The Fixed-term Parliaments Act and the Next Election

Sir Stephen Laws

Foreword by Lord Strathclyde CH

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Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-910812-97-6

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Lord Strathclyde CH
Leader of the House of Lords 2010-2013

Constitutional government relies on a series of shared understandings, on those with differing political objectives being willing to act in accordance with agreed practice. The high tempers of the Brexit process have put much pressure on these understandings and on that willingness. From the Cooper-Letwin episode to the Benn Act, too many parliamentarians have, alas, proved themselves willing to override constitutional norms – with help from the Speaker. We thus find ourselves in an extraordinary state of affairs in which the House of Commons does not in substance have confidence in Her Majesty's Government and yet is unwilling formally to withdraw confidence or otherwise to bring about the early election that is required.

The Government's dependence on the confidence of the House of Commons is fundamental to our parliamentary democracy and tradition. In times gone by, when confidence was withdrawn, a dissolution would follow, which would return a new House of Commons, which might either support the existing government or some alternative ministry. The Fixed-term Parliaments Act 2011 complicates matters. But how exactly? Specifically, if or when the Government loses a vote of no confidence, is the Prime Minister obliged (constitutionally or legally) to resign and to make way for an alternative government to take office, or may he remain in office during the 14-day statutory period after the vote and thereby trigger an early election?

This is a question of utmost constitutional and political importance. It is answered authoritatively in this new paper for Policy Exchange, written by Sir Stephen Laws, a former First Parliamentary Counsel, responsible in his time for the management of government business in both Houses of Parliament and for constitutional advice to the centre of Government. I was fortunate enough to be able to draw on his immense experience and expertise in my review of secondary legislation and the primacy of the House of Commons in 2015. There is no better person to address the legal meaning of the Fixed-term Parliaments Act or to think through its wider implications.

Sir Stephen's paper is a magisterial study of the Fixed-term Parliaments Act, which makes clear that Parliament in 2011 made a deliberate choice not to legislate about what should happen during the 14-day period

after the Government loses a vote of no-confidence. That was certainly my understanding of the Bill when it was moved through the House of Lords, an understanding very widely shared. While the legal effect of the Act is clear and limited, Sir Stephen argues powerfully that the political and constitutional questions to which it gives rise are open-ended and contested and that all of us should be sceptical about assertions to the contrary.

The significance of Sir Stephen's analysis is that it is a mistake, or a self-serving political move, to insist now that the Prime Minister has always been constitutionally – let alone legally – obliged to resign if such a vote is lost or that he must resign in order to allow the formation of an alternative government. Quite what should happen when a vote of no confidence is lost is a matter of political controversy, informed by analogy to established constitutional principles and practice, in which a government that loses the confidence of the Commons may have recourse to an election.

It is open to the Prime Minister to argue that in present political circumstances, in which there is no prospect of a government enduring for the full five-year parliamentary term, he should stay in post after a vote of no confidence. An early election is inevitable, even if its exact timing is uncertain, and the Prime Minister might refuse to resign during the 14 days after a vote of no confidence in order to secure a dissolution. The merits of this course of action would be for the electorate to judge in the forthcoming election.

The last three years suggest that many parliamentarians, and other participants in public life, are willing to invite the courts to intervene into political controversies in their favour. Some have already been discussing further political litigation in the event that the Government were to lose a vote of no confidence. Sir Stephen makes an utterly convincing case that it would be illegitimate for the courts to attempt to enforce their perception of ideal constitutional practice in the aftermath of a vote of no confidence, ordering the Prime Minister to resign or attempting to quash a dissolution. Not only would such intervention be likely to intensify the UK's political crisis, by preventing the election that is clearly necessary, it would also run counter to the intentions of Parliament in enacting the Fixed-term Parliaments Act in 2011. It should not be contemplated by any responsible parliamentarian or friend of our constitution.

Perhaps even more worrying than recourse to the courts, attempts are clearly afoot to put pressure on Her Majesty to force Her to intervene to dismiss the Prime Minister. Sir Stephen rightly decries these attempts. I entirely agree with him. As his powerful paper makes clear, it is the responsibility of politicians to avoid implicating the Sovereign in political controversy: the proposals that have been floated to force Her hand flout this fundamental limitation.

The political crisis in which the UK finds itself has been worsened by the abuse of constitutional practice, very often by those proclaiming themselves the constitution's true defenders.

The next episode may be an attempt to weaponise the Fixed-term

Parliaments Act, giving the Act a legal meaning it cannot bear and asserting implications for constitutional practice that are at best contestable and at worst pernicious. This constitutional sophistry needs to be confronted. Policy Exchange and Sir Stephen have done us a great service in publishing this compelling analysis, which I commend to you.

