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Select Committee on the Constitution

10th Report of Session 2009–10

Meeting with the Lord Chancellor

Report with Evidence

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

Current Membership

Lord Goodlad (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Lord Norton of Louth
Lord Pannick
Lord Peston
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands
Lord Shaw of Northstead
Lord Wallace of Tankerness
Lord Woolf

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Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

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Meeting with the Lord Chancellor

1. On 24 February we held our annual evidence session with the Secretary of State for Justice and Lord Chancellor, the Rt Hon Jack Straw MP. The transcript of that session is reproduced here, for the information of the House.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 24 FEBRUARY 2010

Present	Goodlad, L (Chairman)	Quin, B
	Hart of Chilton, L	Rodgers of Quarry Bank, L
	Jay of Paddington, B	Shaw of Northstead, L
	Lyell of Markyate, L	Wallace of Tankerness, L
	Norton of Louth, L	Woolf, L
	Pannick, L	

Examination of Witness

Witness: Rt Hon Jack Straw, a Member of the House of Commons, Lord Chancellor and Secretary of State for Justice, examined.

Q1 ***Chairman:*** Lord Chancellor and Secretary of State for Justice, can I welcome you most warmly to the Committee and thank you very much indeed for joining us. We are being televised, so could I ask you, as if it were necessary, which it is not, formally to identify yourself for the record?
Mr Straw: Yes, my Lord Chairman. I am Jack Straw, and I am Lord Chancellor and Secretary of State for Justice.

Q2 ***Chairman:*** Can I begin by asking how you see the Government's priorities in terms of the constitution?
Mr Straw: I start by saying that "the constitution" sounds like a dry and abstract term but what is often forgotten, when debate about the constitution is dismissed as something for the anoraks, is that what a constitution sets out is how people achieve power, how they exercise that power and how they are accountable for that power; so it is fundamental to the running of any society, particularly a democratic society. What we have sought to do over the last 13 years now is to distribute power better and to ensure that the executive is much more accountable for the exercise of that power. That is the consistent thread that has run through all the major constitutional changes that we have introduced, from, self-evidently, devolution to Scotland and Wales and now Northern Ireland, through data protection, the Human Rights Act, Freedom of Information Act, Political Parties, Elections and Referendum Act and, more recently, the raft of changes which were presaged by the Prime Minister's statement in early July 2007 and which I have been following through ever since. My Lord Chairman, I think you are familiar with the contents of the Constitutional Reform Bill, which is now a fairly weighty measure, but the priorities are those that were set out in the Prime Minister's statement of 3 July 2007 and most of those are being taken forward in that Bill. For example, at long last we are putting the Civil Service on a statutory basis, which in my view is very important and long overdue. We are legislating so that Parliament has control over the ratification of treaties, something which I became passionate about in the Foreign Office because I felt that it was simply plain wrong for Parliament to be invited to express a view which the secretary of state could then ignore; so we have changed that. As you know, there has been a great debate, not about whether Parliament, and particularly the Commons, should finally determine the exercise of war powers but how that should be done. The debate was partly about whether it should be on a statutory basis, what is called a mixed basis, or a non-statutory basis. Where we have landed is on a non-statutory basis and typically it will be done by resolution. There has been a lot of toing and froing between my Department and the Clerk's Department about getting that resolution in the right form. There was discussion about the future of the Attorney, on which a number of members of this Committee had strong views. In the event I accepted—it was not the unanimous advice of the various committees that looked at this—the weight of advice, and so we are not proceeding with legislation on that area; then there are plenty of others. To that original agenda we have also added provisions which have now gone through the committee stage in the Commons for there to be a referendum before the end of October 2011 on moving to an alternative vote. In terms of the other priorities, as your Lordships will be aware, having an interest in this as it were, there have been cross-party talks taking place on the future of the House of Lords. They have been in two tranches: one leading up to the votes in March 2007 and one leading up to the White Paper in July 2008, once we had a clear decision from the Commons. What has subsequently happened is that a great deal of drafting has taken place. I will be publishing the draft clauses

for the reform of the House of Lords, which are essentially the guts of a Lords Reform Bill, in the next two or three weeks, and I regard that as very important. There is much else going on but, in terms of the priorities, the priority is to get things done. However, I have also been very anxious—and it happens to have fallen to me to take through most of this legislation, first of all as Home Secretary and now in this post—to do so on a consensual, cross-party basis, because I do not believe that the constitution should be a partisan weapon in the hands of any one party. Of course, if you are in Government you have the initiative. It is absolutely the case therefore that we said in our manifesto, all those years ago, that we would introduce measures like the Human Rights Act and the Freedom of Information Act. They had been relatively controversial, but our work was to achieve a situation, which we did get to on both of those Acts and much else, where there was a consensus—as there was, for example, over party funding legislation, both then and also more recently. Where there is not a consensus and it is a big issue, my view is that there is a strong case for a referendum, which is why we have proposed that on the Alternative Vote.

Q3 ***Chairman:*** Can I ask, Lord Chancellor and Secretary of State, whether you have formed any views on the respective constitutional responsibilities of being Secretary of State for Justice and Lord Chancellor?

