ARREST OF MEMBERS AND SEARCHING OF OFFICES IN THE PARLIAMENTARY PRECINCTS

Memorandum by the Clerk of the House

Introduction

1. The arrest of Mr Damian Green, a Member of the House, and the searching by police of his office within the Parliamentary estate on November 27 2008 have raised issues about the application of parliamentary privilege to such matters and the correct processes which should be followed when such events arise. In this paper I consider the matters of arrest and search separately although they are obviously linked.

Arrest of Members

2. It has always been recognised that the privilege of freedom from arrest does not apply to criminal proceedings.[1] The Commons recognised that limitation on privilege as early as 1429 and the principle has been reiterated on occasion ever since.[2] In 1926 the Speaker ruled that "A Member of this House is, with regard to the criminal law, in exactly the same position as any other person".[3] Privilege has never been intended or used to set Members above the criminal law or to interfere with the progress of criminal investigation.[4]

3. There is also nothing to prevent a Member from being arrested on the Parliamentary estate. In 1815, for example, Lord Cochrane was arrested while seated on the Government front bench but before the House was sitting. On the other hand, the arrest of a Member on the precincts during a sitting of the House would raise questions of hindering that Member in his or her attendance upon the House; service of court documents within the precincts while the House is sitting has been regarded as a contempt.[5]

4. Freedom from arrest in civil proceedings – such as for debt – has been asserted by the House from early times. For instance, in 1340, the King released a Member from prison during the Parliament following that in which he had been prevented, by his detention, from taking his seat.[6] The basis for this freedom from arrest in civil matters was that Members of the House needed to be available to take part in its proceedings. However, as the Joint Committee pointed out in 1999, "The immunity lost most of its importance in 1870, when, with a few exceptions, imprisonment for debt was abolished."[7]

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[1] Joint Committee on Parliamentary Privilege, First Report (1998-99), HL Paper 43-I, HC 214–I, para 326
[2] See Erskine May, 23rd edition, 2004, p84
[3] HC Deb, 7 May 1926, vol 195, c602
[4] Erskine May, 23rd edition, p119
[5] Joint Committee, para 334
[6] Erskine May, 23rd edition, p83
[7] Joint Committee, para 327

5. The only distinction between Members and others arrested in respect of criminal charges is that the House must be informed if a Member is detained from his or her service in Parliament. In these circumstances, it is usual for the Speaker to notify the House of the arrest through an oral statement, although this may be done by laying a copy of the letter on the Table.[8] It is not strictly necessary to inform the House when the Member is not detained for long enough to prevent attendance in the House but it is generally desirable that the House should be informed at the earliest opportunity.

Recent cases

6. There have been many instances of arrests being reported to the House, including 15 between 1987 and 1991, mainly for failure to pay fines in Northern Ireland.[9] Earlier, in January 1970 the remand in custody of a Member on a charge under the Official Secrets Act, was reported to the House the same day.[10] The letter relating to the arrest of a Member, which was sent to the Speaker on 4 August 1978, the first day of the summer adjournment, was laid on the Table on the House's return on 24 October.[11]

7. In 1999 the Joint Committee on Parliamentary Privilege examined the privilege of freedom from arrest in civil matters.[12] The Committee accepted the view of witnesses that it had become of very limited application. The Committee therefore recommended that legislation be introduced to abolish it.

Search of offices in the precincts: exclusive cognisance

8. In the matter of the searching by police of offices within the parliamentary precincts, there are two distinct issues to be considered: first, the status and definition of precincts and secondly, the extent to which privilege might affect the seizure of material. The principle of privilege most relevant to the matter of precincts is that of exclusive cognisance which gives Parliament control over all aspects of its own affairs and, *inter alia*, the power to punish anyone for behaviour interfering substantially with the proper conduct of parliamentary business.[13] It also confers upon the Speaker authority to act in the precincts, for example over matters of security. The second consideration is the extent to which searches of Members' offices within the precincts might interfere with proceedings or impinge upon the protection afforded by Article IX of the Bill of Rights.[14]

Precincts

[8] See Erskine May, 23rd edition, p120
[9] Parliamentary Information List, SN/PC/04594
[10] CJ, Vol 225, p 99
[11] CJ Vol 234, p 546
[12] Joint Committee, para 327
[13] Joint Committee, chapter 5
[14] Article IX states: "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament" [s*pelling modernised*].

9. The precincts of the House are now well understood to comprise the parts of the Palace of Westminster and adjacent office buildings used exclusively by the House by Members, their staff and staff of the House. From 1547 the House has sat regularly in the former royal palace but not until after the fire of 1834 was there a purpose-built meeting place for Parliament. When King Charles attempted to arrest the five Members on 4 January 1642 the House's control of its precincts probably did not extend much beyond the Chamber itself. The King, of course, interrupted proceedings of the House. Even the new Palace of Westminster constructed between 1840 and 1852 remained a royal palace and only in 1965 was control of most of it passed to the two Houses in the persons of their respective presiding officers.