Executive Summary

1. A vote of no-confidence in the government for the purposes of the Fixed-term Parliaments Act 2011 may well take place in the near future, although the point of the vote would probably not be to force an extension of the Art 50 deadline. The vote would be the first test in practice of the provisions of the 2011 Act. The constitutional conventions that govern the situation are therefore unclear.
2. Under the 2011 Act a vote of no-confidence would not trigger an election if, within 14 days after the day on which it takes place, the House of Commons passes a vote of confidence in "Her Majesty's Government". That is a reference to the government in office when the vote is passed; and that could be either the incumbent government or a new one appointed by the Queen during the 14 days. For a new government to be approved in such a vote the previous government would have to have surrendered office.
3. The question has arisen in what circumstances (if any) the PM would, constitutionally have to give up office to allow that to happen.
4. The 2011 Act did not say anything about this and deliberately so. It was the intention of Parliament, when passing that Act that neither the operation of the Act in practice nor various matters omit-ted from it should become matters for the courts. The point of omitting these matters was in part precisely to avoid litigation.
5. The broad purpose of the 2011 Act was to secure, so far as practicable, that elections happened only at regular 5-year intervals.
6. Before the 2011 Act, a PM defeated on a vote of confidence was free either to ask the Queen for a dissolution of Parliament and an election or to resign and allow someone else to take over. It was assumed that a PM would always take the first option. It was also widely accepted that he should not adopt the second course unless it was clear who should next be asked to form a government. It was also accepted that the second option would be practicable only if the existing Parliament was "still vital, viable and capable of doing its job" and if an alternative government was available which could "govern for a reasonable period with a working majority" in the Commons. These are the so-called "Lascelles principles".
7. 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 open to a PM defeated on a vote of no-confidence to argue that he may use the available mechanisms

of the constitution to secure a dissolution and an election. What 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 what happened during the 14 days 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 to discourage.

8. In the current situation the PM would have a good argument for pursuing the election option under the existing procedures, even to the extent of remaining in office to let the 14-day period run out.
9. It seems inevitable that any alternative government that was proposed would fail to satisfy the Lascelles principles. Arguably the current Parliament has already proved itself not to be "vital, viable or capable of doing its job", and it seems to be accepted that neither a government formed by the Leader of the Opposition 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.
10. Under these circumstances, an alternative "government" would probably be offering no more than a short delay before an election that would happen anyway. An offer to hold a second referendum rather than an election would not compensate for the absence of a workable and effective programme for governing the country in the many months that a referendum would take to arrange.
11. The Prime Minister would clearly have a good argument for not resigning. It was never thought in the past that a Prime Minister 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 should be thought to have changed for the case where, one way or another, an election is going to happen anyway.
12. There would be other arguments available to support a PM who chose to remain office after a vote of no-confidence so as potentially to trigger an election. There is nothing in the 2011 Act that suggests that some or all of the 14 day period cannot be used by the Government in an attempt to restore its majority. Indeed, the context of the Act suggests that was a scenario that must have been contemplated.
13. 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 which the opposition do not want.
14. The intention of the 2011 Act was to avoid the possibility of

litigation about what happens after a vote of no-confidence. The legislation was specifically amended in the House of Lords to secure that objective.

15. The prorogation litigation has suggested that the Courts might be more willing to intervene in the process than might previously have been thought. However, that would be in defiance of the express intentions of the legislators. The courts should not involve themselves in the political question of when the Prime Minister should or should not resign or any related "purdah question". A decision that he should resign could only be seen as a criticism of the failure of the Sovereign to exercise Her personal prerogative to dismiss him. It would be folly for the courts 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 to determine the outcome of an imminent general election.
16. Those who are seeking to thrust a role on the courts or indeed on the Crown or seek to assert that what the courts or the Crown should do is obvious and clear are wrong and behaving irresponsibly. They cannot escape responsibility for drawing the courts and the Crown into political controversy by claiming that doing so would all be the fault of those who would – with justification – dispute whether matters are really as clear as they say.
17. Ultimately all these questions are intensely political questions that only the electorate can make a judgement on.
18. Where an election is triggered by a no confidence crisis the incumbent government is entitled to think it is entitled to retain office until the election result is known. That gives the electorate a chance to make the judgement at the earliest opportunity.

Introduction

1. In the continuing Parliamentary battles over Brexit, the remaining possible scenarios include some in which a motion for the purposes of section 2 of the Fixed-term Parliaments Act 2011 is put down in the House of Commons at some stage (either before or after 11 pm on 31 October 2019), "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 ("the confidence principle"), once a vote of no-confidence under the 2011 Act has indicated that the incumbent Government has lost the confidence of the House.
4. A very lively debate has taken place in the press and amongst academic commentators about what the constitutional position is, or should be, in those circumstances. The debate has also raised questions about the constitutional position if the House of Commons sought to indicate its loss of confidence in some other way than under the 2011 Act.
5. This paper is a restatement and revision of an earlier paper published in early September at a time when the moving of a 2011 Act no-confidence motion was contemplated principally as a way to force an extension of the Article 50 deadline - and so the postponement of the UK's withdrawal from the EU - in the face of the Government's unwillingness to bring that about itself. That option of using a 2011 Act motion for that purpose is now unlikely, because reliance is being placed, instead, on the European Union (Withdrawal) (No. 2) Act 2019 ("the Benn Act").
6. In the light of that, although many of the questions discussed in the earlier paper remain relevant to situations that might still arise, the discussion of them needs to be set in the updated context.
7. Those questions are about whether the confidence principle requires the incumbent Prime Minister to resign immediately upon the loss of a 2011 Act no-confidence 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 established constitutional practice nor the law 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 confidence principle and the Supreme Court's prorogation decision