Mr Straw: I am perfectly comfortable about exercising both roles. They are distinct. Many of your Lordships will remember the great debate that took place following the original proposals in the Constitutional Reform Bill, which led to the continuation of the position of Lord Chancellor. I happen to think that was the right decision, for all sorts of reasons. The distinction in practice—I believe in theory but actually in practice—is a very important one, because on the one hand you have the Justice Secretary functions, which in terms of their operation and how they are moderated by other colleagues in Government are no different from any other secretary of state functions. The functions may differ but how they are operated is no different. On the other hand, the functions of Lord Chancellor are principally related to the judiciary and the maintenance of the independence of the judiciary. On those, in turn, I act independently of other colleagues in Government. Therefore, with the single exception of formal minutes to the Prime Minister, asking for him to transmit a recommendation for a judicial appointment to Her Majesty, Downing Street and the Cabinet Office are not involved in any of that, and I think that is very important. Obviously, there always have been issues like money, where you have to bid for money for the Court Service and the judiciary, but I think that it is perfectly possible for one person to do both jobs, although it is for others to judge whether I have done them properly. Should there be this separation of functions? Yes, because also some of the functions of the Lord Chancellor are not ones which can be delegated. It leads to more work, but I think it is very important that, given the principal duty is to protect the independence of the judiciary, they should not be delegated.

Q4 ***Lord Lyell of Markyate:*** On the Judicial Appointments Commission and the Lord Chancellor's position concerning the appointment of judges, the old system seemed to be thought to go against some kind of perception, but it had the advantage that the government of the day, through the Lord Chancellor primarily, was seen to be responsible for a fair and very well-working system. I am fearful that has been weakened and your power, and above all your duty to make sure the system works, is being weakened by passing too much to an appointed quango. Would you like to comment?

Mr Straw: First of all, Lord Lyell, I share your view that the previous system worked well. My immediate memory goes back to and including Lord Mackay. Obviously I have some recollection before that, but if you take that 23-year span from Lord Mackay's appointment in 1987 I cannot think of a single occasion when there was any kind of public concern about how appointments were made. Even before the rather more formal changes, which I think Lord Irvine introduced—they were non-statutory but more formal—I am in no doubt that the appointments that came forward were appointments based on the best judgment, not just of the Lord Chancellor alone but also of the senior judiciary and others, as to who was the best person for the job. Looking back on this, my own view is that this debate about the power over appointments got caught up in a wider debate about whether it was tenable for the Lord Chancellor to combine three roles in one—as head of the judiciary who occasionally did sit, certainly Lord Irvine did, on the Judicial Committee of this House and as Speaker of the Lords. My own view was that those two roles were not compatible with the third, which was as an executive member of the government. I think it was that that people were really driving at when they chose to focus on the system of appointments. Establishing arm's-length, non-departmental government bodies was kind of flavour of the month, or the year, for a period. Both governments did it. I think that the JAC has done a good job, but if you asked me would I have necessarily gone down this route I am not certain that I would have done. I would add two things. One is that Baroness Neuberger is today publishing her report on diversity in the judiciary. That has been a panel that she has chaired which has included senior

members of the judiciary, Lord Justice Goldring and many others, and it has some important recommendations on how the system can be improved, some in a non-statutory way and some which may require statutory change, and I know that this Committee will want to look at that. The second is that there was an undertaking given by Government that the Constitutional Reform Act 2005 would be one of the first Acts to be subject to post-legislative scrutiny. I have before me, and I have yet fully to consider, the draft of my Department's and my view of how this provision has worked. I intend in my comments on that to make some observations about, frankly, the rather clunky way in which particularly the arrangements in respect of senior appointments work. The truth is that, for appointments at district judge level, the scores of appointments in tribunals and also at circuit judge level, in practice the opportunity for the Lord Chancellor—or indeed, to a degree, for the senior judiciary—to exercise an informed judgment is limited; because there are so many appointments you have to do those with panels. At a senior level, I think the system is rather clunky. Although the Judicial Appointments Commission has tried earnestly to improve diversity, there is not any evidence that it has been more successful than the previous system. At the very senior level, there is a very fine balance between ensuring that people are the best candidate for the job and also taking into account the fact that members of the senior judiciary are bound to have a relationship with the executive. It is impossible for that not to happen. I bear in mind what Lord Phillips said in a lecture which he gave in Kenya a couple of years ago, where he made the case for the executive to have a role in those appointments. I do not think there is any argument about that. The issue is, are the current provisions in the Constitutional Reform Act overcomplicated and, in the current jargon, too clunky? I think they probably are.

Q5 ***Lord Pannick:*** Can I ask you whether a Bill of Rights and Responsibilities is still a constitutional priority for Government and, if it is, how far have we got?
Mr Straw: Yes, it is. As you will be aware, my Lord Chairman, we published a Green Paper about this about 18 months ago, and we have received a lot of comments on this. The difficulty is pinning down what would be in it; pinning down the issue of responsibilities, and also—this was why the gestation period was rather longer than I anticipated—dealing with this question of the justiciability or not of economic and social rights, which is a really difficult issue. The courts do not want, I think, broad-brush rights to healthcare or to social welfare to be the subject of endless litigation, with the court ending up in the shoes of the legislature. It is not an appropriate role for the courts or for politicians to, as it were, delegate to the courts; but that possibility caused a good deal of nervousness around the system. That was one set of difficulties, therefore. The other was from those who said, "You don't need to say anything about responsibilities because it is a self-evident truth that people have a responsibility to obey the law and to be able to get on with their lives subject to that". I understand that argument, but the other side of that position, which is the one I hold, is that we need to get across to the public that citizenship is a two-way street. In a democracy, of course you have rights against the state; that is of fundamental importance in a democracy; but you also have duties and responsibilities to your neighbour, in a biblical sense, and to the wider community. These two are not symmetrical, but I think that there are too many people who have believed that rights are a free commodity that you just draw down when it suits you. The last point I would make is that I was very anxious to see the Human Rights Act—which I am very proud of and I think has been a very important Act—get a better press. Therefore, saying to folk that, first of all, responsibilities are inherent in the European Convention and in a whole concept of law, but then trying to draw that out; not in such a way that you end up with more people in the criminal courts because they have failed to meet their responsibilities in a general sense, but in a moral and ethical sense, I thought that was very important.

