HOUSE OF LORDS

Committee for Privileges

1st Report of Session 2008–09

The Powers of the House of Lords in respect of its Members

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The Committee for Privileges

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Contacts

General correspondence should be addressed to the Clerk of the Committee for Privileges, House of Lords, London, SW1A 0PW (telephone 020 7219 8796).

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THE POWERS OF THE HOUSE OF LORDS IN RESPECT OF ITS MEMBERS

Introduction

1. On 25 January 2009 the *Sunday Times* published a series of allegations against four Members of the House. The Leader of the House immediately asked the Sub-Committee on Lords' Interests to investigate these allegations, and the Sub-Committee's and this Committee's conclusions and recommendations on the conduct of the four Members are contained in a separate Report.

2. At the same time as the Leader referred the specific allegations against the four Members to the Sub-Committee, she invited this Committee to consider two wider issues. On 26 January, in response to a Private Notice Question by the Leader of the Opposition, Lord Strathclyde, she informed the House that she had written to the Chairman of Committees asking the Committee for Privileges "to consider any issues relating to the rules of the House that arise, especially in connection with consultancy arrangements, and in connection with sanctions in the event that a complaint against a Member is upheld".[1] This Report embodies our conclusions and recommendations on the second of these issues, the power of the House to impose sanctions upon its Members.

The advice of the Attorney General and Lord Mackay of Clashfern

3. Our first step was to seek the advice of the Attorney General on the range of sanctions available to the House in the event of a serious complaint against a Member being upheld, and in particular on the powers of the House with regard to the suspension of Members. We also sought the advice of Lord Mackay of Clashfern, a member of this Committee and a Lord of Appeal. The memoranda submitted by the Attorney General and Lord Mackay are annexed to this Report at Appendices 1 and 2 respectively. We are extremely grateful to them for their assistance.

4. The Attorney General's conclusions on temporary suspension are summarised in paragraph 14 of her memorandum:

> While it is possible to construct a respectable argument that the power of the House to regulate its own procedure includes a power to suspend a member for a period within a Parliament on the grounds of misconduct, I consider, on balance, that the House does not have such a power. In my opinion, the key factor against this argument is that a suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament (albeit to a lesser degree than permanent exclusion). This is a fundamental constitutional right and any interference with that right cannot be characterised as the mere regulation of the House's own procedures.

5. The Attorney General also draws attention to a binding resolution agreed by both Houses, in 1705, to the effect that "neither House of Parliament hath power, by any Vote or Declaration, to create to themselves any new Privilege, that is not warranted by the known Laws and Customs of Parliament". She

[1] HL Deb., 26 January 2009, col. 10.

advises that a decision to suspend or expel a Member would exceed the limits of the House's power of self-regulation, and so constitute the creation of a "new privilege", contravening the 1705 resolution.

6. Lord Mackay of Clashfern, in contrast, concludes that the House does possess the power to suspend its Members. He agrees with the Attorney General that Members are, by statute and by their letters patent, entitled to receive a writ of summons at the commencement of each new Parliament, and that the House cannot by resolution require that the writ of summons be withheld. However, he goes on to advise that implied within the writ of summons are certain conditions, in particular a requirement that Members respect the rules of the House; and the House must therefore possess a corresponding power to enforce its rules where necessary. He therefore concludes:

> "The House's existing power to adopt the procedures necessary to preserve 'order and decency' includes a power to suspend, for a defined period within the lifetime of a Parliament, a Member who has been found guilty of clear and flagrant misconduct. I consider further that the exercise of such a power would not affect the rights conferred upon Members by virtue of their letters patent; rather it would affirm the conditions implied in the writ of summons, that Members must conduct themselves in accordance with the rules of the House." (Paragraph 38)

7. Lord Mackay also advances a secondary argument, based on historical comparison between the two Houses. He concludes that the House of Lords, like the Commons "had in 1705 an inherent power, deriving from its status as a constituent part of the High Court of Parliament, to discipline its Members". His advice on this secondary point therefore leads to the same conclusion, that "any decision that the House may now take as to the means by which it imposes such discipline, for example by suspension, falls within the undoubted privilege of the House to regulate its own procedures." (Paragraph 54)

Conclusions of the Committee

8. We have carefully considered the advice of the Attorney General and Lord Mackay of Clashfern. **We are unanimously in agreement with the advice of Lord Mackay, and accordingly invite the House to agree the following conclusions:**

- **The House possesses, and has possessed since before the 1705 resolution, an inherent power to discipline its Members; the means by which it chooses to exercise this power falls within the regulation by the House of its own procedures.**
- **The duty imposed upon Members, by virtue of the writs of summons, to attend Parliament, is subject to various implied conditions, which are reflected in the many rules governing the conduct of Members which have been adopted over time by the House.**
- **The House has no power, by resolution, to require that the writ of summons be withheld from a Member otherwise entitled to receive it; as a result, it is not within the power of the House by resolution to expel a Member permanently.**

- **The House does possess the power to suspend its Members for a defined period not longer than the remainder of the current Parliament.**

9. The procedure for imposing a suspension should in due course be set out in a new Standing Order; the wording of the Standing Order would be a matter for the Procedure Committee. However, we emphasise that the function of Standing Orders is not to confer new powers, but to describe the rules and procedures governing the use of existing powers; the lack of a Standing Order does not prevent the House from exercising its existing power to suspend its Members in the interim.

