



HOUSE OF LORDS

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Inquiry on

**SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS
FOR THE REST OF THE UK**

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Witnesses: Rt Hon. Alistair Carmichael MP and Rt Hon. Lord Wallace of Tankerness QC

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Members present

Baroness Jay of Paddington (chairman)
Lord Cullen of Whitekirk
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Lester of Herne Hill
Baroness Wheatcroft

Examination of Witnesses

Rt Hon. Alistair Carmichael MP, Secretary of State for Scotland, and **Rt Hon. Lord Wallace of Tankerness QC**, Advocate General for Scotland

Q27 The Chairman: Good morning and thank you both very much for coming. As you know, we are primarily concerned, as the Constitution Committee, with looking at some of the legal and constitutional aspects of the outcome of the referendum. That somewhat constrains our discussion, although, on the basis of the evidence that we have had so far, it still seems to be pretty wide-ranging, as it no doubt will be this morning. I thought that I would mention that at the beginning, because it gives focus to the questions that we want to ask. I understand, Mr Carmichael, that you would like to make an opening statement. That would be very helpful, so maybe you would like to start.

Alistair Carmichael: Thank you, Lord Chairman, for the opportunity to give evidence to the committee. I know that you have already received written and oral evidence from a number of eminent academics and constitutional experts. I have had the opportunity of reviewing some of that evidence with interest. It is fair to say that, inevitably, there will be a difference between the evidence that you have received from witnesses so far and the evidence that the Advocate General and I can give you today. We are both ministers of the Government of the United Kingdom as well as being Scots.

As Secretary of State for Scotland, I have a duty to make sure that the interests of people in Scotland are at the forefront of the minds of my Cabinet colleagues. That is not just about making the case for why Scotland benefits from being part of the United Kingdom; it is about making sure that, day in, day out, decisions made by the United Kingdom Government are made in the full knowledge and interests of Scotland. Your inquiry explores a hypothetical scenario that conflicts with my primary duty as Secretary of State for Scotland. If there were to be a yes vote in the referendum—a scenario that I hope and believe the people in Scotland will not allow to happen—it would mean that people in Scotland had given a mandate that they no longer wished the United Kingdom Government to act in their interests.

It is worth considering what such a mandate would mean. It would mean that the interests of Scotland on the one hand and the interests of the continuing United Kingdom of England, Wales and Northern Ireland on the other would diverge. It would mean that there would need to be negotiations on the terms of Scottish independence—negotiations in which Scotland on the one hand and the continuing United Kingdom on the other would each seek to achieve the best deal according to their own national interests. It would mean that negotiators representing Scotland and negotiators representing the continuing United Kingdom would need to strive to put the interests of their own side above the interests of the other. That is a scenario that fills me with dread, but it is the reality of independence.

However, unless and until the people of Scotland vote to leave the United Kingdom, there is no such mandate to enter into these negotiations and I have the duty which I have outlined to you. Unless and until the people of Scotland decide otherwise, the United Kingdom must act in the interests of all parts of the United Kingdom, including Scotland. That is why the UK Government are not making plans for the implications of a yes vote. Academics and constitutional experts can speculate about the different ways in which these issues could be resolved, but as a minister in the Government of the whole of the United Kingdom I cannot.

Unless and until the people of Scotland vote otherwise, the UK Government will continue to act on their behalf and on behalf of the interests of people across the UK. I hope that, come 19 September, we will continue to do that, with the endorsement of the people of Scotland to remain part of our United Kingdom. Thank you, Lord Chairman.

Q28 The Chairman: Thank you very much, Secretary of State. I think that the whole committee appreciates that the Government are unhappy about discussing hypotheticals, but several people in the Government have spoken about, for example, currency union, the place of the BBC and issues that could broadly be said to be matters that need to be negotiated. Perhaps I might quote the evidence of the Deputy First Minister of Scotland, Nicola Sturgeon, who said to us: “The Scottish Government accepts that detailed negotiations ... cannot begin ahead of the referendum. However, we believe that sensible discussions about the practical consequences of independence should take place to help the people of Scotland to make an informed choice.” Is that not a fair point?

Alistair Carmichael: To a point it is. It was for that reason that it was necessary for the Chancellor quite recently to explain that, on the basis of the advice that he had been given by the Permanent Secretary to the Treasury, he could not countenance entry into a currency union between the remainder of the United Kingdom and Scotland, if Scotland were to be an independent country. I think it is widely accepted that it would have been irresponsible for the Chancellor, having received that advice, not to have made that clear. Having said that, there is always going to be a balance in these matters between those of us who as politicians are required to engage in the debate and ministers who do the job that we are elected and appointed by the Prime Minister to do.

