

BRITISH GOVERNMENT IN CRISIS



CHRISTOPHER FOSTER

"Politicians and civil servants will find it a penetrating and perceptive account of what has been happening in government in recent years"

Robin Butler

British Government in Crisis
or
The Third English Revolution

SIR CHRISTOPHER FOSTER



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*To our grandchildren—Emily, Arthur, Miles and Max—
Whose generation's task it will be to clear up the mess
ours has made*

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Introduction

WHAT HAS GONE WRONG?

WE ARE BADLY governed. Some reasons for this are now widely acknowledged: Cabinet being replaced by prime ministerial government; the dominance of a political culture of spin; the rise of unelected special advisers and political cronies to positions of great power; the marginalising of Parliament and the substitution of the media as a 24 hour a day forum for political debate; but most important our inability to restrain a perilous and deeply flawed foreign policy in Iraq or to bring about a lasting improvement in our public services despite more billions spent on them. We have a government which seems to think leadership consists in issuing never ending, but frequently changing, streams of instructions and then is surprised the public sector does not immediately jump to it and implement the latest.

But there is much more—and more fundamental—than that which I will argue has been a revolution in how we are governed, with an outcome as yet too unstable to last. We seldom any longer produce good new laws. No surprise that almost as soon as one law is passed another initiative leads to another law on the same topic. Our white and green papers are so spun as to be normally uninformative and often unintelligible. The civil service is in danger of being politicised and demoralised. The structure of government and the public sector has become too fragmented to be manageable. The PM is too grossly overloaded to achieve what is expected of him. He has no time, if he had the inclination, for much beyond spin and over-hasty decision-making. The job has been refashioned to suit only people with similar attributes to his.

However, though the Blair administration has made government worse, the debilitating revolution started well before his. This book is my attempt to understand what has happened and what can be done about it. In different capacities, I have spent more than 40 years advising or commenting inside and outside government. I started to feel something was seriously wrong when after several years I again found myself near the centre of power as an adviser on rail privatisation. I had been involved in another major policy failure, the poll-tax, but had believed that fiasco was due to one person's wilfulness, namely Margaret Thatcher, and could have been averted but for her. The origins of rail privatisation convinced me something was systemically wrong. We no longer had—as I remembered us having in the 1960s and 1970s—the time or the

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capability to be thorough enough to explain to ourselves, to Parliament and the public just what we were attempting, and therefore to make reasonably sure what was practical and would work.

Like many others—all the more so because I was a long-term Labour sympathiser—I had hoped Blair would rescue and improve government. From my vantage-points as a non-executive board member of Railtrack, vice-chairman of the RAC and then chairman of the RAC Foundation, I have seen attempt after attempt fail to get a decent, workable, environmentally-friendly transport policy. A flawed rail privatisation, which could have been put right, has been turned into a disaster from which the railways may never recover. Meanwhile road congestion grows and we have no sensible policies to tackle it, only unending spin. I looked to see if similar factors have held back improving education, the NHS, and crime and disorder. I believe they have.

This book is an attempt to explain what has gone wrong and an apology for my failures, especially over the poll-tax and rail privatisation. If one believes, as I do, that British government in the past, though full of imperfections, was better, then one is under an obligation to say how and why. In this book's first chapters I have attempted an honest assessment—much helped by others who knew it—of the strengths and weaknesses of what I call the Old Regime, that is, before the Revolution; also of why it fell; and whether, if improved, it might have developed into something more satisfactory than that which we now have. I believe it could have done.

I then describe the changes in how we are governed which took place under Thatcher. I also review the failure of the poll-tax. Then I consider the counter-revolution John Major attempted and, after it failed, the further decline in the quality of government which his administration brought about. To explain where we are now I discuss Cabinet, news management, the altered standing of ministers and the undermining of the civil service under Blair. I discuss the plight of the railways as a concentrated example of most of the failings of modern British government combining to make a difficult situation worse. I summarise the Revolution before considering what is likely to happen next and what I believe most needs to be done.