8. Before proceeding to that discussion, however, it is necessary to mention one other matter that has intervened since the earlier version of this paper. The Supreme Court's decision in *Cherry/Miller* (No 2) [2019] UKSC 41 ("the prorogation case") purports to affirm the confidence principle in paragraph 55—

> "The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts."

9. Nevertheless, the practical effect of the Supreme Court's decision went a considerable way towards actually undermining the fundamental principle it purported to affirm. The Supreme Court adopted a novel understanding of the concept of Parliamentary Sovereignty, which was different from the more orthodox view taken by the Divisional Court, and extended it to include the capacity of Parliament to legislate as and when it felt the need. The prorogation of Parliament was found to be unlawful at least partly because it would have frustrated, without reasonable justification, "the ability of Parliament to carry out its constitutional functions as a legislature".
10. In reaching this conclusion the Court disregarded the usual and very long-standing practical constraint on Parliament's capacity to legislate, namely, its inability to legislate except in collaboration with the executive, and usually only on the initiative of the executive. It is obvious that a capacity to legislate subject to that constraint could not be frustrated by a decision of the executive as to when Parliament should sit.
11. By ignoring the relevance of this usual constraint, the Court associated itself with the questionable procedural changes allowed by the Speaker to Commons procedure. Those have dangerously undermined the confidence principle by making it unnecessary for the House of Commons to withdraw its confidence from a Government with whose principal policies it disagrees. They

have made it possible, in order to delay or avoid accountability to the electorate at an election, to keep the Government in place as a powerless puppet and issue it with legislative directions. The Court showed a regrettable disregard for the systems effect of their decision and were, in my view, quite wrong effectively to endorse a revolution in the normal conventions that many Parliamentarians attribute to a less than impartial discharge of his role by the Speaker.

12. Nevertheless, the following discussion will proceed on the assumption, that the confidence principle as it was understood before being potentially weakened by the Supreme Court decision remains the fundamental principle of the UK constitution.

The legal and timing requirements relating to 2011 Act no-confidence votes

13. The basic 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.
14. The express provisions of the Act, in setting out the basic legal position following a no-confidence defeat, say no more than 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.
15. If an election is triggered, the date of the election is then chosen by the Prime Minister[1] and the date of the dissolution of Parliament is fixed by law by reference to that date. The earliest election date that can be chosen is the 27th working day after the end of the 14-day period. The law requires there to be a period of 25 working days (so not counting Saturdays or Sundays, or bank holidays) beginning with the dissolution of Parliament and ending with the day before election day[2]. There has to be at least one day (but it need not be a working day) between the last day of the 14-day period and the first of the 25 working days for the issue of the

1. Section 2(7) of the 2011 Act.
2. Section 3(1) of the 201 Act, as amended by the Electoral Registration and Administration Act 2013.

Royal Proclamation fixing election day.

16. Parliament ceases to exist with its dissolution on the first of the 25 working days and is unable to make substantive decisions while dissolved, or until the new Parliament has met again after the election been opened with a Queen's Speech. Parliament is almost invariably prorogued before being dissolved, mainly to provide a closing ceremony for the Parliament being dissolved Parliament, but also to facilitate campaigning as soon as the business that it has been agreed to complete before the election is done.
17. The date for the first meeting of the new Parliament (for swearing in members and electing a Speaker) and a later date for the State opening are fixed before the election under the Royal Prerogative on the recommendation of the Government. Parliament cannot be recalled during a dissolution. Once an election has been triggered, it would be usual, but not essential, for a 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.
18. There is, in theory, no limit on the delay that a Prime Minister might choose to allow before an election when recommending a date for it under the 2011 Act; but it is 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.[3]
19. It also needs to be remembered that an election does not necessarily produce a government able to govern immediately and that a new Parliament takes time to get up and running.
20. 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 be opened with a Queen's Speech, or for confidence in any new government or in a continuing one to be capable of being tested, until at least the week beginning with the second Monday after a Thursday election.