Q29 The Chairman: We have heard evidence, surprisingly, from academics about how this whole debate is about politics. I think that members of the committee are interested in, for example, the speech that you, Lord Wallace, gave to the 80 Club two weeks ago in which you

said that, as you collectively felt, “legal issues matter.” So perhaps you would like to outline those ones that you think are legally and constitutionally significant.

Lord Wallace of Tankerness: Following on from what the Secretary of State said, given that the public have been asking for information, the Scotland Office and, indeed, the whole of the UK Government embarked on a series of Scotland analysis papers to help to inform the debate. A lot of work has gone into them—they are very detailed. The first paper that we produced—“Devolution and the implications of Scottish independence”—set out some of the background to what we believe will be the important legal framework that would attend any yes vote. The first and perhaps most important issue relates to the view that the United Kingdom Government came to on the basis of evidence from Professor James Crawford of the University of Cambridge and Professor Alan Boyle of the University of Edinburgh, from whom you have had written and oral evidence—

The Chairman: Yes, Professor Boyle was here last week.

Lord Wallace of Tankerness: The view is that the rest of the United Kingdom—England, Wales and Northern Ireland—would be a continuator state and that Scotland would be a new state. Some of the principles or guidelines that led us to that conclusion included, first, that there is good precedent, the most recent one being South Sudan and Sudan, where Sudan was the continuing state and South Sudan was the new state. There is also the case of Singapore and Malaysia. Perhaps the example closest to home relates to when the Irish Free State left the United Kingdom in 1922, when Great Britain and Northern Ireland continued as the United Kingdom and the Irish Free State became a new state. Secondly, in public international law, regard is given to relative population and size. I do not think that there is any question but that, in terms of both relative population and relative size, England, Wales and Northern Ireland would be much larger than Scotland. Thirdly and importantly—although they are all important—how would this be seen in the eyes of the rest of the world? I think that this is of

considerable importance. Again, given the United Kingdom's standing in the world—the fact that we are a permanent member of the United Nations Security Council, our membership of NATO and a number of organisations, and the treaties that the United Kingdom has entered into—the continuing United Kingdom would be seen as a continuator state, with the obligations and the rights of that, and Scotland would be identified and seen as a new state. Fourthly, the other alternative would be two new states, which was the position with the formation of the Czech Republic and Slovakia. That proceeds on the basis of mutual agreement—a joint agreement. We do not believe that there is any way in which the Government of the continuing United Kingdom would sign up to the disestablishment or disintegration of the United Kingdom and all that would flow from that. That is perhaps the most important and fundamental legal view.

Other issues that we may wish to explore include those around European Union membership, on which there is a lot of uncertainty and a lot of politics. We believe that the continuing United Kingdom would continue to be a member of the European Union and that Scotland would be a new state having to apply for membership. There can be much debate about how that would proceed and, crucially, about the terms of membership.

The other issue that I addressed in that lecture related to institutions and the sharing of assets and liabilities. You may wish to explore that but, briefly, we believe that the institutions would stay with the continuing state. This Parliament is an institution of the United Kingdom state. You only need to say that, in a sense: a new Scottish state would not want to have part of it; the whole point of independence is not to be a part of it. There is a distinction to be made between institutions such as the Bank of England, which is the central bank of the United Kingdom and an institution of the United Kingdom, and assets, which could include, for example, gold reserves and literal pounds, although the pound as a currency is not an asset. These are the kinds of issues that I highlighted in that lecture.

The Chairman: That is very helpful. We will come back to assets and liabilities, but perhaps we could pursue for a little while questions about the potential arrangements after a yes vote.

Q30 Lord Lester of Herne Hill: I fully understand the Secretary of State's dread, which I share, but, as I am sure you appreciate, we are trying to deal with an important hypothetical to work out some of the implications. As you know, the Scottish Government have suggested that a timetable of independence by 24 March 2016 is realistic. Lord Mackay of Clashfern, among others, has indicated his reasons for thinking that is not realistic. The first thing that I wanted to establish is that negotiations, if they did occur, would have to occur in good faith and in a practical way in an attempt to find a solution that resolved some of the conflicts that the Secretary of State has powerfully indicated. Can we start with that assumption, in spite of the conflicts?

