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## ***Shifting control?* Aspects of the executive-parliamentary relationship**

The key constitutional question of the relationship between the UK Parliament and the UK Government has come to the fore in recent months, sparked, in large measure by the Commons' Liaison Committee's two reports, *Shifting the balance: select committees and the executive* and *Independence or control?* The continuing programme of Commons modernisation has also fed this debate, especially recent innovations on programming of legislation and deferred divisions.

This Research Paper seeks to examine, in broad terms, some major aspects of this issue, by addressing some key themes, examining the current debate, and noting other models of executive-parliamentary relations. It also looks briefly at prerogative power in the context of the debate. Other relevant Research Papers on modernisation, select committees and on constitutional reform generally are cited in the text.

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## **Summary of main points**

The relationship between a territory's legislature and its executive is central to the constitutional and political system of that territory, and has been at the forefront of parliamentary debate in recent months. In particular, the current Government Commons modernisation programme and the Liaison Committee's proposals for enhancing the departmental select committee system have focussed attention on the formal and actual relationship between the Westminster Parliament and the UK Government.

This is a complex question, and one which can lead down many different political and constitutional paths. No attempt is made in this Paper to cover substantively many of these issues – whether it be the legislative process, financial accountability and scrutiny, the effect of 'Europe' or wider constitutional reform, and so on. Members seeking authoritative guidance on existing or proposed parliamentary procedures or practices related to the topics considered in this Paper should consult the Clerks. There are many models of executive-legislative arrangements, and two are briefly considered in a comparative context, the US Congress (Section III) and Scottish devolution (Section V).

The current debate, both within Parliament and in the context of two major review projects (by the Hansard Society and the Conservative Party, respectively), is summarised.

One particular aspect that is sometimes overlooked in any discussion of executive-parliamentary relations is the existence and use of prerogative power, that is, power exercised (primarily) by ministers in the name of the Crown (often called the 'royal prerogative'). This source of executive power, its scrutiny by Parliament, and the views of the major parties are very briefly examined.



## CONTENTS

<b>I</b>	<b>Introduction</b>	<b>7</b>
<b>II</b>	<b>Some issues in the debate</b>	<b>10</b>
	<b>A. Terminology</b>	<b>10</b>
	<b>B. The role and function of Parliament</b>	<b>11</b>
	<b>C. The role of party</b>	<b>15</b>
	<b>D. The majoritarian principle</b>	<b>18</b>
	1. Select committee membership	18
	2. The Commons as a whole	19
	<b>E. Parliamentary staff</b>	<b>21</b>
	<b>F. The US Congress</b>	<b>22</b>
	1. The separation of powers	23
	2. The majoritarian principle	24
<b>III</b>	<b>The current debate</b>	<b>25</b>
	<b>A. The debate in Parliament</b>	<b>25</b>
	<b>B. Mr Hague's 13 November speech on the constitution</b>	<b>32</b>
	<b>C. The Hansard Society Scrutiny Commission</b>	<b>36</b>
	<b>D. The Norton Report</b>	<b>38</b>
<b>IV</b>	<b>Parliamentary scrutiny of governmental prerogative power</b>	<b>40</b>
<b>V</b>	<b>The Scottish Parliamentary model</b>	<b>45</b>
	<b>A. Establishment of the Parliament</b>	<b>45</b>
	<b>B. Early operation of the Parliament</b>	<b>48</b>



## I Introduction

In recent years there has been much talk of the diminishing role of Parliament and the increased power of the Executive in the British political system. Critics have sometimes examined current trends and have tried to suggest concrete remedies; they have frequently looked back to an alleged ‘golden age’ when the balance between legislature and executive was better maintained. Others have reached the pessimistic conclusion that little can be done to alter the situation. ....

Much of the argument appears to start from a misunderstanding of what the role of Parliament has been in the past (a question of description) or what the role ought to be (a question of prescription). Nor is the evidence of past commentators, like Mill or Bagehot, always correctly interpreted. Indeed, the lessons of history itself are not infrequently misapplied ...”<sup>1</sup>

The Liaison Committee has taken forward the ongoing debate on the relationship between Parliament and the Executive in its two recent reports, both characterised by stark titles which make clear the Committee’s view of the terms of the debate:<sup>2</sup>

- *Shifting the balance: select committees and the executive*, 1<sup>st</sup> report of 1999-2000, HC 300, March 2000<sup>3</sup>
- *Independence or control?* 2<sup>nd</sup> report of 1999-2000, HC 748, July 2000<sup>4</sup>

Although the primary focus of the Committee’s attention is the select committee system,<sup>5</sup> it addresses this in the overall context of executive-parliamentary relations, as can be seen from its conclusion in the first report:

106. It is now twenty years since the setting up of the departmental select committees. Their establishment was a major step in making the Executive accountable to Parliament, and so to the citizen and the taxpayer. Over those two decades, the committees have done a great deal of valuable work; but their full potential has still to be realised. In this report we have set out a programme of reform and modernisation which will do just that. There are some who see the

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<sup>1</sup> H V Wiseman, *Parliament and the executive*, 1966, preface

<sup>2</sup> The Government’s reply to the first report was published as Cm 4737: <http://www.official-documents.co.uk/document/cm47/4737/4737.htm>. The Leader of the House’s evidence to the Committee on 10 July is reproduced in the second report: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmliaisn/748/0071001.htm>

<sup>3</sup> <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmliaisn/300/30002.htm>

<sup>4</sup> <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmliaisn/748/74802.htm>

<sup>5</sup> To that extent, it can be regarded as being a development of its ‘end-of-a-Parliament’ reports, such as that of March 1997, *The work of select committees*, 1<sup>st</sup> report of 1996-97, HC 323: <http://www.publications.parliament.uk/pa/cm199697/cmselect/cmliaisn/323i/lc0102.htm>

House of Commons as a toothless adjunct of an all-powerful Executive. We aim to disprove this.

And see the opening paragraphs of its follow-up report:

1 On 3 March this year we published proposals to improve the Select Committee system. We drew on the lessons of the reformed Select Committee system over two decades, and on the practical experience of the 33 Chairmen who make up the membership of our Committee. Our proposals were designed to make the system more effective and independent; to make it a better scrutineer of Government; and to provide a better deal for the citizen and the taxpayer.

2 On 18 May the Government published its response. It rejected virtually every recommendation we had made.

3 The Reply was both disappointing and surprising. We found it disappointing because our proposals were modest. We did not suggest line-by-line scrutiny of the Estimates as a condition for their approval; we did not suggest any change in the powers of Select Committees: for example, to allow them to require papers from Government Departments or to summon Ministers - for all of which there are strong cases. And we found it surprising that a Government which has made so much of its policy of modernising Parliament should apparently take so different a view when its own accountability and freedom of action are at issue.

And the conclusion:

**77 We believe that in its Reply the Government has missed an opportunity of reforms which would have been greatly to its credit. It is strange that the expressions of support for increasing the effectiveness of Select Committees are not matched by things that might make a real difference - not even by Select Committees at Westminster having some of the powers which the Government has been happy to see in Edinburgh, Cardiff and Belfast.**

**78 There has been much discussion about shorter sitting hours, and more family-friendly scheduling of business in the House. This may be all very well; but any real modernisation of Parliament must provide better accountability and tougher scrutiny of the Government of the day. This is our aim. We believe it is the test by which the public will judge the effectiveness and value of Parliament. This is not something that will go away.**

The Leader of the House's appearance before the Committee on 10 July provided an opportunity for scrutiny of the Government approach to the broader themes raised by the first report, as in this exchange with Dr Tony Wright:<sup>6</sup>

5. I just have one question and that is this: the title of our report was called *Shifting the Balance*, what I really want to know is whether you think that that balance needs shifting. Does the balance between the House of Commons and the

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<sup>6</sup> <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmliaisn/748/0071002.htm>

Executive need rebalancing? Because when we came in, and of course we are all modernisers now but modernising means different things, I thought a strand of what we meant by modernisation was we were going to strengthen Parliament in relation to the Executive. Here we have a central proposal which says the ownership of Select Committees, the scrutineers, should belong to the House of Commons and not belong to the Executive. That is shifting the balance. What I want to know as a matter of starting point and principle is, is that a balance that you want to see shifted?

*(Margaret Beckett)* Yes, it is, but not in the way that you suggest. Thinking this is the only way we can shift the balance is, I am afraid, one I do not share. Let me put two points to you. First, I return to the observations I made to Mr Sheldon at the outset, that one of the things that I think most unbalances the way that the House works at the present time is precisely the way that we handle legislation, which is after all an enormous part of our parliamentary work, indeed that is very much key to the way in which Parliament scrutinises the Executive. So if we can make improvements there, that would make an enormous difference to shifting the balance of the way Members work. You refer directly to the proposals with regard to appointment of members of Select Committees. I do not accept that it is the Executive who appoints those Members now and, indeed, the mechanism we use now is the mechanism that was recommended by a former Procedure Committee in, I think I am right in saying, 1978. That mechanism does mean that it is the House which makes those appointments and there have been occasions, I understand, when the House has rejected proposals that were made for appointments. One of the concerns I have, and I said earlier that I regret the way in which a number of issues which are not frankly a matter of general contention between us have become attached to this specific proposal as a result of the way the Report is framed, is not a matter of whether or not I reject the notion of shifting the balance between Parliament and the Executive but when I look at this proposal my immediate thought—because I fear this is one of my weaknesses as a politician—is how would it work. ....

And this exchange with Nicholas Winterton:

62. What about shifting the balance back from the Executive to Parliament, which is what this is all about? None of those things really do that. Perhaps it will bring about better scrutiny but what about giving Parliament greater authority against the Executive? This is what we have sought to do.

*(Margaret Beckett)* It depends, Mr Winterton, on what you mean by that. I am very mindful, although I am afraid I cannot at this moment recall, I have a feeling it was in a report from the Select Committee on Transport, although I certainly would not swear to it, I well remember reading quite recently in one of the reports of our many Select Committees the strongly worded observation that "it is the role of Select Committees to scrutinise Government and not to substitute their judgment for that of Government".

63. But to hold them to account.

*(Margaret Beckett)* I wholeheartedly support the notion that Select Committees should scrutinise Government—by the way, I emphasise "Government"—and hold it to account. However, I also accept that caution is required if we are talking

about substituting the Select Committees, the judgment of Select Committees, for that of Government.

**Mr Winterton:** How can we hold them to account if the Government has so much say in those who serve on them?

The broader issue of Parliamentary reform generally, especially in the context of the Labour Government's approach, was examined in two 1997 Research Papers:

- *Aspects of parliamentary reform*, Research Paper 97/64, 21.5.97<sup>7</sup>
- *Parliamentary reform: the Commons modernisation programme*, Research Paper 97/107, 28.10.97<sup>8</sup>

On wider themes of the nature of the British constitution, and its reform, see Research Paper 96/82, *The constitution: principles and development*, 18.7.96.<sup>9</sup>

## II Some issues in the debate

.... The position of the Government in the House is quite a special institution of modern days, a growth of parliamentary usage; it has effects transcending the legally prescribed privileges of the Ministry, influencing the whole conduct of the House, what it does and what it leaves undone, and pervading the entire sphere of parliamentary life. ... But here we must emphasise one point – that it is embodied and recognised in a conception, which only took shape during the nineteenth century, that the Ministry possess what is called the *leadership of the House*.<sup>10</sup>

### A. Terminology

Any discussion about this subject can be confused by different meanings which are ascribed to the various terms used, such as 'executive' and 'legislative'/'legislature'. For example, traditional separation of powers arguments often refer to Parliament's relationship to the judiciary, when what is usually meant is a dispute between the courts and the Government acting through its parliamentary majority.<sup>11</sup> Professor Anthony King

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<sup>7</sup> <http://hcl1.hclibrary.parliament.uk/rp97/rp97-064.pdf> } only available to users

<sup>8</sup> <http://hcl1.hclibrary.parliament.uk/rp97/rp97-107.pdf> } of the parliamentary

<sup>9</sup> <http://hcl1.hclibrary.parliament.uk/rp96/rp96-082.pdf> } internet

<sup>10</sup> J Redlich, *The procedure of the House of Commons*, 1908, vol III, pp22-3. This was written at a time when this was graphically illustrated by the Prime Minister of the day (if in the Commons) being also Leader of the House.

<sup>11</sup> See Research Paper 96/82, 18 July 1996, pp 30-33 or T Wright (ed.), *The British political process: an introduction*, 2000, pp44-7. There are many different systems of governance, and devolved and local governments, from the Greater London Authority to the National Assembly for Wales, as well as local authorities, exhibit, a number of them. See generally <http://www.parliament.uk/commons/lib/research/rp98/rp98-038.pdf> Research Paper 98/38: *Cabinets, committees & elected mayors* 19.3.98.

discussed this terminological aspect in its broader sense in a major article in the mid-1970s:<sup>12</sup>

There are in the real world institutions called ‘executives’ and ‘legislatures’, and it is tempting to speak of the ‘relations’ between them. It is tempting, but much more often than not misleading. It seldom makes sense to speak of executive-legislative relations. Rather, there are in each political system a number of distinct political relationships, each with its own ‘membership’, so to speak, and each with its own dynamics and structure of power. If we wish to understand the real world of politics better, it is these separate relationships that we should seek to identify and study. The traditional separation-of-powers language is not only unhelpful most of the time; it is a positive hindrance to understanding. It blurs distinctions that ought not to be blurred and distracts attention from important political phenomena.