10. A fuller description of the precincts is set out in the report of the Joint Committee on Parliamentary Privilege in 1999:

> "260. The large measure of control exercised by the two Houses over the premises where they meet has symbolic as well as practical importance. The Palace of Westminster is a royal palace, and used to be controlled on the Sovereign's behalf by the Lord Great Chamberlain. Control of the use of the precincts of the two Houses is now vested in their presiding officers on behalf of the House. [There are exceptions. Control of Westminster Hall and the Crypt Chapel is vested jointly in the Lord Great Chamberlain, as representing the Sovereign, and in the Speaker of each House on behalf of the two Houses. The Lord Great Chamberlain also retains control of Her Majesty's Robing Room and the Royal Gallery, both of which are in the precincts of the House of Lords]. Rules made by the two Houses determine who may enter the precincts and the conditions on which the premises may be used. The police on duty in the two Houses are under the direction of the Serjeants-at-Arms. Both Serjeants have power given them by their respective Houses to deal with misconduct by non-members.
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> 261. The position of the two Houses in this regard, and the powers of their presiding officers, are not set out in any statute. Nor are 'precincts' statutorily defined. The extent of the precincts has never been a matter of dispute in court. The two Houses assume that precincts include, and that the courts would accept they include, in addition to the Palace itself and its immediately surrounding areas such as Old Palace Yard and New Palace Yard, various buildings adjacent to the Palace occupied for parliamentary purposes. [Apart from the Palace, the precincts include new buildings in Parliament Street, Canon's Row, Bridge Street and Portcullis House. All these buildings are freehold and are permanent premises built to meet the needs of Parliament. In addition to these freehold properties, Parliament leases properties in Millbank, Dean's Yard, and Abbey Gardens, which, though not held permanently, are nevertheless used exclusively for parliamentary purposes and regarded as part of the precincts.] Two

former leaders of the House of Commons, Lord Newton of Braintree and Mr John McGregor MP, said in evidence that the absence of a statutory definition of precincts had not caused any practical difficulty. We see no need for any change in the present position."

11. In 2007, the parliamentary 'site' was designated for the purpose of s.128 of the Serious Organised Crime and Police Act 2005 and described as "the Palace of Westminster and Portcullis House", although the relevant plan of the designated site includes 1 Parliament Street and the Norman Shaw buildings as well which is clearly correct.[15]

Recent cases

12. The only recent occasion on which the definition of the precincts has been at issue was in 1986 in the Zircon case.[16] Although the facts of that case are not directly related to the current issues, the conclusion of the Privileges Committee are relevant.

13. On that occasion, the BBC had prepared, but decided not to broadcast, a television film called The Secret Story. The film included material on a secret defence project, concerned with a means of collecting intelligence, code-named Zircon. Some Members of the House arranged to show the film within the precincts of the House. The Speaker, Mr Bernard Weatherill, was reluctant to intervene. The Attorney General applied to the court, on the ground of national security, for an order banning the showing of the film within the precincts of the House of Commons until the House had had an opportunity to decide whether the showing of the film should be allowed.

14. In the exercise of his discretion, the judge refused to grant an injunction, taking the view that the matter should be under the control of the House of Commons authorities even in advance of any motion in the House. There being insufficient time before the proposed showing for the matter to be considered by the House itself, the Speaker acting as the controller of the precincts then made an interim banning order, to enable the House itself to decide the matter.

15. The matter was referred to the Privileges Committee, which supported the Speaker's action. The Committee reported: "it might be thought . . . that the fact that something is done within the precincts of the House might afford that action some kind of immunity or protection of privilege. This would mean that the precincts of the House would somehow be treated as a sanctuary from the operation of the law, irrespective of whether the activities concerned were a proceeding in Parliament . . . your Committee can find no precedent for the House affording its Members any privileges on the sole ground that their activities were within the precincts. The fact

[15] SI 2007, No. 930.
[16] *First Report from the Committee of Privileges*, HC (1986-87) 365

that the Zircon film was to be shown in the precincts therefore gave those responsible no privileged protection."[17]

Search of offices: privilege, Parliament and the courts

16. The Zircon case reaffirms the ancient privilege of exclusive cognisance in the control of the precincts through the Speaker, but it also suggests that the precincts cannot be used to create what the Joint Committee on Parliamentary Privilege called a "haven from the law".[18] Not only has the House refrained from exercising privilege to prevent any interference with criminal proceedings but for it to do so threatens to unbalance the comity established between the courts and Parliament over areas of each's jurisdiction.