Q6 ***Lord Pannick:*** Do you think this can be achieved without at the same time working towards a written constitution? You see this as a stand-alone document?
Mr Straw: No, I think it would be a building block of a written constitution. Although this is a long-term project, we are doing work on how you get to a written constitution already. We are one of the very few countries now without a written constitution. I think that the only others are Israel and New Zealand. Israel and New Zealand are fine democracies and there are historical reasons why each of us does not have a written constitution but, if every other democracy in the world has managed it, it is not beyond the wit or imagination of jurists and politicians in this country to do that. It will take a long time, but some of the building blocks are already there.

Q7 ***Lord Rodgers of Quarry Bank:*** You referred, Lord Chancellor, to the role of the Attorney General. Last summer you referred to significant necessary reforms to the role of the Attorney General that had been achieved without the need for legislation. I wonder if you could tell us rather more precisely what those reforms have been. This has been a

controversial issue, the whole question of the role of the Attorney General, and of course very sensitive over the Iraq war. Are these short-term changes very personal to the present Attorney General and therefore they may be reforms, as you call them, here today and gone tomorrow?
Mr Straw: I certainly do not think they are reforms that are here today and gone tomorrow. The original proposals were to place the changes on a statutory basis and we provided a great deal of detail on that but, as your Lordships will remember, there were three committees altogether that looked at this issue: the Joint Committee on the Constitutional Reform Bill; the Committee here, which may indeed have been this Committee, and I apologise for not having immediate recall. Was it, my Lord Chairman?

Q8 ***Chairman:*** Yes.
Mr Straw: It was this Committee—and then the Justice Committee at the other end. They came to slightly different views but the burden of opinion was against making changes on a statutory basis. Since, to go back to what I said right at the beginning, I was seeking to try to work on a consensus—not on the basis of a lowest common denominator but on the basis of whether there was a genuine consensus—we decided to proceed on a non-statutory basis; and there seems to have been broad acceptance of that. The major changes—they were in hand anyway and Baroness Scotland has taken these forward—were to ensure that the Attorney was not, or was not giving the appearance—because I do not think any Attorney ever did in practice—of gratuitously interfering in prosecutorial decisions, except where he or she had a necessary role, not least over issues of national security or international relations. There is the other issue about whether the legal adviser to the Cabinet should or should not be a minister of the Crown. I famously was right in the middle of the issue of the legal advice on Iraq, but I think that role had to be exercised by someone who was a minister of the Crown and, therefore, fully answerable to Parliament; because if you think of the counterfactual, if you do not have that person directly answerable to Parliament then you have to have someone who is appointed to do this. You could not have a judge, it seems to me; so you have either a distinguished government lawyer or a distinguished lawyer from outside who does this job. There could be as much controversy about their opinions as there sometimes is about the opinions of the Attorney. The difference, however, is that they would not be directly answerable; far less answerable, I think. If what one is worried about is people getting at the Attorney, if that were the game, in practice it would be easier to get at the Attorney if the Attorney was somebody who was appointed than if they were, as they are, someone who is on their own in government, with functions which are even more distinct than mine are, and directly and personally answerable for them. My judgment, therefore, is not just that the system is working but that in practice it is actually the best available.

Q9 ***Lord Rodgers of Quarry Bank:*** I was not arguing the merits; I was asking precisely what the changes were. Coming back to the role of Baroness Scotland, she made clear on a number of occasions her own interests and the changes she wanted to make; but, again, are they not so personal to her that another Attorney may take a different view and lose the reforms as you describe them to be?
Mr Straw: I doubt it. I obviously cannot anticipate the future, but the changes that have been made have been part of a continuum. The changes that Baroness Scotland has introduced have not been idiosyncratic, if that is what you have been driving at. It seems to me that they have been with the grain; with the grain, not least, of the increasing professionalization of the Crown Prosecution Service and the reorganisations that that has gone through, which I think have been very successful and which were initiated by Lord Morris originally. My view, therefore, is that I do not think so.

Q10 ***Lord Pannick:*** Could I ask, Lord Chancellor, would you accept that the government should never act in a manner which the Attorney General has advised would be unlawful?
Mr Straw: Yes. I cannot think of any circumstance in which it would be appropriate to do so—full stop.

Q11 ***Lord Pannick:*** If legal advisers in a department so advised, the government would, if it disagreed, seek the view of the Attorney?
Mr Straw: Yes, that is the position. If you are touching on the exchange of minutes that I had with the legal adviser to the Foreign Office, his constitutional position was clear; he was fully entitled to say to me what his view was. My constitutional position was also clear, which was that it was a matter for the Attorney General. At the time there was that exchange of minutes, there was already before the Attorney instructions from the same legal adviser saying, "Will you please advise?". As I said in my evidence to the Iraq inquiry, one of the reasons why, to be blunt, I took exception about the very didactic and very short minute that I had received, just telling me that there was no doubt about this, was that the same legal adviser had written a 15 or 20-page set of instructions which expressed great doubt and said there were two views, which indeed there were.

Q12 ***Lord Woolf:*** I do not think you are saying that the government have to accept the Attorney, at least to this extent: that they always have the option of

saying to the Attorney, "We don't think you should be Attorney any more".
Mr Straw: Yes, but I think that would be catastrophic for a government.

