

Is it too late to stop a no deal Brexit?

It has been suggested Boris Johnson could bypass Parliament's opposition to a no deal Brexit by timing a general election so Parliament was not sitting over the 31 October deadline. **David Howarth** explains what procedures could be used to avoid this, if politicians are determined to stop no deal.



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According to the *Sunday Telegraph* of 2 August, the Prime Minister's special adviser Dominic Cummings has declared that '[MPs are too late to prevent a no-deal Brexit](#)'. This is because even if the House of Commons passes a vote of no confidence in Boris Johnson's government in early September, 'we'll call an election for after the 31st [October – the current exit day in both EU and UK law] and leave anyway'. Is this correct? The answer is, technically, 'no', although whether MPs have the political will to take the necessary steps to stop it is a different question.

The *Sunday Telegraph's* argument depends on the terms of the Fixed-term Parliaments Act 2011, which removes the Prime Minister's power to call an early general election through asking the Queen to dissolve parliament and replaces it with a power for the House of Commons itself to call for an election, either by a two-thirds majority or by a motion of no confidence in the government which is not followed within 14 days by a vote of confidence in the same or a different government.

Section 2(7) of the 2011 Act does indeed provide that 'the polling day for the election [called for by the Commons by either route] is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister'. On the face of things, the *Sunday Telegraph* is right. Any election following a vote of no confidence could be scheduled for after the UK's current exit date and so could not prevent a no deal Brexit.

But the *Sunday Telegraph* is missing four vital points. First, the Prime Minister who decides the date might not be Boris Johnson. Secondly, a new Prime Minister might win a no confidence vote thus averting any election. Thirdly, Parliament might pass an Act amending section 2(7). And fourthly the Prime Minister is subject to judicial review in exercising the section 2(7) power.

The first point is fundamental. The UK Prime Minister is not elected, either by the electorate or by Parliament. The Prime Minister is appointed by the Queen. The Queen by convention appoints someone believed to be able to command the confidence of the House of Commons, but that person does not need to win a vote in the Commons before being appointed and even if that person subsequently loses a vote of confidence, he or she remains Prime Minister until either resignation or dismissal. As a result, it is perfectly possible for someone other than Boris Johnson to be Prime Minister at the end of the 14 days and for that person to choose an earlier date for the election.

How might someone else be appointed Prime Minister? We can discount the standard method that the existing Prime Minister resigns and in doing so advises the Queen to appoint a specific person as successor, since the whole scenario assumes that Boris Johnson is aiming to be Prime Minister at the end of the 14 days. The situation would be that Johnson, having lost the confidence of the House, simply squats at Number 10. Can anything be done to dislodge him? The answer is technically yes. The Queen can dismiss him. Admittedly no monarch has exercised this power since 1834, and it was a bit of a disaster then, and the Queen would almost certainly not exercise it if there was any chance that an incoming Prime Minister would fail to command the confidence of the House.

Some will argue that the Queen should do nothing even if an alternative majority exists since the most democratic way out of the dilemma is to let the electorate decide the issue. But this line of argument faces two big objections. First, ruling out a new government frustrates the intention of the 2011 Act, which allows for that possibility. Secondly, the issue for the electorate to decide is above all Brexit and if Johnson intends, as we now know, to time the election so that the electorate cannot decide Brexit, the democratic argument for doing nothing falls away. Johnson, a Prime Minister lacking the confidence of the House, would have decided, not the people. The Queen might agree to do nothing if Johnson agrees to hold the election at the earliest possible date, but that would also foil the plan.

The issue therefore becomes how to give sufficient reassurance that an incoming Prime Minister would command a majority. The most straightforward way would be a resolution of the Commons recommending a specific person. Admittedly, the government normally controls the agenda of the House of Commons, and so it would be difficult to arrange for a vote, but a method, previously unrecognised, seems to exist in the shape of Standing Order 24.

Standing Order 24 allows the Speaker, on application from an MP, to insert an emergency debate into the order paper. It used to be thought that the motion for such a debate could only be a bland one that the House had 'considered' something and that a motion so 'expressed in neutral terms' could not be amended. But the new edition of [Erskine May](#), the bible of parliamentary procedure edited by the Speaker's senior advisers, reveals that the previous understanding is incorrect. The motion does not have to be in neutral form and if it is not in neutral form, it can be amended. Erskine May helpfully gives as an example of a motion not expressed in neutral terms an SO 24 motion moved by the opposition on [11 December 2018](#). It merely said, 'That this House has considered the Prime Minister's unprecedented decision not to proceed with the final two days of debate and the meaningful vote, despite the House's Order of Tuesday 4 December 2018, and her failure to allow this House to express its view on the Government's deal or her proposed negotiating objectives, without the agreement of this House.'

On the basis of the new interpretation of SO 24, it should be possible to move an emergency motion that could be amended to include a recommendation about who should become Prime Minister or to suspend the rule that grants the government control of the agenda and set aside time for such a debate and vote.

Even if the government manages to keep control of the agenda, it might still be possible for MPs to indicate that a majority exists for someone else to become Prime Minister. For example, they could sign a collective letter or, which amounts to the same thing, sign a Commons Early Day Motion (one which, contrary to its name, is not debated, but of which the supporters are recorded and counted).

As a result, the Queen might install a new Prime Minister. That Prime Minister might decide not to ask the Commons for its confidence and so allow the 2011 Act to run its course. If so, the new Prime Minister, not Johnson, would choose the date. Alternatively, the new Prime Minister could put down and win a motion of confidence, so that no election would take place. Even if the new Prime Minister lost the confidence vote, he or she would still set the date.

The third point, that Parliament could amend the 2011 Act, is another possible use of the SO 24 procedure. The Commons might seize control of the agenda to pass emergency legislation, as happened with the Letwin-Cooper Bill earlier this year. That bill could, for example, change the law to require the Prime Minister to choose the earliest possible date for a general election. It could also make a no deal exit less likely by requiring the Prime Minister to ask for an extension of exit day and to accept any extension offered by the EU27, or even require a revocation of the Article 50 notice if the EU27 refused to offer an extension.

The fourth point, litigation, is probably the weakest, since judges would be very reluctant to interfere, but, in principle, statutory powers, including s. 2(7), may only be used for a proper purpose and after considering only relevant considerations, and so a court might decide that delaying the election solely to make it politically meaningless was improper and thus illegal.

Of course, the first two methods only work if MPs can agree on a new Prime Minister. Politically that might be difficult. Jeremy Corbyn is unlikely to command wide enough support but choosing someone else – some have mentioned Hilary Benn or Yvette Cooper, but others are possible, including Ken Clarke and Caroline Lucas – requires the current party system to be dismantled. The third method, the Act of Parliament, is politically less disruptive but runs its own risks. It needs a solid majority, which might not exist for every proposition, and it requires the House of Lords to be treated with unaccustomed procedural brutality.

A no deal Brexit can still be stopped, but only at a price.

This article gives the views of the author, and not the position of Democratic Audit.

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