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SECRET

January 8, 1981

Constitution: Options for Third Stage

Objective

The objective is to present to the Queen, as soon as possible after February 6, an Address of both Houses of Parliament asking her to cause to be laid before the UK Parliament a Bill based on the proposed Resolution now before the Joint Committee. For the successful outcome of the whole process:

- (a) the Address should be regarded by the public, by both Houses of Parliament and by the UK as satisfying constitutional requirements (i.e. there should be no room for argument that the document sent to the Queen is not an Address of both Houses);
- (b) the Address should contain all the amendments which the Government wants to propose or accept;
- (c) there should have been an adequate opportunity for the Canadian Parliament to debate and propose amendments to the Address.

It is also important that the Address pass through Parliament with as little procedural controversy as possible, in order to minimize the grounds for delay or obstruction in the UK itself.

Problems

1) Opposition tactics in Committee

Despite the fact that the Committee resolved on December 10 to begin clause-by-clause study on January 12 and complete its report by February 5, it seems likely that the Opposition will continue to attack the process and to argue that more time is needed. The December 10 resolution will help, by making it more difficult for the Opposition to justify obstruction or delay. Nevertheless, there is no guarantee that a satisfactory report can be made. There is no guarantee that all clauses will have been studied by February 5, or that the Committee will have reached a conclusion on the form of its main recommendation.

*Encouraged by
The Smith on Friday*

Since the Committee is bound by its terms of reference to report, there is authority for the Chairmen to put all necessary questions in time to allow a report by February 6. There is only 1 real question in the terms of reference, though: whether or not "such an Address" should be presented. The nature of "clause-by-clause" study in these circumstances is unclear.

It is assumed that every effort will be made in the time remaining to obtain the Opposition's cooperation in this respect. But the possibility of failure must not be ignored, and it remains most important that the Government be seen to have made every effort to arrive at a report. This aspect of our problems is not further dealt with in this note.

2) Admissibility of amendments in Committee

The Chairmen of the Joint Committee have apparently been provided with preliminary advice to the effect that it is not within the Committee's power to make amendments to the proposed Address which go beyond the scope of the document actually before them; and, in particular, that the

question of natural resources is beyond the terms of reference of the Committee. We think this advice is wrong. While it is true (a) that a committee is not empowered to go beyond the scope of its terms of reference and (b) that in studying a Bill, a committee must in the absence of instructions confine itself to the subject-matter of the Bill, it would be an extremely narrow interpretation of the Committee's terms of reference to say that the Committee is not entitled to suggest that the Address contain constitutional amendments other than those proposed. The Committee was requested not only to consider and report on the "proposed Resolution", but also to recommend "whether or not such an Address, with such amendments as the Committee considers necessary", should be presented to the Queen. The Committee has not been asked to report the document back to the House, as would be the case with a Bill.

In the case of a normal Bill, the Bill is referred to committee after having received the approval of the House at second reading. The "proposed Resolution", on the other hand, has never been before the House, and the Committee's mandate must necessarily be broadly interpreted since the House has not expressed an opinion on the document it has asked the Committee to consider. Surely part of the Committee's task must be to consider whether the proposed Resolution goes far enough, and therefore the Committee must have the power to suggest additions to the Address, if it recommends that an Address be presented.

Who is doing this?

Although the advice given to the Chairman seems to be wrong, it will be necessary to be prepared (a) to meet procedural arguments on the point in Committee, and (b) to make the amendments in the House if necessary.

It may be against the Opposition's own interests to argue that the NDP amendment is not receivable, since other amendments outside the "scope" of the proposed resolution would also be out of order. If the Conservatives adopt a strategy of proposing only narrow amendments, however, they may attack the NDP motion on procedural grounds.

If the Chairman rules that the amendment is beyond the Committee's power to make, it is still possible for the Committee to include it in the report, since the Committee is master of its own procedure. The Speaker might rule it out of order; but she would not be called upon to do so unless concurrence in the Report were moved. Even then, the leave of the House could be sought to report that recommendation.

Alternatively, the amendment could be made after the Committee had reported, either by sending the matter back to the Committee with instructions, or by the introduction of a new resolution.

3) Nature of Committee Recommendation

namely?

The Government said when it published the proposed Resolution that concurrence in the Committee Report would constitute authority to present a Joint Address to Her Majesty. We have no reason to change the advice on which this statement was based, since it seems clear to us that if both Houses concur in a recommendation that a certain Address be presented, the Address can thereupon be presented without further action. However, over the course of the last 3 months a considerable body of opposition to proceeding by way of concurrence in the Committee Report has revealed itself, both in the House and in the Senate.

