HOUSE OF LORDS

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Witnesses: Professor Tony Wright and David Howarth

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Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Pannick
Lord Powell of Bayswater
Lord Rennard
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witnesses

Witnesses: **Professor Tony Wright**, [University College London], and **David Howarth**, [University of Cambridge].

Q79 The Chairman: Good morning to both of you. Welcome back to the Palace of Westminster, although I seem to meet you in the corridors on many occasions, so this is obviously still a home from home for you. We are very grateful to you both for coming. As is normal Select Committee procedure, this is being recorded, so please identify yourselves for the record when you first speak. Thank you, David Howarth, for your very useful note, which was much appreciated by Members of the Committee.

We have embarked on this inquiry mainly because we have, in relation to various Bills that have come before us—not only since last May—come up against concerns about the process by which these Bills are taken through Parliament by the Government. We have been asking ourselves questions about whether there was some overarching concern that we could expound so that we could then, we hope, look for some solutions in the political process in the broadest possible sense, through consultation and government activity, as well as parliamentary activity.

We are very grateful to you as both politicians and parliamentarians for thinking about this. We have now come to the point where we are looking at the nature of constitutional reform and constitutional Bills and, more essentially, at the practicalities of how we alter what we all agree—in our initial and independent examples—is a rather unsatisfactory process. That is really the moment that we have reached, so it is particularly fortunate that you are both with us this morning. As I say, David Howarth has kindly produced this useful note for us, which I am sure everyone has read. Tony Wright, do you want to say any opening words or shall we just plunge straight in?

Professor Tony Wright: I think you would like me to say that I am Tony Wright. I would certainly like to have seen David's note, which is obviously helpful; I have not given you a helpful note. If I had sent you a note, this would have been it. I do not know what you want to discuss but I want to try to sell you an idea that I have been trying to sell to people for the best part of 15 years without success of any kind. You are my last hope. I will read an old paragraph and a new paragraph that give the same idea from different times. You can then think about it what you will.

I first wrote this in 1995, with the prospect of a Labour Government coming in with a big programme of constitutional reform. I was thinking about how this might happen coherently. I wrote then:

"Parliament is strengthened rather than weakened when it develops mechanisms to perform functions that need to be performed but which it is not able to perform itself. Far from eroding an abstract sovereignty, this enhances real effectiveness. One such function is the provision of a source of expert and authoritative constitutional advice on a standing basis. Britain is distinguished by the absence of a body of this kind, yet it is indispensable for a process of sustained reform. The example of the Law Commission offers an initial precedent, the current work of the Constitution Unit an unofficial one".

I go on to say that the Labour Party, "should announce now that it intends to convert the Nolan Committee into a standing constitutional commission, with a new membership as an integral element, in its commitment to an ambitious programme of constitutional reform. Neither the Cabinet Office nor the Home Office can provide the motor of reform and a new agency is needed which is committed to the enterprise and has the expertise and authority to drive it along. There will be no shortage of work for this constitutional commission to undertake".

I had a go at that before 1997. I had a go around 1997 because I thought it would be helpful to try to avoid the charge of ad hoc-ery in the reform proposals, to get some coherence, and to think about our governing arrangements on a sustained basis.

To take us almost up to date, in the summer of 2009, with the expenses row in full fling, I sat in my garden in a state of deep depression and wrote a letter to the Prime Minister, saying what we might do about it. I made two proposals. One was that we should do something serious about House of Commons reform to show that we could reform ourselves in the wake of the expenses scandal. That led to a reform committee, which David served on—we had a good time—and to the acceptance of our proposals by the Commons in those extraordinary circumstances. That now has a good effect on what is happening there.

That was my first proposal; my second went back to my old hobby horse and met a stony silence. I say in my letter to Gordon Brown: "Proposals are being floated daily at the moment from all sides in a competitive game. If any are to be implemented, they would need careful investigation and analysis, exploring advantages and disadvantages, and being converted into concrete form. Ad hoc-ery in a competitive bidding war would be the worst way to proceed. A serious reform programme would be a project for many years".

I went on to say: "What we lack is a standing mechanism to carry such a programme forward. In 1997 I suggested a standing constitutional commission of the kind that exists in different forms in other countries to underpin our constitutional reforms, give coherence to them and provide a continuing source of constitutional advice on issues as they emerge. I now suggest a new version of this in the form of a democracy commission, set up for, say, 10 years with the prospect of permanence, to keep our political system under continuing review. This will be much preferable to the one-off constitutional convention that is sometimes proposed. The commission could hold convention-like hearings to help define the issues, but then offer authoritative advice on how they could be proceeded with, if elected politicians chose to do so. It would also offer a place to which issues could be referred for detailed analysis on a continuing basis. It would become the centre of expertise and advice on a whole range of constitutional matters".

That is the one proposal that I have been interested in promoting over the years. As a footnote, I think particularly of the dreadful campaign on the alternative vote, which has been preceded by no independent inquiry of any kind and is informed by no independent analysis. Therefore, we have a campaign on the rather important issue of whether we will change our voting system, which has become a kind of slanging match between two camps. The absence of a body to make some informed contribution to proceedings of that kind seems to me to sustain the case for the proposal that I made. As I say, you are my last calling place.

Q80 The Chairman: You may be dropping pearls of wisdom on to slightly less stony ground. It is interesting that you had not seen the paper that David Howarth produced for us. There were many similarities between what you said and what David wrote. That is an interesting coincidence if it is only coincidence. On the point that you both raise in slightly different forms about the constitutional convention, is that not something where you have

both drawn on the experiences of countries that have a more formal constitution to embrace? Is what David Howarth described as a formal or written constitution not a first denominator for this kind of arrangement?

