DEMOS

THE EMPEROR HAS NO CLOTHES

A PROPOSAL TO BOLSTER THE AUTHORITY OF SELECT COMMITTEES

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As MP for Chichester (1997 – 2017), Andrew Tyrie served as Chairman of the Commons Treasury Select Committee (2010 – 2017), Chairman of the Liaison Committee (2015 – 2017), and Chairman of the Parliamentary Commission on Banking Standards (2012 – 2013) whose recommendations for the reform of governance in major financial institutions, now implemented, are widely held to be transforming business practice in financial services. Andrew has also held board roles in investment management and property firms. He was previously Special Advisor to Chancellors of the Exchequer Nigel Lawson and John Major. Andrew Tyrie has been Chairman of the Competition and Markets Authority (CMA) since June 2018.

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FOREWORD

Andrew Tyrie was the most formidable Chair of a Commons Select Committee ever. Without resorting to the grandstanding or hectoring of some of his colleagues, he held to account those responsible for the financial crisis and, as Chair of the Parliamentary Commission on Banking Standards, identified the remedies. Courteous, well-briefed and persistent, he cut through the defences of those who appeared before his Committee, and then steered his Committee towards unanimous conclusions. Virtually all have been accepted by the Government.

He stretched to the limit the current powers of Select Committees, but has concluded that they are proving inadequate to the task. In 'The emperor has no clothes' he exposes the weaknesses in the current settlement, and argues for reform. As someone who chaired the Standards and Privileges Committee for 8 years, I have had my share of recalcitrant witnesses; I agree with his analysis and his promotion of possible solutions. At a time when many in Parliament are also coming publicly to share his concerns, his solutions will be of interest to MPs – and to the wider public who follow these important Parliamentary and constitutional issues.

The Rt. Hon. the Lord Young of Cookham CH

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INTRODUCTION

Select Committees are the success story of Parliament over the last decade. Election of Chairmen by secret ballot of the whole House – introduced by the incoming Coalition Government – has been seized by several Select Committees to boost their authority. As a consequence, scrutiny of the executive, and wider public life, is both more effective and more meaningful, and increasingly seen to be so. Select Committees are extending their influence and developing a capacity to set Parliament's agenda in new ways.

To perform this job, Select Committees have started to make much fuller use of their theoretical powers, which are extensive, particularly the power to summon witnesses and produce papers. In turn, some – particularly witnesses and people and institutions of whom papers have been demanded – have challenged Parliament's right to make such demands. A few have ignored or frustrated those demands. Parliament's bluff is now being called. This paper argues that the time has come for reinforcement of those powers to give them full practical effect. This is now essential if Select Committees' crucial, and relatively new, roles – closer to the centre of political life – are to be entrenched. What follows sets out how to accomplish it.

IS THE STATUS QUO TENABLE?

SUMMARY

In a nutshell, it isn't.[1]

The apparently recondite issue – of the enforcement by Parliament of the powers of Select Committees to obtain papers and cross-examine witnesses – has high stakes attached. Select Committees have been helping to restore Parliament's credibility, becoming again part of "the grand inquisition of the nation". They are crucial to the long-term future and health of Parliamentary democracy in the UK.

Committees cannot do their job fully now: there is a gap between real powers and appearances. The Parliamentary magic to secure compliance with requests for people and papers is wearing off. It is not just that Select Committees are already constrained; the constraints are likely to get worse. An assertive executive, supported by a reasonable Parliamentary majority, would be happy to let it deteriorate.

IN MORE DETAIL

Doing nothing is the easy option. It avoids the risk of unsettling the constitutional balance between Parliament and the UK courts (if legislation were used to bolster Committee powers) or the European Court of Human Rights finding the House's procedures were incompatible with the UK's international human rights obligations, which might happen if there was no legislative basis for their use. It is primarily for these reasons that not much, so far, has been done.

Those who advocate doing nothing might also argue that, in most cases, papers are supplied willingly, and people are ready, or even eager, to give evidence.

However, the experience of the last twenty years has shown that, just at the moment when powers of compulsion are most needed – during the most high-profile inquiries, on matters of greatest concern to the public – they have

1 The fact of the inquiry launched by the Privileges Committee in 2016 suggests that they have concerns. Appendix 2 sets out their terms of reference.

often been found to be wanting. Some examples:

- the Government succeeded in preventing a timely and full investigation into the origin of the Iraq War by the relevant Committees – Defence, and Foreign Affairs. They were unable to see what and whom they felt necessary. Congressional inquiries into the same question in the US, by contrast, were more effective;[2]

- the Culture, Media and Sport Committee noted that it "repeatedly encountered an unwillingness to provide the detailed information that we sought, claims of ignorance or lack of recall, and deliberate obfuscation" in its 2010 inquiry into *Press Standards, Privacy and Libel*.[3] In 2011, in its subsequent inquiry into *News International and Phone Hacking*, the Committee had to use the power[4] to summons the Murdochs;[5]

- in its 2016 report on BHS the Work and Pensions Committee noted that "Advisers citing issues of legal privilege and client confidentiality acted as a bar to us gathering information" and that in some cases a very wide interpretation of these concepts was used.[6] As set out in evidence to the Standards Committee, Sir Philip Green and Ian Grabiner have refused to comply with an order from the Women and Equalities Committee.[7] In many cases, these are the type of investigations which may have contributed to the restoration of Parliament's reputation for doing the job the electorate expects of it.