The arguments being put forward against concurrence in the report fall into two categories:

(a) Difficulty of Amending

A committee report cannot be amended directly, but must instead be referred back to the committee with instructions to amend it. The situation here is complicated by the fact that it is a special committee with a fixed mandate, which means, according to some precedents, that the committee has to be revived in order to carry out the instructions; further complications flow from the fact that it is a joint committee, which means that amendments could only be made pursuant to resolutions of both Houses reviving the committee and instructing it to make an amendment to its report.

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Some people, particularly Senators, have difficulty accepting this procedure as practical even for a single amendment. When one considers that several amendments could, in theory, be proposed, it seems clear that the process could be complex and slow.

(b) Legitimacy

There are strongly-held opinions, particularly in the Senate but also expressed in the House by Mr. Clark and Mr. Baker, to the effect that concurrence in the Committee Report is not enough, and that for the UK to act there must have been a motion for an Address approved directly by both Houses.

As indicated above, we do not agree; furthermore, we would argue that there is no convention requiring a formal "Address" to the Queen, and that a clear expression of the will of both Houses, transmitted to Her Majesty by the Canadian Government, would suffice. On the other hand, there may be reasons to sidestep the issue.

From the Government's point of view, it may be highly desirable not to proceed by way of concurrence in the Committee Report, even though it seemed a fair way to go about it. First of all, the procedure for making amendments to a committee report is obviously difficult to understand, and it is likely that the Government will find it impossible to convince Parliament or the public that it is not trying to preclude the possibility of amendment. Second, if amendments were actually to be made to the committee report, it could involve delay. Third, the procedure for debating a committee report is not suited to the logical, orderly and expeditious consideration of what is in effect a relatively long and difficult piece of legislation; it would be hard for the Government to demonstrate at any given point that further debate was unnecessary, or that the opposition was simply obstructing. Fourth, the legitimacy arguments are impossible to win; there is a danger that relying on concurrence in the Committee Report as authority to present a Joint Address would prove unacceptable to the public, and it might give the British an excuse to delay acting on the Canadian request. Furthermore, the Speaker could be placed in a very difficult position if asked to sign an Address based on concurrence in a Committee Report (although presumably this could be avoided).

How is this different?

*What about the problem
of concurrent debate in
both houses?*

The Government has nothing to gain by proceeding by way of concurrence, provided that any procedural difficulties in respect of moving a resolution on the same subject as a committee report can be avoided. (See page 10). Moreover, if presented in the proper light (and early enough), the Government's intention to proceed by another route could be seen as a major concession and a demonstration of good faith.

4) Public Relations Considerations

*This is a double whammy
move. If badly
introduced, it
could damage
the Govt.*

The key to winning the war, and not just the battle, is to nullify the Opposition arguments about the process. It is essential that the Government act early (i.e. some time before February 6) to make it clear that it is trying to be fair, and that it is flexible in the matter of procedure. At some point, it should be revealed publicly that the Government has been trying hard to reach an agreement with the opposition parties on how to handle the third stage. If it could be made clear to the press and the public that the Government was not intending to railroad at the third stage, and that it was willing to meet the concerns expressed by Mr. Baker and some Senators, the ground would be set (a) for an agreement with the other parties on a special procedure, or at least for pinning the failure to agree on the Conservatives, or (b) for the introduction of a new resolution directly.

The ground should also be laid now for limiting debate at the third stage. Consideration could be given to the proposal that the Government announce its desire to move a motion in the House for a fixed schedule for the debate, including extended hours and extra sittings. This intention should probably be made known before February 6, to be most useful. If a motion is put, it could include the terms of a special procedure for considering the Address; if so, it should be accompanied by a corresponding motion in the Senate, so that the Senate does not feel free to adopt its own procedure.

The arguments for limiting debate at the third stage will be strengthened to the degree that the Government is able to persuade people that the Committee's work has resulted in substantial improvements to the Address.

Options

1) If the Committee for some reason fails to report, or cannot produce a useful report, the Government's only real option will be to introduce a motion for an Address directly. Since it will have been able to include whatever amendments it wants, the Government would presumably not benefit from any agreement to treat the new Address as a Bill. An attempt should be made, of course, to establish a timetable for the debate by unanimous agreement.

The main question, if there is no Committee report, is whether to proceed in both Houses at once. To do so would save some time, but in order to strengthen the apparent fairness of the procedure chosen (in what will be a contentious climate) it might be better to debate the resolution in the House of Commons first; the Government could argue that it wanted the House to have a full opportunity to change the resolution before introducing it in the Senate. The possibility of conflicting amendments would be reduced; moreover, the Senate debate could be more carefully monitored and controlled if not simultaneous with the Commons debate.