‘Parliament’ itself can have many meanings, especially in the context of the present discussion.<sup>13</sup> Even setting aside the use of the term when what is often meant is the ‘House of Commons’,<sup>14</sup> some commentators may confuse or conflate the Government majority in the Commons with the collective House itself.<sup>15</sup> Even with the conventional bi-polar view of the House, each ‘side’ has several components, such as the front-benches and the back-benches, and, under certain circumstances, the relevant relationship may even be between, say, the two front-benches and the two back-benches, or the Government front-bench and the rest of the House.

## **B. The role and function of Parliament**

Often, Parliament is defined by resort to a description of what a parliament does.<sup>16</sup> Adopting this functionalist perspective may have profound implications for its perceived relationship with the executive, by, for example, concentrating on the formal aspects of a parliament, especially those directly related to the various forms of its proceedings. This can, therefore, ignore or minimise other more informal, but extremely important, aspects of activity in and around a parliament, through the medium of its members, individually or in various forms of

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<sup>12</sup> A King, “Modes of Executive-Legislative relations”, (1976) 1 *Legislative Studies Quarterly*, p 32

<sup>13</sup> King considers this from one perspective, see pp 13-21

<sup>14</sup> This usage may become even less accurate as the impact of current and possible House of Lords reform is felt, in the operation of that House and its relationship to the Government and to the Commons. Traditionally disagreements between the Lords and the Government over, say, the content or progress of Government legislation are often described as disputes ‘between the two Houses’.

<sup>15</sup> This also applies to the House in committee mode, as well as in plenary mode. Different types of committee, such as whether select or standing, will themselves exhibit different characteristics and behaviour.

<sup>16</sup> As in W Bagehot’s accepted mid-Victorian classic *The English constitution*. Strictly, the functions of the two Houses should be considered separately and in relation to each other. See further <http://www.parliament.uk/commons/lib/research/rp2000/rp00-060.pdf> Research Paper 00/60: *Lords reform: major developments since the House of Lords Act 1999* 14.6.00

groupings. Examples of this are the constituency casework role of elected members, and their other representational activity.<sup>17</sup>

Much of this activity may rarely or never touch the formal proceedings of a parliament. However it will involve elected members, and possibly their staff and even parliamentary staff (such as information and research staff). It may also involve the use of parliamentary resources and facilities (such as meeting rooms for deputations, lobby groups, party and cross-party groups).

In broad terms, the modern role and function of a parliament, especially one in the ‘Westminster model’ mould, appears to be two-fold:

- a legislature, in its narrow sense of law-making processing and passing the legislation desired by (mainly) the Government,
- a democratic forum, for holding to account the power and actions of the executive, and representing the views and interests of the people.<sup>18</sup>

The legislative role is generally regarded as primary, so much so that ‘legislature’ is nowadays all but a synonym for a parliament. Modern societies are so complex and the reach of public policy so pervasive that parliaments nowadays do not engage significantly in *policy-making* or *policy-implementing*.<sup>19</sup> These are regarded as the functions of the executive arm of government. As Griffith and Ryle succinctly put it, ‘parliamentary government’ means “not government by Parliament, but government through Parliament.”<sup>20</sup> Parliament acts as a forum, providing the essential, legitimising link between government and governed.

These two roles can lead to different characteristics of behaviour within a parliament, especially in its interactions with the executive. Further, when examining the relationship between the two governmental organs, account must be taken of the legal and practical status of each, and the degree of autonomy each has or can have from the other.<sup>21</sup> The distinct legal and practical autonomy of the executive arm of government is relatively easy to recognise; that of Parliament much less so, not least because, in the Westminster model, the members of the executive remain full members of the legislature.

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<sup>17</sup> Such as dealings with ministers and others, public activities such as speeches, meetings, deputations, participation in party and all-party groups and so on

<sup>18</sup> The treatment of delegated legislation straddles both these roles, in that Parliament will often have some input over much of this type of legislation through its scrutiny processes, although it will not be able to initiate or formally amend it. Delegated legislation is, strictly, a form of executive action, akin in some ways, in this context, to exercise of the prerogative (on which see Section IV of this Paper).

<sup>19</sup> See, for a useful summary, P Norton, “Introduction: the institution of parliaments”, chap 1 of P Norton (ed.), *Parliaments and governments in Western Europe*, 1998, p5

<sup>20</sup> J Griffith & M Ryle, *Parliament: functions, practice and procedures*, 1989, p10.

<sup>21</sup> This is developed further in B Winetrobe, “The autonomy of Parliament” in D Oliver & G Drewry, *The Law and Parliament*, 1998, p14

These two functions have different, sometimes opposite impacts on the relationship of Parliament to the Executive. As a legislature, it is obviously convenient for the Executive to be actively represented within Parliament to ensure the smooth and successful passage of the business (legislative and otherwise) it requires or desires. On the other hand, when Parliament is seeking to 'hold the Government to account' and to scrutinise its activities, the usual principles of propriety and effectiveness would seem to require the maximum degree of separation between the body doing the scrutinising and the body being scrutinised. This potential and actual tension between the two roles, and how they are played out within Parliament, is at the heart of Parliament's dilemma as to its proper role and function, and how it can give effect to it. Can Parliament maintain, and be seen to maintain, the required degree of autonomy, especially when in scrutiny/accountability mode, while operating within a 'Westminster model' of Governmental membership in, and practical control of, Parliament?

As this dilemma cannot, at least in the short term, be addressed by Parliament shedding one or other of these functions, how the legislative assembly deals with it will be on the basis of balance, and in adapting itself, structurally or otherwise, to operating in these different modes. The weaknesses perceived by some commentators in the operation of parliaments such as that at Westminster may be due, not so much to the existence of two apparently contradictory functions *per se*, but to the continuing imbalance which has developed between them over the last century and more. The legislative function, a mainly executive-driven operation, has been said to have become so predominant in the practical and perceived role and function of a parliament that it may have tipped the balance at the expense of the scrutiny function, a primarily parliament-driven operation.

The traditional response to this analysis is to propose reforms which seek to bolster the scrutiny function, through enhanced forms of investigation and enquiry through a committee system, or otherwise. Sometimes, either separately or linked to this, there is a demand that the volume of legislation be diminished, though, generally, reforms to the legislative function tend to seek to improve the mechanisms and procedures of the legislative process, either within the parliament or, increasingly, in the external stages before formal introduction into parliament of 'finalised' legislative proposals.<sup>22</sup> Thus Parliament often tends to address the effectiveness or otherwise of its two main modes separately.<sup>23</sup>

One potentially more holistic approach may lie rather in examining, not so much what a parliament *does*, but what it *is*. In this way, any contradictions of the functional analysis need not be so determining, and an equally, or even, more appropriate and coherent basis may be found for arranging a parliament's activities and operations.

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<sup>22</sup> See, especially, the work of the Modernisation Committee, including its latest report, which was considered by the House in the same week as it debates the Liaison Committee's report.

<sup>23</sup> There will inevitably be some overlap, such as the potential use of select committees in the legislative process, or in the wider reformist issues of the parliamentary calendar and patterns of sitting.

A parliament is both a place and an organisation. It is a place in the sense that it is “the forum for the public debate and criticism” of governmental acts,<sup>24</sup> and as an assembly of democratically elected representatives. Whereas the debating forum concept again leads in part towards a consideration of function, the concept of an assembly emphasises the multiple personality of a parliament. By that is meant that its members come together in a variety of guises, such as:

- individual members
- political parties
- party or cross-party groupings
- government and others
- committees

In a legal and constitutional sense, of course, it is common to talk of the UK Parliament<sup>25</sup> as an organisation or institution with its own personality and viewpoint. The courts will use this terminology when interpreting statutes or in separation of powers cases.<sup>26</sup> Yet, with the exception of the need for entities with legal capacity to act for the Westminster Parliament,<sup>27</sup> or the representational or symbolic roles of the Speaker, there is little in practice where there is something properly called ‘Parliament’. Speaking in its legislative capacity or in other parliamentary modes, it is in effect the expression of its majority, which is another way of saying that the voice of Parliament can be almost synonymous with the voice of the government of the day with a working majority. In other words, whoever commands a majority not only has a dominant position in relation to the substantive business and proceedings of Parliament, but also in relation to the organisation and operation of Parliament as an institutional entity. In terms of the latter, this has appeared to develop, however caused, into an effective power of initiative as well as of decision.

In (primarily) English constitutional history, the development of Parliament, in terms of its relationship to the executive, can, in very simple terms, be seen to comprise three broad stages:

- initially as a means whereby the executive (monarchs, and their ‘ministers’) required/requested the involvement (generally thorough the provision of financial and physical resources) of elites,

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<sup>24</sup> Griffith & Ryle, *op cit*, p10

<sup>25</sup> As is obvious from the context, this discussion refers primarily to the House of Commons.

<sup>26</sup> eg “the will of Parliament”

<sup>27</sup> One example is the House of Commons Commission, established under the *House of Commons (Administration) Act 1978*, and the two Houses’ Corporate Officers (the Clerks of the two House) under the *Parliamentary Corporate Bodies Act 1992*

- the rise of a more autonomous role of such parliaments in the government of the state, in conjunction with, or in opposition to, the formal executive power,
- the gradual dominance of the parliament by the executive, now in the guise of the political government in the name of the Crown, reinforced by the party system, notwithstanding (or, perhaps, because of) the growth of the mass legitimacy derived from popular democratic election.

This simplistic description<sup>28</sup> does suggest that the basis of the executive-parliamentary relationship, at least at Westminster, is one of a continuing contest between governors and governed, represented respectively by Ministers and by Members of Parliament. This is not a contest for power to govern as such. The idea of a parliament with executive powers, a form of traditional local government writ large, has not been seen to be a serious option at UK level in modern times. What it does mean, perhaps, is that it has shaped the acceptance of the concept of executive ‘rights’ and ‘privileges’ within Parliament, characterised by the concept, however phrased, of the Government’s ‘entitlement to get its business’.<sup>29</sup>

### C. The role of party

As Griffith & Ryle’s classic text on Parliament notes, ‘the principal consideration determining the way in which Parliament works is the party system.’<sup>30</sup> Whether this is a positive or negative influence on the operation of parliament is a question at the heart of the debate on executive-parliamentary relations. It affects not just MPs as individuals, but as collectivities other than on party lines, including all MPs or all MPs bar those on the ‘Government payroll’. This is a crucial, but vast and complex issue, and this section of the Paper seeks to do no more than highlight several key aspects.<sup>31</sup>

It arises in particular in relation to the scrutiny roles of Parliament, especially through select committees, that is, the operation of bi-partisan (or non-partisan) bodies within a partisan and adversarial institution. Walkland claimed, in a 1983 essay, that “the movement for a strong committee system in Parliament ignored one of the most

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<sup>28</sup> See further, the first part of the introductory chapter to *Erskine May*, 22<sup>nd</sup> ed., 1997, p3

<sup>29</sup> For the “essential criteria” for a reformed legislative process, enunciated by the Modernisation Committee (chaired by the Leader of the House) in its very first report: *The legislative process*, 1<sup>st</sup> report of 1997-98, HC 190, para 14, July 1997. An illustration of the pervasiveness of the concept of Executive ‘control’ of Parliamentary business may be the recent comment by the Leader of the House in relation to progress of its legislation this session in the Upper House, “where the Government do not control the timetable or the agenda” (HC Deb vol 355 c401, 26.10.00). This leads to motions, in the name of the Leader of the Lords, such as that agreed to by the Lords on 27 November: “That Standing Order 40 (Arrangement of the Order Paper) be suspended on Wednesday 29th November so far as is necessary to give the Government power to arrange the order of business.” (HL Deb vol 619 c1111, 27.11.00).

<sup>30</sup> J Griffith & M Ryle, *Parliament: functions, practice and procedures*, 1989, p 17

<sup>31</sup> Critiques of the role of party, especially in Parliament, often give rise, not just to proposals for ‘internal’ parliamentary reform, but also for wider constitutional and electoral reform.

elementary findings of comparative legislative research -- that the strength of a legislative committee system varies inversely with the strength of the party system in a legislature.”<sup>32</sup> On the other hand, a more recent commentator claimed that “the most significant impact of the departmental select committees lies .in the ‘Chinese walls’ they have erected within the Commons itself. For the DSCs have engineered a partial but distinct institutional separation between the Commons’ machinery for executive scrutiny on the one hand, and its forums for legislative and party political business on the other.”<sup>33</sup>

Some do not decry the existence of party itself, but what they see as its excessiveness. A good example is the recent report of the Norton Commission, set up by the Conservative Party to examine ways of strengthening Parliament:<sup>34</sup>

The culture is pervaded by party loyalty. Partisanship dominates, especially in the House of Commons. .. Party is crucial to political life, and indeed central to the Westminster form of government, but excessive partisanship is detrimental to Parliament, limiting its capacity to call government to account.

