*from*

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Dear Sir

I enclose some observations on the Green Paper on Parliamentary Privilege, principally concerning the Bill of Rights.

Yours faithfully

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# THE BILL OF RIGHTS
## Is it in force?

*Submission by Sir William McKay*
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1. Article IX of the Bill of Rights 1688 is at the heart of modern parliamentary privilege. Since this, the central parliamentary claim to freedom of speech, is incorporated in statute law, the interpretation and scope of the privilege have been matters for the judges and not the Houses. Judicial decisions are not frequent but are usually significant.

2. The Bill of Rights Act is an Act of the Parliament of England. There is a Scottish parallel, the Claim of Right Act 1689, passed by the Estates of Scotland, to which (unlike the Bill of Rights) no sequence of subsequent judicial interpretations is attached. The texts of article IX and its Scottish equivalent are in an annex at the end of this paper.

3. The argument in succeeding paragraphs is that neither statute has been in force since 1 May 1707. Both conferred protection on institutions which ceased to exist when the Parliament of Great Britain came into being, and no statute – the Acts of Union or any other – applied them to the new body. There being no parliamentary correlative of these provisions, they must be spent. Put another way, the Claim of Right Act at least must be spent because the parliament it protected – the Estates – has disappeared. The same must logically be true of the Bill of Rights Act unless the Union Parliament was *legally* the heir to the English Parliament, so that the English legislation would apply to the united body without further action. It will be argued that there is no basis for that supposition,

*Political continuity*

4. What the Union Acts said about parliaments was that the two incorporating kingdoms were to 'be represented by one and the same Parliament, to be styled the Parliament of Great Britain.' Creating a single legislature was the logic of incorporation. The Acts did not say that a selection of Scottish legislators - 45 Members and 16 representative peers - were to be added to the English Parliament.

5. At the same time, it is not difficult to see why a sense of continuity prevailed - then and since - in England. In contrast to events in Scotland, there was no change in English or Welsh constituencies in 1707. The Houses of the united body sat in the same Chambers as the English Parliament, and consisted (so far as England and Wales were concerned) of all the same people. Only one small change was made (in the Lords) to pre-Union procedures. There was no dissolution of the English Parliament – no election, no new writs of summons. There was only a proclamation

under the Great Seal of England that 'the Lords of Parliament of England and the Commons of the present Parliament of England should be members of the First Parliament of Great Britain.' There was in fact no General Election until the autumn of 1708.

6. Procedurally the united House of Commons acted as if nothing whatever had happened. On the very first day the new House sat, there was a dispute about where the mace should be placed after the election of a Speaker. It was settled by reference to an order of the English Parliament in 1661; and if any of the Scots present wondered what they had let themselves in for, no one said so. A good many years later, however, the issue did surface in the House of Commons, but the outcome was no different. In 1945, a Member returned for a Scottish constituency wished formally to take his seat without the normal presence of two supporters, since he was the only representative of his party in the House. It was argued that the precedent according to which this would be disorderly pre-dated the Union, and consequently there was 'no reason why Scottish Members should be bound by the customs and usages of the old English Parliament'. The House, on a division, upheld the need for supporters.[1]

7. Some academic commentators have assumed, with greater or lesser degrees of confidence, that the British Parliament was indeed the English Parliament writ rather larger. Much the boldest view is that 'obviously, as a matter of fact, it would be far-fetched to say that in form or in substance a new Parliament came into being in Westminster in 1707.'[2] Far-fetched or not, it is impossible to reconcile this view with the facts. If the make-up of the English Houses was undisturbed, the effect on the Scottish legislature was profound. In place of a unicameral assembly with only a shadowy division between the constituent Estates there appeared a bi-cameral body in which a handful of Lords of Parliament elected by their fellows sat in the upper House, and members of the other two Estates, in smaller numbers and a very different arrangement of constituencies, took their places in the lower. Hood Phillips is more tentative, though his conclusion is much the same as that previously quoted:

> the orthodox view, at any rate among English writers, is that at the Union the English and Scottish parliaments extinguished themselves, and transferred their power to the new Parliament of Great Britain, and it is assumed that the Parliament of Great Britain inherited and developed the characteristics of the English Parliament, including sovereignty.[3]

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[1] HC Deb (1945-46) 410 c 41.

[2] K W B Middleton *New Thoughts on the Union* in Juridical Review vol 66 1954 page 53 n3.

[3] *Constitutional and Administrative Law* (7th edition 1987 page 65). Wade and Bradley do not speculate whether any kind of continuity existed between the pre-Union parliaments and the Union Parliament stating simply that '[t]he former English and Scottish Parliaments ceased to exist' (*Constitutional and Administrative Law* 11th edition 1993 page 90).

*Legal discontinuity*

8. More robust than the tentative Hood Phillips but no more evidenced is the view of the Lord President of the Court of Session (from the bench) in 1953 at the other end of the spectrum. Lord Cooper had difficulty in seeing 'why it should have been supposed that the new Parliament of Great Britain should inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that the Scottish representatives were admitted to the English Parliament. That was not what was done.' [4]

9. Beyond these assertions, however, no evidence or analysis has ever conclusively demonstrated that the Parliament of Great Britain was capable of recognition as the legal heir of the English Parliament, enjoying the same statutory protection. There are however two pieces of evidence, both from 1707 which, though they do not proclaim an explicit belief that there was *no* continuity, are nevertheless consistent with discontinuity.