David Howarth: Perhaps I can jump in here. I am David Howarth from the University of Cambridge. I thank the Committee for seeing members of the University of Cambridge's law faculty three weeks running. That might be some kind of record. As the Chairman indicated, I am probably at the legal realist end of the faculty. Since Tony has raised the AV referendum, I should add that I am an electoral commissioner so I will not comment at all on that matter for that reason.

I suppose the practical question is: how much can be done to improve the process without going the whole way and changing the underlying constitutional doctrine? The underlying constitutional doctrine—the legislative supremacy of Parliament—lies at the heart of all our problems in the process of constitutional reform. I started my note by referring to my own experience of trying to draft constitutional-type legislation. I tried to draft a fixed-term Parliament Bill. Tony has tried to do the same thing. However, if you do that, you find that, no matter how clever you are, in the end what you write cannot be permanent. It cannot be entrenched and can always be repealed. That is part of the explanation of why the process is so unsatisfactory: nothing permanent is being done here. All errors are potentially temporary. People think throughout the process, "If we get it wrong we can put it right next time". There is no rule that says that constitutional issues must be kept separate from other issues. The Constitutional Reform and Governance Bill, which we looked at towards the end of the previous Parliament, was an extraordinary mishmash of big and small issues. There was no concentration on a particular issue and no incentive to think about important issues separately. The move to a formal constitution, which you can do through a convention process or a beefed-up version of Tony's proposal, will lead in the end to a clearer process

of constitutional reform. The most important characteristic of a formal constitution is that it has an amending clause. Article 5 of the US Constitution tells you how to change it. It also tells you what level of consensus you need, what extra processes you need and whether you need more people. For example, are the electorate needed, through a referendum, to pass constitutional change? As long as you do not have that, you have the present confused, potentially politically contentious system, which will always have those characteristics.

It might be—many people hold this position—that the present arrangements are what we want to continue with for their flexibility. If that is one's position, the question arises of what can be done that is less than full reform. The problem is that, politically, there will always be big incentives to overthrow whatever is set up if the political requirements are great enough in the circumstances.

Q81 Lord Crickhowell: As someone with a degree from the University of Cambridge, I will pursue this point. I have come to every session so far with academics and lawyers. They have produced wonderful theories and plans, and I have said, "Yes, but we have parliamentary democracy". I have then asked the questions that you, David, addressed so well in your paper. At the end of the day, you both want a convention. Some have suggested that this committee in the House of Lords could have an ongoing permanent role. However, if there is House of Lords reform, the House of Lords as the defender of the constitution will disappear as well. At the end of your paper—and at the beginning and end of Tony Wright's operation—you come up with a difficulty. To get to the convention you have to persuade the Government of the day and Parliament to set up this institution. In the present situation, where there is an agreement between the two governing parties—who are rushing, as you said, to legislate very quickly at the start—it is even more unlikely that we will get agreement to do it. So how do we get your desirable objective of some kind of

constitutional convention? How do we persuade them—given that Tony Wright has failed to do over many years—to go down this route?

David Howarth: It depends on how bad you think the present situation is. We have piecemeal reform, contradictory reform and lost opportunities all over the place. Much of that arises because of the desire of Governments to bring in constitutional reforms very early in their terms because they might need to use the Parliament Act to get them through. Therefore, the way in which various proposals are put together is never really thought through; you just get lots of stuff right at the start. This is all very bad, but if people are prepared to tolerate it you will never get anywhere. You will not get to the next stage. Just how bad is it that the way in which we look at House of Lords reform does not involve thinking about localities and regions? The Government's own policy is localist but that localism has not reached the constitutional reform agenda at all. There are lots of contradictions here. However, if the Government of the day think that the contradictions are fine, that they can fix any problems later and that it does not really matter—there are lots of possible political catches in going down that route—there is a problem. That also raises the problem whereby, even if you have a convention, will its proposals be accepted? Will its proposals end in a referendum that legitimates a new formal constitution that gets rid of the legislative supremacy so that we can start again? The problem is that unless you are in some kind of political crisis, where there is a big incentive for people to get on with drafting the text and a big incentive to accept it, there is a danger that it will not go through. I propose the convention because it is better than all the other options, which are even worse.

The other ways of getting around, through or beyond legislative supremacy are particularly horrible. The one that keeps coming up is the judicial route. The judges might decide that the principle of legality is, in extreme circumstances, more important than legislative

supremacy. Some of the judges in Jackson hinted at this and there are other extra-judicial writings of that sort. If they did that we would end up with a judicial dictatorship. The one thing that the judges cannot do is create a higher law-making track—a constitutional law-making track. They cannot democratically produce a way of going beyond the ordinary legislative process. All they can do is restrict what can be done now. They do it in a way that is entirely in their own heads and is not democratically accountable. We end up with a limitation on the present situation without any satisfactory higher track. That is one way, which I very much oppose.

The second way is the legislative way: to try to do it through Parliament. There have been various ingenious attempts at this proposed. One, which we should look at because it is quite amusing, is Bill Cash's UK Sovereignty Bill from the previous Parliament. It was an attempt to control the exercise of Royal Assent. There were lots of problems with it but it was an attempt. Then there are various proposals to redefine Parliament to include constitutional councils and constitutional courts. The trouble with these is that it is either unclear whether they will work and unclear how you would change them if you do it badly; or it gets very complicated. It is rather an amusing week's work—trying to work out exactly how to draft this. It gets so impossibly complicated that it would be virtually impossible to explain to the public. To have a constitution that you cannot explain to the public is the way to political ruin.