Inherent uncertainties about the principles

21. Some of the debate about the appropriate response from the Prime Minister and Government to a no-confidence vote has been intemperate and extravagantly hyperbolic, to the extent even of

3. These factors mean that the argument that was used to reject the Prime Minister's offer of a pre-31 October election (viz. that having promised an earlier date he might fix a later date) was, at the very least highly implausible. It would also have been possible, if there had been agreement on all sides and a real willingness to have an election, to pass a short Bill fixing the date and removing the possibility of any unwarranted delay.

invoking 17th century Civil War analogies. There is no shortage of extremism in the constitutional debates around Brexit, with one academic commentator even advancing an argument for the imposition of criminal sanctions of up to life imprisonment on public officials advising on means to implement government policy when it is inconsistent with the inferred purposes of legislation passed by a Sovereign Parliament.[4]

22. The fact is that anyone asserting that there is only one clear-cut answer to any of the various incidental constitutional questions that are not the subject of express provision in the 2011 Act, either badly misunderstands the UK constitution or, more likely, is making a political case in favour of their own particular political point of view about the most desirable outcome. Their assertions need to be treated sceptically.
23. There are some who want to extrapolate the provisions of the 2011 Act and construe them as providing legal answers to questions with which they do not expressly deal but which have always previously been regarded as answerable only in accordance with flexible convention (see, for example, the commentator mentioned above[5]). Those advocating this approach need to show that there is a legitimate justification for substituting the hard-edged rigidity of law for the flexibility of norms previously assumed to apply as matters of convention. They also need to explain why it is appropriate to make new legal rules in the midst of a highly controversial dispute, the outcome of which might be affected by the change, and to do so without any Parliamentary authority.
24. This point applies with even more force where there is room for very considerable doubt as to what (if anything) the conventions themselves would have required, and when, as set out below, the argument for the supposed legal rules in a particular case are to be built on the provisions of a statute, like the 2011 Act, the unequivocal intention of which was to avoid legislating for that case.
25. Hitherto the principles of constitutional propriety and legitimacy in the UK constitution and in relation to government formation and resignation have depended 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.
26. There is no established and accepted practice for the situation where a government is defeated on a 2011 Act no-confidence vote. It is a situation that would arise entirely out of the effect of the 2011 Act, and in the new context that is 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

4. J. King, 'The Prime Minister's Constitutional Options after the Benn Act: Part I', U.K. Const. L. Blog (9th Oct. 2019) (available at: https://ukconstitutionallaw.org/blog/)
5. J. King, 'The Prime Minister's Constitutional Options after the Benn Act: Part II' U.K. Const. L. Blog (10th Oct. 2019) (available at: https://ukconstitutionallaw.org/blog/)

should happen after a vote of no-confidence for the purposes of that Act to become generally accepted.

27. 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 gave rise to issues involving considerable uncertainty, as well as significant ambiguities.[6] 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.
28. Furthermore, the relevance of the 2011 Act turns in this context on the Act's broad purposes. As the discussion ought to be about the relevance of those broad purposes to constitutional principles and practice (rather than for establishing legal rules), identifying those purposes is not confined to what would be taken into account by lawyers determining an Act's legislative purposes for use in statutory construction.

The pre-2011 Act position

29. The accepted constitutional position before the 2011 Act was that a Prime Minister who had lost the confidence of the House of Commons, or indeed at any other time, 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 where the government was unable to command the confidence of the House of Commons 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.
30. The conditions required to be satisfied before the Sovereign might refuse a dissolution had been 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.
31. 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—
    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

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

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.

32. 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 even try 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 about 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.
33. 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.
34. 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 of the next largest party. More importantly, it was also assumed that any Prime Minister would always prefer the dissolution option.
35. 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.
36. It is important to emphasise that, both under the pre-2011 Act practice and under the 2011 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

37. It is well known that there were two principal political purposes of the 2011 Act.
38. 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.
39. 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 reassurance that it could not have an election sprung on it without such a rupture.
40. 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.
41. Section 1 of the 2011 Act set out the main provision of the Act requiring general elections at fixed five-year intervals.
42. Section 2 set out the exceptional cases where an election was still to be possible between those dates.
43. 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 proved to be no obstacle to the holding of the 2017 election.
44. 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, without leading inevitably to an election, would allow one to happen if it was needed. That mechanism is the one described in paragraphs 13 to 15 above.

45. 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 with other parties - or perhaps a "confidence and supply" agreement. 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*". [7]
46. 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.
47. The important thing about the two main political 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

48. 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(3) of the 2011 Act.
49. Clause 2 of the Bill for the 2011 Act, as originally presented to

7. See also paragraph 2.19 of the Cabinet Manual 2011: "Under the Fixed-term Parliaments Act 2011, if a government is defeated on a motion that 'this House has no confidence in Her Majesty's Government', there is then a 14-day period during which an alternative government can be formed from the House of Commons as presently constituted, or the incumbent government can seek to regain the confidence of the House. "

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.

