**House of Lords: Jobs for life no longer, The Economist, March 8, 2007**

**A surprise vote should drag the upper house forward into the 18th century**

AMONG the quirks that make the House of Lords such a delightful place, the difficulty of getting hold of its members rates high. Few have offices, many eschew e-mail and the only blackberries to be found are in the dining room, beneath a thick layer of crumble.

This may now change, after the House of Commons voted by a majority of 113 on March 7th for a fully elected House of Lords. The vote was of an advisory kind, and so has no force as legislation. But it will guide the government's choices when it introduces a bill, perhaps as soon as in the next parliament, to reform the Lords. Their Lordships have a say next week, and are unlikely to embrace their total liquidation. But make no mistake: a big step towards real reform of the second chamber has been taken.

The clarity of the outcome is a surprise. Last time the Commons was asked to vote for change, in 2003, MPs wound up looking silly. None of the seven options on offer gained decisive support and all the rousing talk of reform came to nothing. The same might have happened this time. MPs had eight options to choose from. First they were asked whether they wanted to abolish the Lords altogether. Then, after that had been rejected, seven options were presented, ranging from appointing all the members of the upper house to electing them all, with various blends in between. Jack Straw, the leader of the House of Commons, favoured a 50-50 mix, as did Tony Blair. Gordon Brown, the chancellor of the exchequer and probable prime minister from this summer, preferred a chamber with 80% of its members elected.

Most expected votes to cluster around the 80-20 split. So the majority for full democracy is a surprise too. The outcome had some unexpected authors. Some MPs who opposed reform voted for the most extreme version on offer, calculating that this was the best way to goad the Lords into opposing it. Most, though, just wanted the tidy resolution of what had long seemed an anachronism, albeit a rather effective one.

If resisting the government's will is indeed a mark of effectiveness, then the unreformed Lords have been doing a fine job since most of their hereditary members were removed from the chamber in 1999. In the intervening years the Lords have defeated the government more than 350 times, according to the Constitution Unit at University College London. Although Labour has the largest number of peers, they are harder to control than their cousins in the lower house. And an alliance of Conservatives, Liberal Democrats and independents can easily defeat the Labour lords, should they choose to do so. They have been particularly truculent when defending unpopular causes such as civil liberties. Even so, support for this crew of unelected spoilers has been rising.

The pressure to reshape the Lords comes not from the voters but from politicians. On the face of it, this is odd. MPs know that a democratically elected upper house will challenge their supremacy, and many grumbled about this in the debate that preceded the vote this week. Three things tipped them towards getting rid of all hereditary and appointed peers.

First, some opposition MPs wanted a brake on government, even if it might slow down their own party one day. Second, arguing against more democracy is a hard thing for any elected politician to do. And third, the vote took place just as a whiff of old corruption
surrounding the present system for appointing the Lords intensified. The Metropolitan Police, who have been investigating what has become known as the cash-for-honours affair, probably had more sway over MPs than centuries of accumulated thought about what Britain's constitution might look like. Most MPs explained their votes in terms of sweeping away once and for all the parties' powers of patronage.

The party continues

For Mr Straw, the result is a triumph, even if it was not exactly the one he hoped for. He is tipped these days as a possible chancellor if Gordon Brown becomes prime minister, and the vote has improved his prospects. But those who hope that the vote will see the death of party patronage in the upper house should probably look away now.

Much depends on how the new breed of lord is elected. The government wants a third to be chosen every five years. Each member would serve a single 15-year term and thereafter would be barred from standing for election to the upper house again. The appointed peers (and the few remaining hereditaries) would slowly shuffle away, but in the meantime the Lords would swell to a huge size, mixing life peers with temporary ones. The law lords are to be pulled out into a separate supreme court, but the fate of the 26 Church of England bishops who currently sit in the Lords is not yet clear.

If the government gets its way, the lords would be chosen from regional lists and elected according to proportional representation, as members of the European Parliament are now. The parties would control these lists, so the same sorts of people who are currently appointed to the Lords—doughty supporters, ageing MPs getting in the way of younger talent and perhaps even party donors—might well end up there, but this time with offices and pension plans. Nobody really knows what the change might cost, though David Lipsey, a Labour peer who used to write for *The Economist* and opposes the reform, has estimated it at over a billion pounds.