Q13 ***Lord Woolf:*** That may be so. I just think it is important to bring that out, because no single lawyer's opinion should be critical on an issue such as going to war. Although obviously great attention must be paid to the Attorney, to say that the government are not entitled to change the Attorney, they must take the consequences of doing so but, in other democracies where they have Attorneys, indeed Attorneys where the Attorney is a civil servant and is not a member of the government, that happens.
Mr Straw: Yes, my Lord Chairman. It is an obvious truth that a government could ignore the view—

Q14 ***Lord Woolf:*** I accept that it would be extraordinarily difficult.
Mr Straw: May I just say this? In my now really quite long experience as a minister, even the possibility has never ever been canvassed. I cannot myself think of any circumstances in which ministers, on any issue, would either seek to ignore the view of the Attorney or, as it were, have the Attorney threatened with dismissal if he or she did not change their mind. It would be outrageous if that happened. On the issue of the military action on the war—which is one of *the* most difficult issues to face any Attorney and *the* most profound and controversial decision certainly to face this administration—it was always understood across Government, above all by me, that the Attorney's decision on the lawfulness of any potential military action would be the end of it. Part of the public difficulty has been that, because of the timing—although my own view was that, having negotiated the resolution, there was far less ambiguity in it than was being suggested, because I knew what the words meant, what they did not mean, which words had been put in and which words had been left out and why they had been left out—there was some ambiguity about it and, therefore, there was a huge debate in the public prints, not least from lawyers, with very distinguished lawyers on both sides arguing the case. There was a former deputy legal adviser from the Foreign Office saying it was perfectly plain that 1441 does not require a second resolution—that was Christopher Greenwood, now our Justice in the International Court of Justice—and many others on the other side. That was one thing, therefore. The second thing was the issue that the lawfulness of taking military action became intertwined with the separate argument about whether it was justifiable in moral and political terms to take legal action, and that was partly a matter of timing.

Q15 ***Lord Lyell of Markyate:*** I think you are absolutely right to emphasise that this is a matter of accountability to Parliament. The Attorney General must give his honest legal advice as to what it is and if the government does not follow it, the Attorney must resign. As you say, that would lead almost certainly and quite rightly to a major crisis.
Mr Straw: Indeed, yes.

Q16 ***Baroness Jay of Paddington:*** We do have to remember that we have had a good example recently in this House of a position that the Attorney took against the position of a Committee of this House and against the Front Bench of the Government in this House. It was not, of course, a matter of as huge importance as the Iraq decision but it was about the capacity of this House to suspend members in disciplinary proceedings, where the Attorney made her position completely clear in the House and the House and the Government decided not to take it. It was obviously not regarded as such a major decision as on Iraq, but there was no issue about her position.
Mr Straw: Most of the advice that Attorneys give is about domestic law. In those situations, the Attorney's decision is not the final one. Sometimes the Attorney may say—though has never said to me—"It's completely unlawful and you'll end up inside if, Secretary of State, you do this". What they are normally saying is, "Have you looked at this? We think that there is either no prospect of success in the courts, or some prospect or a good prospect". That is the real world. The final decision will be taken by the courts and that kind of eases the pressure. The problem in matters of international law is that it is both more ambiguous, more open to debate and there is not a final arbiter to say whether it is lawful to go to war before you make the decision. The burden has to rest with somebody, it seems to me, and it certainly should not be with the Cabinet, so it lands on the Attorney. I do not think there is any alternative to that.

Q17 ***Chairman:*** Lord Chancellor and Secretary of State, there has been great debate over the last few years about Parliament's role in the deployment of British troops overseas and the exercise of the Royal Prerogative. Would you like to tell the Committee how the Government's thinking has developed on these matters?
Mr Straw: Again, the Joint Committee was extremely helpful on this and so too has been the contribution from members of this House who have great military experience—former defence chiefs and others. As I said in my introduction, we have agreed that we would do this on a non-statutory basis. What we have therefore been seeking is a resolution and a change in standing orders at the Commons end particularly—because these decisions will ultimately

be made by the Commons but with involvement by your Lordships' House—that, in clear cases where there was no direct emergency and no issue of having to make a decision to go to war in secret for operational reasons, that decision would be the subject of a vote before the action took place. The best example I can give is over Iraq, where, whatever else people say, the Prime Minister and the Cabinet agreed quite early on to a recommendation from the late Robin Cook and myself that the Commons had to make this decision. There were then four major debates, including three on substantive resolutions, before that happened. It is to try to replicate that in a standing order but without undermining the operational flexibility of the Forces or the occasional need for surprise. There have also been some complicated issues with the clerks in the other place, just to get the language right and things like that. That is why it has gone through a number of iterations, but the policy is very clear.

Q18 ***Lord Shaw of Northstead:*** Lord Chancellor, the ability of the select committees to subject a range of senior public appointments to pre-appointment scrutiny is now in place. A specific example is when, in October 2009, the House of Commons' Children, Schools and Families Committee concluded that it was unable to endorse the appointment of Dr Atkinson to the post of Children's Commissioner for England, the Secretary of State, Mr Balls, nonetheless proceeded to make the appointment. How would you respond to arguments that the pre-appointment scrutiny model there was undermined by these events?
Mr Straw: I do not think that it was undermined at all. There was never any suggestion that the select committees would have a veto over appointments. You can make that argument but to do that would require legislation. These were pre-appointment scrutinies by select committees and, if one takes that case, in the absence of a select committee hearing the decision would simply have been announced. There would have been no controversy about it, no public airing of whether this person was or was not the best person for the job, and none of that would have happened. Ultimately, under the current arrangements, it is for the relevant secretary of state—sometimes obviously it goes to the Prime Minister and then to Her Majesty—to make these appointments. My view—and I have dealt with a number like this and will be dealing with one very shortly, namely the successor to Dame Anne Owers as Chief Inspector of Prisons—is that this system works well. It has required everybody else within the system—ministers and the officials on appointing committees—to raise what were already good standards of process to a higher level.