Q82 The Chairman: We will not raise anything in that context, because I know that you are not going to comment on it. Lord Pannick, Lord Rennard and Lord Hart all want to come in but, Tony Wright, do you want to comment on the political issue?

Professor Tony Wright: We have not directly answered your question, which was added to by Lord Crickhowell. I was at a conference in 1997, just at the time that the Labour Government was coming into power. It was an Anglo-German conference, and my job was

to describe what the Labour Government would do in constitutional terms. I went through the list, and I could see the Germans getting really quite upset. Eventually, a German professor could contain himself no longer; he jumped up and said, "But where is the plan?". In a way, that is your question, to which the answer is that we have what is often described as being a political constitution. That is what we do. We have this for all sorts of reasons, most of which are historical. We will probably continue to have such a constitution unless something so traumatic happens that we have to do a bit of constitution-making of the kind that has gone on elsewhere at certain times. However, there is no imminent prospect of that.

This is the constitution that we have and we are changing it all the time. The sovereignty bit of it is more circumscribed than it was. We have set up all kinds of independent external bodies to look at bits of the system. There is a process of progressive codification and chunks of the constitution are now being written down whereas previously they were not. The role of the party used to be a no-go area as far as the constitution was concerned, but we now have extremely elaborate regulation of parties, party funding, and what parties can do, and so on. There is a process of codification, but it is being done in the context of a political constitution, which is one where, essentially, politicians have to take the initiative. They can deal with constitutional measures very much as they deal with other measures.

David rightly says that this can easily lead to the overthrow of measures, which it can, and that may be a disadvantage or an advantage. There has been a huge raft of constitutional measures since 1997, but no one has proposed that any of them should be overthrown. If you get the politics right, then they will bed themselves down and become a normal part of the system. All I am proposing is that, given that we have such a constitution, let us at least make it work in a rather more informed way. That is my proposal, which may differ from

David's proposal. I want a body that sits there pretty much all the time that provides some informed commentary on what we are doing.

Q83 Lord Pannick: It is obviously going be difficult to get agreement on the adoption of the democracy commission or the constitutional convention and to pass legislation to that effect. Do either of you think there is any value in a softer political approach, by which I mean some form of agreed guidelines promulgated by this committee, which is approved by the House of Commons and the House of Lords, as our report on fast-track legislation was agreed in this House? It is true that that would not be binding but there would be a political price to pay if legislation was brought forward that did not comply with the procedures that we were recommending and the criteria that should be adopted for consultation and for pre-legislative scrutiny? Is there no value in that?

David Howarth: There is some value. My only word of caution would relate to what you expect it to achieve. The more important and pressing the issue, the less will be achieved. It depends on what happens in practice. If there is a quiet period in this area for a while and only a few things turn up and are dealt with, well, then you could expect such a procedure to be pretty well entrenched and it may be able to survive in slightly more serious circumstances later on. However, be under no illusion that a Government equipped with a majority in the Commons, the Parliament Act 1911 and the will to act will do what they want to do. You need to realise that when putting forward those softer ideas. It is not that they have no value; the question is what you expect to get out of them.

Perhaps it would be a good idea to think about the legislative process more broadly, not just constitutional Bills. The Better Governance Initiative, for example, has been proposing improved procedure of this kind for all Bills, because we generally have a problem with rapid legislation being ill thought out and then having to be amended greatly later in the parliamentary process. That means that the original proposals are not properly scrutinised,

because they are altered. A vast amount of parliamentary time is taken up by the Government changing their own Bills rather than discussing their proposals. I would guess that this is about to happen with the Health and Social Care Bill.

Professor Tony Wright: These are not incompatible proposals. It will be a perfectly sensible and perhaps a helpful enterprise to devise some kind of protocol that says that, if you are introducing constitutional measures, you should do it in a certain way. That would be a very useful template, but it would not alter the fact that, as David has said, we are still talking politics. You can have a protocol that says that there should be no constitutional measure that is not preceded by cross-party talks, and that would be fine, but those of us who have seen cross-party talks—

David Howarth: Cross being the right word.

Professor Tony Wright: You could adhere to the protocol and it would not make a blind bit of difference. I would just add that while it would be nice to distil good principles, there has to be something else in the mix if it is really to make a difference.

Q84 Lord Rennard: A powerful case is being made for having a permanent constitutional convention. It is implicit in what you are saying that the first task of that convention should be to draw up a written constitution. I would like to explore for a moment a much softer option. The Scottish Constitutional Convention was set up largely by opposition parties, but not exclusively so. It involved civic society and produced a model that meant that, when there was a change of Government, the Government largely adopted that model. Is there any merit in something softer than perhaps full legislative agreement to set up such a commission, such as setting up a constitutional convention with civic society, political parties, and experts such as ourselves contributing to it, perhaps producing some guidelines for a written constitution that could then be adopted when there was a political will to do so?

Professor Tony Wright: These are different proposals. The Scottish Constitutional Convention was the right model for Scotland at that moment. It brought civil society together to do a job that was then taken up by the politicians. It was then processed with some skill by the politicians and has worn well. I am not saying—nor do I think that David has said, although I have not read his paper—that you cannot have a constitutional commission of the kind that I have proposed without it getting down to the job of writing down the constitution. I am not saying that at all. In fact, I am saying quite the reverse. The more that you do not have a formalised, codified constitution, the more you have to ensure that a political constitution works well. That is what I am arguing for. I do not think the moment is right for writing it down. There may come a moment to do that. Things are far too flexible and so many things are uncertain, not least the position of this House. If the moment came when there was a political desire to write it down, then you would have a body that would be able to do it.

