

Origins of the Confidence Convention

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Constitutional conventions are rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised. Since they rarely are made through express agreements and most often arise out of practice, their historical origins are never clearly defined and their meanings are often imprecise. As Sir Ivor Jennings has observed, "it is never quite certain at what point practice becomes or ceases to be convention".

Perhaps the most important convention of British style parliamentary government is the vote of confidence or the principle that a government cannot continue in office without the support of the elected members of the assembly. A strict interpretation of this convention would mean that if a government is defeated, particularly on a whipped vote, it must either seek to reverse the defeat, seek a vote of confidence, resign or request a dissolution. Others would argue that the proper constitutional response depends on the type of defeat, each of which invites a different response from the Government. On votes of confidence, the Government is expected to resign or request a dissolution. On items central to government policy, it may decide either to seek an explicit vote of confidence from the House or to resign or request a dissolution. On items not central to government policy, it need neither contemplate nor seek a vote of confidence since confidence is not at stake. The Government decides into which category a defeat falls.¹

This paper proposes to analyse the concept of confidence as it was interpreted during the years 1780-84 in the British Parliament. That Parliament witnessed the unprecedented resignation of the ministry of Lord North as a result of a perceived loss of confidence of the lower House. It also witnessed the resignation of the Shelburne Ministry due to defeats in the Commons on government measures and the firing of the Fox-North Coalition for its failure to carry a government bill in the House of Lords. More importantly, the parliament provided one of the most critical debates in British constitutional history between the opposition forces of Charles James Fox, who held a majority in the Commons, and William Pitt, who suffered thirteen defeats in the Commons, over whether a government can continue in office without the support of the elected members.

North's resignation in 1782 challenged the convention that the king had absolute freedom to choose his ministers. Although

the Crown had acknowledged nearly a hundred years earlier that it had to rule with Parliament, the precise relationship between the King's advisors and the Commons was not clear. Blackstone stressed that the Houses of Parliament were not to encroach upon the royal prerogative since "if... the two Houses of Parliament, or either of them, had avowedly a right to animadvert on the sovereign... the balance of the constitution would be overturned..."² However, the realms of Parliament were to act as a check upon each other:

In the legislature, the people are a check upon the nobility and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved while the sovereign is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching and punishing the conduct, not indeed of the sovereign; which would destroy his constitutional independence; but what is more beneficial to the public, of his evil and pernicious counsellors.³

The Commons' control of ministers was therefore limited to impeaching them for crimes, a procedure they had to share with the Lords. Yet it was from this procedure that the principle of responsible government came. "From the right of condemning ministers", Professor Pares writes, "the right of designating them must, in the end, be deduced".⁴ Impeachment was obviously unsatisfactory to the Commons. Perceived errors in policy were not necessarily crimes, the final verdict on the fate of a minister was left to the Lords and the proceeding could be launched only after the damage had been done. The Commons were thus encouraged to find a more effective method of controlling the executive.

They were also encouraged by three other factors. By the 1780s, the cabinet had become more clearly defined as a body which was collectively responsible for the policies of the Crown and was standing united in the Commons. The first example of a collective resignation of a ministry had taken place in 1746. In 1770 Lord North insisted that the Lord Chancellor be dismissed for voting with the opposition on an important government measure. Since the ministers responsible for policy could not be identified, the Commons were in a position to demand that they be accountable to them.

Secondly, the Crown had surrendered its private sources of revenue and was more dependent than ever on Parliament for its

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supplies. On assuming the throne in 1760, George III had exchanged the Crown's hereditary income for a permanent civil list which he found was increasingly insufficient. With dependency came the demand for accountability. To assert that right, the Commons resolved in 1780 that it was competent "to examine and correct abuses in civil list revenue expenditures, as well as in every other branch of the public revenue." Since it was competent to control Crown revenue, it was also ready to declare itself competent to control the policies of the Crown and the ministers who made those policies.

Lastly, the period saw the beginning of the modern political party. Formations described as aggregates of personal groups held together by friendship, common patrons and admiration for the leaders, seemed to be giving way to disciplined ideological parties. Edmund Burke had advanced the idea of a political party, in *Thoughts on the Causes of the Present Discontents*, as a "body of men, united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed."⁵ Both the Rockingham Whigs and the Fox-North Coalition seemed to structure themselves by the Burkean model and have been credited for laying the foundations of the modern political party.