I am grateful to those with whom I have discussed these matters over many years and in particular for the generosity of their recollections and comments to many friends and acquaintances who have commented on draft chapters of this book. It would be invidious to single them out, but some have given me unbelievable help throughout this project, several more have commented on every chapter, others on all those of which they had direct experience:

Andrew Adonis, Christopher Brearley, Sir Patrick Brown, Lord Butler of Brockwell, Chris Castles, Sir John Chilcot, Sir Geoffrey Chipperfield, Vic Cocker, Lord Croham, Tam Dalyell, MP, John Edmonds, Professor Andrew Evans, Lord Freeman, Sir John Garlick, Professor Stephen Glaister, Sir Terence Heiser, Professor Eric Hobsbawm, Lord Hoffmann, David Holmes, Professor Christopher Hood, Sir Robert Horton, Lord Howe of Aberavon, Lord Hunt of

Tamworth, Professor George Jones, Edmund King, Sir Timothy Lankester, Professor Martin Loughlin, Lord MacGregor of Pulham Market, Anthony Mayer, Professor Iain McLean, Sir Nicholas Monck, Lord Morris of Aberavon, Sir Patrick Nairne, Nigel Ogilvie, Sir Edward Osmotherly, Francis Plowden, David Rayner, Lord Richard, Sir Michael Scholar, Andrew Smith, John Smith, John Swift, Lord Waldegrave, John Welsby, Lord Wilson, Christian Wolmar and Philip Wood, but also serving civil servants in many departments and other public servants who by convention are not named. None is responsible for my use of those recollections and comments.

At my old friend, Tam Dalyell's, suggestion, I had useful conversations with a number of current MPs: Kevin Barron, Andrew Bennett, Jon Cruddas, Louise Ellmann, David Hamilton, Tom Harris, Gerald Kaufman, Andrew Lanslie, Helen McEchan, Anne Mackintosh, Theresa May, Clare Short, Chris Smith, Graham Stringer and David Wright. I interviewed some because they were ex-ministers, but most because as recent arrivals in the Commons I was interested in their appraisal of their roles as MPs. Again, though I could not have written my chapter on Parliament to-day without what they told me, none is responsible for the use I have made of what they said.

My greatest thanks goes to my wife for her patience, to Jo Abbott, who was my secretary at the RAC Foundation, for her indefatigability in collating and circulating chapter drafts, and in arranging meetings, and to Sebastian Foster for editing my typescript.

Christopher Foster
London
December 2004

PART 1

THE OLD REGIME

1

Parliament

Of Parliament:

. . . its various members ought to represent the various special interests, special opinions, special prejudices to be found in that community. There ought to be an advocate for every particular sect and a vast neutral body of no sect—homogeneous and judicial like the nation itself.

Bagehot (1867)¹

Of Accountability:

Democracy is government by explanation.

*A.J. Balfour*²

THE PRINCIPAL FUNCTION of Parliament, and particularly the House of Commons, has not been to be part of government or a legislature, which in any true sense it is not, but to hold ministers to account. To do that effectively, it has been important that members between them should have a wide range of experience and be in contact with as many opinions as possible at home and abroad. So constituted, it has also been able to provide enough ministers of quality and some in each generation who were outstanding. Governments showed their strength and cohesion, or their weakness, through their performance in the House of Commons. The accountability of the Executive to Parliament, though not without shortcomings, remained effective until near the end of the 20th century.

PARLIAMENT AND THE EXECUTIVE

The British constitution, because forged in 17th century battles between Crown and Parliament, is bi-partite, not tri-partite: the position of the judiciary (and the civil service) being derived from the powers of the Crown and not separately entrenched in law.³ In Britain sovereignty is said to belong to Parliament, or more strictly the Crown in Parliament. However, the monarch's veto on legislation has long been theoretical and the House of Lords' veto limited

¹ Bagehot (1997) 16.

² Quoted in Howe (1994) 77.