David Howarth: The advantage of there being an unofficial convention in the Scottish case was not just that it expressed the settled will of the Scottish people, but it did so in particular ways. That is, it overcame the objection to devolution that there are too many options and that it would be dragged through a parliamentary process and would never be properly agreed. Those unofficial conventions can bring people together to produce a more practical proposal that can be implemented more easily should there be an occasion to implement it. What it does not do is provide that occasion. Some believe that this would be a good exercise and is worth doing but, once again, it is important to control expectations about how likely this is to succeed.

Q85 Lord Hart of Chilton: Lord Pannick has just asked the question that I wanted to ask, but I will ask another. You have asked whether the circumstances are bad enough to indicate that something should be done. I would like to turn that around and ask you

whether you think that things are bad enough that something has to be done, even if we cannot immediately find the right solution. Do you believe that something needs to be done?

David Howarth: I have always thought that they are bad enough. They have been bad enough since the 1970s when the present process of constitutional reform started with the European Communities Act 1972. There have been many occasions since then when people could not even work out whether what was being proposed was a constitutional change or not. I remember in the 1980s and 1990s the same question coming up: is this a constitutional matter, or is it not? A country that cannot decide that is in trouble. There is a particular reason for that, namely that it is important for a country to have an idea of constitutional politics as opposed to ordinary politics. The political processes that are about the system of government and the way in which we govern ourselves should be at a higher, grander, less self-interested level, tone and style than the ordinary knockabout of politics every day, run by the media in the short term and not by political requirements. The way we organise ourselves means that we never get to that; we never get to a point where you can say that people are thinking about the long term here, they are thinking about the structure and about something that might be there for a very long time and which it would be difficult to alter. That is why I have always thought we need something different: it is so that we can separate out important politics and not-so-important politics.

Professor Tony Wright: It is even more complicated than that. It is not only about knowing whether it is a constitutional matter or not, but knowing whether it is a first-class constitutional matter and whether something else should happen because of that. There is currently a list of issues that politicians throw around, which keep coming back to hit us. We have proposals for the recall of politicians and primaries, we have the endless discussion about the House of Lords, party funding, electoral reform—issue after issue. There comes a moment when you just need to try to do it in a more sensible way than we do it now.

The Chairman: We will come back to the House of Lords. All the things you have mentioned—apart from the absence of a convention or a standing commission—on scrutiny, cross-party talks and the revising agendas that re-look at pre-legislative scrutiny, have all happened. We have made no progress in a decade whatsoever, so it is not necessarily a process but a political will, as you have both said.

Q86 Lord Rodgers of Quarry Bank: You have had a special relationship in Parliament on campaigning, but my overall question is: to what end? The assumption is that we are in favour of reform, but what is the reform that we want to see? Is there a point at which the process will stop? That is, is there terminal business, which you have been discussing, when you have to retire from campaigning because everything has been done? What is the objective? What do you expect? There might be no plan, but where is it meant to go? What quality or value do you expect?

Professor Tony Wright: I have some sympathy with a Victorian judge who said, "Reform, reform—aren't things bad enough already?". I suspect that that is caught by your remark. Constitutions are evolving, developing, living things; they are not set in aspic. Even those that are written have the constant problem of amendment and development. Therefore, you would want to keep them in good shape. What constitutions do—keeping an eye on the relationship between the different bodies of state, and the state and the citizen—are things on which you would want to keep a good critical eye, at all times and places, to ensure that they are working well.

Q87 Lord Rodgers of Quarry Bank: What is working well?

Professor Tony Wright: It is what I have just described a constitution as being.

Lord Rodgers of Quarry Bank: Yes, but what is the measure of working well?

Professor Tony Wright: If you take the electoral system, you will see that we have a problem. We have a first past the post electoral system—whatever view you take of it. I was

not ill disposed towards it for much of its life, but it seems to have broken down. That is why we have a coalition Government and why we have interest in electoral reform. The question is: if the first past the post system has broken down because the electorate has changed and because of fragmentation and all the other things that we know about, then what should we do about it? Do we say, "Oh, well, we will just defend what is because it is", or do we have an interesting, critical and important discussion about what we should now do? That, to me, is what we should be doing, but we can only do that in an informed way.

Q88 Lord Renton of Mount Harry: I listened to you both with absolute fascination, because you have both been in the House and know about being MPs and so forth. But one of you said just now that people are beginning to think that it is time for constitutional change. The difficulty is that it is very few people who think that; it is still a minute number. The trouble with AV and what is going to happen on 5 May is not really about the complexity of AV, et cetera, but that, given that many local authorities are not going to the polls that day, the turnout is going to be very small. That is the major concern now. The problem that we have, and which you have, too, is how to move forward a vehicle that 90 or 95 per cent of the population in Britain do not think about at all.

David Howarth: I cannot possibly comment on the AV referendum, but—

The Chairman: Let us then take the House of Lords reform, which is what I raised, given that that is neutral but current.

David Howarth: There is no end to reform. The point is that the amount of energy that people need to engage with a particular constitutional issue is quite great. As you say, people are not that interested. One of the problems with the present flat structure is that a Bill about the reform of the House of Lords and a Bill about changing the law on drainage are exactly the same as far as the process is concerned. However, with a formal constitution, when constitutional change is difficult and rare, the occasions when change is needed, when

enough of a head of steam rises to mean that something might be done, are occasions when people might temporarily, although not for very long, get involved in the issue and think about it. You cannot expect people to think about the entire structure all the time, and for as long as Parliament is sitting. There have been House of Lords reform proposals and Bills coming along every five minutes for the past few years, and you cannot expect the public to be engaged every time that happens. There is too much of it. However, if the structure were different, if constitutional reform were not just parliamentary and if there were a specific procedure for that sort of thing, then it is possible that people might be engaged for that time.

