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# Trial by Committee

'A jury of your peers' is a familiar concept, but what of 'a jury of your Parliamentarians'? **Alan Ward** considers the powers of Parliamentary Select Committees to conduct investigations and potential consequences when these inquiries run in parallel with regulatory or criminal procedures.

Perhaps the most enduring image of the Enron scandal will be the appearance of the company's senior executives – mired in allegations of fraud – before Congressional Committees.

Since the Enron hearings in early 2002, a succession of key individuals at the centre of ongoing regulatory investigations – including Tony Hayward, the former chief executive of British Petroleum, as well as numerous senior executives at Wall Street banks – have been subject to interrogation before Congress.

Following Parliamentary reforms in 2010, Select Committees in Westminster have evinced a growing appetite to conduct similar inquiries. On several occasions since 2010 Select Committee procedures have been conducted in parallel with regulatory and/or criminal investigations into the same events and issues:

- In July 2011, at the height of the criminal investigations into allegations of phone hacking and bribery of police officers, Rupert Murdoch, then chairman and CEO of News Corporation, and Rebekah Brooks, the former editor of the *News of The World* newspaper, were summoned to appear before the Culture, Media and Sport Committee.
- In July 2012, Bob Diamond, then CEO of Barclays Capital, was called to give evidence before the Treasury Select Committee, while investigations by the Financial Services Authority and Serious Fraud Office were still active.
- Most recently, in February and March 2014, senior officials of the Bank of England and Financial Conduct Authority have been questioned in Parliament about the ongoing investigation into alleged manipulation in the foreign exchange market.

The increasing coincidence of Parliamentary and regulatory inquiries has potentially far-reaching consequences for both the

subjects of investigation and those investigating. To understand what potential issues a concurrent Parliamentary investigation can pose, it is useful to first look at the nature and powers of Select Committees.

## Growing profile

Select Committees are appointed by Parliament to scrutinise government policy, spending and actions. Since 1979 Select Committees have been structured along departmental lines, with each major government department being subject to scrutiny by a discrete, department-specific Committee.

By convention, Select Committees' independence from the executive is ensured by restricting membership to Members of Parliament who do not hold positions within government, or positions as opposition 'front bench' spokespersons. Although Select Committees are appointed by both Houses of Parliament, it is the Select Committees of the House of Commons that have attracted the most attention in recent years – through the conduct of inquiries, gathering and taking of evidence, along with the publication of reports.

Recognition of the expanding role and prominence of Select Committees can be found both within Parliament and outside. In 2012 a government green paper (effectively, a discussion paper) considering reform to Parliamentary privilege noted "the increasing role [Select] Committees play in public life". In 2013 the House of Commons Political and Constitutional Reform Committee, in its report 'Rebuilding The House', described

"a greater willingness on the part of select committees to undertake forensic inquiries", including "very major investigative tasks that might in the past have been contracted out by the Executive to a judge or inquiry".

In July 2013 Professor Patrick Dunleavy of the research group Democratic Audit published a report entitled 'Parliament bounces back – how Select Committees have become a power in the land', which cites research showing a marked increase in mainstream media coverage of the work of Select Committees between 2008 and 2012. Most recently, in November 2013 the Bagehot column in *The Economist* recognised that Select Committees "have provided many of the big political moments in this Parliament".

## Powers to investigate

In the United States the powers of Congressional Committees to subpoena witnesses and evidence as well as the rights and privileges of those summoned to appear, are codified in the US Code and the Constitution. In the United Kingdom, despite the growing prominence of their investigatory work, there remains no equivalent statement of the ambit of the powers of Select Committees.

The routinely cited authority on Parliamentary practice is Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*. May's treatise has been updated and re-published on 24 occasions since 1844, most recently in 2011 (under the title *Erskine May: Parliamentary Practice*).

May notes that Select Committees "possess no authority except that which they derive by delegation from the House". A list of powers that may be given to Select Committees by Parliament is said to include the power "to send for persons, papers and records".

This power is replicated, verbatim, in the Parliamentary Standing Orders and, in particular, Standing Order 135, which refers to, "all Select Committees having the power to send for persons, papers and records".

The power attributed to Select Committees to summon witnesses and require answers, is said by May to be "unqualified". According to *Parliamentary Practice* a witness before a Select Committee must answer all questions put to him or her, and cannot be excused from answering (or from providing documents) on the basis of any obligation of confidentiality, potential prejudice to extant litigation, legal professional privilege or by asserting privilege against self-incrimination.