What was once an open secret on Committee Corridor is now becoming increasingly obvious to a wider public: the only practical consequence of refusing to comply with a Committee summons, or a call for papers, is reputational. And that cost will vary, depending on the individual concerned. For some

2 I did a relatively detailed comparative study of Parliamentary/Congressional scrutiny of the decision to go to war in *Mr Blair's Poodle goes to War,* 2004, Centre for Policy Studies. The Iraq war was an interesting and rare test case for a comparison of the respective powers of Westminster and Capitol Hill. Each democratic body was seeking to establish the truth about the decisions to initiate the same war.

3 https://publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf

4 The scope and limits of these powers has yet to be codified although, under various standing orders the Chamber gives wide-ranging powers and formalities to obtain evidence, call witnesses and submit reports to the House as a whole. These powers are therefore derived from those of the whole House. The latter can be traced back at least as far as the 16th century.

5 https://publications.parliament.uk/pa/cm201012/cmselect/cmcumeds/903/903i.pdf, para 4.

6 https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/54/54.pdf, para 87.

7 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/committee-of-privileges/select-committees-and-contempts/written/103502.html

– such as the head of a public body, or a major government contractor – to be held in contempt may bring about the end of their careers. For others, particularly those whose anti-establishment credentials may be burnished by a finding of contempt, it may do the opposite.

The present situation – in which Committees' work is confined to scrutiny of the willing and the fearful – has a number of undesirable potential consequences:

- Members of Parliament and the public are less well-informed about controversial issues;
- Committees conduct inquiries on the basis of incomplete information, and they reach conclusions that are poorly-informed or unfair;
- the failure of Parliament to "get to the bottom of things" leads to further public disenchantment with politics, and heightens the sense that the political process is ineffective.

It would be a matter for the House of Lords to decide whether to replicate any new system brought in by the Commons. But it probably should and would. To the extent that the problems identified are not currently shared in the House of Lords, it is probably because Lords' Committees do not seek to swim so often in the treacherous currents of high profile controversies evident on the Commons Committee corridor. The Lords – if it is to sustain a meaningful scrutiny role in the 21st century, and in the absence of a democratic mandate – will need to do some more swimming.

Why neither the Chamber nor the Courts can substitute for Committee Powers

A great deal of the business of the state is now carried out in a penumbra of governmental quangos and regulators of varying degrees of independence.[8] The list is very large.[9] This is the 21st century reality of the exercise of public authority over a great deal of British life. Such bodies are

8 The Government website lists 406 agencies and other public bodies, ranging from minor organisations, such as the Chevening Scholarship Programme to major regulators such as Ofwat and Ofgem, and the financial regulators see https://www.gov.uk/government/organisations

9 For example, the Independent Regulators' Network has a membership of 13: Civil Aviation Authority, Financial Conduct Authority, Financial Reporting Council, Information Commissioner's Office, Legal Services Board, Ofcom, Ofgem, Ofwat, ORR, Payment Systems Regulator, Single Source Regulation Office, The Pensions' Regulator and the Utility Regulator Northern Ireland. This does not include all bodies with a major role. For example, it excludes the Bank of England and the Competition and Markets Authority. Around a quarter of total UK economic activity takes place in the directly regulated sectors.

likely to continue to give evidence, whether or not Parliament reinforces privilege. Many of them recognise the benefits to them of so doing: it can legitimise their own authority.[10] However, in even these cases Parliament's practical capacity to exercise effective scrutiny may be weakened. Certainly, a brake would be put on some of the Select Committees' recent innovations.

As the business of Government has become more complex, and as power and responsibility has passed from central Government to regulators and arms length bodies, the effectiveness of the floor of the House as a means of scrutiny and control has diminished. This has been going on for many decades. It has recently been obscured by Brexit which has temporarily focussed attention on the Commons' "cockpit". Narrow majorities and a Coalition Government have contributed. The growth of the Committee system has played an important part in improving the public perception of Parliament and its relevance to them, acting as a counter weight, among other things, to poor behaviour in the Chamber and expenses scandals.

The Committee Corridor conducts its business in a language more readily understandable and acceptable to the wider public than the Chamber. Its scrutiny is often more substantive, too. A step shift in the importance of Select Committees has come with the secret ballot for election of Chairmen, in the Commons, in 2010. This is the transformational reform. It has given Committees, as a whole, new self-confidence, an ability to speak for and to the public, and more effective leadership, sometimes demonstrably independent of the Whips. Their work is closely followed by the media and the public. They now help frame public discourse.

Overall, a historically somewhat inward facing process, a conversation with itself, based on formal stylised procedures, and equally formulaic language, is now being supplemented in Committees by a public conversation, where proceedings are direct, and based less on assertion, more on substance. Notwithstanding the apparent collapse of trust in politics, Committee proceedings are often held to be effective, and seen to be effective. This is a considerable achievement. It is the consolidation

10 The Bank of England have argued several times that power and accountability need to go hand in hand. See, for example, oral evidence from Sir Mervyn King in Ev 44 of Treasury Select Committee, Accountability of the Bank of England, 21st Report of Session 2010-2012, 8 November 2011, HC 874.

of these gains, and further improvement on them, that is also at stake in the debate about "people and papers" powers.

Other means of enquiry cannot substitute for Parliament

Some might argue that Committees do not need to be so intrusive for another reason: in a state with well-functioning civil and criminal justice systems and with a complex landscape of independent regulation, others – supported by the media – can do the investigative heavy lifting. The claimed shortcomings of Committees in their conduct of inquiries were explored in the Public Administration Committee's 2005 Report, *Government by Inquiry*. This identified political partisanship and Committees' structure and role as the main arguments made against Parliamentary inquiries. They were broadly right. Neither is likely in a court. Those who think that court or judicial scrutiny can act as a substitute for much of Parliament's investigative function are urged to turn to Appendix 1.

