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. Lord Hope of Craighead and Professor Iain McLean

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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
Lord Lexden
Lord Powell of Bayswater

Examination of Witnesses

Rt Hon. Lord Hope of Craighead, KT, former Deputy President of the Supreme Court, and **Iain McLean**, Professor of Politics at the University of Oxford

Q1 The Chairman: Good morning and thank you very much for coming. I know that you have both, individually, given a great deal of thought on this subject. Lord Hope, we were interested to read your helpful speech in the debate which Lord Lang of Monkton led in the House of Lords a couple of weeks ago. We have tried to define our interest. Because there are so many different committees, academic bodies and political organisations studying this issue, the limits of our inquiry were in our call for evidence. I hope you will not feel they are too narrow; it does not mean that we are circumscribing the conversation. If you feel there are points which we fail to make in our questions or comments, please add those in.

This is a fast-moving situation, with the lead story in the newspapers and on television and radio this morning about the speech which the Chancellor, Mr Osborne, is due to make tomorrow in Edinburgh, suggesting that he will rule out the possibility of a currency union if there is a yes vote, which again circumscribes some of the questions we wanted to ask you on the negotiations et cetera. Perhaps the most sensible thing is if I begin with a very general question. Lord Hope, what legal principles do you think will govern negotiations for Scottish independence in the event of there being a yes vote in the referendum?

Lord Hope of Craighead: I have not studied this subject in anything like the depth that your legal adviser or my neighbour who will give evidence with me have. My background is that I dealt with the Scotland Acts 1998 and 2012, and have dealt with Commonwealth cases through the Judicial Committee of the Privy Council. The basic structure, as I see it, is what we find in the Scotland Act 1998, which created a devolved Parliament whose powers do not extend to the constitution. So the question in my mind is what Westminster is going to do about the powers of the Scottish Parliament, which are circumscribed until independence is created. I have in mind also section 33, which allows pre-legislative scrutiny of bills from the Scottish Parliament where it is not within its powers to make laws. I am pretty sure that an attempt to do something that is a reserved matter would be challenged. It would have to come to the Supreme Court, which would deal with it as briskly as it could. But one has to bear in mind that these powers are not without some fence within which it is necessary to stick.

As for the Commonwealth, I have looked at two examples which the committee might find helpful. One is the Solomon Islands Act 1978, and an earlier Act, the Trinidad and Tobago Independence Act 1962. I will not take time in this answer to explain what I found in them, but these are two examples of independence being granted—I am assuming, although I may be wrong, that it would be for Westminster to grant independence to Scotland rather than for Scotland simply to assert it, because there has to be some legal structure within which the thing would take place.

The Chairman: What you have said, Lord Hope, very much coincides with written evidence, which I think you have seen, that we have received from Lord Mackay of Clashfern. Essentially it confirms what you have just said, particularly about the need for preliminary legislation by the UK Parliament, even after a yes vote in a referendum.

Lord Hope of Craighead: I have discussed the matter with Lord Mackay and I entirely agree with him on that.

The Chairman: Professor McLean, do you have a point you wish to add?

Professor Iain McLean: In the presence of the company that I find myself in, chair, no.

Q2 The Chairman: The next question, addressed to you both, is mostly a practical one arising from those different issues which you have addressed and about which we have also had evidence from Lord Mackay of Clashfern. It is about the ambition of the timetable that has been set out by the Scottish Government on their aspirations—let us put them as no more than that—for achieving full independence within a matter of, I think, 18 months. Perhaps you would like to start on that, Professor McLean.

Professor Iain McLean: This is ground I feel more comfortable occupying. I do not think that the Scottish Government's timetable is realistic. One reason it is not realistic is that their principal counterparty will be the rest of the UK, as it will become, and the current Government of the rest of the UK, as we know, runs until May 2015. There will then be another government, whose composition we do not know. The next government may have different policies, priorities and attitudes to such questions as the one you have just mentioned, the currency, as well as to the other enormous questions affecting the relationship between Scotland and RUK. After the currency, the most enormous question is that of the UK submarine fleet and base. Even supposing discussions with the commissioners or plenipotentiaries—or whatever they are—appointed by the present coalition Government were to get anywhere, I would presume that on the controversial matters they would have to start again after the UK general election. I also look at this from the perspective of a game theorist who says that you think back from the final conclusion. The interest of the current UK Government in the event of a yes vote in Scotland in September is simply to say no to everything.

The Chairman: In spite of the Edinburgh agreement?

Professor Iain McLean: In spite of the Edinburgh agreement. As members will know, the two governments currently have very different interpretations of the Edinburgh agreement. The Scottish Government say in their white paper that the Edinburgh agreement commits RUK in effect to accepting the Scottish Government's position on various matters such as currency and procedures for EU entry. The UK Government say that the Edinburgh agreement says what it means and means what it says, which is that the parties should negotiate "constructively". I think that the UK Government's interpretation of what the Prime Minister signed off is closer to ordinary use of language than the Scottish Government's.

