HOUSE OF LORDS

Select Committee on the Constitution

11th Report of Session 2007–08

Relations between the executive, the judiciary and Parliament: Follow-up Report

Report with Evidence

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Select Committee on the Constitution

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Relations between the executive, the judiciary and Parliament: Follow-up Report

Introduction

1. In July 2007, we published a report on *Relations between the executive, the judiciary and Parliament* which analysed the evolving constitutional relationships between the three arms of the state and made a series of recommendations to both the Government and the judiciary.[1] The report in particular focused upon the impact of the Human Rights Act 1998, the Constitutional Reform Act 2005 and the creation of the Ministry of Justice, which occurred during the inquiry.

2. In the report, we emphasised the importance of the Lord Chancellor fulfilling his duty to defend the independence of the judiciary (recognised by section 3 of the Constitutional Reform Act 2005) by ensuring that ministers do not impugn individual judges (and to restrain and reprimand those who do) and recommended the inclusion in the Ministerial Code of "strongly worded guidelines setting out the principles governing public comment by ministers on individual judges".[2] We also criticised the Government's handling of the creation of the Ministry of Justice and called for a transparent process for the setting of the budget of Her Majesty's Courts Service, with appropriate judicial involvement.[3] Other recommendations to the Government concerned the status of the Lord Chancellor, the involvement of the Law Officers in policy-making and legislative drafting, and the possible use of advisory declarations by the courts to rule on whether recently enacted legislation is compatible or incompatible with the Human Rights Act.

3. The report also examined the judiciary's channels of communication with the media and the public. Whilst we criticised sections of the media for irresponsible coverage of judges, we also concluded that the senior judiciary should act more quickly in explaining judicial decisions in controversial cases and recommended that "consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision".[4] We also considered the appearance of judges before select committees, the role of the Lord Chief Justice and his annual report, and the interaction of individual judges with the media.

4. In October 2007 the Government published their response to our report[5] and the Lord Chancellor, Jack Straw MP, appeared before the Committee. The judiciary also provided a response that month—their first to a select

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1 6th Report (2006–07).

2 Ibid, paragraphs 49 and 51.

3 Ibid, paragraph 83.

4 Ibid, paragraphs 49, 146 and 171.

5 Ministry of Justice, Government's Response to the House of Lords Select Committee on the Constitution's Report: Relations between the executive, the judiciary and Parliament, Cm 7223.

committee—and the then Lord Chief Justice, Lord Phillips of Worth Matravers, subsequently gave evidence to the Committee on two occasions. Both of the responses and the three transcripts are reproduced with this report. Our aim in publishing this report is to analyse the responses by the Government and judiciary and to assess progress made since the original report. The report would have been published sooner but we wanted to hear the reaction of Lord Phillips of Worth Matravers to the Framework Document for HMCS[6] and to complete our correspondence with the Editors' Code of Practice Committee[7] before finalising our position on the issues.

The Government's Response and Evidence

Ministers and Judges

5. In our original report we discussed in particular the political reaction to the Craig Sweeney case. Sweeney was sentenced to life imprisonment for abducting and sexually assaulting a three-year-old girl in June 2006 but, in accordance with the sentencing guidelines, he was given a *minimum* tariff of five years and 108 days. The then Home Secretary, Dr John Reid MP, subsequently attacked the sentence as "unduly lenient" and asked the Attorney General to examine the case as the tariff "does not reflect the seriousness of the crime". On a BBC Radio 4 programme, Vera Baird MP, then Parliamentary Under-Secretary at the Department for Constitutional Affairs, stated that the sentence was wrong (an assertion she later acknowledged was incorrect and for which she issued a formal apology). In our report, we found that there had been a "systemic failure" in the operation of the new relationship between the Lord Chancellor and the judiciary, concluding that Lord Falconer, then Lord Chancellor, had failed to fulfil his duty to ensure that ministers do not impugn individual judges and to restrain and reprimand those who do and that the senior judiciary could also have acted more quickly to head off the inflammatory and unfair press coverage that followed the sentencing decision.[8]

6. We are disappointed that the Government response did not accept our criticism of the conduct of Lord Falconer.[9] Whilst it is true that he eventually spoke out "fully and forcefully in public in defence of the judge in the Sweeney case", we continue to believe that he should have done so sooner and that the Government should have disassociated themselves more quickly from the comments of the Home Secretary. It remains our view that the Home Secretary's comments were wholly inappropriate.

7. We note that the Government response stated that Lord Falconer's successor, Jack Straw MP, "will not shirk his responsibility in reminding ministers that they need to be extremely careful not to attack judges".[10] In oral evidence, Mr Straw commented that "we [the Government] are regularly going to be respondents to actions and quite frequently will lose those, and we have to take it on the chin without a huge amount of complaint" and that "we may regret a particular decision and we are entitled

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6 See below, paragraphs 11 and 12.

7 See below, paragraphs 29–33.

8 Relations between the executive, the judiciary and Parliament, paragraph 49.

9 Cm 7233, paragraphs 1–3.

10 Ibid, paragraph 4.

to say that, but not to do that in a disrespectful way" (Q 10). He also made clear that, if the Government was in imminent danger of infringing the rule of law, he would speak "first of all privately to colleagues, and then publicly, if necessary". Pushed further, he stated that "publicly" meant "on the floor of the House of Commons or in the public print" (QQ 11 and 13).

8. In the original report, we concluded that the Lord Chancellor's execution of this responsibility would be made easier if the *Ministerial Code* was amended so as to set out "the principles governing public comment by ministers on individual judges".[11] We are therefore pleased that the Government said in their response that they would "further consider the Committee's recommendations when the Code is next updated".[12] **We reiterate the importance of amending the *Ministerial Code* so that it gives clear and unambiguous guidance to ministers about how they should or should not comment about judges in public. We will review the position when the Government next update the Code.**

The Ministry of Justice

9. We now turn to the creation of the Ministry of Justice (MoJ). Whilst we do not wish to prolong the debate about the way in which this episode was handled by the Government, we do draw attention to the statement in the response that the then Lord Chancellor "discussed the possibility of a Ministry of Justice with the Lord Chief Justice as soon as he judged it appropriate".[13] This overlooks the fact that Lord Falconer himself only found out the plans the day before the then Lord Chief Justice read about them in *The Sunday Telegraph*.[14] It is bad enough that the Lord Chief Justice was not consulted in advance about the proposed MoJ, but it is completely unacceptable that the Lord Chancellor—the minister who, under the Constitutional Reform Act 2005, has express duties to be the guardian of the rule of law and the Government's main conduit to the judiciary—was kept in the dark. **We trust that the Government will, in the event of future constitutional reforms or "machinery of government" changes impacting significantly on the judiciary, involve both the Lord Chancellor and the Lord Chief Justice at a sufficiently early stages of the policy-making process.**

10. In spite of the failure of the Government response to recognise that the Government seriously mishandled the creation of the MoJ, it is encouraging that Jack Straw has since recognised the concerns that the judiciary felt at the time:

> "There was very great frustration by the senior judiciary about the manner in which the announcement had been made about the establishment of a Ministry, which was made over one weekend in January, and then the subsequent speed with which it took place, and from their point of view they are concerned that they have been presented for the second time—I paraphrase what they are saying but I think very accurately—in the space of three years they have been presented with a *fait accompli*" (Q 30).

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11 Paragraph 51.

12 Cm 7233, paragraph 6.

13 Ibid, paragraph 8.

14 Relations between the executive, the judiciary and Parliament, paragraph 61.

11. Moreover, when he took over as Lord Chancellor Mr Straw took a commendably conciliatory approach towards reaching agreement with the judiciary on the unresolved issues surrounding, primarily, the status of Her Majesty's Courts Service and the funding of the courts.[15] In particular, in the light of concerns expressed[16] by the judiciary about the tight parameters that Lord Falconer had placed on discussions, he broadened those parameters[17] and expressed willingness "to consider all issues which are of concern to the judiciary" (Q 37). Furthermore, he told this Committee that "I intend to move heaven and earth to ensure that what happened a couple of years ago, where the Court Service took a hit because of pressures on the legal aid budget, will not happen again" and that "I am not willing to see … the Court Service and the judiciary pay for increases in legal aid" (Q 32). He also made clear that he would not move money from the courts budget to pay for prisons, which had been one of the judiciary's key concerns (Q 34).

12. Finally, in January 2008, the Lord Chancellor and the then Lord Chief Justice reached agreement on a partnership model for the operation of Her Majesty's Court Service (HMCS), including the funding of the courts system.[18] Subsequently, on 1 April, a formal Framework Document for HMCS was laid before Parliament.[19] Under the agreement, the Lord Chancellor and Lord Chief Justice would jointly agree the aims and objectives of HMCS and the priorities for, and division of, funding within HMCS. The Lord Chief Justice would also have the right to communicate to the Chancellor of the Exchequer the views of the judiciary on the provision and allocation of resources during Spending Review negotiations. HMCS staff would owe a joint duty to the Lord Chancellor and the Lord Chief Justice for the effective and efficient operation of the courts. Lord Phillips of Worth Matravers told us on 9 July 2008 that the agreement had resolved the tensions between the judiciary and ministers. He also stated that the HMCS budget would be subject to "a kind of ring-fencing" (QQ 10 and 11).

13. **We welcome the agreement between the Lord Chancellor and the judiciary on Her Majesty's Court Service and look forward to seeing it operate smoothly. We further commend the Lord Chancellor for his constructive and open approach towards reaching an agreement acceptable to the judiciary.**

14. We do however have one concern. The original written statement in January stated that the Framework Document for HMCS would be laid before Parliament "together with the consequential amendments to the Concordat".[20] But in the end it was decided that no amendments would be made to the Concordat, even though the new arrangements would supersede paragraphs 24 and 25 of that document. **We believe that the Concordat is a document of constitutional importance. We are concerned that the Concordat has not been updated to reflect the new arrangements for Her Majesty's Courts Service, and we call on the Government and the**

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15 See ibid, paragraphs 75–87, for an explanation of the points at issue.

16 Ibid, paragraph 65.

17 Cm 7233, paragraph 8.

18 WS 7, 23 January 2008.

19 Her Majesty's Courts Service Framework Document, Cm 7350.

20 The Concordat, agreed in 2004 by Lord Falconer of Thoroton (then Lord Chancellor) and Lord Woolf (then Lord Chief Justice), set out the division of responsibilities between the Lord Chancellor and the Lord Chief Justice.

judiciary to establish a practice of amending the Concordat whenever necessary to ensure that it remains a living document reflecting current arrangements rather than being merely a historic document recording the outcome of negotiations in 2005. Consideration should be given to introducing a formal mechanism for laying revised versions of the Concordat before Parliament.

The post of Lord Chancellor

15. In our report we considered the likely impact of having a Lord Chancellor who, for the time being at least, would also be Secretary of State for Justice and a member of the House of Commons rather than this House. We concluded as follows: "We believe that the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority".[21] Jack Straw, a longstanding and experienced cabinet minister, certainly fulfils these criteria. It is also clear that he takes his duties as Lord Chancellor very seriously: "I am very conscious of the responsibility that I have as the first Member of the Commons and senior politician to have this role, of the importance of me ensuring that I not only follow to the letter what is required of me in the Constitutional Reform Act but to the spirit in terms of protecting and sustaining the independence of the judiciary". He rightly noted that "the practices and precedents that I set for this job [should] set a baseline for how others comport themselves in the post in the future" (Q 5). Mr Straw also thought it "possible" but "very unlikely" that the posts of Lord Chancellor and Secretary of State for Justice would be split up in future (Q 7).

16. The former Lord Chief Justice, Lord Phillips of Worth Matravers, had some very warm words for Mr Straw: "The Prime Minister … could not have done much better than to appoint somebody with the experience and seniority of Jack Straw [who] went out of his way to state how seriously he took his responsibilities to the rule of law, his responsibilities to the judiciary and his responsibilities to make sure that the justice system is properly resourced". Moreover, he continued, "my relationship with him has been excellent; I have not observed any adverse effect from the size of his portfolio" (6 December 2007, Q 29).

17. **We believe that the posts of Lord Chancellor and Secretary of State for Justice should continue to be combined in future. Lord Chancellors in the future, with their responsibilities for the rule of law and the judiciary, should continue to have the authority necessary to fulfil their duties.**

The Judiciary's Response and Evidence

Accountability

18. One of our key concerns in producing the original report was to ascertain how, under the new constitutional arrangements, the judiciary could remain accountable in what one of our witnesses termed the 'explanatory' (rather than 'sacrificial') sense.[22] This became an even more important question once the Lord Chief Justice was given a greater role in the operation of

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21 Relations between the executive, the judiciary and Parliament, paragraph 71.

22 See ibid, paragraph 122 for an explanation of these different forms of accountability.

HMCS, as described above. In our report, we concluded that select committees had a central role to play through the questioning of senior judges in public on the administration of the justice system and on certain key legal issues, but not on individual judgments. We also welcomed the Judicial Executive Board's decision that the Lord Chief Justice should lay an annual report before Parliament, concluding that such a report would "provide a useful opportunity … for [him] to engage effectively with parliamentarians and the public".[23]

19. The judiciary's response accepted that "if the judiciary is to have the input we would like into all aspects of the administration of justice, then we should account for the way in which we have discharged our administrative responsibilities". With this in mind, it continued, "we see merit in the suggestion that select committees can represent an appropriate and helpful forum for the Lord Chief Justice … to explain his views on aspects of the administration of justice that are of general interest or concern and upon which it is appropriate for the judiciary to comment". However, the judiciary were "cautious" about the suggestion that judges might discuss "key legal issues" with select committees. Whilst it was appropriate "for a judge to comment on the operation and procedures of his or her jurisdiction and the implications of any Bill or Act in these respects", it was important to bear in mind that "a senior judge might, at some stage in the future, be asked to adjudicate on an issue they had commented on in the past". Moreover, they were concerned that "the appearance of judges and magistrates before select committees should not become routine for fear of stepping beyond the proper boundary between the judiciary and Parliament" and that any such appearances should take place only when "truly necessary and appropriate".[24]

20. **We welcome the judiciary's express acknowledgment of the need for accountability in respect of their administrative responsibilities. Whilst we understand and accept the judiciary's concerns about the frequency of judges' appearances before select committees and the topics that should or should not be discussed, we reserve the right to call judges to give evidence whenever we feel it necessary and to ask them about any issues which to us seem appropriate in the circumstances. Select committees can be expected to respect the position of judges when doing so.**

21. The other key accountability mechanism that we identified was the proposed annual report by the Lord Chief Justice. We were therefore pleased that the judiciary's response reaffirmed the commitment to an annual report and suggested that this would be "a key part of the judiciary's explanatory accountability".[25] The then Lord Chief Justice, giving evidence to this Committee on 6 December 2007, elaborated further: "I see the annual report as an answer in large measure to those who ask the question how the judges are going to be accountable. I would say to them that if you want to ask us how we are accountable the answer is that I am going to produce an open report on which I shall be open to questioning and if you want to see what we are doing read the report, and if you have questions raise the questions" (Q 13). The first such report, entitled *The Lord Chief Justice's Review of the Administration of Justice in the Courts*, was published in March 2008.

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23 Ibid, paragraph 139.

24 Response from the Judiciary, p 24.

25 Ibid, p 24.

22. In the light of the judiciary's comments, and the importance that he originally placed on an annual report, we were surprised that Lord Phillips subsequently resiled from the commitment to publish such a report on a strictly annual basis. In a letter to Greg Knight MP, Chairman of the House of Commons Procedure Committee, on 25 April 2008 he said that "I do not see that it is either necessary or desirable formally to commit future holders of this post to produce reports on a strict annual basis".[26] Lord Phillips later explained to us that he was "not intending to suggest that we would not be producing [a report] every year"—indeed, he thought it would probably be "a good idea that there should be a regular review each year"—but he did not want to "bind" his successor (9 July 2008, Q 12). Sir Igor (now Lord) Judge felt that "it may not be sensible to produce [a report] every year" but he did "see the force of the point that we are dealing with a public area and you must be able to take us to account whenever you want to" (Q 13).

23. **We agree with Lord Phillips of Worth Matravers that an annual report by the Lord Chief Justice would be an effective way for the judiciary to remain accountable.**

Communications

24. In assessing the way in which the judiciary communicates with the media and public, we concluded that the Judicial Communications Office (JCO) should be more "active and assertive" in its dealings with the media and suggested that "consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision".[27] The judiciary's response accepted that "there may be occasions … when the timely use of a judicial spokesperson, rather than a JCO press officer, to explain sentencing *process* might help provide a balance in the reportage" and noted that "the Judges' Council is, therefore, considering the best means of developing a proposal … to provide in certain circumstances information through certain serving judges that will assist public understanding".[28]

25. Subsequently the then Lord Chief Justice confirmed that "we have identified five judges representing different areas of judicial activity and different geographical areas, who are going to receive training in talking to the media and who will then be available as a resource when we need—urgently, very often—a judicial spokesman to perform that role". He added that "deciding which circumstances are appropriate [for comment by those judges] and which are not is the most delicate matter and it has to be done essentially on a case by case basis" and "these judges should be used as a last resort" (6 December 2007, QQ 18 and 23). Lord Phillips told us that "it is important that judges get used to getting on to the communications office if they anticipate that a judgment they are about to give, a sentence that they are about to impose is going to be controversial, so that we can be forewarned that it may be necessary to deal with media comment" (Q 21). He later told us, on 9 July 2008, that the panel of judges had so far given four interviews on sentencing, bail and housing repossession (Q 17).

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26 Letter not published.

27 Relations between the executive, the judiciary and Parliament, paragraph 171.

28 Response from the Judiciary, p 24.

26. **We welcome the judiciary's decision to appoint five judges to act as judicial spokesmen where appropriate. We hope that this additional resource for the media will help to minimise the kind of misleading and damaging press coverage that resulted from the sentencing of Craig Sweeney.**

Advisory Declarations

27. In our original report, we considered whether the courts could, in appropriate cases, provide greater guidance on the compatibility or otherwise of proposed or recently enacted legislation with the Human Rights Act. We concluded that the Government and the judiciary should look again at using advisory declarations, whereby the courts would make a declaration on the compatibility of recently enacted legislation after hearing submissions from two or more parties in the normal manner.[29] The Government rejected this recommendation.[30] Lord Phillips, when he appeared before us, also had "reservations" about the recommendation because he feared that the judiciary would be "committing itself in advance to an issue that it might then be asked to resolve in an adversarial process" (6 December 2007, Q 3). However, when Lord Woolf—a member of this Committee—explained that we were envisaging advisory declarations being made only after the usual adversarial process, Lord Phillips said that "if it were postulated that this should be done in accordance with our normal court process of having a party on each side putting the rival arguments, then my conclusion might well be different" (Q 4). He added that he thought "there might well be merit" in the proposal as envisaged (Q 5).

28. **It is our view that advisory declarations following an adversarial courtroom process could, with the permission of the Court and in the right circumstances, be a useful way for the courts to give guidance on key questions relating to Convention rights. We note that Lord Phillips of Worth Matravers is open to this proposal. We call on the Government to keep an open mind on whether in appropriate cases seeking an advisory declaration may be beneficial.**

The Media

29. In our original report, analysing the media's impact on public perceptions of the judiciary, we came to the following conclusions:

> "We believe that the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as 'fair game'. A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians. If the media object to a judgment or sentencing decision, we suggest they focus their efforts on persuading the Government to rectify the legal and policy framework. In order to ensure more responsible reporting, we recommend that the Editors' Code of Practice, which is enforced by the Press Complaints Commission, be regularly updated to reflect these principles" (paragraph 146).

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29 Relations between the executive, the judiciary and Parliament, paragraph 111.

30 Cm 7233, paragraph 18.

30. We sent a copy of our report to Sir Christopher Meyer, Chairman of the Press Complaints Commission (PCC). In his reply, he suggested that "the current Code of Practice, with its rules on accuracy and opportunity to reply, should already provide a way for those wishing to hold to account the sort of newspaper reporting you are concerned about".[31] He did, however, pass on our concerns to the Editors' Code of Practice Committee which reviews the Code.

31. The Secretary to the Code Committee, Ian Beales, subsequently wrote to us. Echoing Sir Christopher, he explained that the Code Committee "believes the points raised in your Report are already covered by the Code's comprehensive rules on accuracy and opportunity to reply, which provide an effective remedy for erroneous reports of the sort you highlight". He further cautioned that "any further moves to give specific protection to the judiciary would risk interfering with freedom to comment and—by appearing to make the judges a special case—might increase public perceptions that they were out of touch".[32] For these reasons, the Code Committee would not amend the present rules.

32. We are not in any way convinced by this response. In a follow-up letter, we noted that judges were unable to use the opportunity to reply because they could not discuss their judgments or sentencing decisions outside the courtroom. We said that "judges cannot engage with newspapers in the same way as politicians, businessmen or other individuals. In that sense, they are indeed a 'special case' and should be treated accordingly".[33] We also pointed out that the existing provisions were clearly not working because otherwise newspapers would not continue to publish wholly inappropriate attacks on the judiciary.[34]

33. In response, Mr Beales asked for a number of clarifications,[35] which we provide here. We are not suggesting a restriction on press criticism of judges, but we are calling for an end to the inflammatory and misleading coverage that has all too often appeared in recent years, particularly in some of the tabloid newspapers. Such coverage is in our view likely simply to undermine confidence in the judicial system and its independence. The consequences of this would be extremely serious. It is for this reason that we again emphasise the need for media coverage to be factually accurate and temperately expressed. The Judicial Communications Office can help to clarify any points of factual uncertainty but, as the judiciary have acknowledged, it would be inappropriate for the Office to attempt to justify individual judgments or sentencing decisions. In our view, it would be helpful for journalists and editors if the Editors' Code of Practice reflected the principles set out above. **We expect to see an outcome to the Editors' Code of Practice Committee's deliberations which will respond to our concerns.**

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31 See Appendix 4.

32 See Appendix 4.

33 See Appendix 4.

34 In our report on the Criminal Evidence (Witness Anonymity) Bill (9th Report, Session 2007–08, HL Paper 147) we noted that, "The judgment of the Appellate Committee in the Davis case naturally prompted interest in the news media. While most of the coverage was accurate and informative, some journalists and sub-editors in the tabloid press sought to sensationalise the judgment by disparaging the judiciary. We deprecate misrepresentations of the Appellate Committee's role and the Davis judgment." (paragraph 25)

35 See Appendix 4.

APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee which conducted this inquiry were:

Viscount Bledisloe
Lord Goodlad (Chairman)
Lord Lyell of Markyate
Lord Morris of Aberavon
Lord Norton of Louth
Baroness O'Cathain
Lord Peston
Baroness Quin
Lord Rodgers of Quarry Bank
Lord Rowlands
Lord Smith of Clifton
Lord Woolf

APPENDIX 2: GOVERNMENT RESPONSE TO THE HOUSE OF LORDS CONSTITUTION COMMITTEE'S REPORT, "RELATIONS BETWEEN THE EXECUTIVE, THE JUDICIARY AND PARLIAMENT"

Introduction

The Government is grateful to the House of Lords Select Committee on the Constitution and to all those who gave evidence on a broad, involved and complex series of matters.