The importance of "people and papers" for new forms of scrutiny

The debate about "people and papers" tends to be conducted only on the basis of current Committee investigative practice. This is a mistake. Entrenchment of these powers could facilitate the scope for innovation and extension of their use. During my chairmanship of the Treasury Committee, I tried to make a start.

The power to send for papers was deployed not just to produce evidence (usually published), but instead as a lever. It was used, for example, to provide the Committee with an assurance that that the information it received was full and truthful. This can be done without necessarily breaching commercial or personal confidentiality, or security, the customary reflex refrains of those wanting to withhold papers. For example, the Treasury Committee used the power to:

- impose expert advisers on the FCA and its predecessor regulator the FSA. These advisers were embedded in the regulator for several months, with full staff support. Their job was to scrutinise the preparation of the regulator's two separate internal reviews of the regulation of RBS and HBOS up to their collapse. This was done with the twin purpose of ensuring that the FCA's investigation was thorough and objective, and

also that their summary report (later published) was a fair reflection of all the underlying material and that the public could have confidence in it. They reported back to the Committee in detail, both in writing and in private and public sessions. The expert advisers, on behalf of the Committee, saw all the material (some of which the FCA believed they had a statutory duty not to divulge publicly) on which the FCA's final report was published. The advisers knew, as did the regulators, that if they were denied access to anything they could turn to the Committee for backup. It is probably because of this that the Committee, and its advisers, received the full cooperation of the regulators. The scope for "pulling the wool" over the eyes of the Committee was thereby much diminished;

- ensure that the Bank of England published sensitive documents with only the minimum of redactions, by sending the clerk of the Committee to review the Bank's proposed redactions and to raise any concerns with the Bank directly. Had the clerk been unable to agree matters with the Bank, he would have been expected to bring them to the Chairman's, and ultimately the Committee's, attention. This procedure was extensively developed, including in two notable cases:

  – the Committee had been pressing the Bank for a long time to publish the minutes of the Court of the Bank (the body equivalent to its Board) covering the period of the financial crisis. When it eventually agreed to do so – with some redactions – following the arrival of a new Governor and new Chairman of the Court in early 2015, the Committee required that the clerk be able to read the entire original set of minutes in the Bank, along with the proposed redactions, and then agree each of those redactions with the Bank.

  – the Bank of England had commissioned an internal review of an occasion when the Real Time Gross Settlement (RTGS) system – a crucial part of the UK's financial 'plumbing' – had failed for most of a day, causing serious problems for many businesses and individuals. Again, the clerk was able to read the original report and the proposed redactions, prior to publication. These were,

in this case, legitimately required for reasons both of commercial sensitivity and of security. He proposed overturning some of the proposed redactions, and also proposed other amendments, both to minimise their extent and to make the redacted version easier to follow. Again, these were accepted by the Bank. The alternative, of a report to the Chairman and the Committee of non-compliance with the clerk's suggestions, followed by detailed scrutiny of them in (initially private but possibly subsequent public) hearings, was probably a substantial deterrent to excessive redaction.

Had the clerk not been able to obtain adequate co-operation, or if he had concluded that the redactions were unnecessary or would have led to a misleading impression of the original documents, it would have been open to the Committee to form its own view and, if appropriate, publish the unredacted texts.

The Parliamentary Commission on Banking Standards' (PCBS) experience is also relevant here. This was the first major inquiry to be attempted by Parliament since its catastrophic failure to investigate the Marconi scandal, a hundred years earlier. The PCBS, and the framework of Standing Orders which supported it, have created a precedent for much more Parliamentary scrutiny of the type formerly considered the preserve of judge led inquiries or tribunals. It has shown that Parliament can delve deeply into a major issue of public concern. Furthermore, it has demonstrated that Parliament's capacity to recommend and then force through the implementation of radical remedies, supported by primary legislation, often in the face of initial obstruction by the Government. It showed that this could be done while avoiding partisan acrimony, and more quickly and much more cost effectively than judge led inquiries.

"People and papers" powers were essential to its work. The PCBS was able to secure extensive cooperation from counter parties, including banks under investigation. This was probably due to the reputational risks of not doing so. It may also have been partly because firms knew that the FCA would probably, using its statutory powers, have cooperated fully and promptly to secure papers on the PCBS's behalf, had the banks withheld material. For its part, on receipt of request from Parliament, the FCA would not have relished a clash about the withholding of papers.

The PCBS innovation and its success in obtaining "people and papers" may therefore have owed something to special circumstances. It could turn out to be one of a kind unless Parliament does something to ensure that future Commissions can see and hear what they need.[11]

Fairness

This has already been touched on. What is or is not a fair process for dealing with witnesses and evidence will depend on the context in which the evidence is used, and the subsequent use made of it. It is also, to some degree, in the eye of the beholder. And it changes over time.

Parliament polices itself on fairness. Committee fairness is under constant assessment by fellow MPs informally, and on the floor of the House. The press and wider public are also watching and commenting.

Legal fairness is also in play. The sub judice rules inhibit Committees from looking at matters where legal proceedings are active or people have been charged. In practice, Committees err on the side of caution, often guided by particularly cautious clerks! They almost always avoid calling individuals who are known to be subject to active police investigation, or asking questions of other witnesses directly relevant to it.