17. In a recent note of advice to the House, the Attorney General makes it clear that the determination of whether material is inadmissible as evidence in a criminal trial by virtue of Article IX is a matter for the courts.[19] That would be the case even where the House itself resolves that particular material or categories of material were "proceedings" within the meaning of Article IX of the Bill of Rights. The material would only be inadmissible if the courts themselves consider the use to which it is put amounts to "impeaching or questioning" of Parliamentary proceedings. She adds "it is a question of law both whether particular material constitutes "proceedings in Parliament" and whether the use that that material is being put to amounts to impeaching or questioning of such proceeding."[20]

18. The wider context into which that consideration fits is that of the relationship between Parliament and the courts. Historically that relationship has been a complex and at times difficult one, as is described in Chapter 11 of *Erskine May*. But in modern times Parliament and the courts have reached a mutual accommodation based on the notion that they should each avoid crossing into the territory or preserve of the other. An example of that comity is the House's *sub judice* rule which is a recognition that debate should not cover "live" cases before the Courts. For their part, while the courts have never accepted that they have no *locus* in determining the boundaries of privilege (because privilege is part of common law) they have accepted that the jurisdiction of privilege *within* Parliament, and in particular in relation to its proceedings, is a matter for each House itself.[21] When proceedings of the House of Commons appear to be impeached or questioned in the courts (contrary to Article IX of the

[17] *Ibid*
[18] Joint Committee, paras 242–5
[19] Memorandum submitted by the Attorney General, 3 April 2009, paragraph 3. See Appendix IV for the full text of the Memorandum
[20] *Ibid*
[21] The House or one of its Committees has on occasions tried to define "proceedings in Parliament." The Select Committee on the Official Secrets Acts in 1938–39 argued that disclosures by Members in the course of debate or proceedings in Parliament [including questions] could not be made the subject of proceedings under the Official Secrets Acts. However, it excluded from such proceedings soliciting or receiving such information. HC (1938–39) 101. Also *cf* below, para 22 (Strauss case)

Bill of Rights) Mr Speaker, as guardian of the House's interest, intervenes but it is for the Court to determine what material may be used in any case before it.

19. Nevertheless from the House's point of view, dealing with the matter of the applicability of privilege to seized documents prior to any trial, remains important. A preliminary safeguard must be the Speaker's consideration of a warrant for search when a Member's parliamentary office is the target. The Speaker will need to take account of the validity and precision of the warrant and the reasons for its being applied to a Member's office as well as the privilege implications that may arise.[22]

20. In the Damian Green case the Clerk of the House, acting on the Speaker's behalf wrote to the Metropolitan Police immediately after the seizure, warning them that any privileged material in their possession would have to be returned to the Member. With the agreement of both parties and so as not to interfere with the criminal investigation, officers of the House made a preliminary inspection of both the hardcopy and electronic material to identify such of it that might be protected by parliamentary privilege. Material so identified was returned to Mr Green by the Metropolitan Police. The handling of the matter in this way was specifically designed to avert any interference with the criminal process; it is difficult to envisage how the House itself or a committee could have intervened without affecting that process which, in this case, also involved someone who was not a Member of the House.[23]

21. It was made clear to all parties that the inspection by officers of the House was a preliminary one and did not claim to settle the matter of privilege should a prosecution have been proceeded with. In that circumstance, as the Attorney General has made clear, the House can seek to intervene in any proceedings to assert its privileges. It should be noted that such intervention, in the Speaker's name, is not unusual and has happened on a number of occasions recently.[24] The Attorney General makes clear in her memorandum that she would act as *amicus curiae* on behalf of the House in any case, including one that might have arisen from the arrest of Mr Green and the search of his office, when requested to do so.[25]

[22] See below para 26 setting out details of what the Speaker should consider.
[23] On December 8 2008 the House agreed to setting up a Committee to inquire into the matter of the search of Mr Green's office, but it was not to proceed to substantive business until any police inquiry was concluded. *Votes & Proceedings*, 8 December 2008.
[24] R *(Federation of Tour Operators & Ors) v HM Revenue and Customs & Ors* [2007] EWHC 2062, R *(Bradley & Ors) v Secretary of State for Works & Pensions* [2007] EWHC 242; *Office of Government Commerce v Information Commissioner* [2008] EWHC 737, R (*Wheeler*) *v Office of the Prime Minister & Anor* [2008] EWHC 1409.
[25] Attorney General's memorandum, paras 5 & 6

Members' correspondence

22. It is important to note that Members' correspondence, *per se*, is not privileged. It would only be so if the correspondence related to parliamentary proceedings — for example letters from a constituent which a Member had or intended to use in debate. In 1958 the House resolved that the letter of a Member (Mr George Strauss) to a Minister, on a matter that he might later wish to raise in the House, did not relate to anything before Parliament and was not a proceeding although the Privileges Committee had recommended the contrary.[26] The Joint Committee on Parliamentary Privilege raised the subject as a concern in its 1999 report:

> "103. One important area of uncertainty is members' correspondence. There has been long-standing concern about correspondence and other communications undertaken on behalf of constituents by members of the House of Commons. Members of both Houses now engage in many different activities in discharging their parliamentary duties. As well as speaking in debates, participating on committees and asking parliamentary questions, they write letters and make representations to ministers, government agencies and a wide variety of bodies, both public and private. Constituents of members of the House of Commons expect their members to take up their concerns at local and at national level. In recent years members' work has been transformed by a very substantial increase in this type of constituency correspondence. Most of these activities are not protected by parliamentary privilege. Article 9 protects parliamentary proceedings: activities which are recognisably part of the formal collegiate activities of Parliament. Much of the work of a member of Parliament today, although part of his duties as a member of Parliament, does not fall within this description."[27]

The Committee went on to consider whether absolute privilege should be extended to correspondence between members and ministers and recommended that it should not.[28]

Processes: arrest

23. The processes to be followed where a Member is arrested are long-standing and have often been invoked. As set out in paragraph 5 of this memorandum, the arrest should be notified to the Speaker who may then use his discretion whether to make an oral statement to the House or to lay a copy of the letter on the Table. In a case such as that of Damian Green where the Member concerned is not prevented from attending a sitting of the House because of his detention, there is no requirement for the Speaker to inform the House of the arrest. On this occasion the Speaker made an oral statement on 3 December 2008.[29]

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[26] CJ Vol. 260 1957–58
[27] Joint Committee, para 103
[28] Joint Committee, para 112
[29] See Appendix II

Processes: search

24. There is no record of a case where the police have searched the offices of a Member on the estate. There have been a small number of cases where police investigations into the conduct of staff of the House or Members' staff have included searches conducted with consent on the estate.

25. Where the police seek to enter the House to search a Member's office without his or her permission, the processes to be followed have been considered on a previous occasion. In July 2000, the then Clerk of the House, W R McKay,[30] issued a guidance note to the Serjeant at Arms, the Speaker's Secretary and Speaker's Counsel on the police search of a Member's office. The paper was prompted by the strong possibility that the police would wish to enter and search a particular Member's office and the awareness that there was no real precedent for how such a request should be met. Drawing on the Canadian practice,[31] the Clerk outlined a process under which:
    - The consent of the Speaker must be obtained before there is any action in the Palace.
    - The Speaker should see the search warrant, or a draft, in advance and satisfy herself, on the advice of her Counsel, that she might consent to the search. Considerations relevant to that decision would be: formal validity of the warrant; precision with which it specifies the material being sought; relevance of the material to the charge brought; and the possibility that the material might be found elsewhere.
    - If the warrant preceded rather than followed the formal making of a charge the police ought to be asked specifically to justify that aspect of their request.
    - It would be important to ensure that neither the warrant nor the exercise of the powers it conferred ran contrary to the privileges of the House or individual Members.
    - If material were taken the Speaker ought to be assured that it was that which was mentioned in or relevant to the warrant and no other. Any police officers who undertook any search should be personally accompanied by the Serjeant from their arrival in the precincts to their departure and particularly during the search.
    - A Member charged ought not to be warned of an impending search warrant but the police ought to let him have a copy at the time of the search or as soon thereafter as practicable.

Speaker's Protocol

26. The police action envisaged in the McKay note did not materialise and so the guidance outlined in that note was not tested on that occasion. In 2008, following the search of Mr Green's office, the Speaker issued a protocol to all Members, setting out the processes to be followed in future should the police seek to search a Member's office within the precincts of the

[30] Now Professor Sir William McKay KCB
[31] On Canadian experience, see paragraph 30 below.

House.[32] This protocol adopts the principle behind the McKay note of balancing the proper administration of justice and the right of the work of the House and of its Members to continue unhindered. However, the protocol makes explicit that the Speaker is to be the main decision-maker relating to the execution of any search warrant and that a warrant will always be required. In addition, it provides for the Speaker to seek the advice of the Attorney General and Solicitor General, where necessary, and it addresses the issue of the handling by police of material which may be covered by parliamentary privilege or, in the case of data relating to individual constituents, which is not privileged, require "the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office."

27. On the occasion of the events leading to the search of Mr Green's office, the guidance considered above was not followed. Instead the search of the office was permitted by the Serjeant at Arms on the basis of a consent form signed on the morning of 27 November 2008. The circumstances of the arrest of Mr Green and entry into his office were set out in the Speaker's statement to the House on 3 December 2008. Mr Speaker made a further statement on 9 December 2008 regarding access to the House of Commons server.[33]

28. Since the occasion of the search of Mr Green's office, the procedure for seeking permission to examine documents in a Member's possession has arisen. Mr Speaker has ruled that when the police wish to approach a Member seeking a document in his or her possession, they must first approach the Serjeant at Arms who will then approach the Member. If the Member does not give permission, that is the end of the matter unless the police seek to search the Member's office under a warrant in which case the conditions of Mr Speaker's Protocol will apply.[34]

International experience

29. There are examples of police searches of Members' offices in comparable Commonwealth jurisdictions and in the United States.