Q3 Lord Cullen of Whitekirk: I declare an interest as the chancellor of a Scottish institution, the University of Abertay Dundee. Is it correct to interpret paragraph 30 as meaning that in the negotiations the Scottish Government will be concerned solely with the best interests of Scotland while the UK will be concerned solely with the interests of the rest of the United Kingdom? In other words, there is a complete split, which is quite different from the existing devolved situation.

Professor Iain McLean: That fact will be governed not so much by the content of the Edinburgh agreement as by the fact that after a yes vote this September the negotiating party will be the Government of the UK, although they will in effect be acting as the Government of the rest of the UK. The position of Scottish MPs will then be an anomaly which we may have to look at in a moment. It is an over-interpretation of section 30, which I do not have in front of me—

Lord Cullen of Whitekirk: Paragraph 30.

Professor Iain McLean: Paragraph 30, thank you, Lord Cullen. It is an over-interpretation of paragraph 30 to say that it commits either side to any substantive position. I think it commits both sides to talking in a spirit of co-operation and to no more than that.

Lord Lang of Monkton: Could I follow up a specific point on the currency, which Professor McLean referred to in the context of the different attitudes on either side? I believe, speaking from memory, that the Scottish Government's white paper says that the pound belongs as much to Scotland as it does to England. My understanding is that it does not belong to Scotland nor to England but to the United Kingdom. That is the legal entity and that would remain the legal entity after Scotland left the United Kingdom. Is that correct?

Professor Iain McLean: That is my understanding, although I defer to the lawyers in the room.

The Chairman: Lord Hope may want to intervene.

Lord Hope of Craighead: I think that is right: it is the currency of the United Kingdom and Scotland would have to find a currency of its own if it cannot agree to share the pound with the United Kingdom. That is how I look at it. As far as the date is concerned, I think that it was chosen for political reasons rather than practical ones. As we know, independence day would be in March 2016 and the next election for the Scottish Parliament will be in May that year. I think the First Minister is keen to be First Minister on independence day, and it is not entirely certain what he will be after the election in 2016.

Q4 Lord Powell of Bayswater: I want to add another aspect of the timing, which is the question of Scotland and the European Union. Am I right that only the UK could negotiate about Scotland, at least until independence was granted, and that Scotland could not negotiate on its own behalf?

Professor Iain McLean: That is my understanding. Again, I would defer to any lawyer who thinks differently, but I have not yet heard a lawyer who thinks differently from that.

Lord Powell of Bayswater: You do not think that a more pragmatic solution might be found? The political reality will be that Scotland has voted yes and therefore Scotland should be

allowed to conduct negotiations in Brussels. Perhaps ostensibly that would be under a UK umbrella, but it could nevertheless get on with talking.

Professor Iain McLean: That would depend on whether this was an Article 48 or an Article 49 negotiation. If it was an Article 48 negotiation, I cannot in practice see the UK Government handing that to the Scots, because the UK Government have agendas of their own in relation to the EU. I do not see any possibility of it abnegating that. If the procedure was starting an Article 49 negotiation early, before Scottish independence had been declared, I see that as a more practical route via which Scottish representatives could negotiate directly with the EU. But in that case, the rest of the UK becomes one of the counterparties in the European Council and would express its own views on the matters in dispute in that role.

Lord Powell of Bayswater: There is also the general question of the EU's own timetable, ranging of course from our elections and our presidency of the European Union in 2016 to the elections in France and Germany. All these would combine, surely, to make delay almost inevitable beyond the preferred date for Scotland to have independence.

Professor Iain McLean: I do not know whether "almost inevitable" is too strong, but I would certainly say "very likely".

Q5 Lord Lexden: Is it possible to distinguish, particularly in legal and constitutional terms, between issues that would have to be settled before an independence day and issues that could be settled later—by analogy with the Irish Free State in 1922, where a large number of issues were settled in the years that followed? A bipartisan approach was established at Westminster to make that possible. We do not know whether that will happen in future but can a distinction be drawn?

Lord Hope of Craighead: One can draw some analogy with the Solomon Islands Act. It may be rather strange to think of that as an analogy, but there are three chapters in the statute that would have to be put in place in the situation that you describe. First, there would have to be

something that says that as from the given date—it need not be the independence date, but certainly a specific date—the Westminster Parliament shall have no responsibility for the government of Scotland. At the moment, the position is that it does have that responsibility, and it would simply have to write that out by statute. Secondly, it would have to say that no Act of Parliament after the independence day should extend to Scotland. Thirdly, it would have to do something about the existing laws. In the Trinidad and Tobago example, there is quite a lengthy schedule that preserves existing laws, which is very important for businesses: anybody doing business needs to know what the law is. I would imagine that the agreement would be that existing laws would remain in place unless and until they are altered by the Scottish Parliament. That is the basic structure. One can leave aside all the negotiations in a way, because, strictly speaking, once it has all these powers and Westminster ceases to have powers, you have an independent state. The problem is what sort of state it is and what the state of its currency is.