The traditional – or ‘constitutional’ or ‘high politics’ – approach is ask whether the individual MP is a *representative* or a *delegate*. Edmund Burke’s speech to the electors of Bristol, including the distinction between a ‘delegate’ and a ‘representative’ is almost invariably cited.<sup>35</sup> Austin Mitchell describes this dilemma thus:<sup>36</sup>

MPs have to be schizophrenic: party men [sic] and parliamentarians, exponents of a sectional interest, defenders of the whole; bringing independent judgement to bear on the issues of the day, yet committed to a one-eyed approach. They have to criticise and control the Executive, yet vote for it if it’s their party. .... These dilemmas are always there but usually evaded by the classic neurotic symptom of taking refuge in a mythical persona: Member of Parliament. Man of Judgement.

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<sup>32</sup> S Walkland, “Parliamentary reform, party realignment and electoral reform”, chap 2 of D Judge (ed.), *The politics of parliamentary reform*, 1983

<sup>33</sup> A Adonis, *Parliament today*, 2<sup>nd</sup> ed., 1994, p171

<sup>34</sup> *Strengthening Parliament*, July 2000, p8

<sup>35</sup> ‘Certainly, Gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasure, his satisfactions, to theirs, - and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any, man, or to any set of men living. These he does not derive from your pleasure, -no, nor from the law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgement; and he betrays, instead of serving you, if he sacrifices it to your opinion.’ *Speech to electors of Bristol, Nov 1774*

<sup>36</sup> A Mitchell, *Westminster man*, 1982, p157

The common argument in the last century was neatly summarised by the 1973 report of the Kilbrandon royal commission on the constitution:<sup>37</sup>

Many people are under the impression that the Members' main function in Parliament is to vote for their party. According to this view the rigidity of party discipline has brought the backbench Member more and more under the control of the party whips, turning debate into what one eminent Parliamentarian has described as a ritual dance.

The Leader of the House has sought to examine the role of party from a different perspective, as in her speech in the recent debate on the Liaison Committee's proposals:<sup>38</sup>

There is scope for a debate about the way in which we, in the House and in this country, discuss the role of the party--I might have much to say, perhaps when I retire from the Front Bench, on that. I think that we take too little account of the role of political parties. With the possible exception of the hon. Member for Tatton (Mr. Bell), whose circumstances are unique, not one hon. Member is in Parliament for any reason other than because we are representatives of our parties. However, the workings of the House continue to treat all hon. Members as if we were gentlemen and amateurs who were returned to the House several hundred years ago. That approach does not reflect the role and the existence of parties, although it should do so, and I take issue with my hon. and learned Friend in that respect. Only in this country is it considered somehow ignoble to be a party representative, and to be above parties is considered to be the highest accolade that a politician can receive. It is usually given when politicians are either superannuated or about to be kicked out of their party.

*Erskine May* itself makes a similar point:<sup>39</sup>

The predominant share of the Government in controlling an arranging the time and business of the House is now recognised by the standing orders of the House of Commons. But the fact that the Government is supported by a party or combination of parties and opposed by a party or combination of parties, and that the machinery evolved by these parties performs important functions in the working of procedure is still largely disregarded by the standing orders.

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<sup>37</sup> Cmnd 5460, Oct 1973, para 93.

<sup>38</sup> HC Deb vol 356 c488-9. 9.11.00

<sup>39</sup> 22<sup>nd</sup> ed., 1997, p210. See the discussion of party organisation at Westminster, pp210-4. One reformist tome in 1964 described this disregarding of party in rather stark terms: "So we have the curious situation that in a period when political parties have reached what may be a dominating position in Parliament, Parliament has continued to refuse to take official notice of them. Instead it has imposed something of a ban on the subject, a taboo even, a ritual refusal to mention a distasteful subject." (A Hill & A Whichelow, *What's wrong with Parliament?*, Penguin Special, 1964, p48)

Perhaps one of the more graphic illustrations of this is the virtual absence of party in any of the House's traditional privilege, or more recent standards, regulation, especially in terms of whipping, discipline and the like.

## **D. The majoritarian principle**

There is, therefore, not just a recognition that an executive dominates a parliament because, ultimately, it normally has the votes to impose its will upon the parliament, but also because it is entitled to do so by virtue of the process and outcomes of democratic election leading to that majority. This approach can both

- emphasise the primacy of those parliamentary functions which an executive might regard as positive and productive -- notably the passage of its proposed legislation and the endorsement of its policies and actions -- where the parliament is its 'partner', and
- diminish the importance of those parliamentary functions and modes which the executive would regard as negative or at least less productive from a functional point of view -- those of scrutiny, accountability and redress -- where the parliament is its 'protagonist' (or even 'antagonist').

This majoritarian approach has both a narrow and wide aspect, of relevance to the current debate, to the role and function of select committees and of Parliament itself, especially the House of Commons.

### **1. Select committee membership**

Departmental select committees, in practice<sup>40</sup>, reflect the party balance of the House as a whole, in that a government with a majority will normally have the majority of the membership of each committee. Party balance arrangements are usually perceived as beneficial, as they assure minorities of some representation, and prevent abuse by the majority in excluding opposition from participation.<sup>41</sup> They also have the effect of

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<sup>40</sup> Unlike the case of standing committees (see Standing Order No. 86: <http://www.publications.parliament.uk/pa/cm199900/cmstords/pubbs--g.htm#86>), the Committee of Selection is under no obligation to have regard to the composition of the House, and has full discretion as to its selections.

<sup>41</sup> The Government made this point in its response to the Liaison Committee in relation to selection of committee chairs: "Moreover, such a new system risks jeopardising the long-standing principle that opposition parties are entitled to at least a proportion of Select Committee chairmanships..... The Government believe it is right that the opposition should supply the chair of some Committees, and cannot accept a system which might place this in jeopardy. One of the results of this balance of chairs is that the Liaison Committee itself reflects party balance in the House, as it should. There is no indication that a new system would be effective in ensuring that the Select Committee Panel was not disproportionately composed of Members of the Government party." Cm 4737, para 11.

entrenching the position of the majority. There is, however, some apportionment of committee chairs. Membership is decided by the House, and so is ultimately subject to the wish of the majority, though the question arises on a motion by the Committee of Selection (as is the case also for domestic committees), rather than, as happens with other select committees, by the Government.

The Liaison Committee has addressed this in its *Shifting the balance* proposals:

**10.** When the 1979 system was introduced, the Committee of Selection was given the responsibility of picking Members to serve on the departmental select committees. If the committees were to be independent monitors of Government, the argument ran, then their membership should not be in the hands of government or party organisation - in practice the Whips. They should be selected to do a job on behalf of the House as a whole. On the same reasoning, this procedure was also applied to the domestic committees appointed in the wake of the Ibbs Report of 1990.

**11.** In practice, however, the Committee of Selection - itself heavily influenced by the Whips - has nominated Members to serve on select committees in the same way as Members to serve on standing committees or private bill committees - primarily on the basis of lists supplied by the Whips.

**12.** This has had three unwelcome results:

- on some occasions there have been long delays - whatever their cause - in setting up select committees at the beginning of a Parliament, at the very time when committees need to put in maximum effort to establish their approach, plan their programme and begin work. These delays are of course convenient for the government of the day....
- Members have undoubtedly been kept off committees, or removed from them, on account of their views. Oppositions as well as governments have been guilty of this, but of course if committees are to be effective scrutineers of government it is the influence of the governing party that causes us the greater concern.

**13.** It is wrong in principle that party managers should exercise effective control of select committee membership. We propose a new system.

If select committees are, to use the Liaison Committee's term, 'independent monitors of Government.... [which] should be selected to do a job on behalf of the House as a whole', then the application of the majoritarian principle on all aspects of their operation may not be self-evident. In particular, the requirement for party balance, and, in particular, a Government majority, on each committee, perhaps may not be as strong as it may be, say, for standing committees.

## **2. The Commons as a whole**

The organisation and operation of the Commons House of Parliament, in its institutional rather than its functional/legislature sense, is complex and has been subject to much reform in the last 35 years. Clearer lines of organisation and accountability have been

developed, both by statute and by internal administrative action, and the position is summarised in *Erskine May*.<sup>42</sup> A major review was undertaken recently, which has led to further significant administrative developments, providing the House of Commons with a more coherent, corporate approach.<sup>43</sup> This part of the Paper does not seek to provide a briefing on these issues, but simply to cite them for illustrative purposes, in the context of this discussion.

Applying the above analysis more broadly, a breakdown of the various types of parliamentary activity may more clearly suggest which are amenable to the application of a majoritarian principle. Some ‘domestic’ activity is not dealt with by the House itself, but by the *House of Commons Commission*, a body created and regulated by statute rather than by internal parliamentary rules.<sup>44</sup> Similarly some ‘domestic’ activity is transacted by or through the Clerk of each House, acting as its Corporate Officer, again acting under statutory powers.

On the other hand, much business of an internal, institutional nature is dealt with either by the House itself or through its committees, such as the domestic committees, sometimes in conjunction with the relevant statutory bodies and officers.<sup>45</sup> As such there is potential for the exercise of a government’s majority in the handling of such business.<sup>46</sup> The Leader of the House, a Cabinet Minister,<sup>47</sup> has a long-established role in this respect, not only on behalf of the Government, but also on behalf of the House as a whole.<sup>48</sup>

This extends not just to the arrangement of business, but to the practice, procedure and operation of the House itself. For example, the main relevant committees, including the Procedure, Modernisation and Standards & Privileges Committees, will have government

<sup>42</sup> 22<sup>nd</sup> ed., 1997, pp200-210

<sup>43</sup> ‘Braithwaite Report’ to the Commission, Review of management and services, HC 745, 1998/99, July 1999 (<http://www.publications.parliament.uk/pa/cm199899/cmselect/cmhccom/745/intro.htm>)

<sup>44</sup> The membership of the Commission is the Speaker, the Leader of the House, a Member nominated by the Leader of the Opposition, and three other non-ministerial Members appointed by the House.... As the recent ‘Braithwaite’ review of House management and services remarked: “There is no statutory bar to the Government of the day having a majority on the Commission, but in practice this has never happened”(para4.4)<http://www.publications.parliament.uk/pa/cm199899/cmselect/cmhccom/745/part04.htm#4.3h>. The practice to date has been that the three non-Ministerial Members are one each from the two major parties and one from a minor party (on which see W Proctor, “Implementing Ibbs” (1992) 60 *Table* 66-74, 68). Another possible sign of the Commission’s autonomy is the practice of its spokesperson in the House (eg answering Questions) being the minor party Member.

<sup>45</sup> See generally the Braithwaite Report to the Commission, *Review of management and services*, HC 745, 1998-99, July 1999

<sup>46</sup> As there is no set period for ‘domestic business’, much business of this type would tend generally to arise in what may be thought of as ‘Government time’, under Standing Order 14 (<http://www.publications.parliament.uk/pa/cm199900/cmstords/pubbs--a.htm#14>).

<sup>47</sup> Until the Second World War, these functions were carried out by the Prime Minister.

<sup>48</sup> See *Erskine May*, p 212 (Commons) and p 214 (Lords). The role in the Upper House is somewhat wider, as it encompasses some of the procedural matters which, in the Commons, would be dealt with by the Speaker.

majorities.<sup>49</sup> Normally, the implementation of changes to House procedure and practice, whether by standing or sessional orders, resolutions or otherwise, are at the initiative of the Government. Reports of the Procedure Committee and the Modernisation Committee may well receive Government ‘replies’ and require Government action<sup>50</sup> in much the same way as departmental and other select committees do; neither Committee has any general executive power or scope to initiate change itself.

## E. Parliamentary staff

One factor which may need to be taken into account, to some degree, in the ‘parliament-government’ equation is the existence and extent of a distinct and impartial parliamentary staffing structure, a ‘parliamentary civil service’. As *Erskine May* notes (p184):

A broad distinction can be drawn between those officers drawn from the Members of each House concerned, and permanent officers in the employ of each House. In both Houses these permanent officers, in all departments, are politically neutral. They have no party affiliation and their prime duty is to the House itself, not to the Government of the day.

The then Speaker commented on this, following a point of order in 1995 about the implications for Parliament of the privatisation of HMSO:<sup>51</sup>

Although participation by parliamentary officials in Government decisions is, of course, quite improper, consultations between Government representatives and House authorities will be required at many stages of the proposed process of the privatisation of HMSO. However, there is an important difference between the two that must be maintained at all times, and I shall see that it is.

This can be contrasted, for example, with the situation in the US Congress, where most Congressional posts, including those for committees, are dependent on political patronage to some degree (whether by election or appointment). As described in a classic comparative study of Westminster and Washington, when dealing with several of the most senior House of Representatives positions, “these officers aim to give a fair service to all members; but they remain officers appointed by, and indebted to, the majority.”<sup>52</sup>

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<sup>49</sup> This is chaired by the Leader of the House, a rare example of a minister chairing a select committee in the last 30 years (see HC vol 355 c65w, 23 October 2000)

<sup>50</sup> It could perhaps be argued that motions in the name of the Leader of the House following Modernisation Committee reports, arise in practice out of her committee rather than ministerial capacity.

<sup>51</sup> HC Deb vol 268 c 1019, 13.12.00. The volume number is mistakenly given as ‘288’ in the relevant footnote in *Erskine May*, p184

<sup>52</sup> K Bradshaw & D Pring, *Parliament and Congress*, 2<sup>nd</sup> ed., 1981, p70. The US Congress model is considered more generally below.