Canada

30. The position in Canada is particularly well documented and has evolved within a context of Westminster traditions. In 1973 a parliamentary committee concluded that "It is well established that outside police forces on official business shall not enter the precincts of parliament without first obtaining the permission of Mr. Speaker who is custodian of the powers and privileges of Parliament".[35] In such cases, parliamentary privilege has to be balanced against the demands of justice. The Canadian

[32] Mr Speaker's protocol is set out in Appendix I.
[33] Mr Speaker's statements of 3 December and 9 December 2008 are set out in Appendix II
[34] Mr Speaker's statement of 22 January 2009 is set out in Appendix III
[35] House of Commons of Canada, Journals, September 21, 1973, p.567, quoted in *the Practice and Procedure of the House of Commons* [of Canada], p 116

parliamentary handbook, *The Practice and Procedure of the House of Commons*, states that "if no charge has been laid or there is no evidence of an investigation against a Member, the Chair may exercise its discretion against the execution of a warrant. If there is an allegation of an offence by a Member, and the enforcement of the charge necessitates a warrant, the Speaker may give permission for its execution."[36] A report from a Special Committee adopted by the House in 1990 dealt with procedures surrounding the execution of search warrants within the parliamentary precincts and reaffirmed the principles that should be respected. It stated that "A search warrant must be executed in the presence of a representative of the Speaker who ensures that a copy of it is given to any Member whose affairs are subject of the search, at the time of the search or as soon as practicable thereafter."[37]

Australia

31. In New South Wales a case arose in October 2003 when officers of an independent anti-corruption body executed a search warrant in the Parliament office of a Member of the Upper House, seizing documents and various items of computer equipment. The House's Privileges Committee found that the seizure of at least some of the material involved a breach of privilege conferred by Article IX. The Committee stopped short of suggesting that the Independent Commission against Corruption (ICAC) had committed a contempt because ICAC "did not act with a relevant intent" but it would do so if there was "any further attempt by ICAC to use documents which fall within the scope of proceedings in Parliament in their investigation".[38] Procedures for handling seized material were developed.[39]

New Zealand

32. The New Zealand House of Representatives has also addressed similar issues. In October 2003 a draft agreement on policing functions within the parliamentary precincts was referred to the House Privileges Committee, which Committee reported in March 2004. The agreement defined the precincts of Parliament under the control of the Speaker. It stated clearly that all policing functions carried out within the precincts should be carried out with full regard to parliamentary privilege. However, it dealt only with offences committed within the precincts and the interviewing of members and staff and the service of legal process and not with the search of offices.

33. More recently, on 7 November 2006, the Speaker of the House of Representatives presented the House with a copy of an interim agreement

[36] T*he Practice and Procedure of the House of Commons* [of Canada], p 117
[37] Third Report from the Special Committee on the Review of the Parliament of Canada Act, quoted in *The Practice and Procedure of the House of Commons* [of Canada], p 118
[38] See Report of Standing Committee on Parliamentary Privilege and Ethics (Report 23 – December 2003), Legislative Council of New South Wales, paras 3.66 and 3.70 and J.D. Evans, "Seizure of a Member's document under search warrant", *The Table*, Vol 72 2004.
[39] (Report 23 – December 2003) Chapter 4.

she had reached with the Commissioner of Police on the execution of search warrants on premises occupied or used by Members of Parliament. This matter had arisen because for the first time the police had sought to execute a search warrant against a Member. A search under the agreement had then been made on 27 October 2006, involving material held in a Member's parliamentary and electorate offices.

34. The agreement, based on the precedent from New South Wales, set out a procedure to enable any claim for parliamentary privilege in relation to physical or electronic documents on the premises to be raised. In the case of parliamentary premises, this procedure requires the Speaker and the Clerk to be informed and the latter or her representative to be given the opportunity to be present. Claims for privilege for documents are to be resolved within five working days with disputed documents held in the Clerk's custody in the interim. The agreement stated that nothing in it amounted to a waiver of parliamentary privilege in respect of material seized. The Speaker indicated to the House that the agreement would be referred to the Privileges Committee for consideration once the police and legal proceedings were concluded. In mid-2008 proceedings were still active, with the Member concerned committed to trial at the High Court.

35. Cases in the United States and Australia have concentrated on whether particular documents seized are covered by privilege and their admissibility in court as evidence.

Conclusions: considerations for the Committee

Arrest

36. In summary it seems that so far as arrest of a Member in relation to criminal proceedings is concerned, there is sufficient clarity as to the procedure to be followed, i.e. immediate notification by the police to the Speaker for him to decide how or whether to inform the House. The guiding principle here is whether, or to what extent, a Member would be impeded in performing his or her duties in the House.