Lord Lester of Herne Hill: I wonder whether I have got this right—I may not have. Lord Hope, Professor McLean and Lord Mackay of Clashfern all agree that there needs to be paving legislation before negotiations can take place. That is the first point. Secondly, the Scotland Act will remain in force until independence day. Thirdly, if the Scottish Government were to try to proceed without proper paving legislation having been agreed, there would the probability of a legal challenge because they would be acting beyond the powers conferred by the Scotland Act. Have I got that right?

Lord Hope of Craighead: That is exactly my position, yes.

The Chairman: So in the context of the timetable, we are talking about a great deal of preliminary work involving statutory changes taking place in both Houses of the UK Parliament before negotiation could proceed?

Lord Hope of Craighead: I suppose that one can negotiate and then ratify later. I may be corrected by the academics, but that is one possible scenario. If everybody was of an equal mind and prepared to do this, you could negotiate before any statutes were put forward to ratify what you have decided. That would speed the process up, but I do not see it happening in the present climate until the referendum has been resolved, because the whole effort at the moment is aimed at winning the political battle rather than dealing with the detail.

Lord Lester of Herne Hill: I understand that, but surely anybody with a sufficient interest could meanwhile challenge what was going on, even, on this occasion, up to the Supreme Court?

Lord Hope of Craighead: I do not see a focus for that challenge unless there is something by way of an act of the executive that could be challenged under section 57, or an Act or bill of the Scottish Parliament that could be challenged under section 29. You can do an awful lot without the formality that would give rise to a challenge, if parties are prepared to deal with each other in that way. That is a way of speeding things up, if there is the political will on both sides.

Lord Powell of Bayswater: That last comment is the point I was going to come to. The political reality will look very different, will it not, on the morning after a yes vote? The idea that the Scots cannot even start to appoint their own negotiating team or start negotiating until the UK Parliament has legislated in favour of it will look rather odd and, I would have thought, hard to justify. At the least, there would be pressure for a very quick bill that would go through in a couple of days or something to enable negotiations to start. I find it hard to imagine anything other than that.

Lord Hope of Craighead: I agree with that. I have set out as clearly as I could, in agreeing with Lord Lester, what the legal structure is. However, that does not prevent people from negotiating, provided you know who the negotiators are and provided that you understand that

they will report back eventually with a view to a treaty or legislation to give effect to what they have decided.

Q6 Baroness Falkner of Margravine: Lord Hope, you have just said that the big conundrum is the lack of transparency and knowing who the negotiators are. Of course, from the Scottish side, we have *Scotland's Future*, which sets out that negotiations will be led by the First Minister and representatives of the other political parties and from across Scottish public life. The question that arises is who the negotiators would be on the United Kingdom side. We know that Lord Mackay of Clashfern believes that the negotiators on the United Kingdom side should not be Scottish: in other words, not elected representatives in Scotland. There is also speculation as to whether the other assemblies of the United Kingdom, the Welsh Assembly and the Northern Ireland Assembly, should be involved. Do they have a stake in the outcomes? What, in your view, would be the appropriate negotiating team for the United Kingdom successor state?

Lord Hope of Craighead: I think that is a matter for this Parliament. A quick bill, as Lord Powell suggested, would be a way of sorting that out. It has to be clear that they have the authority to negotiate. One has to get over the hoop that an election is coming up, and it would have to be addressed somehow in a way that has cross-party support and that would get over a change of government, if there was one. Then it would be clear that they would report back to this Parliament, with a view to it approving by legislation whatever they recommend. I do not see how the commissioners, given the various interests, could begin unless they were confident that they had the authority of this Parliament to do it.

Professor Iain McLean: I do not consider it at all likely that this Parliament would fetter itself to not include any Scottish representatives in its negotiating team. Scottish MPs are already saying that they, too, are elected by the people of Scotland. Should Parliament and the current Government suggest that, for the sake of argument, the current Chief Secretary should

be a member of the UK negotiating team, I think any argument that he should stand down because he represents a Scottish seat would not be well received by him or his party—or, I suspect, by this Parliament.

I do not know whether the Irish analogies that Lord Lexden invited us to consider, but which we have not yet come to, are at all helpful here. I can talk in partial answer to Lord Lexden now or leave it until later.

The Chairman: Please do, I think it is relevant at this point.

