An Elected Second Chamber

A Conservative View

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Conservatives and the Second Chamber

We have reached the centenary of the 1909-11 constitutional crisis, instigated by Lloyd George's 'people's b

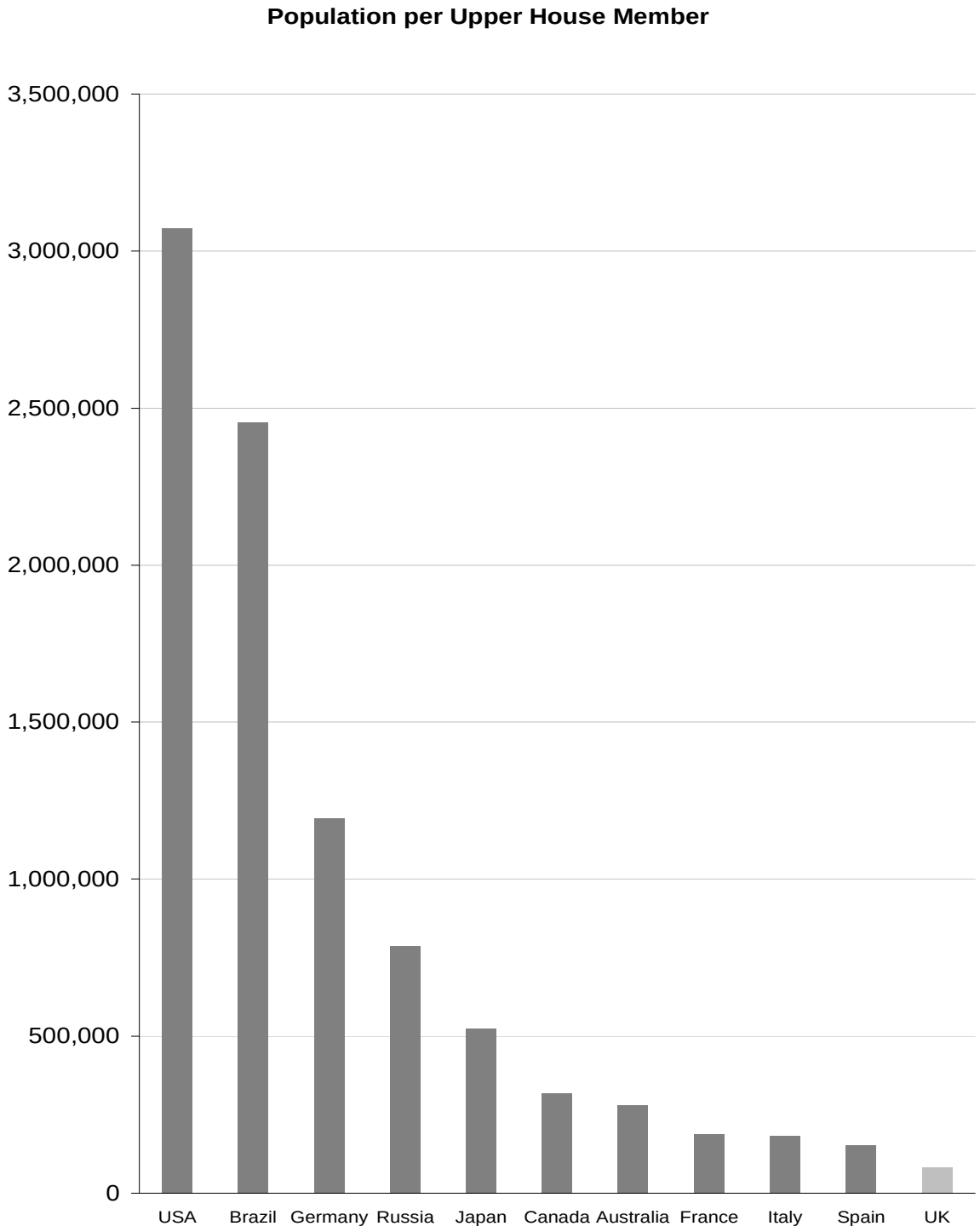
Conservative Democracy Task Force are designed to achieve that.[5] However, the dominance of the majority party of the day, coupled with other demands on MPs' time from constituency casework, put some limit on the Commons' ability to perform a scrutinising and revising role. It is this role that a second chamber, differently constituted from the Commons, should discharge. Even though the current House of Lords is increasingly effective, we believe that only a democratic mandate can entrench the position of a second chamber.

