Why the Grieve amendment to the EU Withdrawal Bill is not unconstitutional

On Wednesday, 20 June, the House of Commons will consider again amendments to the EU Withdrawal Bill intended to give Parliament a meaningful vote on the Brexit negotiations, particularly in the case of no deal being agreed. **Ben Margulies** *considers the constitutional implications of these highly contentious proposals.*

Dominic Grieve MP. Picture: UK Parliament, via a (CC BY 3.0) licence

Brexit wears many hats. It is a campaign of popular liberation, a geopolitical calamity, a harbinger of a new order, and a finalist for portmanteau of the century. Alongside all these roles, Brexit is also a multifaceted and wickedly complex challenge to the British constitution.

Most discussion on this point relates to the precise place the Brexit referendum holds in the constitutional order. Was the vote the expression of the will of the sovereign people, or is only Parliament sovereign? Whom does the referendum bind, and to what duties? Another strand of Brexit constitutional debate revolves around a narrower issue, which is the question of the distribution of powers between Parliament and the executive. Among these questions:

- Can the executive make treaties that effectively repeal parliamentary statutes?
- Can Parliament direct the conduct of foreign policy by passing statutes?
- Can Parliament demand the right to approve or reject all international agreements, even if it has not customarily had that right before now?

Questions such as these was central to the *Miller* case in January 2017, when the United Kingdom Supreme Court ruled that Parliament would have to pass primary legislation before Britain could invoke Article 50 of the Lisbon Treaty and withdraw from the EU (because otherwise, withdrawal would repeal existing statutes, intruding on Parliament's legislative powers). They are also central to debates about the 'meaningful vote', the proposal that would require Parliament to approve any EU withdrawal agreement before the Crown could implement it, and to have some say about what happens next should it choose to reject the agreement.

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A somewhat vague form of 'meaningful vote' is already in the EU Withdrawal Bill, pursuant to an amendment by former attorney general Dominic Grieve (a Conservative). Just before the bill left the Commons at the end of last year, he won passage of an amendment that would require the withdrawal agreement to be enacted in the form of a statute before it can become binding. Grieve and his allies in the Lords are trying to refine this power further. New amendments would require the Commons to approve the withdrawal agreement, in addition to enacting a bill to pass it. Furthermore, should the talks break down, and/or Parliament fails to approve a withdrawal agreement and legislation, the amendments would allow the Commons to impose a negotiating line on the government from early 2019.

David Davis, the Brexit secretary, has rejected the Grieve amendments. He argued that Grieve's approach would be constitutionally unprecedented, and that the treaty-making power rests with the executive. Grieve agreed to withdraw part of the amendment allowing the government to impose a negotiating line, but the Lords passed a revised amendment on 18 June that allows Parliament to approve or reject the government's negotiating plan should negotiations appear to be failing early next year. Again, Conservatives – in this case, former leader Michael Howard, now in the Lords – objected to the amendment as an arrogation of power rightly belonging to the executive.

What does the UK constitution say? As always, this question is a rather knotty one, because the constitution is not codified. But I would argue that Grieve is probably more right than Davis or Howard.

The first and strongest argument in Grieve's favour is that the core of the British constitution has, at least customarily, been parliamentary sovereignty. There are no limits to the powers of the Crown-in-Parliament, and no entrenched powers in British constitutional law beyond Parliament's, and although judges have at times suggested there might be a few foundational statutes that could bind Parliament itself, relating to human rights or judicial review, the treaty-making power is not among them.

Davis is correct that the Royal Prerogative – part of what, in most countries, would be called the 'executive power' – does cover the making and unmaking of treaties. Parliament's own briefing paper on the subject acknowledges this. But the same paper emphasises that the prerogative is always inferior to statute law; it quotes A.V. Dicey's assertion that the prerogative is 'the *residue* of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown [emphasis mine].' If Parliament decides to strip the executive of its prerogative in this one negotiation, or in *every* negotiation, it may do so.

Secondly, Davis may be arguing that constitutional convention – the custom and practice of the UK constitution – makes the treaty power an executive power. That is also true, but that argument fails on two grounds. Firstly, statute supersedes convention as it does the prerogative. Secondly, conventions can be altered formally or informally by practice, without even involving statute law. It was once convention – and prerogative – that the executive could initiate military action on its own. Since the Iraq War, a convention has emerged requiring, in most cases, a resolution of the Commons. If Parliament wants to attempt to introduce a new convention, it can always do so.

Finally, Parliament's right to direct the executive logically flows from the right of the House of Commons to control the executive. This is often obscured in the British case, because in single-party majority governments, the executive can whip its majority and control the Commons. But the Commons retains the power to dismiss the executive. Even in periods of powerful, consolidated majority government, the majority parliamentary party effectively wields the dismissal power on behalf of the Commons, as we saw when Thatcher fell in 1990.

Grieve's amendment is an *unusual* exercise of the control power. Typically, if the Commons fundamentally rejected the policy of the Government, it would force its resignation by threatening or passing a vote of no confidence, as the Spanish Congress of Deputies just did. Indeed, Tom Tugendhat, the chair of the Foreign Affairs Select Committee, said voting down the Brexit agreement would compel just such a resignation. However, the ultimate logic of the relationship is this: if the executive defies the will of the Commons, it must resign or submit. Grieve's amendment poses the same question as a threat of a vote of no confidence – do what the Commons finds acceptable, or face the consequences. It would be comparable to passing a hostile amendment to the Queen's Speech: such an amendment could, like Grieve's, reverse a government policy position and create the scenario Tugendhat describes.

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The Conservative Party is not well positioned to argue for the sanctity of the constitution. David Cameron's government frequently proposed sweeping changes to the structure, operations and conventions of government with little public discussion or foresight. For example, it stripped the Crown of the prerogative of dissolving Parliament in 2011, in the Fixed-term Parliaments Act. This statute, which emerged as part of the Conservative-Liberal Democrat coalition negotiations, radically altered the way votes of no confidence work and created a wholly novel procedure for the early dissolution of Parliament.

Of course, hard-core populist Brexiters will continue condemning Grieve and any notion of parliamentary control, because populism is a doctrine of majoritarian politics and hatred of elites. Others Brexiters will oppose Grieve's work simply on pragmatic grounds, as an obstacle to Brexit. But constitutionally, the former attorney general has the right of it – chiefly, because in the UK, Parliament can't be wrong.

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About the author

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