The existence of Article 9 of the Bill of Rights,[12] and a scrupulous observance of it by the courts, is part of the framework which ensures the fairness of committee proceedings. The Joint Committee noted that:

> *While a Committee's findings may be uncomfortable reading for those criticised, a Committee will not take direct action against them. A Committee report may suggest that illegal conduct has occurred, or that specific conduct should be culpable; it cannot of itself create any legal liability. If a report prompts a disciplinary body to take action, that action will have to comply with the body's own powers and processes. The fact that proceedings in Parliament cannot be questioned in courts or similar bodies outside Parliament provides further protection for witnesses, whether or not they appear willingly.*

11 I have set out some lessons learnt from the PCBS experiment in more detail in The Poodle Bites Back, 2015, Centre for Policy Studies. See, in particular, p. 33 ff and Appendix 2 which, among other things, sets out some of the ingredients essential for any future Commission's success.

12 Article 9 of the Bill of Rights: `freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

As already explained,[13] the investigative function of Parliament is different from the function of the court, or of a public inquiry. Committees may set out their interpretation of events. Their findings should not impose civil or criminal liability, nor should they be used in the courts. The prohibition in Article 9 of the Bill of Rights on "impeaching and questioning" proceedings in Parliament, which includes evidence to Committees, in courts or places out of Parliament, is a crucial protection for witnesses.[14]

Any new legislation dealing with these matters would need to restate and reinforce the principles of Article 9 prohibiting court intervention. Any incursion on the Article 9 protection of evidence by the courts reduces that protection and hinders Parliament in the exercise of its own functions. At the highest levels the courts understand this, but there have been occasions when evidence before Select Committees has been the basis for subsequent cross-examination.[15] Since there is no requirement for permission to be sought to adduce Parliamentary material, its frequency is unknown but probably rare.[16]

There may be other incursions. The courts have been extending the ways in which they consider Parliamentary material. While it is proper for the courts to interpret statute, there may be unfortunate or unintended consequences for Parliament if the courts are broad in their interpretation. To the extent that courts might widen access to Parliamentary material, witnesses would have good reason to resist giving a full account to Committees.

Both the above examples are domestic. A further problem for Committees is that their necessary range of evidence gathering extends well beyond the UK. It may be possible to sustain a high degree of immunity for witnesses in UK courts. But none can be provided for courts in other jurisdictions. Bob Diamond, the Chief Executive of Barclays, may have had such considerations in mind when giving evidence to the Treasury Committee. These concerns are likely to grow with the necessary increase in the calling of witnesses from firms operating in global financial markets, and also those firms engaged in extensive international activity.

13 See Appendix 1.
14 The recent Supreme Court judgement on prorogation interpreted 'impeached' to mean 'impugned'.
15 See Weir v Secretary of State for Transport [2005] EWHC 2192 (Ch).
16 As a first step, the Ministry of Justice could be asked to request that the judiciary keep a record of all such uses that come to their attention and report it to the Ministry and Parliament.

The standards of fairness for witnesses who appear before the Committee in the normal way need to be proportionate. A hearing should not raise questions of civil or criminal liability such as to engage Article 6 of the European Convention on Human Rights.[17] This requires Committee discipline. Committees should consider a witness's reasons for not wishing to come; they should consider requests to hold hearings at other times than originally proposed; they should ensure that the witness has the opportunity to reply, in person or in writing, to points made by other witnesses. It should be made clear that the proper protections provided by legal professional privilege and privilege against self-incrimination would be preserved. This is all usual practice.

The Privileges Committee should consider recommending a codification of the standards which the House expects of Select Committees. This would need careful thought. Two important points to bear in mind would be that first, the standards of fairness, and the safeguards one might reasonably expect as a witness to a Committee, are not necessarily the same as they would be if one were on trial as a defendant. Secondly, there should still be some basic standards and safeguards if the power that Committees exercise is to retain consent and legitimacy. An essential "quid pro quo" for stronger powers over "people and papers" is better safeguards and consistently high standards of Committee conduct. Codification of safeguards is probably the most straightforward way of accomplishing this.

What if the witness refuses to come? At that stage it is arguable that Article 6 rights are engaged: the body determining whether or not the witness should appear could be said to be deciding on a civil obligation. But in any event, the House would presumably wish to be as fair as possible: fairness is not an external, judicially imposed, value but central to the values of both Houses. The fact that Commons Standing Orders reserve time for Opposition parties and that SOs provide for certain levels of conduct both in the Chamber and Select Committees is evidence of this.

It would be a mistake to conclude that only judicial intervention could ensure the fair use of powers by Committees. Each House is its own guardian of fairness. Behind

17 Article 6 of the European Convention on Human Rights: Right to a fair trial.

Parliament stands the electorate which, on the Commons at least, can impose its own judgments. If Committees abuse their powers, those powers can and should be restricted by the House. There is ample precedent for the Commons restricting its powers.[18]

18 For example, in 1978 the House of Commons resolved to exercise its penal jurisdiction as sparingly as possible and only when essential to do so; in two cases the House has rejected recommendations to exclude journalists from the precincts as punishment for giving publicity to leaks (see CJ (1975-76) 64; CJ (191985-86) 374), and in 1958 the House rejected the proposition that letters between Members and Ministers were proceedings.

REMEDIES

If the status quo is an uncomfortable place to stay, what is to be done? There are three broad routes: assertion, legislation and assertion supported by an ECHR compatible Parliamentary court/tribunal. I favour the last of these and what follows explains why.

Assertion of Powers

The advantage of Parliamentary assertion is that it could give each House the power to summon without the risk of having its procedures evaluated by the courts. It carries two risks. First, it should not do so in a way which would survive challenge at the European Court of Human Rights. Secondly, its effectiveness would depend on compliance and enforcement by a third party, probably the police, to support a Parliamentary warrant.