This matter of the status of parliamentary staff is an extension of the more general issue of parliamentary facilities and resources, both generally and for Members individually and in groupings of various types, to enable Parliament and its Members to fulfil effectively their roles, especially that of scrutiny of legislation and executive policy and action.<sup>53</sup>

More widely, the existence of an parliamentary organisational structure which is not dependent, directly or otherwise, on political patronage may provide the potential for different methods of ‘internal’ or ‘domestic’ administrative decision-making and policy-making, and sources of advice and assistance to parliamentarians on matters of procedure, practice and operation.

It may be that the continuing development of the ‘internal’/‘domestic’ side of Parliament<sup>54</sup> will help make more transparent the different types of activity which take within, and even outwith, the precincts. Identifying these activities may make it clear which are appropriate to be undertaken within a ‘political’ context, involving to whatever degree, Members or Ministers, and which could be wholly or primarily undertaken through more administrative channels. The present position, itself evolving, illustrates the many ways in which parliamentary work can be undertaken, from permanent officials, through House Committees, to statutory bodies comprising Members and/or officials. Modes of organisation and operation which are both effective, and appropriate to the unique nature of a parliament, should assist in ensuring the status and autonomy of a parliament, especially in its relationship to an executive.

## F. The US Congress

The bicameral Congress of the USA is often cited as a model of a different form of parliamentary institution, one based on a strict separation of powers, where the executive is not present within the legislature. Its organisation, procedure and practice are based on a unique relationship between two constitutional and political factors:

- the separation of powers

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<sup>53</sup> See, for the example, the rather dated, but still useful (especially for the historical development) studies by Michael Rush, such as *The House of Commons: services and facilities 1972-1982*, 1983, a follow-up to M Rush & M Shaw, *The House of Commons: services and facilities*, 1974. A comparative context was provided by J Morgan, *Reinforcing Parliament: services and facilities for Members of Parliament: some international comparisons*, 1976. Such issues arise in the context of Members’ pay and allowances, on which see the latest issue of the Research Paper on *Parliamentary pay and allowances: current rates*, and the sources cited therein, such as SSRB reports. The 1996 SSRB review contained extremely useful material on the ‘job description’ of MPs: Report no. 38, Cm 3330, July 1996, 2 vols.

<sup>54</sup> A notable recent example of this is the creation of a Legal Services Office, within the Clerks’ Department, a development of the existing offices of Speaker’s Counsel. For background on the earlier situation see B Winetrobe, “Legal advice and representation for Parliament”, in D Oliver & G Drewry, *The Law and Parliament*, 1998, chap. 6

- the majoritarian principle.

The majoritarian principle involves two further related factors:

- the party system
- the spoils/patronage system

## 1. The separation of powers

The US constitutional system, enshrined in its written Constitution, is based on an interpretation of 18th century notions of the separation of the three major sources of state power – executive, legislative and judicial. *Article 1 Section 1* baldly states that:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

And *Section 6, Clause 2* of *Article 1* states that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This factor, and the almost total<sup>55</sup> separation of the executive from the legislature in particular, is the essential difference between the American and UK ('Westminster model') system, and, from a British parliamentary perspective, appears to infuse virtually everything about the Congress. It is not just the visible effect of not seeing the members of the Executive operating in, and through, the Legislature as members of that Legislature; it is that

- the executive and legislative functions of government reside more clearly in their own, separate institutions
- the two branches have their own democratic legitimacy and authority, as they derive from distinct electoral bases
- the Executive cannot directly control and use the constitutional power of the Legislature; it operates with rather than through the legislature.

As Bradshaw & Pring put it, when comparing the American situation with the Westminster model of executive dominance in parliament, "Congress does not have – has never had – this governmental motive force".<sup>56</sup> Thus Congress is an autonomous body<sup>57</sup> at

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<sup>55</sup> The Vice-President is the President of the Senate and has a casting vote, though in practice a Speaker *pro tempore* nearly always takes the chair.

<sup>56</sup> K Bradshaw & D Pring, *Parliament and Congress*, Quartet Books, London, 1973, p2.

the apex of the American constitutional and governmental system, to a degree unknown to the Westminster model. It can be examined both internally, as a dynamic institution, and externally, in terms of its relations to the executive, judiciary and other forces in American society.

## **2. The majoritarian principle**

For whatever reason, deriving in part from the circumstances of its creation, the American political system demonstrates a rather clear, pure version of the will of the majority.<sup>58</sup> It is a 'winner-takes-all' approach, exemplified in the 'first past the post' voting system. This extends to the control and operation of the Congress as an institution, where the electoral majority is entitled not only to dominate and, where able, prevail in the legislature's formal proceedings and activities, from law-making to oversight, but in the 'internal' organisation and administration, including the staffing, of the legislative branch itself.

The other side of this coin appears to be a more diluted and flexible approach to the rights and interests of the minority in Congress than at Westminster. There is an impression that the involvement of the minority in Congress is as much by the willingness or acquiescence of the majority, than by some perception of democratic entitlement. The application of constitutional principles by the judiciary, which seek to ensure protection of minority rights and interests, may perhaps not have the same force in the Congressional context because of the effect of the separation of powers doctrine.

The American constitution, with its separation of executive and legislative branches, produces a very different form of political party system to that which exists in the UK. Whereas in the latter a single electoral process usually produces a single outcome for both the composition of the legislature and the formation of the executive, in the US the Executive and the Legislature are formed by separate electoral processes. Parties are necessarily structured to reflect this,<sup>59</sup> and this results in them being more election machines than ideological or policy-making bodies.

This contributes to an apparent paradox in the Congress, in that party is the fundamental determinant of distinguishing between the 'majority' and 'minority', but may not be so crucial in determining the legislative actions or outcomes of Congress and its individual members. These factors produce one of the most graphic and surprising aspects of Congress, from a Westminster perspective: the extent of the blurring between the 'political' and 'permanent' structures and staffing of the legislature.<sup>60</sup> This also means that there is no clear distinction between 'support' services (finance, infrastructure, security

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<sup>57</sup> An instance of this is the fact that the counsel who draft legislation are Congressional rather than Executive officials.

<sup>58</sup> In its early days, before universal suffrage and civil rights, that majority would have had a rather more limited electoral base.

<sup>59</sup> The federal system is probably not such a distinctive determinant of the differing party systems in the UK and US, as it is to some degree reflected in sub-national government systems in the UK.

<sup>60</sup> This is discussed in section IID of this Paper

and the like) and direct legislative services such as the operation of committees and other functions regarded as clerking and related services at Westminster.

In areas where an impartial stance might be thought to be required, as in personal support services or in the regulation of ethical standards, the Congressional view appears to be that bipartisanship is often an adequate criterion, and there is no necessity for explicit non-partisanship. Even those offices which are expected to act impartially and on a confidential basis are often appointed on a partisan basis, and from a partisan background. Great reliance appears to be placed on values such as honour, trust and integrity to make such a system work effectively.

The balance between Chamber and committee is an important component in the Congressional culture. This is not just a matter of the location of political and legislative power; it also adds to the fragmentation of each House, and Congress itself, as institutions. Within the autonomous legislature, each committee is itself a relatively autonomous and self-sufficient body, not just in terms of its formal proceedings and deliberations, but also in terms of its organisation, staffing and administration. Loyalty to committee, by elected members and staffers alike, appears to be as important as to party or to Congress itself.

### **III The current debate<sup>61</sup>**

I should preface my remarks by making clear that I am not suggesting Labour in Government can dictate change: Parliament must own the process. Reform motivated by the need to re-establish the proper balance between a Parliament and the executive cannot simply be imposed by a new executive even if it is to the benefit of Parliament. Parliament must change itself.<sup>62</sup>

#### **A. The debate in Parliament**

There have been several occasions recently when the Commons has had the opportunity to debate the issue of executive-parliamentary relations.

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<sup>61</sup> The broader issue of Parliamentary reform was examined in two 1997 Research Papers: *Aspects of parliamentary reform*, RP 97/64, 21.5.97, and *Parliamentary reform: the Commons modernisation programme*, RP 97/107, 28.10.97. In addition to the sources cited in this section, see, for example, Andrew Tyrie, *Mr Blair's poodle: an agenda for reviving the House of Commons*, Centre for Policy Studies, June 2000

<sup>62</sup> Ann Taylor, then shadow Leader of the House, *New politics, new Parliament*, speech to Charter 88 seminar on reform of Parliament, 14 May 1996, p4

A major debate was that arising on an Opposition Day motion on 13 July 2000,<sup>63</sup> opened by the Leader of the Opposition and responded to by the Prime Minister. The Opposition's motion stated that "Parliament is the essential and definitive link between citizen and government and should remain the institution at the heart of the nation's democratic system", and called for "the urgent introduction of the reforms necessary to reassert the authority of the House and to reverse the bypassing and undermining of Parliament in recent years." While much of the Opposition's argument was in terms of what it saw as an accelerated decline since 1997, the debate ranged widely, and covered the proposals of the Liaison Committee and the Government's response.

In his speech, Mr Hague said (cc1093-4):

We need reforms and proposals that will make our Parliament stronger, improve our laws and hold our Government to greater democratic account. A good place to start is the recent report of the Liaison Committee, which is made up of 33 Select Committee Chairmen, 21 of whom are senior Labour Members, and the Chairman of which is the right hon. Member for Ashton-under-Lyne (Mr. Sheldon). The report recommends sensible reforms that build on the success of the Select Committee system in providing, as they say, independent scrutiny of Government, exposing mistaken and short-sighted policies and so on.

The Committee proposes to give the House of Commons more teeth by taking appointments to Select Committees out of the hands of the Whips--a principle that I, too, believe would enhance the independence and reputation of Select Committees. As a party leader, I am happy to accept that principle, and I invite the Prime Minister to accept it when he responds to my speech.

In reply, Mr Blair said (cc1098-9):

Parliament and the Executive are structures of power. They owe their legitimacy not to themselves, but to the people--the electors. Our task is to try--in so far as is possible and consistent with representative democracy--to do the people's will. The trouble with his vision of democracy and with going into each procedural aspect of the House of Commons is that that vision stops about two metres in front of his nose. We need to debate other and bigger issues if we are to explore the true relationship between the Executive and Parliament.... Of course modernising the proceedings of Parliament must be part of the objective. We are trying to do that....

We have taken major steps to modernise the other place and to improve the ways in which the House can work. I emphasise that the procedures of the House are not matters for the Government or the official Opposition. I want to make one thing clear: they are matters for individual Members of Parliament who exercise their own judgment on a free vote. They are truly matters for the House. If I may

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<sup>63</sup>HC Deb vol 353 cc1084-1179, 13.7.00

([http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm000713/debtext/00713-12.htm#00713-12\\_head0](http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm000713/debtext/00713-12.htm#00713-12_head0))

say so, following Madam Speaker's announcement yesterday, we shall elect her successor by a free vote, independently exercised, of the Members of the House.

The Liberal Democrat leader, Charles Kennedy, said (c 1109):

Liberal Democrat Members want an effective Parliament. An effective Parliament should be neither excessively obstructive nor excessively subservient. The opportunities available to the Opposition and to Back Benchers rest largely with obstruction. The opportunities available to those who are subservient to the interests of the Government of the day rest largely with having to toady and to follow the party and the Executive line.

There is a genuine debate to be had here. I pay tribute to the report from the Conservative party and from Philip Norton, who is one of the most distinguished academics in the land. I have known and worked with him over a number of years, and I respect him very much indeed. He has made an intelligent and a thoughtful contribution that, with the work of the Modernisation Committee, should provide the basis for a rational, all-party discussion.

On 26 July, Madam Speaker made a statement to the House on the occasion of her retirement. This included some observations on the role and state of Parliament, which received wide media coverage and comment.<sup>64</sup>

One of the privileges of the Speaker is to be able to represent this House abroad, both at Speakers' Conferences and on bilateral visits. I am glad to have been able to accept invitations to represent Westminster in every continent, and to have visited many countries, both large and small, on your behalf. What has always come across clearly to me is the respect felt abroad for the British system of parliamentary democracy. It comes across especially among the emerging democracies of central and eastern Europe, where there is a very keen desire to learn from our experience as they develop their own systems of government. I know that the advice and assistance that we are able to give at both parliamentary and staff level is enormously appreciated.

Sadly, however, I have to say that the high reputation of Westminster abroad is not entirely reflected at home. I know from my postbag how much disillusionment about the political process there is among the general public. The level of cynicism about Parliament, and the accompanying alienation of many of the young from the democratic process, is troubling. It is an issue on which every Member of the House should wish to reflect. It is our responsibility, each and every one of us, to do what we can to develop and build public trust and confidence.

Let us make a start by remembering that the function of Parliament is to hold the Executive to account. [Hon. Members: "Hear, hear."] That is the role for which history has cast the Commons. It is the core task of Members--not merely to act

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<sup>64</sup> HC Deb vol 354 cc1113-4

as representatives of their constituents, important though that certainly is. It is in Parliament in the first instance that Ministers must explain and justify their policies. Since becoming Speaker in 1992, I have made my views known about that, both publicly and behind the scenes, to both Governments. I have taken action to ensure that those who advise Ministers should never overlook the primacy of Parliament. This is the chief forum of the nation--today, tomorrow and, I hope, for ever.