The Committee's report examined constitutional relationships between the judiciary, the executive and Parliament. The inquiry focused its attentions on enforcement of the Human Rights Act since 2000, the passage of the Constitutional Reform Act 2005 and the related Concordat developed between the Lord Chief Justice and the Lord Chancellor, and on the recent creation of the Ministry of Justice. Conclusions and recommendations have been reached as to how a changing relationship between the three branches of government has affected, or might affect, core constitutional principles such as the rule of law and the independence of the judiciary.

The Government's response to the report is below.

Summary

The Committee's report separated its conclusions and recommendations into three parts: Executive and Judiciary; Parliament and Judiciary; and Judiciary, Media and Public. The Government's response focuses predominantly on the first of these.

The Government welcomes the Committee's confirmation of the rule of law's core importance in governing the relationships between the judiciary, the executive and Parliament. Similarly the Government commends the emphasis placed by the Committee on protecting the independence of the judiciary—a principle fundamental to the just treatment of all members of the community.

The Government also welcomes the Committee's call for the former Department for Constitutional Affairs' responsibilities for constitutional affairs to continue to receive the attention they merit. The Green Paper, *The Governance of Britain*, was published in July, outlining the Government's vision and proposals for constitutional renewal. In exploring these, the Government is eager to engage the Committee and others on the rights and responsibilities which shape peoples' relationships with each other and with the institutions of the state.

The Government has given careful consideration to the Committee's conclusions and recommendations. Whilst respecting the thoroughness of the Committee's investigations and the strength of the reservations it raises, the Government remains convinced that the creation of the Ministry of Justice affects neither the Lord Chancellor's statutory obligation to uphold the continued independence of the judiciary, nor his obligation to provide adequate funding to ensure the effective and efficient functioning of the courts.

A more detailed response to the Committee's conclusions and recommendations can be found below.

Executive and Judiciary

Managing the Tensions

Recommendation 1. The Sweeney case was the first big test of whether the new relationship between the Lord Chancellor and the judiciary was working properly, and it is clear that there was a systemic failure. Ensuring that ministers do not impugn individual judges, and restraining and reprimanding those who do, is one of the most important duties of the Lord Chancellor. In this case, Lord Falconer did not fulfil this duty in a satisfactory manner. The senior judiciary could also have acted more quickly to head off the inflammatory and unfair press coverage which followed the sentencing decision. (Paragraph 49)

1. The Government does not agree with the Committee's conclusion.

2. Lord Falconer had a personal role in putting the independence of the judiciary on a statutory footing for the first time, and he spoke out fully and forcibly in public in defence of the Judge in the Sweeney case.

3. Throughout the period of the criticism Lord Falconer kept in close contact with the Lord Chief Justice and with Sir Igor Judge, The President of the Queen's Bench Division in the High Court.

4. The current Lord Chancellor is equally committed to upholding the independence of the judiciary and will intervene as necessary in future having fully considered the individual circumstances in which any criticism arises. He will not shirk his responsibility in reminding Ministers that they need to be extremely careful not to attack judges.

Recommendation 2. The key to harmonious relations between the judiciary and the executive is ensuring that ministers do not violate the independence of the judiciary in the first place. To this end, we recommend that when the Ministerial Code is next revised the Prime Minister should insert strongly worded guidelines setting out the principles governing public comment by ministers on individual judges. (Paragraph 51)

5. The Government is committed to upholding the independence of the judiciary. The decision to establish the Supreme Court and the Judicial Appointments Commission is evidence of this commitment. The new Ministerial Code, which was published in July 2007, sets out the principles and practices expected of Ministers. Section 1 of the Code sets out the following 'The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life'.

6. The Government will further consider the Committee's recommendations when the Code is next updated.

Constitutional Change

Recommendation 3. We agree that the advent of the Ministry of Justice, whilst obviously a machinery of government change, has significant constitutional implications. (Paragraph 60)

7. We understand the sentiment behind the recommendation but would suggest that it was the major changes introduced in the Constitutional Reform Act 2005, including the end of the role of the Lord Chancellor as head of the judiciary, which can rightly be said to have had "significant constitutional implications"; the establishment of the Ministry of Justice less so.

Recommendation 4. We are disappointed that the Government seem to have learnt little or nothing from the debacle surrounding the constitutional reforms initiated in 2003. The

creation of the Ministry of Justice clearly has important implications for the judiciary. The new dispensation created by the Constitutional Reform Act and the Concordat requires the Government to treat the judiciary as partners, not merely as subjects of change. By omitting to consult the judiciary at a sufficiently early stage, by drawing the parameters of the negotiations too tightly and by proceeding with the creation of the new Ministry before important aspects had been resolved, the Government failed to do this. Furthermore, the subsequent request made by the judiciary for a fundamental review of the position in the light of the creation of the Ministry of Justice was in our view a reasonable one to which the Government should have acceded in a spirit of partnership. (Paragraph 67)

8. I understand that my predecessor as Lord Chancellor discussed the possibility of a Ministry of Justice with the Lord Chief Justice as soon as he judged appropriate. On 29 March 2007 the Lord Chief Justice ended a statement on the announcement of a Ministry of Justice by saying "the senior judges have already made it plain that structural safeguards must be put in place to protect the due and independent administration of justice. These concerns must be addressed. Provided that they are, there would be no objection in principle to the creation of a new Ministry with responsibility for both offender management and the court service." We continue to discuss with the Judiciary the best way of dealing with the issues they have raised. We have broadened the parameters for discussion since the Committee's report and are reviewing a range of options.

Recommendation 5. We believe that the role of Lord Chancellor is of central importance to the maintenance of judicial independence and the rule of law. Prime Ministers must therefore ensure that they continue to appoint to the post candidates of sufficient status and seniority. (Paragraph 71)

9. The Government agrees.

Recommendation 6. We sincerely hope that constitutional affairs remain central to the Ministry of Justice's responsibilities and are not downgraded in importance compared to the other duties of the Ministry. (Paragraph 74)

10. We share the sentiment; constitutional affairs have a very high priority.

Recommendation 7. The integrity of the legal system depends on it being properly funded. We consider it one of the vital tasks of the Lord Chancellor to ensure that the Courts Service and Legal Aid budgets uphold that integrity. Whilst it is not for us to suggest how the courts budget should be agreed in future, we do urge the Lord Chancellor to ensure that it receives maximum protection from short-term budgetary pressures upon and within the new Ministry. Moreover, the budget-setting process must be transparent and the judiciary must be fully involved, both in determining the process and in its implementation. (Paragraph 83)

11. The Government agrees that the integrity of the legal system depends on proper funding.

12. We agree that the budget setting process for the courts must be transparent and that there should be appropriate judicial involvement.

Recommendation 8. We are not convinced by the judiciary's claims that the creation of the Ministry of Justice lends any additional urgency to their desire for an autonomous court administration. However, the status of Her Majesty's Courts Service is of central importance to the administration of justice, and we urge the Government to engage meaningfully with the judiciary on this issue in order to find a mutually acceptable way forward. (Paragraph 87)

13. The Government accepts the recommendation. We agree that the creation of the Ministry of Justice does not of itself create a need for an autonomous courts administration. We are working with the judiciary on this issue with the aim of finding a mutually acceptable way forward.

Human Rights Act

Ministerial Compatibility Statements and Parliamentary Scrutiny

Recommendation 9. Where a department has any doubt about compatibility of a bill with Convention rights, ministers should seek the involvement of the Law Officers at a formative stage of policy-making and legislative drafting. (Paragraph 90)

14. It is already the practice of Government to consult the Law Officers formally where legislative proposals may be incompatible with the Convention rights, and particularly where there is any possibility that a statement under section 19(1)(b) of the Human Rights Act 1998 may need to be made in respect of any Bill.

Greater Guidance from the Executive to the Courts?

Recommendation 10. Whilst we have sympathy with the difficulties outlined by Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive. (Paragraph 97)

15. The Government agrees with the Committee's conclusion.

Should there be a System of Abstract Review?

Recommendation 11. Whilst a system of "abstract review" of legislation might seem attractive in some respects, we believe that it could compromise the impartiality of the senior judiciary and that it would not in any case prevent successful challenges under the Human Rights Act to ministerial exercise of statutory powers. (Paragraph 106)

16. The Government agrees. Even when a declaration of incompatibility is sought under the Human Rights Act, the Government believes that it is important that the courts are presented with a real and substantial factual situation in the light of which to consider the compatibility of the legislation.

Review of Bills by a Committee of Distinguished Lawyers

Recommendation 12. We do not believe that a committee of distinguished lawyers tasked with scrutinising legislation for compatibility with Convention rights is desirable at this time. If, however, at some future time the composition of the House of Lords changes, this is an idea that may well merit further consideration. (Paragraph 108)

17. The Government agrees.

Advisory Declarations

Recommendation 13. We recommend that the Government and the judiciary give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights. (Paragraph 111)

18. The Government is not convinced of the utility of this idea. As previously noted, the Government attaches considerable importance to the grounding of cases before the courts in real and substantial factual situations: this assists the courts in considering the compatibility of the law with the Convention rights by enabling them to consider not only the strict words of any given statute, but also the legal and practical framework and context in which it is given effect. It is significant to note that even the European Court of Human Rights would not consider the compatibility of a State's legal framework in the absence of an actual complaint that the Convention rights of a person or organisation (within the scope of Article 34 of the Convention) have been or will be breached. It is already possible to bring a specific issue of genuine practical importance before the courts by means of so-called "friendly" litigation, and the Government would be wary of introducing any greater degree of abstraction than this into the judicial process.

Parliament and Judiciary

Laying Written Representations before Parliament

Recommendation 14. We recommend that any written representations received from the Lord Chief Justice under section 5 of the Constitutional Reform Act 2005 should be published in Hansard; that the business managers should find time for the issue to be debated in the House at the earliest possible opportunity; and that the Government should respond to such representations in good time before either House has finished considering the bill or initiative in question. Further, this Committee will endeavour to scrutinise any such representations in time to inform deliberations in the House. (Paragraph 119)

19. The Government will endeavour to respond in good time to such representations, should they be made.

The Question of Accountability

The Role of Select Committees

Recommendation 15. We believe that select committees can play a central part in enabling the role and proper concerns of the judiciary to be better understood by the public at large, and in helping the judiciary to remain accountable to the people via their representatives in Parliament. Not only should senior judges be questioned on the administration of the justice system, they might also be encouraged to discuss their views on key legal issues in the cause of transparency and better understanding of such issues amongst both parliamentarians and the public. However, under no circumstances must committees ask judges to comment on the pros and cons of individual judgements. (Paragraph 126)

20. The Government will pay close attention to any proposals in this area ,and consult the Lord Chief Justice and his colleagues about it.

A Parliamentary Committee on the Judiciary

Recommendation 16. We are not currently convinced of the need for a joint committee on the judiciary, but we shall keep the situation under review, not least in evaluating our Committee's effectiveness in providing the necessary oversight and contact. The Constitutional Affairs Select Committee in the House of Commons also has an important role to play. (Paragraph 129)

21. The Government will pay close attention to any proposals in this area.

Post Legislative Scrutiny

Recommendation 17. We repeat our earlier conclusion that post-legislative scrutiny is highly desirable and should be undertaken far more generally. This would boost the level of constructive dialogue between Parliament and the courts. (Paragraph 130)

22. The Government is currently giving careful consideration to its response to the Law Commission's report on post-legislative scrutiny. This response is being informed by a number of factors. These include, firstly, the Government's recognition of the potential benefits of more post-legislative scrutiny than currently takes place. Secondly that, as the Law Commission noted, post-legislative scrutiny can be narrowly or widely interpreted, ranging from simple

examination of whether there have been drafting difficulties or whether specific provisions have not been brought into effect, to a much wider examination of how the effects of the Act are achieving its objectives. Thirdly that, as the Law Commission observed, and the Government broadly agrees, there cannot be a 'one-size-fits-all' approach to post-legislative scrutiny, because of the wide variety of legislation.

23. In relation to parliamentary post-legislative scrutiny, it is important to note that any commentary by Parliament on judicial interpretation is not binding on the courts, and there is no obligation on the courts to consider a select committee's views in relation to interpretation. This reflects the fact that interpretation of legislation is a function of the courts and the courts alone. The Government considers this to be essential for the proper maintenance of the separation of powers. This does not of course affect Parliament's ability to legislate specifically to correct what it considers is a mistaken development in judicial interpretation of the law and to restate its intention.

Confirmation Hearings

Recommendation 18. We urge the Government to clarify their position on the introduction of appointment hearings for judges at the earliest opportunity, since this would be an innovation with very profound implications for the independence of the judiciary and the new judicial appointments system. (Paragraph 135)

24. *The Governance of Britain* Green Paper said that: "The Government is willing to look at the future of its role in judicial appointments: to consider going further than the present arrangement, including conceivably a role for Parliament itself, after consultation with the judiciary, Parliament and the public, if it is felt there is a need."

25. We will shortly be consulting on judicial appointments, including on whether the role of the executive should be altered. Any role for Parliament needs to be considered very carefully and there are a range of options that could be considered. As the Lord Chancellor has said, US-style confirmation hearings may be appropriate for the United States but he does not believe they would work for us.

An Annual Report on the Judiciary

Recommendation 19. We welcome the Judicial Executive Board's decision that the Lord Chief Justice should lay an annual report before Parliament, an innovation which this Committee had discussed with the Lord Chief Justice and other senior judges in the course of our deliberations. We suggest that the annual report should be formally laid under section 5 of the Constitutional Reform Act. We further suggest that the report might encompass administrative issues and—where appropriate—areas of concern about the justice system, provided that there is no discussion of individual cases. We believe that the report will provide a useful opportunity for both Houses of Parliament to debate these matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public. (Paragraph 139)

26. The Government is happy to discuss this with the Lord Chief Justice.

Judiciary, Media and Public

Public Perceptions

Recommendation 20. We believe that the media, especially the popular tabloid press, all too often indulge in distorted and irresponsible coverage of the judiciary, treating judges as "fair game". A responsible press should show greater restraint and desist from blaming judges for their interpretation of legislation which has been promulgated by politicians. If the media object to a judgment or sentencing decision, we suggest they focus their efforts on persuading the Government to rectify the legal and policy framework. In order to ensure more responsible reporting, we recommend that the Editors' Code of Practice, which is enforced by the Press Complaints Commission, be regularly updated to reflect these principles. (Paragraph 146)

27. We agree, and have passed this recommendation to the Press Complaints Commission and the Secretary of State for Culture, Media and Sport.

The Role of Individual Judges

Recommendation 21. Whilst judges should never be asked to justify their decisions outside the courtroom, it is desirable for them to communicate with the public and the media on appropriate issues. We therefore strongly encourage the occasional use of media releases alongside judgements, as for example in the Charlotte Wyatt case. Further, we cannot see any reason why judges should not co-operate with the media on features about their activities outside the courtroom, if they so wish. However, we are strongly of the opinion that whatever the media pressure, judges should not give off-the-record briefings. (Paragraph 155)

28. This is a recommendation for the Lord Chief Justice and his colleagues.

The Role of the Lord Chief Justice

Recommendation 22. It is wholly within the discretion of the Lord Chief Justice to determine how he can most effectively communicate with the media and the public. However, we suggest that he may from time to time need to re-appraise his strategy in light of the new constitutional relationship between the judiciary, the executive and Parliament. We believe that, in these days of greater separation of powers, it is highly desirable for him to ensure that the views of the judiciary are effectively conveyed to the public. (Paragraph 160)

29. This is a recommendation for the Lord Chief Justice and his colleagues.

The Role of the Judicial Communications Office

Recommendation 23. We conclude that the judges should consider making the Judicial Communications Office more active and assertive in its dealings with the media in order to represent the judiciary effectively. We suggest that consideration be given to appointing one or more spokesmen with appropriate qualifications and legal experience who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. However, under no circumstances should such spokesmen seek to justify decisions as opposed to explaining them. (Paragraph 171)

30. This is a recommendation for the Lord Chief Justice and his colleagues.

APPENDIX 3: JUDICIAL RESPONSE TO THE HOUSE OF LORDS CONSTITUTION COMMITTEE'S REPORT, "RELATIONS BETWEEN THE EXECUTIVE, THE JUDICIARY AND PARLIAMENT"

Chapter 2: Executive and Judiciary

We have no comment to make on the factual account of the formation of the Ministry of Justice or the discussions between the Ministry and the judiciary. We are at present still engaged in discussion with the Ministry and the new Lord Chancellor and therefore do not think it helpful or appropriate at this stage to respond to the points in your report.

Chapter 3: Parliament and the Judiciary

Laying Written Representations Before Parliament

In the light of the decision that the Lord Chief Justice should produce an Annual Report we now envisage that there will be two types of communications with Parliament under section 5 of the Constitutional Reform Act 2005:

- the routine publication of an Annual Report to The Queen in Parliament; and
- in exceptional circumstances, the expression of some immediate concern about an issue important to the judiciary.

We welcome the proposed handling arrangements for any such representations made by the Lord Chief Justice; the opportunity for an early debate and a timely response from the Government will be essential to ensure that there can be full and proper consideration of issues that are raised.

The Question of Accountability

The constitutional changes reflected in the Constitutional Reform Act 2005, in particular the displacement of the Lord Chancellor as the Head of the Judiciary and the creation of a Supreme Court, led to new interest in the judiciary as an institution and in the issue of the accountability of judges and the judiciary. Both individual judges and the judiciary as a branch of the state are subject to a number of forms of accountability. The forms of accountability and their limits are discussed in the attached paper which is on the judicial website (www.judiciary.gov.uk). The limits in the paper result from the acknowledged need in a democracy for an independent and impartial judiciary which is free from improper influence.

Individual judges are accountable for their decisions through their duty to give reasons and the appellate system, and that they are accountable for their general conduct through the system for judicial complaints, handled by the Office for Judicial Complaints. The duty to give reasons for all decisions is a clear example of "explanatory" accountability, which not only facilitates appeals but assists transparency and scrutiny by the other branches of State and the public.

Save in accordance with the procedure under the Act of Settlement, individual judges cannot be held accountable either to Parliament or to the executive in the "sacrificial" sense whereby their judicial office is put in peril, and they cannot be externally accountable for their decisions. Such accountability would be incompatible with the principle of the independence of the judiciary. It is right,

however, that if the judiciary is to have the input we would like into all aspects of the administration of justice, then we should account for the way in which we have discharged our administrative responsibilities. The question is how to do this in a way which is not incompatible with the judiciary's core responsibility as the branch of the State responsible for providing the fair and impartial resolution of disputes between citizens and the State, in accordance with the prevailing rules of law.

Your Report suggests that Select Committees "can play an important role in holding the judiciary to account by questioning in public". As you will appreciate from the attached paper and our earlier guidance to judges appearing before Select Committee, accountability has in the judiciary's view many facets and we have made clear the aspects on which it would be appropriate for the judiciary to discuss in Parliament.

It follows that we see merit in the suggestion that Select Committees can represent an appropriate and helpful forum for the Lord Chief Justice, after publication of his annual report, to explain his views on aspects of the administration of justice that are of general interest or concern and upon which it is appropriate for the judiciary to comment. There may, of course, be other circumstances in which the judiciary consider it appropriate to express views to Parliament on other issues. We have already developed guidelines on the kinds of issues that it would be appropriate for the judiciary to discuss with Parliament in this way and we are cautious about your suggestion that this should include their views on "key legal issues". There are difficulties in judges giving views on new legislative proposals or the operation of the law. Although, as our guidance recognises, it is appropriate for a judge to comment on the operation and procedures of his or her jurisdiction and the implications of any Bill or Act in these respects we need to be particularly aware of the fact that a senior judge might, at some stage in the future, be asked to adjudicate on an issue they had commented on in the past. An awareness and appreciation of the guidelines, from both the judiciary and the Committee, should ensure that we avoid any such pitfalls.

We are concerned, however, that the appearance of judges and magistrates before Select Committees should not become routine for fear of stepping beyond the proper boundary between the judiciary and Parliament. We have already seen an increase in the number of invitations to appear in the 18 months since the implementation of the constitutional reforms. Therefore, while we welcome the indication that Committees would be open to additional appearances from the judiciary, such appearances need, we believe, to be truly necessary and appropriate.

An Annual Report on the Judiciary

As already stated, we have agreed that it would be appropriate for the Lord Chief Justice to, in future, produce an Annual Report. This seems to us to be a key part of the judiciary's explanatory accountability. We expect that this will build on the information about the court systems that is already made public, will cover the work of the judiciary, within the courts and with others involved in the justice systems, and will highlight areas of particular concern to the judiciary. We hope that the first report will be available early in the New Year.

It is our intention that the Report should be laid before the Queen in Parliament. We agree, as set out above, that it would be appropriate for the Lord Chief Justice to discuss the contents of the Report with both Houses of Parliament at a convenient point soon after publication, and suggest that this might be most appropriately done through a joint meeting of the relevant Committees of each

House. However, as we are sure Parliament would anticipate, the Report will be sensitive to the kinds of issues on which the judiciary should not comment and, as we have already indicated above, we would expect the questions at the subsequent Committee hearings also to take account of these sensitive areas.

Chapter 4: Judiciary, Media and the Public

Introduction

We agree. Judges have their own part to play in maintaining public confidence in the judiciary and the justice system.

Public perceptions

We agree with the Committee's view on the public position Government Ministers should take in relation to judicial decisions.

Role of individual judges

It is a cardinal principle that a judge should give his decision and the reasons for it in public. It has, for some time, been the practice that where a judgment is long and complex a judge will, where practicable, incorporate into his judgment a short summary to assist public understanding. When making sentencing remarks in shorter judgments a judge will always endeavour to explain the reasons for his decisions in a way that can be understood by the public who may not be familiar with the details of the case. Where reasons are given orally, as is almost always the case when sentencing, judges are encouraged to consider preparing a written note of their sentencing remarks to be given by hand to reporters in court. It is inappropriate for a judge outside of his decision to seek to amplify or explain his decision—his public judgment speaks for itself. It follows from this principle and the nature of judicial office that we endorse the Committee's views that judges should not give media briefings.