Alistair Carmichael: Certainly. I think that Lord Lester has known me long enough and well enough to know that, at a personal level, my interest is completely engaged and piqued by these issues, but as a government minister I have to take a different approach. I absolutely take the point that these negotiations will have to be conducted in good faith and in a practical way aimed at resolving conflicts, but the other point that will be significant in these negotiations is the sheer enormity of what is being undertaken. You are looking at unpicking what I would regard as the single most successful economic, political and social union, which has now endured for over 300 years and which has produced institutions that are, rightly, the envy of the world. That is going to be no mean feat and it will require an enormous amount of complicated negotiation. Both as a politician and in my previous professional career as a lawyer, I have been involved in sufficient negotiations to know that setting yourself a somewhat arbitrary timescale is not a sensible way of negotiating, because it fundamentally weakens your hand. If you are to keep to that timetable, the party that has invested importance in that timetable will feel under greater pressure to make concessions in order to meet the

deadline. That is a fairly well-accepted fact of how negotiations proceed. For that reason, I do not see the 2016 deadline as achievable, especially if on all these issues, where they have walked away from the advantages of the United Kingdom, as they say they wish to do, they then want to negotiate their way back in. I do not regard it as a realistic timetable but, frankly, it was the Scottish Government in their white paper who chose to set that deadline. I suspect that it was set for political reasons rather than as a realistic or considered proposition.

Lord Lester of Herne Hill: Would it not be true that, although that may be unrealistic, the longer such negotiations went on, the longer the period of uncertainty on both sides of the border? Therefore, it would be in the interests of the UK, as the continuing state, and Scotland for those negotiations to be conducted as speedily as possible.

Alistair Carmichael: As speedily as possible, but these are complicated matters and, not quite in the middle of that 18-month period, you will have the United Kingdom general election in May 2015. So you can take from your 18-month period a period of at least a month during which the United Kingdom Parliament will be dissolved and when an election campaign will be going on. These negotiations would be best done and would be required to be done in good faith—I do not think that anybody would doubt that—but good faith will take you only so far when you are dealing with matters of the scale of which we are speaking.

Q31 Lord Lester of Herne Hill: What would happen if the two negotiating teams were unable to reach agreement on core issues?

Alistair Carmichael: That takes you into uncharted waters. I do not think that anybody can reasonably know the answer to that. One thing that I can put to you beyond peradventure is that, if Scotland votes yes on 18 September, Scotland will become an independent nation. There could be no question thereafter of Scotland somehow not becoming an independent nation, even if there were difficulties in the negotiations.

Lord Cullen of Whitekirk: I appreciate what you have said about there being many issues, some of which are very complicated. Might it be possible to divide the issues into those that it was essential should be resolved by so-called independence day and those that could be left to a later occasion? When I say “settled”, I mean settled by some means, possibly including arbitration. If it is possible to reach a division, could you indicate what you would regard as the essential items?

Alistair Carmichael: You tempt me down a road that involves essentially setting the mandate or the parameters for any negotiating team. However much I might find that a tempting prospect at an intellectual level, I am afraid that for the purposes of today’s evidence it would be imprudent for me to do that.

Q32 The Chairman: Can I ask you a practical question, which I hope both of you might look at from the perspective of the two Houses of Parliament in which you sit? Lord Mackay of Clashfern has told us that it would be necessary for the UK Parliament to pass legislation in order to enable the negotiations to start. Is that your perspective?

Alistair Carmichael: It would probably be sensible to do that. The United Kingdom Government negotiate agreements and treaties on behalf of the United Kingdom all the time and do so with the powers that they currently have. This would be a negotiation of a very different stripe and I would have thought it sensible for any government undertaking that enterprise to make sure that they had the widest range of views in Parliament engaged in it, for which it might be that legislation would be sensible. As to whether it is legally necessary, I am not going to get into a tangle on matters of law with Lord Mackay of Clashfern.

Lord Wallace of Tankerness: The other dimension that has come through in some of the evidence given to your Lordships’ committee is the question of the legal competence of the Scottish Government to negotiate. Let us be honest about it: there would be an element of realpolitik. But we all know that people quite readily resort to the courts if they want to throw

spanners into works. It may be that something like a section 30 order or some primary legislation was needed—we are in a hypothetical situation—to put beyond doubt the competence of the Scottish Government to negotiate, although the Scottish Government has said that this may go more widely than members of the Scottish Government. The Scottish Parliament would at least have competence then to enter into negotiations, so that would put it beyond doubt.