Professor Tony Wright: The public are not interested in all kinds of things that matter and the constitution is no doubt one of them. You can see these things better historically than you can at the moment. We have just lived through a period of huge constitutional change. It will be looked back on as an era of huge constitutional change. Why did it happen? It happened for a number of reasons, and in great part because a feeling had developed that our system of government was peculiarly centralised and concentrated, had inadequate checks and balances on what a Government could do, and so something ought to be done about it. In Scotland, it was because of a demand for more government in Scotland. The question there was one of statecraft, and the Conservative line was, essentially, "This will break up the United Kingdom", and the line of those who supported devolution was, "Actually, if we want to save the United Kingdom, then we need effective devolution". That was an irresistible moment and you had to make a choice. If you go through the list of measures of these past years, whether it is about devolution, freedom of information, the Human Rights Act or the House of Lords hereditary element, you will see that these are always issues that require attention, if you were concerned with good government. My

proposition is that there are always issues that require attention if you are concerned with good government. We should try to do it in as good a way as we can.

Q89 Lord Shaw of Northstead: I want to bring down the mighty debate to a more pedestrian level. It has recently been announced that there will be a draft House of Lords Bill. I do not like referendums; they can be used as a political convenience by the Government in power. I understand that in the forthcoming draft House of Lords Bill, Members will be elected for 15 years, and those 15 years would probably cover three Parliaments—three House of Commons Parliaments—meaning that there would be more permanence and more steady views, if you like, in the House of Lords. Therefore, would there not be considerable merit if, uniquely, the House of Lords had the final say on whether or not a referendum should be held? In other words, a referendum could only be held by having the agreement of the House of Lords. It would not start the discussion, but it would put an end to it.

David Howarth: It is difficult for me as a serving electoral commissioner, given that we have to run referendums. It might be thought that I had an interest in whether there were more or fewer of them.

Q90 The Chairman: You were quite positive about them in your paper.

David Howarth: Yes, for constitutional reform as a way of gaining legitimacy for a new constitution and for gaining legitimacy for changes to the constitution. Like you, I have never been a great fan of holding referendums all the time. If they are for special constitutional purposes, and, as I said before, I would like to separate constitutional politics from ordinary politics, then I, too, would be very sparing in the use of referendums.

The conditions under which one got to a referendum, in a constitutional amendment process, is important. The normal way of doing it is that you would need to have a constitutional amendment passed by a super-majority of both Houses and a referendum to

change the constitution. Your proposal might be that a constitutional amendment that might pass by an ordinary majority in the Commons would need a super-majority in the Lords or a specific vote on the referendum.

Q91 Lord Shaw of Northstead: The House of Lords can be overruled by the Commons.

David Howarth: Yes, I know; that is the point.

Q92 Lord Shaw of Northstead: The point is, in this unique case, the House of Lords would have the power to say no.

David Howarth: I was just getting to that. You would have to amend the Parliament Act, because, otherwise, in this particular case, the House of Commons would simply pass a Bill taking away that power, which would be the end of that. That is the problem with all the referendums proposed in the EU Bill, in that the Commons could propose a new Bill that either permanently, or for a particular purpose, removes the requirement for a referendum in a particular case.

Professor Tony Wright: I am quite wary of referendums. You generally do not have the vote on the question; you have the vote on whether people like the Government or not. That seems to be the case with referendums everywhere. It is also the case that you do not know which bit of a proposition people like and which bit they do not like. If you had a referendum on a European treaty, there is no way of knowing in a referendum which bits they are saying that they like and which bits they do not like. That is why I have always been rather keen on getting a far more effective parliamentary process that does the job of scrutiny; that is the only way to do it.

Behind your question, there is the real issue that, at the moment, although we have a sort of convention that there will be a referendum on certain sorts of constitutional measures, we do not know what sort of measures. For some reason, nobody thinks that we ought to have

one on the House of Lords. Therefore, there is no system for that. Lord Pannick may think that we have made a protocol. We could have a system, although I do not think that we would, and you could point out a lack of a system, but that would not give you one. I would add to my list, referring to Lord Renton's question, that you must do something about the House of Lords. Whatever view you take on it, to put it bluntly, the House of Lords is now full. Therefore, in answer to Bill Rodgers's point about what is all this reform business, the point is that you get to a stage where you must do something because an issue presses. It is now a case in the House of Lords that you must do something, because you just cannot go on as you are.

Q93 Lord Crickhowell: I want to make one point in passing, because I do not think that it is central to the argument. Tony Wright observed that the first past the post system had failed when it produced the present situation. You could argue that it is exactly what the electorate wanted and that it has actually worked rather well. However, that is merely an observation.

I want to return to the whole business of constitutional change and reform. We have had an example, given right at the end, of a strong case for saying that something must be reformed because it has got into a state that is clearly unsustainable: we have an overcrowded House of Lords. The trouble about the word "reform" is that it is an intensely political word. I preferred, when we discussed it, the word "change". Anyone who thinks that they have something that they want to do uses the word "reform". The present Deputy Prime Minister is very good at saying, "Of course we must reform it", which gives it a sort of imperative that "change" does not. Some of these things are reforms, but quite a lot of the things that are described as reform may not be reform at all. They may be damaging or unproductive. How do we define reform? How do we get away from the fact that it is a political word?