The Role of the Lord Chief Justice

The Lord Chief Justice has been Head of the Judiciary for 18 months. As the Committee acknowledges, there will always be a gap between the level of activity the media would like to see from the Lord Chief Justice and what is wise or even appropriate for the Lord Chief Justice to undertake. In fact, as the Committee advocates, this is kept under constant review, not least as interview bids and other requests arrive for him on a daily basis.

It is important to bear in mind that the Lord Chief Justice has now a direct means of communication with the public through the judicial website (www.judiciary.gov.uk): an illustration of this is the publication on the website of his two interviews with Marcel Berlins (there have been 8840 downloads since April 2006), as well as the publication of speeches and statements by him and other senior judges.

The Role of the Judicial Communications Office

The JCO is, in government terms, a small and relatively new unit responsible for providing communications support to more than 40,000 judicial office-holders. It provides support to the judiciary and to the media when questions arise about judicial issues and keeps up to date the judicial website which, as we have said, is an important means of external communication.

It is accepted there may be occasions, such as the media's reporting following the Sweeney judgment in June 2006, when the timely use of a judicial spokesperson, rather than a JCO press officer, to explain sentencing *process* might help provide a balance in the reportage. The Judges' Council is, therefore, considering the best means of developing a proposal, that whilst ensuring adherence to the principle that judicial decisions must speak for themselves, to provide in certain circumstances information through certain serving judges that will assist public understanding and debate.

Along with the judicial website, the JCO is actively involved in producing educational material for schools and the public generally about the work of judges within the operation of the justice system.

October 2007

APPENDIX 4: CORRESPONDENCE WITH THE EDITOR'S CODE OF PRACTICE COMMITTTEE

Letter from the Chairman to Sir Christopher Meyer

Thank you for sending me a copy of your report on Relations between the executive, the judiciary and Parliament.

I have had a look at the report, and also transcripts of some of the oral evidence. You actually covered some matters that have been the subject of private discussions between the PCC, the press and the judiciary. I think that the current Code of Practice, with its rules on accuracy and opportunity to reply, should already provide a way in for those wishing to hold to account the sort of newspaper reporting you are concerned about.

That said, I will of course feed your concerns in to the Editors' Code of Practice committee, which writes and reviews the Code.

25 September 2007

Letter from Mr Ian Beales, Secretary to the Editor's Code Committee

Following your correspondence with Sir Christopher Meyer, the Editors' Code of Practice Committee has now considered carefully your suggestion for a change to the Code, to protect the judiciary from unfair criticism in the press.

As you may be aware, the PCC has standing guidance on avoiding harassment of the judiciary. However, the Code Committee believes the points raised in your Report are already covered by the Code's comprehensive rules on accuracy and opportunity to reply, which provide an effective remedy for erroneous reports of the sort you highlight.

Any further moves to give specific protection to the judiciary would risk interfering with freedom to comment and—by appearing to make the judges a special case—might increase public perceptions that they were out of touch. This being so, the Editors' Code Committee believes no amendment to the present rules is necessary.

I hope this answers your points. Please let me know if I can help further in any way.

8 November 2007

Letter from the Chairman to Mr Ian Beales

Thank you for your letter of 8 November 2007 to my predecessor, Lord Holme of Cheltenham, about the Constitution Committee's recent recommendations on press coverage of judges and specifically the Editors' Code of Practice.

The Committee has asked me to convey our dissatisfaction at your response. You refer to the PCC's standing guidance on avoiding harassment of the judiciary and the Code's "comprehensive rules on accuracy and opportunity to reply". The Committee wishes to make two points. Firstly, it is clear that the existing provisions are not working. If they were, newspapers would not print wholly inappropriate attacks on the judiciary such as the following from the *Daily Express*:

Using the European Convention on Human Rights as cover, Mr Justice Sullivan made a ruling which many will regard as tantamount to a judicial coup against

Parliament … Britain's out-of-touch judges are increasingly using the Human Rights Act as a means of asserting their will over our elected representatives.[36]

Secondly, the opportunity to reply is not a satisfactory remedy in the case of judges because they cannot discuss their judgments or sentencing decisions outside the courtroom. As the Lord Chief Justice has explained, "it ought to be clear from the judgments in question the process of reasons that has led the judge or judges to reach their conclusions … and it would not be appropriate for those who have given the judgment or, indeed, for me to go beyond that".[37] Judges cannot engage with newspapers in the same way as politicians, businessmen or other individuals. In that sense, they are indeed a "special case" and should be treated accordingly. The question of whether judges are perceived as "out of touch" is not relevant here.

In light of the above, we urge the Editors' Code Committee to reconsider our recommendation.

30 January 2008

Letter from Mr Ian Beales

Thank you for your letter, which will go before the Code Committee at its next meeting, in April. In advance of that, however, I wonder if I might ask you to clarify the Select Committee's thinking on the following points:

- For the avoidance of doubt, would it be correct to assume your Committee is not suggesting that the Code ban *all* press criticism of judges?
- If so, how would the Code differentiate between 'acceptable' criticism and that which would not be permitted? Who, in your view, should decide?
- How would this sit with normal concepts of freedom of expression?
- If judges are inhibited from direct reply to media comment, could not the Judicial Communications Office have a role in this?
- Have members of the judiciary sought this specific protection, as it is not within the recent experience of editors, in their occasional contacts with senior judges, that this has been a significant issue?

I'd very much appreciate your thoughts. I am sure they would greatly assist the Code Committee in its deliberations.

14 March 2008

Letter from Mr Ian Beales

The Editors' Code Committee met last week, but felt it would be better to defer further discussion until your Committee had had the opportunity to respond to the points made in my letter of March 14.

The Code Committee is not now likely to meet again until the autumn, but I will of course put the matter on the agenda, once I hear from you.

27 April 2008

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[36] Leader, 11 May 2006.

[37] Constitution Committee, 6th Report (2006–07): *Relations between the executive, the judiciary and Parliament*, 26 July 2007, paragraph 150.

Minutes of Evidence

TAKEN BEFORE THE CONSTITUTION SELECT COMMITTEE

TUESDAY 23 OCTOBER 2007

Present	Bledisloe, V	O'Cathain, B
	Goodlad, L	Quin, B
	Holme of Cheltenham, L (Chairman)	Rowlands, L
	Lyell of Markyate, L	Smith of Clifton, L
	Morris of Aberavon, L	Windlesham, 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, welcome. It is very good to see you here, thank you for coming. Just as a matter of protocol, given you are multi-hatted, would you prefer to be addressed as Lord Chancellor or Secretary of State?
Mr Straw: It depends on your point of view. I am here really as Lord Chancellor. I have two jobs—I have three, one is representing my constituents—but the Lord Chancellor's role is a distinct role within the law in terms of responsibility for the court system and in respect of the Judiciary—I am not responsible for them any longer—so by all means call me that, or you can call me Jack, if you want, whatever suits you!

Q2 ***Chairman:*** You are in the House of Lords, so a certain measure of formality reigns!
Mr Straw: I am in favour of formality but in these circumstances some others are not.

Q3 ***Chairman:*** Given that we established a good precedent with your predecessor of regular chances to have this sort of discussion, we will stick with Lord Chancellor, if that is agreeable.
Mr Straw: That is absolutely fine, my Lord.

Q4 ***Chairman:*** Thank you. I am told there is about to be a vote so we may have to adjourn, but let us make a start anyhow. I should just say that the proceedings are being televised, so would you be kind enough for the cameras to identify yourself.
Mr Straw: Of course. I am Jack Straw, I am the Lord Chancellor.

Q5 ***Chairman:*** Indeed, you are the first Lord Chancellor—this historic role that goes back hundreds of years—to have been a Member of the House of Commons. I wonder if you feel that having an MP rather than a peer as Lord Chancellor is likely to have any significant impact on a role that goes way back in British history, and whether already you have encountered any practical or procedural difficulties exercising this role from the Commons?
Mr Straw: It does make a difference, first of all. It would have been impossible, in my judgment, to have had a Lord Chancellor as head of the Judiciary prior to the 2005 Constitutional Reform Act, who was in the Commons. I am living proof of the fact that it is not impossible to combine being a Member of the House of Commons with the new responsibilities. But I should say—and I said this before the Lord Chief Justice in his court when I went to swear the three oaths that Lord Chancellors are required to make—that I am very conscious of the responsibility that I have as the first Member of the Commons and senior politician to have this role, of the importance of me ensuring that I not only follow to the letter what is required of me in the Constitutional Reform Act but to the spirit in terms of protecting and sustaining the independence of the Judiciary. I am very conscious of that. I have said in other contexts as well that I am conscious also that, whilst I cannot ordain the future, the practices and precedents that I set for this job with luck should be able to set a baseline for how others comport themselves in the post in the future. In terms of practicalities, the only practical problems—that would hardly be worthy of a footnote in history—have included the fact that the ancient ceremony by which I communicate Her Majesty's consent to the election of Lord Mayor of London had to be moved from the Princes Chamber, which I am told is part of the House of Lords, to the Robing Room, which everybody said was a much better room and why had they not used it before. And there have been some navigational problems over whether I, as a Royal Commissioner, could deal with the prorogation, which we have passed on for this year and it may be sorted out for next year.

Q6 ***Chairman:*** Thank you for that. Can I ask specifically whether—and even this Committee gets confused and if we get confused I daresay other Members of both Houses will be confused—your responsibilities in respect of constitutional reform come under your Lord Chancellor hat or your Secretary of State for Justice hat?
Mr Straw: In terms of legislation essentially I wear, I suppose, the Secretary of State for Justice hat, although it is pretty fungible. Lord Irvine had direct responsibility for some aspects of the 1997 to 2001 constitutional programme. He chaired the Constitutional Affairs Committee in those days and although formerly the Human Rights Bill was my Bill because it was introduced into the Commons we shared responsibility for it. I put it this way, Lord Holme, that until the legislation goes through it is a Secretary of State role. I think it is neither here nor there, to be honest, but sometimes once it has gone through and if it impacts on the role of the Judiciary then it is a Lord Chancorial role.

Q7 ***Chairman:*** I suppose a relevant supplementary to that is can you personally, as a senior member of the government and with a responsibility in this area, envisage that at any point the post of Lord Chancellor and Secretary of State for Justice might be split up?
Mr Straw: I am not a soothsayer, a foreteller of the future. It is possible but I think that it is very unlikely. My own sense is that the Ministry of Justice is going to last. There was quite a debate post 9/11 about whether the Home Office was too big. The Conservative Party proposed that there should be a minister for homeland security. Essentially what you now have in the Home Secretary is exactly that. He is still called Home Secretary and I think that is appropriate. The Home Office has very important responsibilities but they are much less diverse than they were when I was Home Secretary or predecessors of mine were, so all those constitutional responsibilities, most of those were transferred actually in 2001 after I moved on, mainly to what became the Department of Constitutional Affairs but some, for example, in respect of gaming, horseracing, licensing, that sort of area went off to the Department for Constitutional Affairs, and some race relations went to what is now the Department of Communities and Local Government. Then with this big change, which took place and was announced in early May, responsibility for everything really that happens from the door of the court was transferred to what has now become the Ministry of Justice, and I get no sense that that is going to be disturbed. It could be, but I do not think it will be.

Q8 ***Chairman:*** The particular anxiety of this Committee, which we have expressed in more than one report, is that constitutional affairs, although high in the new Prime Minister's list of priorities, could find itself in the reorganisation a poor relation. Do you think there is any danger of that happening?
Mr Straw: I think there is no danger of that with this Prime Minister at all; quite the reverse because it is a very important priority. My Lord Chairman, obviously I cannot speak for future Prime Ministers, it depends on the relative priority that it is given, and in any case we have periods of constitutional change in this country and we have periods of consolidation. We had quite a significant period of constitutional change, just going back during our administration, between 1997 and 2001 and a period of consolidation for six years after that and there is now a further period of change, so it is going to go like this. It will not be relegated because even once it has been passed there is a continuing responsibility to maintain, for example, the freedom of information regime, the data protection regime and the whole human rights and responsibilities agenda, even once the changes are agreed.

Q9 ***Chairman:*** Could I move on to a question which we asked your predecessor and we had an interesting answer both from him and from the Lord Chief Justice, which is how would you personally, now that this weighty, historical role has descended on your shoulders, define the Rule of Law? And you will recall in the Constitutional Reform Act that you have a constitutional role in relation to the principle of the Rule of Law. How would you define that?
Mr Straw: I am glad you have asked me that question. The way I would define it is by recommending that those who wish to have a better understanding of the concept should read Lord Bingham's excellent lecture that he gave a few months ago—the Sir David Williams lecture. He has a far better legal mind than mine and I think his exposition of the Rule of Law, his eight sub-rules, is brilliant. Lord Bingham in this lecture, for those of you who are familiar with it, refers to somebody of whom I have not heard, called Brian Tamanaha, who described the Rule of Law as "an exceedingly elusive notion" giving rise to a "rampant divergence of understandings" and "everyone is for it, but have contrasting convictions about what it is". One of the points that Lord Bingham makes is that of course you can have the Rule of Law also within an entirely authoritarian context, and so you have to ensure that the Rule of Law operates in a democracy with proper checks and balances and so on, and he sets out these eight conditions for it, and I defer to him on that. For those who have not read it, it is a really interesting lecture.

Q10 ***Chairman:*** I will bring in Lord Morris in a moment, but one way of expressing the purpose of the question is: over and above the independence of the Judiciary, which let us assume is common ground, what do you think is crucial or not?
Mr Straw: I will tell you what I think—and this is where I am extremely conscious of my own responsibilities—which is that fundamental to the operation of the Rule of Law within a democracy is that there should be an understanding about the separation of powers and particularly the separation between the Executive and the Legislature on the one hand and the Judiciary on the other hand, and a mutual respect about the different roles that each has. That therefore requires there to be a responsibility on politicians, those in the Executive and Legislature—and of course in our system we are all mixed up—to respect the role of the courts, to appreciate that in a democracy the courts are not only arbitrating between private individuals, private citizens and also between the State—the Crown in our case—and those who are alleged to have transgressed, through criminal proceedings, but crucially the courts are there to arbitrate and moderate on disputes which arise between citizens and the State, the other way, and that we are regularly going to be respondents to actions and quite frequently will lose those, and we have to take it on the chin without a huge amount of complaint. We may regret a particular decision and we are entitled to say that, but not to do that in a disrespectful way. On the other hand, there is also a *quid pro quo* for this and Lord Bingham said, "Thus one can agree with Justice Heydon of the High Court of Australia that political activism, taken to extremes, can spell the death of the Rule of Law." So there needs to be an understanding about where the role of the court ceases and the role of political decision-making takes over. I think in this jurisdiction that we have the balance pretty well right.

Q11 ***Chairman:*** If you felt as a member of the Cabinet, and a senior member at that, that the government was in danger of infringing the Rule of Law, what would you see your responsibility as being?
Mr Straw: To say so, first of all privately to colleagues, and then publicly, if necessary.

Q12 ***Chairman:*** Publicly as in Cabinet?
Mr Straw: No! Surprisingly enough, notwithstanding rumours to the contrary on the whole what happens in Cabinet does not get broadcast, especially not these days actually, if I can put it that way. If necessary publicly, in public—go on the record on it.

Q13 ***Baroness O'Cathain:*** On the floor of the House of Commons?
Mr Straw: On the floor of the House of Commons or in the public print, yes; I am quite clear about that.

Q14 ***Lord Morris of Aberavon:*** Lord Chancellor, I supported the maintenance of the title of Lord Chancellor—
Mr Straw: Thank you!

Q15 ***Lord Morris of Aberavon:*** . . . in the House of Lords at the time and it has been a pleasure if not relief that a senior politician like yourself was appointed to it, being the first from the House of Commons. But having reflected now on part of the statutory responsibilities which could easily be amended is there any real reason for maintaining this strange distinction between Secretary of State and Lord Chancellor? Do you adopt the same approach as your predecessor? We noticed that the opening of the new session was a bit different from what your predecessor did. Is there any real purpose now in maintaining this position?
Mr Straw: Ultimately it is for Parliament and not for me to decide. I certainly do not think it is a priority to go through that great argument that took place in 2004/2005 and change it. As I say, I think I have a responsibility to show that this arrangement with the Lord Chancellor in the Commons is workable; and, as I have again said publicly, may paradoxically work to enhance the independence of the Judiciary because if you are down in that end you have to be very conscious of the need for separation. I also think, Lord Morris, that since the role of Lord Chancellor is embedded in all sorts of statutes and procedures it would be a huge amount of trouble, which is partly why the last effort was abandoned to seek to abolish it. This is purely at a personal and historical level—I would be rather sad to see the post being abolished having survived through the vicissitudes of time since the seventh century. It is a rather quaint relic. As I say, there is a purpose, however, with it, which is that I think that it is worthwhile having a distinction in terms of role and title in respect of the Judiciary from the other functions. I really do think that is important.
Chairman: Thank you very much. Lord Lyell.

Q16 ***Lord Lyell of Markyate:*** Lord Chancellor, you emphasised, and I agree with you very strongly, I think, about the importance of separation of powers and both historically and, as I understand it, still under the Rule of Law today and black letter law today, there is a separation which gives a particular role both to the Lord Chancellor and to the Attorney General to ensure the purity, the complete absence of party political influence on both the Judiciary, which must be totally protected, and the purity of the prosecution process. I was somewhat surprised to hear the Prime Minister in July, when he talked about

Executive changes, lumping the Attorney General in with 11 other items of the Executive. Would you not agree with me—I hope you would—that the Attorney General is not in his prosecutorial or advice-giving functions a member of the Executive? He is the first Law Officer of the Crown, appointed under the Great Seal, with the same seal that a judge has, and acting as independent he is appointed by the Prime Minister but he is Her Majesty's Attorney General not the Prime Minister's Attorney General, and although the Prime Minister can sack him, if he wishes, he cannot tell him what to do. Do you agree?
Mr Straw: All that is true, Lord Lyell, but the Prime Minister did not lump it in. What he sought to do was to deal with some present issues and a perception which has been there from time to time and going back that there needed to be a greater clarity about the role of the Attorney General. Lord Goldsmith is both a friend of mine and someone for whom I have the highest regard in terms of his integrity, but it is just a matter of fact that some of the decisions and processes in which he was involved became quite controversial and the Prime Minister thought—and so did Baroness Scotland—that it was sensible to try to ensure that there was stronger protection for that role, and maybe in some respects to separate the role or to make it clearer.

Q17 ***Lord Lyell of Markyate:*** Is not the problem when you have what are—and you used the word "perception"—perceived to have been mistakes—some of them wrongly—that instead of changing the office you should look into what went wrong. The importance of the independence of the prosecuting authorities and the answerability of government in its widest sense, through the Law Officers or the Lord Chancellor, for that integrity are things not to be lightly got rid of.
Mr Straw: I agree with that entirely and I have made the point myself that there has to be—and you, Lord Lyell, know this much better than me—a point where the prosecutorial role and the role of senior adviser to the government has obviously to come into the counsels of the Executive—there is no way out of that.

Q18 ***Lord Lyell of Markyate:*** The counsels of Government, if I may say so.
Mr Straw: That is what I meant, yes, counsels of Government. Also, because there is a public interest test as to prosecutions in our jurisdiction as well as an evidential test there are going to be some occasions where what is judged to be the public interest will be quite widely defined, not least in terms of national security and so on. The other thing I would say, having, as it were, served with Lord Goldsmith during Iraq, where there is a highly controversial decision which has to be made and advice given as there was in respect of military action in Iraq, whether it was inevitable that the process and maybe the individual giving the advice becomes subject to some controversy is beside the point, but in this case the process did and so did the person, and it was reflecting on that and some other issues. There was some controversy about the decision in respect of the Serious Fraud Office and BAES but the main controversy has arisen over legal advice, as you know, but there is a consultative document being issued on the role of the Attorney General and we are currently in the process of receiving comments on it.

Q19 ***Lord Lyell of Markyate:*** Can I ask you for your reply on these observations? First of all, the Attorney General over Iraq asked the Prime Minister, Tony Blair, for an express written assurance that Britain's immediate national interests were under threat, and he got it. That was described later by the former Secretary of the Cabinet, Lord Butler, as disingenuous. The second point is that over BAE, whilst very senior public officials, our Ambassador in Saudi Arabia and the Director of the Serious Fraud Office, looked at this matter most carefully the Director of the Serious Fraud Office took the decision and was very careful not to do what I am about to say, the Prime Minister suddenly weighs in saying that a good reason was because we were going to lose a lot of business, which is unlawful. If you get the Prime Minister of the day saying unlawful things at the time of a highly important quasi-judicial decision that needs to be brought into the public eye and seen for what it was.
Mr Straw: If I may say so, I do not have the Butler Report in front of me and nor do I recollect exactly what the Prime Minister said—it was words to that effect—but the issue was generally more complicated and the central issue, which I do recall very acutely in respect of the legal position on the Iraq war, went back to whether there was an original decision by the Security Council under Resolutions 678 and 687, which allowed for military action and whether, as it were, that had since been refreshed by Resolution 1441 and whether the conditions in 1441, which could provide for that refreshment to become active, had been fulfilled. I am happy to spend the next hour explaining why in my judgment the decision that was reached by Lord Goldsmith was correct, and that was basically where we had got to. The Prime Minister is on the record in public as saying what he thought the nature of the threat was. As far as the SFO decision is concerned, again I am sorry I do not have the text of what Mr Blair said at the time, but what I do recall was that there were—I think it was on 16 December—linked statements, one made by the head of the SFO and another one made by the Attorney downstairs here and repeated by Mike O'Brien at our end, which set out the circumstances

in which it had been decided to finish the investigation. It probably would have been better if that is all that had been said, is the answer to your question.

Q20 ***Chairman:*** We will have to move on, Lord Lyell. In fact it may interest you to know, Lord Chancellor, that this Committee is planning—I am afraid probably without the period of consultation that you have established for the role of the Attorney General—to issue a short report setting out some of the issues about the future role of the Attorney General, which I hope will be found helpful.
Mr Straw: Thank you, that will be very helpful because the consultation process is still continuing.

Q21 ***Chairman:*** Since we have got on to the question of war-making via the Iraq war, can I be clear—and I know that you have had a chance to study and indeed have responded to our report on war-making powers—do I take it that despite the solid opposition we had from your predecessor Lord Chancellor to any question of Parliament making the ultimate decision approving any significant deployment of the Armed Forces into armed conflict that it is now the irreversible position of the government that that is a decision for Parliament?
Mr Straw: The principle is, yes, to that, and I expressed that in the debate that we had in mid-May—I think it was 17 May—when we had a debate in our House on an Opposition motion and I moved a amendment to do that, and we were informed both by your report, which recommended the convention route and also by the Public Administration Select Committee report from our end, which recommended a more legislative route and, as you know, we are currently preparing to produce a consultative document which sets out in more detail the government thinking for consultation.