Professor Iain McLean: Lord Hope and I briefly discussed both 1921 and 1706 as possible parallels. What happened in those cases was that the two Parliaments appointed commissioners who were answerable to their Parliament, and only to their own Parliament. In some respects, the relatively optimistic scenario that Lord Lexden mentioned—that you can agree on the principles now, get the legislation ready and continue on the details into the future—is borne out by the 1921–22 process and, to a lesser extent, by the 1706–07 process. One might say that in 1921–22, although there were two countries that had been at war, the agreement that was reached was extremely harmonious. That is the rosy view. The slightly less rosy view is that one of the things that they put off was the delineation of the boundaries of the Irish Free State and Northern Ireland. Having a boundary commission—a subject I have written about and which was fully intended by Lloyd George to mean entirely different things to the Northern Ireland unionists and the Irish Free State—was a precondition of having a treaty. But as everyone in this room knows, it all ended in tears, so much so that when the boundary commission was going to report in 1925, the contents were leaked by its unionist member. The report was then suppressed by both governments and not published until 1969, and we know the border trouble that has existed since then. Luckily, on the precise matter of the border, there is no land analogy and I do not think there will be an out-at-sea sea analogy either. I think the out-at-sea border will be settled quite easily.

There are some matters, including very important ones, that could be delayed. The Scottish Government say in their white paper that they want to negotiate a share of what would be UK institutions: embassies, the BBC, the DVLA and so on. A lot of that, I guess, is sub-statutory and can be sorted out whenever the parties are ready. Even one of the two great matters would not need to be sorted, I think, by independence day—namely the fate of HM Naval Base Clyde. But what would imperatively have to be settled by independence day or before is the currency. We are in a different world in that respect to the world of 1921, as the Irish Free State, and then the Irish Republic, continued to use the pound for a further 50 years. Here, we in the British Academy—I know my colleagues have sent in written evidence—think that the closer analogy is the Czech/Slovak split of 1992–93. The currency union in that case lasted, in effect, three days.

Baroness Falkner of Margravine: I wanted to come back on having commissioners drawn from the UK Parliament and not excluding Scots. Would you hold that position, or would you find it logically consistent with good faith in negotiations and constructive negotiations, if the majority of the Scottish representation was SNP?

Professor Iain McLean: I would say that is a decision for the UK Parliament. I think it is unlikely on principle, as I said a moment ago, that the UK Parliament would agree not to have any Scottish representatives in the discussion. It would be for the UK Parliament to decide which Scottish MPs, or indeed Scottish peers, were among the commissioners.

Lord Hope of Craighead: I think your question is directed to the Scottish end and I would think that is a matter for the Parliament at Holyrood to decide, which of course has an SNP majority. It would ultimately have to pass the bill that gives authority to its commissioners.

Baroness Falkner of Margravine: Actually my question was about who the United Kingdom's, or the successor state's, negotiation team would be.

Lord Hope of Craighead: But there has to be an equivalent on the other side.

Q7 Lord Goldsmith: There are two interesting periods: the period between September 2014, assuming that there is a yes vote for independence, and May 2015, when the general election takes place; and the period between May 2015, when the election takes place, and March 2016, independence day. The question then arises, which many people have commented on, of what the status is of MPs elected for Scottish constituencies during both those periods. There is the additional problem, in the second period, of the possibility that the Government will change. We saw how closely the decision as to who the Government would be depended on the numbers at the previous general election, and one can easily foresee that the numbers would change as a result of Scottish MPs disappearing on independence day. So there are two questions. First, who negotiates for the rest of the United Kingdom and what is the role of those elected for Scottish seats? That could arise in both those periods. Lord Hope, you said that certain things are a matter for the UK Parliament, but that raises the question of who constitutes the UK Parliament for those purposes. Given that paragraph 30 of the Edinburgh agreement includes the need for both sides, as it were, to negotiate in the best interests of both people, do you include people for whom the accountable body is the UK Parliament but whose interests are in Scotland because they are going to be part of Scotland? Secondly, more generally, what would the status of Scottish MPs be in that period between the next general election and independence day in 2016?

Lord Hope of Craighead: I have not thought this through completely but it seems to me that the Scottish MPs would be elected for the Parliament: they would be elected to serve for the entire period of the Parliament in which they would begin to serve. In the initial period between the referendum date and independence day, I imagine they would have the full powers of any member entitled to speak and vote on any issue without being excluded. That is their current position. After that, they are still there. There is a question I am very sensitive to because I live in Scotland and I have to pay my travel, if it is not reimbursed for me, over

whether their travel could be reimbursed after independence day, and that might have some sort of practical effect. There might be a question about the expenses of their constituency offices. These sorts of practical things may create a situation of their own. But technically I would have thought that they would be elected to serve for the Parliament until the Parliament is brought to an end by, let us say, a vote in the Commons.

