



IN CONFIDENCE



FOREIGN AFFAIRS COMMITTEE

INQUIRY INTO THE DECISION TO GO TO WAR IN IRAQ:

Orders and precedents of the House governing appearance of witnesses

Note by the Second Clerk

Introduction

This note aims to provide Members with some background information on the rules and precedents governing the appearance of witnesses before select committees. This information may be helpful in relation to the forthcoming inquiry into the war in Iraq.

Formal powers

By virtue of the authority granted to them under Standing Order No. 152 (4a), all departmental select committees have the power to send for “**persons, papers and records**”. Generally, committees need only request witnesses to give evidence but a formal summons can be issued by the Chairman or Clerk. Should the witness thus summoned fail to attend (thereby committing a contempt of the House), the committee can report the matter to the House, which in the past has ordered the offender to attend at the bar.

There are two principal **exceptions** to this power:

- (a) **Members**: Members of either House, including **ministers**, may not be formally summoned to attend as a witness before a departmental select committee. In general, it is rare for ministers in the department scrutinised by a committee to refuse a reasonable request to provide oral evidence. However, there are examples of ministers from other government departments refusing to appear before a committee to which they are not responsible (see below). It should also be noted that a select committee cannot *order* a Secretary of State to produce papers he/she is unwilling to supply; this may only be done by the House agreeing a suitable Motion for an Address.

(In April 2002 the **Prime Minister** agreed to appear twice a year before the Liaison Committee to give evidence to its members. However, Prime Ministers have consistently declined to appear before any other select committee of the House since the 1940s.)

- (b) **Civil servants**: the rules governing the appearance of officials before select committees are less clear. The Government has issued guidance to civil servants giving evidence to committees (often referred to as the ‘Osmotherly Rules’). This states that civil servants give evidence “on behalf of their Ministers and under their direction”. In general, the guidance states, ministers will agree to the request of a committee to take evidence from a named official, but they retain the right to suggest an alternative official whom they

FAC/8/0001

feel is, "better placed to represent them". In the case of a disagreement about which official should appear, it is suggested that the minister appear personally. The Government has also promised to allow time for a debate on the floor of the House in such cases.¹

This *modus operandi* has generally worked well in the past, with the majority of committees receiving satisfactory evidence from the officials whom they wished to see. However, as *Erskine May* observed, the guidance: "has not been approved by Parliament and has no parliamentary status" and there have been a number of notable occasions where committees have disagreed strongly with departments over the appearance of named civil servants (see below).² In one significant exchange during evidence given to the Procedure Committee in March 1990, the Head of the Home Civil Service confirmed that select committees could summon named civil servants and they had a duty to attend:

"75 But would you accept that an official has a duty to appear if summoned by Parliament?"

(*Sir Robin Butler*) Yes, that is a duty and it appears in the *Osmotherly Rules* and is one that is accepted by Ministers.

76. In the case of a specific civil servant being summoned.

(*Sir Robin Butler*) In the case of a specific civil servant being summoned."³

Of relevance to the appearance of both ministers and officials is the resolution passed by the House on 19 March 1997, which stated:

"That, in the opinion of this House, the following principles should govern the conduct of Ministers of the Crown in relation to Parliament:

(1) Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their Departments and Next Steps Agencies;

(2) It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister,

(3) Ministers should be as open as possible with Parliament, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and the Government's Code of Practice on Access to Government Information (Second Edition, January 1997),

(4) Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code (January 1996).⁴

¹ Cabinet Office, *The Working of the Select Committee System*. Cm 1532. p 11

² *Erskine May*, 22nd Edition (London, 1997), p 649

³ Treasury and Civil Service Committee, Fifth Report of Session 198990, *Civil Service Pay and Conditions*, HC 260, QQ 7576

⁴ HC Deb, 19 March 1997, cols 1046-47

FAC | 8 | 0002

Precedents

Relevant **precedents**, which the Committee might find of interest are given below:

1. During its inquiry into 'Sierra Leone' in 1998–99, the **Foreign Affairs Committee** encountered a number of difficulties in securing the written evidence and witnesses it wished. The Committee asked for:

- *access to FCO telegrams relevant to Sierra Leone*—initially this request was refused. Robin Cook, the then Foreign Secretary, argued that such publication would inhibit the frankness of future “sensitive reports of exchanges with other governments”.⁵ Eventually, however, the FCO agreed to give the Committee access to one set of the “key documents”, to be kept securely in the committee office by the Clerk, which Members could only access there. This practice has since become standard with confidential documents.