10. It will also be for the Procedure Committee to consider and report in detail on the practical implementation of any suspension. In outline, we expect that following any suspension the Member concerned would be required to withdraw from the precincts immediately, and that he or she would then be barred from the precincts for the duration of the suspension. This would be consistent with the procedures adopted by the House of Commons.

APPENDIX 1: MEMORANDUM BY THE ATTORNEY GENERAL

Rights of Peers

1. The appointment of life and hereditary peers[1] to membership of the House of Lords is now set out in statute. The Life Peerages Act 1958 confers a power on the Crown to appoint life peerages by letters patent. Hereditary peerages are generally created by letters patent and the House of Lords Act 1999 limits the number of hereditary peers who may be members of the House.

2. The Life Peerages Act 1958 entitles a life peer to receive a writ of summons to attend, sit and vote in the House. The letters patent also provide that a peer "may have, hold and possess a seat, place and voice in the Parliaments". A hereditary peer is entitled to receive a writ of summons in accordance with the case of the Earl of Bristol[2].

3. A person who is disqualified by law is not entitled to receive a writ of summons. Most disqualifications are statutory—aliens, bankruptcy, treason and mental health[3]. Persons under 21 are disqualified from sitting under the common law (set out in the Standing Orders). Erskine May refers to disqualification by sentence of the House but concludes "that a resolution of the Lords as a legislative body could not exclude a member of that House permanently." The Committee is considering whether there is a further disqualification recognised under the laws and customs of Parliament to allow for the suspension of a member in the event a complaint against that member being upheld.

Powers and privileges of the House of Lords

4. The House of Lords has a number of powers and privileges under the laws and customs of Parliament. In particular, the House enjoys the privilege to the exclusive cognizance of its own proceedings—the House is the sole judge of the extent of its own powers, the validity of its own proceedings and the sole interpreter of its own privileges. The courts have no power to interfere even in relation to matters prescribed by statute[4]. This does not however mean that the House has unfettered power—it must exercise its powers lawfully.

5. Importantly the House has limited its own powers. In 1704 both Houses resolved and agreed that "neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament"[5].

6. The House has the power to control its own procedure and this allows the House to change its rules (as set out in its Standing Orders) to adapt to modern requirements. However, that power is limited—the House cannot erect new privileges for itself.

7. The House also has the power to punish members by reprimand, fine or imprisonment. This was confirmed by both the report by the Select Committee on the powers of the House in relation to attendance of its members[6] ("the 1956

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[1] This memorandum does not consider the position of Lords of Appeal nor the Lords Spiritual.

[2] Journals of the House of Lords: volume 3: 1620-1628 (1802) 544.

[3] See *Erskine May* (23rd Edition) pp48-50.

[4] Bradlaugh v Gossett [1883-84] 12 QBD 271.

[5] Journals of the House of Commons (1702-04) 555, 560.

[6] HL 67 (1955-56).

report") and the report by the Joint Committee on Parliamentary Privilege[7] ("the 1999 report"). However, some doubt has been expressed how far in practice the penalties of imprisonment or fine could be invoked today[8].

Power to exclude or suspend?

8. The question of whether it would be lawful for the House to suspend a member on the grounds of misconduct has not been considered in any detail by the House or by any of its Committees. The question of exclusion has however been considered on several occasions and may provide helpful guidance:

9. First, it was argued during the debate on the House of Lords (Discontinuance of Writs) Bill in 1889 that the House had exceeded its powers on the only two occasions when it had excluded members from sitting—in the 1620s Lord Chancellor Bacon (Viscount St. Albans) and the Earl of Middlesex were impeached for corruption, also fined and imprisoned—and it was argued that the House had no power to expel a member for misconduct[9]. However, it was suggested that the House may have an inherent power, similar to that of the House of Commons, to expel members who bring disgrace and discredit upon it[10].

10. Secondly, in the 1956 report the Select Committee concluded that any proposals which amounted to the exclusion or partial exclusion of a peer from the House would not be in the power of the House. The Clerk of the Parliaments, in submitting his evidence to the Joint Committee on Parliamentary Privilege in 1998, relied on the 1956 report to conclude "the Lords, unlike the Commons, have no power to expel a member for contempt. Nor do they have power to suspend a member"[11].

