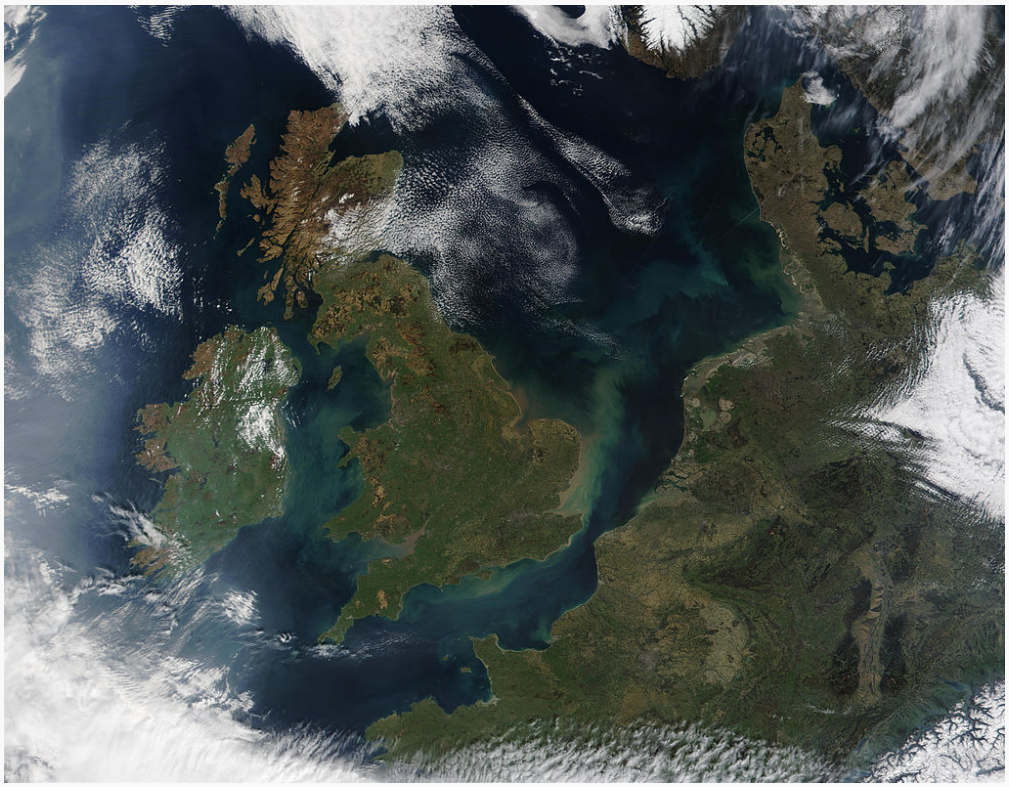
To appreciate the importance of the Brexit referendum, we must consider the series of constitutional issues that it raises

democraticaudit.com /2016/03/04/to-appreciate-the-importance-of-the-brexit-referendum-we-must-consider-the-series-of-constitutional-issues-that-it-raises/

By Democratic Audit UK 2016-3-4

The Brexit referendum, set to take place in June, has created open divisions in the Conservative Party, with many questioning the sustainability of two warring tribes within the same one-party government. Here, ***Andrew Blick*** *argues that in order to understand the constitutional significance of the referendum, we must move beyond the politics of the situation, and assess the concept of the supremacy of the Westminster Parliament; the nature of referendums as political decision-making devices; the collective responsibility of Cabinet; and the possibility of a break-up in the UK.*



Credit: NASA

On 23 June we decide by referendum whether to remain within or leave the European Union (EU). The choice we face is not simply a matter of economic and trade policy, or the external relations of the United Kingdom (UK). It engages core features of our system of democratic governance. If we are fully to appreciate the importance of the forthcoming referendum on continued membership of the European Union, it is necessary to consider a series of constitutional issues that it raises. Preeminent among them are concept of the supremacy of the Westminster Parliament; the nature of referendums as political decision-making devices; the collective responsibility of Cabinet; and the possibility of a break-up in the UK.

We are already hearing much about sovereignty. Central to the platform of the ‘leave’ campaign is the claim that, through exiting the EU, we will regain control over our own affairs, and no longer be constrained by a supranational body in which we are only one voice among 28. This idea requires close attention. The concept of ‘national

sovereignty' can apply to any state. What makes the UK different is the extent to which, traditionally, we emphasise the idea of 'parliamentary sovereignty'. Under this doctrine, the UK Parliament is held to be able to legislate in any way it chooses, subject to no legal restraint. While in most democracies a written constitution is the ultimate source of authority, to which even central legislatures are subordinate, the UK has no such document to bind its Parliament. However, membership of the EU means that European law takes precedence over all other law, even Acts of the Westminster Parliament. Some find this position irreconcilable with the notion of parliamentary sovereignty, and see this contradiction as a reason for leaving the EU. For them the UK Parliament represents the ultimate expression of the democratic will of the people of the UK and it is unacceptable for it to be muzzled. Possible counterarguments are that complete freedom of action for Parliament has only ever been a theoretical proposition, always subject to practical limitation. Moreover, if we departed from the EU, depending on the exit deal we negotiated, the UK Parliament might well find itself still needing to conform to EU law to some extent, as a condition of continued access to part or all of the European single market.