Nor is it clear what these new politicians ought to do with their mandate. Britain is not a federal democracy, so the Lords would have no separate interest to balance against the will of the Commons. But right now such objections seem churlish. A fully elected Lords is far neater than the other options, and the vote marks an end to centuries of holding out against democracy. Now all that's needed is someone to work out what its powers should be.

**Economist, March 8, 2007 (Background)**

The House of Lords, the upper chamber of Britain's parliament, considers legislation made in the House of Commons. Until 1999 the Lords had nearly 1,300 members, 750 of them by birthright. But Labour promised in its 1997 election manifesto to democratise the Lords, and two years later the government expelled all but 92 hereditary peers.

Controversy ensued over how to approach reform. In 2000 a government-appointed commission headed by Lord Wakeham favoured a partly elected House of Lords, with the majority of peers appointed by an independent commission. But the resulting government blueprint for reform, which gave a stronger role to the parties, proved unsatisfactory. Peers angry at the government's plans pushed the Lords to revolt in 2004. In March 2007 the House of Commons voted in favour of a fully elected upper chamber—a big step towards real reform.
Bruce Ackerman, Meritocracy v. Democracy, London Review of Books, Vol. 29 No. 5 (March 8, 2007)

The ghost of Montesquieu is haunting Britain. His theory of the separation of powers famously misdescribed the political dynamics of 18th-century England, which was already moving in the direction of parliamentary government. Yet his arguments for dividing political power hit home in America, and as the United States rose to prominence, its Montesquieuian model proved attractive to the Latin American countries in its sphere of influence.

Britain and France took a different path. They repudiated Montesquieu and concentrated power in a single elected assembly, rejecting constitutional review by a supreme court and subordinating presidents and second chambers to cabinet rule, with the support of the House of Commons or Chamber of Deputies. This model proved consequential for many nations in the Franco-British sphere of influence. By the early 20th century, the liberal democracies of the world found themselves divided into two camps: displaying ‘presidentialist’ variations on America’s version of Montesquieu, or parliamentary variations on the systems exemplified by Westminster and the Third Republic.

The Second World War, and its aftermath, brought a third model to the fore: constrained parliamentarianism. This rejects the US separation between executive and legislature and grants broad powers to the governmental coalition that gains parliamentary support. It rejects Westminster by insulating sensitive functions from political control.

This new separation of powers got its big start with the constitutions of the defeated Axis powers. Germany, Italy and Japan adopted parliamentary government but also established constitutional courts to protect fundamental rights. The dynamic proceeded further as the British Empire became the Commonwealth. Though the metropole remained confident in its Westminster ways, its newly independent colonies imposed constitutional constraints on the powers of parliament. The constitution of India, for example, not only established a robust constitutional court, but also created an independent election commission, whose chief commissioner had the privileged status of a supreme court justice. The success of these early experiments proved immensely attractive during later waves of democratisation. Some new constitutions followed presidentialist models inspired by America or its new French competitor, but many countries took the path of constrained parliamentarianism, with independent central banks joining constitutional courts and election commissions as major checks on the power of the parliamentary majority.

None chose Westminster. And now, after a decade of constitutional revolution in Britain, the Westminster model has died in the land which gave it birth. Yet it was not the old Montesquieu model that killed it. The new separation of powers has served as the great engine of change. The first big move came in 1997, with an independent Bank of England, and the second will come in 2009, with an independent Supreme Court. Under the new regime, the Supreme Court will be able to force Parliament to think again if its legislation trenches on fundamental rights; and the Bank of England now decides interest rates even if the government would prefer a different macro-economic policy. In theory, the Commons remains the ultimate master, retaining the right to destroy its new creations. But, in practice, Britain has joined the world of constrained parliamentarianism that now includes much of the Commonwealth.
The new separation of powers brings an elitist element into the British constitution. Top jurists on the Supreme Court and fancy economists at the Bank of England have gained the authority to check democratic decisions on the basis of professional insight. This elitist element should be kept in mind as we turn to consider the House of Lords, which is, of course, no less elitist. Putting the hereditary nobility to one side, the life peers, and especially the cross-benchers, carry on an older, less narrowly professional tradition of distinguished service: rule by the ‘great and the good’, if not necessarily the best and the brightest. While the professionals in the bank and the court impose a check in limited – if important – domains, the great and good have their say on a much broader range of legislation. The obvious question is how the old elitism of the House of Lords fits into the new elitism of the separation of powers: should the British constitution of the 21st century find a place for both elitisms, or is one enough? Should the rise of the new separation of powers mark the fall of the House of Lords?