11. Finally, in the 1999 report the Joint Committee concluded that the House does not have the power to suspend a member permanently and that it was not clear whether a member could be suspended within a single Parliament.

Conclusion

12. I note that the House and the various committees have consistently taken the view over a long period that the House does not have the power to expel a member or disqualify a member from sitting permanently. On balance, I agree with this view:

a) The precedents from the 1620s are not helpful in that they involved the House exercising its judicial powers in relation to impeachment which has fallen into disuse[12]. They also involved serious criminal offences—there are no precedents for disqualification relating to relatively minor misconduct. In any case, the House has consistently challenged and questioned whether it ever had the power to expel these members.

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[7] HL 43 (1998-99).

[8] There is a separate issue as to whether the exercise of any penal powers, including any power to fine or imprison, would be compatible with the European Convention on Human Rights. However, given my conclusion that there is no power to exclude or suspend, I do not consider that issue in this memorandum.

[9] Hansard, 3rd series, Vol. 334, col. 333-364. See col. 334-6, 347.

[10] Ibid col. 357.

[11] HL 43 – II, p.58, paragraph 19.

[12] Erskine May (23rd Edition) p.73.

b) The exclusion would interfere with the rights of a peer conferred by the Crown by letters patent and the writ of summons to attend, sit and vote in Parliament. This would exceed the powers of the House to regulate its own procedures as it would amount to the creation of a new privilege contrary to the 1704 resolution.

c) While it might be reasonable to expect the House to have similar powers to the House of Commons to exclude, it is clear that the two Houses have always enjoyed different privileges reflecting the history and differences between the Houses.

13. The issue of suspension is less clear. It has been suggested that the reference in Erskine May that there is no power to exclude *permanently* leaves the question of temporary exclusion open. It has also been suggested that if the House has the power to imprison then it must have the lesser power to suspend a member. However, there is no precedent—the House has never purported to suspend a member—and in the 1956 report the Select Committee concluded that the House had no power to partially exclude a member.

14. While it is possible to construct a respectable argument that the power of the House to regulate its own procedure includes a power to suspend a member for a period within a Parliament on the grounds of misconduct, I consider, on balance, that the House does not have such a power. In my opinion, the key factor against this argument is that a suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament (albeit to a lesser degree than permanent exclusion). This is a fundamental constitutional right and any interference with that right cannot be characterised as the mere regulation of the House's own procedures. Accordingly, it is my view that, if a power to suspend a member for misconduct is sought, the safer course is to create a legislative framework to confer such a power on the House.

15. It should be noted that the House nevertheless has significant powers to punish a member found guilty of misconduct. The power of the House to regulate its own procedures would allow the House to resolve that the member concerned be reprimanded or admonished. The House could also resolve that the member be invited to take a leave of absence for a specified time. In my view, such a resolution is likely to be effective in ensuring that the member did not attend the House.

BARONESS SCOTLAND OF ASTHAL QC

9 February 2009

MEMORANDUM BY LORD MACKAY OF CLASHFERN

Introduction

1. The Attorney General has advised the Committee that, "while it is possible to construct a respectable argument that the power of the House to regulate its own procedure includes a power to suspend a member for a period within a Parliament on the grounds of misconduct", her view is that, on balance, "the House does not have such a power".

2. In the Attorney's opinion the key factor in this argument is that "a suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament (albeit to a lesser degree than permanent exclusion)". This, she says, is a fundamental constitutional right and any interference with that right cannot be characterised as the mere regulation of the House's own procedures.

3. When considering permanent exclusion the Attorney General makes a related point, which also applies, albeit to a lesser extent, to temporary suspension: "exclusion would interfere with the rights of a peer conferred by the Crown by letters patent and the writ of summons to attend, sit and vote in Parliament. This would exceed the powers of the House to regulate its own procedures as it would amount to the creation of a new privilege contrary to the 170[5] resolution[1]."

4. In considering the Attorney General's advice I have given attention to two distinct matters. The first and more important is the nature of the rights and duties created by virtue of the letters patent and writ of summons, and the extent to which these may be modified by the House in accordance with the principle of "exclusive cognisance"—the House's "unquestioned authority over the procedures it employs".[2] I have also considered a secondary issue, namely the origins and historical development of the penal powers of the two Houses.

5. Both lines of argument lead me to the same conclusion: that the House possesses and has always possessed an inherent power temporarily to suspend its Members, in the interests of order and good conduct, and that nothing in such suspension would constitute the "creation of a new privilege".