Q19 ***Lord Shaw of Northstead:*** Does a decision like that undermine in any way the appointee himself and his position?
Mr Straw: Obviously, in the case of this particular individual he did not feel it did and he went on to take the appointment. That is a problem with it and it is a reason why, notwithstanding this example, what you have to do is ensure that you are making a recommendation of someone who you think would pass muster before the select committee. You have to apply yourself. I therefore think it works.

Q20 ***Baroness Quin:*** Could I ask a wider devolution point on the back of Lord Shaw's question? I know that Children's Commissioners were established in Scotland and Wales, and I think it was before they were established in England. Dr Atkinson, for whom I have a very high regard, is obviously dealing with a much bigger population in terms of potential customers. I wondered generally how the Government approach this to try to ensure that the needs of the area with the greatest population are catered for in the age of devolution, which I also strongly support. I wondered if you had any thoughts about that.
Mr Straw: I am afraid not many. The appointment of a Children's Commissioner is a devolved matter in Scotland and Wales; they made their own decisions. We followed on from that. Yes, England famously is more than 85 per cent of the United Kingdom. I am happy that it should be like that, as a good Englishman. It is a bigger job and they are subject to scrutiny by this place. I am sorry, I am probably not spotting what—

Q21 ***Baroness Quin:*** I suppose it is not just scrutiny; it is also resources and structures.
Mr Straw: I do not think there is any standard answer to that question. You get these commissioners; they will be provided with resources, partly based on their duties, partly based on what one can argue for; and they have to get on with the job. We are in the process of making an appointment of a Victims Commissioner who will be for England and Wales, and there will be some resources provided which I hope are adequate. They will not be generous but they will be adequate.

Q22 ***Lord Norton of Louth:*** In his recent speech the Prime Minister said that at times he was frustrated at the slowness of the process of achieving constitutional change, and you have already referred a number of times to the Constitutional Reform and Governance Bill. You have mentioned that the Bill itself is getting bigger and bigger, but it is getting bigger and bigger at a time when parliamentary time to deal with it is getting less and less. Are you frustrated with the fact that the Bill itself is not yet on

the statute book? Do you think there is time to get it on the statute book in the remaining legislative days available?
Mr Straw: I hope so, although much will depend on forces beyond my control, namely your Lordships' House. Most of what is in the Bill, not all of it, has been the subject of the most intense pre-legislative as well as legislative scrutiny. I know it is said that insufficient time is given for the scrutiny of Bills in the other place, and I would like to see more; but it will always be limited and you have to allocate it. That is a reasonable criticism. I am in favour of us sitting later but I am now regarded as someone who is of a certain age!

Q23 ***Lord Shaw of Northstead:*** There is nothing wrong with that.
Mr Straw: I agree with that, my Lord Chairman, but, as I say, I think we need to provide more time but it will still be limited. That said, I wholly dispute this view that there was some golden age of scrutiny. In the old days, when I was first sitting in the House in the late-1970s and early-1980s, you went through this kind of pantomime of filibustering a Bill and then having it guillotined and, typically, none of those Bills had ever been published in draft or subjected to pre-legislative scrutiny. Now a very large proportion of Bills are. Would I have liked to have got this through earlier? Yes. It is certainly adding to my workload just now, as we run against the buffers. Do I hope that your Lordships will look at this Bill and think that this is a wonderful Bill, with no surprises in it, and give it a happy second reading—and on this occasion not make the best the enemy of the good, accepting that it is better to have it on the statute book than not, even with rather less scrutiny? If you look at stuff like Civil Service provisions, they have been around for years. We just need to get them done. I am genuinely sorry that there will not be six months of scrutiny here. I would have liked it otherwise, but there we are.

Q24 ***Lord Norton of Louth:*** My point was about the time factor, not about the actual mechanisms of scrutiny because I take your point. I was on the Joint Committee looking at the draft Bill, but of course the committee worked extremely hard to meet the deadline. It did, and there was then a massive gap in time before the Bill was introduced.
Mr Straw: There was, I agree, and I am frustrated about that. I am afraid that it is water under the bridge.

Q25 ***Lord Norton of Louth:*** If you take the processes, which I think are very good, not least at this end, if the normal processes apply, it will be very difficult for that Bill to get through in the time remaining.
Mr Straw: It will. On the other hand, I have been involved in wash-ups in Opposition. I was always brilliantly co-operative.

Q26 ***Lord Norton of Louth:*** In that case, if it does come to the wash-up, you mentioned that the Joint Committee did good work, but of course the Government has added provisions to the Bill that were not considered by the Joint Committee so there is a lot to be looked at.
Mr Straw: I understand that.

Q27 ***Lord Norton of Louth:*** So are there particular provisions of the Bill that you would regard as having priority in the event of the wash-up?
Mr Straw: Yes, but, if you will excuse me, I would rather negotiate that at the time.
Lord Norton of Louth: Drat!

