

WEDNESDAY 28 JANUARY 2009

Present

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

Witness: **Mr Jack Straw**, a Member of the House of Commons, The Lord Chancellor, examined.

Q1 Chairman: Lord Chancellor, good morning. May I bid you a warm welcome to the Committee and thank you very much indeed for joining us. We are being filmed this morning and photographed, so might I ask you formally, as if it were necessary, to identify yourself for the record.

Mr Straw: I am Jack Straw and I am the Lord Chancellor.

Q2 Chairman: When you met us last in October 2007, the Government were consulting on the *Governance of Britain* programme and I wondered if you could give us an indication of how all that is proceeding.

Mr Straw: I am very happy to do so. You will recall that the proposals in the *Governance of Britain* White Papers varied in terms of implementation. Some were for in terms of practice by Government, some were for resolution by Parliament or its separate Houses and some were for legislation. Dealing with those where legislation is not necessary, consultation – and

a key one – was over what formal powers Parliament should have over declarations of war and large-scale military action by the British Government, and you may recall that essentially there were three options raised in the White Paper: one was to leave things where they were, the second was to move to a statutory base for war-making powers and the third was to do it by way of resolutions. Where the consensus has arrived at very clearly is in respect of doing it by resolution. There was a draft resolution at the back of the original *Governance of Britain* White Paper which is currently the subject of detailed discussion inside Government and obviously with the MoD to ensure that the wording is correct and then it will be brought forward. Another area which required a change of practice was pre-appointment hearings in respect of a raft of key public appointments whose role essentially was supervisory over the Executive and that has happened. I think that it is a very important change; it has now happened and is operating and I think that it is operating pretty successfully. Candidates are told in advance. If you take for example the proposed appointment of a new Information Commissioner, which is plainly supervisory over Government, all the candidates were told that they would be interviewed in the proper way, that there would then be an announcement, as there has been, of a new candidate, but that whoever was successful would be subject to this pre-appointment hearing, and that is I think currently taking place. Flying the Union flag required nothing but a very straightforward change in what was a ridiculous policy which, for reasons no-one could ever tell me about, said that the Union Flag should only be flown from Government buildings on 18 days in the year and it is now flown regularly and quite right too. I checked yesterday and there are two flying on top of the Ministry of Justice building. Protests around Parliament does require a change in the law and we are committed to removing what were regarded as rather oppressive provisions which, many people felt rather inappropriately, found their way into the Serious and Organised Crime Act. Whatever else one says about the protests, they are not serious and organised crime, they are protests; they

make a lot of noise and so on, but they are protests. That commitment is very clear. There is then the question of what you do instead and there continues to be a debate, not least with people in the House on both sides, about whether the otherwise existing powers are adequate but perhaps need to be used rather better or whether there needs to be further provision. My instinct is that the existing powers are probably adequate if they were just used rather more actively. The key irritant for members in both Houses and I think for the public, other than those protestors, is not so much the visual presence of the protestors but the noise – I think you may be spared it at this end – which can be rather disruptive at meetings. I could bore you in great detail about the provenance of the ownership of the strip of land on which the protests take place about which I became well informed during the Stop the City riots in 2000 when I was Home Secretary. Another issue was the ratification of treaties. There is clear agreement to that: we have to have a change in the law to ensure that it is the Parliament that ratifies treaties, not this very strange process of the Ponsonby Rule where Parliament is given an opportunity to say that it does not like the treaty which is about to be ratified but actually has no power to stop it. I did not like that practice when I was in the Foreign Office and I am glad that is happening. The role of the Attorney General. There have been proposals made which generally find favour and we are still looking at that. The Government's role in judicial appointments. Much to my surprise, I was proposing in the Green Paper that the role of the Lord Chancellor in respect of appointments below High Court appointments should be omitted because it is a rather formal role. My role in respect of the more senior appointments is a limited one, but I thought it was just a bureaucratic hurdle that served no particular purpose. My predecessor, Lord Falconer, comprehensively objected to that and so have many others and it may be that we simply decide to leave things where they are on the basis that the 2005 Act is simply settling down. The other big issue is that of reform of the Civil Service and there seems to be general consensus that we should proceed with statutory change. My

Lord Chairman, you may ask me about WHEP(?) insofar as legislation is concerned and the hope is that we can bring forward the Constitutional Reform Bill as a bill for legislation later this session. There are other candidates: as well as the candidate for emergency legislation, there are candidates for some pressing legislation, for example on the Royal Mail and banking, but I want to see it brought forward in this session almost certainly as a carry-over bill.

Q3 Chairman: The Joint Committee on the Constitutional Renewal Bill published its report on 31 July last year. Could you say when the Government's response might appear.

Mr Straw: Yes and I am really grateful as some of the colleagues around this table served on that Joint Committee; it was a very good piece of work and I should have said that obviously, in coming to provisional but reasonably firm views, we have taken great account of what the Joint Committee had to say. The reason I have delayed issuing a response was until I pinned down by colleagues in Government about what we were saying and the programme of the Bill. It could have met the timetable but it would have been less precise. So, that was a balance there. The general sentiment – and I can ask Mr Foster who chaired the Committee – is that if colleagues want a more immediate response even though it will be less pinned down, I am happy to oblige. That was why; there is no other reason.

Q4 Chairman: Three Select Committees, including this one, have reported on the future of the Attorney General. Would you like to say a little further about how your thinking is developing.

Mr Straw: We are looking in detail at the proposals but, as your lordships will recall, what was proposed in the Constitutional Reform White Paper was that there should be a clearer division between the role of the Attorney General and the role of the Director of Public Prosecutions with the Attorney only being able directly to intervene in prosecutions in

national security and international relations cases and there should also be a protocol between the Attorney and the prosecuting authorities about essentially who was doing what and there seems to be general agreement and a broad consensus for that. There were proposals that the role of the Attorney as the minister responsible for the prosecutorial system and the role of the Attorney as the Government's chief legal adviser should be split and there should be two individuals doing that job with, in some cases, the suggestion that the job of the Government's senior legal adviser would fall not to a minister but to an appointed official. There is no great purchase on that proposal and it is certainly not one which I favour. I see that I am looking at two distinguished former Attorney Generals around this table. Anybody who has been in government recognises the importance and value of having a senior and experienced lawyer who is also a minister and politician who is able to offer advice. Attorney Generals, in my experience, are not patsies. They offer tough, independent advice as they should but, as importantly, where they do come to certain decisions which are controversial, they can then appear in Parliament to explain those decisions. The most recent example was the decision which was made by Lord Goldsmith when he was Attorney in respect of the Serious Fraud Office case which was, from recollection, in December 2006 or 2007, which decision was confirmed quite recently by the Law Lords.