The 2013 Report of the Joint Committee on Parliamentary Privilege attempted to construct a rights compliant system of Parliamentary self assertion.[19] It is possible that if the Committee's recommendations had been implemented at that time, five years ago, this could have bought Parliament more time before a case, or a series of events, revealed Parliament's powers to be defective when it matters most – the naked (and toothless) emperor.

The Committee proposed safeguards for witnesses, and a process to appeal against a summons; the combination of a fair process and the prospect of imprisonment might have persuaded potentially recalcitrant witnesses to comply. The fact there has recently been an increase in uncertainty (to put it mildly) over Parliamentary powers and that the sanction of imprisonment has not been imposed for 140 years, increases the risk that the 2013

19 See paras 76-100.

proposals might fail.[20]

Standing Orders in each House could make clear that any Member who holds public office should appear before Parliamentary committees if requested. Failure to comply with a request to appear would become a breach of the Code of each House. This would increase the pressure on Members who held public appointments to appear. The assumption is that staff of either House would consider it their duty to give evidence, and that no such order would be required. The 2013 report agreed. But I see little harm in adding staff, and perhaps little good. I have not considered whether to re-open the vexed question of the so called Osmotherly rules as part of this submission, relevant though it might be. If staff were to be included, and all public servants, this could be made a contractual condition of employment. The same approach could at least be considered for all public servants. The latter would be a major step and would certainly drive a coach and horses through Osmotherly.[21]

Legislation

The benefit of legislation to address the "people and papers" powers directly is that it could put these powers of Parliament beyond doubt.

The disadvantage is that it would make significant inroads into two allied principles: Article 9 of the Bill of Rights, and so-called "exclusive cognisance". This is no more than an old-fashioned term used to describe the power of each House to determine its own procedures and to have its right to do so respected. Recent judicial remarks that "it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review"[22] raise the possibility that the courts would refuse to recognise either the provisions of Article 9, or the validity of exclusive cognisance. Parliament respects the courts and would be extremely unlikely to interfere with the determination of a particular case. Nonetheless, it is important that the sovereignty of the Crown in Parliament

20 The power to commit offenders to prison, or into the custody of the Serjeant at Arms, has not been used since Charles Bradlaugh was committed by order of the House of Commons in 1880. Since 1945, two Members (Mr Walkeden in 1947 and Tam Dalyell in 1968) and one journalist (Mr Heighway in 1947) have been formally reprimanded. John Junor (Editor of the Sunday Express) was summoned to the bar of the House in 1957 to explain his actions regarding an article in his newspaper; however, after he made an apology to the House, the House decided to take no further action. (Robert Blackburn and Andrew Kennon (eds), Griffith and Ryle on Parliament: Functions, Practices and Procedures, 2003, p 134; and House of Commons Library, Select Committees: Evidence and Witnesses, 2 June 2016, p 35).

21 For an explanation of the Osmotherly see Andrew Tyrie, *Mr Blair's Poodle*, p.45, 2000, Centre for Policy Studies.

22 Lord Carnwath in the Privacy International case [2019] UKSC 22.

remains understood, and that the freedom of the constituent parts of Parliament to act without interference is respected, including by the courts.

A court's function should be to consider individual cases which come before it, some of which may have wider implications. In doing so courts interpret the law. Parliament (the Crown in Parliament) makes statute law. Each House of Parliament plays a crucial part in legislation. Each makes law on behalf of its own procedures whether established by precedent or framed in SOs, these should be considered the exclusive responsibility of each House. Each House also scrutinises not just the actions of the executive, but broader policy questions, including the judicial process. The functions are interrelated but distinct.

After legislation, the courts, with their intrinsic task of dealing individual justice, would find it difficult to resist the temptation of examining why a Committee wished to call a particular witness, and whether that witness was necessary. That would undermine exclusive cognisance; in my view, it would be wholly unacceptable. This matters because, as indicated earlier, the courts and Parliament do different jobs. A committee inquiry is not a court of law. Committees must be free to decide what evidence they need to hear and see, ultimately limited only by the Chamber from which they are formed, or by Parliament as a whole.

A further constitutional danger would be that the courts would evaluate the way in which witnesses were treated. This would impinge on Article 9. The proper forum for challenging questioning in committee is in Parliament itself, not in the courts; Members are able to challenge a line of questioning if they wish. They – particularly Chairmen – frequently do just that.

The above shortcomings of court oversight have practical as well as constitutional drawbacks. For example, it might be rational for a reluctant witness to delay giving evidence for as long as possible. Such witnesses would be very likely to apply for court review of a summons, if it were available, delaying the Committee's evidence-gathering, potentially for a very long time. The reputational costs of doing so are small because that witness could hardly be criticised for exercising a right of appeal/review. Furthermore, if courts were to be expected to move quickly, Parliament would need to make an application to them for urgent consideration. If one's concern is about exclusive cognisance, the prospect of a

Committee having to make out a case to the court why its inquiry is "urgent" is not a happy one.

These dangers could be limited in a number of ways:

- making Committee processes for calling evidence in ordinary inquiries more explicit;
- ensuring there is some mechanism for appeal against a summons within the House's own procedures;
- ensuring that any appeal mechanism was put in place and met the standards of fairness of the ECHR, which would include the right to be accompanied by a legal adviser;
- drafting legislation in a way which made clear that the courts were not expected to question the House's decision that a particular witness was necessary.

At least two legislative routes might be followed:

- legislation following the Australian or New Zealand model in which the power to impose penalties is given directly to Parliament itself (broad legislation on privilege);
- legislation on the model of the Inquiries Act or the devolution Acts in which failure to comply with a summons is an offence, and the courts then deal with the matter (a more limited legislative approach).