The rights and duties of Peers

The right to receive a writ of summons

6. The rights and duties attaching to membership of the House of Lords were fully described in the report of the 1956 Select Committee on the Powers of the House in relation to the Attendance of its Members ("the 1956 Committee"). The relevant words of the letters patent are as follows:

> "Willing and by these Presents granting for Us Our heirs and successors that he may have hold and possess a seat place and voice in the Parliaments and Public Assemblies and Councils of Us Our heirs and successors within Our United Kingdom amongst the Barons And also that he may enjoy and use all the rights privileges pre-eminences immunities and advantages to the degree of a Baron duly and of right

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[1] The Attorney General's memorandum uses the old-style date of 1704: see LJ vol. 17, col. 677, 27 February 1704 (new style 1705).

[2] Report of the Joint Committee on Parliamentary Privilege (1998-99, HL Paper 43), paragraph 13.

belonging which Barons of Our United Kingdom have heretofore used and enjoyed or as they do at present use and enjoy".

7. Thus the letters patent confer upon the peer the right to a "seat place and voice" in Parliament. However, this right is not in itself enforceable: rather it means that every peer has a right to a writ of summons either upon first creation or at the start of each Parliament. Only upon receipt of the writ is the peer entitled to take up his or her seat.[3]

8. There are certain exceptions to the enjoyment of the right to a "seat place and voice" in Parliament. There are, for example, statutory provisions that disqualify certain categories of peer (aliens[4], those convicted of treason[5], bankrupts[6], hereditary peers not excepted under section 2 of the House of Lords Act 1999, and life peers who are Members of the European Parliament[7]) from, as the case may be, membership of the House, attending the House, or receipt of a writ of summons. In addition, Standing Order 2, dating from 1685 and embodying an established common law principle of the period, states that "No Lord under the age of one and twenty years shall be permitted to sit in the House", and writs are accordingly not issued to those under age.

9. But in the absence of such disqualifying provisions, in statute or in common law, the right of a peer to a writ of summons is unchallenged. This right was set out in the Earl of Bristol's case in 1626, where the House resolved that even the Sovereign could not withhold the writ of summons from a peer otherwise entitled to receive it.

10. On balance, therefore, I accept the view of the 1956 Committee, endorsed by *Erskine May*, "that a resolution by the Lords as a legislative body could not exclude a member of that House permanently".[8] This means, as I understand it, that the House could not by resolution require that the writ of summons be withheld from a peer otherwise entitled, by statute and by virtue of the letters patent, to receive it at the commencement of the next Parliament.

Other rights conferred by the letters patent

11. I have also considered whether the letters patent confer any further rights, over and above the right to receive a writ of summons, which might fall under the general heading of "rights privileges pre-eminences immunities and advantages to the degree of a Baron duly and of right belonging which Barons of Our United Kingdom have heretofore used and enjoyed". The rights that fall or formerly fell under this general heading may be characterised as "privileges of peerage", as distinct from parliamentary privilege; indeed they attach to peers regardless of whether or not they are Members of the House. Some have been repealed by statute (for instance, the privilege of trial by one's peers, abolished in 1948); others, such as immunity from arrest in civil cases, remain.

12. I have nevertheless considered whether these words in the letters patent confer upon peers any rights that are relevant to the conditions upon which they sit in the

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[3] The Companion to the Standing Orders, p 4.

[4] Act of Settlement 1701, section 3.

[5] Forfeiture Act 1870, section 2.

[6] Insolvency Act 1986, section 427, as amended by the Enterprise Act 2002.

[7] European Parliament (House of Lords Disqualification) Regulations 2008 (SI 2008/1647).

[8] Erskine May, 23rd edition (2004), p 50. Unless otherwise stated references are to this edition.

House of Lords. I am not persuaded that they do, or, insofar as they do, that the House's power to regulate its own procedures does not over-ride them.

13. One example from the nineteenth century will illustrate this point. In 1868 the House in effect abolished, by Standing Order, the right of Members to representation by proxy. This right dated back to the medieval period; in the words of the Select Committee which recommended the change the previous year, "the privilege which Peers have enjoyed of being represented by their proxies in Parliament when unable to attend in person is so ancient as to have become a prescriptive right as inherent in their peerages as that of being summoned by Parliament, and one consequently of which no vote of the House alone can deprive them."

14. In inviting the House to agree the report, the Lord Privy Seal, the Earl of Malmesbury, went further, arguing that the right to representation by proxy "belonged to the Estate of the Peerage in the same way as the privilege of sending their proxies belonged to the Estate of the Commons". In other words, just as electors as a whole had a constitutional right to send a Member to represent them in Parliament, so Peers who were unable to attend Parliament had a constitutional right to vote by proxy.

15. It is clear therefore that the right to representation by proxy was, in the 1860s, a right "duly and of right belonging" to peers, which they and their forebears had "used and enjoyed" over many centuries. It certainly fell within the scope of the letters patent.