10. The Succession to the Crown Act 1707 (enacted by the united Parliament) provides that 'every person disabled to be elected or to sit or vote in the House of Commons of any Parliament of England shall be disabled to be elected or to sit or vote in the House of Commons of any Parliament of Great Britain.' It is not possible to view this as other than a comprehensive if unintended admission of legal discontinuity, from which may be derived a necessary acceptance that other statutes relative to the English Parliament could not apply to the new body unless similarly validated.

11. The Proclamation under the Great Seal of England appointing the Lords and Members of the English Parliament to the united body without further ado makes the point in an equally unspoken but convincing way. Briefly put, if all that happened in 1707 was that Scots were added to a continuing English Parliament, why was it necessary to re-nominate both English Houses?

12. There is a third argument which arrives at the same conclusion by another path, and - unlike the first two – it could not be more up-to-date. Clause 49 of the current House of Lords Reform Bill reads:

    'Nothing in this Act—

    (a) affects the application of any enactment or rule of law preventing the freedom of speech and debates or proceedings in Parliament being impeached or questioned in any court or place out of Parliament or

    (b) otherwise affects the scope of the exclusive cognisance of Parliament.'

    The significance of the clause must be that structural changes to Parliament may require the relevance of the Bill of Rights to be restated.

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[4] *MacCormick v The Lord Advocate* (1953 SC 396 at 411).

The need for such a provision when the basis of the membership of only one House is to be changed surely suggests that a similar statute was required when the Parliament of England disappeared entirely into the Parliament of Great Britain: but of course there is no such statute.

*The courts and the Bill of Rights*

13. If the arguments for discontinuity between the English and the British Parliaments and the expiry of the Bill of Rights along with the former in 1707 are accepted, what is to become of the decisions of the courts on the application of the Bill of Rights since then? Something needs to be done. Judges may make common law: they cannot bring defunct statutes to life.

14. Both the Bill of Rights and the Claim of Right began life as manifesto statements by those who came out on top in the Revolution of how things ought to have been and how they were going to be in future. Article IX is a splendidly succinct summary of the Whig case – and even in 1689 neither it nor the Scottish parallel were new ideas. For that reason, when in the nineteenth century the English courts began to consider actions involving freedom of speech, they grounded their judgements not on the text of Article IX but more broadly on the Whig views implicit in it and given wider currency by English institutional writers such as Blackstone. They used phrases such as 'grand inquest of the nation' and applied concepts like 'the dignity and efficiency of the Houses.' They did not parse 'court or place' or 'impeached or questioned'.

15. It was not until the middle of the last century that cases turned on the wording of Article IX. It may be that the judges were following a trend in Parliament first appearing in the report of the select committee on the Official Secrets Act 1938-39. Or it may be that the cause is to be sought in broader trends. Whatever the reason, the Union was by then so far in the past that the expiry of Article IX at the birth of the Union Parliament went unnoticed.

16. In Scotland, the pattern of events was different but the conclusion must be the same. There are few Scottish privilege cases and none specifically concerns freedom of speech. The Scottish courts were initially hesitant to accept what were claimed to be the privileges of the new legislature. In the year after the Union and the following year, some of the Lords of Session grumbled about recognising privileges the Estates had not possessed, but they very soon ceased to have any problems in recognising that English privileges were possessed by the united Parliament[5] - though the courts never explained why they came to that judgement until in 1774 Lord Pitfour observed that in things essential to the constitution of Parliament,

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[5] *Grant v Earl of Sutherland* 1708 (11 Morison's Dictionary of Decisions 8562); *Lady Greenock v Shaw* (ibid 8563); and *Livingstone v Morison* (ibid 8565).

'common sense is common sense everywhere' [6] - a conclusion characterising in a phrase the Scottish Enlightenment: whether it has much to do with law is another matter. I have so far traced no relevant judicial observations in Scottish courts since then, other than that of 1953 which is referred to above.

*Conclusion*

17. The contention in this submission does not seem ever to have been argued in the courts or in Parliament. The highest judicial authorities in the UK have however come to an implicit conclusion in quite the opposite sense. When asked in 1999 by the Joint Committee on Parliamentary Privilege whether the Bill of Rights and the Claim of Right would be interpreted in ways which reflected the previous understanding of English courts, the Lord President and the Lords Chief Justice of England and of Northern Ireland answered in the affirmative. In effect, they accepted that the Bill of Rights and the Claim of Right were in force (though they did not venture on whether the two confer the same degree and scope of protection, and the glorious muddle which would arise if on examination the courts decided they did not – as seems plain enough from the Annex).

18. Notwithstanding these most authoritative views, there is in my opinion sufficient doubt about the continuity issue to justify including in any Parliamentary Privilege Bill a clause re-enacting article IX of the Bill of Rights, with effect across the UK and deeming it to have been the law in Great Britain since 1707 and in Northern Ireland since 1801, thus underpinning judgements relying on the Bill of Rights given since then. The relevant text in the Claim of Right could remain un-repealed, since it would then clearly apply only to the pre-1707 Estates. Commonwealth jurisdictions which have incorporated the Bill of Rights into their codes would not be affected by any of this, since the act of taking the Bill of Rights into their law could not depend on whether it was or was not in force in Great Britain or the UK at the time they adopted it.

## *Annex*

Bill of Rights (article IX)
... freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament ...

Claim of Right

That for the redress of grievances and for the amending, strengthening and preserving of the laws, Parliaments ought to be frequently called and allowed to sit, and the freedom of speech and debate secured to the Members

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[6] *Mackintosh v Dempster* in Maclaurin *Arguments and Decisions in Remarkable Cases* 1774, 383.