37. The Committee may wish to revisit the question of whether freedom from arrest in civil matters has any meaning in a modern context or is anomalous as suggested by the Joint Committee on Parliamentary Privilege and its predecessor Committee of Privileges.[40]

Search

38. So far as search of Members' offices in the precincts is concerned, the Committee may wish to re-assert the importance of exclusive cognisance which enables the Speaker, on behalf of the House, to act as the controlling authority in the precincts.

[40] See paragraph 7 above.

39. Given proper process, including the need for a search warrant setting out clearly the grounds for search, the Committee may wish to re-affirm the principle that the precincts cannot be a haven from the law and that the proper administration of justice within the precincts should not be impeded.

40. The Committee may also wish to consider a number of issues arising in connection with searches which include:
(a) adequate notice being given to the Speaker of an intended search;
(b) the need for a formal search warrant;
(c) the need for the warrant to specify the material being sought and its relevance to any charge being investigated;
(d) the need for a precise record of material being seized and conditions the Speaker may attach to the handling and custody of such material;
(e) the need for attendance of senior House officials during any search;
(f) how the individual Member concerned is affected;
(g) treatment of data relating to individual constituents;
(h) any special conditions in respect of national security considerations;
(i) treatment of electronic material and computer links; and
(j) the treatment of privileged material held by any official of the House during a search of offices other than a Member's.

Speaker's Protocol

41. The Committee may wish further to consider if Mr Speaker's protocol set out in Appendix I provides sufficient protection and whether new arrangements for police conduct in seeking permission to examine documents should be included in it.

APPENDIX I

MR SPEAKER'S PROTOCOL ON THE EXECUTION OF A SEARCH WARRANT IN THE PRECINCTS OF THE HOUSE OF COMMONS

1. In my statement of 3 December 2008 (OR col 3) I said I would issue a protocol to all Members on the searching of Members' offices. In future a warrant will always be required for a search of a Members' office or access to a Member's parliamentary papers including his electronic records and any such warrant will be referred to me for my personal decision.

2. Although much of the precincts of the House are open to the public, there are parts of the buildings which are not public. The House controls access to its precincts for a variety of reasons, including security, confidentiality and effective conduct of parliamentary business.

3. Responsibility for controlling access to the precincts of the House has been vested by the House in me. It is no part of my duties as Speaker to impede the proper administration of justice, but it is of equal concern that the work of the House and of its Members is not unnecessarily hindered.

4. The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts. It is long established that a Member may be arrested within the precincts.

5. In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me. In all cases where any Officer or other member of the staff of the House is made aware that a warrant is to be sought the Clerk of the House, Speaker's Counsel, the Speaker's Secretary and the Serjeant at Arms must be informed. No Officer or other member of the staff of the House may undertake any duty of confidentiality which has the purpose or effect of preventing or impeding communication with these Officers.

6. I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere. I reserve the right to seek the advice of the Attorney General and Solicitor General.

7. I will require a record to be provided of what has been seized, and I may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved.

8. Any search of a Member's office or belongings will only proceed in the presence of the Serjeant at Arms, Speaker's Counsel or their deputies. The Speaker may attach conditions to such a search which require the police to describe to a senior parliamentary official the nature of any material being seized which may relate to a Member's parliamentary work and may therefore be covered by parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material removed, until such time as any issue of privilege has been resolved.

9. If the police remove any document or equipment from a Member's office, they will be required to treat any data relating to individual constituents with the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office.

10. The execution of a warrant shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police.

11. In view of the concern shown by Members, I am circulating this document without delay, but I shall take into account any representations by Members for its revision and will issue a revised document, should this be necessary.

The Speaker

APPENDIX II

SPEAKER'S STATEMENT (3 DECEMBER)

Mr. Speaker: I wish to make a statement to the House about the arrest and entry into the offices of the hon. Member for Ashford (Damian Green) last Thursday, 27 November, which raises a subject of grave concern to all Members of the House.

In the past few days there has been much pressure on me to make public comment about these matters, but I felt that it was right and fitting that I should make no comment until Parliament reconvenes, because it is this House and this House alone that I serve, as well as being accountable for the actions of its Officers. I should emphasise from the start that it is not for me to comment on the allegations that have been made against the hon. Member or on the disposal of those allegations in the judicial process.

I should also remind the House, as stated in chapter 7 of "Erskine May," that parliamentary privilege has never prevented the operation of the criminal law. *[Interruption.]* Order. The Joint Committee on Parliamentary Privilege in its authoritative report in 1999 said that the precincts of the House are not and should not be

> "a haven from the law".

There is therefore no special restriction on the police searching the parliamentary precincts in the course of a criminal proceeding—nor has there ever been.

On Wednesday last, the Metropolitan police informed the Serjeant at Arms that an arrest was contemplated, but did not disclose the identity of the Member. I was told in the strictest confidence by her that a Member might be arrested and charged, but no further details were given to me. I was told that they might be forthcoming the next morning.