[5] Conservative Party Democracy Task Force, Power to the People: Rebuilding Parliament (2007).

Pressures and prospects for reform

The Commons votes of March 2007 showed wide-ranging cross-party agreement on the case for a largely elected House. As already noted, 59% of Conservative MPs voted for at least one of the 'democratic' options; for Labour and the Liberal Democrats, the figures were 76% and 98% respectively. The cross-party talks that led to last year's White Paper showed significant, though not complete agreement on the shape and nature of the resulting chamber.

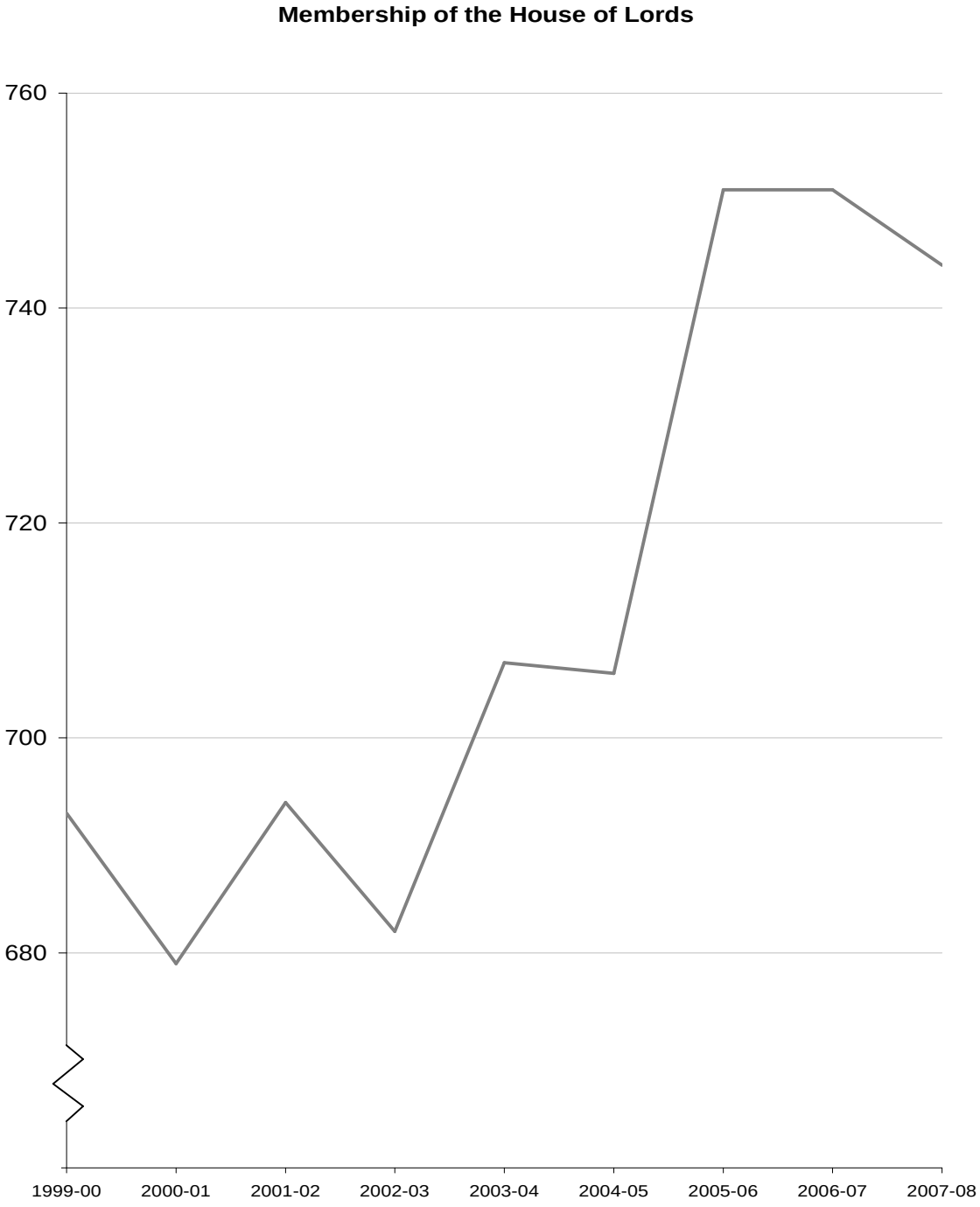
Meanwhile, a number of scandals in recent years have put a harsh spotlight on the Upper House and



Source: House of Commons Library

These numbers are likely to grow. While removing the hereditaries, Tony Blair created life peers at an exceptionally rapid rate for much of his premiership to counterbalance Labour's historic disadvantage in the chamber. During his term of office, 163 Labour peers were created, compared with 62 Conservatives and 53 Liberal Democrats; his total tally of 386 creations (including cross-benchers) was just one fewer than that of Thatcher and Major combined. At the end of the 2007-08 session, there were 744 members of the Lords, an increase of 51 (7%) on the first post-hereditaries session of 1999-2000. At the time of writing, this had fallen slightly, to 740 members.