David Howarth: Reform is a change that you like. It is better than "modernisation"; I hated that word. I have always said that using that word was a reason to vote against something. This is partly a problem of not having a formal constitution. The neutral word that can be used if you do is "amendment", but since we have no text to amend, we cannot use that word.

Professor Tony Wright: That is a good point and David's addition to it about "modernisation" is also a good point. When the Labour Government came in in 1997, it set up a modernisation committee in the House of Commons. That makes the point that is being made. The odd thing about it, which eventually disabled it, is that it never started by saying what the problem was that it was going to deal with. So, it just went off to do all sorts of things. The point about reform is that it should be about improvement. If it is not about improvement, then we should call it something else.

Q94 Lord Irvine of Lairg: Modernisation is a word which is used to defuse argument and debate and to suggest that you are just bringing things up to date. I well remember, in relation to the Access to Justice Bill, that No. 10 wanted to call it the modernisation of justice Bill. However, I took the view that the Access to Justice Bill was a much more defensible title and one that described the broad purposes of the Bill.

Professor Tony Wright: When you draw up your protocol, you should at least ban the word "modernisation".

Q95 Lord Norton of Louth: On Lords reform, you can argue that it has been discussed for an awfully long time, but rarely from first principles. It is very much at a superficial level of changing the composition and the fact that you are thinking about the role of the Lords. The other problem is relating it to other changes that have taken place. You have made points in your paper about the piecemeal nature of change and the fact that there is no joined-up thinking. In terms of what one does about it, we are now addressing two types of

questions, are we not? One is what is achievable and the other is what is desirable. The starting point has to be what is desirable and then whether that is achievable in terms of political will.

Tony Wright suggested that we might have a permanent constitutional commission, but I want to tease out what is the relationship between that and the rest of the process. You have the input side, namely the principles on which it has to operate, but then what flows from it in relation to the rest of the process? Should Parliament have a particular mechanism for dealing with what comes out of this commission? In other words, how does it operate and then what happens to its recommendations that means that it has some effect?

Professor Tony Wright: That is really useful. The last point about how Parliament should deal with it is where I suspect some protocol exercise might be useful, although I would not invest too much hope in it, because all that you can hope for is that authoritative, expert and evidential material would be produced by a commission of the kind that we are proposing and that that would have an impact on how Parliament considered these things. It is the lack of that at the moment which is causing the difficulty. For example, nobody is asking your first principle question, which is, "What do we want a second Chamber for?". Unless you can answer that question and do so in relation to our political system, you cannot then have the subsequent discussion about how you might compose it, its functions and so on. You have to ask what you want an electoral system to do. Again, the answer will be different in different political systems. It may seem a straightforward thing, but it is not. We are not going to develop your exchange, but if you want a system that produces decisive majority Governments, which it is said that we always did want, because we the British people like strong government—that is my point about first past the post; that was its justification—and it is not doing that, then even on its own terms it is not working. So, you have to ask what you want from an electoral system and only then can you start having a conversation about

how we might therefore compose such a system. None of that seems to happen, which is why we have this series of lowest common denominator exchanges about the electoral system at the moment. I think you can say the same thing about party funding and almost everything, namely that they would at least be improved and the process of transmission from doing the job to how Parliament is receiving it could only be improved if there were a body of that kind.

Q96 Lord Norton of Louth: How detached should it be? Should the commission that you are proposing not just be standing outside Parliament and perhaps putting a report before Parliament, but have a more formal link, say, to a committee of either House?

Professor Tony Wright: Over the years, I have developed the view that Parliament is always stronger in doing what it does if it has some connection to an outside body that is doing the work. Parliament is terribly good at doing some things, but not at doing the work. The PAC is only effective because of its link with the National Audit Office. The committee that I chaired made the ombudsman system more effective and so on. I think the more linkages of that kind that you can get, the better. One of the things that the committee that I chaired did was to keep an eye on the constitutional watchdogs, of which there are now a number. You could formalise that; it would be good for the external body and for Parliament to try to see how that link would work.

The example of the Committee on Standards in Public Life is worth reflecting on. I remember vividly the day that it was set up. John Major was in such difficulty that, in an act of desperation, he thought "Oh well, we'll set up an external body to deal with these terrible standards issues that are pulling us down all the time". For some time, that had great effect and that body had great authority. No Prime Minister would have felt able, for a period, to reject the recommendation of the Committee on Standards in Public Life. If you look at it over the years, you will see that that ceased to be the case and it is an interesting point that

there was no organic connection between the body and Parliament. That is why I am quite keen that we should try to bring the Committee on Standards in Public Life under a new all-purpose constitutional commission.

David Howarth: There is a difficulty here, which is that it is easy to connect such bodies with Parliament if Parliament eats their product in small bites. However, and this goes back to your original question, the real difficulty is that we have no structural thinking going on about the interaction between the composition of the Houses, the electoral systems, the courts and so on. We have no thinking about how all this fits together into a system of government, which is why I favour the convention end of this proposal rather than the commission end, because at least it starts with a structure, asking what kind of system of government we want and how that fits in with the kind of politics we want. The difficulty, which you have identified, is that that is a big chunk, and it might be too big for a parliamentary process to be able to absorb, which is why I think such a body has to go for a very long time and build up its own momentum and legitimacy.

Q97 Lord Norton of Louth: Picking up Tony Wright's point about the nature of the commission, because you are suggesting we need a convention to say what should be, is there not a case for starting with a commission that makes sense of what we already have?