All signs seemed to be favouring a new constitutional convention with respect to the Commons' control of the executive. The proceedings of the 1780-84 Parliament would be crucial in the acceptance of the confidence principle. According to Jennings three tests must be made to determine whether a convention exists: what are the precedents, did the actors believe they were bound by a rule, and what are the reasons for the rule?⁶

The Precedents

North's Ministry held office at the opening of Parliament on October 31, 1780 and resigned March 20, 1782. On February 27, 1782, it was defeated on a motion expressing opposition to the American war. North interpreted it as no-confidence and offered to resign. In a letter dated February 28, he wrote: "Lord North submits to His Majesty's consideration that as the House of Commons seems now to have withdrawn their confidence from Lord North, it will be right to see, as soon as possible that other system can be found."⁸

On March 8, his government defeated by 10 votes an opposition motion critical of the funds given to the military. Although the motion was not explicitly confidence, North interpreted it as such and due to the fact that his majority was small again offered to resign:

...the opposition...meant by their Motions to remove, in as little offensive a manner as possible all the administration. This was likewise understood by the friends of Government so that the question was, in fact, whether the Ministry should be immediately removed or not, and yet they were saved by only ten votes.

After such a division, Lord North is obliged to repeat his opinion that it is totally impossible for the present Minister to conduct His Majesty's business any longer.⁹

On March 15, the first explicit no-confidence motion in the House of Commons was moved but North defeated it by nine votes.

Three days later he resigned because he anticipated defeat on a second no-confidence motion:

Your Majesty will perceive that we shall infallibly be in a Minority even on Wednesday next, when the House will be moved, in direct terms, to resolve *That it is their opinion that the management of public affairs ought not to be continued in the hands of the present Minister.*

...the fate of the present Ministry is absolutely and irreversibly decided; The votes of the Minorities on Friday last contained, I believe, the genuine sense of the House of Commons, and I really think, of the Nation at large... The torrent is too strong to be resisted; Your Majesty is well apprized that, in this country, the Prince on the Throne, cannot, with prudence, oppose the deliberate resolution of the House of Commons: Your Royal Predecessors... were obliged to yield to it much against their wish in more instances than one: They consented to changes in their Ministry which they disapproved because they found it necessary to sacrifice their private wishes and even their opinions to the preservation of public order, which are the natural consequence of the clashing of two branches of the Sovereign Power in the State... The Parliament have altered their sentiments and... their sentiments whether just or erroneous, must ultimately prevail...¹⁰

The Rockingham Ministry (March 27, 1782 — July 1, 1782) was not subject to any censure motions and was not defeated on any government measure but the Shelburne Ministry (July 2, 1782 — February 24, 1783) suffered two defeats, both relating to the provisional Peace Articles with France, Spain and America. On February 23, 1783 Shelburne offered to resign:

"I am deeply concerned to find it the universal sense of Your Majesty's Servants in the House of Commons, that any further attempt to carry on Government on the part of Your Majesty's present Servants would be vain and highly prejudicial to Your Majesty. The State of the Navy, the Disarmament, the Loan besides other points cannot admit of further delay, and it will be impossible to prevail on Your Majesty's present Cabinet to decide on any of them, after all that has now passed the House of Commons".¹¹

The Fox-North Coalition (April 2, 1783-December 18, 1783) was not defeated in the Commons on any government measures. The *East India Company Bill* was carried at third reading 108 to 102. Yet the Bill was defeated in the Lords by a majority of 19 voted on December 17. The next day the King dismissed the Ministry.

The Pitt Government was appointed December 19, 1783, and was in office when Parliament was dissolved on March 24, 1784. It was censured by five no-confidence votes and defeated on one item central to government policy, namely the *East India Company Bill*. Despite repeated opposition demands to do so, Pitt refused to resign. Speaking in the Commons on February 2, he said:

With regard... to the resignation of ministers, he saw no reason for it. If that House insisted upon their going out, there were two constitutional means open to them, either by impeachment to proceed against them for their crimes, if they had committed any, or by an immediate address to the

crown to desire their removal. The removal of ministers lay with the crown and not with that House; in remaining in office, therefore, with a view to keep the country from anarchy and confusion, and to prevent the government from falling prey to that administration which they had removed, and suffering them to force themselves upon the sovereign against his will, was neither illegal nor unconstitutional... The present administration, not having resigned because they had not the support of that House, was by no means contrary to law or the constitution.¹²

Did the Actors Believe They were Bound by a Rule?