That process now looks overdone. Of the 725 members of the Lords (excluding those on leave of absence or suspended), 214 are Labour peers, while the 201 crossbenchers outnumber the 196 Conservatives. This imbalance is likely to grow during the remaining term of the Labour government. In addition, the Conservative peers (with an average age of 70) are older than their Labour (average age 68) and Liberal Democrat (average age 66) counterparts. The Conservatives also find themselves over-dependent on the remaining hereditary peers, who make up a quarter of their total membership and are on average younger and more active than their life peers.



Source: House of Commons Library

Thus a future Conservative administration is likely to undertake significant creations of peerages to prevent finding itself in a very weak position in the second chamber. Taking the current party

balance, and applying the proposal in Lord Steel's bill that the governing party should have a lead over the opposition party of up to 3 per cent of the chamber, this would imply some 26 creations of Conservative peers alone; allowing for some opposition creations, the overall number would be bigger. If this is done through life peerages, it will swell the chamber further for many years to come. Frequent changes of government – following the pattern of the 1960s and 1970s, rather than that of the last three decades – could mean that this process is repeated.

The second peculiarity of our current arrangements is that the anachronistic hereditary principle has proved surprisingly tenacious. The Blair – Cranborne deal in 1998 to retain 92 hereditaries ensured that change was far less radical than outward appearances suggest. It secured the retention of roughly half the active hereditary peerage; most of those ejected to oblivion rarely if ever attended. It also created a new and serious abuse: by-elections conducted by hereditaries to fill vacancies caused by deaths of their colleagues. Lord Steel has described the absurdities involved in the process: "we [the Liberal Democrats] had six candidates for a by-election and four voters. Before the Great Reform Bill of 1832, the rotten borough of Old Sarum had at least 11 voters. In the Labour Party, there were 11 candidates and only three voters, and we had the spectacle of the Clerk of the Parliaments declaring to the world that a new Member had been elected to the British Parliament by two votes to one."[8]

In spite of all this, even supporters of a full-scale reform – moving to a fully or predominantly elected chamber – have for some time believed that there is little prospect of its early accomplishment.[9] For any government, tackling the most serious recession in half a century will be a much higher priority; it will not want to put its rescue measures at the mercy of delay by the Lords. In some of the confrontations of recent years, there have been clear threats from the peers to wreck not just individual measures that they found offensive, but the government's wider legislative programme. This tactic was employed with considerable effect in 2003-04, when the government proposed to remove the remaining hereditary peers without moving to an elected chamber but was ultimately forced to back down.[10] Similar threats were made over the eviction of the hereditaries in 1998-99 and the Hunting Bill in 2004. Proposals for comprehensive reform of the Lords risk triggering the same reaction; as Justice Secretary Jack Straw has noted, "Lords reform can come with a heavy political cost", including "disruption to the legislative

The Commons' position is reinforced by its financial privilege, by the need of governments to maintain its confidence and by the presence in the Commons of the Prime Minister and the large majority of cabinet ministers.

There is also widespread agreement that, since the peerage as an honour will be separated from membership of the reformed chamber, the name 'House of Lords' will need to change. The White Paper suggested, without giving a firm commitment, following widespread international practice and using the term 'Senate'. We prefer 'Upper House'; however, we do not believe that wrangling over the chamber's name should be allowed to get in the way of substantive change.

Given the long and tortuous history of debates on the second chamber, these points of agreement are very welcome. They suggest that, over the last decade, there has been a growing

for the European elections.

We favour the use of larger regions precisely because it would work against competition for constituency business with members of the House of Commons (and also with local councils). This would be compatible with either list systems or the Single Transferable Vote. The latter is, however, better suited for a system in which candidates build a strong personal following by attention to local issues (as is the case in the Republic of Ireland), rather than for very large electoral areas. The only national second chamber for which it is used is the Australian Senate, and there it is in fact closer to a closed list system, as party list votes are allowed and there are significant disincentives to vote instead for specific candidates. In addition, the Australian Senate differs from the second chamber envisaged for Britain in that it has powers that almost equal those of the House of Representatives, and its members are able to stand for re-election.