The government’s White Paper on reform doesn’t ask these questions, suggesting that Britain’s recent embrace of the new separation of powers has not yet been assimilated into the old Westminster paradigm of constitutional thought. Nevertheless, the White Paper does express uneasiness with the elitism of the present House of Lords, and proposes a democratic cure: some members of the new chamber, it suggests, should be selected at the polls, and much of the coming debate will predictably centre on the proper proportion – 50-50, 80-20 or even 100 per cent?

The promise of democratic legitimacy is a sham. To preserve the primacy of the Commons, the government’s proposals hobble the democratic standing of the elected members of the upper house. Once chosen by the voters, each will serve for about fifteen years, but they can’t run for a second term. This is a recipe for irresponsibility. The bar on re-election strips voters of their basic tool for democratic accountability: the politicians’ fear that their constituents will throw them out of office. Contrast the intransigence of George W. Bush – who is prohibited from running again – to the increasingly rebellious congressional Republicans, who grimly recognise that the president’s policy on Iraq is endangering their re-election in 2008. Even Bush might be more responsive to public disillusionment with the Iraq war if he were contemplating another run for the White House.

In Bush’s case, the voters knew what they were getting in 2004. But this won’t be true of the elected lords. They will often be relative unknowns, nominated by their parties to a distinctly secondary political position. Many will be tempted to use their position as a platform to gain public notoriety, rather than to engage in the tedious assessment of complex legislation. If their lust for public applause sets them at odds with the party that elected them, what of it? They are safe for 15 years, and their growing fame might gain them a prominent position afterwards. Over time, the parties will learn the dangers involved in selecting nonentities with an independent streak. They will respond by nominating only their most loyal mediocrities as a final reward for undistinguished careers. The government’s plan for democratising the Lords is looking pretty weak: when stripped of re-election incentives, the elected Lords threatens to become an assembly of media hounds and loyal mediocrities, with the latter preponderating over time.

Compared to this, the self-conscious embrace of elitist methods of selection looks positively attractive, especially if ways could be found to inject some political responsiveness
into the selection process. Consider the way the Germans handle an analogous problem. Their constitutional court is a more powerful institution than either the new Lords or the new Supreme Court: in the final analysis, the Commons has the authority to impose its legislation despite their dissent, but the Bundestag often faces an absolute veto from the court on constitutional grounds. As a consequence, the Germans have taken careful steps to assure that the justices don’t stray too far from public opinion as it evolves over time. Not only are they limited to a 12-year term, but the government must gain the support of a two-thirds majority for their initial appointment. The supermajority rule allows the minority party to veto extremists, and insist on thoughtful mainstream types; and since two vacancies generally occur at once, the minority can also assure one of the positions for a mainstream type from their own ranks. Over the last half century, the system has worked to generate a flow of distinguished jurists, from many parts of the profession, and has greatly contributed to the court’s high standing.

Something similar might be adapted for present use: a portion of the Lords should be selected by a supermajority of the Commons, with their terms staggered so that a significant number are selected by each parliament. This will help keep the upper chamber in tune with public opinion. I don’t suggest that this method, or any other, should provide the exclusive means for selection. For the next quarter century, it makes more sense to experiment with a variety of different selection schemes for different membership classes. Everybody will be in a much better position to judge the respective strengths and weaknesses of each method after some practical experience. Indeed, the selection provisions of the new statute should expire, say, in 2035, to enable the next generation to re-think the issue.