50. 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.
51. 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, and some had advocated in the course of the Bill's passage; but it is clear that, in the event, the investiture vote mechanism was rejected as the appropriate precedent, perhaps, amongst other reasons, because of the hiatus it would have allowed in the tenure of the office of Prime Minister[8].
52. The amendment made in the House of Lords had three main objectives[9].
53. 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 take place.
54. 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.[10]
55. Indeed, the Bill is perhaps a paradigm for the chilling effect of judicial activism on policy formulation and legislation. Even though it was thought 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 Bill's provisions to take a form that might otherwise have been more appropriate, or covered more ground.[11]
56. In that way, it is clear that Parliament specifically decided that the

8. 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.
9. See the debates at Report Stage in the House of Lords on 16 May 2011
10. 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.
11. It is this context that makes the argument for using the Act as the basis for the legal regulation of government formation, the timing of a dissolution and of the duty of the Prime Minister to resign and of the sovereign to dismiss him not only absurd, but utterly disreputable.

price of avoiding any intervention by the courts in its proceedings, in the process of government formation or in the operation of the confidence principle 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. Subtleties and discretions were specifically avoided to reduce the risk of involving the courts in politics.

57. 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. The intention was thus to preserve the personal prerogative of the Crown in choosing Her Prime Minister.[12]
58. 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, either 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.
59. 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 party that had previously been the junior coalition partner in the Government were in fact 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.
60. 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 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 the operation of those considerations to produce better processes.

12. It is worth noting that this clarification did not – as perhaps it should – result in any further clarification of the Bill's explanatory notes, which continued to refer to "a government", as pointed out by Philippe Lagassé in paragraph 1.6 of his evidence to the House of Lords Constitution Committee.

61. 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, though, to provide a remedy for the mischief at which the Act was aimed to create a perception that that shift had occurred.
62. 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 is 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.
63. 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.
64. Furthermore, in 2011, another assumption, now found in paragraph 2.10 of the Cabinet Manual, was also already current, following the events around the formation of the government in 2010. That assumption now 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".
65. It is the constitutional 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

66. 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 for the purposes of the 2011 Act?
67. Essentially, they relate to the question of at what stage following the defeat (if at all) there is a constitutional 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.
68. His constitutional responsibility to his Sovereign means that he should not resign before he can do that. It is not that She needs his advice to appoint a successor, or that She has to comply with any recommendation he makes. 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 and when that would be possible.
69. The important political context for this controversy at the time of the earlier version of this paper was that the Government's defeat on a 2011 Act no-confidence motion would have been, for all practical political purposes, too late to trigger an election for a date before the time fixed for the UK's Withdrawal from the EU in accordance with both international and domestic law. The question therefore arose whether there should be an extension of the Art 50 deadline if the Government was defeated on a no-confidence vote.
70. The defeat would have triggered the purdah convention limiting government activity in the run up to an election[13]. Did that require the Government to apply for an extension? If it was unwilling to do so, did convention require the Government to resign to make way for a government which would apply for an extension before itself triggering an election?
71. The conclusion I reached in the earlier paper for that scenario was that the question whether the interaction of the timing of the election and the timing of the expiry of the Article 50 period created an obligation on the Prime Minister and Government to resign in favour of a government that would apply for an extension was indistinguishable from the question whether the purdah convention itself required an application by the incumbent Government. As there were two perfectly legitimate views of what the purdah convention would require, the Prime Minister was entitled constitutionally to make a decision between them and then to seek to justify his choice to the electorate in the ensuing election, and he was under no obligation to deprive himself of that choice by resigning if he was not otherwise required to resign.

13. See para 2.31 of the Cabinet Manual.

72. The Benn Act, and the passage of time, has made this a largely hypothetical issue, at least for the time being. However, the question whether a Prime Minister and Government defeated on a 2011 Act no-confidence vote are otherwise required to resign (either immediately or before the end of the 14-day period for which the Act provides) remains highly relevant.
73. In current circumstances, what this question seems most certainly **not** to involve is how best to fulfil the broad purposes of the 2011 Act, as explained above, or even as more narrowly analysed for the purposes of statutory interpretation (if that were relevant). There is no serious or realistic suggestion that anything that is done following a vote of no-confidence in the current Parliament could lead anywhere other than to an early election. The unequivocal and 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.
74. 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 coalition for so-called "national unity") which would itself need to trigger an early election (viz. one before 5 May 2022).
75. 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 an approach to the next steps in the Brexit process. It follows that only a short delay before an inevitable election is practicable. A delay of several months for a second referendum has been discussed but would require either an agreed programme for government or a decision to put all other issues of national governance on hold until after the referendum. The first is clearly unachievable. The second is a situation no responsible politician could possibly want to create, even if it were possible.
76. 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 in all foreseeable circumstance following a defeat for the current government on a 2011-Act no-confidence is different because of this fundamental distinction: that a general election would be

bound to happen anyway and sooner, rather than later.