Q5 Chairman: Are there any other policy proposals in the pipeline or consultations including perhaps on the *Governance of Britain* programme or outcome of consultations that are still to emerge?

Mr Straw: Particularly at this stage in a Parliament, there are no rabbits that we are about to pull out of a hat, though I will check! There is the Reform of the House of Lords White Paper, an elected Second Chamber, which has, amongst other things, some important recommendations at paragraph 7.22 on the establishment of an independent Commissioner for Standards at this end and wider powers in respect of discipline and, for reasons of which this

Committee is very well aware, these proposals have now received, as it were, a second wind which I greatly welcome as I support them. Meanwhile, the Public Administration Select Committee published their own quite brief response to that on 15 January. As I say, there are no pending major policy changes of which Parliament is not aware. Just looking through my list, the only other two things I perhaps could have mentioned was the national security strategy which is something we were able to deal with internally and was published on 19 March and that is going to continue, and the establishment of the independent United Kingdom Statistics Authority which has been a personal pursuit of mine for 15 years ever since I made a speech setting out my own party's position on this to the Royal Statistical Society in 1994 and it has been an interesting journey. Those changes have now come into force. Sir Michael Scholar has already very vocally – and, in my view, entirely properly – established the authority and independence of the United Kingdom Statistics Authority and it is having a very important effect on the relationship between statisticians and ministers and officials in all government departments and all the better for it because one of the great frustrations that I have had – and I am sure many others have had – is the fact that, on the whole, UK statistics are of very high quality but sometimes errors in their use have been made, not least by ministers, and then the credibility of the statistics as a whole is undermined. That is no good because official statistics are the currency of domestic political debate and, these days, international debate as well.

Q6 Baroness Quin: You mentioned the reform of the House of Lords White Paper. Is this situation still the same regarding timing of any legislation that might be brought forward about that?

Mr Straw: In terms of major legislation – and I made this clear when I made an Oral Statement when this was published last July in what could only have been at that stage the last 20 months of a Parliament and now the last 15 months of a Parliament even if it goes to the

buffers – it is frankly not possible to promote legislation of this controversy and complexity – leave aside controversy, it is the complexity of it as well – in the last months of a Parliament. For those who say, “Why don’t we go ahead?”, that is the answer. There is no particular reason why individual items, if there is pressure, as I think there is now, should not be pursued although I understand – and it is a matter for your lordships’ House – as far as conduct here is concerned, the view which certainly Baroness Royall has taken is that there are measures which your House can take which do not require legislation and that is obviously a way of dealing with the immediate problem that you face. If I were to be asked why we have been slightly reticent about particular proposals for private members, the reason comes back to the management of the legislation because, if we get agreement that they will be confined to very specific issues, then we could go ahead but, if they turned out to be a Christmas tree on which people then hung major proposals for reform, then it would unmanageable. The good news about this document which followed its predecessor was that it was a product of two years of intensive discussion in a cross-party working group which included Cross-Bench Peers and a representative of the Bishops. Although, as I make clear in the introduction, the proposals were the Government’s and we take responsibility for them, they did and they do reflect a very broad consensus between the major parties about the way forward. The House of Commons pronounced – it did not find favour at this end – with the majority in favour of either a wholly elected Second Chamber or a mainly elected Second Chamber – 80 per cent – was very clear. Every other alternative, including the one which I put forward which was for 50/50, was roundly defeated and that was the template for the discussions in the working group part two. What you have there is very clearly worked through proposals which, in my view, could and should be put on to the statute book in the opening years of a new Parliament.

Q7 Lord Rowlands: I would like to ask you about an observation of one of the Joint Committees' findings or observations when they found that because of the disparate nature of the proposals in the Bill, it is difficult to discern the principles underpinning it. Could you discern for us the principles underpinning it.

Mr Straw: Yes, modernisation of the Constitution. If you have that view – and it is an exercise over which this Government has been involved ever since we came into power almost 12 years ago – you then have to move from the general to the particular. People can equally parody what we did in the first couple of sessions which included the Human Rights Act, the Freedom of Information Act and devolution to Scotland and Wales as well as the Northern Ireland process and much else besides and say, “What is the connection?” The connection was a desire to see the relationship between citizens, Parliament and the Executive changed. That is a fundamental principle behind so-called modernisation and that is what we have been seeking to do, to rebalance power in the British constitutional system and each of the proposals involves a modification and a reduction in power, which in the past has sometimes been unaccountable, held by the Executive. That is the principle and then you get down to how do you do that and there are bound to be a series of discrete proposals.

Q8 Lord Rowlands: I would have thought that anybody listening to the long introduction in the way you went through the individual proposals would have come to the conclusion that this was a pretty disparate bill leaping from one issue to the next and then in the middle you have the Civil Service Commission. The impression I have received from the evidence you have just given us is that there is a curious mixture of proposals rather than some things bound together. You say that the only binding thing is that they are modernising.

Mr Straw: What binds them – “modernising” is a single word – is the desire by Government and I believe by Parliament to see greater clarity and movement in the relationship between, as I say, the Executive, Parliament and citizens and to ensure that, as far as possible for

example, vestiges of the royal prerogative, where they are important, are reduced or removed and I think that is of great importance, that there is a statutory base for the operation of the Civil Service which I think is really important and in the range of other issues. As I say, you can parody any set of constitutional changes by saying that they are separate – I would not use the word “disparate” – but of course they are separate, but we are open to suggestions about other changes that should be made, but I think that the issue is not whether they are separate but whether they are desirable and I have yet to hear people saying that what we have done on appointments is undesirable or what we are proposing to do on treaties is undesirable or the Civil Service and so on. If there are other suggestions, we are happy to think about them.