North and Shelburne felt bound by the rule that if the government lost the confidence of the House, it must resign. North felt the test of confidence was not a simple majority but a substantial majority: a margin of nine or ten votes was not enough. Neither Prime Minister requested a dissolution instead of resigning. Pitt refused to be bound by the confidence principle and held to the earlier convention that the selection of ministers belonged to the King.

The greatest roadblock to the acceptance of the vote of confidence was the King. George III never believed that his ministers had to have the support of the House of Commons. In 1779, when North was defeated on an important bill and offered to resign, George wrote:

"I am sorry Lord North takes so much to heart the division of this day; I am convinced this Country will never repair a proper tone unless Ministers as in the Reign of King William will not mind being now and then in a Minority particularly on subjects that have always carried some weight with popular Opinions; if it comes to the worst the Bill will be thrown out in the House of Lords...?"¹³

Like Pitt, he held that ministers could only be removed through the procedure of impeachment in which a charge was laid: since no charge had been brought forward against Pitt's government, he was under no obligation to dismiss it.

George III had been reluctant to call the Rockingham Whigs to office and so abhorred calling the Fox-North Coalition, that he contemplated abdication. After dismissing the Coalition, he wrote:

The political struggle is not, as formerly, between two factions for power, but it is no less than whether a desperate faction shall not reduce the Sovereign to a mere tool in its hands; though I have too much principle ever to infringe the rights of others, yet they must equally prevent my submitting to the executive power being in any other hands than where the Constitution has placed it... My cause... is that of the Constitution as fixed at the Revolution and to the support of which my family was invited to mount the Throne.¹⁴

The King recognized that the Coalition's rise to power was constitutionally significant. It had insisted on excluding the King from appointing any of the junior ministers and approximated a modern political party in that it had a disciplined majority in the Commons. Because it threatened his constitutional power, he used the defeat of the *East India Company Bill* as a pretext for firing it.

In opposition, the Coalition insisted that the confidence principle be upheld. They did not deny:

... His Majesty's undoubted prerogative of appointing to the executive Offices of State such Persons as to His Majesty's Wisdom shall seem meet; but at the same time, that we must, with all Humility, again submit to His Majesty's Royal Wisdom, that no Administration, however legally appointed, can serve His Majesty and the Public with Effect, which does not enjoy the Confidence of this House...¹⁵

Fox called Pitt's refusal to resign "the basest tyranny and calculated to accomplish the ruin of the liberties of the country". He asked: "Did it not completely overthrow (the Commons') power in the constitution? Did it not reduce them to a state of the most perfect non-entity and insignificance... Did it not strip them of all the power and privileges with which time, the constitution and the people of England had vested them?"¹⁶

The Reasons for the Convention

Although the English electoral system at this time was characterised by rotten boroughs, an extremely restricted franchise and dominated by political patrons who controlled many of the seats in the Commons, the House seemed to look upon itself as the spokesman of the people. Often in the debates on the non-confidence motions moved against Pitt, members referred to themselves as "representatives of the people". Fox unquestionably embraced the democratic principle.

A precise definition of who the 'people' were was never made, yet one is struck by the democratic liberalism which pervaded the Coalition's argument. It was the liberty of the people that the House was to protect and the liberty was threatened by the refusal of Pitt to resign.