A former clerk to the Privileges Committee, Ms Eve Samson, has submitted evidence to the Committee setting out the arguments for each. I won't repeat them. I make a much more limited set of observations:

- both approaches carry considerable risks. It would not just be an incursion into exclusive cognisance. The likelihood must be that the scope of court incursion would develop over time. The courts' area of decision would resemble a ratchet not a pendulum;
- given this risk, other approaches should at least be attempted first, even if they also carry weaknesses;
- whatever else is done, Parliament should legislate to limit the extent to which courts could take evidence on Parliamentary proceedings. The former requirement, that permission of the House was required before proceedings were used, should be put on a statutory footing. Modern mechanisms for granting such permission might be

considered, although I am not an enthusiast.[23]

Assertion: Parliament as a court/ tribunal

I strongly favour this approach, if it can be made to work. First, it re-clothes the emperor. Second, it offers the best prospect of keeping the courts largely out of the business of Parliamentary scrutiny. Third, it can create a flexible tool for developing – internally – the checks and balances now required to support the more powerful Committee system that has developed as a consequence of election. Fourth, by addressing the above, it reduces the scope – whether by necessity (caused perhaps by a Committee overreaching the use of its powers) or excuse – for a government to reverse the reforms made to the Select Committee corridor. The risk of this is too often overlooked.

As pointed out earlier, the apparent potency of Committee scrutiny has a great deal to do with the Parliamentary arithmetic over the last decade. And in consideration of all aspects of Committee powers, it is vital to have in mind that what the Chamber – supported by a majority governing coalition – gave in 2010 it could take away at any time.[24] A government with a large majority might not be so generous to Committees as a coalition government, or one in a hung Parliament.

The fairer and more thorough a House's internal process the less likely the courts are to attempt to intervene. Lord Thomas of Cwmgiedd appears to agree. He has suggested in evidence to the Privileges Committee:

"13. If Parliament was strongly opposed to the involvement of the courts in the manner suggested, the court's function (as suggested above) could instead be exercised by the High Court of Parliament. I am sure that a better course could be to revive a Committee composed of Peers who have held High Judicial Office, who could then determine such contempt issues in a judicial manner."[25]

The disadvantage that one House would be deciding on the privilege of the other could readily be addressed. A Committee of

23 For example, the Speaker could be given power to permit certain classes of use without reference to the House as a whole.

24 Robin Cook's proposed reforms for election failed for this reason (Labour had a majority of 166) and, supported by a conspiracy of the whips of both major parties, killed his proposals. Parliament may not like to hear it but, having earned greater respect on the Committee corridor, it needs to keep earning the right to deploy its new and powerful tools of scrutiny.

25 Written evidence from the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, Select Committees and Contempt, Committee of Privileges, May 2017, (SCC0013).

Lords and Commons Members, probably led by a Law Lord, and with a number of experienced MPs and Peers (five in all might be enough) could meet this concern. It should not take decisions without Members of both Houses present. It could probably be constituted by parallel Standing Orders (or the equivalent) in each House. There would be no need to follow exactly the current Joint Committee 'template' in Standing Orders.[26]

If there were to be such a court, or specialist tribunal, it should be required to adjudicate on the basis of a narrow definition of what might constitute reasonable grounds for non-appearance or the withholding of papers or information. Such grounds would include whether the demand was reasonable or proportionate (proportionality could include matters such as whether the Committee was seeking material which was not central to the inquiry and which might prejudice criminal investigations or legal proceedings, endanger security, breach legal privilege or breach commercial confidentiality). It should be expected to do its job as quickly as reasonably possible.[27] All the above could be set out in Standing Orders.

Each House should have fair procedures, also set out in Standing Orders, for the exercise of "people and papers" powers. These should operate before the case goes to this new Parliamentary "court". For example, the relevant Select Committee should be required to consider whether the evidence it sought was needed and to give the witness warning, so that representations could be made. If it subsequently issued a summons, which was disobeyed, the matter would be referred to the Committee of Privileges. The witness should have the opportunity to explain to the Privileges Committee his or her decision to ignore the Committee order. If the Committee of Privileges decided that the original summons was unreasonable, arguably no further action should be taken – but a Select Committee might at least want to put its case for disagreeing with the Privileges Committee to the floor of the

26 If, for example, it were concluded that each House should retain jurisdiction over its own proceedings, and that a Joint Committee would compromise it, purpose built arrangements could be devised. The relevant Committee in one House could have the power to co-opt members from the relevant Committee of the other House. A good deal of flexibility is already possible: the Standing Orders of the Commons already permit Committees to deliberate and take evidence with Lords Committees. It would also be necessary to permit the Committee to include co-opted members from the other House in the agreement of reports. These are second order problems.

27 The Supreme Court held hearings in the Miller case (for exiting the European Union) on 5, 6, 7 and 8 December 2016. It delivered its judgment on 24 January 2017; a Parliamentary court could act with similar expedition. Its recent judgment on the prorogation of Parliament was delivered even more quickly.

House (for which provisions could be made). If the Privileges Committee concluded that there had been a contempt, its report should be endorsed by the House before the matter can proceed. This would give the relevant Chamber an opportunity to block the process.

The executive might mobilise against the Committee's conclusions. But it could probably find a way of interfering anyway, if it was determined enough. By requiring it to be reported, any government intervention would at least be highly transparent and subject to debate. At this point, if requested by the relevant Committee, the Privileges Committee, and not opposed by the relevant Chamber, the issue could be referred to the Parliamentary court/tribunal for final decision (assuming continued non-compliance from the witness).