Q28 ***Baroness Jay of Paddington:*** I think that there would be a specific interest in this House about whether the clauses, for example, on the hereditary peer by-elections were retained. I would be interested for an indication on that, but I understand you are not going to give it. It is encouraging to hear you say in your opening remarks, Lord Chancellor, that the clauses on House of Lords reform will be published within two or three weeks, but of course this will run up against the timetable as well. What do you see as the status of those clauses when they are published? Do you have a perspective view about how they might be incorporated in a new Bill after a general election, if you are still in your post?
Mr Straw: They are essentially, as I said, the guts of the draft Bill. They are draft, but this would be the first time, certainly since 1968—I was not in the House at that stage, the last time there was serious debate about the future of the Lords in 1968 and I cannot recall whether there was a Bill at that stage—

Q29 ***Baroness Jay of Paddington:*** Yes, there was. It was Michael Foot and Enoch Powell.
Mr Straw: I remember what happened, I simply do not remember whether it was on the basis of a Bill. It is the first time since 1968 then that provisions have come forward. The difference this time, however, is that there is a very substantial cross-party consensus, both about what the objective is and how we get there. On the future, there will certainly be a commitment in our manifesto to implement these provisions. I am as confident as I can be that there will be something equivalent in the Liberal Democrat manifesto and, judging from what Mr Cameron has said in recent speeches he has made, there should be in the Conservative manifesto. There was last time, after all. I am certainly not anticipating the results of

the election—I am looking forward to as many years as it is felt appropriate for me to carry on as a minister—but I am optimistic about this scheme coming into law.

Q30 ***Baroness Jay of Paddington:*** It has almost become a cliché in discussing the House of Lords reform that, if it is to be introduced and have any hope of making progress, it has to be introduced right at the beginning of a Government's term. You feel that this is your ambition to do this on the basis of these clauses?
Mr Straw: We are further forward than Parliament has been for over 40 years and we are further forward than ever before, I think, in terms of a broad consensus behind the changes. If there is a commitment—and I am pretty certain there will be, certainly in two manifestos and I hope in the third—to reform the second chamber, then that obviously deals with problems like the Salisbury Convention.

Q31 ***Lord Lyell of Markyate:*** Just in case history might be getting rewritten, could I ask you, Lord Chancellor, to look back at the Criminal Justice Bills of the first half of the 1980s? I sat on practically every single one of them. Not one of them was guillotined and they were all fully debated in your House.
Mr Straw: I will do. So far as debate upstairs is concerned, very occasionally the committees run out of time, but not often. Quite often it is the reverse. One of the things that has changed since the early 1980s is the introduction of select committees, so the whole nexus of the way the Commons, as well as this place, operates has changed. Of course, Norman St John Stevas, as he then was, got the select committees going in 1979–80.

Q32 ***Lord Lyell of Markyate:*** Lord Chancellor, the other thing that has changed is very much shorter working hours.
Mr Straw: They are not that much shorter.. As I say, I am in the same position as I think you are in terms of the need for greater flexibility over hours. I fought a rearguard action about changing the hours originally, and won on Tuesday and lost on Wednesday. I would revert to a normal moment of interruption at ten o'clock rather than seven o'clock, because I think it undermines the rhythm of the day. I personally would be content on much greater flexibility over programming. This I think will come in anyway. There is the other side of this, however. I did not sit on the criminal justice measures in the early 1980s but I sat on lots of others which were the subject of guillotines, and it was a sort of pantomime. There would be a three-hour debate; the government of the day would say how they had bent over backwards and how we had been filibustering; the opposition of the day would say it was the end of civilization as we knew it; it was an outrageous abuse of power; statistics on which administration had brought in more guillotines were traded; and Michael Foot's five guillotines in one motion were always raised. Then everybody breathed a sigh of relief. It is still the case that on non-controversial measures they just go through, and that is it. It is on the controversial stuff that the old system did not work. I am not saying the new one does, but the old one certainly did not work. I can think of where we got the first seven clauses on the Housing Bill in 1980 and the rest then—Trying to find a way of achieving satisfaction is difficult. I think that we could do better.

Q33 ***Lord Norton of Louth:*** This comes back to the question raised by Baroness Jay. You put provisions in the Constitutional Reform and Governance Bill relating to the House of Lords which were not in the original draft Bill. You have mentioned now that you are going to bring forward draft clauses for Lords reform next month, so there is a good chance that this House will be debating provisions of the Constitutional Reform and Governance Bill affecting the Lords, yet at the same time you will be publishing draft clauses of a Bill that presumably would render those clauses irrelevant. I am not quite sure what the logic is, therefore.
Mr Straw: I do not think they render them irrelevant at all, my Lord Chairman. Some of the clauses, as you will be aware, are about disqualification, resignation and things like that. I hope that they are not controversial. The one which may excite a little is the issue of ending the hereditary by-elections. You have to decide. It will be some years before legislation for a reformed second chamber is on the statute book and then is implemented. It is inconceivable, even with the fairest wind, that it could begin before the election after this; so we are talking about 2014 or 2015. Meanwhile, there is an issue about whether one continues with hereditary by-elections or not, and I made my position clear in the other place. This is not about removing existing hereditaries, nor, as I made clear about 15 times on the floor of the House, is it about gratuitously disadvantaging the Conservative Party; and I have always made that clear. However, my view is that the system of hereditary by-elections is risible, save in one particular, which is that the Alternative Vote is used.