Q8 Lord Goldsmith: Perhaps I might put a question to Professor McLean that might bring a slightly less legal answer. I am the last person to criticise giving a legal answer, but I wonder whether there is a more political answer as well.

Professor Iain McLean: The legal answer being what it is, how would Scottish MPs in the 2015–20 Parliament behave in practice after independence day, or in the run-up to independence day? This question has two parts, one of which Lord Goldsmith has already alluded to. One part is the contingency that the UK government elected in 2015 would lose their majority when the Scottish MPs go. This has obviously occurred to all of you, but if the numbers are such as to produce that result, the implication is that the UK Government have every incentive not to agree in a hasty way to the matters in which the RUK and Scotland are the counterparties. That makes it all the more likely that independence day could not be in March 2016. If it was, there would be a number of unsettled matters. Speaking as a political scientist, I can see that there would be a very powerful incentive for the Scottish MPs elected to the 2015 UK Parliament not to resign at least until after the 2016 Scottish Parliament election, because we do not know what Parliament will be elected in Scotland. Should the Parliament that is elected in Scotland decide that independence was a terrible mistake and wish to abort the negotiations—however small that likelihood is—if Scottish MPs had voluntarily resigned their seats in March they would be looking a little silly in May or June. I would predict that they would not go voluntarily before May or June 2016 at the earliest.

Lord Goldsmith: Looking at that second period between the 2015 election and independence day, some people suggest that the UK government during that period would be a lame duck because they would be looking at the possibility of disappearance relatively soon. Do you have any comment on that?

Professor Iain McLean: If those are the electoral numbers, those will be the electoral numbers. Of course, there is an interaction with the Fixed-term Parliaments Act 2011. Until we know the constituency numbers, we probably cannot go much further than saying that the procedures laid down under the Fixed-term Parliaments Act would be central to any calculations by the next UK government.

Q9 Lord Lester of Herne Hill: Yesterday, Lord Newby was asked by someone in the House about the implications for the BBC of Scottish independence. It is quite a good example to ask you about because broadcasting does not stop at a land frontier. There are EU free speech rules as well as the European Convention on Human Rights that at the moment govern the BBC and its listeners. In the negotiations on the BBC, am I right in thinking that if Scotland is not in the EU there would be a question about the application of the EU broadcasting rules? Whether it is in or out of the EU, the European convention would provide at least some common standards, because presumably Scotland and the UK would continue to be bound by it. I hope that is not too technical a question.

Lord Hope of Craighead: I am not sure about that, with respect. The United Kingdom is a signatory to the treaty that created the Council of Europe. Scotland would be a new state and it would have to become a member of the Council of Europe. There is a void there as to whether it would have actually crossed the bridge and whether the people of Scotland would be covered by the European convention until they become signatories to the treaty and assert it as part of their law. I do not know exactly how they propose to treat that, because there is no discussion of it in the white paper which the SNP issued.

Lord Lester of Herne Hill: In trying to work out not only what you call the BBC but, more importantly, how you guarantee freedom of communication in broadcasting after independence—given that it does not stop at the land frontier—how would they negotiate on the European obligations binding the UK but apparently not binding Scotland?

Lord Hope of Craighead: Scotland could have a constitution. It would take a long time to agree it, of course, but it could have a constitution that contained the rights that are set out in the Human Rights Act 1998 and the schedule. That could be done fairly simply. Without that, there is a question mark over exactly what the right to free speech is, except on what the judges divine from the common law, which would be the only anchor they would have.

The Chairman: We will go back to Lord Lang, who I think is the only member of the committee who has been a Scottish MP.

Q10 Lord Lang of Monkton: Yes, I think that is right, Lord Chairman. Happily, I do not plan to revert to that status in any circumstances. I would like to seek clarification of the position of Scottish MPs after independence, who have been elected, as Lord Hope said, for a Parliament. This matter was raised in the House of Lords a week or two ago and the Advocate General for Scotland, Lord Wallace of Tankerness, said that that would be a matter for negotiation, which elicited a gasp around the chamber. I heard views expressed afterwards that some sort of statute would need to be passed to clear up the position. Surely, if they are no longer citizens of the United Kingdom, as most of them would no longer be, and if they no longer had constituents whose interests they had been elected to represent, that would seriously undermine their status. Is there no statute that clarifies the position they would be in in that situation, and if there is not would we therefore need to form new legislation or, as the Advocate General said, reach a negotiated settlement?

Professor Iain McLean: I query your premise about UK citizenship. The Scottish white paper says that it will offer Scottish citizenship to various classes of persons and it is quite

comfortable with them holding UK citizenship, as they all would on independence day. Therefore, I assume by default that Scots, including Scottish MPs in particular, will continue to be UK citizens until some legislative change is made if the UK chooses not to offer UK citizenship to those living in Scotland, but that would be its choice. Beyond that, I cannot go beyond my answer to Lady Falkner and Lord Goldsmith: that this would be highly political and that whatever negotiations Lord Wallace speaks of—and he is speaking for the present Government—might take a different form under the new UK government. I think that the spirit of self-abnegation would not be particularly strong among Scottish MPs, at least not until the result of the 2016 Holyrood election was known.

