

# Securing Electoral Accountability



Professor Richard Ekins and Sir Stephen Laws





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# Introduction

The central question in British politics today is whether the UK should leave the EU on 31 October with or without a deal or should instead apply to the EU for an Article 50 extension. The policy of Her Majesty's Government is to leave on 31 October and not to apply for an extension; the House of Commons does not support this policy, which is the central policy of this Government, but the House has nonetheless held back from formally withdrawing its confidence in the Government.

The House has held back from withdrawing confidence partly because it has left it too late to guarantee an election before 31 October, an election that might return a Government which enjoyed the support of the Commons and was willing to apply for an Article 50 extension.

Instead, a cross-party coalition of MPs has supported legislation – the Benn Bill – to compel Her Majesty's Government to act inconsistently with its central policy and to apply on or before 19 October 2019 for an Article 50 extension until 31 January 2020. The legislation would also require the Government to accept any alternative extension which the EU might propose, subject to a House of Commons veto. The legislation does provide for cases where an application might not need to be made; but, partly as a result of the passing of the legislation itself, those now appear highly unlikely to arise. The cross-party coalition has made it clear that it will not support a no-deal Brexit, which suggests that the Commons will acquiesce in any extension (perhaps on any terms) that the EU may choose to propose.

It is constitutionally imperative that the decision about whether the UK should seek to extend the Article 50 process, and thus its continuing EU membership – and on what terms and for what period – should be made by a Government in whom the House of Commons has confidence and which is willing to take electoral responsibility for the decision. In the present circumstances, this requires an election in mid-October. This paper outlines the constitutional case for this course of action and anticipates and answers objections to it. The paper also discusses how the Government should and should not act if an early election is not held.

## Constitutional principle and the Benn Bill

It is always open to the House of Commons to refuse to support Government policy and, in extremis, to withdraw its confidence in the Government. A formal withdrawal of confidence would open the way either to the Commons supporting some other government, if one can be appointed that would govern with its confidence, or, more likely, to an early election being held. It is flatly inconsistent with established constitutional principles for a cross-party coalition to seize the initiative from the Government in the way that has taken place this week – taking over the business of the House and legislating to side-line the Government in relation to foreign policy and, in particular, to the UK's negotiations with the EU.

The breach of principle is confirmed and compounded by the procedure by which the Benn Bill has been procured, including: novel use of the Standing Order No. 24 procedure; the failure to accept the need for a money resolution for a Bill which has major financial implications; the Speaker's ruling that Queen's Consent is not required for a Bill that patently 'affects' the prerogative; the adoption of a fast track procedure that would be totally intolerable if adopted by the Government (and the disregard, without even an express disapplication, of the spirit and letter of Standing Order No. 14(13) about publishing Bills before one asks the Commons to pass them); and the reliance generally on the less than impartial assistance of the Speaker, and so on and so forth.

The Commons clearly does not have confidence in the Government. It is not only refusing to support its flagship policy but imposing and attempting to manage the implementation of the opposite policy by legislation. Proof, if further proof were needed, lies in the fact that the Prime Minister made the Government's opposition to the Benn Bill explicitly an issue of confidence. That is why he properly sought an election from the House of Commons after the Bill passed the Commons. He has a duty to continue to seek an election since he has in substance lost the confidence of the Commons. For the Commons to take over government in this way is neither a good way to govern the country nor consistent with any previously accepted understanding of what is constitutional. It sets a disturbing precedent.



## The constitutional imperative for an early election

As noted, the Commons has not formally withdrawn its confidence, which means that the Government remains in office. The Government seems now, in practice, to have accepted that the UK cannot leave the EU without a deal before an election is held (unless the EU refuses to agree to an extension of Article 50 period). Its solution is to propose that an election should be held as soon as possible, preferably before the existing extension runs out and before the terms of the Benn Bill would require the Prime Minister to apply for an Article 50 extension.

Others want to delay any election until after the Prime Minister has been forced to apply for and/or to accept an extension, and ideally until after the extension has come into force and tied the hands of any new majority government an election might return.

The question has thus become when an early election should be held. The obvious answer is that it should be held before an extension needs to be made to avoid the UK leaving the EU without a deal. This would leave it to the UK electorate to decide whether to support political parties who propose leaving with or without a deal on 31 October or to support those who propose that the next Government, which they would hope to form, should apply for an extension and use it for whatever they would propose (be that further negotiations, a second referendum, unilateral revocation of the UK's Article 50 notice, or anything else).