Q33 Lord Lang of Monkton: I would like to return to the concept of the continuator state, which seems pivotal to what might happen in the event of a yes vote. The view expressed in your excellent and very lucid lecture, if I may say so, Lord Wallace, is very clear and has not been challenged, as far as I am aware, by anybody. Almost all the evidence that we have had—and I think our perception of it—is in line with that. I would like to find out to what extent that endows the negotiating position with which the United Kingdom Government would enter negotiations. Does it give added weight to the negotiation? It seems to me that the Scottish National Party, in their white paper, base all their estimates of their future prosperity and success in negotiations on the assumption that they enter them on an absolutely equal basis with the UK Government in negotiating assets that lie between the two negotiators. I am assume that part of the basis on which the Chancellor made his speech was the fact that the UK was the continuator state and would be in possession of the currency and he could already see that that would simply not be part of the negotiations. To what extent does that concept of continuator state endow the negotiating position more generally?

Lord Wallace of Tankerness: It is the crucial starting point. On your specific example, it allowed the Chancellor to make that statement. It is my view that the Bank of England as the central bank is an institution of the United Kingdom and would be the institution of the continuing United Kingdom. There has been very little contradiction to the position that we set out. We set it out on the basis of well-informed advice. Crucially, that would be the

position in the eyes of the world. If the Scottish Government have aspirations of a March 2016 conclusion, I do not think that it would be worthwhile spending time trying to argue over something that has such widespread support. It sets out what the starting point is. I think that it is the case, as is implicit in the memorandums of understanding since devolution, that both governments should hold each other in mutual respect. But it means that, if you are looking at things such as the currency, there is a starting point and any negotiation would flow from that position. That is the case with other institutions. You can put it in terms of, “Does that give an upper hand or a lower hand?” but I think that it is better putting it in terms of making sure that you are negotiating on the basis of reality and how it will be seen in the eyes of the rest of the world.

Lord Lang of Monkton: Secretary of State, I assume from your opening statement that you might contemplate being a member of the negotiating team on behalf of Scotland rather than the United Kingdom by then. I am not asking you to answer that, but would you like to comment on how you see the negotiations proceeding against the background of the United Kingdom as the continuator state?

Alistair Carmichael: I do not think that there is a great deal that I could really add to Lord Wallace’s analysis beyond the statement of the blindingly obvious that you would not expect somebody from England, Wales or Northern Ireland to negotiate on behalf of Scotland and so you would not expect a Scot to negotiate on behalf of people from England, Wales and Northern Ireland. You start from the presumption that these are countries that are foreign to each other at that point and will each pursue their own national interest. You would expect no less. I would be mildly sceptical about whether my presence would necessarily be wanted by the negotiating team that would be put in place at that time, although, as a Scot, and a proud Scot, I will always want to pursue Scotland’s best interests. I believe that Scotland’s best

interests remain as being part of the United Kingdom. As a Member of Parliament, my primary duty is to my constituents in Orkney and Shetland.

Q34 Lord Lester of Herne Hill: Many years ago, and I have to declare this, I wrote an article in the *International & Comparative Law Quarterly* called “State succession to treaties in the Commonwealth”. In those days, it was the United Kingdom’s position, as part of decolonisation, that a new state inherited all the obligations of the United Kingdom so far as treaties were concerned. I argued for the clean slate theory, which I think is the current one; it was the position that the International Law Commission subsequently adopted. So I personally agree entirely with the view that you take as Advocate General and the view of James Crawford and Alan Boyle. But I would like to ask you about that. Does it not follow that, if the UK without Scotland is the continuing state and Scotland is a new state, Scotland has to negotiate for every treaty right and obligation that it seeks on behalf of Scotland? It has to negotiate not only, say, membership of the European Union, but membership of the Council of Europe and the European Convention on Human Rights, as well as all the other trade and other agreements that have to be separately and independently negotiated. Am I right about that?

Lord Wallace of Tankerness: I think that it is a matter of principle. You are right. The practical issue is that some would be easier than others. For example, you could not imagine membership of the United Nations to be particularly problematic. Membership of NATO requires the unanimous agreement of all member states of NATO and so might be more problematic. I think that people would positively encourage membership of various human rights conventions and there is no reason to suggest that that would not happen. I stand to be corrected, not least from such an eminent jurist, but my understanding is, albeit that I have made the caveat before about the break-up of Czechoslovakia, that the two respective countries wrote to our Prime Minister indicating that they wished that the treaties to which the

old Czechoslovakia had been party should continue. You cannot make a complete read-across, but there may be some that would be nodded through. Others might be more difficult. Double taxation agreements could be problematic. The basic principle that you assert is one to which I would subscribe, but the devil would be in the detail and the practical realities.

