

Congressional Investigations:

THE BRITISH SYSTEM²

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I

IT IS NOT AMISS to state the lesson of experience at once. Publicity is the antiseptic of the democratic body politic. It ought to be administered in appropriate doses at the proper time, preventatively if possible. But the body will be ravaged and tortured into disgust and stupidity, it might even be killed, if vitriol is thrust down the patient's throat, the vitriol of despotic temper and savage persecution.

The subject being complicated, it is well that some simplicities be introduced at the very beginning. Therefore, I state the purpose of this article, then follow it by indicating its cardinal lessons, and only thereafter display the facts and the philosophy of investigations.

Since this paper is contained in a symposium on congressional investigations, its purpose may be made explicit. It is to enable comparison of congressional investigations with parliamentary investigations in a system of government that is more than any other comparable in its law and mores with that of the United States.

II

The term "parliamentary investigations" is used not because it is perfectly coterminous with congressional investigations, but because it is the nearest which responds to a comparative treatment. In the British system of government parliamentary investigations exist, but they are not identical with those in use inside Congress. Outside Parliament (that is, the legislative assembly itself) there are investigations which further its legislative and inquisitorial control over administration—investigations set up by the administrative departments or (virtually) the Cabinet that do the work intra-congressional committees are supposed to do.

Hence, for true comparison between the two systems, and to throw a

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² For a treatment of the comparative constitutional law and practice consult Finer, *Theory and Practice of Modern Government* (1949).

strong light on each, this article must consider not only all the extra-parliamentary inquiries which assist the legislature in preparing to make law and to control executive policy and administrative action, but also operations in legislative committees themselves.

However, the institutions of government do not exhaust the situation. The spirit of practice in the use of those institutions is decisive. The truth lies in a modification of Sir Henry Maine's famous dictum: "Liberty is secreted in the interstices of procedure." To this we must add that liberty is more genuinely guaranteed by the spirit of decency, fair play, self-restraint, and concern for the nature of the rule of law itself than by the rigid outlines of procedure. A corruption of spirit corrupts the integrity of the noble rule. *Circumspice!*

Is it not a truly extraordinary phenomenon that in the United States, where Congress is not a sovereign body, but subordinate to a constitution, there appear to be less restraints upon the arbitrary behavior of members in their treatment of fellow members and rough handling of the civil rights of the citizen during investigations, than upon the equivalent action and practice of the British House of Commons, which, together with the House of Lords, is acknowledged to be the supreme and unchallengeable constitutional authority? Though Parliament is sovereign and can legally do anything it likes, its practices are kinder, more restrained, and less invasive of the rights of those who come under its investigative attention. The student is forced to pause and reflect upon this remarkable reversal of demeanor and status. Self-restraint and reciprocal magnanimity are, as it were, the unuttered conventions of the British constitution.

Many facts and much interstitial philosophy are displayed and analyzed in the course of this paper, and since it often happens that the lesson of it all may be obscured by the succession of detail, it is just as well that the main juridical conclusion should be stated at once. It emanates from, it has not been imposed on, the facts. It can be best expressed in a quotation from a famous colloquy between James the First, who attempted to consolidate the absolute sovereignty of a monarch over the laws of England, and that stout Justice whose dictum so largely nourished the American tradition of revolution and independence, Chief Justice Edward Coke, defender of the common law against the tyrant whether King or legislative assembly. The passage runs as follows, but in place of the King's argument, and the term "Majesty," one might substitute "congressman," to taste its contemporary flavor.

And the Archbishop said that this was clear in divinity, that such authority belongs to the king by the word of God in the Scripture. To which it was answered by me, in the

presence and with the clear consent of all the judges of England and barons of the exchequer, that the king in his own person cannot adjudge any case, either criminal . . . or betwixt party and party . . . ; but according to the law and custom of England. . . .

[T]hen the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had endowed his majesty with excellent science and great endowments of nature; but his majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance of goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law—which law is an act which requires long study and experience, before that a man can attain to the cognizance of it—and that the law was the golden metwand and measure to try the causes of the subjects, and which protected his majesty in safety and peace. With which the king was greatly offended, and said that then he should be under the law—which was treason to affirm, as he said. To whom I said that Bracton saith *quod rex non debet esse sub homine, sed sub Deo et lege.*²

It is high time to recall that, indeed, the checks and balances of the American Constitution were founded on the truth common to all the founding fathers, quoted by Madison from Jefferson's *Notes on Virginia*: "One hundred and seventy-three despots would surely be as oppressive as one."³

III

I now turn, more specifically, to parliamentary investigations. My attention, for obvious reasons, is given almost exclusively to the House of Commons. The general arrangement and spirit of law making, the status of the House of Commons as the grand inquest of the nation into executive policy and administrative action, must be brought into the foreground. The British Parliament differs from Congress in this one tremendous practical feature: *it is in the full assembly of the House, not in its committees, that the center of authority over political principle and action is located.* The House of Commons does not delegate to its committees the power of life and death over laws and the conduct of investigation as the House of Representatives and the Senate do. The principle of a bill, its main theory, the great lines of its enacting clauses, are decided by open debate in the House of Commons itself with the social passions, the party emotions, the flow of information and the contending interests, focussed in the one body open to the public view. Similarly, with the prosecution of investigations of executive action. Law originates in the full House of Commons. It is discussed, analyzed, and accepted or rejected in the full House of Commons. Its committees have only a subsidiary and adjunct role over which the House is always master, according not only

² 12 Co. Rep. *63-*64 (K.B., 1655).

³ The Federalist, No. 45 (Modern Lib. ed., 1937).

to the rules of procedure, but to everyday political facts. The continuous investigation of administrative action or any social action which is within the sphere of political authority is conducted by the House itself, as one great open and focussed forum. Outstanding among the several procedures by which this function is exercised is the power to ask questions every day of ministers and the power to adjourn the House of Commons for a debate on a matter of urgent public importance whenever the "mind" of the House of Commons feels that this is necessary in the interest of good government. This fact, of open and focussed integral responsibilities, produces an organic House, in which each member feels his temper moderated by the fact that he is a member of an organism.* He does not feel, as one sometimes believes a congressman may feel, that he alone, apart from Congress, and apart from his political party, must stand up as the tribune of the people, unlimited by loyalty to a program, unlimited by loyalty to the whole House, its privileges, its dignity, and its sacred obligations.** Edmund Burke's classic characterization⁴ is significant not only because it insists upon the right of a member of Parliament to his judgment as distinct from the will of his local constituents, but because it also implies that the House of Commons is not a fortuitous assemblage of ambassadors, each without responsibility to any but his own constituency, who attend a transient meeting and turn their backs on the pattern and design of loyalties fashioned there. Here is an organism with a life of its own, with a corporate personality, to whose social purpose the various members are subordinate. Their party is honorably founded on public principle and they will not dishonor it by wolfish antics. Should they try, the party, true to its sense of public trust, will punish them by expulsion in the last resort, *even if it means the party has lost a seat*. The parties bow to the majesty of the House, the palladium of public obligation in a virile and sober democracy. The augustness, the majesty, the aloofness of the House of Commons is paralleled by a general sense of public duty which subordinates the personal inclinations, the anger and temper of the individual members of Parliament and of the ministers, to justice and mercy, even as it implements a thorough, incisive, shrewd, and tenacious prosecution of those who have broken the rules and violated the spirit of the system.

* Consult Morstein Marx, *Significance for the Administrative Process*, page 511 *supra*.

** Consult Shils, *The Legislator and His Environment*, page 572 *infra*.

⁴ Speech to the Electors of Bristol (1774), found in *American Affairs* 68 (Everyman ed., 1902).

IV

It is as well at this point to set out those components of the procedure of Parliament, and of the executive in its connection with Parliament, which must be considered as a whole, in order validly to compare congressional investigations and British parliamentary investigations.

Those are: (1) Questions in the House of Commons. (2) Adjournment and debate on a matter of urgent public importance. (3) The standing committees of the House of Commons for legislative purposes. (4) Select committees of the House of Commons. (5) Royal Commissions of Inquiry; and various departmental and treasury committees⁵ which exercise an

⁵ There is no particular point in describing the departmental and Treasury committees at any length. In truth, they are like Royal Commissions of Inquiry in everything but the formalities by which they are appointed. The departmental committees are sometimes inter-departmental, where two or more departments join to institute an inquiry. If there is any difference at all between a Royal Commission and a departmental committee, it is perhaps in its scope or trans-departmental nature—for example, a Royal Commission will be entrusted with a problem like the fall of the population rate, and the status of the press is an affair that transcends all departments and so goes to a Royal Commission. It might be said also that a departmental committee lacks the dignity and the augustness of a Royal Commission, yet there are subjects handled by the departmental committees which might as well have been handled by the Royal Commission; most notable examples of which are the Committee on Ministers Powers Report, Cmd. 4060 (1932), which inquired into the problem of “administrative law”; the Committee on Industry and Trade, Cmd. 3282 (1929), which inquired into the problem of improving industrial and commercial productivity; and the Committee on Finance and Industry, Cmd. 3898 (1931), which inquired into banking, finance and credit (gold standard, etc.), and their relation to trade and employment.

These departmental committees are manned by experts and civic persons and, occasionally, by representative spokesmen, or all three. The Treasury committee is nothing but a departmental committee, usually inter-departmental, instituted by the Chancellor of the Exchequer. For example, the Committee on Ministers Powers was a Treasury committee. Some examples of departmental committee work may be offered in order to indicate the scope of their activities, for they render Royal Commissions on these subjects unnecessary.

1928—Five examples:

- Departmental Committee on Ethyl Petrol
- Committee on Land Settlement in Scotland
- Committee on Legal Aid for the poor
- Committee on Municipal Savings Banks
- Industrial Transference Board

1932-33—(Nineteen committees) Examples:

- Commission on Bechunaland Protectorate
- Committee on Present Position of Cooperative Societies in relation to Income Tax
- Foreign Judgments (Reciprocal Enforcement) Committee
- Committee on Appeal from Decisions of Courts of Summary Jurisdiction
- Import Duties Advisory Committee-Report on Dye stuffs Industry
- Committee on Gift Coupons and Trading Stamps
- Departmental Committee on Housing
- Committee on Industrial Assurance, etc.
- Departmental Committee of Inquiry on Miners' Welfare Fund
- Police Pay (New Entrants) Committee

1937-38—(Twenty committees) Examples:

- Committee of Inquiry into Civil Aviation
- Departmental Committee on Corporal Punishment

[Footnote 5 continued on p. 526]

investigative fact-finding function. (6) Tribunals of Inquiry. The first four are intra-parliamentary and conducted by members; five is executive, may be engendered by Parliament but is not conducted by members (it is extra-parliamentary); six is engendered by parliamentary resolution, is extra-parliamentary and mainly of a judicial personnel and procedure.

QUESTIONS IN THE HOUSE OF COMMONS⁶

All members of the House of Commons have the right to ask questions of ministers every day of the week except Friday, that is on four days of the week since the House does not sit Saturdays or Sundays, when the House is in session, that is, about 150 days in the year. Question-time lasts from shortly before 3:00 P.M. each day to about 3:45 P.M. Every member has the right to ask as many as three questions for oral answer, the purpose of the limitation being to thwart would-be monopolists and exhibitionists. He may ask as many questions as he wishes where the answer is to be written.⁷

An average of 70 to 100 oral questions are asked every day. As many

[Footnote 5 continued from p. 525]

Committee on Evacuation
 Scottish Departmental Committee on Nursing
 Committee on Holidays with Pay
 Palestine Partition Commission
 Commission on Disturbances in Trinidad and Tobago
 Departmental Committee on certain questions arising under the Workman's Compensation Act

1942-42—(Seventeen committees) Examples:

Committee on Post-War Agricultural Education
 Committee on Minimum Rates of Wages and Conditions of Employment in Connection with Special Arrangements for Domestic Help
 Committee on Post-War Hospital Problems in Scotland
 Committee on Hydro-Electric Development in Scotland
 Committee on Land Utilization in Scotland
 Midwives Salaries Committee

1947-48—(Thirteen committees) Examples:

Committee of Inquiry into the Future of the British Film Institute
 Committee on Milk Distribution
 Committee of Inquiry on Evasions of Petrol Rationing Control

⁶ Consult the comprehensive treatment of this procedure in Report of the Joint Committee on the Organization of Congress, Suggestions for the Strengthening of Congress, Statement by Herman Finer, at 49 (1946).

⁷ A clear twenty-four hour notice must be given to the clerks of the House of oral or written questions. Since this means its appearance on the notice paper, questions may be answered anywhere from twenty-four to forty-eight hours after they are handed in. The Speaker of the House, and, in practice, ministers, may also be approached privately by Private Notice by the member. The Private Notice question gives the opportunity of asking urgent and public questions, skipping the time limit of notice. They are put at the end of the regular order. It is usually employed by a member of H. M. Opposition, and is asked by arrangement with the government, which thus signifies its willingness to answer matters of particular urgency. Especially influential members of the House who are not members of the Opposition, are given the opportunity of raising questions in this way also.

more are given a written answer. The oral questions carry with them the right to ask supplementary questions which may, at the discretion of the original questioner, or any of his friends acting in arranged or spontaneous collusion, press the ministers for answers if the original answer is deemed unsatisfactory. This enables the questioner to pierce the guard of the minister and make him confess to inefficiencies which otherwise he might have kept concealed.