Lord Hope of Craighead: The Trinidad and Tobago legislation addressed the issue of nationality. That would have to be put into any independence measure. There could be a continuing citizenship until somebody declared themselves a citizen of Scotland. There would be that option, which I suppose could be available under the Scottish legislation. But this would be a matter of detail for the independence measure. As a matter of negotiation, that would be fairly simple to solve. I do not think that is one of the big obstacles to independence.

Q11 Lord Hart of Chilton: Lord Hope, you spoke in the debate about what the impact on the Supreme Court would be in the event of independence. Perhaps you could expand a little on that. Lord Mackay has a paragraph in his note on the same subject. I would like to hear a little more from you on that.

Lord Hope of Craighead: The position at the moment is that under the Constitutional Reform Act 2005, among the 12 Justices there have to be Justices—no numbers are put on it—who have experience of the practice and laws of all parts of the United Kingdom. Maintaining the tradition in the House of Lords has resulted in there being one from Northern Ireland and two from Scotland. Once they join the court, they become members of the court, with all the powers of every other member. They sit as much, indeed much more, on English appeals and

Northern Irish appeals as they do on Scottish appeals. There is every reason to maintain the existing Justices in position because they are there as members of the court, having been appointed to serve the court on behalf of the UK jurisdiction. That situation has to end in the event of a new appointment. The Judicial Appointments Commission would not be looking for somebody from a foreign state, so there would be that break in the tradition, which I described in my address.

As far as the jurisdiction is concerned, of course Scottish appeals would cease to come south but some provision would have to be made, as you find in Commonwealth legislation, for the continuing appeals. New Zealand, for example, retained the right of appeal to the Privy Council. When that was ended, it was decided that appeals that had already gone through the Court of Appeal in New Zealand would not be subject to the measure that stopped appeals to the UK Court of Appeal. That has meant that one or two cases have come from New Zealand since the jurisdiction was stopped. So a decision would have to be taken as to whether appeals that had been marked and were pending hearing, or perhaps even being heard, on independence day should continue to be within the jurisdiction of the Supreme Court, but it would be impossible to mark a new appeal after independence day, if that was to happen.

Can I add one footnote? There is an important fact to consider in the maintenance of the present team: Wales. There are a number of cases—I sat on one, and one is being heard next week—under the devolution system for Wales. To be frank, the people who know about devolution—the right language to use and its feeling—are the Scottish justices who have dealt with this for a number of years. There is a strong case, until there is a Welsh member of the court, to maintain the Northern Irish and Scottish representation that we have, because we have that balance, which gives some degree of confidence to the Welsh that their position is being understood.

The Chairman: Do you want to pursue that, Lord Hart?

Lord Hart of Chilton: I do not think so. I was just looking to see whether Lord Mackay said anything that it might be useful to have Lord Hope's comments on. He said, "However, two independent states could agree to have a supreme court in common although if this were to be agreed the constitution of that court would require to be adjusted to take account of the new constitutional position of the two nations". I suppose that one might regard that as fanciful.

Lord Hope of Craighead: I do not think it is entirely fanciful. I think that the identity of the judicial body is important. There is the Judicial Committee of the Privy Council. That is where appeals from New Zealand went to. They are the same judges, to all intents and purposes, but there could be privy counsellors from Scotland who would continue to exist, I suppose. It could be handled through the Privy Council, but I think the atmosphere in Scotland at the moment is very much against that. I do not think they like appeals coming south to any court. Lord Mackay is right: it could be done if they wanted to do it.

Q12 Lord Cullen of Whitekirk: Lord Hope, you mentioned the 2005 Act. Can you remind me of the position of the existing so-called Scottish Justices? Were they appointed specifically to represent Scotland or were they appointed simply to be members of the Supreme Court?

Lord Hope of Craighead: They were appointed to be members of the Supreme Court, and that is how one regards oneself. It is very significant, because of course we have to share the Scottish jurisdiction with the English appointees but they regard themselves as part of the court of the United Kingdom.

Lord Cullen of Whitekirk: So I take it that when an advertisement is put in the papers, it does not say specifically that applications from England will not be entertained?

Lord Hope of Craighead: No, it does not. I sat on the appointments commission and we were very careful in the design of the advertisement for that very reason. We are very anxious not to identify people as representing their individual nations. Part of the strength of the court is the way in which all the jurisdictions come together and pool ideas.

The Chairman: Although, Lord Hope, you indicated in your previous answer that people are identified by nationality even if they are not recruited in that way.