16. Nevertheless, the 1867 Committee found that the exercise of this right had become "objectionable", and tended "to weaken in the public mind the authority of the decisions at which the House arrives". It therefore recommended that a "Standing Order should be agreed to against [proxies] being called". The House accordingly agreed Standing Order 61:

> "61. The ancient practice of calling for proxies shall not be revived except upon the suspension of this Standing Order; and not less than two days' notice shall be given of any Motion for such suspension."

17. The wording of the Standing Order was carefully chosen: it did not formally abolish the "ancient practice of calling for proxies" (which would presumably have required an Act of Parliament), and instead explicitly allowed for the possibility that a motion could at any time be set down to repeal the Standing Order and revive the practice. But the requirement of two days' notice gave a signal that, in the words of the Committee, the Standing Order should not be "lightly suspended". In the 141 years since the Standing Order no attempt has been made to revive the use of proxies.

18. The decision of the House in respect of proxies was well judged. The House took the view that its inherent power to regulate its procedures was sufficient, if not permanently to abolish, at least to suspend a general right of peerage, enjoyed by peers by virtue of the letters patent, a right that had hitherto been deemed a fundamental constitutional principle.

19. I therefore conclude that the only right conferred upon peers by the letters patent which is relevant in the present case is the right which I have already described—the right to receive a writ of summons at the commencement of each new Parliament. This is a right which, in the absence of statutory authority, cannot be over-ridden, and thus the House has no power, by resolution, to exclude a Member permanently.

20. I now turn to the question of whether a temporary suspension, within the lifetime of a Parliament (which would not over-ride the right of Members to receive a writ of summons at the commencement of the next Parliament), would, as the Attorney General argues, amount to the creation of a "new privilege".

An existing power or a new privilege?

21. Both Houses resolved in 1705 that "neither House of Parliament hath power, by any Vote or Declaration, to create to themselves any new Privilege, that is not warranted by the known Laws and Customs of Parliament".[9] It follows that any steps taken in respect of sanctions against Members must be warranted by the law and custom of Parliament. The Attorney General's view is that the assertion of a power to expel or suspend a Member would not be so warranted, and that it would therefore "amount to the creation of a new privilege", contrary to the 1705 Resolution.

22. I accept the Attorney's view that there is no warrant, according to the law and custom of Parliament, for the House to claim a "new privilege". The question is, therefore, whether modifying the effect of the writ of summons by means of suspension would amount to the creation of a new privilege, or whether it would simply be an extension of an existing, inherent power.

23. There is no simple and comprehensive definition of "parliamentary privilege". The Joint Committee on Parliamentary Privilege stated that "parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively."[10] This is a description, rather than a definition. In more general terms, Jowitt's *Dictionary of English Law* defines a "privilege" as "an exceptional right of advantage".[11] This is consistent with *In re Miller*, in which Lord Esher argued that "an already existing legal right" could not constitute a "privilege".[12] It follows that a "privilege" must be an advantage conferred over and above the ordinary law.

24. One of the fundamental privileges enjoyed by both Houses is their claim to exclusive cognisance of their own proceedings: "Both Houses retain the right to be the sole judge of the lawfulness of their own proceedings, and to settle—or depart from—their own codes of procedure." (*Erskine May*, p 102)

25. There are many examples of self-governing bodies or associations (local authorities or clubs, for example), which have extensive powers of self-regulation. The crucial difference between the two Houses of Parliament and these other bodies lies in the privilege of exclusive cognisance—the fact that decisions of either House in respect of their own procedures may not be questioned by the courts. For instance, the Joint Committee on Parliamentary Privilege noted that in *Bradlaugh v Gosset*[13] the court "declined to intervene when the House of Commons refused to allow a member who was an avowed atheist to take the oath even though he was required to do so by statute"[14]. It is this independence of

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[9] LJ vol. 17, col. 677, 27 February 1704 (old style; new style 1705).

[10] Report of the Joint Committee on Parliamentary Privilege, paragraph 3.

[11] Jowitt, *Dictionary of English Law* (1985), p 1430.

[12] [1893] 1 Q.B. 327, p 335.

[13] Bradlaugh v Gosset (1883) 12 QBD 271.

[14] Report of the Joint Committee on Parliamentary Privilege, paragraph 240.

judicial oversight that constitutes the "privilege", or "exceptional right of advantage" enjoyed by Parliament.

26. It follows therefore that the House's power to make rules regulating the behaviour of its Members is not in itself a privilege, but a power comparable to that enjoyed by many other organisations by virtue of the ordinary law. As long as this power is exercised in accordance with the law and custom of Parliament, the question of a "new privilege" does not arise.

27. The law and custom of Parliament is grounded in history and precedent, but not limited by them: both Houses, but particularly the House of Commons, have evolved new procedures over time, in order to adapt to circumstances. The custom of Parliament is not static—it may be modified, so long as such modification does not overturn fundamental principles of the constitution or the law of Parliament.