I insist very emphatically on the tremendous investigative and disciplinary power of these questions, which may concern any matter of public importance within the authority of government. Some observers of House of Commons procedure urge that many of the questions are trivial, that many of them simply reveal information which everybody already knows, and that many of them, again, supply rather than elicit information. This view is not intelligent. The question period has three characteristics of the utmost importance for the investigative function of the House of Commons. These are its regularity, its continuity, and the open publicity of the information which this form of inquisition presupposes. As a result ministers suffer from an anticipatory dread of having their administration found faulty, their reasoning subjected to open criticism, and finding themselves inescapably bound, sooner rather than later, to divulge what the House of Commons wishes to know. It must be remembered that any answer given by any minister under the British system of the collective responsibility of the Cabinet commits every member of the Cabinet; and even when it is not given by the Prime Minister or his Deputy Prime Minister, but by any minister in or outside the Cabinet, the whole Cabinet is committed to the policy implied in the answer. There is no refuge afterwards in the excuse that the answer was tentative, without solid basis, or that it was unintended.

Two qualities of the effectiveness of question-hour are of the utmost importance. They are emphasized here because they are not to be found in any of the instruments used by Congress to investigate either the administration or individuals. The first is that the knowledge that questions may be asked at any time and that they must be answered within a comparatively short time after they are asked, aborts the accumulation of inefficient or undesirable administration and policy to a point that when an investigation ultimately is necessary, it usually savors of the sensational and the scandalous. The knowledge that a question can be asked, and that the answer is a governmental commitment made amid the attention of several hundred members of the House, tends to influence the questioner to control the insinuations of malice, bias and temper that

might be injected into his question, to insure that the question is justifiable on public grounds and not on the grounds of personal political ambition, exhibitionism, fun or sadism. In a responsible atmosphere the procedure emphasizes responsibility. The questioner is in question. On the other hand, ministers know that though the practice of questions causes them considerable trouble and a very great deal of anxiety, their answers, if accepted, involve the whole House in the responsibility for the actions taken or policy pursued. The responsibility of subsequent action is not on the ministers in the absolute sense which it might have been had they gone on in their own sweet way without question at all. They now have an assurance, and can actually move ahead with their administration and their policy more confidently than in a system which separates the legislature from the executive, and tends to separate the legislature from the citizens-at-large in such a way that neither knows the mind and intentions of the other.

As for fact finding, the government cannot take refuge behind the walls of a constitution which separates executive from the legislature. The legitimate excuse "it is not in the public interest" must satisfy hundreds of able members conscious of their right and dignity and who are determined to know. No government can in the electoral situation afford to court the public suspicion that it has something bad enough to need hiding. The volume of facts is immense.

Questions are asked in the full House of Commons, and when the House is in fullest attendance. Moreover, the questions which raise the most important and crucial political issues are fully reported, not only in the great metropolitan newspapers, but also in the newspapers published in the provinces.⁸ The question-hour is, in fact, a town meeting of the politically conscious observers of the whole country.

The force and the sanction behind questions, that which causes the process to be a very grave matter and which forces ministers to answer as fully and truthfully as the situation requires, is the responsibility of the Cabinet to the House of Commons and the responsibility both of the House of Commons and the Cabinet to the country. It has been urged by some observers of British parliamentary methods that this responsibility is more theoretical than real, because a vote of confidence cannot under modern conditions overturn a Government since it is founded upon a majority of seats in the House of Commons. This observation is true, but only formally and superficially so. The House of Commons is every day

⁸ For the facts concerning nation-wide circulation of metropolitan newspapers, consult Report of the Royal Commission on the Press, Cmd. 7700 (1949).

the arena of a contest between the Government and its followers and the Opposition leaders and their followers, for gaining credit in the country. From the long accumulation of credits derived from the blows that are struck against each other, on the issues of the highest public policy, may emerge a balance cashable at the next general election. The eyes of the public are on the House of Commons. The eyes of the men in the House of Commons, and this includes the Government, are on the people in the country and on the coming election. The constitution is well-nigh plebiscitary. Therefore, every question and every answer is invested with seriousness, with a contingent and stinging seriousness.

It happens often enough that simple questions turn into ones penetrating deep into the vitals of governmental policy, in keeping with the every day subtle and animated and fluent manifestation of politics. Great debates and inquiries may be inspired and forced by them. For example, in 1928 the House of Commons burst into passion over the Savidge case which came about because harsh methods had been used by Scotland Yard against a clerical worker accused of a morals offence. The result of this was in the end the establishment of a Tribunal of Inquiry to which reference will be made later,⁹ and finally a Royal Commission of Inquiry to recommend changes in police procedure.¹⁰ A question that began with the allegation that the government was threatening prosecution of a member to prevent disclosure of ineffective provision of anti-aircraft guns, led to investigation by a Select Committee on Privileges of the application of the Official Secrets Acts to members of Parliament. In the 1930's a third concerned riots caused by new Unemployment Compensation Regulations, and produced a debate and a very important change in the regulations.

DEBATE ON MATTERS OF DEFINITE AND URGENT PUBLIC IMPORTANCE

Questions easily lead to the second form of open parliamentary investigation to which I have referred; namely, "the adjournment of the House on a matter of definite and urgent public importance," though the motion need not originate in a question. This procedure is based upon Standing Order Number 8, which permits debate that very day, if a member of the House, supported by forty others, moves the adjournment of the House on a matter of definite and urgent public importance, and if the Speaker of the House of Commons accepts the motion.

It will be at once appreciated that this procedure places a very important responsibility upon the Speaker, because the decision whether the

⁹ Consult page 564 *infra*.

¹⁰ Consult Report of the Royal Commission on Police Powers & Procedure, Cmd. 3297, 9 Official Docs. Eng. 127 (1928-29).

matter is of definite and urgent public importance is his. Personally, it may be remarked here at once that the Speakership of the House of Commons is in draconic contrast to that of Congress. In Congress the Speaker is, necessarily, a partisan. In the House of Commons it has been contrived by accumulated tradition, and institutions deliberately established, to convert the Speaker into an utterly impartial servant of the whole House, and, one might say particularly, of the minority; he is the rules of the House come to life without interposition of his personal or partisan views. Therefore, it is possible to allow that Speaker the power to decide whether the regular agenda of the House of Commons shall of a given day be suspended in order that at 7:00 o'clock that same evening a debate may occur on a fresh emergency matter put before the House. I have already mentioned the Savidge case.¹¹ Other cases illustrate this power of parliamentary investigation: on May 7, 1946, when Mr. Bevin announced that the Government proposed to evacuate Egypt the Speaker accepted Mr. Churchill's motion to adjourn the House. In July 1946, when the British government arrested some members of the Jewish Agency, a member moved the adjournment of the House and Mr. Speaker accepted the motion. On the latter occasion the member who moved the adjournment was a member of the majority party in the House of Commons. In February 1947, during the great fuel crisis, once again a member of the Labor Party raised a question on supplies of coal not available for a great motor manufacturing works; a debate on the adjournment occurred on that same day. The Government was compelled to prove its case with satisfactory evidence.

Now, it is not intended to make overmuch of this right, because such motions are accepted roughly only twice a year. Yet the possibility of instantaneous arraignment keeps the government alive to opinion in the House of Commons and alert in its administration, which means efficient and lawful relationships with the millions who are under its democratic power. The debate takes place clearly in the public view. This kind of discussion in the House of Commons, like questions, also aborts the necessity of something more pretentious, rigid and formal in its procedure, and also more ponderous. If the purpose is to secure the responsibility of the executive, it is not always the number of times the instrument is used, but the contingency that it may be used that exerts effective control over the minds and actions of ministers.¹²

¹¹ Consult Report of the Tribunal appointed under the Tribunals of Inquiry (Evidence) Act, Cmd. 3147 (1928), in regard to the interrogation of Miss Savidge by the police.

¹² Nothing could better sum up the feeling of ministers on this and on the forms of debate to be mentioned presently than the opinion of one who has been for nearly thirty years a mem-

In other words, we have here in questions and in the right to raise a debate on the adjournment, a constant and ceaseless review of the actions of the executive. In contrast to this the investigative power of Congress is occasional and not continuous. It is cumbersome and very slow. When an investigation does come, not after a long process of questioning such as in the House of Commons, the actual hearings seem to the observer to develop almost into a prosecuting criminal inquiry, or, as Walter Lippmann has said, "into a wild and feverish manhunt in which Congressmen do not stop at cannibalism."¹³

A word or two must be said about the debates on motions other than Supply¹⁴ at this point. Frequently in the evenings when public business is ended at 11:00 P.M. a half an hour or so is available for debating the motion for that day's adjournment at 11:30 P.M. This is the opportunity for a member to raise some individual grievance,—such as a pension, some post office procedure, damage to a view through public works, railway fares, British Information Services, housing—but not a matter that requires legislation. This then is another opportunity to interrogate the administration and get some sort of answer. Then, further, private members are normally allowed to put motions to the House on every Wednesday from the beginning of the session until just before Easter. Since all members

ber of the House of Commons and has held some of the highest ministerial offices. In answer to questions in the Third Report from the Select Committee on House of Commons Procedure, No. 189-91 (1946), the Rt. Hon. Herbert Morrison said: "It is perfectly proper and indeed to the public advantage that Parliament should jump in; a short sharp vigorous debate on the adjournment, even for only half an hour in which the government is thoroughly exposed and knocked about, will have a far more rapid, beneficial effect than a number of meetings of a select committee, the result of which may be that the department may become demoralized waiting for the select committee's report, and it might, indeed, slow up the procedure of disposal. . . ." *Ibid.*, at 123. "But I do say on the point of exposing a scandal, that a row on the floor in my judgment is quicker and the execution by the axe against the minister is sharper than in the case of the necessarily more leisurely investigation of a select committee. . . ." *Ibid.*, at 127. "Sometimes party bias—a sharp vigorous attack—is in the public interest, and if a Minister is slipping up or something is badly going wrong, the quicker he is knocked about with all the bias, vigor and energy of which the critics are capable the better. It may be right it should be so. I want ministers always in their lives to be apprehensive about these potential sharp and vigorous attacks. That is indeed the justification, under our Constitution, for the existence of the Opposition. It is a great blessing, and a great advantage always, and sometimes a nuisance. But that is what it is for." *Ibid.*, at 127.

¹³ Roughly, fifty-nine days out of an average of some 120 days of a parliamentary session are spent on the control of policy—all of which involves putting the government on its mettle to justify itself by the production of information about its processes and thinking—this is some 50 per cent of the time of the House. The time includes questions, debates on the adjournment as already sketched, Supply (to which attention will be given shortly), some six days of debates in the form of reply to the King's speech, some six days on general motions for adjourning the House at vacation periods, some fourteen days for motions open to the discretion of members—including the Opposition's motions of censure.

¹⁴ The word "Supply" is used in Britain to connote appropriations.

could not possibly find Wednesdays enough, the privilege is allotted by ballot. Members form teams for the selection of subjects of debate and ballot. The Opposition organizes the subjects most troublesome to the Government.

Motions involving censure of the Government, demanded by the Opposition, are accorded when the Government feels that political temperature has risen to the degree that requires some purge by debate.

Now it is possible for the executive of the United States as several cases have made clear, to decline discovery of executive material under interrogation by Congress.¹⁵ It is possible also for the executive in Britain to do this, and on grounds of the public interest or public safety information has been refused.¹⁶ But where the executive sits in the assembly and in the same seats as the other members, and where it personally emanates from election by the people at the same time as the rest of the House, and is elected on the same terms as colleagues of the rest of the House, it is far more difficult for the executive to resist giving the information the House requires than where legislative and executive have separate origin, separate authority, separate responsibilities. Perhaps because there is a separation, the United States Congress is the more jealous, and tends to act as though it were bent on inflicting capital punishment whenever it appears that the executive is denying to it the information it demands in order to carry out its own functions as the legislative body or as the controller of the nation's purse.*

THE STANDING COMMITTEES OF THE HOUSE OF COMMONS

The six standing committees are nominated every session by the Committee on Selection, itself established sessionally. The latter consists of eleven members, who, by practice of the House, are nominated by the leaders and the Whips of the political parties in accordance with their numerical strength from those most experienced and trusted by Parliament. In composing the standing committees the Standing Orders of the House of Commons direct the Committee of Selection to consider the composition of the House, the classes of bills committed to such committees, and the qualifications of the members selected. In practice this means that the dominating considerations are party strength and loyalty, the geo-

* Consult Shils, *The Legislator and His Environment*, page 576 *infra*.

¹⁵ Consult *Discovery of Documents under the Federal Rules*, 18 *Univ. Chi. L. Rev.* 122 (1950).

¹⁶ Consult especially Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 *Fed. Bar J.* 103 (1949).

graphical distribution of membership, and expertness on, and special interest in, the subject matter of the standing committee's work.¹⁷

The fundamental character of the standing committees is that they are strictly subordinate to the power of the House of Commons so far as the principles of bills are concerned. They are nothing but a subordinate agency of the House of Commons designed to save its time and to help it in the noncontroversial, or at least the minimum controversial, aspects of a bill. Their chief function is to improve the technical qualities of legislation and to enable minor though possibly important concessions to be made to the Opposition point of view or to the second thoughts of the Government. In other words, they have little in common with congressional committees.*

Prior to 1934 the Committee on Selection nominated a panel of between eight and twelve chairmen of committees. And these appointed the chairman of the standing committees from among their own number. Since 1934, when chairmen were endowed with the "kangaroo" power of closure, it has been the Speaker of the House who appoints the panel. It is extremely interesting and important to notice that the chairmen of committees thus chosen are not necessarily chosen from the majority party of the House of Commons, but the Speaker and the panel of chairmen have regard to the length of service in the House of Commons and parliamentary standing. It is attempted to secure as chairman a man who, quite apart from partisan considerations, will conduct the committee with fairness, guide the progress of business, and simulate in his conduct of the committee the impartial and serviceable qualities of the Speaker of the House of Commons himself. Naturally, the proceedings in committee on each bill are in the hands of a minister; and with regard to the composition of the committees, the Government is clearly in the majority, with the consequence that the drive and direction are in its hands.

