prime Minister who argued that the national interest required him to see out the 14 days to ensure that there was an election instead. Could it really be argued that he would be under a constitutional duty to acquiesce in a scheme to take power for the sole purpose of using it to influence the election? Would he really be likely be pay a political price if he refused to allow that to happen?
94. The proposal for a caretaker government to be formed to apply for an extension is, of course, not quite that; but from some perspectives it would not look that different – particularly to those

who would see it as a device for the proponents of "remain" to work with the EU27, through what would otherwise have been a purdah period, to make arrangements for facilitating the successful election of a UK government more congenial to the EU.

95. So, we get back to the same question: whether there is constitutional requirement to try to get an extension if an inevitable general election would otherwise result in a UK exit from the EU before the result of the election could make a difference.
96. The hypothetical scenario is that a Prime Minister is defeated in a no-confidence vote and so immediately becomes subject to the purdah convention. He concludes that the convention not only does not require an application for an Art 50 extension, but ought to be understood as disallowing one pending an election. In those circumstances, he could legitimately argue that he should not give up power, pending the election, to a government whose only policy was to do what he thinks it would be a breach of convention for him to do himself.
97. In addition, he would, in the same way, have a good argument that he was entitled to use the constitutional tools at his disposal to resist being forced to breach the convention by the House of Commons. After all, if it were appropriate for the purdah convention to be overridden by a majority in the House of Commons, it would have no value at all in the normal case where the Government commands a majority in the run-up to a general election.
98. Also, once an election has become inevitable, a good case will always be capable of being made that the campaign needs to be transferred, as soon as possible, from the floor of the House of Commons, to the country.

Who decides?

99. It is clear that I think that there are respectable arguments and other responses that could be used by a Prime Minister defeated in the Autumn on a 2011 Act no-confidence motion - or one in similar terms but not triggering the Act - to resist a suggestion that he is required to resign and to make way for another. The different arguments have different degrees of constitutional force; and their force in a particular case would depend on the detailed circumstances. They are obviously not going to convince everyone and so cannot be regarded as knock-down arguments, but nor can they be dismissed as fanciful.
100. In those circumstances, if the answers are not clear-cut, who decides what is right?
101. That question cannot be answered without honestly acknowledging just how intensely political it all really is in practical terms.

Reduced to its raw political content, it is about who decides what the political context and agenda should be for the next UK general election.

102. The way in which the questions about that context are resolved may well determine the fate of different parties in that election. If Brexit is a *fait accompli* by election day, "Leave or Remain" will be off the agenda, and the Brexit Party may find its "fox has been shot". So far as actually leaving is concerned, accountability to the electorate will involve a retrospective judgement. On the other hand, if there has been another extension, the election may help to resolve what happens next, or it may not, but the election becomes a re-run of the referendum question.

103. It must be clear that I do not think the courts should decide. It would be folly for them to run the risk to the respect in which the judiciary and the rule of law are held by taking responsibility for deciding an issue likely determine the outcome of an imminent general election. For the reasons given, it would necessarily involve an excessively innovative and creative approach to law-making. The courts should, at all costs, avoid answering questions in that way where the view nearly everyone else takes of the right solution is likely to be coloured by their political position on the most controversial political issue of the day.

104. It seems to me that the pre-2011 Act assumption that the courts would not consider it their function to become involved in arbitrating on the exercise of the personal, constitutional prerogatives of the Crown (including the appointment, dismissal and resignation of Ministers and Ministries) or in the timing or subject-matter of elections was based on sound constitutional principles and precedents.

105. The Miller case, in relation to the legislative consent convention, accepted the - I think obvious – proposition that the sovereignty of Parliament includes the capacity to legislate on constitutional matters without making those matters necessarily justiciable - although there are obvious risks in attempts to do so. Non-justiciability for the Parliamentary or prerogative implications of the 2011 Act was unequivocally the intention of Parliament when it passed that Act. It would, moreover, be absurd to suggest that the Act did have the effect of making justiciable precisely those issues that were specifically omitted from the Act so as to avoid the risk that including them might have that effect.