Any failure or refusal to attend a Select Committee, or to answer questions, or provision of false or misleading evidence, may – according to May – be treated as a Contempt of Parliament, which may be reported to the House of Commons (via the Standards and Privileges Committee), which will decide what sanction, if any, to impose.

The scope of the powers of Select Committees as adumbrated by May is adopted in full in various modern-day Parliamentary publications. In particular, the House of Commons 'Guide for witnesses giving evidence to a House of Commons Select Committee' (re-published as recently as January 2014) refers to Committees' power to "insist on the attendance of witnesses and the production of papers and other materials" and their ability to "require witnesses to answer questions".

## Practical issues

When Rupert and James Murdoch were summoned to appear before the Culture, Media and Sport Committee in July 2011, the debate about Select Committee powers was distilled down to one question: what if the Murdochs refused to attend?

The most comprehensive answer to this question was provided by Richard Gordon QC and Amy Street, two barristers commissioned by the Constitution Society (an educational organisation) to provide a legal opinion on the subject.

Their paper, entitled 'Select Committees and Coercive Powers – Clarity or Confusion?' (June 2012), concluded that Select Committees have no effective means to compel witnesses or obtain documents, that there is no power to punish contempt, and that witnesses before Select Committees are not necessarily protected by Parliamentary privilege.

In particular, Erskine May's assertion that obligations such as legal professional privilege (normally considered an absolute right) or privilege against self-incrimination, do not provide a basis to refuse to answer Select Committee questions, is described by Gordon and Street as "seriously misleading".

The principal issue taken by Gordon and Street with May is the enforceability of coercive powers of Select Committees: "For a power to be compulsory it is necessary to be able to enforce it."

As a matter of legal theory, Gordon and Street argue that the enforcement process that May envisages – ie, a contempt being reported to the House, which determines sanction – is incompatible with modern-day standards of due process and rights, as set out in supranational conventions such as the *European Convention on Human Rights*. As a matter of practice, there is no precedent in modern times for Parliament imposing any sanction (or censure) on a non-Member – the House of Commons has not imposed a fine since 1666, or committed an individual to prison since 1888. No non-Member has been reprimanded at the Bar of the House since 1957.

## Parallel investigations: issues for witnesses

As noted at the outset, the Select Committee inquiries into phone hacking, LIBOR and, most recently, the Bank of England's oversight of foreign exchange markets, have indicated a growing willingness on the part of Parliamentarians to gather evidence in parallel to regulatory investigations. Rebekah Brooks appeared, when called by the Culture, Media and Sport Committee to give evidence in July 2011, only days after being arrested by the Metropolitan Police.

The prospect of being summoned to give evidence before a Select Committee may (on a strict reading of Erskine May/the Parliamentary 'Guide for witnesses') act to compel an individual to answer questions and provide an account in circumstances where they would otherwise decline to provide such an account on a voluntary basis, if asked by a regulator/enforcement agency.

Where a state agency, such as the FCA or SFO, exercises powers to compel an individual to answer questions, the individual's privilege against self-incrimination is preserved by statutory provisions that render any compelled evidence inadmissible in criminal proceedings (subject to a small number of exceptions).

The only near-analogous protection afforded to witnesses before Select Committees appears to arise through the comparatively nebulous doctrine of Parliamentary privilege. The question as to whether evidence given before Parliament would be admissible in criminal, regulatory or civil proceedings would be determined in the respective tribunals those proceedings are brought in. Furthermore, with Select Committee hearings conducted in public, televised hearings, any evidence given in Parliament would most likely be known to all parties to any proceedings, whether formally admitted into evidence or not.

## The future: codification or compromise?

Should a Select Committee chair wish to assert the sort of rights that Erskine May attributes to Select Committees it is conceivable that a would-be witness, with sufficient reason or motivation to resist public inquisition, might refuse to engage, and put Parliament to its election as to whether to impose any sanction.

Otherwise, it is possible to envisage the recalcitrant witness being able to negotiate a compromise with the Select Committee, as appears to have been achieved by Rebekah Brooks, affording legal representation and protection of privilege against self-incrimination, while giving the Committee opportunity to ask questions.

There may come a time when the powers of Select Committees have to be committed to statute. However, until then, pragmatism is likely to triumph over principle, and the respective rights of Committees and witnesses will probably be mediated not in Court but by way of uniquely British compromise.

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