28. The House of Lords has also regulated its proceedings over time both by developing conventions, written or unwritten, and, to a lesser extent, by agreeing Standing Orders. Standing Orders were formerly styled "Remembrances for Order and Decency to be kept in the Upper House of Parliament, by the Lords". There can be no doubt that the House has exercised its power to regulate the conduct of its Members with a view to maintaining the "order and decency" of proceedings.

29. The Code of Conduct, agreed by Resolution of the House in July 2001, provides guidance for Members on "the standards of conduct expected of them in the discharge of their parliamentary and public duties". The Code clearly falls within the scope of the House's power to regulate its procedures.

30. Thus the House has the power to agree rules with a view to regulating the conduct of its Members and so preserving "order and decency". The question for the Committee is whether, according to the law and custom of Parliament, the House's power to regulate its own procedures also extends to the temporary suspension of a Member who has been found guilty of a clear and flagrant breach of these rules. To answer this question, I have considered in more detail the terms of the writ of summons.

The writ of summons

31. The writ of summons commands the peer to be "personally present" at Parliament, "to treat and give your counsel upon the affairs aforesaid". So while the letters patent confer upon peers a *right* to a "seat place and voice" in Parliament, which is then fulfilled by the issuing of a writ of summons, the writ imposes a *duty*. As Viscount Birkenhead L.C. said in *Viscountess Rhondda's Claim*[15], "It will be observed that it is imperative in its terms. It does not purport to confer a right or privilege, but to demand the fulfilment of a duty."

32. The peer who receives a writ of summons answers it by attending at the House, handing the writ to the Clerk, taking an oath or making an affirmation of allegiance and signing the Roll. Only by virtue of receiving the writ and following this procedure is the peer entitled to take any part in the proceedings of the House.

33. Thus the Attorney General's statement that "suspension would interfere with the rights of a peer conferred by the Crown to attend, sit and vote in Parliament" conflates various distinct rights and duties. That the letters patent confer an important constitutional right upon peers is undoubted, but it is not an open-ended right: in practice all the right means is that the peer is entitled to receive a

[15] [1922] 2 A.C. 339, 364.

writ of summons; this writ in turn imposes duties upon peers rather than creating further rights. The way in which peers perform these duties is from the start hedged about with conditions and procedural requirements.

34. It follows that the rights enjoyed by peers are by their nature subject to conditions. They are entitled to receive a writ of summons, and this in turn places a duty upon them to "treat and give counsel" in Parliament. The two Houses are, of course, independent and self-regulating institutions, which have set and continue to set a wide range of conditions on the attendance of their Members, and rules for their conduct. For instance:

- Peers are to attend the House; if they cannot do so, they are to obtain leave of absence (Standing Order 23).
- Peers are not to converse among themselves while the House is sitting (Standing Order 22).
- Peers are to speak "standing and uncovered" (Standing Order 27).
- "No Lord is to speak more than once to any Motion" (Standing Order 31).
- Peers are to refrain from "all personal, sharp or taxing speeches" (Standing Order 33).
- The length of debates and of individual speeches may be curtailed by decision of the House.
- If a peer is thought to be seriously transgressing the practice of the House, the House may resolve that he be "no longer heard". The effect is to prohibit the peer from speaking further on the motion before the House.

35. I consider therefore that the way in which the duty imposed by the writ of summons to "treat and give counsel" is performed is necessarily subject to modification by the House, in accordance with its own rules of procedure. Thus the rules of the House may be interpreted as "implied conditions" inherent in the writ. The key consideration is the extent to which such rules may restrict the Member's performance of his duty, before coming into direct conflict with fundamental constitutional rights. The case of proxies, already described, shows that the House has acknowledged its considerable latitude, if not formally to abolish such rights, at least to suspend them.

36. If follows therefore that if a Member of the House were to be guilty of a clear and flagrant breach of the rules of the House, gravely transgressing the conditions implied in the writ of summons, it would be open to the House to prevent him, by resolution, from attending for such definite period as the House deemed appropriate. I would not regard such a resolution as over-riding the right conferred by the letters patent to receive a writ of summons at the start of a new Parliament. Indeed, I would expect any such suspension to be relatively short and at all events not to exceed the remainder of the current Parliament, since the effect of the writ which is being modified itself ceases upon dissolution. With this proviso, I would regard such a resolution as affirming the conditions implied in the writ of summons, that Members must conduct themselves in accordance with the rules of the House.

37. By exercising such a power the House of Lords would keep in line with the House of Commons. That the House of Commons has power to suspend its Members has not been doubted, and even though the Attorney General warns against drawing analogies between the powers of the two Houses, I cannot

overlook the fact that the House of Commons' authority to suspend a Member exists even though suspension deprives the Member's constituents, who have committed no offence, of representation in the Commons for the period of the suspension. This seems more serious in its constitutional repercussions than suspending a peer, who represents nobody but himself.