Q22 ***Chairman:*** As things stand today which route do you tend to prefer, the convention or the statutory route?
Mr Straw: This is a consultation so you cannot have a consultation and then say, "It is what we have decided and we are not take any notice of things." If ever you are labouring away and you think that what you are doing is not making a difference then you need to reflect on why there has been a shift within government on the principle. The principle has been conceded and it is jointly because of the work of this Select Committee and the one at our end, because people think and read these documents and can see a strong case. Also the fact that it was two authoritative Select Committees where you are able to say, "We have thought about this and we have to take very full account of the anxieties we all share that the military action should not be inappropriately constrained, that our commanders and troops on the ground should not be compromised but we think there is a way through this," is very influential. It is fair to say that the balance of opinion is in favour of the convention approach, but when you pin it down it is not just that a textbook would write that this has become a convention but pin it down in resolutions of the House of Commons and its Standing Orders. A possibility of a hybrid approach maybe but with some serious misgivings about a wholly statutory approach, but that is where we are.

Q23 ***Chairman:*** We will await the consultation with great interest. I have to say that a big shift in the government's thinking is a masterly understatement for what was really a 180 degree change, and I know that you yourself were part of that and this Committee certainly welcomed the change in the government's response.
Mr Straw: Thank you. We can argue about the angle of the change, but I would say in the government's mitigation that the major change took place in advance of Iraq because I do not know what decisions would have been approached 30 or 40 years ago but it certainly became first off to the late Robin Cook and myself that we could not possibly make decisions which were legitimated in those circumstances unless there had been not just one but a series of debates and decisions in the House of Commons, and whatever else you say about that there was a whole series of explicit, substantive decisions taken.
Chairman: Indeed. Lord Rowlands.

Q24 ***Lord Rowlands:*** May I just say, Lord Chancellor, when we started our inquiry I was a passionate supporter of the statutory approach but during the course of our inquiry, frankly, from the evidence one has heard and tackling the actual way you drafted it I became a convert to the convention because I could not quite see how you could pin down in statute all of the range of possibilities that would arise. Do you think you can crack it statutorily?
Mr Straw: I do not know, is the answer. I have set out, Lord Rowlands, where the government is coming from and what the Prime Minister has said in the House and also what is said in the Green Paper that I published alongside the Prime Minister's statement on 3 July was pretty clear. It tilted pretty strongly—

Q25 ***Lord Rowlands:*** But you also floated the idea of a hybrid.
Mr Straw: You will have to wait, if I may say so. Just as there are various forms of a convention which could just be we have changed our practice and it is reflected in the exposition of Erskine May, to actually putting it down in at least grey letter law in Standing

Orders, there are possibilities that we have tried to adumbrate in the consultative document. What we say at paragraph 29 of the Command Paper to 7170 is that, "The Government will propose that the House of Commons develop a parliamentary convention that could be formalised by a resolution. In parallel, it will give further consideration to the option of legislation," and that is what we are seeking to do to flesh out in the consultative document. Can I say, Lord Rowlands, that I hope very much that whether as a Committee or whether as individuals you are able, given your own interest and knowledge in this area, to contribute directly to the consultation because it is really important we get this right?
Chairman: Indeed. Lord Bledisloe.

Q26 ***Viscount Bledisloe:*** Lord Chancellor, your Green Paper talks only about the role of the House of Commons in dealing with this. What role do you see for this House in this matter?
Mr Straw: We thought about this a great deal—and it is not in any sense to be regarded as an insult or impertinence towards this House—and we are clear of the fundamental principle that decisions about going to war have to be made ultimately by the elected chamber. But I think there is every argument in favour of those debates in the Commons being informed by debates here in the Lords, so it is a question of making sure that the one comes before the other.

Q27 ***Viscount Bledisloe:*** So you see that this House having a role to play and then the House of Commons having a debate in the light of that and making a decision which is then binding?
Mr Straw: Yes. You can have a debate simultaneously but then people can rightly say that apart from voicing opinions what exactly is the point of the debate. I think it is far more satisfactory—it is obviously a matter for you—for the debate here to precede the debate in the Commons.

Q28 ***Chairman:*** Could I move the questioning on to a different area, which is the still regrettably outstanding question relating to the creation of the Ministry of Justice in terms of unresolved issues between the Executive and the Judiciary. This is a saga that seems to have been going on forever. The negotiations were supposed to have been concluded before the introduction of the Ministry of Justice, but they were not, and when you came in as the new minister you quite understandably said that you wanted time to understand the issues. We are now three months later and I think there is a great deal of curiosity as to where exactly we have got.
Mr Straw: I said this when I gave evidence to the Constitutional Affairs Select Committee at the other end a couple of weeks ago, I see it as part of a process—obviously with products from the process—but not as a single event. There is one issue, Lord Holme, on which progress is being made—and I cannot say when there is going to be a final conclusion—which is in respect of the formal organisation of Her Majesty's Court Service, which I think is a matter which particularly exercised the Judiciary. We have had a working party which has been led jointly by Clare Sumner, who is a senior official in the Ministry of Justice, and Michael Walker, who is a well known and experienced District Judge, who came forward with a series of option papers which both the Lord Chief and his colleagues are looking at and so am I, and Alex Allan, the Permanent Secretary of the Department is trying to bring together in the judicial working group. So that work is continuing.

Q29 ***Chairman:*** I am sorry to interrupt, that is specifically on the Court Service; is that a sub-group of the larger negotiations?
Mr Straw: It is a rather key issue because the working party, which is at an official level, which Clare Sumner and Michael Walker are leading feeds in ultimately to the Lord Chief and myself, but also through this judicial working group as well. There are a variety of options ranging from leave things where they are to establish the Court Service as a non-departmental public body, almost wholly at arm's length from ministers. It may not come as any great surprise for your Lordships to learn that I favour something somewhere in the middle because there is no question about any interference with judicial decisions. There are issues which inevitably impact on the Court Service as an administrative body, my department and me as the department responsible for the Court Service and me particularly as the minister who has to go to the Treasury to negotiate for more money to be able to show that this is an effective and efficient public service, and there is a complicated set of relationships there. There is also a very large number of non-judicial staff working in the Court Service, who are the direct responsibility of my department and of me. So it is squaring that circle against the background in which the Court Service has only recently been established. But that work is going on. There is a second area of very considerable frustration for the Judiciary, which is over judicial appointments and over the tardiness of the process and what was seen as some gratuitous interference in the process. I have sought essentially to extract myself from any unnecessary involvement in the process, so that my involvement for the vast bulk of judicial appointments is at the minimum required under the Constitutional Reform Act. I cannot obviously break the law, but I have been endeavouring to improve the processes between the Judicial Appointments Commission and my own

department and the Director General which covers that to stop second guessing and shadowing by each, to get clarity about respective roles and to sort out some of the problems that have arisen simply over what used to be called manpower planning—I suppose forecast of staffing levels—for future demand for Recorders here, Circuit Judges there and High Court Judges there, and to encourage, to put it mildly, the Judicial Appointments Commission to reduce the time that this process is taking. It ought to be very straightforward but the fact is that it is taking eight weeks to get medicals done after an appointment is otherwise ticked off, so just trying to compress these processes and also making sure that my office and also that I turn round the decisions as quickly as possible. It is for the senior Judiciary to say what their perception is of this but I hope they would say that they think there has been some perceptible improvement.

Q30 ***Chairman:*** Perhaps if we have time we could come back to the issue of judicial appointments later, but as I understand it that was not one of the main bones of contention in the spring between the Judiciary and your department around the creation of the Ministry of Justice; that was not one of the big bones of contention at that time anyway.
Mr Straw: It certainly was when I became Lord Chancellor, let me say. I genuinely was not present at those discussions. There was very great frustration by the senior Judiciary about the manner in which the announcement had been made about the establishment of a Ministry, which was made over one weekend in January, and then the subsequent speed with which it took place, and from their point of view they are concerned that they have been presented for the second time—I paraphrase what they are saying but I think very accurately—in the space of three years they have been presented with a *fait accompli*. Your Committee made some fairly strident comments about that.

Q31 ***Baroness O'Cathain:*** You are right; our recommendation number four was the one that dealt with that.
Mr Straw: What I have had to deal with is the consequences of that and that is what I have been seeking to deal with. There is a concordat which was there before I took over this job. A very key issue is obviously to do with the relationship between the Judiciary and myself and my department. There are general aspects to that but there is also this particular thing about the role of the Court Service and, Lord Holme, the issue of money.

Q32 ***Chairman:*** Indeed.

Mr Straw: I have made a joke of the fact that I swear three oaths—two are in rather fine prose because they are written at about the time of the Prayer Book, one is in the most constipated prose because it was drafted in the Committee of both Houses and that is the oath that I have to make under the Constitutional Reform Act, but anyway that one talks about ensuring a sufficiency of resources. The joke I have made is that I have sent a copy of that highlighted to the Chancellor of the Exchequer. However, that has not resolved the fact that the CSR settlement was actually agreed before I took over and it is tight, as it is for most departments. What I have said—and I am prepared to repeat again here—is that I intend to move heaven and earth to ensure that what happened a couple of years ago, where the Court Service took a hit because of pressures on the legal aid budget, will not happen again, and I have explained to both the Chairman and the Chief Executive of the Legal Services Commission and to representatives of the Bar and the Solicitors that legal aid has to be kept within its own budget. That is that and I feel wholly comfortable about that; I am not willing to see particularly the Court Service and the Judiciary pay for increases in legal aid. Although I understand the pressures on the legal aid budget and the concerns of solicitors and members of the Bar it is a fact, which no one can avoid, that we spend more per head on legal aid than any other jurisdiction in the world and the figures are very stark, at £34 a head in England and Wales, £27 in Scotland, and dropping very rapidly even in comparable common law jurisdictions to around £10—and I can give you the exact figures if you wish them—in respect of New Zealand or Ireland. There has also been a fivefold real terms increase in legal aid spending since 1980. I think we would be hard put to find another public service that has increased by that amount; and a threefold increase, or getting on that way, in the number of practitioners who are reliant on legal aid in the same period. So what we have to understand as far as legal aid is concerned is that savings will have to come from within that budget and everybody—and this includes those who represent defendants, has a responsibility to improve processes because a huge amount of the money does not go on, as it were, advice or on law—it goes on processes.

Q33 ***Baroness O'Cathain:*** Waste.
Mr Straw: Baroness O'Cathain says waste and, yes, it is waste; it is wasted in terms of the inefficiencies and disconnections in the system.

Q34 ***Chairman:*** So it sounds as though some of the elements of what I will call an agreement with the Judiciary are gradually coming into place, but the question I would like to ask you, given that government has willed greater separation of powers,

would you now personally, as Lord Chancellor, feel some sense of urgency to get a proper settled agreement with the senior Judiciary so that what is at the moment a running sore and been running rather a long time is ended?
Mr Straw: It is wrong to say that it is a running sore—I do not get that sense from them and they have certainly not used that phrase with me, that it is a running sore. I did act pretty quickly. We have this review being run by Clare Sumner and by Michael Walker. There is other work going on in hand and I am absolutely nailed to the floor in terms of the undertakings I have given about their budgets, and everybody understands this. All of us are stuck with public spending settlement and it was ever thus, and I may say that even were the Court Service an entirely arm's length non-departmental public body it would not be immune from cuts if they were to happen. May I just make this point because there are those who think if you are running an NDPB you end up with greater immunity; it is not the case. The Environment Agency belies its name—it is a non-departmental public body and arm's length from government, but when the money needed to be found because there was a hole in the Rural Payments Agency budget that NDPB took part of the hit. Meanwhile, what I have been doing is saying that I am not going to either take money out of the courts to pay for the other two big areas of spending, one of which is legal aid and the other is the Prison Service, and actually if you read at the small print of the settlement they both have some more money and also undertakings of more in respect of prisons.

Q35 ***Chairman:*** Would you like to venture a prediction when you will have all this tied up?
Mr Straw: As I say, I obviously note what you say, Lord Holme, on the issue of judicial appointments and I can tell you that when I spoke recently to a group of senior members of the Judiciary—I had a meeting with them for two hours—a large part of the time was spent over problems of judicial appointments, and that was their preoccupation. So there is that and what is seen as a major issue is the relationship with the HMCS and I am hoping to bring that to a conclusion as quickly as I can, but I do not want to put a date on it. I have to do it in a cooperative way. There are also issues of the broader relationship with the Judiciary, including issues like proper consultation with them over what goes into Bills, taking proper account of their views. I will give you one example where I have sought very actively to take account of their views and other practitioners, in the current Criminal Justice and Immigration Bill, clause 26 in respect of quashing convictions, quashing convictions whether the power of the Court of Appeal to quash convictions where the guilt of the accused is not an issue—so in other words the issue is that of process—whether that should be constrained to prevent them in general from issuing an acquittal where the guilt of the accused was not really in question. We had a lot of responses to the consultation document, including from the senior Judiciary. As I told the House on the Second Reading, all the responses were critical of the original drafting, so I have sought to change it and I think these things are important.

Q36 ***Baroness O'Cathain:*** In that response to our recommendation four you are actually saying that the parameters for discussion with the Judiciary over the Ministry of Justice have now been "broadened". Can you give us some indication of what the parameters are?
Mr Straw: The background to this—and I am trying to find what I said in respect of your recommendation four—is that there was a suggestion that there was an unwillingness by—

Q37 ***Baroness O'Cathain:*** It is your paragraph 8.
Mr Straw: I have it now, thank you. That there was some unwillingness by government to talk about these issues in the round, the wider issues, and that is what I have sought to do. I have been ready to consider all issues which are of concern to the Judiciary. I made it clear to them as I do to your Lordships that it is a self-evident truth that we may come to the conclusion where we have to beg to differ, but I hope that if we do—and I hope we do not—that we do it in a respectful manner with an understanding of each side's position. But I am not trying to constrain discussion in any way.

Q38 ***Baroness O'Cathain:*** Lord Chancellor, you have not agreed to the Judiciary's seemingly reasonable request to have a fundamental review of the situation following the creation of the Ministry of Justice. Would you say that you are likely to do that and, if so, when do you think you might do it?
Mr Straw: I have not established a big-ticket Review, with a capital R, into relations with the Judiciary. I am open to persuasion on this but I happen to think at the moment that there are better and speedier ways of achieving the same end. First of all, crucially by the approach I take—and at the risk of repetition I have spelt out the nature of the approach—by dealing with things that I can deal with which are causing real frustration, which were on judicial appointments, I promise you—and why should I make that up?—and they are continuing to exercise me as well as the Lord Chief, but I am working very hard with the Judicial Appointments Commission to speed things up. There is this issue, which I think is the main issue for which they said they would like a Review, with a capital R, which is the constitutional position of the Court Service, and I think the review, with a small R, that

has been established, the Clare Sumner/Michael Walker group and the iterative process we have is a better way through because we are more likely to reach agreement with that. It is easy to say, "Have a separate NDPB with a judicial chairman, it is entirely separate", but then this body will still require public money; there will still have to be some way in which people in my department, with the Lord Chancellor of the day, and with the Treasury can work out whether they need more money—what their efficiency and effectiveness is. So there has to be—and there is in all systems in the world—a relationship between the administrative side of the Judiciary and the Executive and it is working out the best relationship there, so I think it is better to do an iterative process. But I am open to arguments if this one does not work.

Q39 ***Baroness O'Cathain:*** Can I pursue this for one moment and that is do the Judiciary buy in to your way of dealing with this fundamental review?
Mr Straw: You would have to ask them.

Q40 ***Baroness O'Cathain:*** Because you are talking to them at the moment.
Mr Straw: I know. Sorry, I do not want to put words into their mouth. They are working very cooperatively on this; whether they would prefer a different approach is a matter I do not want to answer for them. But they are working very cooperatively on this and if we can reach agreement I think that is better.

Q41 ***Viscount Bledisloe:*** I am glad to see, Lord Chancellor, that the government has ruled out the idea of American-style confirmation hearings for judges. Do you contemplate any other form of parliamentary involvement in the judicial appointment process and how could that be without encroaching on the independence of the Judicial Appointments Commission?
Mr Straw: There is a consultation on this whose publication is pretty imminent and what we sought to do in that document is obviously to analyse where we are at the moment. There is a good deal of foreign example given, which I thought was important, from major EU and OECD countries, to look at what happens elsewhere, including in respect of America. My starting point on this, I may say—and I am still on record as saying this—is to allow what is in the Constitutional Reform Act for some years before you change it, and the Lord Chief Justice in a lecture he gave in Kenya a couple of months ago made some interesting observations about this, where he said that the Executive should not be involved directly in making the appointments, and indeed I am not, as you know, because the power I have is very much a back-stop one and working with the senior Judiciary not against them, save in respect of the very senior positions—and I am paraphrasing what the Lord Chief said—where he said words to the effect that it is important that at the very least that people who hold these very senior judicial appointments should have some broad confidence of the Executive, and I think that is true. And that does not detract from their independence in any way, so it is squaring that circle. This is an issue, that if you were to go down the route of some parliamentary involvement it would have to be post-appointment, it would not be pre-confirmation.

Q42 ***Viscount Bledisloe:*** May I venture to suggest that you are amalgamating somewhat the Executive and the Parliament. I agree obviously that you have a role in that you have a right to approve or disapprove recommendations; I was asking more whether you saw any parliamentary involvement.
Mr Straw: All I would say is that you could have a role. I expressed my personal opinion but we have said we will have a consultation about this. We are going to give a good deal of information about what happened in other countries. You could do, but whether it is desirable or not is another matter and we will look forward to the current weight of opinion. But my assessment of the current weight of opinion is that people think it is not such a good idea, but if we are opening up a constitutional debate we need to be open to other people's ideas even if we are not persuaded of them at the moment.

Q43 ***Chairman:*** You will have noticed that this Committee was distinctly unenthusiastic about the idea of parliamentary confirmation hearings.
Mr Straw: Yes, I did, and I think we will find that is probably true the other end, but since practices vary in OECD countries it is quite important that this should be brought out, and if both Houses come to the view that it is not desirable that is really important because it is their decision then, not the Executive's for them.

Q44 ***Lord Rowlands:*** Can we go back a fraction on the question of the role of the Court Service and its status. As a former member I took a very active interest in the state of Her Majesty's courts, my Crown and County Court—they were part of the community fabric—and I hope you would not come across to any decision which would stop a Member of Parliament, for example, making representations about the state of the buildings or the performance of the court at any particular time.
Mr Straw: Lord Rowlands, if I may say so, that is a very important point. If you take the issue of the state of buildings, of amalgamations, court closures, these ultimately are political decisions and I think that the Court Service which was an NDPB at arm's length

which has to make those decisions would find that extremely uncomfortable. I also think that the system would not work. There are five Members on this side, Lord Holme, who have served quite a long time down the other end, and with respect to each of them if there had been a proposal to close the courts in your areas, regardless of whether there was an NDPB officially making that decision, it would have been raised in the House of Commons, the minister responsible would have been on the rack and ultimately, whatever the formalities, it would have had to go to ministers for a decision. So I want to make sure that in any rearrangements of the relationship between the ministers, the department, the Court Service and the Judiciary we reflect the reality of where decisions ought to be made and the difference between the decisions which are ultimately political—which of course impact on the Judiciary, such as where you put courts. Let me say with the public in East Lancashire there is quite an argument going on in respect of the future of the courts and their physical condition for some time, and I am expected to sort it out, as a local Member of Parliament.

Q45 ***Lord Smith of Clifton:*** Lord Chancellor, if we could move on to the Green Paper, is there an underlying philosophy or intellectually coherent thread which ties together the proposals in the Green Paper on *The Governance of Britain* and, if so, how would you define it, please?
Mr Straw: The answer is yes and you would expect me to say that; it would be a career shortening answer if I said no. How would I define it? In a nutshell it is about making the Executive much more accountable to Parliament and Parliament more accountable to the people, and I really mean that. The accountability of the Executive has shifted over time compared with when I was serving as a special adviser in the mid-1970s Labour Government—ministers and officials are infinitely more accountable than they were. For example, there were virtually no Select Committees—there was the old Trade and Industry one and there was a science one and for two years there was an education one and there was also a Public Accounts Committee, but ministers with whom I worked, Barbara Castle and Peter Shaw and their juniors, never ever had to go before a Select Committee and have a grilling—ever. Yes, from time to time they went to the Commons and answered questions but it was a "thank you very much" and a rather benign session, but I have been to less than benign sessions—two hours being grilled is a very different circumstance from the repartee of the Commons. Both are important, but that is freedom of information which has made ministers much more accountable, with many other changes. But it is still the case that in some areas ministers are not as accountable as they should be and the Prime Minister is very alive to that, which is why he made, to many people's surprise, the whole constitutional agenda such a key part of his set of priorities, worked on it for some months before his election as Labour Leader and then incoming Prime Minister, and it was the first big announcement he made. That is what we are trying to achieve.

Q46 ***Lord Smith of Clifton:*** Lord Chancellor, I think many of us were enthused by that statement and the subsequent Green Paper. Since then there has been a perceptible lack of momentum in that—it has been "Events, dear boy, events" and all that—how do you see that momentum being maintained?
Mr Straw: I beg to differ because there has been no lack of momentum in my department and I am sitting with some officials behind me who I could bring to the stand and ask them whether they have been doing nothing since 3 July, and I promise you that they have not been. What has been going on is that there has been very heavy work on a series of consultative documents on war powers and treaties, upon the appointments to the Judiciary, elsewhere in government, on rights and protest and a huge amount of work going on in respect of the British Bill of Rights and Responsibilities. It is true that there have not been any major announcements, except that we published two statements at the end of July. One was a consultative document in respect of the role of the Attorney and the other was the draft Queen's Speech, but I promise you, Lord Smith, that it is a great deal of work and that will continue.

Q47 ***Lord Rowlands:*** In that case can you give us an update on where the Constitutional Reform Bill stands? We know there have been several consultations but are we going to get this Bill published in a draft and are we going to have pre-legislative scrutiny with a Bill of this importance? Can you give us an idea first of all of timescales?
Mr Straw: The publication of three of these consultative documents is pretty imminent, and I think the consultation period lasts for three months so by the turn of the year they will feed into the preparation of the Constitutional Reform or Renewal Bill, which will be published in the New Year—I cannot give you an exact date—and that will be published in draft and for sure there will then be a period of consultation and pre-legislative scrutiny. The current aim is to have that include the provisions in respect of the Civil Service which have been the subject of quite longstanding consultation, so we are not intending to publish a further consultation on those because you will recall the response to the Select Committee at the other end. But the government back in 2005 or 2006 published its own

draft Bill in respect of the Civil Service, so that forms a template for that part of this draft Bill.