Something must be said on the size of committees. It is not necessary to go back before the year 1946 excepting by a very allusive reference. Today, each committee has appointed to it twenty members of the House of Commons as its permanent nucleus, and then up to thirty additional auxiliary members who are appointed "because of their qualifications" to

* Consult Meader, *The Importance of the Fact-Finding Process*, page 449 supra.

¹⁷ In the case of the Scottish Standing Committee, all of the members from Scottish constituencies sit together, with between ten and fifteen other members nominated by the Committee of Selection, with an eye to the balance of party strength in the House of Commons. When a bill relates to Wales alone all Welsh members are put on the committee to which the bill has been referred.

assist discussion on the particular bill. In a sense, then, these committees are miniature Parliaments for minor legislative operations.

It was provided in 1907, and in certain amendments to the rules of procedure since that time, that all bills, with certain exceptions, which have passed their second reading in the House of Commons automatically go to the standing committees.¹⁸

The authority of the committees is well described by the rules of the House of Commons.¹⁹ The rules of the House of Commons do not, of course, give an all-round, all-dimensional, political view of the status and functions of the committees, but they do set a procedural basis for the former. A committee is bound by the decision of the House on second reading in regard to the principle of a bill and should not, therefore, amend the bill in a manner destructive of this principle. The objects of a bill are stated in its "long title" which should cover everything contained in the bill when introduced; and any amendment which is within the scope of the stated objects of the bill is in order. The committees may make amendments relevant to the subject matter of the bill. This gives them some latitude. Where such amendments are outside the objects stated in the title the committee extends the title so as to cover them. Amendments which are outside the scope as defined by what has already been said cannot be entertained and must be ruled out of order, unless a special instruction has been given by the House to the committee permitting such latitude.

It will be appreciated that since the careful, systematic, and firm drawing of the alignment of political parties, it could hardly happen that a committee would destroy the work of the House of Commons. On the second reading both Government and Opposition concern themselves only with the main principles of the bill. There is no place for minute and individual amendments to its various clauses. The bill is accepted or rejected as a whole, and since the vast majority of all bills introduced into

¹⁸ The exceptions are: (1) Tax Bills and consolidated fund or appropriation bills, which are committed automatically to a committee of the whole House; (2) bills for confirming provisional orders; (3) in the case of any other bill a motion may be made by any member that the bill be committed to a committee of the whole House or to a select committee or to a joint committee of the House of Commons and the House of Lords. It may be noticed that the phrase "any member" includes, of course, any member of the Government, and normally the Government takes the initiative where it thinks the whole House should handle the committee proceedings on a bill. In addition to these exceptions, others were established in 1946: (4) any bill which it may be necessary to pass with great expedition; (5) one-clause bills not requiring detailed examination in committee, and (6) bills of "first class constitutional importance," as of the order of the Statute of Westminster or the reform of the House of Lords.

¹⁹ Consult May, *Parliamentary Practice* c. XXI (Campion's ed., 1946).

the House of Commons are introduced by the government,²⁰ which, *ex hypothesi* has a majority, the bills are accepted. It remains, then, for the committees to confine themselves within the scope of the principle, and thus their subordinacy is effected. They have none of the power of life and death of a committee of Congress. They have none of the power of life and death over the bills as in the parliamentary commissions of continental democratic legislatures. They are the instrument and the handmaiden of the House of Commons designed to save its time. When it is realized that from 1919 to 1939 standing committees sat on an average of ninety-five days a session, a session itself being something like 120 to 130 days, and that in 1945 the Education Bill occupied the whole House of Commons itself for fourteen days, it will be appreciated what a saving of time the committee sitting upstairs is to the House of Commons.

Let it be borne in mind that there are no standing committees on appropriations or ways and means: these matters remain in the whole House.

Some other remarks must be made upon the committee proceedings especially to make indubitable their unlikeness to the United States congressional committees. First, there are no hearings in these committees. No witnesses appear before the committees. No lobbying groups appear before them, at any rate, in informal and open activity. No representatives of experts or special interests outside the House of Commons give testimony in the direct and formal way that is to be observed in the operation of committees of Congress. Standing committee proceedings are public, as public as the proceedings of the House of Commons itself. But once again let it be emphasized there are no hearings in the American sense. Therefore, they can hardly be called investigative committees. But, if the source of the information they need so that their work may be fruitful is examined, one obtains a clearer insight into the nature of these British parliamentary investigations. Naturally, in the course of discussing the numerous amendments (they may run into hundreds) to a bill, there must be many occasions when information is called for. The minister who is in charge of the bill and wants to get it carried through and report it back to the House of Commons as soon as possible, must inform to persuade—his parliamentary future depends on his proficiency. The information comes through the minister; and his information is sifted through the civil servants who are the experts in the various departments. The question then is, from where do these civil servants get their information? Some they have by their own first-hand researches. The rest they

²⁰ Consult Finer, *op. cit. supra* note 1, at 437.

obtain from the various claimant interests in the country, from studies made by experts, professorial and otherwise, outside the services of the government. They will base themselves upon the findings of Royal Commissions of Inquiry, of Departmental Committees and Treasury Committees of Inquiry, upon the various annual and special reports produced by the different government departments, upon the reports of their advisory committees named by public representative bodies.²¹ Moreover, the various political parties themselves have their own research departments by which they are enabled to call upon the vast amount of information available to the membership of their parties, individual and group; and where it is necessary they make special inquiries throughout the country through their party campaign agents and through the various committees formed within the party, to bring to bear and focus the information on the business of Parliament.

There is thus plenty of information; but it is information which is already available. The committee is not an investigative committee. It is a committee that asks questions. It is a committee that sifts information proffered to it or exacted by it. But it does not bring before it a crowd of witnesses as a congressional committee does when it is preparing a report upon a bill that has been committed to it.

It will be noticed that the size of the standing committees of the House of Commons is considerably larger than that of any of the standing committees of Congress. This is no accident. I have deliberately avoided introducing any long historical account of the committees but it may here be said that their history goes back almost to the very beginnings of Parliament.²² Changes in size have not been spasmodic and irrational. The House of Commons felt that it must have sufficiently small committees to permit of enough separate committees in simultaneous operation at a time when big legislative programs were being handled, so that attendance did not too heavily burden the time of each individual member. But at that same time, and this has been a constant and a very important ele-

²¹ On the latter, consult Vernon & Mansergh, *Advisory Bodies* (1940).

²² Consult 2 Redlich, *History of Procedure of the House of Commons* 203-214 (1908). From 1888, because of congestion of business in the House and the obstructionist tactics of Irish members, the way to relieve congestion was found in the establishment of two Standing Committees. In 1907 the number was increased to four, one of which was to deal with Scottish business only, and as we have seen we have now come to six committees. Before 1919 the size of committees was between sixty and eighty; in 1919, this was changed to a minimum of fifty and a maximum of seventh-five. In 1926 the nucleus number was changed to a minimum of thirty and a maximum of fifty, while the optional auxiliary element was increased to between ten and thirty-five. Therefore, the maximum size could be eighty-five, the minimum could be forty.

ment in the decision on the size of the committees, it was desired that these committees should be representative. If some six hundred members of the House of Commons are already a rather minute and simplified mirror of a vast country with complicated domestic and imperial interests, then a committee of fifty or even eighty is so much less representative. Now, it is true that the substantial quality of a bill is what commends it to the acceptance of the masses and evokes from them loyalty and obedience to its clauses; but, in a democratic age, there is one other extremely important element in the authority of the law—the reasonableness of the procedure by which it is established. Of this procedure, representativeness, as establishing the basic justification of law, is a most important ingredient, and the House of Commons has attempted to maintain this in the size and composition of the standing committees. The committees were reduced in size because too large a committee made concentration on the subtleties of amendments difficult, and also the larger the number of members with an arithmetical interest in participating, the more difficult the maintenance of order.

The committees now meet three days a week for two and one-half hours each morning, and, when they are heavily laden, in the afternoons as well if the House is not considering important business. Legal draftsmen from the Parliamentary Counsel's Office (an executive officer) are on hand watching carefully for the effect of amendments upon the total purpose of the bill, and advising the Government representatives in what form they should accept the amendment, if at all. Not only do the committees save the time of the House of Commons, but confined as they are practically to noncontroversial issues, the members of the Opposition and private members within the ranks of the Government itself, find many occasions for the introduction of extremely useful amendments. Some even go just beyond the noncontroversial, yet being recognized as in the interests of all parties, the bill is so amended. When the committee reports back to the House of Commons, the House of Commons deals with the bill in what is called the Report Stage of the bill, the stage that precedes the Third Reading. The Report Stage debate may traverse the whole bill, paying special attention to the amendments of the committee. It is not surprising to find that with the increasing authority of committees owing to congestion of business in the House of Commons, the House itself tends to protract its debates on the Report Stage, so jealous is it as a full assembly, operating in the open, of anything which is done in committees. The House remembers that though publicity is possible in the committees, nevertheless the standing committees have less public attention paid to

them than the proceedings of the House of Commons itself and verbatim transcripts of proceedings are not always printed. From the relative, though not sinister, obscurity of the committees, the House of Commons wishes once more to drag the bills and throw its own fierce light upon them.

We have seen, then, that the standing committees of the House of Commons have almost nothing in common with the congressional committees, whether for the preparation of the passage of a law or for the investigation of executive conduct. This that may look like congressional committee investigations is not such, and hence we must go to those devices of the British constitution which do supply the services in the British system which the American congressional committees supply in theirs.

SELECT COMMITTEES OF THE HOUSE OF COMMONS

The House of Commons is served by another type of committee, namely, the select committee. Select committees can be classified generally into two classes, though their basic rules are the same: constant select committees, and *ad hoc* select committees. The classification is purely my own and for purposes of convenience. The constant committees are those like the Select Committee on Privileges, the Committee on Public Accounts, the Select Committee on Estimates, and the Committee on Kitchen and Refreshments; they are distinguished from the *ad hoc* select committees by the fact that they are in existence year after year, even though their members are appointed sessionally. Their purposes, as can be deduced, are permanent purposes of the House. The *ad hoc* committees on the other hand are select committees whose members are chosen sessionally but where the committee itself is established for a particular occasion. Where the House of Commons desires to inform itself more particularly on the subject matter of a bill or to investigate some branch of administration not covered by the constant committees, and where it needs information to make up its mind—distinguishing the situation from the handling of a bill before the standing committees—the House of Commons may establish a select committee.

I give attention to the committees in this order: the *ad hoc* committees, the Committee on Privileges, and then those concerned with appropriation and public accounts.

Ad hoc Select Committees

It may be said in general that the scope of the select committees is, of course, the whole scope of parliamentary interests, and that that scope is

equal to that of the congressional committees.²³ Yet may it at once be said that the select committees are no longer the force for investigation that they were in the earlier part of the 19th century. This is an important fact, because the decline of select committees meant that the Parliament and the government have been compelled to find some other means of gathering the facts. The decline of the use of select committees left a way open for and, indeed, was caused in part by, the more frequent use of the Royal Commission of Inquiry and the inquiries conducted by the Departments and the Treasury.²⁴ The number of *ad hoc* committees setting out to find special information is about four or five a year. Nevertheless, the instrument is available and is in frequent use.²⁵

²³ A report of the Select Committee on Committee Rules and Printed Papers thus describes the scope of the committees a quarter of the way through the 19th century: "The importance of the subjects that engaged the attention of Parliament during this period renders the reports of the committees by whom the investigations were conducted of the greatest public interest. In these reports, there is scarcely a subject connected with the laws, institutions, commerce and morals of the country but what will be found treated on: the administration of justice, the privileges of Parliament, the national Church, arts and manufacturing, agriculture and trade, criminal law, police and education—all have their place; and it may be observed that on all subjects relating to arts and commerce, more information will be found in the reports than of former periods, arising from the superior intelligence of those who are called upon to impart knowledge, the willingness with which it is communicated, and the greater accuracy with which the evidence and documents are prepared." Parliamentary Papers No. 516 (1825). The scope is valid for today.

²⁴ Some figures will give an indication of this decline. The average number of select Committees reporting before 1830 was about fifteen. By 1845 the number was thirty and a little later it was around forty-five. Yet, in 1913 there were twenty-one committees. In the session of 1929-30 the number was fourteen. More recently the numbers are even lower, and if there are subtracted from the total number reporting in any one year, those which are the constant type as mentioned before, it can be seen that the number of *ad hoc* committees is much smaller.

²⁵ Select Committee on Post Office (Sites) Bill (1928). Seven members. Four named by the House, three by the Committee of Selection. Allowing petitioners to pray to be heard through counsel, agents, or themselves. Witnesses for the Yorkshire Penny Bank, the Principal of the Secretary's office, General Post Office, the General Manager of the Yorkshire Penny Bank, and an architect. Consult Report from the Select Committee on Post Office (Sites) Bill, No. 51 (1928).