Q9 Lord Rowlands: In that case, would you change the long title of the Bill to allow Parliament to discuss the additional proposals which is one of the other suggestions made?

Mr Straw: I worked on the basis that its scope was going to be so wide that ingenuity of parliamentarians would be such as to ensure that that happened. Lord Rowlands, you will be aware, having been a minister, that there have to be some limits to what is discussed otherwise, as it were, you end up making an enemy of the good and everything disappears into a hole, but I am certainly open to think about that suggestion.

Q10 Lord Lyell of Markyate: I much agree with what you said about the Attorney General’s legal advice giving powers and one of the reasons is his accountability to Parliament. I was not quite clear what you were saying about his power to direct prosecuting authorities in particular the DPP and the Director of the Serious Fraud Office and so on. In my view, that should not be confined – and I hope you were not saying that it was confined – to matters of national security or international relationships. It needs to be across the board. It actually has worked extraordinarily well over the decades and indeed more than a century

and I do not know of any occasion where they have actually come to loggerheads, but it is a very, very important power in practice and I hope that you would agree with that.

Mr Straw: The proposal in the White Paper was that the formal power to intervene in respect of a prosecution should be confined to international relations and national security, unless my memory is failing me but I think that is the case, and that the relationship in respect of other prosecutions should be more of a supervisory one. I think that one can argue this both ways but, in respect of other prosecutions, I think the chances are that the DPP is just as capable of coming to a decision about whether to drop a serious crime prosecution for example as the Attorney General. One of the things that we have been trying to search for here – and this is by no means an exact parallel and I accept that – is that, given the sensitivity of the prosecutorial role – and that has changed over the years because, following the 1985 reforms, you have a single prosecuting authority for England and Wales in the way you did not have before that and the oppressive development of the CPS in recent years, not least following reforms which Lord Morris introduced – should there be a clearer relationship between the prosecutors in most cases and the minister responsible for the prosecuting authority just as one of the products of the Constitution Reform Act 2005 is, in my view, to produce a clearer and a better relationship between the judiciary and the minister who has some responsibility for the work of the judiciary but no responsibility at all, quite properly, for what the judiciary do. That relationship, the old one of the Lord Chancellor, has been running out of time and I think that the new one is better and that is what we are trying to do.

Q11 Lord Lyell of Markyate: You have not really addressed the point, if I may say so. If you are going to have accountability, you have to have power. How can you account to Parliament for something where you think there is a fundamental error of judgment by for example the DPP? As I say, it does not happen because everybody knows that that power is ultimately there and therefore when the Attorney General is answering that he or she is

actually responsible in the end, but how can you be responsible if you do not actually have power? I think that is a weakness which it may be that you and I actually agree about but, in the way it has been expressed by you so far, I get the feeling that it is more muddled than it should be.

Mr Straw: With respect, you will have to come to your conclusion and I know that you will. I do not think that it is muddled; I think that it is just a matter of choice. As I say, I think that in practice, in respect of prosecutions other than where there are national security or international relations considerations, I am very clear that the proper thing is for that responsibility to rest with the Attorney General and I think it would be unfair for it to rest with a non-elected official apart from anything else, and I think that in respect of the day-to-day business of the Crown Prosecution Service, what we are proposing is sensible but I do not regard it as a die in the ditch issue.

Q12 Lord Norton of Louth: I am tempted to ask whether there is any change you could think of that could not be justified under the heading of “modernisation”.

Mr Straw: I was conscious of the fact that it was said that modernisation can mean virtually anything and that I ought to be more specific and I then was.

Q13 Lord Norton of Louth: In general terms. If I could move us on from policy to process. The foreword to the *Governance of Britain* White Paper spoke of it as being “the first step in a national conversation” and expressed the hope that people drawn from a wide range of backgrounds would be engaged in the debate. To what extent do you think that hope has actually been realised?

Mr Straw: I think that it has been realised in part. Trying to get “national conversation” with a number of people can vary. We all depend in many ways on newspapers and television and in these days internet media. What I find amongst a lot of people is that there is a real

appetite and interest in constitutional issues. This afternoon I am speaking to the British Institute of Human Rights and they are obviously interested but, when I go to talk to students at Blackburn College, we run out of time when I am talking about these issues. One of the truths about not all constitutional change in our history but quite a lot of it is that it begins with relatively few people pushing it and gradually people understand its significance. That is even true of the two major reforms, the Human Rights Act and the Freedom of Information Act for which I am responsible as Home Secretary.

Q14 Lord Norton of Louth: Given that and the comment you made about the type of contact, to what extent is it a structured conversation and what lessons would you say you have learnt from the exercise so far in actually engaging in debate?

Mr Straw: We did give a lot of thought to having very structured conversations and we ran one in Leicester which was pretty successful. There is an issue of cost and I have been nervous about spending not my money but taxpayers' money on this and that nervousness has self-evidently increased as the economic situation has deteriorated and what could easily have been acceptable publicly 20 months ago I judge is not acceptable now. I have to say that I am slightly old fashioned on this when I lift the veil on debate in government. The Leicester exercise was a good one. Sometimes you do need structure in order to get people who would not otherwise think of debating issues to talk about them. The structured Cabinet consultations which the Cabinet is holding around the country are working very well. I was sceptical about this exercise when I was first told about it but it has been really interesting. I also believe that you cannot beat standing on a soapbox in the middle of Blackburn and having a conversation with people and that is what I was doing last Saturday, or making yourself available at public meetings which I shall be doing on Friday week as well as responding to letters. So, generating and provoking that kind of conversation.

Q15 Lord Norton of Louth: Obviously what then follows from that is what happens as a consequence of conversations. To what extent does it actually feed into government deliberations?

Mr Straw: It does. All these conversations mould what you think and it is quite osmotic. I think everybody who has been an elected politician, as well as anybody who sits on a train or meets friends who are not involved in politics, will say that what is raised with them affects what they think and, for sure, what my constituents say when I am sitting in Eaglewood(?) Park – I am not making a joke about this and the game is less interesting than perhaps it should be – and people around me mutter at me helps to build up a sense and provides a test of whether what newspapers are reporting about public opinion is accurate or not. Most of the time, funnily enough, it is, though you may or may not like it. That is why I gave the interview that I did to *The Daily Mail* that I do not think that the Human Rights Act is a villain's charter but it is self-evident truth that many people do feel that and, as I will be saying this afternoon, if you want a genuine dialectical process to take place, you have to begin that process where people are, not where you can tell them they ought to be and that is the funny thing about how you make progress.