(In correspondence with the Committee, Mr Cook also made clear that he was unwilling to disclose information to Members that would hinder the inquiry then being conducted by Sir Thomas Legg. The Committee produced two Special Reports on this matter, arguing vehemently that: “no area of Government expenditure, administration or policy can be ‘ring-fenced’ from parliamentary scrutiny by the establishment of a Government inquiry”.⁶ The House subsequently debated part of the First Special Report, on whether the Government could impose “prior conditions on the release of information properly sought by a Select Committee”, during an Opposition Day.⁷ The matter was not resolved in the Chamber and in its final Report, the Committee registered its belief that the Government should supply information to committees regardless of what departmental inquiries were being carried out at the time.)

- *access to relevant intelligence reports and assessments*—this request was refused on the grounds that such papers were not normally released to committees and the Foreign Secretary refused to change his position.
- *a private evidence session with the Head of the Secret Intelligence Service (“C”)*—this request, and a subsequent one for a private briefing, was also refused by the Foreign Secretary who argued that the Intelligence and Security Committee (ISC) was the appropriate committee to examine the SIS’s work and that “C” would be unable to say anything useful in a session with the Committee anyway, owing to the nature of the agency’s work. The Committee registered its annoyance at this refusal in its final Report. Since that time, however, it has secured two private briefings with “C”.
- *evidence from three named officials*—these had been directly involved with the Sandline Affair. The Department initially only offered one and, in the end, the Committee had to settle for a “compromise” of two

2. In March 2002, the Department for Transport, Local Government and the Regions (TLGR) refused to allow Lord Birt, then acting as an adviser to Number 10’s Forward Strategy Unit, to give evidence to the **Transport Sub-Committee** on its inquiry into ‘**The Government’s Ten Year Plan for Transport**’. The Department argued that the civil servant it nominated was the

⁵ Foreign Affairs Committee, Second Report of Session 1998–99, *Sierra Leone*, HC 116, para 98

⁶ FAC, Second Special Report of Session 1997–98, *Sierra Leone*, HC 852. Also see: First Special Report of session 1997–98, *Sierra Leone*, HC 760.

⁷ HC Deb, 7 July 1998, col 865

FAC/8/0003

appropriate witness to answer the Committee's questions on this subject and that Lord Birt was an unpaid strategy adviser to the Prime Minister with no executive responsibilities. Owing to the convention cited above, the Committee was unable to summon Lord Birt to appear before it as he is a peer. The Committee produced a full Report on this matter, but was unable to secure Lord Birt's appearance.⁸

3. The **Transport Sub-Committee** also had cause to make a Special Report to the House in 2002 on the summoning of witnesses.⁹ As part of its inquiry into '**London Underground**', the Committee wished to take evidence from a Treasury Minister, as it argued that the Secretary of State was, in this matter, "little more than a messenger" for a decision made by the Chancellor. HM Treasury refused to supply a minister, however, and the Committee therefore presented a Special Report to the House calling on it to make the Order: "That a Minister from HM Treasury do attend the Transport, Local Government and the Regions Committee to give evidence about the London Underground PPP." This matter was discussed in an Estimates Day debate on the subject on 27 June 2002, but no further action was taken by the House.¹⁰

Options

Should the Committee experience difficulty in obtaining the written or oral evidence it requires, it could consider undertaking a number of steps:

- *issue a formal summons* for the appropriate "persons, papers or records"—this would only be possible in the cases not covered by the exceptions noted above.
- *produce a Special Report*—special reports are produced in "reference to some matter incidentally arising related to the powers, functions or proceedings of the committee".¹¹ In such a report, as in the case of those produced by the Committee in the last Parliament on Sierra Leone, a committee can report the difficulty it is experiencing in pursuing a particular inquiry and seek guidance from the House as to how it should proceed.
- *produce a Report*—a 'full' Report may similarly be used to draw a particular matter to the attention of the House but it could also include recommendations or conclusions, to which the Government would be obliged to answer (if the department was, for example, refusing to supply particular papers).
- *obtain time for a debate in the House*—as highlighted above, the Government has undertaken to make time for a debate when committees disagree with the Government over the availability of witnesses. This would give the Committee an opportunity to seek guidance from the House and, if necessary, to urge it to act. Such a step would probably need to be preceded by the publication of a Special Report.

As the precedents listed above show, however, in the past the House has been unwilling to exercise its full authority in matters of disagreement between committees and departments when they have been drawn to its attention.

Geoffrey Farrar

Second Clerk of the Committee

10 June 2003

⁸ Transport, Local Government and the Regions Committee. Fourth Report of Session 2001–02, *The attendance of Lord Birt at the Transport, Local Government and the Regions Committee*, HC 655

⁹ Transport, Local Government and the Regions Committee, First Special Report of Session 2001–02, *The attendance of a minister from HM Treasury*, HC 771

¹⁰ HC Deb, 27 June 2002, col 990 ff

¹¹ Erskine May, p668

FAC/8/0004