

CONFIDENTIAL

Mr Powell  
CDD to see?  
3/7

Pne Nimble



70 WHITEHALL, LONDON SW1A 2AS

01-233 8319

From the Secretary of the Cabinet and Head of the Home Civil Service  
Sir Robert Armstrong GCB CVO

Ref. A086/349

31 January 1986

Dear Murdo,

Westland: Officials Appearing Before Select Committees

We spoke this evening about the current position, which might be summarised as follows:

- (a) The Clerk of the Defence Select Committee has indicated to Mr Powell and Mr Ingham that they will not be required to give evidence on Tuesday 4 February.
- (b) The Clerk has asked Sir Brian Hayes whether the named officials from the DTI might be available on 5 February, should the Committee again request their attendance: but he has implied (if I am correctly informed) that such a request would not take the form of a summons.
- (c) The Chairman, Sir Humphrey Atkins, has told the Solicitor General that, despite the letter requesting this, he will not be expected to give evidence to the Committee. The Solicitor General's office have conveyed orally to the Clerk the reasons why it would have been inappropriate for him to do so: but it has not been necessary for the Solicitor to write a formal letter of refusal.
- (d) The Chief Whip's discussions with the Chairman of the Committee will resume on 3 February, and may lead towards a compromise of which the main element would be the preparation by the Committee of a questionnaire, to be submitted in advance, on the basis of which Sir Robert Armstrong might be invited to give evidence in place of any of the five named officials (No 10 and DTI).

/This

Murdo MacLean Esq

CONFIDENTIAL

CONFIDENTIAL

This may prove an over-optimistic scenario. You explained to me the personal sensitivities of individual members of the Committee, and the need to persuade the Committee as a whole that what we are working towards is not a new departure, a refusal of the legitimate rights of Select Committees, a contempt of Parliament etc.

In his further discussions with Sir Humphrey Atkins, I suggest that the Chief Whip might stress the long-standing conventions which support the position we are adopting. I attach a quarry of material on which he could draw. The quotation from the First Report from the Select Committee on Procedure, which remains the agreed position, is important; so also are the precedents, which I think taken together tell a reasonably convincing story. It might be worth suggesting to Sir Humphrey that the Committee, if it did take evidence from Sir Robert Armstrong, could ask him some questions about these conventions and precedents. It might be positively helpful to us to restate these matters on the record; and it might also help the Chairman in his position vis-à-vis the other members.

Sir Robert Armstrong would of course also appear before the Committee only on Ministerial authority and under Ministerial instructions. There would therefore be areas of questioning on which he would not wish to be drawn beyond what Ministers have already stated on the record. But he might be able to confirm, if asked, that those Ministerial statements represent a fair and accurate statement of the facts of his inquiry into the disclosure of the Solicitor General's letter, and that there are no hidden subterfuges. A statement of that kind, coming from the Head of the Civil Service, could be of considerable value, not only with Members of Parliament but with public opinion.

I also enclose a draft negotiating brief for the Chief Whip's use, prepared at an earlier stage. It is somewhat overtaken by events but contains some material which may still be useful.

I am copying this letter and enclosures to Nigel Wicks (No 10), David Morris (Lord Privy Seal's Office), John Mogg (DTI) and Ken Lussey (DTI).

*Yours ever*

*Michael*

(M C Stark)  
Private Secretary

CONFIDENTIAL

CONFIDENTIAL

OFFICIALS APPEARING BEFORE SELECT COMMITTEES

Terms of Reference of Select Committees

Under Standing Order 99 Select Committees are appointed "to examine the expenditure, administration and policy of the principal government departments." The words underlined are broad enough to cover almost any questions that a Committee might want to put to Ministers or officials on the conduct of Departmental business. Each Committee is concerned with the affairs of a particular department. However, it is not unusual for Ministers or officials of one Department to appear before the Select Committee for another Department where the subject matter of the inquiry makes this relevant. Any attempt to argue that a particular matter falls within the purview of another Departmental Committee is unlikely to be fruitful. It merely shifts the issue to that other Committee and in fact Committees can if they wish sit together on matters of common interest. In any case it has always been accepted that interpretation of its terms of reference is a matter for the Committee. If the Government wanted to challenge them, it could only do so in the House itself.