Q16 Lord Morris of Aberavon: I would like to come back to the point made by Lord Lyell regarding the Attorney General. I broadly welcome what has been proposed because, like you, I am a little old fashioned. Basically, as I see it, it is the status quo with some refinements. However, I do not think there is an understanding – and I think Lord Lyell has touched it – on what happens in prosecutions in general. The DPP – and there are two DPP, one in Northern Ireland and one here – comes along, usually on a weekly basis unless there is an emergency, and there is a discussion on difficult cases and there is a meeting of minds. Contrary, to what the Prime Minister said, the Attorney, in my experience – and I have talked to many other Attorneys – never takes a decision. After the meeting, the DPP will go back

and consider and reach her own view and the same with the Director of the SFO. I well recall a rather important case involving a young serviceman where it seemed to me, as a criminal lawyer, having seen the film of what happened, that the case would never hang together and that particular DPP went back and thought about it and took another decision. So, one has to be very careful and I would advise prudence on this because, at the end of the day, you have to answer on the floor of the House, as Sam Silkin(?) made quite clear, and I had to answer on adjournment debates and that case in Lancashire regarding the rape by a gentleman whose name I have long forgotten. At the end of the day, you are answerable. So, if there is no power, although it has never been used in anyone's experience, you are really shooting a blank cartridge.

Mr Straw: Do I take from the example you have given that, in the event, leave aside what formal powers you had, it was the DPP's decision which continued?

Q17 Lord Morris of Aberavon: Yes.

Mr Straw: If I may say so, I think you are making my point. The prospect of the Attorney General and the DPP continuing on a weekly basis to discuss prosecutions is set out in the protocol. We know why this very sensitive issue arose and it arose principally because of Iraq but also because of the controversy about the SFO decision. Both have been found to be lawful – the second lawful and the first not unlawful to be precise. When I looked at it, I thought that the relationship, although it was not fundamentally to be changed, would benefit by greater clarity and that is what we proposed.

Q18 Lord Peston: I want to intervene briefly since you said you were interested in people's views, so you ought to know that some of us who are not former General Attorneys take the totally opposite view that there ought to be a totally separate legal adviser to the Government who is not a minister under any circumstances and the precise wording of the question put to

him should always be publicly known and the answer should immediately be made public. There are two views of this matter around this table and, since you said that you were a great believer in hearing views, Jack, I thought you ought to know that.

Mr Straw: Thank you. May I respond by saying that what you would be doing in that case in practice if you had somebody who was not a minister and not accountable directly to Parliament – they would go to a Select Committee but facing a Select Committee is rather different to facing a House on equal terms and feeling particularly on both ends but especially in the House of Commons where you have the people’s elected representatives – especially with your proposal for the advice to be published is essentially setting up the legal adviser to the Government not so much as a legal adviser but as a legal arbiter and, the moment their advice was published, it would be incredibly difficult for a minister then to take a different view and, if they had taken a different view, it would mean that defending proceedings in court from judicial review would be incredibly difficult and, bluntly, it would disrupt the workings of government for no good purpose. There have been a number of occasions where I have received not advice from the Attorney General but high level advice from my own lawyers and I have said, “I am sorry, I disagree” or for example “I do not agree that we should concede this case, we will fight it and let us see” and nine times out of ten, as it happens, I have been successful in coming to a different view. No, that would be blocked off. You would have to go and see your mates and say, “What do you think about this? The Government’s legal adviser is saying this on the record but I disagree”. If that then happened and that public advice was overturned in court, the authority of the Government legal adviser itself would be undermined. It would just fall apart.

Q19 Lord Norton of Louth: Coming back to the issue of engagement, as you know, there are those who would argue that referendums are a means by which people can engage in

determining issues on constitutional issues. Do you have a view on what occasions it would be appropriate or not to actually hold a referendum?

Mr Straw: I think that you have to do this on a case-by-case basis and it is very much a matter of judgment. Ones on which there would be a fundamental change in our constitution. Say, for example, in respect of membership or the leaving of the European Union, entry into the euro, and change in the voting system in the House of Commons which would be an absolutely fundamental change to the whole constitution and we are committed and I am committed to having a referendum on that and I think other parties are too. We could not just leave it to Parliament. Then, as we have already seen, both the devolution settlements as well as to a degree what has been proposed in Northern Ireland and the two ones within Great Britain were put to votes and, in Scotland, it was a foregone conclusion and in Wales it was by no means a foregone conclusion and the majority was tight: 7,000 as I recall.

Q20 Lord Norton of Louth: As a supplementary, I can see the case for a case-by-case assessment of whether to hold one and, in certain cases, some time after it was given, you can say it is fairly clear cut, this first-class constitution issue. If there not a problem in terms of determining where the dividing line is because some issues will be fairly close and the problem, if there is no clear principle underpinning it, is that those who do not get a referendum will say, "It is not legitimate, we have not held a referendum"? That is the inherent danger if you do not have a clear principle.

Mr Straw: There is. However clear the principle – and the principle (and I think that you and I agree about this) is that you should reserve referendum for major constitutional changes, big ones, top-line ones – there is then the argument about whether it is a major constitutional change. You will recall, as I do, that initially the Government of the day took the view that entry in the European Union did not require a referendum. That was their view. The view of

the Labour Party was different and, to make your point, although those who had put forward the proposal for a referendum in the early 1970s inside the Labour Party did so because they thought there would be a “no” vote – and let me say just for the record that I voted “no” – but, as it turned out, the public, when they were faced with the choice in the ballot box, decided by a margin of two-to-one in favour of the European Union and that then ended the argument about whether or not it had been legitimate to join the European Union. You have to do it on a case-by-case basis. Obviously, you are a constitutional expert and, if you have a better idea, I am open to it, but I really do not think that there is one.

Q21 Lord Rowlands: Pre-legislative scrutiny is a relatively new procedure and of course the Constitutional Renewal Bill was innovative. From the Government perspective how do you think the whole process of scrutiny of that Bill has worked?