Q48 ***Lord Rowlands:*** That touches upon a point about which the Committee have been rather concerned, that this sort of jumbo Bill, which would have the ratification of treaties, the role of the Attorney General and the Civil Service Bill all rolled into one is really not a satisfactory way to proceed, certainly not including the Civil Service Bill.
Mr Straw: It would include the Civil Service Bill.

Q49 ***Lord Rowlands:*** But we are saying why?
Mr Straw: Why? Frankly, because these are cognate in the sense that they are all to do with constitutional renewal and it makes sense that if you want securer form to have them in one Bill rather than in a large number of Bills.

Q50 ***Lord Rowlands:*** They are very disparate issues.
Mr Straw: They are and they are not. With great respect they are within the overall framework of making the Executive more accountable to Parliament and perhaps we should call it that, and reducing the effect of the prerogative. So rather than calling it the Constitutional Reform Bill maybe I should call it the Executive Accountability Bill because that is what it is all about. Then you will have different parts of it. Could I just make this point to Lord Rowlands to try to persuade him that this is a better way of proceeding? First, it would be faster because there would be a draft Bill, but everybody who has had experience of legislation knows—and there is a former Chief Whip sitting there—that five separate Bills takes a lot longer than five cognate subjects put into one. It is a choice but if there is a broad consensus behind this, as I think there will be, it is better to have it in one Bill. The other point is this—and this is a point that has been made against me for having one Bill—that it would be very wide in scope, so if others wish to raise other issues on the constitutional change and accountability of the Executive they could do that and these will be in scope. So the paradox of this is that there will be greater opportunity for both Houses to discuss other issues which are within that overall framework.

Q51 ***Chairman:*** So you see it as a positive advantage that it is a portmanteau Bill and people can put other things in the portmanteau?
Mr Straw: I do.

Q52 ***Chairman:*** So that might not be compatible with the government wanting urgently to get the Bill through.
Mr Straw: That is the point made by business managers to me so I hope that the business managers do not hear what I am saying. It happens to be true and we are alive to it, but I think overall it is better to have it in one Bill than a number.

Q53 ***Lord Lyell of Markyate:*** If I may come back quickly? Lord Chancellor, you keep saying that all these three aspects are to do with the Executive. You, Lord Chancellor of Britain, are not saying that the Crown Prosecution Service with its independent prosecuting duties is part of the Executive, are you?
Mr Straw: No, I have never said that.

Q54 ***Lord Lyell of Markyate:*** You have just said it is part of a Bill to deal with the Attorney General—
Mr Straw: I am sorry. It was not I who mentioned the Attorney, with great respect, I do not think. I talked about the Civil Service, war powers, treaties—

Q55 ***Lord Rowlands:*** The Attorney General will not be in this jumbo Bill?
Mr Straw: It is not a jumbled up Bill, Lord Rowlands.

Q56 ***Lord Rowlands:*** A "jumbo" Bill.
Mr Straw: It is a coherent Bill. I really resist that description. It is wholly coherent Bill, or will be, to do with holding the Executive better to account.

Q57 ***Lord Lyell of Markyate:*** Then why does the Attorney General come into it?
Mr Straw: On the Attorney that consultation is continuing—it may or may not. I have never ever suggested that the CPS is, at the point where it is making decisions about prosecutions, an arm of the Executive—it is obviously a department of government but it is at arm's length from the Executive, and the announcements that Baroness Scotland made on 3 July actually strengthen that independence.

Q58 ***Lord Lyell of Markyate:*** They did not actually. No Attorney General sitting in this room and none that I can think of has ever taken a prosecuting decision which was not required by statute. So she just does not do it. The Prime Minister said she did and he told her to say it but it was wrong.
Mr Straw: It was a more complicated process than the Prime Minister telling her to say it, let me tell you.
Chairman: We have to move on. Lord Rowlands.

Q59 ***Lord Rowlands:*** Can I finally press you on the question of legislative scrutiny? First of all, to have an assurance that all constitutional issues of any significance will be the subject of pre-legislative scrutiny? Secondly, we have been very disappointed, and in fact we have relayed our disappointment to the former Leader of the House about the number of Bills that have been subject to pre-legislative scrutiny. I know that the principle has been accepted but the

actual practical aspects of it, very few Bills have actually been subject to pre-legislative scrutiny. Can we have a principle about how many Bills and the type of Bills that are going to be subject to such scrutiny?
Mr Straw: On the first it is our hope and intention that Bills in this area will be subject to pre-legislative scrutiny, and I cannot think of any area which would not be. It is not in my gift to give an absolute promise that there are no circumstances in which we would not introduce a constitutional change without pre-legislative scrutiny, but it obviously makes sense to have it. Actually the record on that has been pretty good; if you look at going back over the last ten years in this field on the whole we have consulted widely on these issues.

Q60 ***Lord Rowlands:*** I think there is a difference between consultation and specific request.
Mr Straw: And had pre-legislative scrutiny. On a wider issue, I was concerned as Leader of the House and so have business manager colleagues at this end about the fact that a number of Bills which have been subject to pre-legislative scrutiny had dropped off. Business managers are always anxious to see Bills go into pre-legislative scrutiny because it makes them on the whole better Bills and it improves their chances of going through. The problem is, however, one of actually managing them through. It is hard to pin this down exactly but there was a point where we had a lot of Bills coming through which were candidates for pre-legislative scrutiny and we have got into a position now, as we come into the eleventh session, where there seem to be fewer. I think it may partly be to do with the cycle of each Parliament. We are now looking at the third parliamentary session and that third session is always an important one because it may be the last full session before a general election. That is the reason I suggest. There is no hostility to pre-legislative scrutiny whatsoever, it is just that there have been some practical problems with it.

Q61 ***Lord Rowlands:*** Does there seem to be a principle behind which Bills you chose to do so?
Mr Straw: We had a meeting this morning which I happened to chair in the absence of the Leader of the House about next year's legislative programme. The decisions are—and you have been involved in this, as others have been round the table—that you look at the programme, you look at the balance of the programme, you also look at the time available. As it happens we are more likely to, because of other pressures on the programme, to put some Bills into pre-legislative scrutiny than would otherwise be the case for next year. But you have to have a programme that makes sense, that keeps both Houses occupied. I am serious here because there are twice as many candidates for legislation as ever there is time. We have to take account of the EU Treaty Bill, which is going to take up a tidy bit of time, so we have to put those in the pot. As I say, I think we will find that there will be more candidates for pre-legislative scrutiny than there were.

Q62 ***Chairman:*** One theme that comes out constantly from the Green Paper, perhaps in response to a perceived democratic deficit, is the need for new and inventive forms of consultation and one could consider this as a subset of pre-legislative scrutiny, but clearly the government feels impelled—and I must say personally I am very sympathetic to it—to the idea that you have to find ways of consulting and involving people on the fundamental issue of how their democracy works, so in respect of the Legislative and Regulatory Reform Bill, the Constitutional Reform Bill, the Government of Wales Bill and so on, there is specified that there should be consultation and all sorts of forms of consultation are proffered. Citizens' Juries, your colleague, Mr Wills, at a seminar the other day was talking about the idea of a citizens' summit, whatever that is, but I gather that the Prime Minister does not like the idea of the great and good coming together in a constitutional convention, so can you tell us what you call the principles of engagement that are going to be worked through because if we are saying that there needs to be a democratic public involvement, whether we can think of it in parliamentary terms as pre-legislative scrutiny or whether it is a good thing in itself, it seems to be that we are inventing it as we go along and I would be very interested to know, given your leadership, how we are going to get to settled principles of engagement so that we are not just reaching for a new gimmick every day.
Mr Straw: The principle is easy to state and I think we have already, which is that we need better to involve people in the decisions which affect them. I am more on the optimistic side of the curve as to whether or not there has been less engagement or more in recent years—I think in many ways there has been more, although that has been disguised by something else that has been going on, which is a decline in deference. I am absolutely serious, Lord Lyell, and there is a very interesting book written by a man called Kevin Jefferys, called *Democracy—People and Politics Since 1918*, which charts this. It is a good read, I have just finished it, and I think it puts a kind of pessimism about the state of our democracy into a better perspective, because we have always been pessimistic about it. I think our democracy is certainly healthier than it was in the 1970s when I still had this ringside seat in government. All of us are searching for ways of engaging people in these decisions. I have told the Prime Minister that in my constituency, which has the benefit of being a compact, single town with a strong sense of itself, I

have long engaged in what I would described as citizens' juries, with a small c and a small j, in which I continue to do open air meetings in the town centre, as I did on Saturday and I did two weeks before that. I had a very serious conversation, as they now call it, with my electors; and I do residents' meetings and so on. I do not regard those as gimmicks, I regard those as processes better to engage people and ultimately to give them a sense of control over what is happening in their lives, in their streets. With some of these more abstract issues, like the British Statement of Values, I think it is right to think about whether there are more formal methods of open-air meetings and residents' meetings where we can bring out issues that people are not used to discussing. I can only say to those who are cynical about these processes that about 18 months ago I had a real concern in my constituency about the growing divide between the white community and the Asian community—a real concern. The local authority on an all-party basis said, "We have to have some process for bringing people together; we cannot just stick them in a room and say that they must like each other because that is not going to work." So, yes, consultants were employed to do this, to work out ways in which you could bring people better together, including people who have absolutely opposed views. So with these consultants based in Manchester what was called "100 Voices" was developed. It started off on a ward basis and then people finally came together at a two-day conference in the meeting rooms at Dene Wood Park, and it really worked and I have seen that process then continuing to have all sorts of spin-offs as people who had not previously been involved in politics, with a small p, suddenly found that they found it very interesting and were involved. With the Statement of Values what we are trying to do here—both simple and also very difficult—is to articulate what we all think are British values and to see whether we can arrive at a consensus. It may be we cannot, in which case I do not think we should legislate on the Statement of Values unless there is a consensus, but to have a process which is moderated by people who are reasonably expert—maybe what has been called the Citizens' Summit—to argue this through; and citizens' juries, if they are properly used, as the 100 Voices was, can work. The last point I would make, Lord Holme, is on the issue of a convention of the great and the good. I will tell you why I am opposed to that, which is that we have what is called a convention of the great and the good, which is called the Houses of Parliament. We undermine our democracy and our Parliament if we try and invent a convention to do the job which is ultimately ours. The reason why the convention had to meet in Philadelphia—and met for an awful long time and mainly in secret—was because there was not a Parliament over there. That is what they were seeking, and had there been they would not have had to have the convention. The reason why in Scotland that convention got going was because there was not the machinery for having a Scottish Parliament and it helped to develop the idea of Parliament up there. I am very much in favour of others holding their own scrutiny of these ideas and that is a good idea, but ultimately it has to be for this Parliament to make decisions.

Q63 ***Chairman:*** It is very difficult to argue against consultation, it is like arguing against motherhood and apple pie, but I think perhaps what people will begin to expect from the government is to set out what the principles of engagement are and what form of consultation is appropriate for what sort of measure, rather than it simply being whatever happens to suit the convenience of the government of the day. But the danger always, which I am sure you will concede, is that who asks the question controls the agenda and you have to have a process which people believe is genuinely consultative and appropriate to the measures concerned and that is the vacuum at the moment.

Mr Straw: I do not think there is a vacuum but I accept that people may come to this whole agenda with some scepticism, if not to say cynicism. I do not think we are going to get over that until we give them confidence about the product and show to people that the process has not been a sham and that we are ready to listen. Ultimately there should not be an escape from this sort of democracy; it is for ministers to propose and for Parliament to dispose—that is called democracy. We should not pretend that we are subcontracting out our decision-making to some kind of Athenian democracy because that cannot work, but we should assert that the process between ideas and law is a long one and a complex one and that the more people are involved in that the more they can be pretty well assured of being satisfied either with the outcome or the reasons why they do not have the outcome they want. It may be the latter rather than the former.

Q64 ***Lord Goodlad:*** Lord Chancellor, what do you regard as the main benefits of the new practice of publishing the government's legislative programme in draft form?

Mr Straw: The main benefits are that as well as consulting over the individual measures and whether or not there has been a draft Bill for pre-legislative scrutiny there has almost almost been a statement of principles, a White Paper or Green Paper preceding a Bill, almost always, you are able to consult over the balance of the programme and people who look down it say, "We think that rather than having that there should be something else in it."

Q65 ***Lord Goodlad:*** Do you think it will help pre-legislative scrutiny on a more methodical basis?
Mr Straw: It could do. Bear in mind, Lord Goodlad, that this particular programme for consultation was announced very late in the session and that was because the Prime Minister only took office at the end of June and the Leader of the House made her announcement in the third week of July, I think. In normal terms our intention would be to announce it at an earlier stage, and you will be familiar from your time as Chief Whip that we are now in a cycle where already ministers are thinking about the legislative programme which starts in 14 months' time.

Q66 ***Lord Morris of Aberavon:*** The point I wanted to make was is there not a real danger that some of these juries or whatever they are called—I use that as a shorthand point—can be hijacked by minorities? I have been to an American town meeting and are they different in substance to that?
Mr Straw: I would not put the danger all that high. On the whole these juries or panels are chosen for balance; they are not chosen at random, necessarily, but they are chosen to reflect a balanced range of opinion. If I can use the example of the 100 people involved in 100 Voices in Blackburn who were chosen, as it were, by category so that you had a reflection of the balance within the white community and within the Asian community and you had a balance of political opinions, a balance in terms of people who were involved in voluntary organisations and people who were not involved in anything at all, and there were some people there who might have voted for the BNP and some who might have voted for extreme parties on the Trotsky left. It was not really possible to hijack that. If, however, they had come out with the consensus that emerged as an extreme one we would have had something to worry about. On the town meetings, as I say, with the Police Chief and Chief Executive and Leader of the Council I run these regular residents' meetings—and have done for the last four and a half years. They are not decision-making although they are phenomenally influential as to what happens in their area, and we have not had them hijacked. Just making a point to you, Lord Holme, what has been crucial about this was when they first got going people were very cynical about them and thought they were simply a single event for people to let off steam and be told to go away. Because people have understood that it is part of a process in which they are told what formal decisions are made following it and what action is happening and there are follow-up meetings where they can put us to proof again, people's sense of confidence in the process has greatly increased.

Q67 ***Chairman:*** Can I ask you a timing question, Lord Chancellor? You have been very generous with your time; can we plan that you would stay with us until half past five?
Mr Straw: Let me just turn behind me. Could we make it 25 past?
Chairman: A good compromise; thank you very much. I have several colleagues who would like to ask you questions. Lord Smith.

Q68 ***Lord Smith of Clifton:*** Lord Chancellor, I noticed earlier that you talked about a Statement of British Values, which I can understand, but officially it is a British Statement of Values, which I cannot for the life of me understand. I commend you on your change in language and terminology. Could you explain to me why it is a British Statement of Values as opposed to a Statement of British Values?
Mr Straw: Not really! It is like the essay that I was set when I was a law student, to explain the difference between a breach of a fundamental term and a fundamental breach of a term and I have still been trying to find the answer. There is obviously a difference about the adjective but we are talking about British values, essentially.

Q69 ***Lord Smith of Clifton:*** What do you envisage as being distinctly British about the Statement of Values and the Bill of Rights and Duties? What are they likely to include which is not shared across Europe and the Commonwealth? And are there implications for the Human Rights Act?
Mr Straw: On the Statement of British Values, I would like to think that many values that we regard as being distinctly British are now ones which have been reflected elsewhere in the world, and we have had an evangelical role—we have, genuinely—when it comes to ideas of liberty and values. I cannot say what will be distinctive about this until this process is finished but I would like to suggest that personally I think one of the things that is distinctive about the United Kingdom—and is not exclusive, which is a different point, but is distinctive—is our tolerance. I think there is a remarkably high level of tolerance in this country. How will it differ from other statements? In France they have this very strong sense of what they call solidarity and we do perhaps have a vague idea of what it means but it does not translate very well—I am looking at Baroness Quin, who may have a stronger idea of what it means than do we—and I am always struck by that in Europe. So it may be the order in which the values are set out, the precedence it is given that is distinctively British as well as some of the values themselves. On the Bill of Rights and Responsibilities, what I said in my speech at the Party Conference, in shorthand, as it were, is that we do not want to undermine the Human Rights Act and fundamentally the incorporation of the

European Convention into British law, which I happen to think was a very important and a durable Act, and in the end it is worth recalling that after some changes were made in the Bill that we did achieve a broad party consensus—indeed, I remember Lord Lyell, I think, saying at the Third Reading that we had got it into better shape—and we had, on all sorts of parts of it. What that process on the Bill showed is that we have some choices when you come to incorporation; there are still some parts of the Articles of the European Convention which are not incorporated, most notably Article 13 on Remedies. The other point which again I made at the Party Conference speech is that I think we have learnt—and I have certainly learnt—over recent years that we need better to articulate into the equation the fact that with rights go obligations and responsibilities—they always have done. That side of the equation was taken for granted by the drafters of the European Convention, which were British lawyers—almost exclusively British lawyers—and I think that in today's world we need to take better account of that, so that is what we are seeking to do and so not to undermine the Human Rights Act and still less the European Convention, but to see ways in which it can be supplemented and complemented and this crucial balance of rights with duties and responsibilities and a mutual obligation is brought out.

Q70 ***Lord Smith of Clifton:*** Might I ask what have been the reactions from the Scottish Executive, the Northern Ireland Executive and the Welsh Assembly Government to the proposed British Statement of Values?
Mr Straw: I do not recall, because it is an early stage preparation, that we have had a formal response from them, but we are a Union and I was privileged to take part in a ceremony today where Mr Speaker unveiled a plaque in St Stephen's Hall to the three centuries of the Union. There are British values which transcend English, Scottish or Welsh or Northern Irish values.
Chairman: In the few minutes you have left I am anxious to get Baroness Quin and Lord Windlesham in, if I can.

Q71 ***Baroness Quin:*** The Green Paper contains the statement by the government that a written constitution might be desirable and achievable. Is this a strong view of the Cabinet? What has brought about this change of mind in government and perhaps in your own position too?
Mr Straw: Change of mind, this is not a 180 degree turn, but a sort of shift. Unless one considers that what one decided were ones view at the age of 22 would last one through ones decades one is entitled to keep thinking and modify ones opinions, and as Twain famously said, "If the circumstances change I change, what do you do?" One of the great attractions about politics is that you have to keep thinking, and the circumstances have changed. We have now moved on over the last couple of decades into a period first of all where we are a much more heterogeneous society—it is really marked when you look at the changes in the population, the fact that the ethnic minority population doubled in a period of ten years between 1991 and 2001 and that is going on. We are more heterogeneous. We have introduced a number of constitutional changes and we are proposing some more. There is also the issue of the House of Lords reform, which we have not referred to today, and I am very grateful to you for that, whether or not that continues, and that will also be a major building block. So, Baroness Quin, there may come a time—and I think it is at least some years, see me out of this job, probably—where we will think that we have had major changes, we have reached a settled state and is it not now time to codify those? I am personally not in favour of tearing everything up by the roots and saying that we should have a fundamentally different relationship between the High Court and Parliament and the Supreme Court, but I think putting them in a single document would not be a bad idea.

Q72 ***Baroness Quin:*** I think you have partly answered my next question, which was going to be about the timescale you were envisaging. In terms of the constitutional reform that is likely in the near future, do you believe there is a case for a referendum in respect of any of the likely measures?
Mr Straw: If there were major changes, yes. For example, we as a party—and I think this is widely shared and always agreed—that if there was a change to the voting system for the Westminster Parliament there would have to be a referendum—it cannot be in the exclusive ownership of one party, it simply cannot be, in my view. If there were a change to change the sovereignty of Parliament, to, as it were, to set up an American-style constitution self-evidently we would have to have that agreed by some referendum and I suggest it would be with a qualified majority as well. Where I would go with this is that once we had got to a settled state on all the major changes—and as we saw in Victorian times there appeared to be intense constitutional change and then it settled. It is not to seek to codify where you have got to so you describe in the second document the arrangements rather than pull everything up by its roots.

Q73 ***Baroness Quin:*** Do you think we need to codify the circumstances in which referendums should be held before they are held?

Mr Straw: In terms of process they were in the 2000 Act, in which you and I played a role in the Home Office. The only way you could codify it is if you had a written constitution, you laid that down and then you have to have somebody arbitrating on it, which would be a Supreme Court. I think it is better to leave it to political judgment, in my personal view.
Chairman: I want to try to get two questions in and if we could ask them back to back and then allow you to respond to both of them. Lord Goodlad.

Q74 ***Lord Goodlad:*** You have very kindly referred, Lord Chancellor, to the House of Lords reform; would you envisage the House of Lords reform Bill being the subject of a referendum?
Mr Straw: I have not envisaged it, no. Just to add to that, I have certainly envisaged—and the Prime Minister made this clear in his speech—that any change should be the subject of a clear manifesto commitment.

Q75 ***Lord Windlesham:*** A novelty that has not been discussed so far is the notion of the Speaker's Conference, with which I was not very familiar before I read some of the information which is before us this afternoon. The Prime Minister has said that he wants to revive the idea of the Speaker's Conference as part of the search for solutions, but it does not look as though a decision is imminent just yet and there is still a great deal of discussion and so on and consultation to go along. Is there a case for this or do you think it would be a practical issue to have a Speaker's Conference and, if so, who are the members of such a conference, and how and why and how long will all this take if it were to be pursued? It is not something that I feel very strongly about but it was a suggestion that was just thrown around at the beginning of this meeting before you joined us.
Mr Straw: The proposal from the Prime Minister has been that there should be a Speaker's Conference covering certain areas of electoral law and practice. The Prime Minister recognises, as do I, that we have to be careful about the agenda for a Speaker's Conference because the Speaker is above the party battle so there need to be areas where one is searching for a sense of it, so that it includes, for example, the issue of how we extend the representation both of women and of black and Asian people within Parliament, on which there will be different views but I think there is basically the beginnings of an all-party consensus and there are other areas like that. I personally would not—and we are not proposing to use it for much bigger and potentially contentious areas, for example the House of Lords, because it would not work. There is a footnote that I was looking for to say that Speakers' Conferences have not turned out to be spectacularly successful down the ages, but anyway we are aiming to improve the score on the positive side.