When the Government has in substance lost the confidence of the House of Commons, and when there is no prospect of another government being appointed which would command the confidence of the Commons, it is wrong to fail to support steps that would lead to an early election (whether under the Fixed-term Parliaments Act 2011 or by way of an ad hoc Bill mandating an early election). The 2011 Act makes it possible for MPs to act in this way, but does not legitimise or justify such action. “The fundamental principle of the constitution”, we have said elsewhere, “is that the Government should stay in office so long as it maintains the confidence of the Commons, but no longer. In this way, a general election determines who is in a position to form a government, and the House of Commons is at the heart of our democracy.” The 2011 Act transfers responsibility for the dissolution of Parliament, when it can or will no longer support a functioning government, from the Prime Minister alone to the House of Commons as a whole. This is a responsibility the House should not shirk. Refusing to support an early election in the present circumstances appears

calculated to rob the country of a functioning government (viz. one that enjoys the confidence of the Commons) in a time of national crisis and to involve taking over government, in relation to the vital question of the UK's relationship with the EU, while, at the same time avoiding and delaying electoral responsibility for this course of action.

# How to legislate for an early election

The cross-party coalition's actions might be understandable insofar as they could be based on a perceived risk that an election resulting from the operation of the 2011 Act (either with or without a no-confidence vote) could not be guaranteed to be before 31 October. But a Bill mandating an early election on a named date answers this concern. A concern might also be that, without the Benn Bill, if an election before 31 October returned a hung Parliament – requiring time to be taken to form a new government – the current Government could remain in office and, in the meantime, refuse to apply for an extension.

The constitutionally proper course of action has for some time been that the House of Commons should withdraw its confidence in Her Majesty's Government, forcing an early election. As we have noted above, the cross-party coalition left this too late to guarantee an election before 31 October. But the Government has now conceded that an election should be held before this date that would put the question of whether Article 50 should be extended to the UK electorate. It would also spare the EU the difficulty of knowing how properly to respond to an application that it knew was unwillingly made, and from which the UK after an election might wish to resile.

It is quite possible for reliable legal and other assurances to be given to those in Parliament who are opposed to a no-deal exit that could guarantee (so long as the EU would agree to an extension) that an early election would not result in a no-deal exit by default, viz. that the UK would not leave the EU on 31 October, with or without a deal, after the election, without a decision to do so being made by a new Government, with the express support of the House of Commons.

Parliament might enact the Benn Bill and enact legislation requiring an election on 15 October or some other date early enough before 31 October. The Government might then contest the election on a manifesto commitment to repeal the Benn Act, as it will then be.

However, the time needed to get Parliament working again after an election means that an election on 15 October would probably leave insufficient parliamentary time before 19 October, if the Government were to win the election, to repeal the Act or to get parliamentary approval for a no deal exit. The terms of the Act require the Prime Minister on or before 19 October to apply for an extension until 31 January 2020. For that reason, any statute mandating an early election should also amend the

Benn Act to avoid the election being beside the point.

The amendment might authorise a Prime Minister after the election to include, in the application that must be made under the Act, the condition that the extension should not take effect, or would lapse on a specified date before 31 January 2020, if a majority of the House of Commons were to vote, on or before 31 October, to reject the extension or to approve its termination on a date before 31 January 2020. This would retain the obligation provisionally to apply for an extension, but would restore the freedom of the next Government, after an election and with the confidence of the Commons, to fulfil a mandate from the electorate to decide whether there should be an extension, and on its length and terms. It would avoid the problem that there is likely to be insufficient parliamentary time between a 15 October election and the 19 October statutory deadline for the newly elected Parliament to make a decision.

This amendment would also avoid simply surrendering effective control over the date and terms of any extension to the EU, were a new Government elected that wanted an extension. Instead, the next Government, supported by the Commons, would be able to conduct negotiations about the timing and terms of an extension with a freer hand and on a more equal footing.

## Options for the Government

If there is a continued failure to find a two-thirds majority in the House of Commons to support a motion under the Fixed-term Parliaments Act, and if a majority in the Commons also refuses to support an ad hoc Bill mandating an early election, then the question is how electoral responsibility is to be restored. How is the principle that we should be governed by a Government that enjoys the confidence of the Commons and which is accountable to the UK electorate to be secured? How is the situation to be avoided in which the questions whether there should be an Article 50 extension and for what period and on what terms are made by an unaccountable cross-party coalition rather than, as it should be, with the approval of the electorate through the conventional mechanisms of parliamentary government?