³ Tomkins (2003) chs 2 and 3.

by Parliament acts and conventions, leaving the Commons intact so that in practice, because of direct election, it possesses the sovereign power of Parliament. However, its sovereignty is legal fact, not political reality. Rather, as the public lawyer John Griffith has said, practical sovereignty belongs to the Executive, which has the Crown's governing powers, provided it has the support of the Commons, a fact modified but not replaced by entry into Europe.⁴ Every generation needs to ask how effective, without being disabling, are the checks on that sovereignty, which Parliament and other elements in the constitution provide. That question precipitated the Civil War and the Glorious Revolution. In the 1920s, a lord chief justice wrote a book about *The New Despotism*.⁵ In 1978 Lord Hailsham claimed sensationally that we have an 'elective dictatorship', a phrase so catchy that it is still used, despite great changes in the checks and balances on the Executive since then.⁶

THE SEPARATION OF POWERS

What Bagehot called the fusion of ministers and Parliament—the fact that the first are drawn from the second—has been the strongest argument against what has been mis-called the separation of powers between Legislature and Executive (mis-called because what would have been involved was the separation of people into different institutions.⁷ The powers are already separate.)⁸ Eulogising the British constitution in the 18th century, Montesquieu had thought the separation of powers between its Executive, Legislature and Judiciary its best protection against the tyranny he observed in France.⁹ He assumed each would have a distinct motivation: to govern, make laws and enforce them, but Jeremy Bentham pointed out that such separation in Britain was largely a fiction. Cabinets then contained several judges as well as peers and MPs. Judges sat in Parliament and Cabinet. MPs were regularly elevated to the bench. Bentham argued that they did not have distinct motivations according to their function, but were equally motivated by financial self-interest.¹⁰ He was right to believe that the art of constitution-making was to find expedients—usually laws, rules and conventions—which would have the effect of constraining people's private interests and aligning them with whatever was held to be the public interest governing the performance of their public functions.¹¹ It was a

⁴ Griffith (1963) 401–2; also Smith (1999) 11.

⁵ Hewart of Bury (1929).

⁶ Hailsham (1978); Daintith and Page (1999) 17.

⁷ I am indebted for this point to Professor George Jones.

⁸ Also Tomkins (2003) ch 2.

⁹ Montesquieu [1748] Book XI, ch VI.

¹⁰ Bentham [1776] (1948), mainly ch 3. Even into the second half of the 20th century MPs were often made judges.

¹¹ Most extensively explored in relation to the government regulation of industry, Laffont and Tirole (1993).

point, too, of which the authors of the American constitution were well aware, though too few contemporary reformers are.¹²

But such expedients do not need such separation. It has been the opposite of British practice in Parliament, Cabinet and political decision-making which has valued bringing together people of different background and motivation.¹³ Because ministers sit in Parliament, they become better known and their characters better understood, which enhances their practical accountability. The effectiveness of that accountability was most considerable when a wide range of experience and knowledge found expression in the Commons, as happened both in its corrupt period until the mid-19th century and during its period without substantial allegations of corruption until near the end of the 20th century. The effectiveness dwindled thereafter when charges of sleaze and corruption led to severe limits being set on MPs' ability to gain and use outside experience. They powerfully reinforced other reasons why it not only became dominated by professional politicians, but discouraged them once elected from broadening their experience and understanding.¹⁴ How that happened and its consequences for government will be important later. Sadly the crude doctrine—that it implies separate institutions, not just separate powers—has returned inappropriately to influence ideas on constitutional reform.¹⁵

THE REFORM OF PARLIAMENT

Parliamentary corruption was significant while its members were actively making laws and many were government placemen; when Whitehall and Westminster worked through trading favours, while courtiers on the make unashamedly surrounded kings. In the 18th century the crown deliberately overcame the political instability of the 17th century—between court and country, region and religion—by systematic corruption mainly to secure a majority in Parliament. Many seats were for sale for money or favours. Once in Parliament MPs could, and many did, make money by promoting, supporting or sometimes opposing private bills to serve a multitude of private and local interests.

Because central government had little to do with the economy; because there was parliamentary resistance to any form of centralised, crown-directed protectionism; because there were enough places in which industry could develop unaffected by local restrictive practices and perhaps because of the

¹² Madison, Hamilton and Jay (1992) 263–7, 'Ambition must be made to counteract ambition'.