It is often remarked in relation to the EU vote that it is curious that in a matter connected to its legal supremacy, Parliament has chosen not to take the decision itself, but delegate it to the electorate. In theory, politicians could choose not to abide by the outcome of the EU referendum, but probably at immense political cost. Referendums – at full UK and national or regional level – are now an accepted part of our democratic system. Their advocates present them as a means by which the electorate as a whole can engage in decisions of overriding importance. It was not always this way. Once referendums were regarded as a sinister mechanism of mob rule, a means by which authoritarian regimes could seek legitimacy, and not suited to the UK. They could also be held to undermine principles of representative democracy, under which publicly accountable individuals take decisions on our behalf after careful deliberation, insulated from populist pressures. Some doubt whether an issue as complex as the EU can be satisfactorily resolved through the posing of a binary question to a public that are anyway to a large extent poorly-informed on the subject. Whatever the merits or otherwise of referendums, it was European integration that forced them onto the agenda. Europe has often been an issue producing fissures within rather than between parties, and which it is consequently difficult for regular political procedures to resolve. This dynamic led to the first UK-wide referendum in 1975, on continued membership of the European Economic Community (EEC); as it has done again in 2016. The 1975 referendum did not settle the issue of membership decisively, since we are still arguing about it today. Can we expect the vote this year to be any more successful? Will the losing side accept the verdict as final?

The tendency of European integration to create cross-cutting divisions in British politics leads on to our third constitutional theme. It involves another fundamental principle of the UK polity: the collective responsibility of Cabinet. According to long-established tradition, now officially encapsulated in documents including the *Ministerial Code*, Cabinet is an environment in which senior members of the government can discuss issues frankly and confidentially in order to reach a group decision. While disagreements may occur internally, once a conclusion is reached (as summarised by the Prime Minister in the chair), ministers unite publicly behind it, regardless of the particular views they took at Cabinet or one of its sub-committees. This rule applies to all government ministers, both within and without Cabinet. If they cannot adhere to it, they are obliged to resign.

Some issues can strain this approach. Strict discretion is hot always adhered to and secrecy does not always hold. Ministers, while not willing to leave office over a disagreement, can drop public hints that they do not personally favour a particular course of action; and the media might contain what they purport are accounts of Cabinet discussions. Even more rarely, disagreement over a matter can be so fundamental that it becomes the subject of a formal suspension of collective responsibility. This approach enables ministers openly to dissent, avoiding politically undesirable resignations. The first occurrence of such a loosening came in 1932, when the National government could not agree about international trade policy; the second in 1975, when the Labour Cabinet was divided over the EEC referendum of that year. A further suspension came in 1977-1978, again over Europe and policy towards a directly elected European Parliament. During the Liberal Democrat-Conservative coalition of 2010-2015, the possibility of opt-outs from collective responsibility was an important means of holding the government together. It was used over issues including the referendum on the electoral system of 2011. In 2016, a plebiscite on European integration has once again necessitated the instigation of an agreement to differ. Ministers are allowed to dissent

from the view that we should remain members of the EU. The Prime Minister hopes to confine disagreement to this specific issue, and once the vote has taken place, move on. But the EU connects to so many other areas of government business, and is such a proven source of lasting political rancour, will it be possible to do so?

The relaxation of collective responsibility opens up other connected constitutional matters, involving the impartiality of the Civil Service and individual ministerial responsibility to Parliament. The Prime Minister and Cabinet Secretary have sought to impose an edict that civil servants must work to support the official government position in favour of continued UK membership of the EU. If a secretary of state is exercising the opt-out and opposing this stance, then the civil servants working in her or his department are – according to recently issued guidance – not permitted actively to assist her or him in this endeavour. Indeed, dissenting ministers are now not allowed access to papers relating to the referendum, if they had not already seen them before these rules were introduced. This arrangement might seem a natural consequence of the suspension of collective responsibility. However, it is an important constitutional principle that secretaries of state are responsible to Parliament for their departments, including the activities of staff within them. These restrictions could call their control over officials into question. It may be, moreover, that the very idea of the government advocating that people should vote a certain way in a referendum, and aligning with a campaign to this end, is problematic.

At the time of the EEC referendum of 1975, the possibility of devolution to Scotland and Wales was on the agenda, but had not yet become a reality, while self-government in Northern Ireland had broken down following the renewal of violence and the onset of 'the Troubles'. Now we have firmly established elected legislatures and executives in all three territories. While they remain, in theory, subject to the legal supremacy of the UK Parliament, the devolved systems are as close to constitutional fixtures as it is possible to come in the UK. But they have had no involvement in the decision to hold the EU referendum, even though the outcome will have immense implications for the policy areas within their remit. Devolution has created a new institutional and democratic basis for recognition of the UK as a multi-nation state. Yet it is possible, because of the overwhelming relative size of the population of England, that the UK as a whole could vote to exit the EU while the electorates of one or more of Wales, Scotland and Northern Ireland favoured continued membership. England might not tolerate being restrained by another participant in the Union, while those smaller components might resist dominance by England. At this point, some hold, the continued existence of the UK could come into question, as it did at the time of the Scottish Independence Referendum in 2014. In this scenario, the constitutional implications of the EU plebiscite would be at their most potent. A vote predicated on the desire of an EU member state to have more control of its own future could lead to it having no future.

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