At 7 am on Thursday, police called upon the Serjeant at Arms and explained the background to the case, and disclosed to the Serjeant the identity of the Member. The Serjeant at Arms called me, told me the Member's name and said that a search might take place of his offices in the House. I was not told that the police did not have a warrant. [Hon. Members: "Ah!"] Order. I have been told that the police did not explain, as they are required to do, that the Serjeant was not obliged to consent, or that a warrant could have been insisted upon. *[Interruption.]* Order. Let me make the statement. I regret that a consent form was then signed by the Serjeant at Arms, without consulting the Clerk of the House.

I must make it clear to the House— *[Interruption.]* Order. I must make it clear to the House that I was not asked the question of whether consent should be given, or whether a warrant should have been insisted on. I did not personally authorise the search. It was later that evening that I was told that the search had gone ahead only on the basis of a consent form. I further regret that I was formally told by the police only yesterday, by letter from Assistant Commissioner Robert Quick, that the hon. Member

was arrested on 27 November on suspicion of conspiring to commit misconduct in public office and on suspicion of aiding and abetting misconduct in public office.

I have reviewed the handling of this matter. From now on, a warrant will always be required when a search—[Hon. Members: "Oh!"] Order. If the hon. Gentleman will let me finish—I have waited for four days. Some have been able to go on television; I have not had that luxury. I have not been able to speak to the media. A warrant will always be required when a search of a Member's office, or access to a Member's parliamentary papers, is sought. Every case must be referred for my personal decision, as it is my responsibility. All this will be made clear in a protocol issued under my name to all hon. Members.

Lastly, I have decided, myself, to refer the matter of the seizure by police of material belonging to the hon. Member for Ashford to a Committee of seven senior and experienced Members, nominated by me, to report as soon as possible. I expect the motion necessary to establish this Committee to be tabled by the Government for debate on Monday. I also expect a report of the Committee to be debated by this House as soon as possible thereafter.

SPEAKER'S STATEMENT (9 DECEMBER)

Mr. Speaker: I undertook to look into the matter of the Wilson doctrine and access to the House of Commons server, which was raised by the hon. Member for Newbury (Mr. Benyon) on 4 December. The Parliamentary Information and Communications Technology service takes the security of its systems very seriously, and is grateful for the support that the Joint Committee on Security, the Administration Committee and the Commission give in that respect. PICT would not allow any third party to access the parliamentary network without proper authority. In the Commons, such access previously required the approval of the Serjeant at Arms. Following my statement on 3 December, if PICT receives any requests to allow access in future, it will also seek confirmation that a warrant exists and that I have approved such access under the procedure laid down and the protocol issued yesterday.

With regard to the incident involving the hon. Member for Ashford (Damian Green), no access was given to data held on the server, as PICT was not instructed to do so by the Serjeant at Arms. No access will be given unless a warrant exists and I approve such access.

APPENDIX III

SPEAKER'S STATEMENT (22 JANUARY)

Mr. Speaker: I have a statement to make. Yesterday evening, the hon. Member for Shrewsbury and Atcham (Daniel Kawczynski) raised a point of order in which he reported that police had entered his office without permission and demanded that he release to them correspondence from his constituency. The House authorities have looked into the matter. I can tell the House that the case concerned general inquiries in the course of an investigation into a serious crime that may involve threatening behaviour towards Members and other public figures. It did not involve the hon. Member for Shrewsbury and Atcham or his staff.

In the course of the investigation, a police officer assigned to duties in the House, but exercising her responsibilities as a constable, sought assistance from the staff of the hon. Member and agreed a time to meet them. Assistance was given by the hon. Member's staff after the officer had explained the nature of the inquiry. At a point in their discussion, the hon. Member was contacted by his staff because it was thought necessary to seek his permission for the police to obtain a single-sheet document from his office. The purpose of the investigation was explained to the hon. Member, and after discussion, he agreed to supply the document. *[Interruption.]* Order.

I can confirm to the House that at no time during those proceedings did the police exercise any compulsory powers to require the document to be supplied. The hon. Member and his staff were not the subject of the police inquiry. It was not a matter that involved the seeking of a search warrant. I can confirm that the document is not privileged, but for reasons related to the sensitivity of the police investigation, I make no further comment about the details of the case.

The hon. Member for Shrewsbury and Atcham was made aware of these details by the police. While I accept that, in this case, the police officer acted with good intentions, I have instructed that any police officer assigned to duties in the House must advise the Serjeant at Arms of the intention to seek the assistance of a Member and his staff in his offices. The Serjeant at Arms will in turn approach the Member before the police take further action. I shall, of course, keep the House informed of any details concerning the case insofar as it affects the privileges of the House.

APPENDIX IV

MEMORANDUM SUBMITTED BY THE ATTORNEY GENERAL

PARLIAMENTARY PRIVILEGE - ROLE OF THE COURTS AND THE HOUSE OF COMMONS

1. By way of general observation on the role of the Committee on Standards and Privileges, while the Committee has the function of considering specific matters of privilege referred to it by the House, it does not itself determine whether material is subject to Parliamentary privilege – it only makes a recommendation to the House and it is for the House to decide the matter by resolution.