Question Time offers a prime opportunity to hold Ministers to account, and I share the disappointment at the slow progress that is made. Too many Back-Bench Members are being deprived, by the long-windedness of colleagues, of their chance to question Ministers. We are not moving down the Order Paper as we should. There is also an issue of quality as well as quantity. There is, from time to time, a risk that engagement with the real issues is seen to be overshadowed by political point scoring simply for its own sake.

Parliament's other prime function is the scrutiny of Government legislation. There is, I believe, throughout the House a general recognition that that is an area ripe for improvement. Committees of the House, as well as outside bodies, are making a substantial contribution to the debate. The issues are serious and complex, and there is no simple solution. The debate should not be conducted, however, on party lines--nor on the simplistic basis of the Executive versus the rest of us. The objective, to my mind, must be improved scrutiny leading to better legislation--perhaps through the greater use of pre-legislative arrangements; I think that they might be useful to us. In addition, the issue is as much one of quality of scrutiny as of quantity.

Furthermore, the House must be prepared to put in the hours necessary to carry out effective examination of the Government's legislative programme. If that means long days, or rearrangement of the parliamentary year, so be it. Of course, I have been here long enough to recognise the importance of enabling parliamentarians to enjoy a domestic life; it should not be impossible to meet both objectives--but where there is a clash, the requirements of effective scrutiny and the democratic process must take priority over the convenience of Members.

In early November, two major debates provided scope for considered examination by the House of the significant issues surrounding the relationship between Parliament and the Executive. The debates on Tuesday 7 November<sup>65</sup> related to the proposals in the Modernisation Committee's recent report on the programming of legislation and the timing of votes.<sup>66</sup>

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<sup>65</sup> HC Deb vol 356 cc 172-288, 7.11.00  
([http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm001107/debtext/01107-09.htm#01107-09\\_head1](http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm001107/debtext/01107-09.htm#01107-09_head1)). Much of the relevant discussion arose in debate on the preliminary business motion.

<sup>66</sup> 2nd Report of 1999/2000, HC 589, July 2000  
(<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmmodern/589/58902.htm>).

In the debate on the preliminary business motion, the Shadow Leader of the House encapsulated the approach of the Government's critics who regarded these modernisation measures as of more general constitutional importance:

As several hon. Members on both sides have said, this is not a party political matter; it is a matter for Parliament. It is at the heart of our democratic proceedings. The way that we deal with it tonight will be seen as a reflection of the extent to which the Government, of which the right hon. Lady is a member, respect the right of individual hon. Members to challenge the Executive, and the right of an official Opposition to have sufficient time and opportunity to challenge the Government of the day, whichever party is in government.

I see the right hon. Lady's papers on the Dispatch Box. I hope that she will address that issue. No doubt the House will want to consider other important matters of a constitutional nature, and it would be wrong of the Modernisation Committee--I say this as a new member of the Committee--to give equal weight to matters such as Westminster Hall and the motions before the House tonight.

There is one litmus test that should be applied to our deliberations tonight, whether in this debate or on the substantive matters to follow: do the proposals strengthen the Executive, or do they strengthen the right of hon. Members to scrutinise, question and debate? That is the test. It is not a matter of hon. Members' personal arrangements for attendance in the House. The fundamental question has been reflected in many of the contributions that we heard.

For the Liberal Democrats, Paul Tyler said (c240):

I take as my text a quotation from the minority report put before the Modernisation Committee by the right hon. Member for North-West Hampshire. He said:

We believe that the terms of trade between Parliament and Executive need to be tilted back towards Parliament.

I agree, and I think that the hon. Member for Ealing, Acton and Shepherd's Bush and Members on both sides would do so, too. I was here in 1974 and I remember what Parliament was like then. Under successive Governments, attempts have been made by those on the Front Benches--and sometimes in collusion, it has to be said--to prevent the House of Commons from acting as effectively as it should. That is why I welcome the Government's agreement to the Liberal Democrats' suggestion that there should be an informal ad hoc sessional business committee. That would provide Back Benchers and both Opposition parties with real opportunities to tilt the terms of trade back towards the House.

Ministers tended to concentrate on the specific modernisation proposals, rather than the wider issues relevant to this Paper. For example, winding up the debate, Paddy Tipping said (c272):

Programming provides something for everyone: the Government know when they will get their business through, should the House agree it; the Opposition have the power to determine the terms of debate and to choose what will be dealt with in prime time; and all of us get some certainty about our working hours. Being able to plan leads to better use of our time and greater efficiency of our work.

However the wider constitutional aspects arose directly in the debate, on an adjournment motion, the following Thursday on the Liaison Committee's reports.<sup>67</sup> Opening the debate, Robert Sheldon, who chairs the Liaison committee, considered the bipartisan nature of select committees (c474):

Some people considered that such a state of affairs would be difficult to achieve because Parliament does not have the separation of powers evident in the United States Congress. We understand that the first priority of hon. Members is to support or oppose the Government, but it is possible, in a Select Committee, to move away from that confrontation and look at the facts of a matter. It is interesting that the trust and confidence that grows between Select Committee members means that it is more difficult for them to play the party game at the expense of the investigative role that is their proper task. Some saw the stronger party system as a barrier to achieving meaningful agreement.

In practice, such agreement generally has been achieved to the benefit of the inquiry process and the holding of Ministers to account. The Select Committee system has shown that determined Members can be surprisingly effective. Our Select Committees have to operate without the strength given by the separation of powers. Within the context of the Government and the Opposition, with their own agendas, it is possible to achieve informed and more objective conclusions.

The Leader of the House's speech is of importance in the context of this Paper, as the following extracts will illustrate (c480-1):

The Liaison Committee itself describes its proposals as modest. It does itself less than justice. My own view is that the overall impact of its recommendations would be profound. They would impinge on the role of every individual Member in the House, not just on the way in which the House deals with the Executive. It is arguable that they would even impinge on our constitutional conventions because it seems to me that the Committee envisages a perceptible shift away from the long-established role of Select Committees--perhaps going back hundreds of years--to scrutinise decisions of Government, and towards Select Committees beginning, unprecedentedly, to substitute their judgment for that of Government. *[Interruption.]* I am glad to hear that the Opposition agree that that is what is envisaged. It is, of course, worthy of discussion, but it is a profound and not a modest change.

However, as I have already said, one fundamental principle underpins the Government's approach to Select Committee work: it is that Select Committees exist, as they always have, to scrutinise the decisions made by Government, not to substitute their own judgment for that of the Executive. Those who draw simple comparisons between our work and that of other legislatures sometimes overlook the huge difference between a legislature in which the Executive is not represented, and one from which the Executive draws its authority and to which

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<sup>67</sup> HC Deb vol 356 cc473-541, 9.11.00

members of the Executive are, as Ministers, personally accountable. For example, accountability for ministerial appointments runs through the Minister directly to the Members of this House as the legislature, and the Minister is answerable for the decisions that he or she takes.

Barry Sheerman, who chairs the Education sub-committee, intervened (cc482-3):

**Mr. Sheerman:** My right hon. Friend and I have been friends for a long time, but I have to tell her that I think she is missing the issue underlying the Committee's report and the work that we put into it, which is the role and authority of Parliament, not of the Select Committee system. Those who have been Members of Parliament for some time know that this place is dying on its feet. If we do not find a proper role for Parliament, we shall become merely subservient to Ministers and the Executive. My right hon. Friend says that Parliament is a busy place in which people have lots to do, but, after many years as a Member, I have come to believe that, soon, parliamentary private secretaries will start to have parliamentary private secretaries. Everyone on the Front Benches on both sides seems to have a PPS, and we cannot run a Select Committee system when, every five minutes, someone is promoted to PPS or junior Minister.

**Mrs. Beckett:** My hon. Friend is right to say that he and I are friends of long standing. That is why I am sorry to disagree with him. I am genuinely dismayed to hear him echo that easy and, in my view, empty criticism of the role of Parliament, expressed most frequently by Opposition Members and used in a partisan way--

**Mr. Sheerman** *indicated dissent.*

**Mrs. Beckett:** I know that my hon. Friend is not saying that--he believes that the problems go back many years and I accept that the issues have long been the subject of argument. They are, in a sense, old chestnuts--what happened to the giants of yesteryear, or why are today's politicians so trivial? The debate has been going on for centuries. Perhaps I am too old-fashioned for the taste of my hon. Friend and those who are participating in the debate, but I regard being elected to be a Member of Parliament as one of the greatest honours that the people of this country can confer on one of their fellow citizens and I reject with contempt the assertion recently made by a fellow Member of Parliament that being a Member of Parliament is not work for a grown up. There is plenty of work to be done--certainly, I have never had any difficulty finding work to do, even when I have not held office. ...

First, let me tell my hon. Friend the Member for Huddersfield (Mr. Sheerman) that I do not accept that the House is as diminished, nor that it is as subservient, as it has become fashionable to allege. However, I accept that there is always room for improvement in the way in which we carry out our duties and I am always prepared to consider proposals on how we might do so.

Winding-up for the Opposition, Nigel Evans said (c536):

It is, however, right to give the report proper deliberation. It is timely and comes at a time when journalists are writing about how Parliament has changed. The hon. Member for Kingston and Surbiton (Mr. Davey) says that we must find a new role for it but, irrespective of our judgment of what the role of Parliament

and the House of Commons has been, we can all agree that the changes suggested in the report are worth considering. I am not saying that we should adopt them all, but it is right for us to have the opportunity, hopefully in the near future, to say which of them we should take on board to strengthen the House of Commons.

The Opposition day debate on 13 July rehearsed the arguments well and clearly demonstrated the desire of hon. Members of all parties to strengthen Parliament. The fire for strengthening Parliament burns brightly among some Government Back Benchers, but not so brightly--indeed, it is flickering badly--among members of the Executive. This is all about bringing the Executive to account. That is a vital role for both Opposition and Government Back Benchers.

Like many of my right hon. and hon. Friends, I break out in a cold sweat when I hear about changes that are to take place under the guise of modernisation. We all know what modernisation means. It is a euphemism for streamlining the House so that a quantity of legislation can be got through as quickly as possible. The quality of that legislation does not matter any more, and adding value is not deemed so important. As a result, we have longer recesses, truncated days, and timetabled or guillotined legislation.

Winding-up the debate, Mr Tipping concluded (c540):

Many people have spoken tonight, and some have said that the Government's concessions do not go far enough and that we cannot satisfy them. However, I hope that when the dust has settled, right hon. and hon. Members will reflect on everything that has been said today and accept that the Government have already made changes to improve matters for Select Committees. For our part, we too will reflect on this debate.

We have not agreed to debates on substantive motions, but we have provided more time in Westminster Hall than most reformers could ever have dreamed of. Westminster Hall is indeed a parallel Chamber. Ministers must take debates there as seriously as they do on the Floor of the House, and we will ensure that they do. We have extended the European scrutiny system. We have agreed to the Procedure Committee's proposals on scrutiny of treaties. We have already eased restrictions on joint working at the request of the quadripartite Committee, and will do more. We have sent draft legislation to Select Committees for scrutiny, and we hope to do much, much more. I hope that this will be a defining moment--a defining task--of the Government.

Right hon. and hon. Members may not consider that the changes go far enough, but there has been more change in three years than in the previous 15. The balance may not have shifted far enough for everyone, but we must recognise that it is already shifting towards the Committees.

On Monday 20 November, the House debated the third and fourth reports of the Modernisation Committee this session, on Thursday sittings and sittings in Westminster

Hall respectively.<sup>68</sup> Although there was not as much discussion of the wider issues relevant to this Paper as there was in the 7 November debate on programming of legislation and deferred divisions, some Members did refer to various aspects, including opportunities for scrutiny.

## B. Mr Hague's 13 November speech on the constitution<sup>69</sup>

Taking as his theme that “we live in a country where Parliament is increasingly diminished, marginalised, and sidelined”, the Leader of the Opposition devoted a significant part of his Oxford speech in November to the role of Parliament and its relationship with the Executive:

But perhaps there is a connecting theme here after all. For with every constitutional change that this Government has introduced, our Parliament at Westminster has been made weaker, not stronger.

Peter Mandelson has said that ‘the age of representative democracy is slowly coming to an end’. But it must not be allowed to come to an end; for this is a trend we can – and must – reverse: there is a huge amount at stake. So I am looking forward one day to standing in a strong, representative, democratic Parliament and saying that the age of Peter Mandelson has come to an end.

I am not pretending that it is only this Government's reforms that have weakened Parliament. For over a hundred years, it has been losing power to Governments of all political persuasions, including the last Conservative Government. The steady transfer of power to the institutions of the European Union has also had an unprecedented impact on our Parliament, going far beyond other international treaty agreements; and the growth of pressure group politics and the rise of the mass media have opened up new, seemingly more direct, conduits between the people and Government. ...

Without a strong Parliament, democratic accountability in Britain is impossible. No one in the modern world has come up with an alternative that allows the people such direct and sustained scrutiny of the Government. At least since the time of William III, Parliament has been the place where government is called to account in Britain. But not only is the parliamentary constituency the most direct link between our national institutions and a local town, its people and its businesses, but Parliament also provides political manifestation of what Dicey

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<sup>68</sup> HC Deb vol 357 cc22 – 108, 20.11.00 ([http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm001120/debtext/01120-06.htm#01120-06\\_head0](http://pubs1.tso.parliament.uk/pa/cm199900/cmhansrd/cm001120/debtext/01120-06.htm#01120-06_head0)). See HC 954 and HC 906 of 1999/2000, November 2000 (<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmmodern/954/95402.htm> and <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmmodern/906/90602.htm>).