CONFIDENTIAL

Power to send for Previous Papers and Records (PPR)

Select Committees are given powers by the House to send for persons, papers and records. In the last resort though these powers can only be enforced by the House.

The power to send for 'persons' enables a Committee to summon a witness to attend the Committee and to bring with them all such documents as they are informed will be required for the use of the Committee. This power to require attendance is formally unlimited. The only exemptions concern Peers (who may attend "if they think fit") and members of the House of Commons (including Ministers) who may be requested to attend, but can only be ordered to attend by the House itself.

CONFIDENTIAL

Conventions

In practice the exercise of the legal powers of Committees is constrained by convention. Conventions covering the withholding of documents from Committees (eg Cabinet documents) are not dealt with in this note.

As far as the attendance of official witnesses is concerned the most authoritative statement of the conventions appears in the First Report of the Select Committee on Procedure (1977/8 Session) and in the Memorandum submitted by the Clerk to the Procedure Committee.

After setting out the Committee's powers the Clerk went on to state in para 15

"Finally it may be noted that, by long-standing practice, committees requiring evidence from officials of a department of state or other body have usually left it to them to select the person or persons to give evidence. There is no doubt, however, that a committee possessing PPR could summon a named official if it so wished, but to summon an individual civil servant against the wishes of the Minister to whom he is responsible might lead to his being instructed by that Minister not to answer a committee's questions in his official capacity."

He went on to state in para 25

"The case is of course different in regard to civil servants, who can only be presumed to attend as servants of the Crown acting under the direction of Ministers of the Crown. Civil servants do in fact on occasion ask to be excused from answering questions, in accordance with the practice acknowledged in Select Committee procedure and mentioned in the last sentence of paragraph 21 of this memorandum. The most usual ground upon which excusal is requested is that a question concerns policy within the control of Ministers and could only be answered by Ministers. There is no case on record so far as we are aware of a civil servant being ordered to answer a question, still less for a formal report being made to the House of his refusal to do so. Though civil servants are sometimes placed under some pressure to reveal more than they have been prepared to do, it would seem that committees acknowledge that a servant of the Crown may have instructions from the Crown's Ministers as to how he should reply and that the proper remedy lies against the Minister concerned. It would certainly appear more in accordance with Ministerial accountability to the House that Ministers should accept responsibility for the conduct of their officials, and that the House should proceed against Ministers in the last resort by vote of censure or indeed by the refusal of supply. "

CONFIDENTIAL

In the Committee's Report itself, these points were reflected in paras 7.8 and 7.10

"The evidence which government departments and agencies are prepared to give, however, is limited in practice both by political considerations and by various conventions, some of which have come to be regarded as binding. There is, for instance, a long-standing practice that committees requiring evidence from a Government department usually leave it to the department to nominate their witnesses. There has also been a recent case of the Government insisting on the right to choose which Minister or Ministers should represent it before a committee. Civil Servants are presumed to attend on behalf of Ministers and under their directions, and may occasionally ask to be excused from answering questions, most often on the grounds that they involve policy matters which are the responsibility of Ministers.

"It would not, however be appropriate for the House to seek directly or through its committees to enforce its rights to secure information from the Executive at a level below that of the ministerial head of the department concerned (normally a Cabinet Minister), since such a practice would tend to undermine rather than strengthen the accountability of Ministers to the House."

The 20th Edition of Erskine May refers to the Clerk's Memorandum as giving a "comprehensive description" of the powers of Select Committees on PPR.

CONFIDENTIAL

Government Undertakings

It has been recognised that there may be differences of interpretation between Ministers and Committees as to the application of these conventions in practice. Acknowledging this there have been two relevant undertakings:-

In 1979 the Leader of the House said (Hansard 25 June 1979 Cols 45-6):

"There need be no fear that departmental Ministers will refuse to attend committees....or that they will not make every effort to ensure that the fullest possible information is made available to them. I give the House the pledge on the part of the Government that every Minister....will do all in his or her power to co-operate with the new system of committees and to make it a success".