Mr Straw: Of the Constitutional Reform?

Q22 Lord Rowlands: Yes.

Mr Straw: I think that it has worked well and it is particularly important. My view is that, as a general principle, you should not proceed with significant constitutional change without there being a broad consensus and there may be votes on what is proposed in the Bill and there will be arguments about particular issues, but I have been rather clear that the Constitution cannot be seen to be in the partisan ownership of the party in power at the time. That is why for example, as this is also a constitutional issue, I was adamant when we were reforming party funding that, although we had a huge majority and the prospect, which turned out to be accurate, of a further ten years in power, we should not misuse the power we had to create a partisan advantage over our opponents because that is just wrong. It is not like other changes which may well be partisan for good reason.

Q23 Lord Rowlands: Do you think it should therefore become a convention that any legislation which carries constitutional change of any significance should automatically be subject to such scrutiny?

Mr Straw: I think that in practice will be as it is already becoming that and I think that that will be the rule unless there is some emergency, which I do not anticipate, which would mean that you would have to rush the whole thing through. I think the consensus is basically yes because you have to get these things right and there is no single wisdom on these things. Taking the reform of the House of Lords, it would be a hopeless prospect to try and reform the House of Lords without a consensus between the parties. There will be argument, as there is great argument within each party, about reform but at least you are in a situation where all three parties are marching broadly speaking to the same objective and we have done a great deal of work on this – and there have been two years of work behind that – to try and pin down how it would operate.

Q24 Lord Rowlands: I was a veteran of the 1968 House when there were nine House of Lords reforms.

Mr Straw: And, if I may say so, I think that makes my point quite well because that was Richard Crossman rushing his fences as he ever did.

Q25 Lord Rowlands: Again referring to one's previous experience, of course it has been a convention that the Commons always takes constitutional bills on the floor of the House. Do you think that that is still the most effective way of scrutinising?

Mr Straw: Again, there is an argument about what is constitutional and whether something is palpably constitutional. The reform of the House of Lords is plainly constitutional, which is another reason why it would not be possible to legislate at the end of this Parliament. If you are asking me about what I feel about scrutiny, I think that the new procedures which we now

have in place in the House of Commons for the examination of bills upstairs are significantly better than they were before. Now, I would say that, would I not, because it was I, as Leader of the House, who pushed them forward. However, the first three or four sessions of a Public Bill Committee are a Select Committee examination of a bill and it is only after that that you go through a line-by-line examination. Having myself had to go on the stand and be subject to cross-examination upstairs, it concentrates the mind. The interesting thing about that kind of examination, which is a point I so often make to my colleagues across government, is that greater parliamentary scrutiny actually helps ministers. It may occasionally embarrass ministers as well but fundamentally, the greater the parliamentary scrutiny, the greater the authority a minister in practice is able to exercise in his or her own department. If you take big bills, in large chunks of them the policy has been agreed but the detailed wording of the drafting has not been agreed and you have a better opportunity to come up to the officials and say, "Excuse me, what the devil are you doing putting that in?" Not being in an adversarial position, to respond to colleagues on all sides when they say, "Isn't this a bit daft?", to say, "On the face of it, probably, yes, but we will come back to it. We have time". On constitutional matters, my view is that the sensible thing would be probably – but it is a matter for the House, not for me – to have a Public Bill Committee holding that kind of examination and then for the business managers to make a decision about what should go on the floor and what should go upstairs. On this, the big stuff should go on the floor and some of the provisions would be better examined and dealt with upstairs.

Q26 Lord Rowlands: One of the consequences of the changes, however good that process has been, is that in fact bills come up to this place and huge chunks of them have not really been debated on the scrutiny ---

Mr Straw: It is said that that is the case. If you look at the report of the Modernisation Committee of either late 2006 or early 2007 in respect of the legislative process, more hours

are spent on bills – or they were if you look at the data and I am happy to put it before the Committee – at our end than at this end. Obviously there is a difference which is that most of the time spent at this end is on the floor of the House and most of the time at the other end is spent in Committee. Also, if I think back to the apparently golden age before programming of bills, what I recall is bills like the Housing Bill of 1980 or the Education Reform Bill of 1987 – and I sat on both those Bill Committees – where the opposition quite deliberately ran a filibuster on the first six or seven clauses, because that was our job. We were expected to prove that we were fighting the cause. So, we would go through this process and we would keep people awake all night, mainly ourselves, we would surprise our constituents who asked why we were tired and we said that we were up debating some obscure part of a bill and they would look at us as though we ought to go and see a doctor, and then there would be a fuss and then we would leave the House when they announced there would be a guillotine and then there would be a three-hour guillotine debate and we would say that it was the end of civilisation as we knew it, the Government would say, “Yes but, when you were in power, you introduced five guillotines in one motion and that was the end of civilisation as we knew it” and then you pass a programme motion and we breathed a sigh of relief and you then proceeded to debate actually less of a bill than you do now. So, it was not a golden age. Personally – and it is a point that I have made to my Whips – I think that we ought to provide for more time on the floor of the House where we can on report stages because sometimes there is not enough time there and the Whips understand that and they have been more accommodating than they were. On the whole, it is upstairs by agreement that the programme is taken and there should be complementarity between the two Houses. Things that we cannot do should then be looked at here and I do not have a problem with that at all.

Q27 Lord Rowlands: On the more general point about pre-legislative scrutiny, I think that a number of Parliamentary Committees have been finding the pressure of actually dealing

with them, sometimes because the bill is introduced quite late and there are time pressures on the bills, and we, in our own report in 2006/07, drew attention to the problems that were arising. Governments had the odd habit of introducing consultation documents when the process was almost complete. Should we not have a review of how it is working or at least take account of what the experience has been to date?

Mr Straw: We certainly take account of the experience. I think that on the whole it has certainly been working better than before we had pre-legislative scrutiny. The main problem with pre-legislative scrutiny is getting people to give the same scrutiny to bills in draft as they do later on. There have been plenty of examples where there has been something in a bill which is potentially explosive but the dog does not bark until the last moment. I bear the scars of this because there were proposals, very modest I might say, in what became a mode of trial bill to implement a recommendation on Royal Commission, not from me, to give Magistrates' Courts greater power over whether either way offences should be referred to the Crown Court. There was consultation on this and all the rest of it – and I think that Baroness Quin may remember this when she was working with me in the Home Office – and it seemed to be perfectly acceptable. The business manager said that, on the basis of this, it should be introduced in this place and then, whoosh, there was a huge explosion: this place turned it down, voted against it, and that was the end of it. So, it is a kind of lesson.