<sup>69</sup> *A Conservative view of change*, delivered at Magdalen College, Oxford, 13 November 2000, Conservative Party Press Notice 2268/2000

called ‘the sovereignty of the people’. It is this sovereignty, granted at the ballot box, that gives the Government its working majority in the House of Commons. And it is that majority from which the strength of any Government is derived.

Unlike the burgeoning interest group politics, Parliament is a forum that gives a voice to all the people: it is a place where weaker voices are heard, not just those who shout the loudest; a forum where every member represents all his constituents and not just those who give him or her their support.

As Ivor Jennings wrote, ‘Members of Parliament know the British people to be free people, and themselves the representatives of that freedom’. Limited and accountable government is the bedrock of our freedom. And when Parliament is bypassed, people feel their historic liberties are under threat.

And, having set out his proposals to deal with the so-called ‘West Lothian’ or ‘English’ Question’,<sup>70</sup> he continued:

The way Parliament itself operates is a second area where my Party is bringing forward proposals for reform. The House of Commons is the keystone of democratic accountability in this country. Millions more people vote in elections to the House of Commons than any other elected institutions in this country. It is what provides the crucial link between citizen and government.

And its current predicament – diminished, marginalised, sidelined – provides the reason for our current constitutional malaise.

As I said earlier, the decline in our Parliament is nothing new; indeed, Parliament’s power to hold the Executive to account has been declining for over a century. Gone are the days when Governments were frustrated by what George II called ‘that damned House of Commons’. As the business of government has grown, and its pace quickened, it has become more difficult for Parliament to review every part of it. As a junior Minister I always found it was fairly easy to get legislation through the House of Commons – it was in the House of Lords that I needed to win the argument.

Under this Government, Parliament’s decline has been accelerated rather than arrested. They have cut Prime Minister’s Question Time from twice to just once a week; they have been happy to guillotine automatically any legislation they choose, without any corresponding constraint on the quality or quantity of government legislation; they have divorced votes from debates. ....

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<sup>70</sup> This is not considered here. See generally Research Paper 98/3, *The Scotland Bill: some constitutional and representational aspects*, 7.1.98, section 11 (<http://www.parliament.uk/commons/lib/research/rp98/rp98-003.pdf>), and in the context of Lords reform, *Research Paper 99/7, The House of Lords Bill: Lords reform and wider constitutional reform*, 28.1.99, section IV (<http://www.parliament.uk/commons/lib/research/rp99/rp99-007.pdf>).

[I]t is in renewing the House of Commons that we must concentrate our efforts. That is why I set up the Commission to Strengthen Parliament, under the chairmanship of Professor Philip Norton, Lord Norton of Louth, that published its report in July.

The Norton Report is the most authoritative and important contribution to the debate about parliamentary democracy in Britain for a generation. The Report includes recommendations on reforms to both Houses, but let me concentrate on the House of Commons today, as it is an area that this Government has neglected.

It is a wide-ranging report. While some of its recommendations might sound dry or technical, they involve fundamental changes to how the House of Commons works: increasing the depth of questioning of Ministers; putting the parliamentary timetable in the hands of committees of the House; making the publication of Bills in draft standard practice; improving scrutiny of secondary legislation and delegated instruments; substantial improvements to the examination of European legislation; and allowing civil servants to supply information to Parliament.

We are looking closely at every one of these proposals. We are not signed up to every dot and comma of the Norton Report, but it does form the route-map that will guide our reforms to Parliament.

I know many of its proposals would make life for a future Conservative Government more difficult. But not only will a stronger House of Commons make for better legislation and help us to avoid the mistakes that have been made in the past. It is also one of the objectives of Government to provide a strong constitutional framework, even if that does mean that it will be inconvenienced from time to time on the matters of the day.

Already I have accepted its recommendation to restore Prime Minister's Question Time to two slots a week, and extend those to twenty minutes each. Prime Minister's Question Time not only brings the Prime Minister into the House of Commons, but it is the only means by which he is immediately called to account by the directly elected representatives of the people.

Restoring Prime Minister's Question Time to twice a week will make Parliament more relevant. Last month, Tony Benn struck a chord in all parties when he told the House of Commons: 'We have been in recess since July, and during that time there has been a fuel crisis, a Danish no vote, the collapse of the euro and a war in the middle east, but what is our business tomorrow? The Insolvency Bill [*Lords*]. It ought to be called the Bankruptcy Bill [*Commons*], because we play no role.'

Another way to make Parliament more relevant is to give Departmental Select Committees more teeth. They already are an important part of the role Parliament plays, because they allow the proper, detailed enquiry that cannot take place on the floor of the House on every subject. And they ensure ministers and civil servants are always kept under the watchful eye of scrutiny.

The existing system of Select Committees, where they shadow government departments, was set up in 1979. They have already proved a major success, but I want to strengthen them further. At the moment members of select committees from all Parties, are selected by party managers – and that can't be right. The government says it is 'not convinced that a change to the current system is needed'. But it clearly makes no sense that a body designed to scrutinise the Executive should have most of its membership determined by that Executive. Our proposals for reform have a great deal of cross-party support.

This is one step in setting up a separate career structure for MPs. Parliament will never be independent and assertive if most of its members have the prospect of ministerial appointment at that back of their minds. Looking across the Atlantic, the powerful committee structure is one of the most attractive features of the United States' system. Just as a straightforward recount procedure is the most attractive feature of ours.

### **C. The Hansard Society Scrutiny Commission**

The Hansard Society established in September 1999 a Commission, chaired by the Conservative peer and former Leader of the House of Commons, Lord Newton of Braintree, to examine the scrutiny role of Parliament. This will complement its earlier Commission on the legislative process, which reported in 1993.<sup>71</sup> Full details of the Commission's activities and publications are on the Hansard Society's website.<sup>72</sup>

The remit of the Commission is "to examine how effectively Parliament scrutinises the work of government and holds the executive to account for its actions ... Its final report, due to be published in the spring of 2001, will endeavour to establish a set of core principles for the scrutiny of the executive. It will highlight examples of good practice and, where necessary, recommend changes to ensure effective parliamentary scrutiny of government." The Commission issued a consultation paper which outlined its thinking,<sup>73</sup> and the various issues it is examining, including:

What is the purpose of parliamentary scrutiny? How effective is parliamentary scrutiny? How could it be improved? How effective are select committees in holding government to account? Are parliamentary questions an effective form of scrutiny? Is there adequate scrutiny of government spending? What is the role of the House of Lords in scrutinising government? What is the impact of devolution on government accountability? How can individuals and organisations outside Parliament be better involved in the scrutiny process?

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<sup>71</sup> *Making the law*, 1993 ('the Rippon Report')

<sup>72</sup> [http://www.hansard-society.org.uk/parlReform\\_dlb1.htm](http://www.hansard-society.org.uk/parlReform_dlb1.htm)

<sup>73</sup> <http://www.hansard-society.org.uk/parlReformConsult.htm>

To date it has produced three discussion papers:<sup>74</sup>

- A Brazier, *Systematic scrutiny: reforming the select committees*, July 2000<sup>75</sup>
- G Power, *Creating a working Parliament: reform of the Commons Chamber*, October 2000
- A Brazier, *Parliament and the public purse: improving financial scrutiny*, December 2000

In the Power paper, it is argued that a perceived decline in the role and influence of the Commons chamber:

has serious implications for democracy. Through parliamentary debates, questions to ministers and statements to the House the chamber oversees the work of government on behalf of the electorate. The support of MPs legitimises government activity and the Government derives its authority from its ability to carry majority support in the chamber. The chamber is the ultimate forum in our parliamentary democracy for calling ministers to account for their actions. “Parliament needs to retain and protect its role”, as the 1996 report from the Public Service Committee into ministerial accountability noted, but “to do so, it has to be more effective in fulfilling it.”

This paper assesses the chamber’s role in scrutinising and holding government to account. It investigates the causes and extent of the chamber’s decline. By examining parliamentary procedure and practice, and the culture of Westminster it analyses how well equipped MPs are to ensure systematic accountability from government. The paper concludes with a series of recommendations designed to reflect the challenges to Parliament’s role and the variety of tasks that today’s MPs are expected to perform. The recommendations seek to create a Parliament where debate is topical and where the committees and the chamber better complement each other in the pursuit of accountability. In short, it aims to create a working Parliament.<sup>76</sup>

Its conclusion was as follows:

In her farewell speech as Speaker, Betty Boothroyd expressed her concern about the low public perception of Parliament, but described the chamber as “the chief forum of the nation – today, tomorrow and, I hope, for ever.” If it is to retain that role it needs to be reformed so that it performs its core tasks more effectively. The chamber is the one place where the Government is legitimately called to account on behalf of the public, yet other mechanisms are superseding Parliament in this respect. The media, the courts and a host of Commissions and regulatory

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<sup>74</sup> The Society also publishes regularly other papers of Parliamentary interest, not directly connected to the Commission. See, for example, the collection of essays edited by Greg Power, the Commission’s Secretary, *Under pressure: are we getting the most from our MPs?*, 2000

<sup>75</sup> For a summary see the Society’s press release of 10 July: <http://www.hansard-society.org.uk/pr1.htm>

<sup>76</sup> Introduction, p2.

bodies stand in judgement over Government performance and the delivery of public services. Parliament needs to reflect these changes so that it draws on and complements the work of these other bodies. The chamber should be at the centre of political debate, but to do so it must address the question of what it is for and thereby clarify its role, improve its procedures and reflect more closely the public interest.

#### **D. The Norton Report<sup>77</sup>**

In July 1999, William Hague set up a ‘Commission to strengthen Parliament’, chaired by the Conservative peer and politics professor Lord Norton of Louth, “to examine the cause of the decline in the effectiveness of Parliament in holding the executive to account, and to make proposals for strengthening democratic control over the Government.”<sup>78</sup>

In the opening paragraph of the introduction to its report, published in July 2000, the Commission stated that

Parliament is the essential and definitive link between citizen and government ... Parliament remains the institution at the heart of the British political system because it alone can confer legitimacy ... Parliament is the body through which government is called to account between elections, the body that ensures that the voice of electors - individually and collectively - is heard by government between elections. It is, in its very essence, the buckle that links citizen and government.

It continued:

Other bodies may fulfil some, but only some, of the tasks ascribed to Parliament. ... However, Parliament alone can carry out the full range of tasks ascribed to it. It alone has the constitutional authority to give assent to measures of public policy. It alone has the popular legitimacy to do so. ....

In short, Parliament matters. The best way to appreciate how much it matters is to consider what it would be like if it did not exist. ... The health of the political system rests on having an effective Parliament.

*Citizens need an effective Parliament.* They need a body that can call the government to account, that can ensure that government answers for its actions and the actions of civil servants. They need a body that can scrutinise and, if necessary, change the legislative proposals brought forward by government - proposals that, once approved by the Queen-in-Parliament, have the force of law. They need a body that can ensure that their voice is heard by government when they have a grievance, be it about the impact of a policy or the absence of a

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<sup>77</sup> *Strengthening Parliament*, July 2000, published by the Conservative Party.

<sup>78</sup> It was also asked “to work up details of William Hague’s proposals for the examination of English bills in a post-devolutionary Parliament.”

policy. They need the security of knowing that, if there is a problem, there is a body to which they can turn for help, a body that can force public officials to listen.

*Government needs an effective Parliament* . It needs it because its authority derives from Parliament. Government is elected through Parliament and its political authority derives from that very fact. Undermine the authority of Parliament and ultimately you undermine the authority of government. The more government seeks to achieve autonomy in making public policy, the harder it has to work to maintain its capacity to achieve desired outcomes. The more it distances itself from Parliament, the more it undermines popular consent for the system of government. It needs Parliament to give its approval to measures and, prior to doing so, to scrutinise those measures.

Parliamentary scrutiny should be seen by government as a benefit, not a threat. A healthy and vibrant government is one that is able to justify its measures and welcomes critical scrutiny. Riding roughshod over Parliament achieves no benefit: it undermines the popular legitimacy of government as well as Parliament, it results in poor - and potentially unpopular - legislation and it may require corrective legislation at a later stage. Ultimately, no one - government, Parliament or citizen - benefits from such a situation. An effective Parliament ensures that government engages in rigorous thinking, is able to argue convincingly for what it proposes, and that its proposals emerge after robust probing -probing that takes place in the full glare of public exposure. In essence, good government requires an effective Parliament.

Parliament is, then, crucial to the health of our political system. To undermine Parliament is to undermine the coherence, the stability and the authority of our political system. To strengthen Parliament in fulfilling its functions is to boost the health of the political system. That is our starting point.

The Commission accepted the “basic attributes” of the ‘Westminster model’ of parliamentary government, where “Parliament is not a policy-making legislature. It is a reactive, or what has been dubbed a policy-influencing, legislature.” Its essential attribute “is that it facilitates accountable government.... Between elections, the government is accountable to the electors through Parliament. Parliament is not there to govern. It is there to ensure that that part of it which forms the government justifies itself and, if necessary, pays heed to the views of the electors.” This model “also serves to deliver a system of government that is coherent, responsive and, on the whole, effective and stable. It delivers stability through ensuring the essential combination of effectiveness and consent. It enables government to raise the resources necessary to maintain its commitments of public policy (effectiveness) and citizens to accept the legitimacy of the process by which those resources are authorised (consent). Parliament is crucial to maintaining that balance. It authorises the government's programme but, in order to maintain popular consent, has to ensure that what the government wants is subject to critical scrutiny and that the voices of worried citizens are heard.”