77. Moreover, those[14] 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.
78. It is not enough to say that Parliament having provided for a 14-day period following a no-confidence vote must have intended to require it to be used for a particular purpose and then to suggest that the Act somehow identifies that purpose. There is no textual evidence for that in the Act itself, and there is a considerable amount of legislative history to suggest that no such requirement was intended. At best the Act can be seen as having provided a cooling-off period in which a political solution to the confidence crisis might have the opportunity to emerge. Any suggestion that it was the intention of the legislators to prescribe what that solution should be involves more imagination than traditional methods of statutory interpretation would allow.
79. Clearly as a former Parliamentary Counsel, I am extremely unsympathetic to any version of statutory interpretation that seeks to attribute intentions to an Act of Parliament that manifestly and flatly contradict the actual intentions of the legislators. My lack of sympathy is not only because the adoption of such a version of interpretation would imply that I had wasted my professional life trying to articulate the true intentions of the democratically elected politicians who instructed me. It is mainly because it would involve a thoroughly illegitimate arrogation of legislative power to those whose oath requires them to do right "after the laws and usages of the realm" one of which is to respect the will of Parliament. On the other hand, I do not, like Professor King, think that any public official who disagrees with me about the true purpose of an Act of Parliament and advises the Government or, presumably, the monarch accordingly ought to be prosecutable for misfeasance in public office and liable to criminal penalties of up to life imprisonment.

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

80. 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

14. Prof Mark Elliott in his blog "Public Law for Everyone" 8 August 2019, points out (citing a Tweet) that Tom Hickman of UCL had suggested this. Perhaps he was the first. Lord Sumption suggested it in evidence to the Public Administration and Constitutional Affairs Select Committee on 8 October Q 54. Professor Jeff King suggested it in a blog on the website of the UK Constitutional Law Association.

before the end of the 14 days for which the Act provides.

81. 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 quite unsustainable. The 2011 Act did not remove the option for a dissolution from the equation, it merely changed the means of exercising it.
82. 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.[15]
83. In addition, if a Prime Minister does pursue the dissolution option, 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 "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.
84. The same argument, that a Prime Minister can still pursue the dissolution option, 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. It seems that something that has to be considered. 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.
85. The argument that any sort of no-confidence vote other than one under the 2011 Act can create a constitutional duty for the Prime Minister and the Government to resign, still less a legal one, involves defying Parliament's clear intentions when passing the 2011 Act. It is further weakened by recent events and by the judgment of the Supreme Court in the prorogation case.
86. The passage of the Benn Act amounted to a defeat on an issue of confidence and the Government responded accordingly with a motion for an election under section 2(1) of the 2011 Act,

15. The availability of this argument is also suggested by Philippe Lagassé in his evidence to the House of Lords Constitution Committee.

which the House of Commons failed to approve. The Supreme Court invalidated the prorogation for the express purpose of ensuring that the House should be able to legislate to respond to the Government's policy on EU withdrawal, if necessary, in a way contrary to the Government's wishes. The Court not only acquiesced in the situation in which a government can remain in office after having lost a non-statutory no-confidence vote but subject to legislative directions, it actually endorsed it as involving the House's exercise of the constitutional functions that should not be frustrated by a prorogation.

87. The events leading up to the attempted prorogation in September 2019 appear to suggest, at the very least, that it is legitimate for a government that loses a non-statutory vote of no-confidence but then proposes a motion for a general election under section 2(1) of the 2011 to remain in office even if the motion fails to achieve the necessary majority.
88. This does, however, illustrate another respect in which the Supreme Court's decision in the prorogation case, and the apparent obliviousness in its reasoning to the systems effect of its conclusions, has damagingly disrupted the balance of the constitutional relationship between the House of Commons and the executive. The situation has been made even more intolerable for a government that has in practice lost the confidence of the Commons but is trapped in office by a House that is unwilling to trigger a confidence crisis and risk an election and is seeking to govern itself through legislative directions. Such a government is now in practice unable to provoke the crisis that is its only possible escape by threatening to cut off the flow of legislative directions with a prorogation. Maybe, it could resign, but only if it can do so in circumstances in which the Crown is not drawn into controversy in deciding on a successor and by allowing its opponents to avoid the risk the 2011 Act requires them to take if they want to withdraw confidence.
89. In considering the force of the argument that the Prime Minister is entitled to pursue the dissolution option after losing a statutory no-confidence vote, 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.
90. It is clear, from considering the position of a non-statutory no-confidence vote, that it must be possible for the Prime Minister who loses a statutory one 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. Depending on the circumstances, he might be able to persuade a sufficient majority in the House to agree that there is a

case for accelerating the election by removing the need to wait out the 14 days. Or he might even, alternatively, bring forward and expedite legislation to have an election at an even earlier date after an abbreviated campaign. A short fast-track Bill to disapply the 2011 Act provisions is always an available option. It would have to pass both Houses, but only with simple majorities.