Select Committee on Western Highlands and Islands of Scotland (1928). Relating to contract between the Postmaster General and the Cargo and Passenger Sea Service Company for the conveyance of mails by their vessels with the idea of providing more adequate provision due to the retirement of the company already operating. Eleven members. Roy Wilson in the chair at a time when the Government was Conservative. Committee predominantly Scottish. Persons or bodies desirous of submitting evidence or to appear before the committee, invited to send a written summary. Evidence given by Sir Josiah Stamp, probably as spokesman for the London Midland and Scottish Railroad. Officials from the Scottish Office representing the London and North Eastern Railroad, and Sir Alfred Head, Managing Director of the Coast Lines. Consult Report from the Select Committee on the Western Highlands and Islands of Scotland, No. 117 (1928).

Joint Committee of the House of Lords and House of Commons (1938). Legislation directed to the prevalence of fraud and control of growing nuisance of quasi-charitable house-to-house collections. Six Lords and six members of the House of Commons. Lord Stanmore, taking the

Select Committees are most usually limited to a membership of 15.²⁶ They may be named by the House on the motion of any member; but invariably the motions to establish select committees and the nominations are made by the Government. This itself is interesting, because the select committees, although an instrument of the House, are nevertheless also

chair. Witnesses: spokesman for the Association of Municipal Corporations, Town Clerk of the City of Manchester, Assistant Secretary to the National Council of Social Service, the Secretary of the Manchester and Salford Council of Social Service, Registrar of the Birmingham Citizens Society, the Liverpool Council of Social Service, Secretary, Charity Organization Society, Deputy Commissioner of Police, Honorary Secretary of the British Hospital Association, Representative of King Edward's Hospital Fund, President, Chief Constable Association and colleagues, Chief Constable of Warwick, County Clerk of Kent, Representatives of the County Councils Association. Consult Report by the Joint Committee of the House of Lords and of the House of Commons on the Collecting of Charities (Regulation) Bill (H.L. 185) (H.C. 168) (1938).

Select Committee on Official Secrets Acts (1938). To inquire into the substance of the statement made on 27 June in this House, Mr. Duncan Sandys, member for Norwood; and the action of the Minister of Defense and the Attorney General, into the question of the application of the Official Secrets Acts to members of this House and the discharge of their parliamentary duties. Fourteen members. Very distinguished membership, including several men learned in House of Commons procedure, the law, and its traditions. In the Chair, Sir John Gilmour. Conservative Government. Witnesses sworn on oath. Witnesses who appeared: Mr. Sandys, the Secretary of State for War, various military officers, the Attorney General, the Chief of the Imperial General Staff, the Minister for the Coordination of Defense, the Prime Minister. Examination quite pressing by the Labor members. Witnesses frank. The Prime Minister, Mr. Chamberlain, also pressed and also frank. Consult First Report from the Select Committee on the Official Secrets Act, No. 73 (1938).

Select Committee on Budget Disclosure (1947). To inquire into all the circumstances relating to or associated with the disclosure of budget information by the then Chancellor of the Exchequer, Wednesday, November 12. Mr. Lawson in the Chair. At this time the Government was Labor. Witnesses were: the Chancellor, the correspondent of the newspaper which first published the rash information, the editor of that same newspaper, and the Secretary of the Parliamentary Lobby Journalists. This inquiry elicited much valuable information on relationship of the press to House of Commons proceedings and the traditions regarding information and its disclosure. Consult Report of the Select Committee on Budget Disclosure, No. 20 (1947).

Joint Committee on Food and Drugs Bill (1938). Seven Lords and seven members of the House of Commons. This was a Bill based upon the recommendations of a temporary committee comprising members of Parliament and representatives of the associations of local authority, the consolidation of the law regarding the inspection of foods and drugs with various amendments to bring the law into accord with modern conditions. The committee report was in 1937 and numbered Cmd. 5628. Here was a case in which Parliament needed to consider the politics of the subject and to be assured by technical and administrative explanations the consequence on trade and the consumer of this bill. The witnesses who appeared were officials for the Ministry of Health and members of the Office of Parliamentary Counsel, representatives of the local government associations, of the National Federation of Meat Traders Associations. They came en bloc and the various clauses were disclosed in their presence and on their being questioned from time to time. Other times there were present representatives of the Society of Public Analyst, Mersey Docks, the Harbor Board and the Veterinary Medical Association, the other local authority associations and railway company associations, the commercia

[Footnote 25 continued on p. 541]

²⁶ They may go up to twenty-one; one of the constant committees, the Committee on Estimates, actually numbers twenty-eight.

an instrument of the Government, which might itself be the subject of investigation. It can hardly be said that a select committee is, as it so often is in practice in the United States Congress, an agency of the legislature to prosecute and combat the executive.

Should the subject matter of the deliberations of the select committee be of a quasi-judicial nature, it is customary to have the Committee of Selection undertake the naming of its members. It is not the practice of a member of any select committee to take part in any inquiry while the affairs of any body in which he may be personally interested are under investigation.²⁷

Select committees have no inherent authority. This is delegated to them by the House in what is called an Order of Reference; their investigations must fall within a reasonable interpretation of this Order. If a bill has been sent by the House of Commons to a select committee, the bill itself is the Order of Reference, and the deliberations and amendments must fall within its title and scope. The House of Commons can at any time intervene and extend, vary, or restrict the Order of Reference.

As regards rules of procedure, the select committees are replicas of the House of Commons, with small and unimportant exceptions. The chairman is appointed by the committee itself unless the House of Commons

[Footnote 25 continued from p. 540]

motor users association, the Cold Storage trade, and Officers of the Local Departments concerned with the administration of the subject. Consult Report by the Joint Committee of the House of Lords and the House of Commons Appointed To Consider the Food and Drugs Bill (H.L.) (H.L. 98, 117) (H.C. 125) (1938).

The Doncaster Area Drainage Bill (1933). A joint committee. Five Lords, five commoners. Many petitions were presented against the Bill. Chairman, a member of the House of Lords, Askwith. Numerous parties represented the various local authorities in the area covered by the bill and various officials of the government department concerned with the subject of making better provisions for the drainage of the Doncaster drainage area. Consult Report by the Joint Committee on the Doncaster Area Drainage Bill, No. 61 (1933).

Joint Committee on Gas Undertakings (Basic Price) (1933). Ten members, five from each House, to consider a report on the problem of basic price system of charge by gas enterprises. Lord Meston, Chairman. Representatives of the Board of Trade, the National Gas Council, a Fellow of the Institute of Chartered Accountants, specializing in gas and water companies accountancy, a gas engineer, speaking from the point of view of the various local authorities, a chartered civil engineer, consultant to gas corporations, advising for the companies, and another chartered accountant, speaking for the companies. Consult Report from the Joint Committee on Gas Undertakings (Basic Prices), No. 19 (1933).

²⁷ Many select committees are actually joint committees of both Houses; since the subject referred to them is some fairly abstruse bill in which the interests of private persons, groups, companies, local authorities, are involved, where the government is taking land or sites or interfering with well-acquired rights, or, alternatively, technical information is required, or again, laws are being consolidated into a code—the evidence of the parties and the experts is essential to a just decision on the form of the law. Hence it is clearly a saving for all concerned that the committee stage of each House should be fused in a joint arrangement. Then, equal numbers of both Houses are appointed, and a member of the House of Lords is elected to the chairmanship.

otherwise orders, which it rarely does. A small quorum is required relative to the size of the committee. Select committees need special leave to sit outside the House and to make investigations outside, and according to the specific subject matter entrusted to them are from time to time given this power. One of the older criticisms against the select committee procedure was that they were obliged to sit in the precincts of the House of Commons and that this was inimical to their ability to investigate social situations where first-hand observations were necessary. Where the House of Commons finds it necessary there is now no bar to such sittings outside the precincts of the House. Like the standing committees, and unlike Royal Commissions and Tribunals of Inquiry, the members of select committees are exclusively members of Parliament.

The witnesses who appear before select committees may be ministers, departmental officials or as occasion demands, members of the public. Witnesses may appear voluntarily and the committee has the power to call for persons, papers and records under sanction of a power to punish for contempt. The House of Commons may give the committee the power—and it is plenary—to require evidence on oath, and the select committee enjoys the power of the House of Commons to compel attendance by the sanction of commitment, reprimand, admonition, a fine, or if the House of Commons would wish it, the request to the Attorney General to prosecute offenders. Witnesses must answer all the questions the committee sees fit to put, but a witness may plead with the committee that he not be asked a question. Once the committee has decided by a majority that the question shall be asked, the witness is bound to answer under the penalties mentioned. A witness cannot excuse himself from answering on the grounds that he may thereby subject himself to a civil action or because he has taken an oath not to disclose the matter, or because the matter was a privileged communication to him. Nor can he refuse on the ground that he is advised by counsel that he cannot do so without incurring the risk of incriminating himself, or that it would prejudice him as defendant in litigation which is pending, excuses which would be sufficient ground in a court of law.

Nor can a witness refuse to produce documents. The parties may examine witnesses either by themselves or through their counsel. Members of the committee, of course, may and plentifully do participate in the examination. The committee has the power of penalization as stated before in the cases of refusals to answer, for false evidence, prevarication, and for perjury. Perjury is also punishable under the Perjury Act of 1911,²⁸

²⁸ 1 & 2 Geo. V, c. 6 (1911).

though where evidence is not given upon oath its falsity is punishable only as a contempt. As for the power to send for any papers which the select committee may require, it is conferred by the House of Commons itself, which, at the request of the committee's chairman, may move an address in the House or communicate with the secretary of state to whose department the papers relate, who will then lay them before Parliament if he thinks proper. Virtually the Cabinet must assent to the transmission of such papers. The committee cannot require an officer of a public department to produce any paper which, according to the rules and practice of the House of Commons itself, it is not usual for the House to order to be laid before it. The evidence of witnesses is taken down in shorthand, and becomes available as "published minutes of evidence."

The presence of strangers is generally permitted during the examination of witnesses, but they may be excluded at any time. When, however, committees are deliberating or, as the American phrase has it, are in "executive session," it is the invariable practice to exclude strangers. Any member of a select committee has the right to secure the clearance of the room if he wishes to take the opinion of the committee upon any matter arising in proceedings. When parties whose conduct forms the subject of the Order of Reference appear before the committee—people whose rights and interests as distinct from that of the general public are directly affected²⁹—they may be allowed to be heard in person or by counsel. From time to time the parties interested may make petitions praying to be heard, and an order for such hearing may be granted. The application of these general rules is such as to give any party full opportunity of explaining his rights and interests; they secure the fullness of information to the committee, and so exercise the power of investigation that the least amount of coercion and damage is done to those, whether public servants or private citizens, who must come before it. In accordance with permission given by the House of Commons committees may for the purposes of the more businesslike handling of their investigation divide themselves into subcommittees and apportion the subjects referred to their consideration.

The House of Commons, where desirable, confers among others the power to employ an officer to visit the scene of the investigated practices, to print and circulate questionnaires, to make analyses of patent medicines, to obtain expert information on the subject matter of telephonic

²⁹ E.g., where their land is wanted by the post office, where they have slandered the House, where they are charged with concealing a monetary interest in their parliamentary advocacy, etc.

communications, and to call into consultation representatives of the Indian states and of British India (the latter during the operation of the Joint Committee on the Indian Constitutional Reform in 1932, 1933, and 1934).³⁰

Once the examination of witnesses has been concluded, the chairman usually prepares and circulates a draft report or resolutions to members before the report is considered by the committee in executive session. Any member of the committee has the right to submit a draft report for the consideration of the committee also, and these may be entered in the minutes of the proceedings. If only one draft report is received this is discussed paragraph by paragraph. If more than one draft report is received then it must be decided which one shall be taken as a basis for the clause-by-clause consideration.

Failing unanimity, the conclusions agreed to by the majority of the committee are the conclusions of the whole committee. There is no place in the operation of select committees (as there is in Royal Commissions or Departmental or Treasury Committees) for a minority report. The only way to get a disagreeing opinion published is in the record of disapproval of one or more members to various paragraphs in the report or to the entire report, signaled by the dissenting members voting against those paragraphs to which there is objection. The dissident may put his observations and conclusions in opposition to that of the majority on record by proposing an alternative draft report or moving an amendment to the question for reading the draft report a second time. Where a committee cannot agree on a report, it may state this to the House, submitting the minutes of evidence that it has taken; or it may merely report the minutes of evidence without any observations or expression of opinion. This latter course has been followed by some. Virtually the right of a dissident member to record his observations and conclusions through an alternative draft report does indeed establish a split in the committee and a minority opinion. But no such report is given the dignity of a minority report.

The House of Commons may at any time hasten the work of the committee by requiring submission of a report by a stated time. When the select committee has agreed on a report, the chairman or some other member is directed to make the report to the House; and, in the course of

³⁰ To the Select Committee on National Expenditure during World War II (to be considered later) the House of Commons gave the right to address secret memoranda to the Prime Minister for the consideration of the War Cabinet where considerations of national security precluded the publishing of certain recommendations and of the arguments on which they were based. This power was granted with the proviso that whenever it was exercised, the committee should report the fact though not the details as soon as possible to the House.

time, the House will express its agreement or disagreement with the report as a whole or with the omission of certain paragraphs; or it will agree to the recommendations therein contained as a whole or with certain reservations.

The Select Committee on Privileges

The Select Committee on Privileges has been marked out from the *ad hoc* committees because it is a "constant" committee and its work is the kind that might very well lend itself to the persecution of those whose conduct it takes under inquiry. To this committee are appointed regularly the most distinguished and responsible parliamentarians, including the Prime Minister and Leader of the Opposition. Since the dignity of the House is in their guardianship, two cases may be cited to indicate the importance of the Committee from the standpoint of this symposium.