Q28 Lord Rowlands: What lesson?

Mr Straw: The lesson is that you have to stir the dog. If you are having pre-legislative scrutiny, you have to get people to give the same scrutiny to the draft as they would do to the final bill.

Q29 Lord Rowlands: And you do not think that that has been happening?

Mr Straw: To a degree it is, but I think that sometimes it is not.

Q30 Lord Norton of Louth: If we move on to the other end of the process, I think we would agree that pre-legislative scrutiny is clearly a good thing and Public Bill Committees are a good thing and I think you would agree that post-legislative scrutiny is a good thing, so the Government last year published its proposals on post-legislative scrutiny that most bills should be subject to review three to five years after enactment and a memorandum sent to the relevant Select Committee. Could you bring us up to date on where we are now with that. I understand that the process is now underway.

Mr Straw: I may have to send you a memorandum to give you the detail about that. It is underway. I think that is really important because – and I have been as guilty of this as anybody else – there is a great temptation when you have a bill, particularly if it is in my sort of area, to treat it as a paper which is saying lots of things and sometimes proposals which have not really been thought through get put in and then it is embarrassing later on when they are not implemented or there are not the resources to go with it. On the detail, unless my official is more up to date than I am, I may have to ...

Q31 Lord Norton of Louth: Perhaps I can update you. I think that some process has started and at least one has already come forward in a rather legalistic way and been sent to a Select Committee but it has not actually been published. I put it to you that it would be helpful, which was the Government's intention in the document last year, to ensure that they are published so that we see them.

Mr Straw: Indeed. If I may, I will follow that up and send a memo to the Committee.

Q32 Lord Peston: Just on the post-legislative scrutiny, there is one thing I do not fully understand. I assume when you say that that will be looked at by the relevant departmental Select Committee that means both Houses or would it only be the Commons?

Mr Straw: There are not exactly parallel Select Committees here.

Q33 Lord Peston: No, there is not is my question.

Mr Straw: I think that what we meant there – and I would have to check – was that it would be a Commons one. There are some parallel Committees and in effect this Committee is one because it complements the work of two Select Committees: the Justice Committee and Public Administration Committee. However, there are plenty of other committees, for rather good reasons, where there is simply a departmental committee and it is always open for example to this Committee to ask for details because your remit is wide, but I think that there is a limit to the kind of work and evidence giving and so on on the other side.

Q34 Lord Peston: That is really what I was trying to elucidate. Take the Banking Bill, I would bet my last dollar that that bill, although it is needed and the Government ministers are doing the best that they can with lots of amendments, eventually when it is passed, which we have to do, it will turn up to have certain defects.

Mr Straw: Sure.

Q35 Lord Peston: If someone were to produce a post-legislative scrutiny document on that, it is not obvious whether we have a committee in this House at all that could receive that document because the whole matter is highly technical and we do not have that kind of expertise. On the other hand, obviously this House would like to be involved with anything of that sort because we have been pushing it for years.

Mr Straw: If I may say so, that is a matter for this House and for discussion with the authorities at both ends rather than for me. We have to respond to the requests. I would just make the observation that, thinking back to when I was a special adviser in the 1970s, the change in the scrutiny by Parliaments through Select Committees of what ministers do is astonishing. I cannot think of a single occasion when Barbara Castle or Peter Short, with

whom I worked for three-and-a-half years in the mid-1970s Government, had to go before a select committee whereas I have been before two in two weeks.

Q36 Lord Peston: I can remember those happy days. My ministers would have gone there if they had had to.

Mr Straw: The numbers of parliamentary questions were tiny.

Q37 Lord Pannick: You have made clear that there is to be a Green Paper before Easter on a Bill of Rights and Responsibilities. You have also made clear that it is not in any way going to water down the Human Rights Act and I think you have also said that much of it may not be legally enforceable. What is the constitutional point of such a bill? There is not exactly a great demand for it from supporters that you would park, to use your earlier example, is there?

Mr Straw: With great respect, I think there is and it is this and I have spoken about this at some length and gave evidence last week to the Joint Committee on Human Rights and I have the transcript here.

Q38 Lord Pannick: So have I.

Mr Straw: No doubt you have read it. As you are very well aware, responsibilities are written into the European Convention articles, explicitly in some areas, and, in any event, they are philosophically and jurisprudentially implicit in much of the basic law in the western world but across the rest of the world. The point that I have made in a series of lectures that I have given and the point that I repeat this afternoon is that we have not reached a position where there is a kind of frankly affection and positive support for the Human Rights Act that I hoped for and I want to see. I have reflected on why that is and there are two reasons. One is the kind of drip, drip, drip nonsensical stories you get. I had one today where apparently

a prisoner is claiming that it has been an abuse of human rights because a female prison officer is not wearing a veil when she talks to him. Well, that is total nonsense. There is no basis in the Human Rights Act or any other constitution which requires such impertinence by a prisoner to be followed through by a change of practice by prison officers. You get somebody asserting this and you have to deal with it. More than that, there are a number of myths which have taken off about how the Human Rights Act has been turned into what has been called by some a villain's charter. You have also had – and this is my key point here – when we passed the Human Rights Act, the international situation was relatively benign. It came into force on 2 October 2000 and, just over 11 months after that, you had the terrible atrocities of 11 September 2001 and that created a very hard and tough climate for this and what has happened subsequently. My own judgment – and it is widely shared across government as well and I think by many others – is that we have to rebalance the climate in which human rights are seen to exist and to flourish and to bring up more explicitly the importance of responsibilities as well. In all the work that I have done, I have not suggested for a second – and of course I would not – that responsibilities are directly reciprocal with rights and, to take a self-evident point, people have a responsibility to observe the law and, if they do not, they find themselves on the wrong side of the law but it does not follow for a second in a civilised society that, by virtue of that fact, their rights to a fair trial against torture and so should be removed. Of course it must not. It is trying to say to people, that there are two sides to this. When I spoke about this recently to the Joint Committee on Human Rights, a point which I had not been explicit about before but I offered to the Committee and I gather did chime some chords was to say that in a way what we are seeking to do is not that different from what the principles of the Courts of Equity developed over some centuries where what they said was, “Yes, we will look at your rights and try and enforce what is just here, but we are going to look at your conduct in coming to a decision”

and the maxims of equity seemed to encapsulate that this is a two-way thing. The last point that you raised was what would be the legal force of a text. That would depend but there are plenty of texts which have very powerful moral force without necessarily being justiciable and I note that, in the Netherlands, the Government there, of a similar persuasion to ours, is involved in exactly the same process of getting up what they call a Charter of Responsible Citizenship for the same reasons as us.