Q35 Lord Cullen of Whitekirk: I want to ask a question about the implications of the general election. If at the time of the general election negotiations are not complete, as seems likely, is it possible that negotiation stances will form part of what political parties put before the electorate?

Alistair Carmichael: That is a matter of politics. I think that it is self-evidently going to be the case. Scotland has had a lengthy debate on this. I joined my political party as a 14 year-old, so I have dealt with this issue for the last 34 years. It has been very much a part of Scottish politics to the extent that, once we get to 19 September, I look forward to dealing with other matters of perhaps greater political significance to the day-to-day lives of my constituents. It is apparent to me now, as a member of the United Kingdom Parliament, that there is growing interest in the rest of the United Kingdom, but, with all due respect, they have a long way to catch up with us. If we were to find ourselves in that position, then, yes, I would expect the terms and conditions of the independence agreement in respect of directions in which the negotiating teams would expect to go to be a significant issue in that general election. It is by no means impossible that it may change the course of the negotiating stance that would be taken by either party to these negotiations.

Q36 Baroness Wheatcroft: Looking at the state of the UK's continuator Parliament after independence—should we get independence—what would be the status of Scottish MPs and how long could Scottish MPs continue to sit in the UK Parliament? There are very different opinions as to when that would come to an end.

Alistair Carmichael: My assumption would be that for as long as the United Kingdom Parliament has jurisdiction over the people of Scotland—that is, until the day that Scotland formally leaves the United Kingdom—then Scottish Members of Parliament would continue to sit as Members of Parliament. We are in highly unusual territory here; certainly, in the last 300 years of our constitution it is genuinely unprecedented. But I think that it is fair to assume, given the uncertainties that I have outlined about timetables, that membership of the Parliament here would have to continue. It is always, of course, for the members of both Houses to set their own sessional orders and standing orders and to determine the manner in which their own business is conducted. That is an essential consequence of parliamentary sovereignty.

Baroness Wheatcroft: I wonder whether I could ask Lord Wallace if he believes that those Scottish MPs would have to leave immediately after independence, or does he take the view that they would have been elected for a full term?

Lord Wallace of Tankerness: I share the view of the Secretary of State. I cannot see any constitutional basis on which you could sit for a place for which a Parliament no longer has jurisdiction. Up until that point, even on the simple principle of no taxation without representation—as the writ of the UK for taxation matters would cover the whole of Scotland—it would only be right that the people of Scotland had representatives.

Q37 Baroness Wheatcroft: Secretary of State, you were very clear in your opening remarks that a yes vote would mean independence come what may for Scotland, without specifying the scale of that yes vote or of the poll. Yet, as is clear, the Scots are being asked to vote for something that is very vague. Can you imagine that after a yes vote and a period of negotiation, there might be a growing body of opinion saying, “Hang on; we did not think that this was quite what was on offer. We would like a second referendum”?

Alistair Carmichael: I cannot imagine that being the case, not least because this is a decision which, while it is made in Scotland, has implications for the whole of the United Kingdom. I cannot be clearer, and I do not think that anyone on either side of the debate would wish to contest this, that a yes vote on 18 September means that Scotland will become an independent nation. You are quite right that that would bring with it substantial elements of uncertainty—you might even say risk—but that is what the people of Scotland are being invited to vote for, warts and all, if I may say so. I cannot imagine the circumstances where, having voted for independence by however narrow a margin—and as far as I am concerned, that is 50% plus one—we might not then become independent. This is a once-in-a-lifetime decision, from which there will be no resiling.

Baroness Wheatcroft: I understand the political imperative to take that view now, but I just wonder whether you think that that view might change.

Alistair Carmichael: No.

Lord Wallace of Tankerness: It is interesting that, in a long debate which has produced a lot of divided opinion, neither side—neither those advocating independence nor those opposed to it—is advocating a second referendum.

Alistair Carmichael: This is why the conduct of the debate in many respects thus far has been somewhat unsatisfactory. There have been too many unsubstantiated assertions. The Scottish National Party have clearly embarked on a deliberate strategy, which is, as the political campaigners would have it, to de-risk the proposition—that is, to invent various scenarios where, in relation to the currency, for example, they identify an element of what being part of the United Kingdom brings with it that is popular and desirable in the eyes of most Scots and then pretend that it is possible to walk away from the United Kingdom while walking back in or indeed retaining those aspects that are desirable. Currency is one; membership of the European Union is another. That is why people in Scotland—my fellow Scots—must

understand that, if they vote yes and walk away from the United Kingdom, that means that you walk away from the bits that you like as well as the bits that you do not like.