106. Clearly, the Sovereign is going to have a role in these events. I want to say as clearly as I possibly can that I am not going to express any view on how She should discharge Her role. I need to give this special emphasis, because last time I said this there were commentators who, no doubt for their own purposes, chose to understand me as doing just the opposite. I think it would be quite inappropriate for me to express a view. I am sure She will give wise

advice to the Prime Minister in private and that its purpose will be to guide him towards the best route to the reconciliation of the national divisions to which Brexit has given rise. I would not presume to suggest what that advice should be.

107. I will say, though, that it is the responsibility of politicians on all sides not to draw the Sovereign into the political battle and to ensure that political differences are resolved by the political process. That is a particular responsibility when the issue has the level of political salience that attaches to whether or not, and on what terms, the UK leaves the EU on 31st October 2019. It is a responsibility that lies particularly heavily on those who promote new processes of questionable legitimacy which might, as constitutional innovations, provoke a situation requiring the Sovereign's intervention.

108. I cannot condemn too strongly the actions of otherwise responsible and respectable politicians and commentators who have been giving definitive and uncompromising views on what the Sovereign should do. I particularly condemn those views when they take a form that pusillanimously allows the inference to be drawn that it is those politicians and commentators who will be stirring up the controversy should the Sovereign or the Prime Minister choose to take a different view from them on matters which, as I have argued, are very far from clear-cut. These efforts to use excessive and unjustifiable confidence in their own opinions to ensure that any resulting blame for a controversy is laid at the Prime Minister's door are transparent and indefensible.

109. So, if neither the courts nor the Sovereign should decide, who should? I think the answer quite clearly has to be the electorate: in the election that would inevitably, sooner or later, be the consequence of any no-confidence defeat for the Government in the Autumn.

110. We do all need to be conscious of the risk of "confirmation bias" - in ourselves, as well as in others. I have reflected on where my sympathies lie and on what makes me think what I do.

111. I am not a person who thinks that the benefits or risks of a no-deal exit (even if it were possible to find a credibly impartial assessment of what they might be) are such that either stopping it or making it happen is an end that would justify any means. Indeed, I think that any constitutional course of action based on ends justifying means (whatever the benefits or the risks) is dangerously destructive of any ambition to achieve both legitimacy for the outcome and "loser's" consent - which is the main function of any constitutional arrangements, and, in my view, essential to the success of any policy.

112. I am unable to accept the premise that statutory provisions enacted by Parliament need to be respected only so long as the outcomes they produce are for the time being approved by a majority in

the House of Commons. That seems to me to be the substance of the argument that any steps are justified for obstructing the no-deal outcome for which the 2018 Act provides, because there "is no majority in the Commons for no deal". I cannot reconcile the premise with the rule of law.

113. It was Parliament that in 2011 enacted legislation that gave the House of Commons a statutory right to insist on an early election but left the timing of the election and the response of the incumbent Prime Minister and Government to a no-confidence vote to be resolved by the political factors generated by the defeat. It was Parliament that in 2018 enacted legislation that expressly gave statutory cover exclusively to a no-deal exit, that insisted on there being new primary legislation before an exit with a deal could take place and that structured its legislation to ensure that the initiative for negotiating any extension and for making proposals in response to the rejection of any negotiated deal was retained by the Government.

114. I accept, of course, the right of everyone (including a majority of MPs) to campaign for changes in the law and to make use of established procedures, accordingly. I do not accept that that involves an entitlement to have the law's operation suspended until they succeed, or to insist on changes to the current constitutional settlement and processes so as to enable them to do so.