David Howarth: It is a good starting point. The question is where you go from there.

Q98 Lord Renton of Mount Harry: Going back to the question of referendums, one of you asked how much can be done without going the whole way, and it seems to me that that is a very wise remark to make. I fought six or seven general elections and I always regretted, whether I won or lost, that a higher percentage did not vote. I can only see this improving via referendums, perhaps using the availability of internet voting et cetera. However, is it not right to say that in Australia you will get fined if you do not vote? That is one reason why Australia has such a high percentage. Can we possibly look in that direction

of making voting in a referendum very easy, but asking whether you fine people if they do not vote?

David Howarth: It is an interesting question. You are trying to get legitimacy by this sort of process: do you get more legitimacy by forcing people to vote or not? There is an argument that you get none, because they are only doing it because they will be fined 100 dollars if they do not. What good is that? Is that real consent?

Professor Tony Wright: I am not sure whether we have moved on from referendums on constitutional matters to the more general use of referendums. If we are on the latter, I would add to my list of problems the fact that it is possible to have referendums which are quite contradictory. You can vote for one thing, such as increased spending, one year, and then cutting taxes. The virtue of our system of government is that somebody has to make it add up and sort of coherent. A referendum can make it incoherent.

Q99 The Chairman: As it did with the Irish example on Lisbon. The whole thing was completely incoherent as a result of the referendums.

Professor Tony Wright: I went on a committee trip to the United States some years ago, looking at their system of having referendum questions on the ballot paper at each election. I went as an enthusiast and I came back saying "Never let it happen here", having talked to people who were closely observing what happened, what people got up to, how it was funded and all the rest of it.

Q100 Lord Renton of Mount Harry: You will not yet have read yesterday's *Hansard*, when we talked about the European Union Bill. The talk went on from 3.46 pm to after 10 pm, and we covered only two clauses. There are 360 columns in *Hansard*. Lord Howell did say when "a treaty change is deemed to transfer competence or power from the UK to the EU, it will in principle require the approval of the British people in a referendum". In my book, that is a very large move forward. There is argument as to whether that is required or

not and that is what a lot of the talk was about last night, but it is interesting to me that the Government are moving in that direction.

Professor Tony Wright: Who is going to decide whether a particular measure transfers a power or not, how big a transfer it is and how big a power?

The Chairman: First class.

Lord Renton of Mount Harry: That is exactly why the discussion took nine hours and has only just started.

David Howarth: What is interesting about this is is that these kinds of questions end up in the courts, and then the question is whether we have the right court structure to decide that sort of thing. A similar discussion happened in France about the last round of European treaties. It was decided by their constitutional council that a constitutional amendment was required. This comes up all the time. In France, you can do it either by referendum or by a purely parliamentary process. They have a particular way of deciding constitutional cases, with a court which is separate from the ordinary courts and is appointed by different people in the political process. A lot of the people who are in the court have been in politics. So, do you want a constitutional court of that sort or of the American sort, which is a court that deals with ordinary law as well? It seems to me that we are deciding that kind of issue by default. By passing the EU Bill in its present form, we are saying, "That stuff goes off to our ordinary courts where it is decided by ordinary judges". Is that the kind of constitutional court we want for our country, going back to Tony's point about the kind of politics we have in this country?

Q101 Lord Irvine of Lairg: Maybe my moment has passed, but I was going to ask you to revert to the subject of House of Lords reform, which is of passing interest to the members of this Committee. If you ask the question, "Should the House of Lords be appointed or elected?", would you agree that you have to answer the question of what value it would add

to the existing legislative process, understanding that you have an elected House of Commons? You have to ask that fundamental question. If you cannot answer it and say what value it would add, that presumably leads to two other fundamental questions. First, should we simply have a unicameral system and not a bicameral system? Second, it leads to this question: is there not value in an appointed House of Lords, because it brings into the legislative process people of different experience and backgrounds to the modern professional politician and, therefore, that is an argument for retaining an appointed House of Lords? There are all these fundamental questions, which I think, and I invite you to agree, have to be grappled with before you launch into House of Lords reform.

David Howarth: They are structural questions about what sort of legislative process you want and what sort of political balance you want in that constitution. If you look around the world, there are second Chambers whose function it is to get in the way of the first Chamber—that is their function; the check and balance is part of the system. Now, in this country, when I tried to put forward that sort of function for the second Chamber in the House of Commons, Jack Straw would say, "No, you're in favour of deadlock", and I would say, "Yes, I am in favour of deadlock. Deadlock can be quite a good thing". But it is a political choice about whether the structure is meant to obstruct the Government or not. What other functions are there, if you look around the world? Another function is the representation of regions or localities, which can be done in a variety of ways. Even the French Senate represents regions and localities in some particular way, in a non-federal state; that is another function that you might want to think about. Or it might be that you are looking for a purely technical revising role. Then the question is, "How do you appoint people to that?", because it might not be a good idea to appoint people to a revising Chamber on the grounds that they have done some service to the state in some completely unrelated field. It might be, if that was your aim, that you would look to the Conseil d'État, a

body whose expertise was in how legislation works in technical ways—in fact, a body rather close to Tony's commission. It could be that we are going towards a rather different constitution from the one we have.

Q102 Lord Irvine of Lairg: If these questions cannot really be answered then, subject to our space problems in the House of Lords, the alternative to doing something is doing nothing.