Q76 ***Lord Windlesham:*** Is there a commitment to it or are you still looking?
Mr Straw: There is work going on at the moment to establish it. If you have a Speaker's Conference it will not operate unless all the political parties are willing to agree to its terms of reference and to its modus operandi, including its agenda.

Q77 ***Chairman:*** Lord Chancellor, you have been more than generous with your time. You can tell that we would be content to keep you here all evening but I know how busy you are and we very much appreciate it. Despite our pinning you there for nearly two hours would you be willing to come back regularly?
Mr Straw: Of course, yes.

Q78 ***Chairman:*** Thank you very much.
Mr Straw: Lord Holme, I understand that this may be your last meeting in the chair and if I could, on behalf of those of us who take an interest in constitutional issues, thank you very much for your work. I do not want to sound impertinent but it goes well beyond the House of Lords and I am really grateful to you and also it has been reflected in the joint interest of the House, which is in the Hansard Society as well, so thank you very much.
Chairman: Thank you very much indeed.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

THURSDAY 6 DECEMBER 2007

Present	Bledisloe, V	Peston, L
	Goodlad, L (Chairman)	Quin, B
	Lyell of Markyate, L	Rodgers of Quarry Bank, L
	Morris of Aberavon, L	Rowlands, L
	Norton of Louth, L	Smith of Clifton, L
	O'Cathain, B	Woolf, L

Examination of Witnesses

Witnesses: LORD PHILLIPS OF WORTH MATRAVERS, a Member of the House, Lord Chief Justice of England and Wales and LORD JUSTICE THOMAS, examined.

Q1 ***Chairman:*** Lord Chief Justice and Lord Thomas may I bid you a warm welcome to the Committee and thank you very much indeed for making time to come and see us. We are being televised, as you know. I will ask the first question, if I may, which is what is the current situation in respect of the negotiations with the government over the outstanding area of difficulty, namely the status of Her Majesty's Court Service?

Lord Phillips of Worth Matravers: Thank you. As the Committee is already aware Clare Sumner, who is a senior official in the Ministry of Justice, and Michael Walker, who is an experienced District Judge and a member of the Judges' Council, have been examining a series of options for the Court Service. This has resulted in the production of a model; the model reflects a partnership between the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor and I are meeting next week to discuss this model and we will then be in a position to know whether that can be adopted and we shall of course update Parliament in the New Year.

Q2 ***Chairman:*** Do you think, Lord Chief Justice, that any agreement is likely to satisfy the Committee's recommendation that the courts' budget should receive the maximum protection from short-term budgetary pressures upon and within the new Ministry?

Lord Phillips of Worth Matravers: I doubt if anything that is proposed will provide the maximum protection. I hope that this proposal, if agreed, will provide reasonable protection.

Q3 ***Chairman:*** Lord Chief Justice, your response to the Committee's previous report did not address the recommendation that the government and the judiciary should give further consideration to how advisory declarations might be used to provide guidance on questions relating to Convention rights. Would it be appropriate now to tell us what you think about that particular recommendation?

Lord Phillips of Worth Matravers: I have reservations about this recommendation. The role of judges is to resolve disputes—disputes between parties. If the judiciary are going to be asked to give an advisory opinion in advance on something that is essentially an issue of law the first question is, to whom do they give it and what input is there into the discussion? If it is not going to be an adversarial process so that government asks the judiciary to give its approval to a proposal, to say in advance that the proposal would be in accordance with the law, that opinion would then be given not in an adversarial process but a one-sided process and the judiciary would be, as it were, committing itself in advance to an issue that it might then be asked to resolve in an adversarial process. The other side in that process would not consider this to be fair; they would consider that the judiciary had already indicated a view before hearing the argument.

Q4 ***Lord Woolf:*** Could I ask a follow-on question? I should disclose my hand that I am very enthusiastic about the concept of advisory declarations and have written on the subject. But you are presupposing that there is no adversarial situation. If there was an adversarial situation—and we have many cases now where organisations such as Liberty have been able to in fact carry the argument of the individual against proposals such as extending periods of detention without trial—would your answer differ?

Lord Phillips of Worth Matravers: I think it might differ. If it were postulated that this should be done in accordance with our normal court process of having a party on each side putting the rival arguments, then my conclusion might well be different.

Q5 ***Lord Woolf:*** I must concede that I was partly an author of this suggestion. I was presupposing a situation where really what one was doing was dispensing with the need to find a nominal claimant and in this way it is only used exceptionally where there is a burning dispute which is a matter of great public interest, if the court had a discretion—it did not have to do it, but only did it when it thought that the public interest required it to do it, might there be merit?
Lord Phillips of Worth Matravers: I think there might well be merit in that. I was rather envisaging something along the lines of what happens in France where the Conseil d'État is consulted by the government about proposed legislation and that is a one-side process.

Q6 ***Lord Morris of Aberavon:*** Lord Chief Justice, your response to the report stated that you were cautious—and I have some sympathy with that—about the suggestion that Select Committees might ask senior judges about key legal issues in the cause of transparency and better understanding of such issues amongst both Parliament and the public. Would you be good enough, Lord Chief, to elaborate on your caution about the suggestion?
Lord Phillips of Worth Matravers: I think it is twofold. First of all, I would be reluctant for it to become too common for judges to be coming to give evidence before Select Committees. Secondly, I think my caution relates to the question of what these issues would involve. It comes back again to the point I was making before, that judges should not be committing themselves in advance to a view on any matter which they may subsequently be required to resolve in a judicial category.

Q7 ***Lord Morris of Aberavon:*** That, Lord Chief Justice, I fully understand, but are there broad issues which are of more general interest, which do not apply to a particular indication that you might have to adjudicate, such as the use of comparative law, which you have been doing for longer than I remember, the distinction between sections 3 and 4 of the Human Rights Act, and the wider interpretation, if it is used any more, of *Pepper v Hart*, which many of us thought was not always a good line to go on and matters of that kind.
Lord Phillips of Worth Matravers: There are these wider issues and indeed I suspect that some of them sometimes are raised and dealt with by judges on an occasion such as this one. The *Pepper v Hart* example I think is an example of something which might impinge on a decision the judge was required to reach in relation to the application of the *Pepper v Hart* doctrine in a particular case.

Q8 ***Lord Norton of Louth:*** Our report gave a warm welcome to your proposal for an annual report to be laid before Parliament, and you have indicated previously that we are likely to receive that early in the New Year. Would it be possible to give us any idea of the type of issues that we will be raised in that and particularly your comment that it will highlight areas of particular concern to the judiciary?
Lord Phillips of Worth Matravers: I hope that it will not just be areas of concern, there may also be some success stories to report. Essentially the report will be looking at the way the justice system is working and the justice system works as a result of the partnership between the Ministry of Justice and the judiciary, so we will obviously be focusing on the question of how it is working in the partnership, looking at the different courts, looking at problems that are arising, how we are dealing with those problems and trying to give an overview of the extent to which the justice system is working well, or problems that we are confronting that need to be dealt with, and whether we have the resources that we need to deal with them.

Q9 ***Lord Norton of Louth:*** In your response you indicated that you saw it as a mechanism for reaching out and explaining not just to the Executive and Parliament but to the media and the public. Do you have any ideas as to the way in which you would help to bring it to the attention of the public?
Lord Phillips of Worth Matravers: I think we can rely on the media to help with that and they may well want to talk to me after I have delivered this report about various matters it discusses.

Q10 ***Lord Norton of Louth:*** The mechanism, I was not quite clear from the response whether you saw it as the basis for your future meetings, say, with this Committee, that it would be based on the report.
Lord Phillips of Worth Matravers: I imagine that this Committee would be quite likely itself to want to ask questions about the report, and I would see that as a desirable and appropriate mechanism for bringing these matters before the public in so far as the report itself does not do so clearly or adequately.

Q11 ***Lord Rowlands:*** You mentioned resources. Will the report deal in any detail with the issue of resources, that Parliament can be well informed as to whether the judiciary think they are being funded properly?
Lord Phillips of Worth Matravers: I think I can give a firm yes to that one.
Lord Justice Thomas: Could I add a word about this? Since about 2000 the Crown Courts have published short annual reports and these have become more informative over the years. The Commercial Court has done so for much longer, and that has become informative. So there is a basis you can look at—

these are now published on the Web and they have been for the last two or three years—and they do, Lord Rowlands, cover the volume of business before the courts, how the courts are dealing with resources, what the success stories are and what the downside has been.

Q12 ***Lord Norton of Louth:*** Those reports are speaking, if you like, to an attentive public, whereas with this annual report you are actually seeking to reach out to a much wider audience.
Lord Justice Thomas: Yes. Those reports are produced by each Crown Court so each local newspaper can see as regards its own community what it is dealing with. It tries to address it in terms that would address that audience, but obviously the Lord Chief's report has to try and give a complete picture across the country.

Q13 ***Lord Peston:*** I think I am in favour of the annual report—I must be because I was on the Committee when they agreed to recommend it—but as Members of their Lordships' House we must get every day at least one annual report from one body and they go straight into the wastepaper basket, if I might say in my case almost invariably. I often ponder, apart from the cost of them, as to who reads them at all. We are talking often of bodes that are very narrow and so on, but in your case do I take it that what you have in mind is that you would actively wish to promote the annual report? There will be people in the legal business who will read your annual report but if we ask who else is actually interested one begins to wonder. You have a concept for reaching out, I take it?
Lord Phillips of Worth Matravers: I do. I see the annual report as an answer in large measure to those who ask the question how the judges are going to be accountable. I would say to them that if you want to ask us how we are accountable the answer is that I am going to produce an open report on which I shall be open to questioning and if you want to see what we are doing read the report, and if you have questions raise the questions.

Q14 ***Lord Peston:*** If I could ask for an exact example. If we take what people have been talking about in the last day, whether we have too many people sent to prison, would that come as a topic that would appear in an annual report and that you would respond to the public's response, or would you rule that out on other grounds?
Lord Phillips of Worth Matravers: I do not think it would be ruled out. I think in so far as overcrowding of prisons was impinging upon the way that judges administer justice it would be a proper thing on which to comment. But I think perhaps the more general topic—and it is obviously an important topic—would not probably be a subject matter of the report.

Q15 ***Baroness O'Cathain:*** Before I ask my question could I pick up on something that Lord Thomas said about Crown Courts in the various parts of the country operating on the principle of giving an annual report, and that then can be shown to the public and the reporters on the local newspapers. I am very interested in all of these things and I have never seen any reference to any Crown Court response in our local newspapers. So my question is: do you track this? If you do track it are you satisfied with the coverage you get, and if you are not satisfied how are you going to do something about it?
Lord Justice Thomas: I think that the way the Crown Court normally relates to its local communities is by its annual open day where people come and there are now quite considerable numbers who come. As to the newspaper reporting in the Crown Court, one has seen over the years a decline in the amount of reporting generally on court cases. And as to whether the newspapers report Crown Court reports: it is very rare, in my understanding, that they do so, partly because the fact that they exist is not that widely known. We have tried to promote it but, as I think has already been said, annual reports sometimes do not thrill people as being very exciting. But they do contain a great deal of information and quite often it is information that is very important, as to delay, conditions for jurors, conditions of the buildings, problems, for example, with the prison escort contract we had. So there is a lot of information contained in them.

Q16 ***Lord Rowlands:*** The reason I asked about resources was when we were preparing the last report I tried to discover what the net cost of the court system was and I found it rather difficult to find.
Lord Justice Thomas: I think it is very difficult to find because government accounting I have never found easy to follow. The cost of the court system is not contained in the annual reports of the Crown Court; the nearest you find it is in the annual report of Her Majesty's Court Service, and to try and split out the costs between, for example, providing civil justice, family justice and the Crown Courts is never easy, largely because in many buildings you conduct all three jurisdictions. There should be a principle, because the Treasury likes civil justice to pay for itself, that the amount we spend on the civil justice system ought to be contained in a separate document so that one can see the money that is raised by fees is actually spent on civil justice and not on other things, and we have been pressing for clearer and more transparent accounting.

Q17 ***Lord Rowlands:*** And will your report in time be able to help us in that regard?

Lord Justice Thomas: At the moment it is not so fully within our knowledge. It should be within the Court Services' because at the moment the current constitutional framework is that that lies exclusively within the responsibility of the Lord Chancellor, but in the future the judges may be able to contribute more, depending on the matter to which the Lord Chief Justice has regard, namely the future governance of HMCS.

Q18 ***Baroness O'Cathain:*** Our report recommended that consideration should be given to appointing one or more spokesman with appropriate qualifications and legal experience, who would be permitted to speak to the media with the aim of securing coverage which accurately reflects the judgment or sentencing decision. Your response seemed to endorse this and *The Times* apparently reported that a panel of judges is to be trained to talk to the press and do broadcast interviews whenever there is a need for a judicial voice to help to produce a more informed and balanced debate. Could you explain exactly what is intended and how far indeed you have got with this initiative? It does really link in with the previous subject.
Lord Phillips of Worth Matravers: The first question is do the judges think it is a good idea to talk to the media at all in such circumstances. It is an important question of principle and you are quite right that we reached the decision that the answer was yes, in appropriate circumstances. Deciding which circumstances are appropriate and which are not is the most delicate matter and it has to be done essentially on a case by case basis. We decided that it is desirable that there should be judges who are available to respond in appropriate cases. There has been a sub committee of the Judges' Council looking at this in detail. We have identified five judges representing different areas of judicial activity and different geographical areas, who are going to receive training in talking to the media and who will then be available as a resource when we need—urgently, very often—a judicial spokesman to perform that role.

Q19 ***Baroness O'Cathain:*** So the panel of judges will constitute just five?
Lord Phillips of Worth Matravers: At the moment there will be five; if these do not prove to be enough then we will have to consider training up a few more.

Q20 ***Baroness O'Cathain:*** How do you link in then with the responsibility of Sir Igor Judge on this one because he has a PR role—and I do not mean PR in the sense of PR, but an informative role, because there is no question about it that this is needed, is it not?
Lord Phillips of Worth Matravers: Yes. Sir Igor Judge is after all one of the big guns and sometimes one needs to call up a big gun. But the role we are really envisaging that these judges will perform is not so much a big gun role; it is a role in dealing with an individual case that calls for some input from the judiciary. Sir Igor, or indeed I on occasion think it is appropriate to speak to the media where a big gun is needed.

Q21 ***Baroness Quinn:*** How do you intend to ensure speed of reaction in these circumstances because very often it seems that if reaction is not quick then stories get legs and become very, very unmanageable and difficult and often very misleading.
Lord Phillips of Worth Matravers: Yes, I think we must rely primarily on our communications office. As its name involves it is about communications. We would hope that they will learn, sometimes even in advance of circumstances where this input may be needed. It is important that judges get used to getting on to the communications office if they anticipate that a judgment they are about to give, a sentence that they are about to impose is going to be controversial, so that we can be forewarned that it may be necessary to deal with media comment. Otherwise, one may be taken by surprise by media comment and have to react quickly; but, again, the communications office will be the first to pick up the comment and maybe get on to me and say, "I think we ought to have a judge to deal with this."

Q22 ***Viscount Bledisloe:*** Will the press and the media have a list of these judges with contact numbers, or will they talk to the communications office and then be put in touch with the judge if the communications office thinks it is appropriate? Secondly, will the individual judges on the panel take a proactive role sometimes and get in touch with the media and say, "You would like to know about this" or "I will clarify this."
Lord Phillips of Worth Matravers: These are questions on detail on which I am not in a position to give an informed comment other than guessing what the answer is likely to be. I do not think the answer is likely to be that the press are going to be provided with phone numbers for five judges so that they can ring them up whenever they want to bounce anything off a judge. I think that these judges are more likely to be reactive than proactive.

Q23 ***Lord Morris of Aberavon:*** Lord Chief, is not the important thing that one cannot really anticipate where the story will have legs, as Lady Quin has suggested. These situations arise, and therefore what is important is that the communications office—which is the first line of defence, after telephone numbers of judges—is in touch with the sentencing

judge who can put them right, so that when they talk they talk with knowledge; and only in the second resort do these specialist spokesman need to react at all.

Lord Phillips of Worth Matravers: I would entirely agree with that; I think it is very important that the communications office is informed, preferably in advance. But certainly if there is a sentence that has been imposed that is provoking a reaction the first thing they will want to know is what is behind it, and these judges should be used as a last resort.

Q24 ***Lord Norton of Louth:*** Clearly you would expect these cases to be exceptional where you would need a judge to come out and deal with the media to explain a particular case and, as you indicate, the important thing is deciding on a case by case basis what would apply. But are you able to give an illustration of the type of issue you think that would fall within the area that would require this type of reaction? In essence, where is the dividing line?

Lord Phillips of Worth Matravers: I think the Craig Sweeney case was a classic example where the sentencing judge had been acting entirely as he should in accordance with statutory requirements and was being attacked, quite unfairly, as if his decision had been something entirely of his discretion. If a judge says, "I am going to allow you one-third off because you pleaded guilty at the outset," you can imagine the press perhaps attacking the judge—"Fancy giving a third off to this villain just because he said he was guilty, when it was quite obvious he was going to be convicted anyway." Somebody needs to say to the press, "Actually if you look at the statute that is what the judge is required to do."

Q25 ***Lord Norton of Louth:*** So at the core of it would you envisage that what is happening is where there is a misinterpretation of the role of the judiciary in dealing with particular cases?

Lord Phillips of Worth Matravers: That, I think, is the classic situation. Obviously details of a particular case it is undesirable should be discussed in public, there is always the chance or even sometimes likelihood that there is going to be an appeal, and the appeal is the right mechanism for challenging the individual decision reached by a judge.

Chairman: Lord Lyell, whose birthday today the Committee has already acknowledged!

Q26 ***Lord Lyell of Markyate:*** One of the most significant changes, Lord Chief Justice, brought about by the Constitutional Reform Act in 2005 was that the Lord Chief Justice became Head of the Judiciary. In that role where do you draw the boundary between matters on which you feel able to comment publicly and those you must avoid? For example, you recently gave a very interesting speech to the Howard League for Penal Reform calling for a re-examination—it seems to have proved terribly timely—of the legislative framework for sentencing, and in March in Birmingham you welcomed the Law Commission's proposals for new homicide legislation. Where does the dividing line come?

Lord Phillips of Worth Matravers: I try to avoid matters that are politically controversial. The Birmingham lecture was a lecture essentially to a law faculty about proposed changes to our substantive law and there I felt it perfectly appropriate to look at the problems that our law had been giving rise to in this area—problems for judges, numbers of cases that were going all the way up to the House of Lords because the law was uncertain—and giving my view in relation to the desirability of some of the changes that were proposed from really a rather technical viewpoint of how well the law will work. Moving on to the speech to the Howard League for Penal Reform, sentencing is, I think, unfortunately very much in the political arena and in giving that speech I did my best to avoid any areas of political controversy. I said that if there was a proposal, as we now know there is, from Lord Carter, that there should be a sentencing commission or some body which would enable Parliament to anticipate the consequences of legislation or maybe other trends on the demand for prison places then I hoped that this would receive detailed consideration in a non-political atmosphere, or words to that effect.

Q27 ***Lord Lyell of Markyate:*** I think it is bound to be political although one hopes that the solution will be right and command consensus. What Lord Carter seems to be suggesting is that there should be a sentencing commission which will look and see how many people there are in prison and give guidance that, whereas you might have thought of giving ten years, now since we are so crowded you should not give more than eight years, or something of that nature. Were you consulted about this idea of the sentencing commission before the Carter Report and the government statement was made?

Lord Phillips of Worth Matravers: I have had discussions with Lord Carter about this idea. It is a very complex concept. Certainly in this jurisdiction one sees the way it has been adopted in the United States. I did not give and I have not given a view as to how it would work, whether it would work, how desirable it would be if adopted in this jurisdiction; what I have said is I really think that this is something we ought to look at so that we can see what is involved. Lord Carter has suggested that there should be a working group with judicial involvement to look at what is involved and how this would work, and that is something in principle I would favour.

Q28 ***Baroness Quinn:*** I personally agree with what you have just said but is there a real issue in trying to resolve the dilemma between the principle that the punishment fits the crime, on the one hand, and the second statement, about which we heard a lot yesterday, that resources have to be taken into account?
Lord Phillips of Worth Matravers: This is, I think, an important and very interesting area. The first question is the punishment fitting the crime. That raises the question is there some absolute level of punishment for any particular crime? If you believe that there is and it should be left to the judges to decide what that punishment should be, regardless of the cost, then fine. I myself believe that Parliament, which is responsible for taxing the public and using the revenues raised, has a legitimate interest in the cost of punishment. The public is paying for punishing offenders. You have to keep offenders in prison when they are dangerous, but there are prisoners who have ceased to be dangerous; maybe they were sent to prison at the age of 22 for murdering somebody in the course of drugs dealing—a very serious offence calling for serious punishment, and they are dangerous at the age of 22. Ten years on their personalities may have matured and they may no longer be dangerous. If you keep them in prison after that you are keeping them in prison to punish them. That has its cost. As I said in the lecture, if you are going to put somebody in prison for 30 years by way of punishment you are investing £1 million or more in that operation. I think Parliament ought to reflect whether that is the most desirable way of using resources having regard to, obviously, the viewpoint of the electorate. But it is a debate, I think, that needs to be had.

Q29 ***Lord Smith of Clifton:*** For the first time ever, Lord Chief Justice, the Lord Chancellor is a Member of the House of Commons rather than this House, and someone who has been drawn from the world of politics rather than the law. How has this novel background affected the relationship between the Lord Chief Justice and the Lord Chancellor? Has the significant growth in the Lord Chancellor's policy remit been a significant factor in this context?
Lord Phillips of Worth Matravers: When this Committee reported it was before Jack Straw had been appointed as Lord Chancellor and this Committee said it hoped that in future the Prime Minister would always appoint as Lord Chancellor somebody of sufficient seniority. The Prime Minister obviously listened to the words of this Committee because he could not have done much better than to appoint somebody with the experience and seniority of Jack Straw. Jack Straw, when he took office and swore the oaths that the Lord Chancellor has to swear, went out of his way to state how seriously he took his responsibilities to the rule of law, his responsibilities to the judiciary and his responsibilities to make sure that the justice system is properly resourced. My relationship with him has been excellent; I have not observed any adverse effect from the size of his portfolio. He has expressly made it plain that he would not contemplate robbing the Court Service of funds they need because of the demands either of legal aid or of the prison system.