The above procedures, or something like them, should ensure that a recalcitrant witness would have several opportunities to challenge the original Committee decision, even before a Parliamentary court/tribunal began its work. They should also ensure a high level of transparency.

Who would put the case for the relevant House before the Parliamentary court? This responsibility should probably lie with the Chairman of Privileges of each House – in practice a suitably qualified and experienced QC on his or her behalf.

WHO WOULD ENFORCE THE SUMMONS/WARRANT?[28]

This should be the Serjeant at Arms in the Commons and Black Rod in the Lords. He or she should be empowered to act on the authority of the Parliamentary court/tribunal,

28 The High Court has well established machinery for enforcing its orders by a system which uses warrants regarded as binding by the officers of the court, or 'Tipstaffs', the police and prison governors. It also has well established "people and papers" powers. In the High Court, if a person has been ordered to attend to give evidence and/or to produce documents at court but has failed to appear, the High Court has power to issue a bench warrant for their arrest. A bench warrant is an order addressed to the Tipstaff requiring him/her to apprehend somebody in question and bring them to court. Bench warrants are also addressed to every police officer equally requiring them to assist the officer of the Court. The Tipstaff and his/her deputies are not police officers, but officers of the High Court. In practice, the Tipstaff often asks the local police to make an arrest on his/her behalf. Once produced before the judge by the Tipstaff, the person in question, known apparently as the 'contemnor' may purge the contempt by answering the questions or supplying the relevant documents. If they do not do so they can be imprisoned or fined.

In the case of imprisonment, the judge signs a warrant of committal which is an instruction to the Tipstaff to take the contemnor into custody and convey them to prison to serve the sentence and the governor of the prison has an obligation to keep them in custody for the duration of the sentence, unless it is lifted by the court. Contemnors of this sort, if they subsequently decide to purge their contempt by giving evidence/documents, can come back to court to ask for the sentence to be lifted or reduced in exchange for their co-operation. The maximum sentence is 2 years. Contemnors can also be fined an unlimited amount.

drawing on some of the current practice for the enforcement of court orders in the High Court currently. It is for consideration whether – necessarily tightly drawn – legislation could support the Parliamentary court/tribunal, and officers of Parliament, by imposing a requirement on the police (or any other relevant authority) to enforce a Parliamentary warrant or summons. Any substantive court challenge to the validity of the warrant would amount to a challenge of the decision of the Parliamentary court/tribunal. Their decisions would have the protection of Article 9, being proceedings in Parliament and would therefore be liable to be struck out by the court. I favour the above approach. Nonetheless, the proposal is not entirely without risk: it could, possibly, introduce substantive court scrutiny by the back door, discussed below.

The sanctions could be significant, and could be either a fine or imprisonment. These need to be sufficient to deter non-compliance.[29]

Some drawbacks

The biggest difficulty with the approach above is that – as with a court of law – the power to find contempt and impose sanctions would lie with a court of Parliament – the new Parliamentary body. Its judgments could, sooner or later, provoke a challenge at the ECHR on the grounds that a fair hearing was denied. This could be the case, however august its composition and robust its procedures.
A central argument of those bringing the case would be that the Parliamentary court/tribunal was composed of members of the same institution as the one bringing the contempt findings.
In my view, any move from the status quo will encounter this risk or worse. If, as I have reluctantly concluded, permitting contempt to continue (and probably develop) also carries growing and ultimately unacceptable risks for Parliament, the decision rests with which response carries least risk. It is on these grounds that I favour the above approach – one which could, if thoughtfully designed, provide a high level of safeguards for witnesses, high enough to act as a bulwark against a successful ECHR challenge.

29 The Inquiries Act 2005 provides a precedent of sorts. It gives a maximum period of imprisonment of 51 weeks. The Contempt of Court Act 1981 gives superior courts the power to imprison for up to two years.

CONCLUSIONS

I have made five proposals:

1. legislation to reassert Parliamentary privilege over evidence in Committees in conformity with Article 9 of the Bill of Rights;

2. a change in Standing Orders to require office holder MPs and Peers to appear before Select Committees (although a case can be made for this not being needed);

3. self-assertion by Parliament, supported by a strong and demonstrably ECHR Article 6 compliant court/tribunal of Parliament;

4. consideration of legislation to require that the police (and any other necessary relevant authorities) support Parliament in the enforcement of a warrant or summons;

5. codification in Standing Orders of the standards and treatment that a witness is entitled to expect when giving oral evidence.[30]

None of this is straightforward. A great deal of detail would need to be worked up. But the underlying points remain: doing nothing is an invitation to deeper problems later.

What's proposed here offers, in my view, an early prospect of re-clothing the emperor. It may work. The existence of such a framework may be enough to ensure that the Parliamentary court/tribunal is scarcely ever needed. If it doesn't work, and notwithstanding its attendant risks, full scale legislation may well be essential, notwithstanding the considerable accompanying risks to exclusive cognisance.

Beneath all the legal mumbo jumbo is a crucial constitutional principle. Effective Parliaments need certain immunities and rights to be able to function, to speak on behalf of the electorate and to secure their consent for legislation. Access to "people and papers" are two of those rights. In an age of multi-media politics and greater direct democracy, they are essential.

30 Consistent with para 85 of the 2013 report.

Gentlemen's understandings and agreements break down when those involved have little sense of obligation. Parliament's development is strewn with such agreements which, when challenged, are replaced by clearer codes, Standing Orders and statute. A number of such challenges have occurred recently. Parliament must act.