Q38 Lord Hart of Chilton: Mr Gordon Brown has entered the fray by making his contribution. I doubt that you are going to tell me whether you think that is going to assist the yes vote or the no vote, but it is clear that, if there is a no vote, that is not the end of the road, is it? There will be a completely new debate opened up following a no vote because the issues raised by Mr Brown are not going to go away. They are going to be very important, I would have thought, for further consideration of the status of the United Kingdom and the way in which it is to continue.

Alistair Carmichael: You are quite right. They are not going to go away and nor should they. It is almost a cliché to say that devolution is a process and not an event, but that is seen increasingly as a truism. From my point of view and that of my party, the devolution of further control to the Scottish Parliament, in particular of its budget-raising powers, is not only desirable but necessary. One reason why I joined my political party as a 14 year-old was my belief that Scotland could be better governed from Scotland, within the United Kingdom. The creation of a Scottish Parliament was an issue that motivated me and continued to motivate me throughout my adult political life. We have seen, though, a somewhat unbalanced politics emerge in Scotland since the creation of the Scottish Parliament where, because the funding for public services still comes directly from the Treasury in a lump sum every year, the debate in Scotland now is merely about how you spend money. We need to anchor that debate in a more balanced way, involving a greater discussion of how we raise money. I think that that will be healthy for the Scottish Parliament and healthy for political debate in Scotland. As a result, ultimately it will be good for the United Kingdom as a whole.

Q39 Baroness Falkner of Margravine: Secretary of State, I want to take you back a little while remembering that you were chief whip for one side of the coalition. I ask you to wear

that hat briefly as you reflect on this question on the role of Scottish MPs, were there to be a yes vote, in the period between the general election and the point at which they would cease to be members of the United Kingdom Parliament. My question is this. In that interim period, do you think that they would be entitled or well advised to vote on English matters?

Alistair Carmichael: That would be a question to be resolved on the other side of a general election. It is a hypothetical layered on top of a hypothetical. I confess that when the noble Baroness referred to my history as the chief whip, I was mildly concerned that I might be invited to comment on stuff that would make my answers as Secretary of State look positively expansive. But I think that there would be in that event renewed attention on the issue that you raise. How that would play out ultimately would depend on the views of the returned members after May 2015 and the terms of the debate that had taken them there. It is another level of uncertainty, which of course does not come into play if the people of Scotland remain part of the United Kingdom.

Baroness Falkner of Margravine: Lord Wallace, could I take you to the role of peers who reside in Scotland? I think that some 60 or so give Scotland as their place of residence. You have been clear in your view that, if you do not live in the United Kingdom, you should not be part of its legislature. Is that a correct interpretation?

Lord Wallace of Tankerness: I think that it is slightly more subtle than that. The key thing is the writ of summons. Everyone on the committee here is a peer of the United Kingdom, but that must be read subject to section 41 of the Constitutional Reform and Governance Act 2010, which deems anyone who is a member of the House of Lords to be a taxpayer for the purposes of three taxes: income tax, capital gains tax and inheritance tax. I think that it has to be seen in that light. You will recall that, when that Act was brought in, section 42 gave a transition period if people wished to change their membership.

Baroness Falkner of Margravine: Their status.

Lord Wallace of Tankerness: Yes, their status. That would be another thing that would have to be considered: whether people felt that it was worth paying income tax in two separate countries to continue their membership of the House of Lords.

Baroness Falkner of Margravine: There may be a view that, because they were existing members of the House of Lords, those 62 or so current peers should be allowed to continue as members and new peers from an independent Scotland would perhaps not be appointed. If those 62 remained, would you have a view on whether they, for example, should exercise full rights of scrutiny and voting rights, or would you imagine that that they would have somewhat diminished rights?

Lord Wallace of Tankerness: As the Secretary of State said in an earlier answer, each House has its own standing orders and, in what I sincerely hope is an event that will never arise, I rather suspect that people would want to address the question that the noble Baroness raises. I think that it would be a matter for the House itself to come to a view on; no doubt good sense would prevail. It is a self-governing House.