91. 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 constitutional response for a Prime Minister and Government. A section 2(1) motion for a dissolution could be moved as mentioned above, 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 can reasonably be argued that it was the intention of the 2011 Act (and, specifically, the Lords amendments incorporated in section 2) to confine the confidence issue to motions in express terms, and that it is essential to clarify the effect of any non-statutory motion by testing it with a statutory one.
92. Furthermore, there would still be a case, in the light of what it can be inferred was envisaged in 2011 and from the wording of the Cabinet manual, for the Prime Minister to justify using time during the 14 days on 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. That possibility is not necessarily displaced by an opening bid in the form of an attempted investiture vote - assuming such a blatant challenge to the Crown's prerogatives as to the appointment of the Prime Minister were made possible.
93. 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 at least a plausible argument that the effect of the 2011 Act was to extend the "period of grace" from one to 14 days.
94. If it is accepted as reasonable that at least some of the 14 days could be used by the incumbent to try 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.
95. Voting confidence in the incumbent government at that stage would be the only way of avoiding consequences that might be unattractive to those who successfully moved for the first no-

confidence vote: e.g. a general election in which some or all of them might expect to do badly.

96. This approach might carry some political risks, but a Prime Minister might also think that he would be able to justify them to public opinion as a legitimate response to his opponents in a game in which they themselves have been treating the rules as no more than tools to be manipulated - and maybe with the help of the Speaker disregarded - to get their own way after the opportunities and 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.
97. The confidence principle is an effective way of producing stable government. It is the nuclear option that facilitates minority government when that is what an election necessitates. The House of Commons is given a harsh choice: it either allows the appointed government to govern, enjoying the privileges that government brings with it (including usually practical control over the initiation of legislation and the time spent on it in the Commons) or it withdraws its confidence and triggers a situation that must always carry the risk of an election. In that way national governance remains coherent until confidence is withdrawn and there is an incentive to keep it in place until the matter can be resolved with the triggering of a confidence crisis. The situation that has now been developed and allows the Commons to withdraw the privileges of government without withdrawing confidence is utterly corrosive of any sensible form of coherent national governance. It will make minority government for all practical purposes impossible in future.
98. These, however, are arguments that are perhaps only 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 – the one that would prevent 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?
99. 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.

100. 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.
101. 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.
102. These suggestions seem 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.
103. 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 runs up against the consensus in 2011 against a formal "investiture vote", as well as the fact that the Sovereign has a personal responsibility undefined by law, but regulated by convention, to choose Her first minister.
104. On the other hand, irrespective of 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.
105. 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. There cannot be a clearer example of inappropriately drawing the Sovereign into politics than votes on political directions to Her to exercise Her choice of Prime Minister in a way She might think inappropriate in the circumstances.
106. 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.

107. As many commentators have pointed out, it is quite difficult to see how, in the current Parliament, 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. There has been much speculation about this, and different names are regularly put forward. By convention the leader of the opposition would have first claim, but it seems clear at the moment that a government led by Mr Corbyn, if he were appointed, would be unable to win a vote of confidence under section 2(5) of the 2011 Act. Other candidates would only stand a chance if Mr Corbyn stood aside; and his willingness to do that, if it became a serious possibility, might depend on how long the alternative would expect to continue in office and the programme for government the new government would propose to adopt.

108. Moreover, there is a much more important question, namely, whether Mr Corbyn or any other claimant would really be intending to form "a government". As things stand, it seems that every alternative to the present Prime Minister would be proposing to be no more than a "caretaker Prime Minister" through an inevitably imminent election campaign. In the case of the leader of a proposed government of so-called "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.

109. In those circumstances, there would be a very strong case for a Prime Minister to argue for the continuing relevance of the Lascelles principles (see paragraph 31 above). 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 very difficult to see how, following a 2011 Act no-confidence vote in the present Parliament it is going to be possible for anyone reasonably to conclude that the existing Parliament is still "vital, viable, and capable of doing its job" or that the Sovereign can "rely on finding another prime minister who could govern for a reasonable period with a working majority in the House of Commons". As mentioned above these are simple "common sense" tests for deciding whether it is appropriate to resolve a confidence crisis with a change of government, rather than a general election.

110. In those circumstances the Prime Minister could very plausibly argue that it was his constitutional duty, in the national interest, to ensure that the election is held at the earliest possible opportunity.

111. 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.

112. 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 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.
113. However, as I suggested above, even in that situation 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 early 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?
114. Any proposal for a caretaker government to be formed to do something specific in relation to UK withdrawal from the EU 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.
115. 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?

116. 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 current Parliament 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.
117. In those circumstances, if the answers are not clear-cut, who decides what is right?
118. 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.
119. 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 matters are still unresolved the election may help to resolve what happens next, or it may not, but the election becomes a re-run of the referendum question.
120. 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 to 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.
121. Nevertheless, the decision of the Supreme Court in the prorogation case does suggest that it might be more likely than anyone would previously have thought possible or sensible that the Court might be willing to take the further step of treating as both justiciable and reviewable the personal prerogative of the Sovereign on Her choice of Prime Minister, a prerogative on which She is not required to act on ministerial advice. I think that would be wrong; and, to be clear, it would also be a disreputable form of sophistry to seek to argue that the courts would only be asked to review a decision of

the Prime Minister not to resign. Such a review would inevitably amount to a challenge to the Sovereign's failure to dismiss him and could not be seen otherwise.

122. If the Supreme Court did take that step, it would be in direct contradiction to 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. That assumption was based on sound constitutional principles and precedents.