Lord Hope of Craighead: Well, not nationality, Lord Chairman, but by experience. You have to have knowledge of the laws of Scotland in order to be able to guide the court in how it deals with a Scottish appeal. That sort of experience is necessary, just as you need people from England with Chancery experience or commercial experience or whatever it might be.

Q13 Lord Lester of Herne Hill: When the Constitutional Reform Bill was being debated, Lord Cooke of Thorndon attempted to widen the pool for the Supreme Court to include Commonwealth judges. He failed, for various reasons. The Court of Final Appeal in Hong Kong allows a foreign judge to sit on that court in order to broaden its composition and cosmopolitanism. It would be theoretically possible, would it not, to imagine either the Judicial Committee of the Privy Council or a revamped Supreme Court at least allowing for the appointment of Scottish judges after independence to either of those bodies in order to deal with the kind of thing I was talking about before, such as European convention issues and others that are part of the glue that binds Europe's states at the moment.

Lord Hope of Craighead: I see no problem with the Judicial Committee of the Privy Council because anybody who has held high judicial office and is a privy counsellor is competent to sit on the Judicial Committee. That avenue would be open even after independence. There is no reason why, if they thought it was helpful, they should not invite a privy counsellor to sit, as they used to do before Lord Cooke was a member of this House and a number of New Zealanders came, and we had a Caribbean judge as well. That is easy. I think the Supreme Court is quite different. I do not see how that would work because there would be no Scottish appeals coming any more. If not strictly legally, the provision is that all parts of the United Kingdom would forget about Scotland. You could not put somebody in there from Scotland under that system.

Lord Goldsmith: Perhaps I can widen this slightly. It is perfectly possible to have two or more sovereign nations agreeing on a common appeal court. There are not many examples, but the Caribbean Court of Justice is one. The Privy Council is somewhat different. My question to Lord Hope is: would there be benefits to the people of the rest of the United Kingdom and, indeed, Scotland by continuing to have a common court able to develop almost a common law? I know that Scots law is different from English law and the English do not always understand that—we just think you have strange concepts that we cannot pronounce properly, but otherwise it is the same—but from your experience, both sitting in Scotland and in the Supreme Court here, do you think it would be advantageous to continue to have a common court to deal with the most difficult issues so that the people of Scotland and England got the same answer?

Lord Hope of Craighead: I do believe that. Part of the background is that a great deal of legislation that affects commercial matters applies throughout the United Kingdom, and much of that would continue after independence. There is great value in having a voice on the court that interprets a provision that has to apply both to Scotland and to the rest of the United Kingdom. The problem is more an emotional one, or you might say a political one. I do not think that the atmosphere in Scotland would go along with the idea of being told what to do by London. That is the reality, and it colours so much of this debate. There is a great deal of resistance, but in principle what you say is right and I would personally regard it as very desirable.

Q14 Lord Lang of Monkton: I am interested in our witnesses' views on the principles underlying the apportionment of assets and liabilities between an independent Scotland and the remaining continuator United Kingdom. The Scottish Government's white paper seems to assume that Scotland has an automatic entitlement to a share of all assets. It is slightly less clear on liabilities, as one can understand. But the UK Government's view, as expressed in

their departmental papers, is that the UK as the continuator state would be the prime inheritor of those assets: fixed assets would remain with the nation where they were located, but moveable assets and liabilities would be a matter for negotiation, with the UK in the position of owner. Is that correct and are there any underlying legal principles or statutes that support that position?

Lord Hope of Craighead: That is exactly as I see it. The fixed assets point is easy. Ownership of things built above ground adheres to the owner of the ground. It is a simple position and the lex situs determines who owns property there. Moveable assets, debts and credit balances are different. That is for negotiation. I suppose the banks would maintain that if they had a head office somewhere, the amount of assets they held should be attributed to the place where they had their head office, but that is much more open to question. Ultimately, it comes down to negotiation. Of course, it is a question of negotiating one balance against another and there are interests on both sides to be balanced out.

Professor Iain McLean: I agree with Lord Hope that the assets question is relatively easy, as long as the correct distinction is made between an institution and an asset. Your legal adviser gave a clear answer on this to a committee in another place a couple of weeks ago, and I am sure he can repeat it to you, so I will not attempt to usurp him. On the liabilities side, according to the Scottish Government's white paper and other commentators, there seem to be three possible positions. The Scottish Government say that they are willing to accept a historic share of the UK's liabilities and they choose a start date for that historic share that happens, by strange coincidence, to be favourable to the political position of the current Scottish Government. I think this is a non-runner. The only base year possible for a historic share is 1707. The data are missing for the first 200 or 250 years of that apportionment. That leaves in play population share, which is easy as everybody knows what it is, and share by GDP, which is slightly trickier.