The Select Committee on Privileges in 1947 investigated the complaint of a member of the House who had been General Secretary of the Civil Service Clerical Association for many years.³¹ He had complained that as a paid spokesman in Parliament for this organization he was being pressed to speak the views of the latter and not his own independent opinion. The inquiry was conducted with the most sober and careful questioning of the complainant and of the officers of the organization. Mr. Churchill, a member of the Committee, took particular care to see that the Attorney General who represented the Government, did not unduly bear down on the complainant who had once been a Labor member and had seceded to become an Independent.

The next case involved the disclosure of information by two members of the House of Commons to newspapers of proceedings at a Labor Party caucus in the House of Commons and also an article by one of these men alleging that members of the House gave him "news," some while they were in a semi-drunken state, some for money.³² This investigation involved the questioning of members of the press upon their means of obtaining parliamentary information.

Select Committee on Estimates

It has already been emphasized that the House of Commons has no Appropriations Committee or Ways and Means Committee other than the full assembly (the whole) of the House itself. It has nothing like the standing committees of Congress or of the legislatures of France, Belgium and

³¹ Report from the Committee of Privileges, No. 118, Minutes of Evidence (1947).

³² Report from the Committee of Privileges, No. 138 (1947).

other democratic countries.³³ Hence, the raising of taxation and the appropriation of monies, that is to say, both sides of the budget, are debated in Committees of the Whole House—of Supply and Ways and Means respectively.³⁴

In the United States, the operation of the Ways and Means Committee and the Appropriations Committee and their various subcommittees, certainly results in a very thorough inquiry into the operation of the executive departments and independent agencies and the production of an enormous amount of information of value to members of Congress and of extraordinary value to the public, the press, and independent students of public administration. Such a body of information is not available through the procedure of the Committee of the Whole House (of Commons). The House of Commons has some twenty-six days "allotted" in an entire session to Supply (including the four when the House moves to go into Committee). This amount of time does not allow of a thoroughly exhaustive inquiry into the operations of government by the probe of the Commons power of the purse. The Estimates are so voluminous, their form so technical, each item so involved in the detail of practical administration to which it relates, that a thorough job in this investigation would require ten times the attention, much more, indeed, than the total amount of time available to the House of Commons for all of its purposes.

However, the twenty-six "allotted" days do permit the House of Commons to debate the work of certain departments whose Estimates the Opposition is permitted to select. Debate is a general review of the policy and administration of the department whose Estimates are being considered, with attention to significant specific items that arouse feeling. Of course, the Opposition leaders prepare carefully for their role; they move to *decrease* the sum. The Government is certainly under a compulsion, as potent as a vote of censure, to support its demand by full justifications, and it is through these that the House is furnished with much information of a kind, which, in the United States is obtained through an Appropriations Committee. Once again, then, the information thus obtained by the House (and public) is obtained intermediately, not im-

³³ In order to save time and to secure a more concentrated attention to the economy and efficiency of the appropriation of monies, the House set up such a standing committee in 1919, but dropped it after only one session, because the House felt that appropriations were far too important to be entrusted to a committee so much smaller than the House itself.

³⁴ The budget is, of course, an executive budget: the House cannot (by its own Standing Orders) propose an increase in expenditures or in taxes unless recommended by the Crown (that is, the Cabinet). Consult May, *op. cit. supra* note 17, at 653. The Estimates produced by the Government and debated by the House are finally enacted in the annual Appropriation Act; the proposals for taxation are summed up in the Finance Act.

mediately, through the interrogation of ministers; and ministers obtain their facts from their departmental informants, who in their turn utilize their own experience and that of various other auxiliaries for the collection of information already mentioned.*

The House of Commons is very sensitive to its incapacity to examine into the Estimates more closely, to do no more than debate grievances and policy, and for over fifty years has sought a way by which it could get a closer grip on the technical inwardness of the Estimates, even though the Treasury is trusted highly in its task of preparing them. During the 19th century the House of Commons was accustomed to use its procedure to establish select committees on specific aspects of government expenditure. These committees were given Orders of Reference "to inquire into the expenditure on . . . and to report their observations to the House." The basis on which the committees acted was the Estimates that had been presented to Parliament.

This arrangement of select committees to inquire into the Estimates was given permanent institution in 1912.³⁵ The committee consists of twenty-eight members. It is usual to have a member of the Opposition as its chairman. The committee has a power, or may acquire the power, of operating through subcommittees and of conducting its investigations outside the precincts of the House of Commons itself. However, the committee is handicapped by the fact that the main policy on finance is laid down by the Government and is maintained by the majority of the House of Commons. This, therefore, gives the Estimate Committee the opportunity only of operating on matters of detail within the ambit of the policy thus laid down. All parties in the House support the right of the

* Consult Morstein Marx, *Significance of the Administrative Process*, page 503 supra.

³⁵ The Order of Reference runs: That a select committee be appointed to examine such of the Estimates presented to this House as may seem fit to this committee, and to suggest the form in which the Estimates shall be presented for examination, and report what, if any, economies consistent with the policy implied in those Estimates may be effected therein. All of the members are outstanding members of the House. Nobody but officials to be cross-examined.

This committee has been in operation ever since 1912, with the exception of the periods of the two wars, when a slightly different form of committee was set up entitled Select Committee on National Expenditure with a slightly different procedure. The Order of Reference of the Select Committee on National Expenditure that operated in World War II from 1939 to 1945 was: "[T]hat a Select Committee be appointed to examine the current expenditure defrayed out of monies provided by Parliament for the Defense Services for Civil Defense and for other services directly connected with the war and to report what, if any, economies consistent with the execution of the policy decided by the government may be effected therein." The chief difference between the Select Committee on the Estimates in normal times and that in war time is, that the latter did not operate on the basis of estimates presented by the government to the house of Commons, because at Estimate time, the Government, for reasons of defense and secrecy, only presented to the House a token estimate, and therefore, the Committee was obliged to enter into the expenditures only as they occurred.

Government to lay down the principle and policy of financial provision. Secondly, the Select Committee does not use the power to question persons other than ministers and officials. Thirdly, it is perfectly clear that no body of Estimates could possibly be given a thorough going over, not even one set of departmental Estimates, between the time the Government presents the Estimates and the time the House must debate them. Therefore, the Committee has sought, from time to time, to choose some one department and to make an inquiry into it, some part of its work only, not so much with the hope that its report to the House will affect the financial provision of that particular year, but that in time its report will be of value to the House and the Government.³⁶ In its course, the Committee has certainly subjected the departments concerned to an investigation productive of facts and also influential upon their policy and day-by-day administration. The members of this Committee are chosen, as other committees are, not as experts, but as a good general cross-section of the House. It has been argued, in my opinion properly, that the members here are concerned with some assessment of whether the government is getting value for its money.³⁷

It must not be thought on account of what has been said that the Select Committee on Estimates exerts no influence at all. Much information is gathered.

Select Committee on Public Accounts

In order to understand the position of the Committee on Public Accounts, it is necessary to say a word or two on the position of the Comptroller and Auditor General. His is an office set up by the Exchequer and Audit Act of 1866³⁸ the purpose of which was control of monies from government funds and the audit of accounts. As to the first, this is no place for further discussion. The second is important. The Comptroller and Auditor General is a servant of the House of Commons. The actual terms of his office are "to inquire into the legality and economy" of expendi-

³⁶ Such inquiries have been made by the Select Committee on Estimates into the following subjects: agricultural research, government expenditure on films, advertising, the generation and purchase of electricity, the form of the estimates, the administration of the post office, the establishment of the Organization and Methods division in the Treasury, the conduct of the new type of week-end interview for recruitment of the civil service.

³⁷ A former chairman of the Committee on National Expenditure (1939 to 1945) said that what was needed was "the combined abilities of a group of men with different aspects, coming from different walks of life, with different ideas; and that examination is not going to be materially helped by a body of expert auditors or accountants." Select Committee on Procedure, 3d Report, 189 H.C. Papers, Minutes of Evidence, at 222 (1946).

³⁸ 29 & 30 Vict., c. 39 (1866).

tures. He reports to Parliament on his examination of the accounts of the previous year after those closed accounts have been sent into his office by the various spending departments. This report is passed over to the Select Committee on Public Accounts. The Committee has been set up in every session for the examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure. The Comptroller and Auditor General can report to it illegalities in expenditure, at which time the House may demand the surcharging of those responsible for illegal expenditure or condone such expenditure where the illegality is not of a *mala fide* nature. Perhaps of more continuing importance, the proposals of the Comptroller and Auditor General and of the Public Accounts Committee are put into the form of directives and recommendations to the various departments by the Treasury.

The Committee consists of fifteen members. Its chairman is always a member of the Opposition and the rest of the members are distributed according to the party composition of the House. It examines the reports of the Comptroller, who personally serves as adviser at its request. He and his officials attend the Committee in order to prompt them along the lines of the most fruitful investigation. Treasury officials and departmental officers are called for in order to supply the information that the Committee requires. The Treasury finds answers to the questions raised by the Comptroller, and demands them from the departments. The Committee reports to Parliament.

The report of the Comptroller and the report of the Committee are retrospective. However, the recommendations contained therein and the philosophizing upon the legality and efficiency of expenditure do not fail to have their influence in future years.³⁹ But it must not be thought that

³⁹ Those who have wished to make the Estimates Committee more effective have suggested that it be supplied with officers, something like the counsel and staff of the congressional committees. House of Commons Committees have no counsel or staff. House and Government are in general hostile to this idea. The Government is afraid that the Select Committee would build up a body of experts on the departments, and that each department would then have to undertake more work in confronting what would be virtually a little bureaucracy of the House. As a matter of fact, at present the Committee is helped by one of the clerical officers of the House of Commons who does go through the Estimates and draws the attention of the Committee, at its request, to the things which deserve its attention. He also makes contact with the departmental officials who are to come forward for interrogation by the Committee. A treasury official (of recent appointment) also assists in order to facilitate connections between the Committee and the government departments. Some believe that the Committee might be more effective if it could see the Estimates early, and through its own staff secure an inner grip upon the department concerned, but this argument is resisted by a large contingent of opinion because it is feared that if this were the case, the responsibility of the administrative departments for doing their best would deteriorate because officials would have in mind that in the ultimate resort the authority of the Select Committee would prevail. It might be pointed out that the Committee on National Expenditure in war-time did have a large staff. The Com-

the Comptroller and Auditor General attends as an investigator for the House of Commons. He is not an administrative investigator nor is he a House of Commons investigator. He is rather in the position of a judicial officer, an independent person in an independent department and merely indicating what should be inquired into. It is the business of the Committee on Public Accounts to make those inquiries, and they have frequently been made with resulting benefit to financial probity, efficiency, and economy.

The Comptroller and Auditor General attends all its meetings and, when required, its deliberation meetings. As permanent witnesses, so to speak, the Committee has two officers of the Treasury present while it calls evidence. This system insures that the House of Commons has an effective machine to assure that the money which it has voted is spent on the object for which it is intended, and on all accounts its operation is of the highest efficiency. But once again it must be emphasized that this kind of investigation does not involve the investigation of people outside the Ministry or the departments. The Comptroller and Auditor General, before he puts in his report to the Committee, confers with officials whose conduct needs explanation and those explanations appear in his report. In other words this touches upon the function of administration. Since the Comptroller and Auditor General is able to make comparisons of expenditures in one department or division in comparison with another, the Public Accounts Committee has always encouraged him to bring to its notice expenditures that appear to be uneconomical. Cases of extravagance could hardly, and in fact do not, pass by the scrutiny of his office.⁴⁰

mittee as a whole had a clerk and so did its seven subcommittees. Its private advice to the Government in war-time was of great efficiency in improvement. Some people in the House of Commons are rather afraid of having a staff for the Committee because they fear that the officials of the Committee might become more important than the committee itself.

The clerk of the House of Commons who is in attendance on the Select Committee on the Estimates, had this to say on American practice: "On the National Expenditure Committee the question was brought up by the staffing of the Senate Committee on the Defense Program, the American counterpart of our National Expenditure Committee, which was presided over by Mr. Truman. There they had quite a different set-up. They had a large body of officials, barristers, accountants, and professional men of that type appointed presumably for the purpose, who really did the work which a House of Commons committee does itself. They did the inquiry and fed the committee with almost predigested food. That is probably a perfectly proper system under the American constitution. I do not think it would fit at all into British ideas of the constitutional responsibility of members of the House. Members of the House have very strong powers and those cannot be devolved onto their officials of any sort. . . ." Select Committee on Procedure, 3d Report, 189 H.C. Papers, Minutes of Evidence, at 235 (1946).

⁴⁰ Compare for example *Epitome of Reports, Public Accounts Committee, 1857-1925* and *ibid.*, 1925-1938.