123. The *Miller (No. 1)* 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, backed up by the assumption mentioned in the previous paragraph, was unequivocally the intention of Parliament when it passed that Act. It is absurd to suggest that the Act had 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.

124. It is also worth pointing out that the responsibility to keep the Sovereign out of politics is a responsibility that falls on politicians, not on the courts. In the prorogation case, the Supreme Court arrogated to itself a role that had previously been thought to fall on the Sovereign in relation to the exercise of a "constitutional prerogative". It may have thought it was protecting the Crown from controversy. That is not its role; and its attempt to do so was constitutionally very damaging and would be more damaging still if extended. The responsibility of politicians to keep the Crown out of politics is a powerful incentive to politicians to find political solutions to political problems. That is an important factor in the way the UK constitution has always operated and should continue to operate. There is no similar responsibility on politicians to keep the courts out of politics, as has been made abundantly clear over the past three years. Indeed, the willingness of the courts to become involved has proved a disincentive to the finding of political solutions to political problems. Why seek compromise and consensus if you think you have a good chance of persuading a court to crush your opponents utterly? Legal involvement in high politics is not only bad for the courts, it polarises opinion and makes national reconciliation less likely.

125. Clearly, the Sovereign is going to have a role in any confidence crisis that is triggered under the 2011 Act, and so She should. I want to say, though, 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.

126. I will reiterate, 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 and on what basis the next general election is fought. 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.

127. 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, or asserting that the law dictates what She should do. This is particularly true when the views take a form which (whether deliberately or carelessly) allows the inference to be drawn that it is those advancing them who will be stirring up the controversy should the Sovereign or the Prime Minister choose to disagree. These efforts to use excessive and unjustifiable confidence to ensure that any resulting blame for a controversy is laid at the Prime Minister's door are transparent and indefensible. As this paper argues, none of the issues on which views of this sort have been expressed have clear-cut answers and confident assertions that they do are inappropriate.

128. 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. And such an election is made all the more urgent by the situation in which the Commons is seeking to govern through a captive government by legislative direction.

129. Because the earlier version of this paper allowed for a view of the purdah convention that might have precipitated a no-deal exit before an election, I took some paragraphs to explain my views on the current political situation and why I thought that was a justifiable outcome. My argument was based on the fact that those who opposed it would only be subject to the consequences of their own failure to act earlier.

130. We do all need to be conscious of the risk of "confirmation bias" - in ourselves, as well as in others. For those purposes I reflected on the extent to which my own analysis fell into that trap. To be clear, whatever I thought in 2016, I am now amongst quite a large group of people who think that the only way to heal the divisions from which British politics and society are suffering as a result of Brexit, is for the politicians who promised to respect the referendum result to find a way to do so, and as quickly as possible.
131. A detailed examination of whether UK withdrawal should or should not be allowed to happen before an election is held is no longer necessary. That matter will or will not be resolved in accordance with the Benn Act. If the issue arises again, so as to raise questions about the purdah convention or about whether the Prime Minister and Government should resign after a no confidence vote in favour of Government willing to apply for a further extension, I would return to the arguments in the earlier version of this paper.
132. Any issue now likely to arise about whether and (if so, when) the Prime Minister should resign after a defeat for the government on a 2011 Act no-confidence motion is confined, in practice, to a question about when and on what ground a relatively imminent general election should be fought. It would be total folly for the courts to think that is a question that they should resolve. The 2011 Act has nothing to say about that, once it is accepted that an early general election (viz. one before 5 May 2022) cannot be avoided. Politicians and the courts should keep the Sovereign out of it, but that does not mean that the courts should take over Her role.
133. There may be circumstances in which the right and honourable thing for a Prime Minister to do following a 2011 Act no-confidence defeat is to resign to allow someone else to take over the government, and so avoid an early election; but there is plenty of room for different views about what those circumstances are. Factors such as the ability of Parliament to continue to do its job if there were a change of Government and the capacity of the new government to govern for a reasonable period with a working majority must be relevant. A mere form of words that the House of Commons would confer confidence on someone else cannot be enough to require them to be appointed to form a Government.
134. It is difficult because of the novelty of the situation to find any convention that clearly identifies the circumstances in which resignation is the only or right option. In the end, the incumbent Prime Minister will have to make a judgement on the basis of whatever seems to him most easily justifiable in political terms, in all the circumstances that exist at the time. No doubt he will get wise advice from his Sovereign but that will be private and should not be justiciable either directly or indirectly, nor should it be the subject of political debate.
135. The traditional and unchallengeable convention of the UK

constitution is that when a confidence crisis triggers an election it is the incumbent government that retains office until the outcome of the election is known. The Prime Minster and everyone else should accept that what he decides to do in response to any no-confidence vote will be judged by the electorate in the election that it is clear is now necessary before the situation in Parliament can be resolved.

Appendix

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

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 Majesty's Government (as then constituted), and
(b) 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)

£10.00
ISBN: 978-1-910812-97-6
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