A second reason was that the royal prerogative should not be independently exercised. It could no longer be an absolute right: it could only be a 'functional' right. Lord North brazenly declared that the Crown prerogative "could receive efficacy only from the support and confidence of parliament; without these it would be a scarecrow prerogative and without them the king would be a nobody."¹⁷ Fox believed the prerogative of the Crown was basically hollow:

A good deal has been said respecting the prerogative of His Majesty to choose its ministers. The same observation is, however, applicable to this exertion of privilege as to every other of a similar nature. The crown has an exclusive right to make peace or war; but though it is invested with this privilege, would it be safe to exercise it without consulting parliament? I am sure it would not; I am equally satisfied that the prerogative in the election of ministers in opposition to the House of Commons, is a measure as unsafe, as unwarranted and as unjustifiable.¹⁸

The last reason, and perhaps the most important, was that without the confidence of the House a government would be politically inefficient and the stability of the state would therefore be threatened. Both North and Shelburne believed it was in the best interests of the King that they resign. North had told the King that "If by remaining in office I could serve your Majesty, I would run any

risk; But Your Majesty's affairs grow worse by every hour that my removal is delayed."¹⁹ He reminded the King that his predecessors had changed Ministers, despite their private wishes, for "the preservation of public order, and the prevention of those terrible mischiefs, which are the natural consequence of the clashing of two branches of the Sovereign Power in the State".²⁰ Shelburne said it would be "highly prejudicial" to the King if his government carried on, noting that the "State of the Navy, the Disarmament, the Loan besides other important points cannot admit of further delay".²¹

Despite being in a minority, Pitt was able to manage to secure two items which were central to government policy, namely, the *Mutiny Bill* and the *Appropriate Act*. The fact that the opposition did not stop these two measures was perhaps a tactical error. Although it flaunted the confidence in the face of the Coalition, it showed itself to still be politically efficient: the King was not absolutely compelled to bow to the wishes of the Commons.

Conclusion

The vote of confidence arose from the inadequacy of the impeachment procedure, the identification of the cabinet as a collective

body responsible for government policy, the dependency of the Crown on the Commons for all public revenues, and the rise of the modern political party as witnessed by the Rockingham Whigs and the Fox-North Coalition. Confidence was originally interpreted more as a perception of waning support for government policies in the Commons as opposed to a numerical defeat in that assembly. North believed he could not continue with a majority of only nine and even resigned before he was formally defeated in the House. Neither North nor Shelburne were defeated on explicitly non-confidence motions yet defeats on items central to government policy were interpreted by them as a want of confidence. Neither Prime Minister, nor Pitt for that matter, requested a dissolution following their defeats in the Commons. It is obvious that the vote of confidence was not a constitutional convention by 1784.

It would be another generation before one of the driving forces behind the confidence principle i.e. the modern political party, would be strong enough to establish it as a constitutional convention. Until then, the Crown was not bound by it. Yet the Parliament of 1780-84 did establish important precedents and illustrated the reasons for the convention which is the cornerstone of responsible government as we know it.

Notes

¹See Philip Norton, "Government Defeats in the House of Commons: Myth and Reality", *Public Law*, (Winter 1978), pp. 360-378.

²Sir William Blackstone, *The Commentaries on the Laws of England*, John Murray, London, 1876, Volume 1, p. 216.

³*Ibid.* p. 123.

⁴Richard Pares, *King George III and the Politicians* Clarendon, Oxford, 1953, p. 205.

⁵Edmund Burke, *Works*, volume I, Samuel Holdsworth, London, 1842, p. 151.

⁶See Sir Ivor Jennings, *The Law and the Constitution*, 5th edition, University of London Press, London, 1959, p. 133.

⁷*Ibid.* p. 136

⁸J. Fortescue, *The Correspondence of King George III* Macmillan, London, 1928, No. 3535.

⁹*Ibid.*, No. 3546.

¹⁰*Ibid.*, No. 3566.

¹¹Fortescue, *op. cit.*, No. 4130.

¹²*The Parliamentary History of England*, Volume xxiv, pp. 483-4.

¹³Fortescue, *op. cit.*, No. 2536.

¹⁴Fortescue, *Historical and Military Essays* Macmillan, London, 1928, pp. 45-6.

¹⁵House of Commons, *Journals*, March 8, 1784.

¹⁶*The Parliament History of England*, Volume xxiv, pp. 476, 599.

¹⁷*Ibid.*, p. 291.

¹⁸*Ibid.*, p. 476.

¹⁹Fortescue, *The Correspondence of King George III*, No. 3568.

²⁰*Ibid.*, p. 395.

²¹*Ibid.*, p. 247.