One further point, beyond the terms of reference of the Privilege Committee's inquiry, might be worth bearing in mind. None of the foregoing applies to the Intelligence and Security Committee (ISC). The ISC is not a Select Committee; it is not even a full Committee of Parliament, as commonly understood, although it is a Committee of Parliamentarians.[31]

In my view, the gap between the rhetoric of successive governments about the effectiveness of the ISC's role, and the reality of its impotence – most vividly exposed by its failure, in two reports, to get to the bottom of the UK's facilitation of rendition – touches on issues of Parliamentary privilege. It could benefit from the attention of the Privilege Committee. Sooner or later Parliament will need to address the ISC's manifest shortcomings. A referral of its "people and papers" powers to the Privileges Committee would be a good start.

31 The Prime Minister controls what it may investigate. The government may block access to any or all information – without recourse or appeal – on grounds that it is 'sensitive'. Likewise, the government can refuse to permit witnesses – whether in camera or otherwise – appearing before the ISC, even if the ISC has concluded that their contribution to an inquiry is essential. In practice, the Prime Minister also controls its membership. See *Neither Just nor Secure*, Peto and Tyrie, 2013, Centre for Policy Studies.

APPENDIX 1

The Public Administration Committee has, in the past, pressed for greater Parliamentary involvement in and influence over inquiries, not less.[32] They were right to do so.

There are many reasons why Select Committee inquiries underpinned by powers enabling Committees to get the evidence they need, are not simply legitimate but are essential. They can be grouped in a number of ways:

- the Commons has a mandate; it makes decisions on behalf of the electorate who chose its members, and those members can be removed;
- Parliament does not just consider what Government is doing now; it considers what it should be doing, and, if necessary, promotes change;
- those with power should be expected to explain themselves to Parliament;
- Committees can move swiftly to look into matters of public concern – far more speedily than courts or inquiries;
- not all power or information lies within Government; Committees need to hear from those outside Government;
- as legislators, Committee members gain knowledge and understanding through the evidence process in a way which simply could not be achieved through reading third-party reports;
- Committees are tools of transparency. Their inquiries can force Government into making policy or legal changes, if they show it to be necessary;
- even where policy is not altered by the inquiry, Committees' transparency can expose the executive's "hidden wiring".

32 https://publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/51/51i.pdf

Public inquiries might perform some of these functions, but it is up to the Government to decide whether or not to establish a particular inquiry. Inquiries do not have either the swiftness of response or the ability to continue to press for change which can make Committee action effective.

It would certainly be inappropriate to expect the courts to look into much of the above. Their function is essential, but very different from that of Parliament and Parliamentary bodies:

- the courts make their findings in the context of the cases which come before them, and on the basis of the evidence which is presented to them by those with resources and permission to intervene.

- Parliamentary law making is complex; proposals from Government will typically have been drawn up by policy experts and consulted on widely before being announced; Members of Parliament who scrutinise and, if legislation is required, enact that policy are drawn from across the country, and have a wide range of experience and expertise. Not only can anyone make representations to a Committee or an individual MP, Committees can and do seek out representations from those whose voices might not be heard.

- the courts can apply the law, and, to a certain extent, develop it, but Parliament and Government can decide if the law or policy needs changing; such changes need to be properly informed.

A Committee undertaking an inquiry does not necessarily know what it will uncover. The Culture, Media and Sport Committee's inquiry into phone hacking, for example, showed that in certain parts of the press phone hacking was a normal method of operation, rather than an isolated abuse. It is possible that a series of civil actions would have led the government to a public inquiry in time, but the Committee intervention brought the issue speedily to political attention. Similarly, Committee intervention after the collapse of BHS enabled Parliamentarians to understand the regulatory system, and its failings, as well as to look at events in one particular company.

The power to send for papers is essential for all the above such work. The cry may go up that the courts and inquiries are fairer than Committees. Arguably. But it need not be the case that Committees are less concerned about fairness, due process and individual rights than the courts. And the fact

that they may come to different views as to where the balance lies should not necessarily draw the conclusion that their view on the balance is inferior to that of a court.

Nonetheless, certain safeguards for defendants in court (and generally in inquiries) don't, at the moment, exist for witnesses in Select Committees. Some of those safeguards – like right of appeal – might not be relevant to Committee work. Others might be, and it's worth thinking through whether and how they should be codified.

The scope for unfairness is far greater when Committees publish a report that makes personal – and what in a non-Parliamentary context might be defamatory – criticism. They can do that now; furthermore, Committees are more at risk of publishing unfair criticisms if they cannot collect they evidence they need.

Nonetheless, if the Committees' powers and effectiveness are to continue to grow, they need to have in mind that their own behaviour is a public and Parliamentary "common good". Excesses and abuses of power (broadly defined) can erode it. Each Committee owes a duty of responsibility to the others: to show self-restraint in the handling of sensitive issues; to exercise good judgment; to respect the boundaries between one another laid down in Standing Orders. It has not invariably been on view.

APPENDIX 2

In its call for evidence the Privilege Committee asks:

- How can Select Committees effectively exercise their powers to summon witnesses and call for papers, while at the same time treating potential witnesses with fairness and due respect?
- What are the benefits and drawbacks of the three options identified in 2017 by the then Clerk of the House, that is, to do nothing, to reassert the House's existing powers by amending Standing Orders or by Resolution, or to legislate to provide a statutory regime?
- What are appropriate sanctions for non-compliance or other contempts on the part of witnesses? How should these be applied?
- What protections or safeguards are necessary for witnesses within either a changed or the current system? How can the House demonstrate that it is treating prospective witnesses fairly?
- What relevant developments have there been, since the inquiry was originally launched, in other Parliaments and assemblies in the UK and overseas?

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