David Howarth: There is a problem with the status quo here. There is a point that I was going to make on a different question but I think it fits here as well. There is a problem in privileging the status quo just because it is the status quo. If one were to move to a formal constitution and amendment to that constitution were to be difficult, you have the legitimacy of the passing of the constitution to justify privileging the way things are. But the situation that we are now in has never received any wider consent. Where we are now has only arisen through the passage of ordinary Bills and bits of process. Just ask yourself this question—this is the only comment I'll make on the electoral system—when was there a referendum to establish first past the post? There just was not one, so one has to be very careful in the type of argument you are making, Lord Irvine, in privileging what is just because it is. If one were to ask the question, "What is the structure now? What is the purpose of the House of Lords now?"—and we did this in the House of Commons in the previous Parliament—you get all sorts of contradictory answers which might lead one to the situation of "Something must be done".

Q103 Lord Irvine of Lairg: We can all fling maxims at one another. Sometimes it appeals to many that you should "cling to nurse for fear of something worse", particularly if you cannot make up your mind on what is better.

Professor Tony Wright: I do not know how far you want to go on House of Lords reform.

The Chairman: I am sure we will have many sessions on House of Lords reform.

Professor Tony Wright: One little thing. I do not know if you remember, Lord Irvine, but when I was your PPS many years ago, you did ask me once to do a little note for you on House of Lords reform.

The Chairman: A little note.

Professor Tony Wright: It was a little note, because I saw the issues perhaps disarmingly clearly. I always thought that the House of Lords was quintessentially the House of scrutiny, and therefore the question was how you could make sure it performed that role well. You nod assent until we get to this point: then I took the view that I thought we probably needed some mixture of election and appointment. I know you nod your head now, but my mantra was, "Enough election to be able to answer the legitimacy question, and enough appointment to be able to answer the question about independence and expertise". I was not adamant about the mixture—I was fairly flexible about the mixture—but somewhere in there we could get an answer. Indeed, the committee that I chaired produced quite a major report spelling out how this would be done. It managed to persuade Robin Cook at one time; it then persuaded Jack Straw; but it never persuaded the House of Commons. I suspect that at some point we will need to return to those sorts of things.

The Chairman: If I may say so, that was very much the burden of the Royal Commission report in 2000.

Q104 Lord Norton of Louth: I shall come back to something we have not touched on: process. It strikes me that a core part of the problem at the moment is within Government itself—the methods it utilises to address constitutional issues, and whether it has mechanisms for itself engaging in joined-up thinking. Now, if there is a problem within Government, what can be done to improve the internal processes by which Government itself determines whether there should be change to the constitution?

Professor Tony Wright: I am not close enough to know, but my sense is that the aggregation of expertise on this has got diffused over the years. I do not think there is a major centre within Government that would provide an answer to this. Part of the way that you have described it is making sure the linkages are right. I think that it was Lord Crickhowell who said, "What chance have we got of getting such a commission?" but I think that it would have been perfectly straightforward for the Government coming in in 1997 to have said, "There will be a commission". It would have seemed a perfectly ordinary thing to do. I do not think that it is a great big thing to announce; indeed, it might be helpful. The linkage point is getting the right linkage from that to Parliament and into Whitehall. I am with you: I do not think that we are up to speed on that front either.

David Howarth: The relevant parts of Government shift around. It is my impression that there is expertise but it is in different places. As Tony says, the relevant parts are the part that deals with Parliament, which are usually missed out of all these discussions. There is quite a lot of constitutional expertise there. There is the part in the Treasury that deals with parliamentary processes to do with money, which also usually gets missed out in this sort of discussion. Then there is the expertise in what is now the Ministry of Justice about the judiciary. Then there is the Cabinet Secretary's own expertise—the manual and, lying behind the manual, the notebooks; in fact, you have this entire constitutional decision-making system aimed at the Cabinet Secretary. Finally, there are all the people in this democratic unit and that democratic unit that do the day-to-day work for whichever Minister is responsible, now the Deputy Prime Minister. That is diffuse across Government.

Q105 Lord Norton of Louth: Should they be more aggregated, then, as it is a first step? They are not mutually exclusive to the idea of this commission, but presumably you need some structure within Government itself so that it can actually reflect on the constitutional issues, qua constitutional issues.

David Howarth: You cannot completely aggregate, because a lot of those people have very important functions within those departments already and cannot be removed, so what you need is co-ordination.

Q106 The Chairman: Joined-up government again. I am very grateful to you for your time. We are probably reaching a conclusion, but I am sure that there are other points that other people would want to make round the table. We have covered a huge amount of ground. No further points from the committee? Do you two have any concluding points apart from, once again I am sure, saying that this is a last chance for improvement?

Professor Tony Wright: I used to notice how often David and I were on the same territory in the House of Commons, and I am delighted to find that we are on the same territory in the House of Lords as well.

David Howarth: Yes. I think Tony's proposal is a good start for where we might want to go, but it is obviously not the end point. I stick to my view that I formed in the 1970s: that the system of government we have in this country is extraordinary in terms of its incoherence. Getting that point across is most important, I think. Of course, it might be that incoherence does not lead to very bad results all the time, but I am sure that there will be points at which we will regret having that system of government.

Professor Tony Wright: I am quite in favour of muddling through, but I think we could put a bit more coherence into it.

The Chairman: A bit more coherence into the muddle.

Professor Tony Wright: A coherent muddle.

David Howarth: A coherent muddle is what we are advocating.

The Chairman: Perhaps we should call our report on this "Attempts to reach a coherent muddle". Thank you both very much; it has been a very interesting morning, and we are most grateful to you. Thank you very much indeed; it has been extremely practically helpful.

Thank you so much. There is no other business as we have dealt with it before. The committee is adjourned. I hope that everybody will have a wonderful recess.