Q40 Lord Lester of Herne Hill: Secretary of State, you stated admirably, if I may say so, the need for a well-informed and rational debate on the pros and cons of Scottish independence. But does experience of referenda—with the Irish in particular, in my case—not teach us that emotion and prejudice also, unfortunately, play a major part? One of the problems that the Government will have to grapple with is that in Scotland it may be that disillusion with the English political system and the parties will encourage people to vote not on the basis of reason but because of their wish for a different kind of political order.

Alistair Carmichael: I take issue with the terminology that you use. I am not sure what the English political system is. I am here as a Scot sitting in the United Kingdom Parliament, as many other Scots have before and, I hope, will continue to do so after my time here. There is certainly a need for political reform of the United Kingdom. I think that there is in fact a need

for the different parts of England now to look at their own constitutional position. I have family there—my wife’s family lives in the south-west of England and I believe that they are as badly served by the current constitutional set-up as we in Scotland were in the past, before we had our own Parliament. I very much hope that it may be, albeit as an unintended consequence of this debate, that that debate will now be pursued in the rest of the United Kingdom, in particular in England, with a seriousness and vigour that we have not seen hitherto.

What we know about constitutional reform of this sort is that it happens only if there is a genuine popular will for it to happen and if the people somehow have a say in defining what it is that they want to have. But that is a debate that we could have within the context of the United Kingdom; you do not have to break up the United Kingdom in order to achieve political reform. We have demonstrated that already by the constitutions of the Scottish Parliament, the Welsh Assembly, the London Assembly and the Northern Ireland Assembly. We have twice given devolution to Scotland from this place. It has been three times, and we are possibly into the fourth now, for Wales and twice for Northern Ireland. The people of Scotland wishing to have a different political design can take comfort from the fact that at no time when they have sought constitutional change since we started the devolutionary process has it been denied to them—or to any other part of the United Kingdom. In fact, to take the other side of that coin, when the previous Government offered devolution to the north-east of England and the north-east looked at it and said “No, thank you”, it was not forced on them.

Q41 Lord Goldsmith: I was going to ask you about legislation. I am slightly inhibited, first, by the clarity with which you, Secretary of State, have expressed your view that you are not here to talk about hypotheticals and, secondly, because Lord Wallace has answered part of the question already. Let me propose it and see where we get to. There are two elements to the question of legislation. One is whether there is a need for legislation in relation to

negotiations. If I understand correctly what has been said so far, there is no need for legislation for the remaining United Kingdom because the UK Government have the powers already. So far as negotiations for Scotland are concerned, there may be a need to put something through a section 30 Scotland Act order, but *realpolitik* will otherwise do the trick. Have I understood correctly your view on that aspect?

Lord Wallace of Tankerness: That is a fair assumption.

Lord Goldsmith: So far as the next stage is concerned, if there is a yes vote, we have had varying evidence as to the need for legislation to deal with independence itself. Plainly, the Scottish Government and the new Scottish state, whatever it may be, will need to have legislation that sets their house in order. What will the United Kingdom Government or Parliament need to do in terms of legislation to have at least something that makes it clear that Scotland is now independent and that the United Kingdom Parliament has no further responsibility for it? Do you envisage more?

Alistair Carmichael: The union was constituted by a treaty followed by two Acts. If it is now to be dissolved, it would presumably need that at the very least.

Lord Wallace of Tankerness: The precedents are not very easy. Obviously, Scotland is not a colony and perhaps people look too simply at how independence went to some of the colonies—very often their independence Act enshrined a constitution. I do not think that anyone is suggesting that Westminster should write this constitution but there may be some way just to disapply certain Acts. We would probably have to go through the statute book to find out what would be appropriate. It need not necessarily be a major Act. I rather suspect that there is a working assumption in other places, as I think happened in the case of Ireland, that Acts of the United Kingdom would continue as simple onward traffic in an independent Scotland. Maybe it would be more appropriate for the Scottish Parliament to enact that matter as one of its first pieces of legislation as a new Parliament, should that hypothetical situation

arise. I suspect that there would have to be something that broke the link and that its content might depend on parliamentary counsel going through and seeing what bits they needed to do.

Lord Goldsmith: With the possible exception that you have raised today of the tax status of remaining peers with residences in Scotland, you are not sure that it would need much more from the United Kingdom Parliament than that.

Lord Wallace of Tankerness: The reason why I hesitate is that one knows that when one starts going down into the nooks and crannies of legislation that has been passed, other things may emerge. Some of them would possibly be fundamental in the breakage of the link.

The Chairman: One area that is concrete, which the Secretary of State has already mentioned and which I said we would return to, is the question of assets and liabilities, not to mention shared services. I know that Lord Lang wishes to speak about that.