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The Senate has a procedure for taking note of something happening in the House

2) If the Committee does report, the choice of the best procedure for the third stage depends on whether the Address proposed by the Committee is in the form which the Government considers final. If it does, it is less important to use a procedure which will make amendments easy; if the recommended Address is not in final form, however, the Government will have to try very hard to use a procedure which allows it to have amendments made without undue difficulty.

The two basic options are:

- (a) to move a resolution directly, and
- (b) to deem (by House order) the Address recommended by the Committee to be a Bill reported out of a standing committee.

It should not be deemed a Bill because of the Senate response

Moving a Resolution Directly

This process will sidestep the committee report and could cause some controversy for that reason, unless the motion were in identical terms to that recommended by the Committee. It would be difficult to make amendments in the House because the procedure for debate would be that followed for a normal motion, and only one amendment and subamendment could be considered at a time. It might also be difficult for the Government to move its own amendments, since it would be the Government's own motion and the Speaker would probably accept only opposition motions for one or two rounds.

If the motion was in "final form", the procedure would be acceptable, because amendments would not be necessary. The process would meet most of the criticisms expressed so far, since the Address would be directly before the House for approval. However, if the motion moved by the Government were different from that recommended by the Committee, the Government would be criticized for failing to allow adequate opportunity for amendments.

These difficulties would be reduced somewhat if the Committee Report were to recommend that the Government move a motion for the presentation of an Address, rather than merely recommending that an Address be presented. The Government could then introduce a motion directly for the Address proposed by the Committee, and would be justified in moving amendments of its own. The need to debate the Committee Report would also be avoided.

Treating the Address Like a Bill

Unanimous agreement to treat the Address proposed by the Committee as a Bill would have four major advantages from the Government's point of view. First, it would ensure that all amendments would be considered, because there would be a report stage; this would deprive the opposition of the argument that there had not been an opportunity to move amendments, and would also enable the Government to make any amendments the Committee had not made. Second, the time allocation rules could be applied to the report stage

Edwards

or "third reading" or both, which would presumably be somewhat less controversial than applying closure. Third, the House order would remove any possibility that at the conclusion of the third stage debate the opposition would argue that the House had still not directly approved the Address. Fourth, there would be no need for the Government to sidestep the Committee Report.

It would be possible for the Senate to adopt the same sort of procedure and deal with the Address at the same time as the Commons. But because of the differences in the rules, traditions and atmosphere of the Commons and Senate, and the possibility of conflicting amendments, the best way to proceed might be to avoid dealing with the Committee Report in the Senate, allow the debate in the House to come to a conclusion, and then seek the Senate's concurrence in the resolution approved by the House. This would avoid conflicts and still ensure that the Senate had the Address directly before it. The main problem might be that of restraining the Senators from debating the Committee Report; if the Senate did debate the Report, there might be procedural difficulties involved in seeking its concurrence in a House resolution on the same subject.

*No
Time element*

The main drawback of a special order, of course, is that it needs unanimous consent. There are advantages in seeking such consent even if it is not forthcoming.

3) For all the reasons outlined earlier in this note, the option of simply moving concurrence in the Committee Report is the least attractive. There may be considerable pressure to debate the Committee Report, however, if there is no unanimous consent for a special order. When the Standing Orders were amended in 1969, the Government tried to avoid debating the Committee Report by moving its own motion (with slightly improved wording). For a variety of reasons, this caused a major brouhaha and the net result was that even though the Speaker never ruled on the procedural questions the Government withdrew its motion and concurrence was sought in the Report.

The circumstances are different here. Because of the obvious difficulties involved in proceeding by way of concurrence, the Government could claim justification in finding another route. Nevertheless, there may be criticism, and there certainly will be if the government motion were different from the Committee Report.

One of the major difficulties in 1969 was that the Chairman of the Committee had given notice of his motion to concur in the committee report before Mr. MacDonald gave notice of his motion to change the Standing Orders. Since the former could be moved under "Motions", and the latter only under "Government Orders", there was room for argument that the motion to concur was the more effective vehicle for dealing with the subject.

There are two ways to protect against a major procedural dispute if the Government wants to move its own motion directly. The first is to make sure that notice of the government motion is given first; the second, as mentioned earlier, is to have the Committee recommend that the Government put before Parliament a motion for an Address. Further protection would be given if the recommendation were worded in such a way as not to tie the Government to moving precisely the same text as that recommended by the Committee, but instead to allow some leeway for making minor changes.

Andrew Watt

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