Subsequently in 1981 the Leader of the House said (Hansard 16 January 1981 Col. 1312):

"I am entirely prepared to give a formal undertaking that where there is evidence of widespread general concern in the House regarding an alledged ministerial refusal to disclose information to a select committee, I shall seek to provide time to enable the House to express its view."

It follows from this that, if a Committee were to report formally to the House the refusal of a Minister to allow the attendance of witnesses ordered by the Committee to give evidence, the Government would be obliged to make time for the matter to be debated, if they considered that the report was supported by "widespread general concern in the House".

CONFIDENTIAL

Precedents

There are very few precedents in total in this area, and only one is directly relevant:

Clive Whitmore: in July 1978 Mr Whitmore, then an Under Secretary in the Cabinet Secretariat, was asked to appear before the Trade and Industry Sub-Committee of the Expenditure Committee in his role as Chairman of a Cabinet Office Official Committee, the existence of which had been revealed to the Sub Committee in earlier evidence. The Prime Minister agreed that he should not be allowed to take up this invitation 'on the grounds that the Cabinet Office, of which he is an official, does not have any direct responsibility' in the matters being investigated by the Sub-Committee (MG 23/605/01C, 12 July 1978). The Sub-Committee then ordered Mr Whitmore's appearance (19 July 1978). The issue was resolved when the Sub-Committee agreed to take evidence from Lord Peart, then Lord Privy Seal but with special responsibility for co-ordinating maritime matters (the Committee's area of concern) accompanied by Mr Whitmore and various other officials.

Other, less relevant precedents, are:

Mr Denman, Head of the Cabinet Office European Unit, was invited by name (1976) to give evidence to a joint House of Lords/House of Commons European Committee's enquiry into the European Regional Development Fund. No further details are available.

Sir Kenneth Stowe, Permanent Secretary DHSS, was invited by name to give evidence to the Agriculture Committee. It was informally agreed with the Committee that other DHSS officials should appear with MAFF officials in the lead.

GCHQ: in 1984 three specified GCHQ officials were invited to give evidence to the Foreign Affairs Committee; their appearance was not allowed on the basis that they were serving members of the security and intelligence services. This was accepted by the Committee.

Industry and Trade Committees have twice had recourse to the Serjeant-at-Arms to obtain documents from nationalised industries - from BSC in 1978 and British Shipbuilders in 1984. In the earlier case some but not all the documents requested were supplied, by agreement with the (reluctant) Committee. In the later case, the documents were supplied on a confidential basis.

Prime Minister was asked in March 1978 to give oral evidence on Civil Service matters to the General Sub Committee. Precedents dug up at that stage related to the 1930s when Prime Ministers had appeared before Select Committees, though they had refused to do so, on Civil Service matters, in 1873 and 1941. There have been no Prime Ministerial appearances since the Second World War. Confrontation with the Committee was avoided by the



offer of the Lord Privy Seal to give evidence since the Lord Privy Seal had been deputed by the Prime Minister to deal with such issues as the Committee were interested in. This was accepted. No attempt was made to argue that the Prime Minister should not in principle appear.

A further Prime Minister precedent arose in February 1980 when the industry and Trade Committee asked for a note from the Prime Minister on a merger between the Departments of Industry and Trade. It was decided that even a note from the Prime Minister would be undesirable; the Secretary of State for Trade and Industry finally answered the Committee's questions in a letter which was cleared with the Prime Minister.

We can trace no precedents on private secretaries or press officers, except that Mr Bernard Ingham gave evidence in July 1982 to the Defence Select Committee on media handling during the Falklands campaign. This was the first ever occasion on which an official from 10 Downing Street had given evidence in this way; the departure from precedent was justified on the grounds that it was a matter for which Mr Ingham had had direct executive responsibility, not merely in his capacity as a member of the Prime Minister's personal staff.

## NEGOTIATING BRIEF FOR CHIEF WHIP

1. Officials appearing before Select Committees to give evidence do so on behalf of their Ministers. As the Procedure Committee, whose recommendations led to the establishment of the Departmental Select Committee, pointed out (First Report from the Select Committee on Procedure, Session 1977/8, paragraph 7.8):

"It is a long-standing practice that Committees requiring evidence from a Government Department leave it to the Department to nominate their witnesses."