Q30 ***Lord Smith of Clifton:*** Do you regard the office of Secretary of State for Justice/Lord Chancellor as one that will inevitably become more and more party-politicised, given the range of policy matters now falling within the Ministry of Justice? I can understand that with a new innovation everyone wants to act perfectly correctly and so on, but as it becomes part of the routine of constitutional life and the personalities change, particularly with regard to the Secretary of State, one can see some slippage in the Chinese walls and the protocols that are observed?
Lord Phillips of Worth Matravers: The role of the Minister of Justice, having regard to the size of his portfolio, I think is bound to bring him into the political arena much more than the role of the old Lord Chancellor and I also agree that that has its dangers, and it is important that he should distinguish between the functions he performs as Lord Chancellor, which should be apolitical, and other areas of his portfolio, such as prisons, which certainly at the moment have considerable political implications.

Q31 ***Viscount Bledisloe:*** Lord Chief Justice, I want to ask you a couple of questions about the judicial appointment system. In your speech to the Commonwealth Conference in Kenya you said that the Commission, whilst of very great calibre, has proved to be over bureaucratic and far too slow. But you expressed the confidence that we should be able to put that right. To what extent has it been put right? To what extent would it be put right and what will then the time lag be between application and appointment?
Lord Phillips of Worth Matravers: It has not been put right yet. It is a big task and I think that part of the problem was that the Judicial Appointments Commission was coming in cold and had to hit the ground running—there was no period of shadowing or anything like that, it had to set up its system and start operating it, and there have been teething problems. We are looking at those problems at the moment. I am confident that we are able to resolve problems that we have identified. As it happens, I am meeting with Usha Prashar at 12.15 today and officials are meeting this afternoon to look at the nuts and bolts of the problems. But I believe that there are

areas of bureaucracy that we have identified that we undoubtedly will be able to deal with. At the end of the day there will always be a problem of timescale involved in judicial appointments because it does take some while to go through the process. However speedily you manage to do it you cannot concertina the process as it is now to the extent that we had in the old days where the Lord Chancellor tapped somebody on the shoulder and said, "I have a vacancy next week, how about it?" So it is going to take time. One has to select enough candidates to fill vacancies that one cannot foresee because people retire through ill health or maybe die unexpectedly and you have to have the appointees available to fill those gaps if the system is going to work well.

Q32 ***Viscount Bledisloe:*** You mentioned the tapping on the shoulder and you said in your note that very often many of the best people who went on the Bench had got there by being tapped on the shoulder. Do you find it a disadvantage not to be able to tap people on the shoulder?
Lord Phillips of Worth Matravers: Yes, I think so. I think that was inevitably going to be a disadvantage, balancing to some extent the advantages of a transparent judicial appointments system. It is undoubtedly the case that there are practitioners who are not thinking of going on the Bench, have been in the past, who have been persuaded to consider that perhaps it is their duty, having taken a lot out of the system, to put something back by becoming a judge. That is something that is simply not open to us at the moment; anyone who wants to become a judge has to go through the appointments system and the competition.

Q33 ***Viscount Bledisloe:*** What is an applicant meant to do in between the time he applies and gets a decision? Is he meant to go on accepting work knowing that if his application is successful he will not be able to do it, or is he at liberty to go on taking work from people under that risk of having to let them down?
Lord Phillips of Worth Matravers: That risk has always been inherent in the system. What happens very often is that the solicitor will ask counsel that he is thinking of instructing, "Have you applied for the Bench?" If counsel then says yes the solicitor may not instruct the counsel. This is a matter of considerable concern to us because obviously it is part of the disincentive of applying to go on the Bench. You find that solicitors are not instructing you because of apprehension that you may not be able to do their case if appointed.

Q34 ***Lord Lyell of Markyate:*** Just taking up those words "tap on the shoulder" you may find there is a solution—you have probably already seen it—that actually that is not quite what happened. During the ten years that I had some involvement as a law officer what the pre-judicial Appointments Commission did was to build up A lists, B lists and C lists and people were let into the secret that they were on the A list; they were encouraged to come, there were regular meetings. Therefore, they could see ahead a great deal more clearly. I see no reason why the judicial appointments system should not once again adopt that sort of system, while being more transparent. Has that been considered?
Lord Phillips of Worth Matravers: The A list, B list, C list system certainly post-dated my appointment; I was tapped on the shoulder, and I had no inclination of the tap at all. The A, B and C list I think was for people who had applied because we had a halfway house where people could apply to the High Court Bench and therefore be put on the list, but the Lord Chancellor could also invite counsel who had not put their names forward as applicants. The idea of having a standing list so that you know you are in the A team I think is one that merits consideration. We have that to some extent at the moment because when, as I understand it, an applicant is considered to be of sufficient calibre to have a High Court appointment but there is not a vacancy at the moment, that applicant will be informed that he or she is selectable but will have to wait to see whether a vacancy becomes available. What is not clear to me at the moment—and I suspect maybe not even been decided—is how long you remain in that position and are you going to remain in that position if there is a subsequent competition in order to have more candidates. That, I think, is an area we have to look at.

Q35 ***Lord Lyell of Markyate:*** I do recommend you to look back because actually it was in position for a very long time. I think you probably went on the Bench at the same time as I became a law officer in 1987, and it was well developed by 1990, I think.
Lord Phillips of Worth Matravers: If you had to apply to go on the list solicitors would still, I think, ask you had you applied for a judicial appointment, to which you would have to answer yes, and the more they rated you—and obviously the solicitors are likely to be instructing people that they rate highly—the more apprehensive they might be that as you applied and you were prepared to go on the Bench as a vacancy arose then there was a risk that you would not be available for their case.
Lord Lyell of Markyate: You are absolutely right. I have had exactly the same feedback that you are giving to us.

Q36 ***Lord Morris of Aberavon:*** Lord Chief Justice, is there not something in between tapping on the shoulder and the full bureaucracy which is obviously

developing, and are you right that they were coming into this cold? There was some delay before they took up their full responsibilities. One might have thought that whoever anticipated that delay would have ensured that the machinery was in place. I remember asking the question whether they had the resources and I was told they had the resources, and the delay is really down to appointment of an honorary Recorder. There is a huge delay of anticipation and is it fair for somebody to have to wait a long time to tell solicitors that "I may not be able to do your work." I was reading only the other day of a specialist appointment in the High Court where the judge retired in February—a very senior judge—and his successor was only appointed in October. That sounds to me odd.
Lord Phillips of Worth Matravers: It is far too long, I quite agree, and these are the flaws in the way the system has been operating, that we believe we are going to be able to address. It is quite true that there was a period under which the new Commission obviously was recruiting and working out how it was going to set about its task. It was not a very long period; there was no real shadowing period. It had very considerable problems, one being there was a time at which it was planned that they would relocate in the Midlands and this made recruitment extremely difficult. I know that Usha Prashar is finding life much easier now it has been decided that the Commission will remain in London.

Q37 ***Lord Morris of Aberavon:*** Has everyone got to apply?
Lord Phillips of Worth Matravers: Yes, you have to apply if you are going to be considered.

Q38 ***Lord Rowlands:*** You have weighed the advantages and disadvantages in the replies to your questions. Which side do you fall on? Do you think that the new system is going to be better than the old, or not?
Lord Phillips of Worth Matravers: In balance I think the new system was absolutely inevitable and it was desirable that it should be put in place. One has to have a transparent system of independent judicial appointments, in my view.

Q39 ***Lord Peston:*** I am referring to the Ministry of Justice Consultation paper on judicial appointments, which wants to know whether the role of the Executive, by which they mean the Lord Chancellor, should have a reduced role and whether the role of Parliament, in which I hope they include their Lordships' House, should have an increased role. The first is a technical question, will you be responding?
Lord Phillips of Worth Matravers: We will be responding; we are preparing a response.

Q40 ***Lord Peston:*** But you have not yet made up your minds?
Lord Phillips of Worth Matravers: I think we have largely made up our minds what is going to go into that response, and I think it is probably better that we should wait for the report.

Q41 ***Lord Peston:*** Are you going to tell us now what your response is going to be, or you would rather we shut up?
Lord Phillips of Worth Matravers: I do not think I am going to tell you what our response is going to be. I think what I can say about the suggestion that relates to the Lord Chancellor's involvement—because the current Lord Chancellor has made his own attitude quite plain and we are in the course of implementing that—as a matter statute the Lord Chancellor is required to approve all appointments. It is perfectly obvious that the Lord Chancellor himself is not in a position to make reasoned decisions in relation to hundreds of appointments, so either he has to have a large staff who are second guessing what the Judicial Appointments Commission is doing so that he can make the informed decision on each one, or it is a rubber stamp. The same is true, to a large extent, of vacancy notices which have to be given by the Lord Chancellor, usually on perfectly obvious requirements, and one has to have a mechanism of going through the Lord Chancellor before the Judicial Appointment Commission can begin to take steps to fill the vacancy. So these are areas where I think everybody is in favour of doing away with requirements of the formalities that do not reflect what has to happen in practice.

Q42 ***Lord Peston:*** There is one supplementary that I would like to ask, which I hope you could in this case answer, that there has been the suggestion—which I may say I am totally opposed to myself—that we should hold in Parliament, which again includes our House—post-appointment hearings for the most senior judges. As I say, I regard that as completely inappropriate but I would certainly like to know your view.
Lord Phillips of Worth Matravers: My personal view is that I share your view. I really cannot see a desirable role for Parliament in such circumstances. I think that Lord Bingham was asked about this and he said, "What are they going to ask? They are going to ask political questions; they are not going to ask, 'Do you keep cats?'"

Q43 ***Lord Peston:*** It would be like the American system, would it not, they would go into your personal background and everything else under the sun; but it is hardly appropriate if you are talking about a very senior judicial figure?

Lord Phillips of Worth Matravers: I personally have yet to see a suggestion of a role that Parliament would play at that stage, to which I would be attracted.

Q44 ***Lord Lyell of Markyate:*** I am a little worried because in the end the appointment of the senior judiciary—indeed the judiciary—is not a judicial function it is an Executive function. But it is a function which, in my opinion, ultimately the government of the day is responsible for, and it actually worked in practice very well down the decades and the centuries—we have a very, very high standard judiciary. I hope that the Lord Chancellor will retain and take seriously his overview—rather like the Attorney General's overview of the prosecuting system—and responsibility for the appointment of the judiciary, and I should be very reluctant—and I hope you would agree with me—that the Lord Chancellor should find himself having withdrawn from that deep responsibility.
Lord Phillips of Worth Matravers: I agree with those comments, I think. The comments I was making before were about what I described as rubber stamping appointments where the Lord Chancellor simply is not in a position himself to make an informed decision at all. When you reach the top judicial appointments—and there the judicial appointments system is different, there is a much greater input from the serving judiciary as to these top appointments—I have always made it plain that I accept that it is desirable that there should be executive involvement at that level because it would be highly unsatisfactory to have, for instance, a Lord Chief Justice appointed in whom the government had no confidence.
Lord Lyell of Markyate: I think we are very close to agreement, but in practice in government you have to accept responsibility for things in which you do not have time for personal involvement, but you should have the power because you should never have responsibility without at least theoretical power.

Q45 ***Lord Morris of Aberavon:*** Where would you draw the line about involvement of the Executive? You mentioned, Lord Chief, the appointment of a Lord Chief Justice. How far would you go on that? And recalling your earlier words, if it is not going to be rubber stamped the Lord Chancellor has to have the appropriate staff to advise him.
Lord Phillips of Worth Matravers: That is certainly true but it depends how many members of the judiciary are going to be involved in a meaningful process of consideration by the Lord Chancellor. If he were to be meaningfully involved in relation to the entirety of the judiciary then you need a very large staff for simply second guessing the Judicial Appointments Commission. But when you get to the top I think I would be reluctant just off the cuff to attempt to draw the line, thinking about the heads of division, those members of the judiciary who have necessarily to work quite closely with government, as we do at the moment in the partnership of the administration of justice.

Q46 ***Lord Woolf:*** The way that the Constitutional Reform Act was drawn was to substantially reduce the involvement of the Lord Chancellor, but to give him an involvement, namely he could refuse in very limited circumstances. An attempt of that sort to give him an involvement but a limited involvement, in principle are you against it?
Lord Phillips of Worth Matravers: No, I am in favour of it.

Q47 ***Lord Woolf:*** Of course, how the Lord Chancellor exercises his discretion and what information he needs is very much a matter for him, but as I understand what you are saying—and correct me if I am wrong—is that with regard to appointments where, quite frankly, the Lord Chancellors in the past have entirely relied upon their officials because they would not be personally involved, is merely a mockery to think that he has to second guess the appointment machinery that we now have in place.
Lord Phillips of Worth Matravers: It is a mockery unless he has a huge body of people in his department who are in effect second guessing the job that the Judicial Appointments Commission has done in order to give him informed advice as to whether they have done a good job. I do not believe in that because I think if you have a Judicial Appointments Commission you let them get on with it.

Q48 ***Lord Lyell of Markyate:*** Just very quickly—and again I think we are extremely close—Parliament is an enormous information gathering machine, and supposing out in some distant county it becomes known that somebody who, for reasons, is thoroughly unsuitable is about to be appointed to what in the locality is a very important position, and that comes, say, through a Member of Parliament to the Lord Chancellor, that residual power which effectively would be used by saying to the Judicial Appointments Commission, "If you appoint this person I will ask you to think again," is a valuable power, and it is a valuable power in the cohesion of this country. Would you agree with that?
Lord Phillips of Worth Matravers: I think I would agree with it and it is reflected to some extent in statutory consultation which takes place with statutory consultees—and I am very often one of them—which give an opportunity to say, "Wait a minute, there is something you ought to know about this particular candidate."

Q49 ***Lord Rowlands:*** We are now less than two years away from the date on which the Supreme Court is going to be set up. Do you think that there are broader implications for the legal system in the actual transfer from an Appellate Committee here to a separate Supreme Court?
Lord Phillips of Worth Matravers: The change I think is much more one of form than substance. It is bringing our system transparently into the system that in practice already exists. The Supreme Court will be there for all to see as an independent Supreme Court. At the moment the man in the street is totally bemused, I think, when he or she hears that this case is going to the House of Lords—they have no idea what that means. I myself think that the standing of the Supreme Court is going to be enhanced above that of the Law Lords. Some of the Law Lords take a completely different view, but that is my own personal view. I think essentially the changes are going to be changes of form rather than substance. The same Law Lords will be doing the same job in new premises with new labels.

Q50 ***Viscount Bledisloe:*** Eighteen months ago we asked you about the split of your time between judicial work and administrative and you said that ideally you would like to sit judicially three days a week and do admin for two days, but that your recent six months had had a particularly heavy burden. Has the burden in fact lightened and have you achieved your aim?
Lord Phillips of Worth Matravers: I have not quite achieved sitting on average three days a week. I think more or less I sit about half my theoretical working time. Essentially I find that I am doing at least one and a half jobs, and so I am under very great pressure of time. I have been sitting three days this week and because I did not have the time I would have liked before the sittings I now have reserved judgments that I have to find time to do, whereas if I had had the time that most judges have to prepare for their cases I anticipate I would have been able to deliver judgments as soon as those cases were completed. So I am under a great pressure but I am still succeeding in sitting, I hope enough to satisfy what I consider are the requirements of any Lord Chief Justice.

Q51 ***Viscount Bledisloe:*** Are you going to be able to improve the situation yet further or is this administrative burden going to be inevitable? And I go back to a previous question, is that going to discourage the best people from succeeding to your job?
Lord Phillips of Worth Matravers: I hope it will not because when I talk to people I tell them that I am enormously enjoying the job, despite the pressure. But I do not think the pressure is going to lessen, no.

Q52 ***Lord Norton of Louth:*** Just going back to the point about the move to the Supreme Court. You mentioned that people did not understand the current system basically because of the nomenclature of it, and I am not sure that there is much evidence for that, but if we go on the basis that the name itself was misleading, if it moved to the Supreme Court—and you are saying that the change is really one of form—do you think that there is the danger that people will misunderstand what the role of the Supreme Court is, given the name that is attached to it?
Lord Phillips of Worth Matravers: Undoubtedly they do all the time when I talk to them. They imagine that our new Supreme Court is going to be like the American Supreme Court, which will be able to overhaul Parliamentary legislation on the ground that it is not constitutional. But I hope that in time the public will recognise the true nature of the new Supreme Court.

Q53 ***Lord Norton of Louth:*** Would it have been perhaps an alternative of another name that would reflect more accurately what happens?
Lord Phillips of Worth Matravers: I do not think I would be in favour of that; I think the Supreme Court is rather a good name, and it is only a question of a short period before people understand the nature of that Supreme Court.

Q54 ***Baroness O'Cathain:*** Are you going to have a great publicity campaign to try and inform people about it, because your point is an extremely valid one? If you talk about the Supreme Court all they think is American movies.
Lord Phillips of Worth Matravers: I hope there will be adequate publicity that will inform the public as to the nature of the new Supreme Court. Of course the public basically reads about these things in the newspapers, so we must rely upon the media to give them that information.

Q55 ***Baroness O'Cathain:*** There is another method but I hesitate to suggest it to you, because the Lord Speaker here has an outreach programme at the moment to inform young people, sixth formers who are doing politics or will do in university, and a number of us are going from school to school with a very good power point presentation, and a lot of good information which comes from the information office, and it is a very worthwhile thing. But of course I guess that the judges just do not have that sort of time, or indeed resources to do it. But it might be worth thinking about it, and indeed even talking to the Lord Speaker about the results that are coming in on this, because it is the young we need to get to.
Lord Phillips of Worth Matravers: This raises a much wider issue than understanding in the Supreme Court. It would be very useful if the young

understood the difference between criminal and civil jurisdiction, which they do not. I am very enthusiastic about teaching children in schools about our legal system, the basics of our legal system, including of course the Supreme Court. And judges do involve themselves on an individual basis in this as much as they have power to.

Lord Justice Thomas: The Magistrates' Association does a lot of good work in this respect as well. There has been for some time a programme, both for the full the judiciary to help, but the magistracy have done a great deal of help, going to schools on a very regular basis.

Q56 ***Viscount Bledisloe:*** Could you not recruit some of the retired judiciary to do some of this education?

Lord Phillips of Worth Matravers: One could try. We try to recruit the retired judiciary to do all sorts of things and we do not always find they are enthusiastic.

Q57 ***Lord Woolf:*** Could I just say that I know of one retired judge who goes to a number of schools to give talks.

Lord Phillips of Worth Matravers: I am sure there are lots who do.

Q58 ***Lord Lyell of Markyate:*** You are an enthusiast for the Supreme Court but you rightly said that it will be misunderstood as having American powers. Are there not other possible unintended consequences? You will be aware that the European Court of Justice and the European Court of Human Rights both reached their conclusions by a much, much wider sense of research and input and diplomatic input and positive lobbying and lunches with Advocates General and all that sort of thing. Are we going to see that kind of change in our Supreme Court or are we going to remain very purist as we have been in the House of Lords, where the idea of anybody having lunch or working with a law clerk would be regarded as extraordinary?

Lord Phillips of Worth Matravers: I hope the latter. We do not find in the Court of Appeal that we are being lobbied are our clerks are being invited out to lunch by those who would like to interest us, and I do not anticipate that if anyone attempts this with the Supreme Court that they will get a very favourable response.

Q59 ***Lord Lyell of Markyate:*** But you do recognise that it happens in Europe and the United States?

Lord Phillips of Worth Matravers: I do not have personal knowledge of either but I am perfectly prepared to take your word for it, the fact that it does.

Chairman: Lord Chief Justice, Lord Justice Thomas, can I thank you both on behalf of the Committee very much indeed for your attendance and indeed for your evidence, which is greatly appreciated. Thank you very much indeed.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 9 JULY 2008

Present	Bledisloe, V	Peston, L
	Goodlad, L (Chairman)	Rodgers of Quarry Bank, L
	Morris of Aberavon, L	Rowlands, L
	Norton of Louth, L	Smith of Clifton, L
	O'Cathain, B	

Examination of Witnesses

Witnesses: Lord Phillips of Worth Matravers, a Member of the House of Lords, Lord Chief Justice, and Sir Igor Judge, President of the Queen's Bench Division, Lord Chief Justice designate, examined.

Q1 ***Chairman:*** My Lords, may I welcome the Lord Chief Justice and Sir Igor to the Committee. Thank you very much for coming. May I congratulate them both on your behalf on their future posts. We are not being televised, but we are being recorded, so I would like, if I may, to ask you to identify yourselves for the record, as if it were necessary.
Lord Phillips of Worth Matravers: Thank you. I am Nicholas Phillips, I am Lord Chief Justice.
Sir Igor Judge: I am Igor Judge, I am President of the Queen's Bench Division.

Q2 ***Chairman:*** Thank you very much indeed. Perhaps I could start, Lord Chief Justice, by asking about the Review of the Administration of Justice in the Courts. In July 2007 you announced that the Judicial Executive Board had agreed that you would lay an annual review before Parliament in order to meet the needs of accountability to Parliament and the public in the light of the 2005 reforms. The first such review was published in March 2008. I think it would be of interest to know who received copies of the review and how much it has been downloaded from the website? Has any assessment been made of its impact in increasing the "public understanding of the role of judges"?
Lord Phillips of Worth Matravers: Thank you. We printed 500 hard copies. They were, of course, placed in both the libraries of the House of Commons and the House of Lords, a copy went to Her Majesty, and copies went to the media. They have almost all gone. I think 80 of them were in Welsh.
Lord Rowlands: Hear, hear!

Q3 ***Lord Morris of Aberavon:*** For me!
Lord Phillips of Worth Matravers: Quite apart from that, we published the review on our website. We have had about 3,000 hits.

Q4 ***Chairman:*** Very, very good.
Lord Phillips of Worth Matravers: As to whether it has enlightened the general public as to the role of the judiciary, I find it rather difficult to comment on that. One suspects, having regard to the limited number of hits, that it has not had a direct impact on the general public but it is there, it will come to the attention of the general public in as much as the media make use of it over the year.

Q5 ***Chairman:*** Have you a view as to whether it would be helpful for there to be some formal follow-up to the review from either the Government or Parliament, or both and, if so, what sort of form it might take?
Lord Phillips of Worth Matravers: I think it would perhaps depend upon whether any serious issues were raised by it. My own feeling is that appearing before the appropriate parliamentary committees to answer questions on the review may well suffice.
Chairman: Yes. Thank you.