As to the effect of the Committee upon the Departments, Herbert Morrison has said:

I would ask the committee to accept this assurance from me, which I think would be agreed to by others with ministerial experience, that the existence of the Public Accounts committee, for example, is a very real factor in the minds of civil servants. They are very apprehensive about the Public Accounts Committee. Sometimes there might be an argument between a minister and a civil servant, and the minister may begin to get a bit slipshod and rough with the civil servant in wanting some things done in the way of spending some money, and the conclusive answer of the permanent secretary sometimes, which rather embarrasses the minister, is "I am the accounting officer and I shall have to appear before the Public Accounts Committee in due course and think I shall have a thin time." That is a very fair argument on his part. The Public Accounts Committee is a real factor in putting the fear of Parliament into Whitehall—which is a good thing.⁴²

We may now summarize very briefly the significance of the work of select committees of all kinds. Regarding investigation of the work of the executive, it is clear that the select committees are penetrating, comprehensive in their examination, inescapable as they pursue the facts and

⁴² Consult Select Committee on Procedure, 3d Report, 189 H.C. Papers, Minutes of Evidence, at 106 (1946). A recommendation was made by the chief clerk of the House of Commons that the Estimate Committee and the Committee on Public Accounts should be merged into one, thus giving the committee a larger membership. Select Committee on Procedure, 3d Report, 189 H.C. Papers, Minutes of Evidence, at XXXV (1946). The proposed committee would scrutinize the Comptroller and Auditor General's report as well as Departmental Estimates. This new committee might have a staff, divide itself into subcommittees and so get a closer grip on past expenditure and future expenditure than either committee has now. The Select Committee on Procedure of 1946 did, in paragraph 43 of its report, recommend that the function of the two committees would be better performed by a single committee though it recommended that the committee would have no powers beyond those possessed by the separate committees at present, nor would there be any change in the position or duties of the Comptroller and Auditor General in relationship to the departments or to the committees.

The Government, particularly in the person of the Right Honorable Herbert Morrison, resisted the suggestion; and the recommendation has not been carried out. Mr. Morrison's remarks on the authority and status of the Government in regard to finance, and therefore of the House of Commons, deserve quotation for they put American and British practice into sharp contrast. He said: "The fear here was that the public expenditure committee would be liable as was the Select Committee on National Expenditure in the war to drop on departments about current activities. That, indeed, I think, is contemplated in the proposal of the clerk of the House. If that is so, and they are liable to send for officers of departments at any time about something or another that they think they should take interest in, then the officers are liable to be pulled up at any time, and possibly examined about current administrative matters. That has two consequences. (1) It is liable to be a drain on the time of the higher civil servants, and an interruption of their work. (2) It is a little bit liable to make them lose their nerve; because if they have a minister chasing them around day by day and a committee of Parliament liable to drop on them any day about something that is happening at the time, they are a little nervous as to who their master is; and one of the things which is very important about the civil service is that you shouldn't make it dictatorial on the one hand and you do not want to make it too nery on the other—because once it gets nery it loses confidence and dithers." *Ibid.*, at 109.

locate responsibility. They impose practical remedies through recommendations that are found acceptable by the House of Commons, because they impose the necessity of resignation on ministers or officials or members of Parliament who are discovered by the select committees to have exhibited shortcomings in their conduct of office, or, alternatively, when the situation revealed is not so serious as to call for resignation, administrative improvements follow. If select committees are looked upon as discoverers of facts, then within the Order of Reference allocated to them, they obtain those facts because they have the means, they have the disposition, and they are enabled to press their demands to a successful conclusion. But, it must be remembered, they are confined within their Orders of Reference, and even if they transcend these or if these are elastic to some extent, nevertheless, as we shall argue later, there is room for some other institution for the investigation of facts which has a broader scope and which, accompanying that broader scope, is endowed with the appropriate procedure. If we regard the select committees from the standpoint of the satisfaction of citizens or groups of citizens whose rights and interests are controlled by Parliament, then their right to petition and have their petition heard under cross-examination by the select committees, is satisfying. Perusal of scores of their proceedings shows clearly that they are penetrating but not persecutory, severe but not sadistic, determined but not damning, magnanimous and not malicious, guided by public welfare and not indulgent in personal frenzy, and anxious to preserve the rule that men are innocent till proven guilty.

A consideration of the contribution so far made by the investigative or quasi-investigative committee agencies of the House, and even of its question and debating periods in the full House of Commons itself, compels the realization that these instrumentalities exhibit certain shortcomings which must be remedied by other arrangements. The procedures already described have two characteristics. One is, that they are of short term. The work of any committee is normally concluded within the space of a single session, while if the House of Commons were to give itself more especially to committee work, it would be necessarily forced to neglect the work of attendance in the full House of Commons itself. Secondly, their membership is confined to members of Parliament. Consequently, there is not only room but necessity for agencies connected with the House, auxiliary to but outside it, whose work periods are not confined to parliamentary sessions, and which permit the co-operation of other citizens, expert or interested, who are not entangled in the onerous tasks of membership in Parliament.

What is required can be set down under three headings. In the first place, some apparatus is needed for the investigation of facts leading up to the enactment of law where new, or fairly new, problems have taken shape to such an extent that their tremendous complexity is sensed. There the issues need to be sorted out, analyzed and thoroughly sifted in all their as yet obscure ramifications so that before the force of will and of brute numbers in the political parties and in Parliament encounter each other head-on, some sober, quiet consideration of the issues outside the heat of partisanship may be possible. Secondly, an institution is needed that is able to enter into the everyday administration and objectives of different departments of government, and make some determination on their value and the competence with which they are handled, organizational alternatives, and the most appropriate type of personnel. Thirdly, a procedure is needed that handles administrative troubles which the Commons is unwilling to undertake, involving the possibility of a partisan judgment. An analogy is the House of Commons transference of the judgment of disputed elections to the law courts.

Until the later part of the 19th century, disputed elections came before the House of Commons,⁴² but could never be cleared of popular suspicion (of legislators' temptation) that political partisan judgments would enter the examination and verdict. Now, there are questions like bribery, corruption, miscarriages of justice, police methods, and so forth, in which political passions are at once involved causing, it may be, injustice in the findings, the obscuration of inconvenient facts, and disquiet of mind. Such matters for investigation may not, however, be the kind which can be formulated in the form of the breach of the law and be therefore actionable before the law courts. It is desirable in such cases, then, in addition to the advantage of saving of time of the House of Commons, to remove such matters from it and call on a Tribunal, the procedure and personnel of which promise the surest guarantees of objective judgment—objective for the persons arraigned, objective for the administration which is studied, and objective in the eyes of the contending parties in the House of Commons.⁴³

⁴² Consult 1 Anson, *Law and Custom of the Constitution* 115, 178-182 (1922).

⁴³ One modern example of the weaknesses of party emotion when let loose in a select committee seems to have been enough for the House of Commons. From October 25, 1912 until June 11, 1915, a committee of seven liberals, six conservatives, and two Irish members, applied itself to investigating charges that certain ministers had while financially interested in the Marconi wireless corporation used their influence to secure from the postmaster-general a contract giving the company a virtual monopoly. The affair began with a question in the House of Commons, arising out of allegations made in a part of the press not lovers of Jews. A court of law, seized with a libel action, would have made short shrift, one way or the other,

We must therefore now turn to the instruments which have been established and some of them established for a long time to render these services to the commonwealth. They are the Royal Commissions of Inquiry, the Departmental and Treasury Committees, and finally, the Tribunals of Inquiry. An investigation of each of these is now essential.

ROYAL COMMISSIONS

It is probably true to say that since the early part of the 19th century hardly a social, economic, or political statute of any importance has been drafted and introduced into Parliament otherwise than as the result of recommendations of a Royal Commission of Inquiry. This is the form of inquiry used in Great Britain to cover the investigation of facts and the exploration of policy in political problems of first class importance.

A Royal Commission of Inquiry is usually set up when parliamentary opinion or the convictions of the government or of any single department of the government within whose purview the subject falls, have matured to the point where more information and guidance of an immediate sort upon policy are regarded as essential and no longer postponable. It may be that a government which has been advocating a reform for years, (especially while in Opposition) suddenly realizes that if it is to present a blueprint of legislation or is to undertake a departure in administrative policy, it must have before it the results of a deep and at the same time extensive inquiry into the factual bases and the contending opinions concerning the action it seeks. Nor is this the only origin of Royal Commissions. In a democracy where the basic assumption of government is that all men are equal, the opportunity is given to those who, by reason of their interest in public affairs and their superior knowledge and sensitivity to the need for action, wish some reform to take place. The number of leaders in a democracy is potentially equal to the total number of voters or to the total number of those who have a right to vote; but only a few hundred thousand, perhaps only a few thousand, are sensitive leaders of public opinion. When, by a long and mysterious process, such leaders become pervaded with the idea that something ought to be done or at least

with the charges. Instead, the committee was burdened with passion and suspicions from the outset; no less than 29,000 questions were asked; the lay chairman could not handle the many legal issues and analogous situations which arose; he had no practice in such investigations (how could he? there were not enough scandals, except those that were crimes and, of course, went to the courts); disorder and heated exchanges occurred owing to party emotion and the absence of the calm of the law courts. And, in the end, the chief victim of the inquiry, Sir Rufus Isaacs, later Foreign Minister, Lord Chief Justice, and Viceroy of India, had not the satisfaction of complete exoneration, for the report was a strict party vote of eight to six in his favour. 1 Reading, Sir Rufus Isaacs 225-73 (1942).

preparations, by improvement of the mind, should be undertaken, the Government, at the instance of Parliament or letters to the great newspapers, or prompted thereto by its friends who are not in the Government, may establish a Royal Commission of Inquiry into the subject.

A Royal Commission is, in legal form, a command by the Crown, on the initiative and responsibility of ministers or a minister, requiring that certain persons named shall examine into a subject of inquiry, which is then stated in what are called the Terms of Reference. Thus, in its legal form the Royal Commission is an executive instrument which establishes, through the executive, a body of men and women who are to make an inquiry into a subject whose bounds and scope are stated in the commission. This at once distinguishes the Royal Commission of Inquiry from the parliamentary committees of all kinds—which are set up by the House of Commons and manned by members of the House. The Royal Commissions of Inquiry are manned by people who are not members of Parliament. Parliament rarely intervenes in the process of the establishment of a Royal Commission excepting to make rather humble suggestions as to the establishment of a Commission and even more rarely suggestions that different regions of the country should be represented, that women as well as men shall be appointed; it practically never suggests names. It is understood that since all parties desire that a Royal Commission shall render an impartial report, Parliament itself ought to remain impartial in its choice, leaving to the Government the responsibility of objectivity and competence. It is rare that any of the parties to such an understanding are disappointed in their hopes. The actual establishment of the Commission occurs by means of the issue of a document as letters patent or a warrant of appointment by one of the departments of state. The authorization is, in fact, that of the whole Cabinet.

The Commission is sharply distinguished from the committee investigations undertaken within the body of the House of Commons itself by the fact that no time limit is set upon their proceedings. Royal Commissions last as long as is necessary to conduct and conclude their investigation and submit their report. Some Commissions, therefore, are of extremely short duration; others quite long. Some have reported within a few months, others have taken years to fulfill the task imposed.⁴⁴ Each Royal Commission constitutes a problem and an opportunity in itself.

⁴⁴ Thus, the Royal Commission on Honors of 1922 lasted three months. The investigation begun in 1923 by the Royal Commission on Local Government continued for more than six years, and issued an enormous body of minutes of evidence and no less than three reports. The Royal Commission on Population was appointed in March 1944 and finally reported in June 1949.

Its problem sets the stage for its scope, its personnel, its term and its procedure.

The problem before the Commission determines the choice of its personnel. Commissions may be divided into the three main groupings of representative, expert, and general civic. In the first category are those Royal Commissions which are faced with a problem that must be settled fairly immediately and where great existing and traditional interests are in conflict, for example, reform of local government or reform of liquor licensing. In the second category are those whose problems are a little more remote, which do not call for immediate legislation, and where the issues of fact are more important than the discovery of a practical compromise which may be implemented in government policy or through a statute, and where expert knowledge is needed in the conduct of what is virtually a social-scientific research. The Royal Commission on Population is an example. In the third group, all the qualities of truth-discovery are needed, but general civic ability and culture are required, as, for example, on the Royal Commission on the Press.⁴⁵ It is exceedingly rare to find a member of Parliament appointed to a Royal Commission, though it has occasionally occurred.

The size of the Commission varies with its terms of reference. If it is representative, it is necessary to make room for various interests. So, for example, the Licensing Commission consisted of twenty-one members, with the following representation: trade unions, four; temperance societies, three; the liquor interests, three; business men, two; co-operative societies, two; social workers, two; government experts on licensing, two. The Royal Commission on Population consisted of only sixteen members, but, then, in a technique especially to be recommended, it was also assisted by special committees: a Statistics Committee, an Economics Committee, and a Biological and Medical Committee. Each of these committees had as its chairman one of the members of the Royal Commission, and each was established to provide for considered specialist advice to the parent Royal Commission, and so consisted of outstanding experts.

It is remarkable that, though Commissions succeed each other in fairly rapid succession, though several may be operating at the same time, and though Departmental committees make inquiries of a like nature, there are still enough experts and public spirited laymen in England willing to serve. No pay is available for them, though expenses of travel and attendance may be met on an extremely modest scale. To serve upon a Royal Commission is not only regarded as a public duty and responsibility, but

⁴⁵ Cmd. 7700 (1949).

is also sought by many people as an opportunity of making a contribution to the welfare and progress of their nation, though it means the surrender of leisure, and indeed, considerable time which might otherwise be devoted to professional advancement.

The procedure of Royal Commissions varies in some details, to which reference will be made in a moment, but the general procedure may be treated first. There is no set rule regarding the procedure. No official rules of procedure are laid down; what is known is traditional, though the Home Office has set out in a circular⁴⁶ the general method by which a Commission might go about its work, and a committee to inquire into the problems of such procedure⁴⁷ has offered suggestions.