38. **In conclusion, I cannot agree with the Attorney General that a resolution of the House temporarily suspending a Member would interfere with rights conferred upon that Member by the Crown, or that suspension would constitute a "new privilege". Instead I consider that the House's existing power to adopt the procedures necessary to preserve "order and decency" includes a power to suspend, for a defined period within the lifetime of a Parliament, a Member who has been found guilty of clear and flagrant misconduct. I consider further that the exercise of such a power would not affect the rights conferred upon Members by virtue of their letters patent; rather it would affirm the conditions implied in the writ of summons, that Members must conduct themselves in accordance with the rules of the House.**

Historical basis for the disciplinary powers of the two Houses

39. In the preceding paragraphs I have set out what I consider to be the most important arguments justifying the House's power to suspend its Members. In the following paragraphs I compare the historical development of the penal powers of the two Houses, with a view to establishing that the House of Lords possesses the same disciplinary and penal powers in respect of its Members as the House of Commons. These historical points are, in my view, secondary to the principal argument. Nevertheless, I include them for the sake of completeness and to provide further confirmation of my central argument.

40. Since the Earl of Bristol's case in 1626, the House has not formally taken a view on the extent of its powers in respect of the expulsion or suspension of Members who have been guilty of misconduct.[16] Indeed, until recently there has been no need for it to do so. So while the 1956 Committee examined many of the issues, it left unresolved many points that now appear fundamental.

41. For example, in evidence to the 1956 Committee, the then Attorney General, Sir Reginald Manningham-Buller, wrote: "we can find no precedent which would form a satisfactory basis for preventing a peer who has not been guilty of any positive misconduct from exercising his rights as a member of the House of Lords". The proviso is significant: in oral evidence Mr G D Squibb, Junior Counsel to the Crown in Peerage Cases, went still further: "If a peer has been guilty of misconduct in some way it would be open to the House, as part of his sentence, to deprive him of the right of sitting and voting, either permanently or for a period" (Q 155).

42. These comments hint at the essentially judicial nature of such powers. The Earl of Bristol's case, while affirming that the Crown could not withhold the writ of summons from a peer, also articulated the principle that the general entitlement to receive a writ of summons did not apply to those "made incapable of sitting in

[16] Although the lawfulness of the expulsion of the Earl of Middlesex was challenged in passing by the Earl of Clarendon in his *History of the Grand Rebellion*, his comments have no formal standing, and were, as the Attorney General's evidence to the 1956 Committee pointed out, "not accurate in point of fact". Clarendon overlooked not only the judgment of the House in the Earl of Bristol's case, but the expulsion of Viscount St Alban and the suspension of Lord Savile.

Parliament by Judgement of Parliament or any other legal Judgement".[17] The latter qualification probably relates to the expulsion earlier in the 1620s of Viscount St Alban and the Earl of Middlesex, and it could be argued that these precedents would justify the House in permanently excluding Members found guilty of serious offences. However, I agree with the Attorney General that these precedents are "unhelpful", involving as they did a now obsolete judicial procedure before the "High Court of Parliament", which has no analogy in current circumstances.

43. But while the bicameral impeachment procedure may no longer be relevant, the underlying powers claimed by the two Houses in adopting such a procedure merit further analysis. Do such powers still exist? And to what extent are they inherent in each House separately?

44. Comparison with the development of disciplinary procedures in the House of Commons helps to answer these questions. As is well known, the House of Commons has the power, set out in Standing Orders, to discipline its Members by temporarily suspending or expelling them. What is less well known is that while the practice of expulsion can be traced back to the late sixteenth century, the House of Commons did not formally assert its power to suspend (first used in 1641, but in abeyance since the late seventeenth century) until 1877, when it was revived only following persistent obstruction of the work of the House by supporters of Charles Parnell[18]. The power was laid down in Standing Orders in 1880.

45. The House of Lords too exercised a power temporarily to suspend Members in the 1640s; most strikingly on 19 May 1642, when the House resolved that Lord Savile, an adherent of King Charles I, should not sit or vote in the House for the remainder of that session. This power was not used again following the Restoration, and has remained in abeyance ever since.

46. What is the basis for these powers, active or dormant? It is well established that the penal jurisdiction of the two Houses in respect of non-Members "derives from the status of the High Court of Parliament and the need for each House to have the means to carry out its functions properly"[19]. It is thus a specific off-shoot of the general privilege of "exclusive cognisance", deriving in the case of each House from the same ultimate source.

47. The same principle applies to the powers of the House in respect of Members. In evidence to the 1956 Committee the then Clerk of the House of Commons stated that:

> "I have no doubt that the power of the House of Commons to punish its Members derived from the fact that the House was a constituent part of the High Court of Parliament[20]. That opinion is based on the decision of the Privy Council in *Kielley v Carson*[21] … where it was held that the

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[17] LJ, iii.544b, 30 March 1626.