Q39 Lord Pannick: Do you recognise the constitutional concern that a statement of responsibilities will either be so trite as to be meaningless or it will be a controversial politically partisan statement which will not command the supports that you hope to document?

Mr Straw: I note that some people, including yourself, think that is the twin risk. What I had hoped to be able to do is to convince distinguished human rights lawyers like yourself that this is a really important exercise and that those who believe in the Human Rights Act, which I do, and think it is important have nothing to fear from it. Where I get frustrated frankly – and I am not saying this of you, Lord Pannick, but some others of my friends is this – is that where one raises responsibilities, it is a kind of red rag to a bull. It should not be. We cannot operate in our society unless people are able to rely on their rights but recognise that they have responsibilities to their neighbour in a biblical sense and they have responsibilities to the wider community and this is a two-way street. I want to get to a situation where, when I am faced with frankly a rather unattractive constituent, unattractive in terms of their behaviour, or when I go around prisons, as I do regularly, and they say to me, “What about my rights?”, I am able to say, “Yes but bear in mind your responsibilities and, if you care to look at this text, you will see that, with your rights which civilised societies enforce for you, even though you deny them to others, you do have certain responsibilities and you need to think about that”. It is trying to change the terms of the debate.

Q40 Lord Lyell of Markyate: One can look at the Human Rights Act, which I broadly support and strongly support, from the other end. To some extent, because it is an amalgam of a large number of countries, it is a sort of safety net lowest common denominator. Is there not a risk of therefore possibly an opportunity for a Bill of Rights that we in this country set higher standards than some other countries or than the Human Rights Act requires? For example, we all grew up in a country where broadly speaking, maybe parking fines are slightly different, if you were going to be punished by a fine or restriction on your liberty, that decision was taken by a court. Now – and we have two examples recently, the Welfare and Reform Act yesterday, where you as a constituency MP and I for many years also know just how hot a topic children and payment for children and that sort of thing is, and people were deprived of their passport by an official. They may have a distant right of appeal to a court but huge powers are given to officials and prospectively – and it is beginning to happen – that is the case in 150 different acts under the Regulatory Enforcement and Sanctions Bill. Are we not going too far in the opposite direction and accepting the lowest common denominator?

Mr Straw: Personally, I do not think so and I do not believe that there was a golden age where, in your words, any punishment went before a court and indeed, in what are alleged to be the halcyon days of the 1950s and early 1960s, Parliament was much less inquisitive and there has been lots and lots of data about that. Michael Ryle, who was the Clerk of the Committees, has written extensively on this about how Parliament has become much more basically aggressive, quite properly, in dealing with the Executive and I can think of all sorts of Executive acts which are not subject to any scrutiny at all when judicial review was in its infancy and all that has changed. I agree that where officials are being given a power of this kind, there have to be written into the provisions proper provisions for appeal, but I think that they have to be done on a case-by-case basis and that is my view.

Q41 Lord Wallace of Tankerness: You indicated that the responsibilities which might set out would necessarily be enforceable. Do you think that there is a danger of raising an expectation which, when it comes to the bit and seem not to be enforceable in fact brings some of the Human Rights culture, which we support, into disrepute because an expectation has been there?

Mr Straw: There may be a danger of that but my own view is that, on balance, there are great advantages in getting this issue up and getting it debated and seeing whether there is consensus for it rather than leaving things where they are. That is my view. Just on Lord Lyell's point, there are very few people who would regard the Human Rights Act as the lowest common denominator and of course there is nothing to stop higher courts in this country and Parliament from setting higher standards than those provided by the Human Rights Act and in practice we do over a range of criminal law and much else besides. When I talk to my European colleagues, some of them are quite surprised about the extent of judicial intervention in Executive decisions here these days and so on and I do not complain about that because it keeps you on your toes as well as providing a modest income for one or two people. It is not the lowest common denominator at all and it is certainly not the Human Rights Act.

Q42 Lord Morris of Aberavon: I would like to turn to the setting up of the UK Supreme Court. As a supporter of it, has it not been a little oversold in its significance? Is it much more than being cosmetic and moving the building? There will be a public perception, which has been underlined, that it is going to be separate but is there any measurement of whether there will be an increased public perception?

Mr Straw: It has certainly not been oversold by me but I think it will be one of these constitutional proposals. Once it is bedded down, people's observations will be twofold. One is, why on earth did we not do that before? Secondly, that it represented a major symbolic

change properly illustrating the separation of the judiciary from the legislature. When I was having a briefing yesterday, I was reflecting on when I went last year to see the Chief Justice of the US Supreme Court and I had been in the Senate Building and I had been nattering to somebody who pointed out to me that originally the Supreme Court was housed in the capital and I thought to myself and I think I may have said, “Well, that was very odd, was it not, mixing these two up?” and I checked myself and thought, no, we know what people say about US Justices and the slightly fungible relationship between them and politicians etc when they are having a go at them. The truth is that having our Supreme Court – I know that it worked and I know that there was never any question about the independence and integrity of the Law Lords but optically it was really odd and I do not think that it could have lasted. I think that it is a great innovation and I also think that it is good that there will be greater clarity in the roles and it is also nice that at one side of Parliament Square you have Parliament, the High Court of Parliament, the Sovereign; on the right-hand side you have the Exchequer and the Revenue; on the left-hand side you have the church; and then opposite you have the Supreme Court.