If the experiment goes well, the new House of Lords may come to seem a British analogue to a great French institution: the Council of State. This is an elite assembly of distinguished graduates of the grandes écoles who have earned reputations for sobriety and thoughtfulness as they ascend to the highest ranks of the bureaucracy. When meeting in council, they systematically examine important initiatives before they are proposed to the Chamber of Deputies. The Council meets in secret and acts beforehand; the Lords would act in public and after the Commons has acted. The Council is selected from a bureaucratic elite; the Lords from a broader establishment. France isn’t Britain, but the Council of State’s successful operation over the past two centuries suggests that a meritocratic House of Lords might contribute a good deal to the thoughtfulness of legislation in the coming century.

Before making a final judgment, recall that the Lords isn’t the only elitist institution that will be finding a place for itself within the emerging British constitution. Consider, for example, how the Lords might interact with the new Supreme Court on legislation threatening fundamental rights. Suppose that a terrible terrorist attack leads some future prime minister to come up with yet another draconian law that seriously damages traditional British freedoms. Despite the predictable outcry from civil libertarians, the prime minister cracks the whip and gains the support of the Commons, only to meet resistance from the Lords, which, in the end, fails to halt his implacable resolve to enact the repressive proposal into law. Here is where the new separation of powers might come to the defence of the old. With the repressive statute now on the books, litigation under the Human Rights Act of 1998 gives the Supreme Court a chance to find the new law incompatible
with Britain’s obligations under the European Declaration – leading to a potential constitutional crisis. The government has repeatedly said that such a judicial declaration would ‘almost certainly prompt’ rectifying amendments enacted under a fast-track procedure set out in the act. It would be hard for future governments to renege on this commitment, especially if the court’s judgment had been supported by an earlier spirited critique in the House of Lords. In short, repeated cycles of elite resistance might well generate a far more moderate statute than one to which only the court or only the Lords could effectively raise objections. Indeed, if the prime minister squarely confronted the prospect of running such a formidable obstacle course, he might well choose to avoid the entire furor by initially formulating a statute that was more respectful of fundamental rights.

Elitism in the cause of human freedom is not a vice, especially when the Commons retains the ultimate power to press forward. But even for civil libertarians there is a downside to the double check by the Lords and the Supreme Court. In this dark scenario, our not-so-hypothetical prime minister does not respond by moderating his repressive legislation to avoid a debilitating institutional struggle. Instead, he wages all-out war against the independence of the elitists on the Supreme Court and in the Lords, asserting that they are depriving him of the tools he needs to save the nation from the terrorist peril. In the end, his populist attack on the new separation of powers carries the day, and Britain returns to an especially repressive form of Westminsterism. Perhaps a system with only one check on the Commons – either Supreme Court or the Lords, but not both – might not generate such a populist crusade.

Perhaps, but I am inclined to bet on a double check. After all, there is no constitutional design that will withstand a sufficiently demagogic leader stoking the anxieties of a sufficiently terrorised populace. And there are many occasions in which a pause for reflection will permit a nation to withstand the terrorist panics that are likely to recur at random moments during the coming century. Putting terrorism to one side, an appointed Lords will also contribute intelligently on a host of other significant matters. The life peers, and especially the cross-benchers, have already played this role, and it seems wise to use these 20th-century achievements as the basis for further organic evolution.

Have I given up on democracy too quickly? Perhaps the government’s White Paper has been too cautious in hobbling the legitimacy of elected members, opening up the dismal prospect of an assembly dominated by mediocrities and media personalities. Perhaps the right response is to create a vibrantly democratic chamber, giving the members shorter terms, and allowing them to return repeatedly to the voters to refresh their popular legitimacy. The government rejects this path because it fears that such a vigorous house might challenge the primacy of the Commons in the government of the nation. But are these fears reasonable?