Q34 ***Baroness Jay of Paddington:*** I wanted to pursue the point you have just raised about the length of time this would take to implement. I may be being stupid but I do not think I necessarily follow that. Unless you automatically assume that an elected second chamber would be elected on the same electoral cycle as the Commons, which has never really been resolved, I do not see any reason why if, as you said in

answer to my previous question, a Bill to reform the Lords was introduced quickly after a general election, with all the collaboration and co-operation which you are suggesting, it should not be on the statute book quite early and implemented much earlier than the next general election.

Mr Straw: The reason that it would not be implemented before—that the beginnings of the change would not take place until the following elections—is because the two main parties at least are agreed that the cycle of elections should take place on the same day as a general election. We have been up hill and down dale on this one but I am clear, my party is clear and so are the Conservative Party representatives, that if you are to have an elected element—it would be an elected element to begin with—that should take place on the same day as a general election. There are provisions for what happens if a general election, as in 1974 and 1964, takes place within less than two years of another election—and I think there are good reasons for that. So that is why I have spoken like that.

Q35 ***Lord Wallace of Tankerness:*** Lord Chancellor, you have just mentioned the merits of the Alternative Vote. Perhaps you could say something to the Committee about the rationale behind that decision to have a referendum on the Alternative Vote. Given that the Prime Minister talked about the importance of trusting people with the choice, what consideration was given to what happened in New Zealand, when in fact people had the choice whether to stick with a first-past-the-post or have a different system and then, if they wanted a different system, go on, having had an education campaign, to choose which of the different systems they might wish to opt for?

Mr Straw: On the first, "Why change?", I should say personally that I came to this view many years ago. I have articles in obscure texts to which I could draw attention and also an un-obscure text, written by my colleague Peter Hain in the mid-1980s to which I contributed. The reason is this: that I am a profound believer, and so is my party, in single-member constituencies, with all the benefits that brings in terms of clarity of accountability. However, in my political lifetime—and, from my point of view, to my regret—two-party politics has given way to three-party politics. Most members here, up until the late-1960s I think, had more than 50 per cent of the vote in each constituency. Now that proportion is many fewer. If we are looking at the broad issue of how do the political classes, people's representatives, regain trust, there is an issue of legitimacy. I think that the way you square the circle of ensuring that single-member constituencies continue, but also that the member elected commands potentially greater legitimacy than they do at the moment, is through the Alternative Vote. There is no other option that I can perceive, if your overriding concern is to maintain the single-member constituency. On the other alternatives, when we did look at or thought about the New Zealand example, it was itself very controversial in New Zealand. My own view, which was accepted by Government, is that to go for a holus-bolus suggestion where you put at large "Do you want us to change or don't you?", would not get you very far. There is a clarity of choice between first-past-the-post and the Alternative Vote. There may be other candidates that come in. Indeed, your party proposed the Irish system, and I would be very happy to debate its merits or lack of them; certainly it has done nothing to increase trust in Irish politics, which is a great deal lower than trust in British politics. Anyway, that is for the future. However, that was why.

Q36 ***Lord Wallace of Tankerness:*** Given that when you appeared before this Committee last year you indicated that pre-legislative scrutiny of constitutional change of significance would be the rule, unless there was some emergency, clearly that has not been the case with regard to the introduction on the sixth day of committee of a Bill that was published in July, after the draft Bill was published two years ago. Was there a reason why we have not had the pre-legislative scrutiny of these provisions?

Mr Straw: It would not have been a candidate for inclusion but for the row over expenses. Before that, it was an aspiration, clearly by people like Peter Hain and myself. It was there, but it was not seen as an immediate priority; we might have put it in the manifesto. As your Lordship's House knows too, the expenses scandal has been completely traumatic of political parties, the political class and so on. That has led to us thinking across the piece about measures to improve, to restore and to enhance trust. They have obviously included things like the Parliamentary Standards Act and those provisions built on the Kelly Report—also decisions we took ourselves in advance of Kelly. We judged that introducing AV with a referendum was a simple and straightforward measure which would enhance trust. It may not be to everybody's liking but all we are proposing is a referendum; we are saying put it to the people. I think that the process of having a referendum will open up the debate about other alternatives. I am happy to see battle joined on those, because I have clear views about what happens when you go for proportional representation—generally bad things.

Q37 ***Lord Wallace of Tankerness:*** I am sure we will have that debate! Perhaps you could clarify one thing for us, Lord Chancellor. You probably know that as a Committee we are doing an investigation into the

issue of referendums. When he appeared before us two weeks ago, Michael Wills indicated that Cabinet members would be free to campaign on either side of a referendum campaign for or against AV. Can you confirm that is the position, that if you are in office Cabinet collective responsibility will be suspended for that?
Mr Straw: Yes. It would be the Prime Minister of the day, but I think I can speak for him or her on this case. What we will not do, by the way, is what happened in 1975 over the referendum campaign on the EU, which Lord Rodgers and others here will remember and so do I. I declare an interest; I took part in the No campaign. However, the cards were stacked very heavily in favour of the Yes campaign. There was even money provided for the two campaigns and then a huge amount of money provided on top by the Government for the pro campaign. One of the reasons why I pursued the referendum provisions in the Political Parties, Elections and Referendum Act 2000 was because of that experience. I thought it was wrong and inappropriate, and we need to ensure that there are clear rules about evenness in resources, fairness and arbitration of whether the rules were being followed, not by the Government but by the Electoral Commission.

Q38 ***Lord Hart of Chilton:*** Lord Chancellor, we have had the opportunity to read the Lord Chief Justice's annual review and there are just three points I would like to put to you. The first is a sort of complaint by him really, that he is unable to place his annual review before Parliament because of a procedural issue concerning the fact that, although the annual review of his predecessors went before Parliament, it should do so only when there is a crisis or an emergency. He is concerned that, since now there is nobody able to speak in the House of Lords, there should be an opportunity for his report, which is obviously a rather important document, to go before Parliament. Do you have any views on that?
Mr Straw: I think that it should—is the answer. There are ways in which it could get before Parliament, not least by me putting my name to it.