Q43 Lord Morris of Aberavon: You used the word “symbolic”. Will this symbolic change have the necessary financial resources which the President and the Deputy President have requested?

Mr Straw: In my judgment they will have sufficient resources. I cannot speak for the Senior Law Lord President Elect of this Supreme Court about whether he thinks that is enough. The building is there, it is properly budgeted for and we are ensuring that there will be the resources for it.

Q44 Lord Woolf: As a law lord, you were often told, at least in the past, that the Law Lords did perform an important function in the legislative process as being really advisers of this

House as to the law and some Law Lords would only use their power to appear in the legislative chamber for that purpose. Bearing that in mind, do you think that there should be some sort of arrangement where, when they reach retirement, the Judges of the Supreme Court are able to come back to the House – and there can be convention to that effect – so as to perform some of the roles which they continue to perform to this day in this House which are constructive?

Mr Straw: Of course, that was one of the arguments against change and, in the event, the change was agreed. I can see the case and obviously it crucially depends on whether we continue with an all appointed House of Lords.

Q45 Lord Woolf: I accept that.

Mr Straw: If we go to a 20 per cent appointed, the numbers are fewer. Obviously if it is all elected, the point does not apply. My guess is – and of course it will be subject principally to the Appointments Commission at this end and not to ministers – that there will be a convention by which certainly some of the most senior Justices of the Supreme Court, if they wanted to, could come in here but, as I think you are aware, there is no direct provision for that. I certainly for myself think that the contribution which retired Law Lords are able to make in the process of legislation is very valuable.

Q46 Lord Peston: Just on Lord Woolf's point, although I agree entirely that setting up the Supreme Court is exactly the right thing to do, I personally will miss having the Law Lords here – I do not mean retired but the actual ones – because they will not be here to harangue when you read one of the judgments and say, "It makes no sense to me at all" and they are usually very nice and start to try and take you through, knowing you are not a lawyer, what the law says about the decision they came to. So, I shall miss that very much.

Mr Straw: I am sure that they would offer you tea across the road!

Q47 Lord Peston: Or I could offer them tea here for that matter as long as I do not try and bribe them in any way of course!

Mr Straw: Of course.

Q48 Lord Peston: As to the question of the statutory arrangements for the appointment of members of the Supreme Court, I think you agreed with Lord Bingham that those arrangements will be brought in without delay.

Mr Straw: They are being used now. We are mimicking the arrangements on a non-statutory basis. That was the basis on which Lord Phillips became appointed, that, as it were, he became the new Senior Law Lord-come-President Elect and it is the basis on which there is currently a process taking place to fill forthcoming vacancies amongst the Law Lords.

Q49 Lord Peston: I seem to recall when he came – I think he appeared before us – and told us about this and one of the things that puzzled me then and I am hoping you might be able to clarify now is that, when we asked him – I think I was the one who had to ask him this question – how did you get appointed, I did not get an answer that ---

Mr Straw: I am sorry, how did he get appointed?

Q50 Lord Peston: Yes, why him? What was the process? I mean, it was not advertised, there was no public hearing or anything like that. It did not seem to me to be any different from what was going on before.

Mr Straw: There is a difference in terms of the appointment process. One hopes that in any process of appointment, the person who gets appointed gets appointed because they are the best and most qualified for the job. If I may say so, that is absolutely true in the case of Lord Phillips.

Q51 Lord Peston: Yes, I agree with that.

Mr Straw: The process was a proper one, it mimicked the provisions of the Constitutional Reform Act 2005 which were applied as the Supreme Court comes into place.

Q52 Lord Peston: But I am right that it is not transparent?

Mr Straw: There has been an advertisement for the current vacancies. There was not for that position of Senior Law Lord. It could almost have been a waste of public money to put adverts in *The Sunday Times* when the potential pool is known and limited.

Q53 Lord Peston: I am still lost as to what therefore has changed. How would it have been different before your agreement? Would you not still have appointed Lord Phillips?

Mr Straw: Of course, I was part of the process and delighted to take my role in that process. Sometimes there are vacancies for jobs where, whatever the process, the result is actually rather obvious and I think it is no great secret that that was true in this case. Is this a better process than the one that went before of essentially consultation and recommendation by the Lord Chancellor of the day to the Prime Minister and to the Queen? Yes, probably, is my view although I think the previous one worked at the senior level. For the very senior jobs, I doubt whether the outcome of the new process will be that different from the outcome of the old process. There is a different point to be made about all the other processes up to and including the High Court because the process these days is more formal and more open and, although this has not happened yet, it gives the potential for ensuring greater diversity of appointments than there was before and it is certainly fairer and there are no longer allegations that so-and-so was appointed to the High Court Bench because they were in chambers with X or Y and that could not continue. At the senior level, no criticisms were made of the way in which the predecessor Lord Chancellor with a different role conducted themselves, but this is the process that exists.

Q54 Lord Woolf: Lord Chancellor, you will recall that one of your predecessors, Lord Mackay, brought in a retirement age of 70 for the judiciary as a whole. There was however transitional provision so that people who were appointed before that time were able to continue to 75. That proposal of Lord Mackay's, so far as the new Supreme Court is concerned, is just beginning to bite because most of the senior judges have been appointed at elderly ages. There was discussion at the time of the Constitutional Reform Act as to whether there should be any change with regard to the age of retirement. Have you considered whether, bearing in mind that you have to, in the usual way, go through different stages before you reach the Supreme Court and bearing in mind that you may be only appointed when you are already getting close to the automatic age of 70 rather than 75 that there is a need for some provision perhaps to be only used in certain circumstances to enable someone who is obviously an ideal candidate of say 68 not to be cut off from even being appointed for two years?

Mr Straw: I am aware of this and I am actually considering this but, given the change that was made, it is quite tricky because of the implications for others and the fairness. My Lord Chairman, I wonder if I could ask to be excused because I was hoping to attend Prime Minister's Questions.

Q55 Chairman: Indeed. Lord Chancellor, thank you very much indeed for being with us and for the evidence you have given. There are various other questions which we would have liked to have time to ask and I wonder if we might do so by correspondence.

Mr Straw: Yes of course or I am happy to come back.

Chairman: Thank you very much indeed for being with us.