115. I reject the much asserted proposition that Parliamentary Sovereignty consists in allowing a majority in the House of Commons an ultimate authority and a right, at any time and in any circumstances, to make or unmake any political decision (even those the power to make which is conferred on others by convention or statute). It is a dangerous constitutional heresy. Parliamentary sovereignty gives the Crown in Parliament the power to enact anything it chooses to enact. It is dependent, though, on every component of Parliament respecting the validity of Parliament's own previous legislative decisions, so long as they are in force. The fact that that has not always happened in the past few months does not justify a repetition

116. I think that politicians who have failed to use the opportunities they had to force an election in time to be able stop or postpone UK withdrawal in the light of the election result should not be able to claim an entitlement to extra time, just because their delay means that time has run out on further opportunities. I understand why they delayed, but the reasons are not ones that, it seems to me, should relieve them from their delay's inevitable consequences.

117. I know I think this partly because the current situation does not seem to me to be as unusual as many seem to think. Almost every major legislative reform I worked on over 37 years of professional involvement in the legislative process attracted a spurt of opposition as commencement approached - often noisier than anything that

had gone on during the process of enactment. They all came into force, and they did so because, in the end, it was accepted that the opposition had come too late.

118. It seems to me that the issues under consideration are essentially political. They boil down to whether the current political conflict would best be resolved by asking the electorate whether it wishes to renew, revoke or explain the mandate it has issued, or by leaving it to the electorate to pass judgement on whether that mandate has been discharged. There are no answers to that to be found in arguments about process or the constitution, and certainly not from the law or in the courts. Attempts to do so are much more likely to diminish respect for the process or the law than to persuade anyone who does not favour the eventual outcome to accept it. No rule can tell you what the right political outcome should be. The process in our constitution will tend to mould itself to whatever political solution prevails. Political problems need political solutions and, when time runs out on discussion about what should be done, what is left is action and accountability for what has been done.

119. It seems to me it would now be a plausibly legitimate position for the Government to take, both politically and constitutionally, that time has run out on discussion, for it to make the political case for allowing its policy to be implemented in accordance with the legislation and timetable already in place and, in due course, for it to ask the electorate for "forgiveness" – if it is forgiveness that turns out to be necessary – for not having sought any further permission.

Appendix

Clause 2 of the Fixed-term Parliaments Bill, as introduced

2 Early parliamentary general elections

(1) An early parliamentary general election is to take place if the Speaker of the House of Commons issues a certificate—
   (a) certifying that the House has passed a motion that there should be an early parliamentary general election,
   (b) certifying whether or not the motion was passed on a division, and
   (c) if it is certified that the motion was passed on a division, certifying that the number of members who voted in favour of the motion was a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).

(2) An early parliamentary general election is also to take place if the Speaker of the House of Commons issues a certificate certifying that—
   (a) on a specified day the House passed a motion of no confidence in Her
   (b) Majesty's Government (as then constituted), and
   (c) the period of 14-days after the specified day has ended without the House passing any motion expressing confidence in any Government of Her Majesty.

(3) A certificate under this section is conclusive for all purposes.

(4) Before issuing a certificate, the Speaker of the House of Commons must consult the Deputy Speakers (so far as practicable).

(5) Subsection (6) applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.

(6) If a parliamentary general election is to take place as provided for by subsection (1) or (2), the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister (and, accordingly, the appointed day replaces the day which would otherwise have been the polling day for the next election determined under section 1).

Section 2 of the Fixed-term Parliaments Act 2011

2 Early parliamentary general elections

(1) An early parliamentary general election is to take place if—
 (a) the House of Commons passes a motion in the form set out in subsection (2), and
 (b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).

(2) The form of motion for the purposes of subsection (1)(a) is— That there shall be an early parliamentary general election.

(3) An early parliamentary general election is also to take place if—
 (a) the House of Commons passes a motion in the form set out in subsection (4), and
 (b) the period of 14-days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).

(4) The form of motion for the purposes of subsection (3)(a) is— That this House has no confidence in Her Majesty's Government.

(5) The form of motion for the purposes of subsection (3)(b) is— That this House has confidence in Her Majesty's Government

(6) Subsection (7) applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.

(7) If a parliamentary general election is to take place as provided for by subsection (1) or (3), the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister (and, accordingly, the appointed day replaces the day which would otherwise have been the polling day for the next election determined under section 1).

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