[They instanced this as an example of the way in <sup>which</sup> the formally almost unrestricted powers of Select Committees to call for Persons, Papers and Records (PPR) are in practice limited by a number of accepted conventions eg. with regard to the disclosure of matters affecting national security]

2. As the Prime Minister pointed out on Thursday in the House, this long-standing practice is particularly relevant in the case of Private Secretaries, and other Private Office staff, who must stand in an especially personal relationship to their Ministers.

3. What Ministers are proposing therefore in this instance (ie. that it is for Ministers to decide who should appear before Select Committees on their behalf) is not new - it has been accepted practice for a long time.

4. It is fully accepted that all these conventional limits to the formal PPR powers of Select Committees rest ultimately on a

judgement of where the overall public interest lies, and are subject to the overriding decision of the House of Commons.

5. It is also recognised that cases may arise - in general or in exceptional circumstances - where there may arise differences of opinion between a Committee and Ministers as to where the public interest lies in a particular case, and about whether or not the normal conventions governing the disclosure of information to Select Committees should be set aside. Where such differences cannot be resolved, and an acceptable compromise achieved, it is ultimately for the House as a whole to decide. The Government is pledged to provide an opportunity for debate if there is evidence of widespread general concern in the House regarding an alleged Ministerial refusal to disclose information to a Select Committee.

6. Subject, therefore, to the overriding power of the House, the view of Ministers is that it is essential to maintain in this matter the constitutional position that it is Ministers who are accountable to Parliament, and that officials appearing before Select Committees only do so when instructed to do so by their Ministers and subject to their direction.

7. Ministers hope accordingly that the Committee will agree that the normal conventions in this matter should apply, and that the Committee will permit the responsible Minister either to give evidence personally or to designate those officials whom he considers, in consultation with the Committee, appropriate in the circumstances to appear before the Committee to give evidence on his behalf.

8. Should the Committee, contrary to the normal conventions, decide to order a named official to appear before them, and the responsible Minister instructed his official to comply with the order, the official would remain subject to the instructions of his Minister, as to whether he would be empowered to add to the statements already made by Ministers. As the Clerk of the House stated in his evidence to the Select Committee on Procedure (First Report from the Select Committee on Procedure Appendix A, paragraph 25) 'there is no case on record so far as we are aware of a civil servant being ordered to answer a question, still less for a formal report being made to the House of his refusal to do so.'



10 DOWNING STREET

THE PRIME MINISTER

I understand that the Defence Select Committee has sent invitations to two members of my office to give evidence on certain matters in connection with the Westland affair.

As you know, the Private Secretaries and personal staffs of Ministers (including the Prime Minister) ~~have no standing and no responsibility other than as assistants to and channels of communication for their Ministers.~~ They cannot be called to account for the decisions and actions of their Ministers nor can they be called upon to speak for their Departments. The nature of their duties and relationships with the Minister on one hand and the Department on the other make it inappropriate that they should be called upon to give evidence to Select Committees.

Your Committee no doubt have it in mind to seek evidence from the two people in question on their roles in the affair of the disclosure of the Solicitor General's letter of 6 January to the then Secretary of State for Defence. They have already been required to submit to detailed questioning on this matter in the course of the inquiry conducted by the Head of the Civil Service; it would, I suggest, be unreasonable and unfair - indeed it would put them in "double

"double jeopardy" to require them to submit to another round of questioning by your Committee.

I have myself given the House of Commons a comprehensive description of these matters, taking full account of the findings of the inquiry by the Head of the Civil Service, and have made it clear that I am not prepared to add to that account. If the two members of my staff were to give evidence to your Committee, they would be under instructions to say that they had nothing to add to my account of the matter to the House of Commons.

In the circumstances, I hope you will agree that the two people concerned should not be invited to give evidence to your Committee.

OR

[In the circumstances I cannot agree that the two members of my staff should give evidence to your Committee].

The Rt. Hon. Sir Humphrey Atkins, M.P.