¹³ Lord Hoffmann in conversation, and in his excellent Hoffmann (2001) has drawn my attention to the importance of getting past the arid formalism of dogmatic interpretations of the doctrine of the separation of powers to what really matters; to its applicability in British circumstances; and to the good sense of James Madison in *The Federalist* in recognising that separation need not and cannot be absolute, Madison, Hamilton and Jay (1992) 246–47.

¹⁴ Riddell (1993) 19–23. The idea of parliament as the prime focus and disseminator of public opinion is in Crick (1964) 273.

¹⁵ Bingham (2003); Oliver (2003) 345–47.

influence of Adam Smith, this corruption did not check the industrial revolution and therefore the take-off of economic growth. However, it did withstand efforts to reform Parliament and administration, not only by radicals and revolutionaries, but even by the Younger Pitt as Prime Minister.¹⁶

This 'market-place' Parliament survived the 1832 Reform Act. It was at its height in the 1840s and 1850s when the statutes needed to build the railways were passed with extensive corruption.¹⁷ A multitude of rail and other statutes, serving private interests, dominated the legislative programme.¹⁸ As in the US Congress 150 years later, it was difficult to pass legislation which did not benefit powerful monied interests (but not impossible, as the anti-slavery movement, repeal of the corn laws, the factory acts and parliamentary reform showed)¹⁹. By the 1860s, parliamentary corruption appeared so scandalous as to prompt reformation: a tremendous clearing up of its processes and procedures that has lasted into our day. Gladstone was probably most responsible.²⁰ The impetus was preparation for the 1867 Reform Act. It raised the prospect of an equally corrupt Parliament composed more of representatives of the middle and lower middle classes. It therefore posed the classic dilemma of how to make democracy safe for the ruling classes. Educated on Plato, Aristotle and Livy, and so well aware of democracy's instability, they knew the ancient democracies had transferred wealth from rich to poor and had fallen partly as a consequence. To restrain headlong democracy—Carlyle called it 'Shooting Niagara'—they replaced corruption with political, judicial and administrative integrity.²¹ At the same time, the development of better processes of parliamentary accountability exposed old ways of trading favours within government. Exposed, they were largely eliminated.²²

THE REAL SAFEGUARDS

In *The Federalist* James Madison stressed how safeguards against excessive power tending to corruption are best built in when a constitution was con-

¹⁶ Ehrman (1969) 223–36, 282–326.

¹⁷ Lewin (1936); Alderman (1973); Foster (1992) ch 1.

¹⁸ Rail and many other private laws were effective because of the self-interest of those who composed bill committees, though unsurprisingly better at safeguarding promoters' and landed interests than rail-users' long-term interests, Foster (1992). Members of congress may accept contributions to their election funds from promoters. Hence the strong impact vested interests have on much US legislation.

¹⁹ McLean (2001) 46, shows that votes for such measures were usually smaller and across parties.

²⁰ Morley (1906) ii, 239, also 363 said that while Gladstone believed parliamentary procedures were of the first importance to the efficiency of government, he left no papers about it and therefore Morley would not elaborate on it. Subsequent biographers have followed his example. But see Ostrogorski (1902).

²¹ Carlyle [1867] 1899, 1–48.

²² I am indebted to Professor Dawn Oliver of University College London for this point. I discuss corruption more fully in Foster (2001).

structed, difficult thereafter.²³ But Gladstone's generation managed it. The standing orders established in the anti-corruption drive of the 1860s built on ancient custom that only the Crown, not Parliament, could originate taxation or expenditure. Only government, and no individual MP, could propose or modify any tax proposal or expenditure item and only one such proposal could be discussed at a time.²⁴ Moreover, Gladstone kept absolutely separate the discussion of raising revenue—in the budget—from discussions of expenditure, later collected in the annual expenditure statement.²⁵ Under his influence, the Commons adopted standing orders to prevent a member chairing a private bill committee in his own financial interest, or packing it with fellow MPs with the same or a similar interest: for the first time chairmen of bill committees became, and have remained, neutral. These changes to standing orders, when adopted elsewhere in the Commonwealth, became known as the 'Westminster rules'.²⁶