After all, the British constitution has developed an elaborate series of conventions to prevent the Lords from taking on airs. Given these well-entrenched understandings, it might be fanciful to fear that a democratically constituted upper house would ever actually launch a serious challenge to the Commons – and if this is so, it might make sense to create a second chamber that is robustly democratic. Unfortunately, however, I believe that the government is right to take seriously the dangers of a challenge by the Lords to the Commons.
The great cautionary tale comes from Australia. Gough Whitlam’s election victory in 1972 marked Labour’s return to power after a quarter century in the wilderness. Within eighteen months, conservative resistance to Whitlam’s legislative programme led him to dissolve both the House and the Senate and call new elections. While Labour won in the lower House, there was a virtual tie in the federal Senate, whose system of representation gave disproportionate weight to the smaller and more conservative provinces. Then fate intervened: one Labour senator died and another resigned, allowing the opposition coalition to gain the upper hand. Once in command, the opposition refused to allow the Senate to approve any appropriations bills until Labour agreed to hold yet another election. On Whitlam’s view, the Senate’s demand for a new election was an unconstitutional assault on his prerogative as prime minister. But this point had been left, in British style, to the unwritten constitution, and so was open to contest. As a government shutdown loomed, the Senate remained recalcitrant: didn’t it, too, speak for the Australian electorate? The impasse proved too much for the governor-general, Sir John Kerr. Although his authority was constitutionally questionable, Kerr broke the stalemate by ousting Whitlam, dissolving both houses of parliament, and calling a new election. The shock waves from this (ab)use of the royal prerogative continue to reverberate today.

An identical scenario can’t occur in 21st-century Britain: the Lords, by statute, are barred from significantly delaying the budget. But many other melodramatic confrontations remain possible. All existing conventions surrounding the Lords deal with a body of unelected peers, and it would be child’s play for an opposition party to argue that these conventions should not bind a new and vigorously democratic chamber. The public would be unlikely to support such a power-grab, but the final outcome would depend on the personalities, issues and passions of the moment, unless clear and decisive steps are taken now to prevent this particular genie escaping from the bottle. The government is on solid ground in hobbling the democratic legitimacy of the upper house to the point where it can no longer raise a remotely plausible challenge to the Commons. My only question is whether its solution manages to throw out the baby with the bathwater in restricting elected members to a single 15-year term. Given the low quality of the members likely to be elected under these ground rules, it seems wiser to build on the best of the traditions of the current House of Lords, and create an appointed assembly which draws broadly on the wisdom and experience of proven leaders from political and civil society.

Once this fundamental point is recognised, it might be possible to reintroduce the democratic principle as a minor theme without doing serious harm. If, for example, 20 per cent of the seats were open for direct election, without any restriction on re-election, this would not bring a significant risk of a Whitlam scenario. But the percentage should be kept low, so as to preserve meritocracy as the dominant principle, making a serious challenge to the Commons impossible.

If this seems too pallid for strong democrats, there is one other move worth considering. Call this the ‘mirror-image’ design. On this system, all members for the upper and lower house have the same terms, and all are free to run for re-election, but electoral laws make it virtually impossible for different political parties to win in the two houses. The modern Italian constitution has, with some minor exceptions, adopted this mirror-image approach, and yet these variations sufficed to allow the conservative opposition to defeat
the Prodi government in the Senate, despite the left-centre’s narrow electoral victory over
the Berlusconi coalition in the popular vote for the Chamber of Deputies.

Technical glitches to one side, I have no doubt that a mirror-image Lords is both feasible
and democratic. My only question is whether it has anything distinctive to contribute to
the governing enterprise. Though an appointed House of Lords would contribute the dis-
tinctive insights of leading members of civil society, I don’t see much gain in a mirror-
image Lords rechecking the work of the Commons. Though MPs often don’t probe
deeply enough into government initiatives, it would be better to provide their parlia-
mentary committees with additional staff, and the like, to allow them to do this job better. A
single serious examination in the Commons seems better than two superficial inspections
by mirror-image chambers.

There is only one way to assure a robustly democratic upper house that, like the US Sen-
ate, brings a distinctively different perspective to government. But this requires a repudia-
tion of the very foundations of parliamentary democracy, and an embrace of the presiden-
tialist model. Once the chief executive is guaranteed a fixed term in office, the constitu-
tion can allow the Senate to challenge the House, and vice versa, without immediately
generating a constitutional crisis of the first magnitude. But Britain isn’t about to take the
presidentialist plunge, and a good thing too, since the pathologies of presidentialism
vastly outweigh the advantages of a robustly democratic upper house – or so I have ar-
belatedly to the charms of Montesquieu, the challenge is to refine, not jettison, the emerg-
ing British commitment to constrained parliamentarianism. Within this framework, it is
wiser to fine-tune the operation of a largely meritocratic House of Lords than to create a
half-heartedly democratic chamber.

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