However, while we favour using the regions that are used for the European elections, we are opposed to the fully closed party list system currently used to elect MEPs; it gives voters no

used for the chamber, for any one party to gain a majority; again, this would maintain the position of the current house. Nor is a combination of elected and appointed members as outlandish as is sometimes suggested: hybrid second chambers are to be found in Belgium, Ireland, Italy and Spain.[19]

Thus, in spite of arguments from consistency and the greater majority in the Commons for a fully elected chamber, we favour the option of 80% elected membership in the belief that this would add to the independence of the second chamber and maintain some of the merits of the current house. We share the widespread view that appointed members should serve on the same terms as elected members – that is, for a non-renewable term stretching over three parliaments.

The July 2008 White Paper argues that, if there is an appointed element in the second chamber, then these appointments should be made through the House of Lords Appointments Commission; that all such appointments should be made on a non-party basis, although this would not preclude those with known party affiliations being put forward on their own merits; that appointments should be made according to published criteria, focusing on the individual's ability to contribute to the work of the chamber; and that the Commission should be put on a statutory basis. The latter provision would entrench the Commission's independence from the Prime Minister; at present, it relies on a 'self-denying ordinance' by the Prime Minister not to

The Commission should be renamed the Honours Commission, taking responsibility for honours

In general, we do not favour automatic appointments to the chamber. The White Paper raises the possibility of such a right of appointment for former senior public servants, such as the Archbishop of Canterbury, the Cabinet Secretary or the Chief of the Defence Staff. Clearly, such individuals would be very strong candidates, but we do not believe that they should be an exception to the normal process of appointment.

Most of the White Paper's stipulations as to eligibility for membership are reasonable (including extending to the second chamber the rules that apply in the Commons to exclude those convicted of a criminal offence and sentenced to a prison term of more than twelve months; any tightening of this rule for the Commons should be matched for the second chamber). However, we disagree with the government's proposal that being resident in the UK for tax purposes should be a condition of membership. We believe that the requirement should be for members to be on the electoral register in the UK, and to pay tax here on their UK income.

With respect to the relationship between membership of the chamber and that of the Commons, we agree with the government that members of the second chamber should be eligible to stand for election to the Commons after the end of their term, but that this should only be possible after a five-year cooling-

list position had been relatively low a longer term (by up to three years) than that of members who had been elected in the normal way.

We therefore believe that an alternative option should be examined: that the new member should serve out the remainder of the parliament in which the vacancy arose, as well as the subsequent two parliaments. In other words, he or she would serve as close as possible to (but no more than) the normal term of three parliaments. This would have the consequence that different elections would not necessarily be for a precise third of the chamber; however, assuming that the distribution of deaths and resignations would be fairly random, the effect would presumably not be significant.

The cross-p

in the Sunday Times affair - should no longer be able to include work related to Parliament even if they do not amount to “paid advocacy”.

The Commissioner for Standards. At present, there is no Lords equivalent of the role of the Parliamentary Commissioner for Standards in investigating complaints about MPs’ conduct and presenting findings to the Committee on Standards and Privileges. In the

Appointments Commission. In similar vein, current government proposals are murky. They

The interim options

So far, we have addressed the issues raised in the White Paper with a view to achieving a lasting settlement for the second chamber. However, given the risk of obstructionism within the Lords, and doubts over the willingness of governments to risk other measures for the sake of constitutional reform, it is important to look at measures that could be enacted in the near term without provoking a confrontation.

The most notable recent attempt at an interim solution has been Lord Steel's House of Lords Bill, which received its Second Reading at the end of February 2009 and has since moved to Committee. This proposes putting the Appointments Commission on a statutory basis and giving it the sole right to make recommendations for life peerages; setting criteria for the party balance and the proportion of non-party members; ending the election of new hereditary peers; and establishing procedures for resignation ('permanent leave of absence') andawithouttion

The shift to term peerages should also help address some of the problems highlighted earlier in this paper. Large-scale creations following changes of government could swell the chamber yet further, while any move to an elected chamber would also act to keep membership high if, during the transition, life peers continued to serve. The latter would be a temporary effect, but one that would last for decades.[30] The use of term rather than life peerages would attenuate the impact of either or both these eventualities.