The Commission believed that:

those attributes are, in combination, powerful and cannot be matched by any of the alternative models on offer. We accept that the model is under challenge, and has been for some time from critics of the system and that it is affected by constitutional changes of recent years. However, we believe that the accountability that is at the heart of the model is fundamental to good government. To move away from that would, we believe, serve ultimately to undermine the legitimacy of the political system. Our system of government allows for popular wishes to be translated into legislative outputs and for electors to remove policy makers from office. We believe that the essentials of our system of government are sound. Our task, therefore, is not to create a new constitutional framework for the United Kingdom but rather to ensure that the balance within the Westminster system is achieved. Government should be allowed to govern but in so doing it must be subject to critical scrutiny by Parliament. If the balance is not quite right - and we believe that it is not - then our task is to recommend ways in which it can be put right.

#### **IV Parliamentary scrutiny of governmental prerogative power**

Not all governmental power derives from statute, and the provenance of such power can influence the scope and extent of any parliamentary involvement in scrutiny of its exercise. As Griffith & Ryle's *Parliament* notes, there are some areas of Parliamentary business, other than in the legislative field, arising from various forms of governmental activity: "The second category of business is that which does not require formal parliamentary authorisation and for such business debating opportunities are not automatically guaranteed. This non-legislative business falls under a number of different heads."<sup>79</sup> These are in relation to ministerial activity:

- under prerogative powers
- under statutory powers which grant wide areas of discretion in the taking of policy decisions without specific parliamentary sanction, such as major capital projects
- under broad statutory powers in the taking of policy decisions without seeking parliamentary authority, other than broad financial approval, such as a switch of emphasis in policy and resources within a particular field.

Much of this activity may come before the House, sometimes at the Government's initiative, but more often at the initiative of others, such as the Opposition parties, or backbenchers. There may also be various conventions in place to ensure that some

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<sup>79</sup> J Griffith & M Ryle, *Parliament: functions, practice and procedures*, 1989, p8

business of this sort does come before the House, such as scrutiny of international treaties,<sup>80</sup> or the annual or other regular debates on particular topics, such as defence and foreign affairs. The issue of delegated legislation is an extremely important one in executive scrutiny terms, but is too broad to be considered in any detail in a Paper of this sort.<sup>81</sup>

Of more direct relevance here is prerogative power, that is the residue, often extensive, of power exercisable on behalf of the Crown. This power can be regarded, along with its statutory powers, and with its practical control of Parliament's legislative sovereignty, as one of the key sources of governmental power, especially in the executive-parliamentary context. A distinction needs to be made between the monarch's personal prerogatives and other prerogative powers. The main personal prerogatives are those in relation to the appointment of a prime minister and other ministers and the dissolution of Parliament -- both, almost by definition, matters of paramount constitutional importance to the executive-parliamentary relationship.<sup>82</sup> The extent of scrutiny of the exercise of prerogative powers is a matter of the procedural rules and practices of the House.<sup>83</sup> For example, *Erskine May* sets out the limits of the questioning of ministers (p298):

Questions may be asked of the Ministers who are the confidential advisers of the Crown regarding matters relating to those public duties for which the Sovereign is responsible. It has been ruled that the Prime Minister cannot be interrogated as to the advice that he may have given to the Sovereign with regard to the grant of honours, or the ecclesiastical patronage of the Crown, or the appointment and dismissal of Privy Councillors or the dissolution of Parliament.

Two recent example of PQs are instructive:<sup>84</sup>

#### **Royal Prerogative**

**Mr. Corbyn:** To ask the Secretary of State for the Home Department if he will introduce legislation to bring the exercise of the Royal Prerogative under parliamentary scrutiny. [109655]

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<sup>80</sup> See *Parliamentary scrutiny of treaties*, 2nd report of the Procedure Committee, HC 210, 1999-2000, July 2000, (<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmproced/210/21002.htm>) and the Government's response of 1 November, deposited in the Oriol Room as an 'unprinted command paper', UC 72, 99/00

<sup>81</sup> See generally, section II of Research Paper 94/16, and the *recent Procedure Committee report*, 1st report of 1999-2000, HC 48, March 2000 (<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmproced/48/4802.htm>)

<sup>82</sup> See *Erskine May*, pp10-11 and 55-59.

<sup>83</sup> There has been a growth in the last 15 years or so in the ability and willingness of the courts to scrutinise and review prerogative powers and their exercise. See the leading cases of *CCSU v Minister for the Civil Service* [1985] AC 374 ('GCHQ case') and *R v Home Secretary ex p FBU* [1995] 2 AC 513 ('Fire Brigades Union/criminal injuries compensation case')

<sup>84</sup> HC Debs vol 344 c865w, 22.2.00, vol 348 c595w, 20.4.00.

**Mr. Mike O'Brien:** No. With very few exceptions, the Royal Prerogative is exercised only on the advice of Ministers. This provides accountability to Parliament for its exercise.

and

#### **Royal Prerogative**

**Mr. Baker:** To ask the Prime Minister if he will list the occasions in the last three months when powers under the Royal Prerogative were exercised on advice from him. [118412]

**The Prime Minister:** As Prime Minister and Minister for the Civil Service, a number of powers under the Royal Prerogative are exercised on my advice. These include a range of public appointments, the conduct of foreign affairs and defence, and the management and regulation of the Civil Service. Records are not kept of the individual occasions on which such powers are exercised.

A leading constitutional law textbook neatly sums up the parliamentary aspect of the prerogative:<sup>85</sup>

Although an Act of Parliament may abolish or curtail the prerogative, the prior authority of Parliament is not required for the exercise of a prerogative power. ... Parliament may criticise ministers for their actions and for their consequences; but Parliament has no right to be consulted in advance, except to the extent that a conventional practice has developed of assuring the opportunity for such consultation....

A recent text on the present Government's constitutional reform programme puts it more succinctly:<sup>86</sup>

The controversial feature of these prerogatives is that they are all extra-parliamentary powers. In other words, major policies and decisions may be adopted by the government under the prerogative without the need for any formal approval by either House of Parliament; indeed, such powers may be exercised without any form of parliamentary scrutiny or discussion at all.

From time to time, there are proposals to abolish prerogative powers or to subject their exercise to greater parliamentary scrutiny.<sup>87</sup> For example, see Tony Benn's *Crown Prerogatives (Parliamentary Control) Bill*<sup>88</sup>, introduced in March 1999. The Liberal Democrats proposed, before the last election, that "the Westminster Parliament will take over defined prerogative powers, including the appointment by the House of Commons of

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<sup>85</sup> A Bradley & K Ewing, *Constitutional and administrative law*, 12<sup>th</sup> ed., 1998, p274

<sup>86</sup> R Blackburn & R Plant, "Monarchy and the royal prerogative" in R Blackburn & R Plant (eds.), *Constitutional reform: the Labour government's constitutional reform agenda*, 1999, p149 For a popular discussion see *Guardian* 6 December 2000 'How prerogative thwarts democracy'

<sup>87</sup> See generally, D Gladstone, "What shall we do with the Crown prerogative?" (1998) 4 *Journal of Legislative Studies* 1-16

<sup>88</sup> Bill 55, 1998-99.

the prime minister, and the power to ratify treaties” and that “the Royal Prerogative will be abolished. All executive powers will be derived from the Constitution or from laws passed by an appropriate legislature”.<sup>89</sup> Its 1998 Policy Review Commission Report had, as one of its principles for constitutional reform, that “the Royal Prerogative would be abolished,”<sup>90</sup> and this was set out in more detail in a policy paper, which was endorsed by the party’s 2000 conference:<sup>91</sup>

3.1.2 We believe that the new constitutional settlement, when it is complete, should be entrenched in a written constitution, which derives its validity from the consent of the people and which defines and limits the powers which politicians can exercise. In particular, the exercise of power under the prerogative of the Crown would cease, (including, for example, the treaty making power and the power to make political appointments) and derive solely from the powers set out in the constitution.

In Opposition, in the early 1990s, Labour had a similar approach. In a 1993 paper, the party proposed reform of the prerogative:

It is where power is exercised by government under cover of royal prerogative that our concerns are greatest. We have concentrated our attention on two of the key areas of prerogative powers. Here massive power is exercised by executive decree without accountability to Parliament and sometimes even without its knowledge. Of course, in practice most governments recognise and accept the constraints of parliamentary approval.

It proposed:

- “These powers to ratify treaties should lie with our democratically-elected representatives”
- “Formal ratification by Parliament of executive action in going to war is the absolute minimum that is acceptable in a democracy”<sup>92</sup>

In a contribution to a 1994 collection of essays on the monarchy, Jack Straw discussed the prerogative:<sup>93</sup>

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<sup>89</sup> *Constitutional declaration*, August 1996, articles 4.4 and 5.1 respectively. The text of the party’s proposed *Great Reform Bill 1997*, published the following month (which, according to the introduction from the Party President, Robert Maclennan, “embodies the proposals of the Liberal Democrats *Constitutional declaration*”) confined itself to a provision that “treaties shall be ratified by the Westminster Parliament. The Royal prerogative to ratify treaties is abolished” (clause 3)

<sup>90</sup> *Constitutional affairs*, para 2.1.1, p5

<sup>91</sup> Reforming governance in the UK: policies for constitutional reform, Policy Paper 40, June 2000, para 3.1.2 ([http://www.libdems.org.uk/documents/policies/Policy\\_Papers/REFORM.pdf](http://www.libdems.org.uk/documents/policies/Policy_Papers/REFORM.pdf))

<sup>92</sup> *A new agenda for democracy: Labour’s proposals for constitutional reform*, 1993, p33.

<sup>93</sup> J Straw, “Abolish the royal prerogative” in A Barnett (ed.), *Power and the throne: the monarchy debate*, 1994, pp125-9 (extracts). Much of this chapter concentrated on the monarchy itself, a matter beyond the scope of this Paper.

The royal prerogative has no place in a modern western democracy ... Accountability of the executive is fundamental to any democracy. Where power is based not upon statute but upon the Royal Prerogative it is this accountability which suffers ... Much of the discussion about the Royal Prerogative centres on the way in which it has been used as a smoke-screen by ministers to obfuscate the use of power for which they are insufficiently accountable. That is entirely right.

Blackburn and Plant, in the recent text already cited, traced the later development of Labour's policy:<sup>94</sup>

If 'the less said the better' was the motto of the Labour leadership when drawing up its 1997 general election manifesto statements concerning the monarchy, it was equally so with respect to the prerogative powers generally. Indeed the election manifesto failed to mention the subject of the Crown prerogatives at all. This was somewhat surprising, given the strong emphasis on the need for its reform in the party's constitutional reform programme published in 1993, *New agenda for democracy: Labour's proposals for constitutional reform*, drawn up under its then leader John Smith and its home affairs spokesperson at the time, Tony Blair.

and

The present state of affairs serves to remind us that the principal beneficiary and custodian of Crown prerogative power is not so much the monarch as the government generally and the Prime Minister in particular ... Tony Blair's declared crusade to strengthen our constitution by diffusing political power within and across its various components will therefore need to extend to his own individual position and power in government.

When in government, the Conservatives defended the existence and use of prerogative power. See, for example, the reply to an adjournment debate on the royal prerogative, initiated by John Garrett in 1993, by a junior Home Office Minister, Charles Wardle:<sup>95</sup>

In any parliamentary democracy, the Government must not be above the law and are subject to parliamentary scrutiny. It is open to Parliament to restrict the prerogative powers exercised by Ministers further, if it wishes to do so, by introducing new Acts of Parliament. However, there is no sensible option of a blanket approach, as the hon Gentleman would like to see. The case must be made and considered specifically, and in each area.

There does not appear to have been an express policy statement from the party since the election, and it was not substantively considered by the Norton Commission.

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<sup>94</sup> pp149 and 150-1 respectively.

<sup>95</sup> HC Deb vol 223 cc489-494, 21.4.93.

## V The Scottish Parliamentary model

### A. Establishment of the Parliament

The new, devolved Scottish Parliament, established by the *Scotland Act 1998*, is of interest to questions surrounding reform of the UK Parliament, in that it displays many fundamental features of the ‘Westminster model’, while seeking to create a new relationship between it and the Scottish Executive and the Scottish people.