10 DOWNING STREET

THE PRIME MINISTER

I understand that the Defence Select Committee has sent invitations to two members of my office to give evidence on certain matters in connection with the Westland affair.

As you know, the Private Secretaries and personal staffs of Ministers (including the Prime Minister) ~~have no standing and no responsibility other than as assistants to and channels of communication for their Ministers.~~ They cannot be called to account for the decisions and actions of their Ministers nor can they be called upon to speak for their Departments. The nature of their duties and relationships with the Minister on one hand and the Department on the other make it inappropriate that they should be called upon to give evidence to Select Committees.

Your Committee no doubt have it in mind to seek evidence from the two people in question on their roles in the affair of the disclosure of the Solicitor General's letter of 6 January to the then Secretary of State for Defence. They have already been required to submit to detailed questioning on this matter in the course of the inquiry conducted by the Head of the Civil Service; it would, I suggest, be unreasonable and unfair ~~indeed it would put them in "double~~

~~"double jeopardy"~~ to require them to submit to another round of questioning by your Committee.

I have myself given the House of Commons a comprehensive description of these matters, taking full account of the findings of the inquiry by the Head of the Civil Service, and have made it clear that I am not prepared to add to that account. If the two members of my staff were to give evidence to your Committee, they would be under instructions to say that they had nothing to add to my account of the matter to the House of Commons.

In the circumstances, I hope you will agree that the two people concerned should not be invited to give evidence to your Committee.

OR

[In the circumstances I cannot agree that the two members of my staff should give evidence to your Committee].

The Rt. Hon. Sir Humphrey Atkins, M.P.





10 DOWNING STREET

THE PRIME MINISTER

*The Prime Minister has asked me to write to you about the information*

I understand that the Defence Select Committee has ~~sent~~ <sup>to</sup> ~~summoned~~ <sup>two</sup> ~~the~~ <sup>members of my</sup> ~~office~~ <sup>office</sup> to give evidence on certain matters in connection with the Westland affair.

As you know, the Private Secretaries and personal staffs of Ministers (including the Prime Minister) have no standing and no responsibility other than as assistants to and channels of communication for their Ministers. They cannot be called to account for the decisions and actions of their Ministers nor can they be called upon to speak for their Departments. The nature of their duties and relationships with the Minister on one hand and the Department on the other make it inappropriate that they should be called upon to give evidence to Select Committees.

*no doubt* I ~~suppose~~ <sup>have in mind to place</sup> that Your Committee ~~would like to hear~~ evidence from the two people in question on their roles in the affair of the disclosure of the Solicitor General's letter of 6 January to the then Secretary of State for Defence. They have already been required to submit to detailed questioning on this matter in the course of ~~the my~~ inquiry; ~~conducted by the Head of the Civil Service~~; it would, *I suggest,* be unreasonable and unfair - indeed it would put them in

"double

"double jeopardy" to require them to submit to another round of questioning by your Committee.

The Prime Minister has  
~~I have myself~~ given the House of Commons a comprehensive description of these matters, taking full account of the findings of the inquiry by the Head of the Civil Service, and has made it clear that ~~she is~~ not prepared to add to that account. If the two members of ~~her~~ staff were to give evidence to your Committee, they would be under instructions to say that they had nothing to add to ~~my~~ <sup>the</sup> account of the matter to the House of Commons.

In the circumstances, I cannot agree that the two members of my staff should give evidence to your Committee, and I have instructed them to decline the invitation to do so.

The Prime Minister feels the same, and  
in the circumstances I hope you will agree,  
that the two people concerned should not be  
invited to give evidence to your Committee.

The Rt. Hon. Sir Humphrey Atkins, M.P.

## SELECT COMMITTEE

Of course the Government want to cooperate with Select Committees. But I think it is also important to be fair in these matters, and I do not think it would be right for officials who have given their evidence to a formal enquiry conducted by the Head of the Civil Service to be required to give evidence all over again to a separate body. My statements to the House on 23 January and my speech on 27 January were based on the conclusions of that enquiry and I do not believe there is anything more which can be added. But were the Committee to wish to see the Head of the Civil Service, I would be very ready to consider this.