2. Secondly, the fact that the House resolves that particular material or categories of material are "proceedings in Parliament" within the meaning of Article IX of the Bill of Rights (which in any case I consider is a matter for the courts – see below) would not automatically have any effect on the admissibility of the material in a criminal trial. The material will only be inadmissible if the courts consider the use to which it is put amounts to the "impeaching or questioning" of Parliamentary proceedings. It would be unprecedented for the House itself to resolve that the material is being to put to such a use – the House would not know the use to which the relevant material is intended to be put to without questioning the prosecuting authorities.

Admissibility of evidence and Parliamentary privilege

3. It is clear that the determination of whether material is inadmissible as evidence in a criminal trial by virtue of Article IX is a matter for the court. Article IX is statute law and its interpretation, as with any other statute, is a matter for the courts. It is a question of law both whether particular material constitutes "proceedings in Parliament" and whether the use that the material is being put to amounts to the impeaching or questioning of such proceedings. The role of the courts was confirmed in *Bradlaugh v Gossett*[41] in which it was held that the while the House of Commons was capable of effectively superseding the general law so far as its internal affairs were concerned, it could not properly extend the scope of the term "proceedings in Parliament". There are a number of cases in which Article IX has been interpreted by the courts[42].

4. The House has, in the past, attempted to clarify the interpretation of "proceedings in Parliament" (the *Strauss* case in 1958 and the recommendations made by the Joint Committee on Parliamentary Privilege in 1999) but I am not aware of such an attempt in relation a specific complaint or investigation since the *Strauss* case. In any case, the House has not attempted to determine the admissibility of such material as evidence in court

[41] [1883–4] 12 QBD 271.
[42] *Prebble v TV New Zealand* [1995] 1 AC 321, *Rost v Edwards* [1990] 2 QB 460.

proceedings. Thus the House has effectively accepted that it is the role of the courts to resolve disputes on the application of Article IX[43].

The role of Parliament in protecting its privileges in court proceedings

5. The House can seek to intervene in any proceedings, under the name of the Attorney General, to assert the privileges of the House. In fact, the House has done so in a number of cases recently[44].

6. The Joint Committee on Parliamentary Privilege considered a suggestion that the House could make a reference to the Judicial Committee of the Privy Council to resolve any dispute on the application of Article IX but concluded that introducing an additional stage into proceedings would cause delay and expense for the parties. It considered that the ability of the Attorney General to intervene and assist the court was sufficient.

Disagreement between Parliament and the courts

7. I am not aware of any instances where Parliament and the courts have disagreed, in the sense that either House has made a resolution (following a report by the relevant privileges committee) about the extent of a Parliamentary privilege and, at the same time, a court has come to a contrary view. In fact, I am not aware of an example since the *Strauss* case where the House has attempted to clarify the meaning of "proceedings in Parliament" in relation to a specific case.

8. As noted above, it is open to the House to intervene in court proceedings to argue (for example) that reliance on particular material would contravene Article IX. In such cases the court is not bound by the views of the House and in some instances the courts have not accepted the submissions of the House (or have not accepted them in their entirety), e.g. *Pepper v Hart*[45]. Consistent with the analysis above, it is the ruling of the court which is definitive.

Impact of a resolution of the House (following a recommendation by the Committee) on the principle of comity

9. If the House were to instruct the Committee to examine the evidence in a particular case with a view to deciding what, if anything, was covered by Parliamentary privilege, any decisions made by the Committee (or a resolution of the House agreeing with its report) would not be binding on the courts. It would again be for the court to decide whether Article IX applied to any particular material. This is made clear by *Bradlaugh v Gossett.* Otherwise this would amount to allowing one House of Parliament, in effect, to amend statute law. In that case Stephen J distinguished matters which were internal to the House (such as sitting and voting) where the courts would not interfere from "rights to be exercised out of and independently of the House" which

[43] Report of the Joint Committee on Parliamentary Privilege, Vol 1, p.38–9, paragraphs 130–132.
[44] *OGC v Information Commissioner* [2008] EWHC 774, *R (Wheeler) v Office of the Prime Minister* & *Secretary of State for Foreign* & *Commonwealth Affairs* [2008] EWHC 1409.
[45] [1993] AC 593.

were a matter for the courts to interpret.

10. In conclusion: the respective roles of the courts and Parliament in relation to the matters of privilege are now well settled. In particular, it is settled that it is the role of the courts to determine any questions of law relating to Parliamentary privilege (especially in relation to Article IX). There is a risk that the principle of comity would be undermined by a purported attempt by the House to determine such questions and thus usurp the determinative role of the courts.

BARONESS SCOTLAND QC

3 April 2009