If the Government cannot secure an early election, it is likely to choose to remain in office. When the Benn Bill receives royal assent and becomes an Act, the Prime Minister will have a clear legal duty, unless he resigns his office, to write to the EU on or before 19 October, in the terms the Act prescribes, applying for an Article 50 extension and to accept an extension to 31 January 2020 or any other date. No one should contemplate the Prime Minister failing to do his legal duty strictly in accordance with the terms of that Act. This would be unconscionable and the courts would very properly provide a remedy that would require him to do his duty.

If an election has been held, but the Benn Act has not yet been repealed or amended, or if an election is to be held shortly after the 19 October statutory deadline, the Prime Minister might choose to make very clear to the EU that his application for an extension has been procured against the Government's wishes. He could properly point out that it is or may be inconsistent with the wishes of the UK electorate, whose wishes have been or are about to be tested, and that in those circumstances the Government is hoping the EU will reject the application or delay accepting it. Indeed, he might make clear that, if the EU were immediately to accept the application, the Government would, if a Parliament is able subsequently to support its actions, strive to find a means to take the UK out of the EU before the extended Article 50 term expired. It would be reasonable for the Government to contest the election on a commitment to this effect. It would be reasonable also for the Government to make clear to the EU that it should not necessarily count on the UK being willing to remain in the EU for the full term of an Article 50 extension.

It bears noting that the Benn Bill was amended in the Commons by way of an amendment moved by Stephen Kinnock MP, an amendment, which

the Lords did not remove. Clause 1(4) of the Bill provides that:

“The Prime Minister must seek to obtain from the European Council an extension of the period under Article 50(3) of the Treaty on European Union ending at 11.00pm on 31 October 2019 by sending to the President of the European Council a letter in the form set out in the Schedule to this Act requesting an extension of that period to 11.00pm on 31 January 2020.”

The Kinnock amendment adds:

“...in order to debate and pass a Bill to implement the agreement between the United Kingdom and the European Union under Article 50(2) of the Treaty on European Union, including provisions reflecting the outcome of inter-party talks as announced by the Prime Minister on 21 May 2019, and in particular the need for the United Kingdom to secure changes to the political declaration to reflect the outcome of those inter-party talks.”

It follows that the reason the UK is seeking an extension, which is not on the face of the statutorily mandated letter, is to find time to debate and pass a Bill implementing the Withdrawal Agreement subject to the outcomes of inter-party talks announced in May. Those talks made no progress and the amendment seems to envisage that they will be restarted after 19 October. It would be open to the Prime Minister – indeed he might even be obliged – to make clear to the EU that this is the reason for the application for the extension. It would also be open to him to make clear that no provision has been made for such talks, that they are unlikely to result in progress, and that the Government has no intention of making time in Parliament to debate and pass such a Bill. It is not obvious that the EU would accept an extension made on this basis.

If the Benn Bill becomes law, as now seems inevitable, and if the Commons refuses an early election, while maintaining in office a Government in which it in practice has no confidence, then the Government may need to consider resignation. The Prime Minister arguably has a constitutional (not legal) duty not to resign until it is clear that there is someone to take his place with the capacity to govern (which, by analogy with the Lascelles principles, arguably includes more than simply applying for an extension). It is not clear, however, that this requires the Government to accept having to serve as a puppet for the policy of others for which it cannot take electoral responsibility.

## Conclusion

The House of Commons cannot legitimately take over the government of the country, in breach of its own conventions and rules and of the logic of the constitution, while refusing to bring about an election that would put the central question to the UK electorate and might return a government that enjoyed the support of a parliamentary majority. The status quo is intolerable. It is still possible, however, to put this right – to secure electoral accountability – without risking the UK leaving the EU with no deal by default, so long as the EU is willing to grant an extension.

The Government must comply with any Act of Parliament, even one procured in gross breach of constitutional practice and principle. The Benn Act, as it stands, would require the Government to act inconsistently with its central policy and it is right that this policy should be put to an election before the Act bites. MPs should agree to make possible an early election to settle whether (and by whom) an application should be made for an Article 50 extension. Legislation for an early election, amending the Benn Act in part, could and should ensure that the UK's policy on whether there is such an extension, its length and its terms, will all ultimately be settled by a government that enjoys popular support and the confidence of the House of Commons.









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