Usually⁴⁸ the chairman calls together his commissioners. He is assisted by a secretary with assistants provided by one of the departments of the civil service. By this time, and even a considerable time earlier, the fact that a Royal Commission is about to commence its sessions is well known throughout the country, more especially to the special interests and experts. The chairman and the members of the commission draw up the lines of the inquiry and consider and decide on the persons and bodies who ought to be questioned by them. At this particular stage the secretary (usually one of the more promising of the administrative class in the civil service) is of great value, since he has presumably been allocated to the Commission because of a special interest and special knowledge acquired in the course of his departmental duties. Almost invariably the Commission announces that it is prepared to receive evidence and to invite the submission of memoranda from interested persons and civic organizations. The secretary will, at the request of the Commission, or by taking the initiative with suggestions, make connection with people who are prepared to give evidence and to submit memoranda in advance. Some Commissions inform themselves by questionnaires. The use of memoranda of evidence preceding the appearance of the writers or of their colleagues and spokesmen before the Commission for cross-examination has been recognized as a particularly desirable procedure because, while it does not prevent the commissioners from asking questions outside the scope of the memorandum submitted, it focuses the minds of witnesses on the written formulation, and is both stimulating and guiding to the commissioners, some of whom may not be familiar with this special section of the evi-

⁴⁶ Report, Departmental Committee on Procedure of Royal Commissions, Cmd. 5235 at 5 (1910).

⁴⁷ *Ibid.*

⁴⁸ In recent years commissions introduce their reports with an account of their procedure.

dence. In some cases, research workers have been employed to make field investigations, in others, to do documentary research.⁴⁹

The evidence on the subject (fact, opinions and recommendations of policy) is then elicited by the practice of public hearings. The Commission may find it necessary from time to time to conduct hearings in closed session; it is exceedingly rare. There then appear before the governmental officials any witnesses the Commission may find useful in its investigation, men and women who come forward in their own right as acknowledged experts on the subject, and the regular representatives, the secretaries, and spokesmen of various economic, political and social groups whether these are of a "lobbying" type or not, and academic experts and specialists of established repute. The chairmen and the various commissioners ask their questions according to their intelligence and their understanding of the subject, and also, sometimes, by the private prompting of their secretary, or of their personal friends. What is missing in this procedure, which might enable the truth of fact or policy the better to be adumbrated, is the cross-examination of witnesses by each other where the evidence severally rendered to the commissioners might be probed in order that the obscured spots might be opened up by witnesses who may understand the situation as it virtually is better than do the commissioners.

It is very noticeable that the Commissions are more severely selective of their witnesses than it would appear that congressional investigating committees are. It appears to the onlooker of long years of observation that almost anybody may appear before a congressional committee to give evidence, however insignificant and irrelevant. It is rare, indeed, that witnesses come before a Royal Commission without some substantial contribution of facts or policy as a recompense for the time the committee spends on them.

In marked contrast with congressional committees of investigation, the Royal Commissions are not provided with the legal counsel (e.g., Francis Biddle at the TVA Committee of 1938) or the publicly paid investigator who asks questions in cross-examination of the witnesses as though he were prosecuting or a defending attorney. The process of questioning and hearing is extremely quiet, sober and decorous—and truth-finding.

A subordinate but not unimportant question is the evidence tendered by civil servants and ministers. It is the convention that where questions of *policy* are investigated (that is, within the framework of the terms) then ministers rather than civil servants are questioned. Civil servants find it awkward to be called upon to answer questions of policy, and they

⁴⁹ E.g., Royal Commission on the Press, Cmd. 7700 (1949).

will usually, in fact, invariably, plead that the question and the answer are matters for the minister and the Commission will not further press them. The civil servants are nevertheless of incalculable value to the Royal Commissions, as can be seen by a perusal of the minutes of evidence of any one of them. Civil servants are usually among the highest, if not the highest, professional experts on some branch of the subject being investigated by the Commission.⁵⁰ But to mention this is not to suggest that the civil service information is, per se, regarded as superior in importance to that of others. It merely happens to be one especially valuable contribution made by those who know whereof they speak to the total volume of evidence before the Commission.

Witnesses who appear before the Royal Commissions are volunteers. Some of them are extremely anxious to be heard. Their own material interests, their political interests, their fads, may be very much involved. A Royal Commission may obtain power to compel witnesses to come forward and give evidence on oath, but this is extremely rare. One may suggest that the hearings and cross-examination in the Royal Commissions have nothing in common in manner, temper, or, where this is relevant, persecutory infliction, sometimes observable in the conduct of congressional committees.

It is impossible to make any general judgment on the quality of questioning. This depends largely, though not altogether, upon the chairman. Where the chairman knows something about the subject, he is of course able to give astute guidance. Where he knows very little, though he may be a very distinguished man in other fields, much time may be wasted while he and his commissioners fumble about; he may choke off questions because he thinks they are irrelevant when, in fact, they are not. So time may be lost. Naturally, nothing so severe as the laws of evidence of the law courts is applied to the examination of witnesses in Royal Commission procedure. It is out of place. It is not necessary. In fact, the far more desirable course is to put the witness at his ease, and to get the maximum facts and reflections upon the facts from him by reasonable persuasion and colloquy. The net results of a Royal Commission consist of its Minutes of Evidence, the verbatim transcript of the hearings and the memo-

⁵⁰ For example, the first volume of the minutes of evidence of the Royal Commission on Local Government, consists of a most remarkable treatise on the history, structure, procedure and spirit of English local government—given in evidence by one of the higher officials of the Ministry of Health of that time. So also the evidence given by the principal officers of the Treasury before the Royal Commission on the Civil Service of 1929, or the officials from the Board of Trade, the Electricity Commissioners, the Ministries of Health and Transport, before the Royal Commission on the Distribution of the Industrial Population, 1940. Cmd. 6153 (1940).

randa, which I, personally, regard as the most valuable contribution, because, as it were, they are life without theory, and they offer any reader material for his own judgment. The second result is the Report. The Report may be unanimous; there may be a majority and minority report; or the Report may be split even more ways than two, the several minorities offering notes, addenda, and reservations. At any rate, most of the facts are there. The Report, majority or minority, presents a reasoned and sober statement of the truths, issues, problems and perplexities, evaluates them, and makes recommendations regarding the practical policy which might be adopted in view of the various ends to be secured.

It is worthwhile now to consider briefly one or two problems relating to this method of investigation. First, could the procedure be improved? Second, ought Commissions be expert or representative, and thirdly, should one press for a unanimous report or be satisfied if the Commission decides to fall into segments of opinion?

Time has taught the Royal Commissioners how best to get at the answer or answers to the problems set them: there is an acute consciousness of the apt use of research, questionnaires, memoranda of evidence, questioning of witnesses, and so forth—this is obvious from the concern of each Commission with this question and their public explanations. The duration, being dependent on the work to be accomplished, is usually adequate. The scope of the problem always needs the closest attention, since any fuzziness about it can be a hindrance to the Commission in its procedure, in its questions, and in its deliberations within its own executive sessions, and can lead to a split report. For this reason, a certain proximity to the date of necessary action is desirable, as this necessity has already stressed and sifted the important from the unimportant. There may be something in the suggestion that the Commissions employ research staffs of their own as distinct from reliance on the experts from the civil service; and the appointment of committees of experts by the Commission on Population offers a fruitful idea.

Shall the Commissions be representative or expert? The answer depends on the nature of the problem. If a problem in practical policy is posed in a field where organized groups, whether employers, trade-unionists, local authorities, and so forth are well established with acquired interests, and if the administration of any solution is to depend on their co-operation and goodwill, then, to reduce the area of coercion, it is desirable to have a representative commission. It will in any case be obliged to meet and contend with the evidence, given in public of a cross-section of national interests other than their own, and ministers, representing the whole nation,

are finally sovereign—or they make the law, resting on a popular majority. But it may be argued, if the vested interests compromise with each other, they will stop short of the discovery of truth, which the student needs, which the public needs, and of the policy that is first-best for the nation as a whole. These criticisms are valid: and yet they have no fully persuasive relevance. The path of advance cannot but take account of the vehicles which are to carry the reforms. It is, of course, most desirable where a problem is of the pure-truth variety, as for example, in the problem of declining population (I do not mean it has no practical bearing—far from it); then the experts are needed: they may see beyond the generations and beyond local, class, and dysgenic boundaries. If pure-truthers were put on the Commissions that are handed a practical and awkward problem, encrusted with long-soused inveterate interests, what would be the result? From the standpoint of reform, we should have an academically perfect answer—and yet, more possibly than not, several answers by a split Commission. As it is in practice, the representative Commission, by the admixture of impartial men and women, cannot help but evoke the facts—and these give them no rest in the long-run, whatever the compromise in the short.

Ought the Commission to aim at a unanimous report? It has been highly recommended by a Commission on Commissions! It argued that unanimity was convincing to political leadership and to the public, and that action was all the more liable to follow. A divided report, on the other hand, would be inconclusive as to action. But, is not the question, thus posed, nonsense? If there is no spontaneous consensus emergent from the enlightened goodwill of public-spirited men and women, is it worth having an artificially induced one? After all, the ultimate unifier is Government, Parliament, and the public. Let the Commissioners be faithful to their views of the public good and true, in their own light and to the common body of evidence. If they are then divided there is still a valuable contribution to the principles of what shape a law should take.

THE TRIBUNALS OF INQUIRY

It is the British practice, where a criminal charge is justified, to prosecute the offender, take him into the courts, and there, by a just, sober, and convincing thoroughness, find him innocent or guilty, without sensible delay. It is rarely necessary for parliamentary or extra-parliamentary bodies of inquiry to undertake inquiries like that which sent a Whitney to Sing-Sing, or seeks to discover and break up a nation-wide crime “racket” of gamblers and molls, or vehemently pursues men and women

alleged to be "un-American." The law has defined the crimes, enacted the penalties, instituted the courts, determined the procedure—and all take their course. The inquiry will be undertaken in the courts, with an independent judiciary, skilled and hard-hitting but just attorneys, and testimony subject to refined rules of evidence—with the defendant innocent till he is proved guilty, and, in that court, not forced to give evidence that may incriminate him.

Many matters, then, which in Britain are investigated in the courts and by the process of charge, counter-charge, cross-examination, and witness, and evidence, in American conditions are investigated in the arena of politics, with all party passions unspent, and with a persecutory temper on the part of some investigators which begins to verge on the rabidness of a Torquemada: no *noblesse oblige*.

However, there may be situations in the conduct of government, within it or involved in its outskirts, where considerable doubt prevails about the guilt of persons suspected, so that a charge, for example, under the Official Secrets Acts,⁵¹ or for bribery, or criminal negligence in the supply of instruments or vessels to the government, cannot be exactly formulated or pressed with a proof of criminal intent, having regard to the severity with which the law courts require proof up to the hilt before fastening a conviction on a man. The public may still entertain suspicions. There may still be proof of harm done, short of crime and criminal intent. Behavior may be impure beyond the limits permissible for good democratic government yet short of the limits of criminal action. There may be culpable incompetence or unfaithfulness to trust not yet formulated in the criminal law and perhaps not formulable.

The Tribunal of Inquiry in British law and practice is an attempt to find a procedure that fits such situations—removing a quasi-political misdemeanor from the political arena because the proof should be quasi-judicial, but not taking the case to a law court because the problem is quasi-political. A "political" charge is submitted to the procedure of what is almost a court of law.

During the debate in 1921⁵² on the Tribunals of Inquiry (Evidence) Act which set up a court of the kind we have delineated, it was argued that an investigatory body was needed which would give: (a) public satisfaction; (b) judicial proceedings; (c) public proceedings; and (d) evidence on oath. In the debate on the Report of the Budget Disclosure Inquiry of 1936,⁵³

⁵¹ 2 & 3 Geo. VI, c. 121 (1939).

⁵² 139 H.C. Deb. 189 et seq. (5th ser., 1921).

⁵³ 312 H.C. Deb. 425 et seq. (5th ser., 1936).

it was suggested to the satisfaction of the House that the inquiry ought to rest on five principles: speed of getting to work, impartiality, thorough and skillful investigation, full publicity, and absence of temptation to make political capital.

The statute,⁵⁴ passed with the heinous memory of the muddle and fiasco of the Marconi Select Committee in mind, requires in gist this: when *both* Houses of Parliament have resolved that it is expedient that a tribunal be established for inquiring into a definite matter described by the resolution as of urgent public importance, such a tribunal will be appointed by His Majesty or a Secretary of State, and it will have the

⁵⁴ The Tribunals of Inquiry (Evidence) Act, 11 & 12 Geo. V, c. 7 (1921).

"1. (1) Where it has been resolved (whether before or after the commencement of this Act) by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:

- (a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
- (b) The compelling the production of documents;
- (c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad;

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

(2) If any person—

- (a) on being duly summoned as a witness before a tribunal makes default in attending; or
- (b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or
- (c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

(3) A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court or the Court of Session.

"2. A tribunal to which this Act is so applied as aforesaid—

- (a) shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given; and
- (b) shall have power to authorize the representation before them of any person appearing to them to be interested to be by counsel or solicitor or otherwise, or to refuse to allow such representation."²

powers, rights and privileges of the High Court concerning the enforcement of the attendance of witnesses, the taking of evidence on oath, and compulsion of the production of documents. Its scope is stated in the resolution. Its proceedings are public except for the periods when the tribunal considers it expedient in the public interest to keep the public out. It is the tribunal that allows the right of representation of witnesses and other persons interested by counsel or solicitor. Those who are contumacious in non-attendance, or refuse to testify or produce documents, are citable to the High Court for the offense.