[18] Erskine May, 19th edition (1976), p 132.

[19] Report of the Joint Committee on Parliamentary Privilege, paragraph 262.

[20] Compare *Erskine May*, 19th edition, p 118: "the origin of a power which is judicial in its nature is to be found naturally in the medieval conception of Parliament as primarily a court of justice—the 'High Court of Parliament'".

[21] In *Kielley v Carson* (1842, 4 Moo. P. C. 63) the Privy Council held that the House of Commons possessed the "power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of contempt … not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of

> power to punish for contempt is inherent in the House of Lords and in the House of Commons, not as a body with legislative functions, but as a descendant of the High Court of Parliament and by virtue of the *lex et consuetudo parliamenti*."

48. These points were explored more fully in exchanges in the course of oral evidence to the 1956 Committee. In one exchange, Viscount Hailsham asked, "assuming that the House of Commons has … thought it necessary to evoke out of the *lex et consuetudo parliamenti* the limited power of exclusion which it calls suspension, is there any reason in principle to say that the Upper House of Parliament … cannot take an identical or parallel step?" Mr Squibb's answer was that "in principle there would be no reason why one House should have wider powers in that respect than the other." (Q 224)

49. Yet while the evidence submitted to the 1956 Committee throws much light on the powers of the House in respect of suspension, that Committee did not itself pursue the argument through to its logical conclusion. The Committee was concerned with the non-attendance of "backwoodsmen", and clearly invoking the power to suspend a Member whose only offence was non-attendance would have been absurd. However, it also follows that the Attorney General's interpretation of the 1956 Committee's conclusions (that "partial exclusion of a peer from the House would not be in the power of the House") is not the whole story. The Committee's conclusion was in fact as follows:

> "It may well be that the House, in law and by the custom of Parliament, has further powers … The fact that these powers have not been treated extensively in this report should in no way be taken as an indication that the Committee regard them as non-existent or obsolete. In light of present circumstances, the Committee have felt that it would not be useful or profitable to spend much time examining, for example, the power of the House to punish for contempt; this must not be taken to imply that the Committee are of the opinion that this power does not exist, or might not conceivably be of use in the future."

50. There can be no doubt that inherent in the law and custom of Parliament, by virtue of the historic role of the two Houses as the High Court of Parliament, is a power, residing separately in each House, to punish its Members. That the House of Lords possesses such a power in the abstract is not disputed: as recently as 1999 the Joint Committee on Parliamentary Privilege acknowledged that both Houses had power to imprison their respective Members, and that the House of Lords also possessed power to impose fines (paragraph 276). The question is whether, in respect of the House of Lords, this acknowledged power extends to a power to suspend a Member.

51. Common sense suggests that the greater must include the lesser—that if the House can prevent a Member from attending by imprisoning him, it must be able also to prevent him from attending by simply suspending him. While this argument seems to me to be in itself almost unanswerable, it has not gone unchallenged. Mr Squibb, in evidence to the 1956 Committee, asserted that "there is no justification at all for saying that punishment for contempt can be anything except a fine or imprisonment." (Q 196)

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the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing contempt being one."

52. This assertion seem to me incompatible not only with common sense, but with the historical derivation of the House's powers. If it is accepted that the disciplinary and penal powers of the two Houses derive ultimately from the same source, the inherent powers and privileges of the High Court of Parliament, it must be for each House to decide according to circumstances how it chooses to exercise those powers. The House of Commons decided in the late nineteenth century that it was appropriate to exercise those powers by means of suspension, but in so doing, as the Clerk of the House, following the judgment of the Privy Council in *Kielley v Carson*, acknowledged in 1956, it did not assert a new privilege—it was simply making use of an existing power in a way that it deemed appropriate with a view to better regulating its own procedures.

53. The House of Lords, in contrast, has not, since the 1640s, chosen to exercise its penal power by means of suspension, though in theory it may still exercise this power by imprisoning or fining its Members—options which are now unworkable in practice. But if the underlying penal power existed in 1705, it must remain inherent in the House of Lords today—the difference between the two Houses lies not in their inherent powers, but in the way they have chosen to exercise these powers over time. Just as the use of proxies, once regarded as a constitutional right, had become "objectionable" by the 1860s, and was accordingly suspended, so the exercise of the penal powers of the House, an issue which seemed largely academic in 1956, now needs to be reviewed in light of changed circumstances.

54. **In summary, I conclude this subsidiary argument by saying that the House had in 1705 an inherent power, deriving from its status as a constituent part of the High Court of Parliament, to discipline its Members; and, moreover, that any decision that the House may now take as to the means by which it imposes such discipline, for example by suspension, falls within the undoubted privilege of the House to regulate its own procedures.**

MACKAY OF CLASHFERN

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