Q42 Lord Lang of Monkton: I had better start by asking you about the context of what legal principles might apply to the negotiations. We touched on the continuator state issue but are there any other legal principles that would form the basis on which negotiations would happen?

Lord Wallace of Tankerness: It is fair to say that the legal principles in public international law that take us to the position of a continuator state are probably far clearer than those on the division of assets and liabilities. There is the 1983 Vienna convention, which has certainly not been ratified—I do not think that the UK even signed it—and is not in force, although it embodied a subject of some controversy among academics and much of what people understood to be the accepted international legal position. The one principle that seems to emerge is of an equitable apportionment, but that sometimes raises as many questions as it answers. There is possibly a principle higher than that, which is giving primacy to an agreement reached between the respective parties. If that can happen, I think that would be recognised in law, but equitable apportionment seems to be a principle that is reasonably

accepted. There are views as to whether that would be per capita; indeed, there is some evidence which I think Mr John Swinney, the Cabinet Secretary for Finance, gave to your Lordships' Economic Affairs Committee. There are other points, such as the *capacité contributive*, which is the ability of respective countries to be able to service debt. That clearly would be a matter for negotiation, but a principle of equal apportionment is one that seems to have recognition.

Q43 Lord Lang of Monkton: Thank you. You touched on the European Union earlier. You both mentioned it in passing and we have not responded with questions on it. I am not sure whether you would view that as an asset, an institution or an institutional asset. In any event, it seems to be pre-empted by the continuator state concept and it remains with the remaining United Kingdom. That seems to be the view also of the President of the Commission and the President of the European Council. In a recent debate to which you responded, Advocate General, Lord Kerr of Kinlochard indicated that a separate Scotland would need to apply for membership of the European Union and would not be able to do so until independence had taken place. That might be 18 months or some years ahead. Is that your view as to the legal position as well?

Lord Wallace of Tankerness: Because this is so unprecedented, I think that we are in uncharted waters. It may be that politics would take over. I think that what Lord Kerr then said, and I hope that I am not misinterpreting him, was that the way round that would be for the United Kingdom to negotiate on Scotland's behalf.

Lord Lang of Monkton: Yes, to which you did not reply.

Lord Wallace of Tankerness: I did not reply. It is an interesting idea. The United Kingdom is the member state. You have to recognise that, on Scotland, the *acquis* applies, so it is not a question like that of Turkey, which has a long way to go to get into that position. I do not think that anyone would guess as to what the procedure would be, but one thing that I would

say with some certainty is that the continuing United Kingdom would remain a member of the European Union with the Schengen opt-out, for example. The principles of the rebate would remain in place, but the figures would change, because the GDP of the continuing United Kingdom would be different. There would also possibly have to be some changes in the number of MEPs, but basically the opt-outs from justice and home affairs would continue. Scotland would have to apply for membership. We can debate how that would be done. The Scottish Government say that it would be under article 48, but I think that that is likely to be somewhat fraught, because it could lead to a convention and all sorts of other treaty changes being brought into play. Article 49 is the article that is there for new members. I could not say with certainty what the process would be. The other point is the question of the terms, which might be the most crucial thing, because there is no guarantee that Scotland would accede, certainly not automatically, to the terms that the United Kingdom has negotiated. In terms of the rebate, the irony could be that, because of how it is calculated, Scotland would end up contributing to the United Kingdom's rebate.

Q44 The Chairman: Thank you both very much. I do not know whether you would like to put on the record this morning any other points that you feel we have failed to cover.

Alistair Carmichael: No. I think that this has been an interesting and fairly comprehensive discussion. I have very much enjoyed it. Thank you for the invitation. If you think that I can help you in this way in the future, I will be more than happy to do so.

Lord Wallace of Tankerness: To follow up on the question asked by Lord Hart of Chilton, I would find it politically very satisfying if, in a year's time, we were before your committee dealing with the consequences of a no vote.

The Chairman: I think that the whole committee appreciates the discomfort that you must have about some of the political aspects of this. You both, Secretary of State and Advocate General, mentioned the "uncharted waters". If I can pursue the metaphor without becoming

too laboured, I think that the charts became a little clearer this morning, particularly on some of the legal and constitutional matters, which are our primary interest. Thank you very much indeed for coming.

Alistair Carmichael: As the current MP for Orkney and Shetland and as the previous MP for Orkney and Shetland, we know a bit about waters, charted or otherwise.

The Chairman: I hoped that you would both appreciate that. Thank you very much indeed.