The Scottish Government's white paper insists that, in 2015 at any rate, on what it regards as the proper apportionment of North Sea assets and entitlement to future revenue flows from the North Sea, Scottish GDP per head will be greater than the rest of the UK's GDP per head. The numbers they provide from official statistics support that for independence day, whatever they may say about independence day plus one. But it is an implication of that position that since among the major things to be apportioned is the UK's public debt, creditors would look to relative GDP as one of the criteria of creditworthiness. If the relative GDP per head of Scotland is higher than that of the rest of the UK, that might lead to an argument that Scotland should take not less but more than its population share of debt. I cannot imagine that argument being acceptable to the current Scottish Government. The realistic territory we are in is population share or GDP share of liabilities. I do not think any other apportionment is worth serious discussion.

Lord Lang of Monkton: While we are on the subject, can I tempt you on to the area of defence and the location of the assets at Coulport and Faslane? How would you contemplate those being apportioned? Would it be entirely a matter for negotiation?

Professor Iain McLean: Fixed assets have already been covered by Lord Hope's answer, I think.

Lord Lang of Monkton: Is a submarine moored alongside the base a fixed asset? Probably not.

Professor Iain McLean: No, a submarine is not a fixed asset.

Lord Lang of Monkton: It is very mobile.

Professor Iain McLean: Then there are principles of international law and previous independence discussions, and at that point I bow out of the discussion and leave it to the lawyers.

Lord Hope of Craighead: The same would apply to aircraft in an airfield in the north of Scotland. They can fly off the airfield. Moveable things are open to negotiation. I was talking about the buildings, the dockyard and so on, which are fixed.

Q15 Lord Cullen of Whitekirk: The stated intention of the Scottish Government is to maintain shared services in certain respects, for example research councils. It appears to be envisaged that there should be accountability in that respect to the Scottish Government and the Scottish Parliament. Of course, we are talking about organisations that are presently UK-based and serve the whole United Kingdom with assets in different places. Can you see how accountability to the Scottish Government and Scottish Parliament would work alongside that to United Kingdom organisations, particularly where there may be different policies being pursued in Scotland from the rest of the United Kingdom?

Professor Iain McLean: These seem to be contractual matters post-independence—vital to those affected, as are many others, but not central to the independence act. As I envisage it, the Scottish Government would come to the RUK government—and this discussion would start before independence day—saying, "We would like to continue to have access to the UK research councils. Can we talk terms?", and the RUK government, in the spirit of the Edinburgh agreement, should be willing to talk terms. Whether those terms would include Scottish representation on—well, on what? In the example of the research councils, these are in a structure that ultimately reports to BIS. The rest of the UK negotiators would be saying, "On what body do you wish to see representation?", and the discussion would go from there. I do not know where it would go, but as it would be discussion between two parties about whether or not to enter a contract, clearly the final contract has to have the approval of both parties.

Lord Cullen of Whitekirk: I was thinking that there might be strain due to the effect of policies in one part of the United Kingdom being different from another and consequently a difficulty in holding the whole thing together.

Professor Iain McLean: That depends on whether you regard a research council as a distributor of money according to certain principles, in which case it is important to know certain things: where does the money come from and in what proportions, and who sets the principles of distribution? On this one, I am relatively upbeat, if that is the right word. It is a contractual matter and it will be up to the two parties to agree a contract, which the UK Government have said they would do in the spirit of the Edinburgh agreement.

Lord Hope of Craighead: I agree with what has just been said. If one thinks of other shared services, such as the National Health Service and the ability of specialist hospitals to provide assistance across the border, that could be solved by contractual mechanisms. There is also the police service and the cross-border warrants system. There are cases that examined this, first, in relation to the Irish position and then in relation to Scotland. If somebody is wanted in England but happens to be in Ireland, there is a system of the signing of warrants that would enable them to be exchanged relatively easily. This is done within something that is rather like the common travel area. They do not need to go through the European arrest warrant system because in dealing with Ireland we regard ourselves as dealing with a relatively friendly and co-operative nation with a similar system of justice. That kind of thing could be perfectly well shared, provided there is a legal structure put in place to give effect to it.

The Chairman: Thank you both very much. You have been enormously helpful and have helped us to get clarity at the beginning of our evidence on these complicated matters. Are there any points that either of you felt you wanted to be sure that the committee understood, which we have failed to address?

Professor Iain McLean: I would only reiterate that the British Academy and the Royal Society of Edinburgh have supplied background evidence, and we would be happy to supply any further evidence should you wish.

The Chairman: That is very kind. Thank you. Lord Hope?

Lord Hope of Craighead: No, Lord Chairman, I do not have anything to add. The questions have covered the ground very fully, if I may say so.

The Chairman: Thank you very much for your time and your thoughts. It has been very helpful.