Q39 ***Chairman:*** Would you be prepared to do that?
Mr Straw: Yes, of course. I was not aware and probably should have been that this was a particularly live issue, but I am happy to pursue it. Of course it should come before Parliament.

Q40 ***Lord Woolf:*** There is a difficulty in the Lord Chancellor putting it forward, because it is wholly inconsistent with the separation of powers which the Constitutional Reform Act was intended to bring into effect. The problem, as far as I can find out about this, Lord Chancellor, is because the view is taken by certain advisers to the two Speakers that this is meant only to be used as a "nuclear option", which was an unfortunate phrase. In fact, the history is clear that what was to happen was that, because the Lord Chief Justice was to lose his conventional ability to speak on behalf of the judiciary, this provision was contained in section 5 of the Constitutional Reform Act. The language of that provision, as I am sure you will appreciate, is absolutely clear. If the Chief Justice is of the opinion that it is a matter which should go before Parliament in the interests of justice, then it is to go before Parliament. I find this curious.
Mr Straw: I am glad to have this further information because I did not think that it was me who was blocking this. Far from it.

Q41 ***Lord Hart of Chilton:*** No, I do not think that it was ever suggested that you are the culprit.
Mr Straw: The Lord Chief Justice has a right to do this and Parliament has a duty to receive it. On the issue of could I, as it were, provide the cover, or at least get it before Parliament—I accept that it would be unsatisfactory –I can think of a number of reports of judicial inquiries which have gone before Parliament because the minister has attached his own name to it. The most notable one was the Lawrence inquiry by Sir William Macpherson. It was his report, every single word of it, but I presented it to Parliament because that was the way of getting it before Parliament. No one suggested that it was my report. I think that what I need to do is to follow this up with the Lord Chief Justice and the Speakers in this House and try to get this little difficulty sorted out.

Q42 ***Lord Woolf:*** Perhaps it is as well. First of all, I think that the proper interpretation of section 5 is something to which attention should be drawn, because that is clear. With regard to your suggestion that you might, of course it would be appreciated if this were to happen, it would be unfortunate because, as I have indicated already, it would be in conflict with what the Constitutional Reform Act was seeking to do. Secondly, it would mean that to an extent the Lord Chancellor would be in a position, contrary to the Act, to say, "In my opinion it shouldn't go".
Mr Straw: I accept that. It would be unsatisfactory. Although, as I say, I present plenty of other reports to Parliament, including the annual report of the Chief Inspector of Prisons; but there is a duty on me to present it to Parliament. My Lord Chairman, I wonder if I could respectfully draw attention to the fact that I will have to leave at about ten to twelve for Prime Minister's Questions.
Chairman: You have been extremely generous with your time, Lord Chancellor and Secretary of State.

Q43 ***Lord Woolf:*** My Lord Chairman, there is one matter which is very important on the question of timing. We have, as you pointed out, a Constitutional Reform and Governance Bill going through this House, which may come into law—one hopes so. The age of members of the Supreme Court—the position there is that we have one of the most recent appointments who is very close to the retirement age. Lord Mackay, who brought the age down from 75 to 70, has said in the House that he thinks that was a mistake. Do you share that view?

Mr Straw: It was very good of him to make that admission! I have already said this to Lord Phillips and other members of the senior judiciary. I readily acknowledge that there are a number of people who are on the Supreme Court or, indeed, the Court of Appeal who are approaching that age who are extremely good and perfectly capable of continuing past the age of 70. The difficulty here, however, is that, in moving an amendment of this kind we would be faced with huge pressure to raise the age limit for all other judicial appointments, including the magistracy. Just as the senior judiciary feel strongly about the age of 70 being the limit for the senior judiciary, the magistracy feel very, very strongly about 70 being their limit. I know plenty of magistrates who are approaching 70 who would rather stay on, and some of them are very good. On the other hand, if we do not have a limit of 70 you will get too little turnover. My view up to now is that—and there are some things you can do in this Parliament and some things you cannot—it would lead to unintended consequences, just as Lord Mackay's original proposal has done. If you asked me, with the benefit of hindsight, would I have done it in this way—probably not. Is it going to be possible to change for the future? I hope so, but it will not be in this Parliament, I am afraid. That is just the situation.

Q44 ***Lord Pannick:*** If the main argument is the knock-on effect for the lower levels of the judiciary, would you not accept that there is a very powerful argument in relation to the Supreme Court because it inevitably takes a long time for someone to rise up the judicial ladder and it would be most unfortunate if people who take time to arrive there and who are not appointed to the lower judiciary until later in life than used to be the case should be required to retire one or two years after they arrive, as will be the case in relation to Lord Collins.

Mr Straw: I accept that argument, but I do not think the argument will necessarily be accepted by the country's 29,000 magistrates, who will make just as powerful an argument on their behalf. That is why we have to sort this out in the round. That is the difficulty. Then there are circuit judges and others in this position. My own view is that it is making the special case, which I personally accept, but we have to try—and this is why it will take a bit of time—to get something of a consensus by which people accept, and not just the Supreme Court justices, that the limit should be raised and everybody else holds back.

Chairman: Lord Chancellor and Secretary of State, thank you very much indeed for coming to the Committee and for the evidence which you have given. You have been most generous with your time.