Details of the process which led to the creation of the Parliament have been set out in previous Research Papers.<sup>96</sup> The scheme which emerged from the work of the Scottish Constitutional Convention (SCC) and the Consultative Steering Group (CSG), and the new Labour Government’s policy set out in the July 1997 white paper and the later legislation, was intended to ensure that the Parliament would not be a ‘mini-Westminster’, a mere copy of the UK Parliament, but would be tailored to suit the particular needs and culture of Scottish constitutional tradition and modern civic society. This is perhaps best illustrated in the four ‘key principles’ enunciated in the CSG report of January 1999:<sup>97</sup>

- the Scottish Parliament should embody and reflect the *sharing of power* between the people of Scotland, the legislators and the Scottish Executive;
- the Scottish Executive should be *accountable* to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland;
- the Scottish Parliament should be *accessible*, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;
- the Scottish Parliament in its operation and its appointments should recognise the need to promote *equal opportunities* for all

The existence of these principles provide a reference point or template for the operation of the Parliament with the new system of devolved governance. In practical terms, this means that any particular existing procedure or proposed change can be tested against the principles, and bodies such as the Parliament’s Procedures Committee operate in this way. This can most clearly be seen in the introduction to its first ever report, which paved the way for the Parliament’s adoption of its own standing orders in place of those bequeathed to it by an SI under the *Scotland Act 1998*:<sup>98</sup>

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<sup>96</sup> See, in particular Research Papers 95/131 and 97/92 as well as 98/1-5, 98/8, and 99/84-85: all of the 1998 and 1999 Papers are available on the Internet (<http://www.parliament.uk/commons/lib/research/rpintro.htm>).

<sup>97</sup> <http://www.scotland.gov.uk/library/documents-w5/rcsg-00.htm>

<sup>98</sup> 1st Report 1999, SP Paper 28, Dec 1999, ([http://www.scottish.parliament.uk/official\\_report/cttee/proced99-00/pr01.htm#intro](http://www.scottish.parliament.uk/official_report/cttee/proced99-00/pr01.htm#intro)) and see the

3. In completing this task the Committee was alive to the work of bodies such as the Scottish Constitutional Convention and the Consultative Steering Group (CSG). The Committee recognised that the principles set out in that work and the aspirations embodied there were highly influential in shaping not only the Parliament's initial standing orders, but the ways in which devolution was intended to operate in Scotland.<sup>99</sup>

4. In its debate on the main CSG report on 9 June,<sup>100</sup> the Parliament recorded its appreciation of the CSG's work and acknowledged the contribution which it had made to the development of the Parliament's procedures. The Parliament agreed that its own operations should continue to embody the spirit of the CSG key principles. The Committee has taken this fully into account in its present task, and will continue to do so in future work. It intends to do everything possible to build upon and develop the innovatory procedures and practices of the Parliament which, as members will be aware, are being observed with keen interest in other parliaments and assemblies in the UK and around the world.

For the purposes of the present Paper, the combined effect of the principles, especially the first three, emphasise the tripartite nature – in terms of power, accountability and involvement -- of the proposed system of devolved governance, involving the Parliament, the Executive and the people. For example, opening the Parliament's debate on the principles on 9 June 1999, the minister, Henry McLeish,<sup>101</sup> emphasised the meaning of the second principle, of accountability (c367):

The second principle is that the Executive should be accountable to the Parliament and the Parliament to the people of Scotland. After the previous weeks, I have no doubt that that is happening. The Executive will be much more accountable to the Parliament in Scotland than the Government is to the Parliament in Westminster. We all support that and want to work to ensure that it is a success. The Parliament has substantial powers, something which I support, and I am sure that those powers will be exercised responsibly and that the partnership of the people, the Executive and the Parliament can march forward together.

And (c370):

When colleagues note the consultative steering group's recommendations, they are noting the recommendations of the people of Scotland for an open, modern and dignified Parliament. In my view, the three elements of Scotland moving forward together steals a march on Westminster, and, as we are building on

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Parliament's 9 June 1999 debate on the Principles,  
([http://www.scottish.parliament.uk/official\\_report/session99-00/or010803.htm](http://www.scottish.parliament.uk/official_report/session99-00/or010803.htm)).

<sup>99</sup> See further, Scottish Parliament Information Centre Research Paper 99/2 *Principles underlining the Parliament*

<sup>100</sup> *Scottish Parliament Official Report* vol 1 9 June 1999 cc 367-94

<sup>101</sup> Who had been devolution minister at the Scottish Office, and had chaired the CSG.

modern European Parliaments, it also gives Scotland a great chance to do things differently as we enter the new millennium.

The development of thinking about the relationship between the devolved Parliament and the devolved Government, in the decade leading up to the establishment of the Parliament, is instructive. The interim report of the SCC's constitutional working group in 1989<sup>102</sup> appeared to adopt a fundamentally 'Westminster model' executive, one formed from the party or parties commanding a majority in the parliament, with an 'executive council' or 'cabinet' composed of ministers who head the main government departments. It went to the nub of the matter (para 12.13):

If parliamentary government is to have any real meaning there must be a far better balance between the powers of the Scottish Parliament and Executive than has been achieved by their UK equivalents. Clearly Parliament must not be able to weaken the Executive so that it cannot govern effectively; but equally clearly the Executive must not be able to override Parliament whenever it chooses through the exercise of its parliamentary majority.

The SCC's follow-up report, *Towards Scotland's Parliament*, published in November 1990 stated that:

the relationship between the executive and legislature should be examined and safeguards built in, lest Lord Hailsham's 'elective dictatorship' lives on north of the border. There are exciting possibilities with new forms of scrutiny which could make sure that elected members are no longer seen simply as lobby-fodder. The aim is and must be to encourage an open, accessible and democratically accountable government and a participatory democracy which will bring Parliament and people closer together in determining what is best for Scotland.<sup>103</sup>

The SCC's work, including its final report in 1995, formed a key foundation for the Scottish devolution policy upon which the Labour Party fought the May 1997 general election. Two months later, the new Government's White Paper was clearly and openly contemplating a traditional relationship between the two arms of the new devolved Scottish government:<sup>104</sup>

The Scottish Executive, which will be accountable to the Scottish Parliament, will exercise executive responsibility in relation to devolved matters. The relationship between the Scottish Executive and the Scottish Parliament will be similar to the relationship between the UK Government and the UK Parliament.

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<sup>102</sup> *A constitutional framework for Scotland*, published in the SCC's consultation document and report of October 1989, *Towards a Scottish Parliament*

<sup>103</sup> Interestingly, this document revealed its perception of a parliament, when it described the proposed Scottish Parliament's wide ranging legislative powers not only as its power base but "its essential reason for existence."

<sup>104</sup> *Scotland's Parliament*, Cm 3658, July 1997, para 2.6, and see also para 4.7

The *Scotland Act 1998* gave effect to this approach, with few obviously apparent innovations as regards the executive side of devolution, other than the formal involvement of the Parliament in ministerial appointments and in their remuneration. Other statutory features, such as the confidence motion provisions in Part II, or the requirement for ministers (other than the law officers) to be MSPs, can perhaps be regarded as the formalisation of recognised UK parliamentary conventions and practices.

The CSG was established by the Scottish Office early in 1998, and was chaired by the Scottish Office's devolution minister,<sup>105</sup> with its secretariat provided by Scottish Office officials dealing with devolution. The aim of the CSG's consideration of the executive side of devolution was stated early in its report: "We have been careful to develop procedures designed to ensure that the Scottish Executive is fully accountable to the Scottish Parliament for its actions."<sup>106</sup> The main consideration in the CSG Report of the Executive itself, as a body, is within a section entitled *Issues relating to members, offices and bodies of the Parliament*.<sup>107</sup>

The Executive arm of devolved government was not explicitly subject to a CSG-type scrutiny or examination in advance of its creation. However the current Executive has chosen, in the *Scottish Ministerial Code*, to bind its ministers to the CSG principles: "In all their dealings with the Parliament, Ministers should seek to uphold and promote the key principles which guided the work of the Consultative Steering Group on the Scottish Parliament"<sup>108</sup>

## **B. Early operation of the Parliament**

The set of initial Standing Orders reflected closely the analysis in the CSG report, just as the *Scotland Act* itself, and its related delegated legislation, reflected the policy of the July 1997 white paper. For example, provision is made for familiar processes and mechanisms, such as written and oral questions to Ministers,<sup>109</sup> ministerial statements, committee scrutiny and so on. As at Westminster, committees reflect the party balance in the Parliament, which means that a government with a parliamentary majority, whether single-party or (as at present) coalition, will have a majority on each committee. There is a fixed daily voting period in the Chamber when most divisions are held ('Decision

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<sup>105</sup> Now the First Minister in the Scottish Executive.

<sup>106</sup> Para 2.1. These are fleshed out in section 3.4 of the report entitled *Accountability*.

<sup>107</sup> <http://www.scotland.gov.uk/library/documents-w5/rcsg-06.htm>

<sup>108</sup> See para 3.1 of the *Scottish Ministerial Code* (<http://www.scotland.gov.uk/library2/doc03/smic-03.htm>), and the speech by the Deputy First Minister, Jim Wallace, to a Hansard Society conference in Edinburgh on 22 February 2000 (*Scottish Executive press release SE0435/2000*: <http://www.scotland.gov.uk/news/2000/02/se0435.asp>)

<sup>109</sup> The original SOs made no provision for a 'First Minister's Question Time', but this was introduced in the revised SOs of December 1999 – Rules 13.6-7: ([http://www.scottish.parliament.uk/official\\_report/cttee/proced99-00/prr01an4-1.htm#chap12](http://www.scottish.parliament.uk/official_report/cttee/proced99-00/prr01an4-1.htm#chap12))

Time’), an arrangement which some critics have said is designed as much for the convenience of Ministers as for members.<sup>110</sup>

The arrangement of the Parliament’s business is intended to be more open and transparent than at Westminster, through the mechanism of a *Parliamentary Bureau*, a ‘business committee’ of the main parties’ business managers, each of which has voting power in proportion to their party’s seats. In terms of the allocated time, Standing Orders guarantee periods in plenary sessions for committee business, business chosen by non-Executive parties, and (backbench) Members’ business.<sup>111</sup> This is akin to Commons *S.O. no. 14*, with the crucial difference that there is no equivalent provision to *S. O. no. 14(1)*: “Save as provided in this order, government business shall have precedence at every sitting.” This has led to some lively discussion, especially in the Parliament’s Procedures Committee, about the ‘ownership’ of the balance of parliamentary time.

The Executive’s view has been that, as in the House of Commons, all plenary time not expressly allocated under Standing Orders is, and should be, potentially at the disposal of the Executive in order to enable it the time to get its business transacted. On the other hand, the then SNP business manager, Mike Russell, has argued that no such presumption can be made in the absence of any explicit statement in Standing Orders, and that all unallocated time belongs to the Parliament, to be allocated to business as arranged under usual Bureau procedures.

Another interesting illustration of the developing relationship between ministers and the Parliament is in the operation of parliamentary committees, especially when acting in scrutiny mode (akin to Westminster’s ‘select committee’ mode). Because the Parliament is a creation of statute, much of what would be dealt with at Westminster by way of informal guidance or unwritten convention is either written down in Edinburgh, or not (yet) covered at all in the legislation or rules of the Parliament. Thus, for example, the nature of available accountability mechanisms, and, in particular, the practical scope of the Parliament’s statutory investigatory powers, especially in relation to ministers and their officials, is a matter of some debate. This became topical recently in the Parliament’s inquiry into the SQA/exams crisis, and led to a debate earlier this month in the Chamber, initiated by the executive and entitled *Executive accountability to Parliament*. This resulted in a resolution of the Parliament, based on an Executive motion, setting out some relevant guidance, which can be regarded, rather broadly, as its

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<sup>110</sup> Decision Time is described further in a PCC Standard Note on deferred divisions, prepared for the 7 November debate on the Modernisation Committee report.

<sup>111</sup> *Rules 5.7* and *5.8* also require that “sufficient time” is provided for, respectively, a statement by the First Minister “setting out the proposed policy objectives and legislative programme of the Scottish Executive for any Parliamentary year” and a debate on that statement, and various items of financial business (including the main Budget Bill) at particular times of the year. Specific provision is made for question times and ‘decision times’.

version of what at Westminster is the Government's unilateral guidance often known as the 'Osmotherly Rules'.<sup>112</sup> The resolution is as follows:<sup>113</sup>

That the Parliament notes that the Executive is committed to a policy of openness, accessibility and accountability in all its dealings with the Parliament and its Committees; further notes both the Parliament's right and duty to hold the Executive to account including the power to invoke section 23 of the Scotland Act and the public interest in maintaining the confidentiality of exchanges between officials and Ministers concerning policy advice; observes that other Parliaments with strong freedom of information regimes do not disclose the terms of such exchanges; calls, to that end, for the Executive and the Parliament to observe the following principles:

(i) consistent with its policy of openness, the Executive should always seek to make as much information as possible publicly available as a matter of course and should respond positively to requests for information from the Parliament and its Committees;

(ii) officials are accountable to Ministers and Ministers in turn are accountable to the Parliament and it follows that, while officials can provide Committees with factual information, Committees should look to Ministers to account for the policy decisions they have taken;

(iii) where, exceptionally, Committees find it necessary to scrutinise exchanges between officials and Ministers on policy issues, arrangements should be made to ensure that the confidentiality of these exchanges is respected,

and commends these principles to Committees as guidelines to be followed in their dealings with the Executive.

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<sup>112</sup> Departmental evidence and response to select committees, 1997 ed. (<http://www.cabinet-office.gov.uk/central/1999/selcom/>)

<sup>113</sup> SPOR vol 8 no. 14, cc1246-7, 1.11.00 ([http://www.scottish.parliament.uk/official\\_report/session-00/or081402.htm#Col1241](http://www.scottish.parliament.uk/official_report/session-00/or081402.htm#Col1241))