The proposal is open to the criticism that, as a practical matter, it could come too late. A new government would want to create peers quickly to strengthen its position in the Lords; they would have to be life peers, since their creation would be well in advance of the passage of legislation to establish term peerages. We propose therefore that those accepting new peerages would be required to sign a commitment, to be lodged with the House of Lords Appointments Commission, that if term peer legislation were to be enacted, they would transfer to that status, backdated to the date of their appointment. Such an agreement would have to be a matter of cross-party consensus.

Once the process of creating term peers had begun there should be no further creation of life peers (at least as members of the legislature). This should also be the point at which elections for hereditary peers should cease, while existing hereditaries should be given the option to convert to life status. As a result, there would be a gradual shift towards a House in which term peerages were the predominant, and ultimately only form.

There are various lines of possible objection to this reform. Some are also those used against an elected second chamber. All can be refuted.

It creates a 'two tier' peerage. The peerage already has numerous tiers. The archbishops and bishops do not remain members of the House of Lords for life; in that sense, we already have a form of term peers. Members already find their way into the House by varied means: as elected hereditaries, or hereditaries holding specified offices; law lords (peers created under the Appellate Jurisdiction Act 1876); and life peers created through various routes.

Like any reform to introduce elected peers, it would require primary legislation. This is indeed the case, but as already discussed the Lords is far less likely to block it than would be the case with a bill for an elected House.

If there is to be an elected House of Lords, it could make the transition more difficult. There is no reason to believe this. The transition to an elected House, if and when it takes place, will in any case be a complex process. The three options set out in the White Paper with respect to existing peers have already been described. If the creation of term peers is timed appropriately, it could be coordinated with the dates on which elections to the new House take place. This system would be very compatible with the option of staged departure of existing peers, but it does not require it: existing life peers could be treated separately and continue for life unless they take up a severance payment and retire. Natural justice favours the latter option; the promises made to existing peers must be honoured ("life should mean life"). Pragmatism points in the same direction; the peers are more likely to obstruct a measure that consigns them to the constitutional oubliette.

It would increase the number of peers when the consensus (reflected in the White Paper) is for a reduction in numbers. This is not the case. The pressures for further creations are already there, and doing so through term rather than life peers would produce a less lasting increase. The

[30] See Chart 8.1 on p. 77 of Ministry of Justice, An Elected Second Chamber, Cm 7438, July 2008.

proposal for a severance payment should also cut down the size of the Lords, as non-attenders take the money and leave.

This implies a significant increase in party-political nominations which will alter the nature of the House. The proposal does not have any particular implications for the balance between party-affiliated and independent peers; the latter would be chosen through the Appointments Commission as at present, though (like the party nominees) on a term rather than life basis. The contribution of non-party expertise would be no less than at present.

Fewer "top" people will want to become term rather than life peers. There is no particular evidence for this; only those who see membership of the Lords as an honour rather than as an opportunity to contribute to the legislature are likely to be deterred. Payment may also attract those – perhaps a less traditional type of member – who would have much to contribute to the House and to politics.

Lord Jay, Chairman of the House of Lords Appointments Commission, recently emphasised that the Lords should "move further along that curve from honour to job."[31] The institution of term peerages could assist this process while avoiding the constitutional crisis that – at this of all times – we cannot afford. A number of the other measures outlined in earlier sections of this paper – notably changes to the standards and sanctions regime, and to the operation of the Appointments Commission – should also be enacted as part of an interim reform. We do not believe that this would provide a durable settlement; election is needed to entrench the legitimacy of the second chamber. However, these measures could provide worthwhile improvements and offer a staging-post to full-scale reform.

[31] Lord Jay, interview on BBC Radio 4, the *Today* programme, 25 March 2009.

Conclusion

The need for an effective second chamber has become greater than ever. The role and effectiveness of the House of Lords have been enhanced in the decade since the departure of most hereditary peers. However, we do not believe that an appointed second chamber – whether by party leaders or by a seven-member committee – can ever command the legitimacy that full and effective discharge of its role requires. It is therefore vital that we establish an effective structure that combines a predominantly democratic mandate with the capacity for reflection that a revising chamber requires.

We believe that the debate of recent years has enabled us to make significant progress towards this goal, notably through agreement on the concept of a long, non-renewable term. In this paper we have set out what we believe to be the best options for the electoral system, the role of appointed members and new approaches to remuneration and sanctions for misconduct. We have also set out a detailed path for transition to the new arrangements which will be both fair to different political parties and to new and existing members, while enabling a relatively rapid move to a reformed chamber.

The Conservative Party has been a consistent supporter of effective bicameralism. Our proposals for the operation of a predominantly elected second chamber are in that spirit and that tradition.