A further protection was that ministers came to introduce almost all legislation for the government (in contrast to the United States, where bills are introduced by senators and members of congress who are not part of the executive).²⁷ This practice, together with party discipline, further prevented MPs from using their power to block and amend legislation as a lever to get ministerial decisions on other matters in their favour (known as 'log-rolling'), except when the government has a small majority. Moreover, when bills are going through committee, British ministers normally successfully resisted amendments, other than their own, until the 1990s.²⁸ These rules were reinforced by the growth of party discipline allowing an elected government to have a substantial chance of carrying their legislative programme while they retained a comfortable majority. Almost all MPs were whipped so that their votes could not be for sale. An outcome was a strong protection against backbenchers achieving or materially influencing legislation at the behest of vested interests or their own inclinations.²⁹ With over 600 MPs, no vested interest was likely to have enough members in its pocket to pass or defeat legislation improperly. It remains the only respectable, but powerful, argument, for more than 600 MPs (though the enormous workload English MPs now have as constituency social workers (see below chapter 10) may now be another).³⁰

By such arrangements Gladstone's generation deliberately destroyed most of the opportunities for jobbery and log-rolling which had been such a prominent

²³ Madison, Hamilton and Jay (1992) 260–67.

²⁴ That only the Crown, that is government, could make expenditure proposals was an ancient convention, Daintith and Page (1999) 107–9.

²⁵ Reid (1962).

²⁶ Reid (1962) 11.

²⁷ cf. Amery (1953) 12.

²⁸ Both John Stuart Mill (1910) 231 and Walter Bagehot (1997) 60, 89, pointed out that laws are not well made in committee, an opinion Hobbes, Blackstone, Bentham, Rousseau and Madison also held and a truth that many contemporary parliamentary reformers are in danger of forgetting. For the other citations, Waldron (2001) 43, 51–53.

²⁹ Also Oliver in Heywood (1997).

³⁰ I am indebted to Rt Hon John MacGregor for this point.

feature of the 18th-century and earlier 19th-century Parliament.³¹ Together they prevented Parliament, and Commonwealth Parliaments based on the Westminster model, from developing like the US congress. Its committees normally consider individual expenditure proposals and related tax proposals together, which allows their members to practise ‘pork-barrel’ (a term used when the money flows into election or party funds rather than into politicians’ pockets) and log-rolling politics. By contrast, members of Parliament, apart from ministers, had and still have no direct decision-making powers over public policy. Except when the government has a small or no majority, parliamentary rules have successfully ensured that MPs do not have improper, or corrupt, influence over public legislation. But they were still free to challenge ministers with all the opinions—their own and other people’s—they believed relevant to an issue.

These and other late Victorian changes altered the functions of Parliament under the constitution. No longer the legislature in a strict sense, it *ratifies* laws (which whipping in general makes a formality); but does not for the most part originate them or decide their content. Besides being a nursery for ministers, the importance of MPs lay then and until recently, (1) in the pressure of their opinions on ministers, the value and variety of which depended on the breadth of their experience, and (2) broadened by that experience, in the shrewdness and understanding they developed in penetrating ministers’ evasions and disclaimers to hold them truly accountable, as well as (3) to some extent in their effectiveness in mobilising their opinions through the Parliamentary Labour Party, the conservative members’ 1922 committee and other backbench committees. Their effectiveness was enhanced because they became MPs after a career or occupation which also gave them knowledge as well as an understanding of people. In that way they were influential, embarrassing ministers to do better, altering ministerial decisions, preventing or forcing changes in legislation. These late Victorian changes altered what the corruption of MPs—as distinct from ministers—could achieve. And there it stayed, until the sleaze allegations of the 1980s and 1990s, not because of superior moral virtue—it is wiser to assume human nature remains the same—but because of safeguards built into the system.

ACCOUNTABILITY AND MINISTERIAL RESPONSIBILITY

The origins of ministerial responsibility were in the 17th century constitutional invention by Parliament that the king’s ministers were accountable to it, not to

³¹ John Dunn in Dunn (2000) 63–69, argues how difficult it is to design procedures to avoid corruption. However, the late 19th century adoption of the appropriate Parliamentary rules, and of a civil service chosen by merit and with tenure, as well as the greater influence of whipping in Parliament, have been responsible for providing such safeguards for MPs, ministers and officials.