It should be observed that in the course of the passage of the Act through Parliament there was struck out a sub-clause giving the Government the right to decide on the establishment of a tribunal. Furthermore, to the cry of "Star Chamber" the Government yielded a clause which would have given the tribunal the right to punish for contempt by three month's imprisonment.

Let it be stressed that it must appear to *both* Houses of Parliament that a tribunal should be appointed—the issue must move both before the procedure can be used. And then it is left to the executive, virtually the Cabinet, to make the appointments. It must satisfy the Houses of Parliament that the appointees are just and good men, on pain of political and public discredit. Once only, so far, has a member of Parliament formed part of the tribunal. Including the year 1948, seven such tribunals have been appointed. A brief reference to each of these is essential to portray the character of the investigatory device in action.

In 1928 came the first major experience. A question in the House of Commons disclosed that a girl secretarial worker had been too roughly interrogated by Scotland Yard while held on a morals charge. A debate on the adjournment shortly followed. A tribunal⁵⁵ was appointed consisting of a distinguished judge of the High Court as chairman, and two members of Parliament, one an independent member for Cambridge University, "a well-known solicitor and a man of very great experience of affairs," and a Labor member, a university professor and, in the words of the Home Secretary who made the appointments, "a man, all will agree, of openness of mind, honesty of character." It may be said that the House strains to have men of this kind appointed. The proceedings, in which some of the most famous counsel at the bar appeared, was penetrating and thorough. The tribunal split, the Labor member writing a minority report more scathing on police methods than that of the two majority members, who were austere enough. Dismissals followed. The House debated the report

⁵⁵ 220 H.C. Deb. 1921-31 (5th ser., 1928).

thoroughly. A Royal Commission was set up to advise on the reform of police methods. It made many recommendations and its views were soon acted upon. The whole organization and procedure of the police in relation to individual liberty had been probed, without relaxation and without ruffianism. Counsel could be and were militant, but the tribunal, removed from the political forum, and though in a matter which aroused the strongest passions, saw that the rule of decency prevailed. Defamation of character was not permitted—and indeed, considering the training of lawyers and the self-respect of citizens, attempts were not made.

The Glasgow case (1933) presented a rather different problem, that of administrative corruption in city government. This tribunal was appointed by the Secretary of State for Scotland.⁵⁶ Minor bribery and corruption had been alleged in the letting of stances in the corporation markets, the letting of corporation houses, the placing of contracts, the grant and renewal of liquor licenses. Prior to the appointment of the tribunal a city magistrate had been tried in court for such offence, had been found guilty and sentenced; in another case, the charge had been dropped on inquiry. The tribunal consisted of a noted Scottish legal luminary, once solicitor-general, and of two King's Counsel, that is, practicing lawyers, but so entitled as a mark of professional success (which, in British conditions of the law, must mean probity, integrity, and civic humanity). Evidence was taken of forty-one witnesses on oath. The tribunal advertised for evidence as it was investigating rumors of a general kind. It found that the allegations could not be sustained through paucity of evidence; yet it would not say that they had been disproved. Its report was a display of the evidence, analyzed and assessed. It made no recommendations to Parliament. Let this be noticed: it warned that it hoped that the fullest publicity would be given to its proceedings, it recorded all the allegations in full—and it warned that while the facts could be reported in the newspapers editorial comment would come under the rule of *sub judice* until the publication of its report.

An allegation made in public, and set in the form of a question in the House of Commons, that disclosures had been made of the budget proposals made by the Chancellor of the Exchequer to his colleagues in the Cabinet, set on foot the Budget Disclosure Inquiry of 1936.⁵⁷ A definite charge might have been made here under the Official Secrets Act, but the Attorney General for the Government proffered as the reason for seeking this tribunal procedure, that (a) manifestly a disclosure had been made,

⁵⁶ Glasgow Tribunal of Inquiry, Cmd. 4361 (1933).

⁵⁷ Budget Disclosure Inquiry, Cmd. 5184 (1936).

but (b) it might be difficult to get a conviction if criminal intent could not be proved. It is tenable that the government took this course because it knew that a conviction might well be obtained, yet it did not wish to fine or imprison a man who had for many years been a senior minister—J. H. Thomas, then Colonial Minister, and a graduate from the Labor Party into a coalition government dominated by Conservatives. It is highly probable that they knew that the culprit was doomed to political disgrace, and that, in British conditions, is tantamount to imprisonment in society without immurement. In any case, a high court judge and two King's Counsel were appointed. It pressed its inquiries far and deep—even into the means taken to preserve Cabinet secrets, and calling on evidence from newspapers and the Stock Exchange. The minister and the man to whom he was found to have divulged information which enabled the latter to speculate on the rise in taxes were declared so to have done. Both forthwith resigned their seats in the House of Commons, the latter protesting that he ought to have been charged in a law court where he could have defended himself better than he thought had been his opportunity before the tribunal. The point is that no "charge" was made and no one was "accused."⁵⁸ The tribunal investigates allegations. It is their gravity and their lack of specific contour that combine to make the tribunal procedure desirable. If they were not as grave, they would be ignored; if they were more sharply specific offences against the law, the law courts handle them. The House, in debate, thought that justice had been done;⁵⁹ one or two members thought that the courts should have been invoked, and one member that the House should have handled the matter in its own select committee.

The tribunal appointed to inquire into a miscarriage of justice in the Hereford Juvenile Court in 1943⁶⁰ consisted only of one man, a lord justice of appeal. It was concerned with the failure of a local juvenile court to follow conscientiously the rules regarding the trial and especially the punishment by flogging (light) and the commitment to a juvenile home, of a boy of eleven accused of stealing goods from a school and damaging other articles. The conviction had been appealed at the extreme end of the legal term, and was quashed by the High Court. The slackness in the procedure below was thoroughly ventilated, and even the lawyers involved were criticized for not having taken appeal action earlier. Treasury Counsel (an officer of the government) assisted the court in such ways as calling wit-

⁵⁸ 312 H.C. Deb. 416, 417 (5th ser., 1936).

⁵⁹ 312 H.C. Deb. 439 (1936).

⁶⁰ Hereford Juvenile Court Inquiry, Cmd. 6485 (1943).

nesses, in the opinion of the tribunal, with "entire impartiality throughout."

In June 1939 the new submarine "Thetis" made a trial dive and did not come to surface again. Something like a hundred men were lost. The issues immediately arising were: was there culpable negligence; was it unavoidable accident; had all efforts been made to raise the submarine in time; which of the contractors were liable to government and families of the lost men for imperfect workmanship, if that were the cause. One justice was appointed as the tribunal.⁶¹ He was assisted by two sea captains and a professor of naval architecture. What could have been made a juicy matter of political scandal was set in its right proportions. Evidence was given, with counsel allowed, by the government departments, the ship-builders and engineers, for some of the deceased, for the officers who had been saved and could give evidence. A clot of enamel in a small tube was identified as the most probable cause of the trouble, if mechanism is considered; neglect to make the necessary test of its working by one or more of the crew as far as the human factor was involved. The former led to civil actions for damages.

The tribunal to inquire into the mismanagement of equipment, food, stores, etc., of the fire, police, and civil defense services of Newcastle-on-Tyne was set up in 1944.⁶² A very learned counsel was appointed, with an official of the Home Office as secretary, and a fire force commissioner and a high official of the Ministry of Home Security as assessors.

One hundred twenty-seven witnesses were interrogated in thirty sittings. The chairman of the Watch Committee (over police and then Fire and Defense services in a slightly different institutional arrangement) had not disclosed his pecuniary interest (as an industrialist) in some smallish transactions of the Newcastle city council. Motor cars had been laxly used for private rides, the records of some small sales of junked apparatus were not as conscientious as they should be, the police photographer had taken pictures of the chairman's family, the municipal cine-camera had been turned on one or two occasions to private use. This was the order of the trouble. The chairman was politically doomed and shamed.

The last and most celebrated case occurred in 1948, involving "The Inquiry into Allegations reflecting on the Official Conduct of the Ministers of the Crown and other Public Servants."⁶³ The issue (political dynamite) was

⁶¹ Inquiry into the Loss of H.M.S. Thetis, Cmd. 6190 (1940).

⁶² Newcastle-upon-Tyne Inquiry, Cmd. 6522 (1944).

⁶³ Cmd. 7616 (1949).

whether there was any justification for allegations that payments, rewards or other considerations had been sought, offered, promised, made or received by or to Ministers of the Crown or other public servants in connection with licenses or permissions required under any enactment, regulation or order or in connection with the withdrawal of any prosecution and, if so, under what circumstances the transactions took place, and what persons were involved therein.

The inquiry was undertaken because there were rumors that a minister had taken gifts in return for giving licenses for the obtaining of materials for building operations, the importation of certain goods, the failure to press prosecution of a firm of football pool operators which had illicitly acquired a bigger supply of paper than they were entitled to. Another was accused of taking presents to help on the provision of permission and credit for the flotation of a new company.

Judge G. J. Lyskey of the High Court and two eminent King's Counsel were appointed as the tribunal. They sat in public while discussing questions of procedure, and for twenty-five days to hear evidence and argument. Fifty-eight witnesses gave oral evidence, and two by affidavits due to ill-health.

Since it is the business and responsibility of the tribunal to collect evidence (differently from a law court where the counsel present it), and the transactions were here so voluminous and complicated, the tribunal relied on the services of some of the law officers of the Treasury and police officers. These made preliminary interviews; they were placed before the tribunal, which directed further inquiries and eventually decided which witnesses should be called before them to give evidence. The witnesses were called, and where they appeared to have an interest justifying representation by counsel or solicitor this was permitted. The Attorney General opened the facts; counsel appeared, witnesses were examined and cross-examined. In any event, a final examination of witnesses was undertaken by counsel for the tribunal.

Counsel appearing for the witnesses were consulted on the fairness of this procedure, and they signified their approval. The use of counsel was a deliberate attempt to improve on the procedure of the Budget Disclosure Inquiry, when, the tribunal itself, having conducted examination and cross-examination, seemed to give the appearance of hostility to the witnesses.

Established not to prosecute, but to find the facts, the evidence was received with a latitude wider than a court of law would admit; but, the tribunal, in coming to conclusions regarding the conduct of any witness, especially of allegations made against him, took account of such evidence

only as would be properly admitted in a court of law in a case in which he was a party and his conduct in question.

Dignified, upright, sober, sensitive in the extreme to the right of a man to protection from anonymous fiends and publicity and spite-seeking men and women, the tribunal took over one million words of testimony and examination. Its report is a fair, discriminating, and clean-cut achievement. Two ministers resigned. In the debate on the report,⁶⁴ which followed shortly after its publication, the House as a whole was satisfied that the facts had been properly found, the Labor Party satisfied that its honor had been cleared and the unworthy men in its ranks purged from its political character. There were still some sticklers for criminal action or no action at all. There were complaints of the sensational behavior of some sections of the press. (Indeed, one editor received a sentence for contempt of court arising out of sensational comments.) A Conservative member, a lawyer who "detested the politics of the Attorney General (Labor) like poison," said:

I think it was an Inquiry carried out without reproach, with great latitude by the Tribunal itself and with moderation by those appearing for the Crown. I do not regret it in any shape or form. It has not thrown a shadow across the fairness of the British and has done nothing but good, although with a great deal of pain, of course, to certain persons.⁶⁵

At this point, the subject may be tentatively closed.

V

We have seen, I think, that Parliament does not contend against citizens and residents as though they were enemies to be hunted down and macerated for public amusement and private advancement or the satisfaction of patent demagoguery and sadisms. The members cherish the people. They could not be selected as candidates without the demonstration of decency: for the political parties have their reputation to maintain: they cannot obtain office by any other currency than this. A member is faithful to the conscience of his party, and it has one: he is faithful to his fellow members and to traditions of magnanimity. He will punish, but with restraint in prosecution, and based on proofs publicly come by on the basis of charges honestly and soberly made. As for Commons' investigations of the Cabinet, why should it be contentious and as raw as Congress is to the administration? The Cabinet ministers are members of Parliament; they have risen to office from a common origin; they are comrades

⁶⁴ 460 H.C. Deb. 1843-1962 (5th ser., 1949).

⁶⁵ *Ibid.*, at 1881.

in arms, after years of close proof in action of their integrity and demeanor. The party rank and file will not conduct disorderly and defamatory mayhem against its own leaders because it has experiential proof that these will not cheat them, or hide from them—all are of the same political flesh and blood. No institutional gap severs leaders and rank and file, for Parliament is sovereign over all things, executive as well as legislative. There is no contrast of authority stimulating and requiring a contest. The executive is at the service of the Commons. It is as zealous against the administrators as the Commons needs to be. For the Cabinet must carry the House with it, before or after the fact: its authority stems from the Commons, 'the faithful Commons'—cut the connection and the Cabinet can only be as alive as a decapitated chicken.

Hence, there are in the British system the minimum number of irritants that might lead to a persecuting, sectarian, defaming temper. These are the results of sober good sense and ingenuity in machinery and procedure, and a spirit of humanity.

Members of Parliament have clearly not forgotten that their ancestors beheaded Charles I for despotism, and that their kin expelled George III from America for "repeated injuries and usurpations" tending to Tyranny. Hence, they keep alive in themselves the medicinal temper, applied radically in past centuries, not to covet the vacant thrones of absolutism.