Q6 ***Baroness O'Cathain:*** Can I ask a supplementary on that point. You said about the 3,000 hits. When you launched the review, Lord Chief, did you actually have a press conference where you had a teach-in for the media, if you like, because you said it depends on the media? You have to bring them along with you, as you well know, I am sure. I am sure you could get them on-side to try and, if you like, disseminate further the contents of your review, thereby making the judiciary even more a real thing in people's minds.
Lord Phillips of Worth Matravers: Yes, I did have a press conference. I do not think I could describe it as a "teach-in". The press when they come to such a conference are rather more interested in making copy out of the matter you are discussing than being given a teach-in. Interestingly, after my appearance before the Commons committee one member of the press asked, "Would it be possible for us to have some

instruction in some of the matters that we write about?" I think he was particularly interested in the conditions under which bail have to be granted. I said that we would be delighted to give the press instructions on anything they wanted us to talk about, provided it was appropriate.

Q7 ***Baroness O'Cathain:*** Do you not think you ought to set the initiative rather than getting the initiative from the press?
Lord Phillips of Worth Matravers: I think there may be a good point there. How many would turn up if we simply said we are going to give a bit of instruction is another matter.

Q8 ***Lord Rowlands:*** When we held our previous inquiry we got very preoccupied by the budgetary issues, particularly the cost of the court administration, budgets and so forth. I was, therefore, rather disappointed that in the annual review there was very little on the whole issue of budgets, except that there was a backlog of repairs, et cetera. Why did it not spell out more for laymen to understand what exactly the court administration costs are and net costs to the public, as it were? Where would we find that information?
Lord Phillips of Worth Matravers: That is probably a good point. I think one of the problems with this report was it was being drafted at the same time that there were continuing negotiations going on in relation to the budget of the Court Service and the role we judges would be playing in relation to that. Maybe we took our eye off the ball so far as informing the public was concerned.
Sir Igor Judge: If I may, I suspect that you would get the information that you need directly from the Ministry of Justice in the HMCS budget.

Q9 ***Lord Rowlands:*** I tried that and did not get very far, to be honest.
Sir Igor Judge: Shall I try and make inquiries, Lord Rowlands, and find out for you? Obviously the information is there, it is a question of whether it was put into the Lord Chief's annual report.
Lord Phillips of Worth Matravers: In future there will be the negotiations that are made provision for under the Framework Document and I would anticipate the result of those negotiations will be an important feature in any future review.

Q10 ***Lord Rowlands:*** I do not want to anticipate a later question, but we have mentioned the Framework Document. Again, in the context of the budget, are you satisfied that the Framework Document on the budgetary issues has resolved the tensions between yourselves and the ministers?
Lord Phillips of Worth Matravers: I am satisfied that it has done that. There is now, as you will have seen, a very detailed process under which the Lord Chief Justice is going to take part in discussions at all the vital stages. First of all, before a bid is made in each expenditure round to tell the Lord Chancellor how much the Court Service needs; when the Ministry then receives its allowance there will be further discussion as to how much of this is going to go to the Court Service, and once that is decided there will be further discussion as to what it is going to be spent on. Once the Court Service has been allocated its budget it cannot have any taken away without going through the whole process again, which I think is very important.

Q11 ***Lord Rowlands:*** So you have achieved a kind of ring-fencing?
Lord Phillips of Worth Matravers: I think this is in reality a kind of ring-fencing.

Q12 ***Chairman:*** Lord Chief Justice, there was a perceived commitment to publish an annual review, but there is now a perception that such a commitment is diluted. Would you like to comment on whether or not there will be an annual review and whether or not it would be desirable for there to be a statutory requirement for an annual review?
Lord Phillips of Worth Matravers: I will start with the latter. We are very firmly of the opinion that it would not be desirable to have a statutory requirement for an annual review. We do not consider that would really be compatible with the independence of the judiciary as a separate arm of state. We do think it is appropriate that we should volunteer a review so that we are publicly accountable in that way, but it is important that we should be doing so of our own volition. As to how often it should be, I did not want to bind my successor is really the answer. I was not intending to suggest that we would not be producing it every year. Producing this particular review proved to be a very arduous task and in future we would not expect to produce anything nearly as detailed, this was really laying the foundations for future reviews. Personally, I think it probably would be a good idea that there should be a regular review each year but, as I have said, it is going to be a matter for Sir Igor and not for me.

Q13 ***Chairman:*** I believe the Supreme Court will be producing an annual review. Would your successor like to make a comment?
Sir Igor Judge: I am just troubled about the automatic assumption that if there is a review it should be annual. If we have something to report we should report annually. If we do not have very much to report, I cannot myself see any sense in reporting when we have nothing much to report. We will have

some things to report every year, there will be all the formalities and all that information can be produced, but if we are producing what I would hope we will produce, a carefully structured, useful report with observation about what is going right and what is going wrong, it may not be sensible to produce it every year. Equally, if there is any area for concern, and there may be, then we should have to address that quickly without having to produce a complete review of everything. I am not committing myself, but I can see the force of the point that we are dealing with a public area and you must be able to ask us to account whenever you want to.

Q14 ***Chairman:*** But if there is not too much to report then it will not be too arduous, will it?
Sir Igor Judge: No, but then there is the paper.
Chairman: The accountability point remains.

Q15 ***Lord Peston:*** I agree with you entirely, of course, there is nothing magical about the period of time called "a year". Certainly in our House I am just astonished by how many annual reports I get which go straight into the wastepaper basket because they are reporting nothing other than using, as you say, a lot of paper and a lot of coloured ink and so on. Is there not a slight problem that if you only report when there is something serious then in a way you are alerting the public when you should not really be over-alerting them? In other words, a report that says, "It is serious but it is under control" might still get misinterpreted.
Sir Igor Judge: I am sorry. Your point is well made. I do not for a moment suggest that we should not have regular reports. If we do not have an automatic annual cycle there must be a facility to enable us to report if something dramatic arises. I am not anticipating the idea that a report should only be prepared when something dramatic arises.

Q16 ***Baroness O'Cathain:*** Still on the Review of the Administration of Justice in the Courts. You noted that the media team of the Judicial Communications Office "is in the process of organising a small panel of serving judges who will be trained to undertake media interviews where it is necessary to provide an informed judicial perspective on issues of sentencing and process". I think this probably arose with all the controversy around the *Sweeney* case.
Sir Igor Judge: Yes.

Q17 ***Baroness O'Cathain:*** How far has the JCO got with this initiative? Has the panel been set up? Have the judges been trained? How many interviews have been given so far?
Lord Phillips of Worth Matravers: We have a team of five now, I think, who have been trained. So far there have been four interviews, I think they were radio interviews, dealing with sentencing, dealing with bail and dealing with housing repossession.

Q18 ***Baroness O'Cathain:*** How do you think they went? Do you think they went better than they would have done by not giving the interviews?
Lord Phillips of Worth Matravers: I think they undoubtedly would have been probably better as a result of the tuition. That is not an easy question to answer. I certainly have not received any expressions of dissatisfaction about those interviews.

Q19 ***Baroness O'Cathain:*** Who decides when the panel actually speaks to the media, or one of the judges who have been trained?
Lord Phillips of Worth Matravers: Sometimes I would decide because I would consider that this is a situation that calls for a spokesman to say something, but in these instances in none of them was I directly consulted. What would normally happen is that there would be either a request of our Communications Office or our Communications Office would become aware of a situation where they felt that it was desirable that there should be a judicial spokesman dealing with a topic. They would then brief the appropriate member of the team as to the topic, as to any other questions that might be thrown at them once they expose themselves to the media, and they would then give the appropriate interview.

Q20 ***Lord Rodgers of Quarry Bank:*** If I may, I would like to squeeze in a question which is related both to media interviews and also your report about relationships between the executive and the judiciary. I am referring to a report in all the papers yesterday about knives. There was a very full report which emerged, although it refers to what Sir Igor is going to say if he has not said it yet, presumably it was explained now rather than later. Also, in at least one report there are references to a further fresh review by the Justice Secretary, by the Lord Chancellor, together with the Home Office Secretary and also the Attorney. That raises the question of are they proceeding in parallel over the whole question of the future of knives. Will it be the case, and is it natural for this to happen, for the new Lord Chief Justice to discuss this matter at all? If not, how do we get such a harmony of view, if there is such, and who is going to deal with the media issues? Presumably either the Lord Chief Justice or your successor said the piece which led to yesterday's papers.
Lord Phillips of Worth Matravers: Can I start and then I will hand over to Sir Igor to deal with what he is reported, and I suspect to some extent misreported, to have said.

Sir Igor Judge: Yes.
Lord Phillips of Worth Matravers: So far as knives are concerned, guidance on sentencing from judges only comes appropriately in the course of a judgment after hearing an appeal in a case involving the use of a knife, in which case that is a perfectly appropriate context for whoever is presiding over the Court of Appeal to give a guideline judgment, or, and this will take longer, the Sentencing Guidelines Council might be considering that issue. It would not be in any way appropriate for any judge to go on the radio or on television and say, "We have got a terrible problem with knife crime, we ought to be sending people to prison for longer", for instance. That would be quite inappropriate. So far as government is concerned, government may be considering legislation to address knife crime. That would involve policy on which it would almost certainly be inappropriate for judges to comment. Judges might quite properly comment on the implications that a change in policy might have, for instance on judicial process, or even the effect this might have on the prison population.
Sir Igor Judge: I read the article in the newspaper yesterday—I think I might even be able to see which paper it was—and I did not recognise it as anything I have said recently, but about three or four weeks ago sitting in the Court of Appeal Criminal Division I gave a judgment in relation to four cases involving knife crime of different seriousness and expressed myself in what some called fairly robust terms. One, on the whole it is not a good idea for people who are carrying knives to be dealt with by way of a caution, the issue should be brought to a court for decision. Two, that sentences in relation to knife crime should be deterrent sentences. I did not use that actual word, I do not think, but sentences which were at the top end of the appropriate range. The appropriate range, of course, depends on the particular crime. There is just the bare carrying, the use and so on and so forth. That article is dealing with something that I said sitting in court, as I said, about three or four weeks ago. It made lots of headlines at the time and then went to sleep again and was resuscitated yesterday.

Q21 ***Lord Rodgers of Quarry Bank:*** When the article says: "Every magistrate in England and Wales is to be sent a warning from the next Lord Chief Justice that knife crime is reaching epidemic proportions", you do not intend to send out any such letter to the magistrates?
Sir Igor Judge: No, I do not.

Q22 ***Lord Rodgers of Quarry Bank:*** Thank you.
Sir Igor Judge: If, however, somebody sends them a copy of my judgment then the copy of my judgment will be sent, but I know nothing about any plan.

Q23 ***Lord Morris of Aberavon:*** I did not see the article, Sir Igor, but I did read the reports of your judgment. There is a rather confused picture regarding the guidance certainly from the Sentencing Guidelines Council regarding knives. Do I presume the media team would cover the activities of the Sentencing Guidelines Council? Perhaps you might agree that the picture is not entirely clear to the public in view of the contradictory newspaper reports that we have as regards the intentions of the judiciary so far as knives are concerned.
Lord Phillips of Worth Matravers: The first question, would the media team cover this, I think the answer would be no. If comment is called for, it ought to come from the Sentencing Guidelines Council itself and on the Council we have our own adviser on relations with the media. Secondly, the Sentencing Guidelines Council lays down long-term guidelines seeking to achieve proportionality and uniformity of approach, not to dictate individual sentences but looking at the longer term. You can get what may be a shorter term situation where a particular type of offence suddenly becomes prevalent, or is shown to be prevalent, which may call for a faster reaction than the Sentencing Guidelines Council is capable of. In that kind of situation it is perfectly appropriate for the President of the Queen's Bench Division or an appropriate member of the Court of Appeal presiding in the Criminal Division of the Court of Appeal to give the kind of judgment that Sir Igor gave.
Sir Igor Judge: May I just add, it so happens that I am seeing the Sentencing Guidelines people this week simply so that we can iron out where there seems to be public misunderstanding and I would expect that by the end of the week the position will be clarified. There is no problem. There is, in fact, no confusion. I do not think there is any uncertainty. I suspect the confusion has been added to by the issue yesterday by the Sentencing Advisory Panel of a very broad paper on the whole issue of sentencing which is not a Guidelines Council paper but a Panel paper and that has got into the mixture, so the cake that is being produced has rather a lot of inappropriate excrescences.

Q24 ***Viscount Bledisloe:*** Going back to the Framework Document, when you made your speech in Melbourne, Lord Chief Justice, you said: " . . . it is reasonable for us [the judiciary] to be prepared to account for the manner in which we perform our share of the partnership". How do you envisage that happening? In particular, how do you envisage Parliament holding the Lord Chief Justice to account for his role in that service?
Lord Phillips of Worth Matravers: The accountability of which I was speaking was explanatory accountability and by producing the review and by

coming before committees to answer questions about it, it seems to me that I am going a long way to providing that explanatory accountability. Of course, I also had the press conference, so that is more dealing with explanatory accountability to the general public.

Q25 ***Lord Rowlands:*** The draft Constitutional Renewal Bill would make a number of changes to the judicial appointments system in England and Wales. Given that the new system has not been operating for very long, do you think any of the provisions in the draft Bill are premature?
Lord Phillips of Worth Matravers: No, I do not. The system has been running long enough to demonstrate a number of teething problems. Those teething problems, to some extent, have been problems that have resulted in delay. Those matters, I think, can be put right. For instance, junior appointments at the moment have to be approved by the Lord Chancellor and that has proved to be really something of a formality, but a formality that takes time. The Lord Chancellor cannot have personal knowledge of individual candidates for junior appointments at the judiciary unless he maintains a huge department to second-guess the Judicial Appointments Commission. In that respect it seemed to us it would be better if the reality was recognised and he did not have a role to play there. Equally, the Prime Minister only has a formal role in judicial appointments but it is a role that can delay the appointments, so what is the point of that particular role rather than leaving it to the Lord Chancellor to make recommendations.

Q26 ***Lord Rowlands:*** So you are content with the Bill as drafted in respect of judicial appointments?
Lord Phillips of Worth Matravers: There are some proposals with which we do not agree. Those, I think, are proposals which would give the Lord Chancellor more control over the Judicial Appointments Commission. He is already in a position to give guidance. He has not availed himself of that power yet, and we do not consider it would be appropriate that he should, for instance, and this is a suggestion, be setting some kinds of targets for the Judicial Appointments Commission. The statute lays down the criteria for judicial appointments and to impose targets on top of those criteria would tend to make it very difficult for the commission to fulfil its statutory mandate.

Q27 ***Lord Morris of Aberavon:*** Initially, Lord Chief, there was some criticism, anecdotal evidence, of delays in judicial appointments and obviously the new body was running in. Have they now caught up? Are there significant delays now? We have heard of certain posts which have been empty for some time. What is the position to date? Are things going smoothly now?
Lord Phillips of Worth Matravers: Things are going much more smoothly now. The most notable problems arose in two areas. There was a competition for the Circuit Bench which ran into a bit of technical difficulty which had to be sorted out and that resulted in delay. There are also problems where a particular post crops up unexpectedly, and Senior Circuit Judge positions are a good example of that. We have had some real problems and very long delays in filling those individual posts because the Commission simply did not have the capacity at short notice to run a competition. They have now addressed that and we are hopeful that we are not going to have that problem any more. I am optimistic that the delays that have taken place in the past are going to be a thing of the past.

Q28 ***Lord Morris of Aberavon:*** Compared to the situation before the JAC was set up, are appointments now as speedy as they were before or slightly more delayed?
Lord Phillips of Worth Matravers: They are more delayed in one particular respect, and I am not sure that one can avoid it but it is a very pertinent one at the moment. I was appointed, or am to be appointed, to replace Lord Bingham as the senior Law Lord. That involved quite a lengthy appointment process because it is a United Kingdom appointment, so the Judicial Appointments Commission and equivalents in Northern Ireland and Scotland have to be consulted and so on. One could see that the appointment was going to be necessary because Lord Bingham is retiring when he reaches his retirement age. It took a long time for that process to go through. That process having been concluded and my appointment announced, it then becomes apparent we needed a new Lord Chief Justice, and so the process of appointing a Lord Chief Justice then begins, and that takes a long time too. The new Lord Chief Justice is announced and then it becomes apparent we need a new President of the Queen's Bench Division. In the old days, the Lord Chancellor, after consulting, would have sat down with senior members of the judiciary and discussed who was going to fill each slot, so it could be done once-and-for-all on a single occasion. The current process really has given rise to some difficulties. We hope that everything will be in place by 1 October but it can be a rather slow process.
Chairman: Critical path analysis.

Q29 ***Baroness O'Cathain:*** On that basis, I know one should not because the judiciary is way up there, you are not supposed to ever suggest anything to them that might come from something so low down below as business, but personnel planning and executive

appointments planning was always the mark of a very good organisation and, in fact, people used to be groomed for that, using the term properly, for promotion and seeing where people were likely through age to move on or move sideways. In fact, sometimes you see six or seven names for a box and way out for somebody who will not be retiring for another three or four years, but those six or seven names might also be for other boxes in the pecking order. Something like that, that has always worked in industry and business, in large corporations, is there any merit in looking at something like that so that people who are in charge of the judicial appointments, and I know we should not really be addressing this to you, the Judicial Appointments Commission, should be aware that things will happen, like somebody will die suddenly or something else might happen or a new position is created, and instead of having a huge, long drawn-out process looking at every name in the sphere, so to speak, there would be an easier way through it?
Lord Phillips of Worth Matravers: Two points. As far as the process I was talking about, first of all replacing the senior Law Lord then Lord Chief Justice then the President of the Queen's Bench Division, I cannot see any easy way of amalgamating that process. Certainly it would need legislation because there are different panels responsible for the different appointments, to start with. The point you make about longer term planning is a very valid point and one that has been concerning us. Judges who are appointed now have to retire at the age of 70 and it does not leave very long for a judge to work his or her way up from High Court to Court of Appeal, maybe the Supreme Court or Heads of Division. It seems to us when we have been discussing this that this does call for a bit of forward planning so that one is looking at the first stage at those who are potentially highfliers who are going to get to the top and making sure that when promotions are considered, those get promoted in sufficient time to get the experience they need to reach maybe the Supreme Court.

Q30 ***Viscount Bledisloe:*** Two questions on that. Firstly, is not one of the difficulties of Lady O'Cathain's very sensible idea that in industry you assume that everybody wants to be promoted whereas the Judicial Appointments Commission is not allowed to look at anybody unless they have actually applied, so the exercise might be rather vain because some of the people you were considering might say they did not want it? Secondly, does not the fact you have given us about your replacement of Lord Bingham demonstrate that there would have been a very serious problem had Lord Bingham unfortunately dropped dead overnight?
Lord Phillips of Worth Matravers: There would obviously be an emergency if somebody who holds an important position in the judiciary dies overnight. What then has to happen is you have to move as fast as you can applying the statutory process and in those circumstances one can move with a degree of speed, particularly if it is a very senior appointment because the panel that makes the replacement appointment is a small one and the catchment area in which it would be looking is a relatively small one. I think the suggestion was really focusing on promotion so that your starting point would be those who already have judicial appointments. I said to all the High Court judges that I would proceed on the basis that they wished to be considered for an appointment in the Court of Appeal unless they informed me to the contrary and, by and large, I think judges do wish to be considered for promotion; not always.

Q31 ***Viscount Bledisloe:*** A different question. You were referring to the removal of the power of the Lord Chancellor over appointments below the level of High Court.
Lord Phillips of Worth Matravers: Yes.

Q32 ***Viscount Bledisloe:*** You and the Judicial Appointments Commission take the opposite positions on that, do you not?
Lord Phillips of Worth Matravers: We do. I think they are taking a constitutional position and I am taking a pragmatic position, and I have always been a pragmatist. We are not taking the Lord Chancellor's control away altogether. If he formed the view that there had been something wrong with the process he could then challenge the entire process and that would remain open to him. All we are suggesting is that there is no point in his having to approve individual appointments. Constitutionally one may say what is the difference between that and a High Court appointment, but in practice he simply has not got any value to add to the process.

Q33 ***Viscount Bledisloe:*** So you are content with a situation where no-one in government is answerable, even theoretically, for non-High Court Appointments?
Lord Phillips of Worth Matravers: I would be, yes.

Q34 ***Lord Smith of Clifton:*** The draft Bill would also give the Lord Chancellor the power to remove judicial offices from the list of posts in England and Wales that must, under the Constitutional Reform Act, be filled following a selection process by the JAC. Jonathan Sumption QC, a Judicial Appointments Commissioner, told the Joint Committee that the JAC accepted the objective of making it easier to redeploy existing judicial office

holders to certain posts without making them go through a full JAC competition, but that they had "serious concerns" about the proposed mechanism because it would "entitle the Lord Chancellor to remove any schedule 14 office and basically resume the appointing power himself in any circumstances whatsoever. It appears to us that this is completely inconsistent with the whole rationale for creating an independent JAC in the first place. We think that the redeployment problem can be tackled by a much less extreme form of legislation." Do you share the JAC's concerns about the breadth of this power?
Lord Phillips of Worth Matravers: Yes, we do, it goes too far. It in theory would give the Lord Chancellor power to remove the entire schedule 14 list from the Judicial Appointments Commission. It is inconceivable he would do so but it does not seem desirable to give him the theoretical power to do that. What we are concerned about is that there are on that list a number of appointments, and particularly appointments on various tribunals, which are filled by serving circuit judges. They do not get paid any more if they are allocated to a tribunal, they serve therefore a limited period and then they have to be replaced. It does not seem to us it makes much sense to say there has to be a competition for these. Sometimes they are not very keen to go anyway. So really it ought to be dealt with as a matter of deployment; it does not involve promotion. The Judicial Appointments Commission probably, if it is going to add value to this process, is going to make it quite arduous. It would be better if they could identify those in particular posts and say we do not need a competition for these posts, they can be dealt with, just as a lot of other posts to which I deploy judges are dealt with, without the involvement of the Commission.
Lord Smith of Clifton: Thank you. I am very glad to hear it.

Q35 ***Lord Rowlands:*** There has been some criticism of creating a two-tier system where by implication the appointments below High Court count for rather less than those above, which is not a message you would want to send out.
Lord Phillips of Worth Matravers: I am not sure. I think probably they do, do they not? High Court judges have a jurisdiction which is much more significant in some respects than judges on the circuit bench or district court judges. Their appointments are I think more important and it seems to me right that at that level the Lord Chancellor should have an involvement so that if he should be advised there is some reason for questioning a particular appointment he should be able to do so.

Q36 ***Lord Rowlands:*** I was quoting Professor Dame Hazel Genn, a Judicial Appointments Commissioner. You do not share her view?
Lord Phillips of Worth Matravers: I must respectfully disagree about that aspect.

Q37 ***Viscount Bledisloe:*** Can I put the contrary point which I used to put to one of the Lords of Appeal? That actually the county court bench which has daily contact with ordinary members of the public is in fact rather more important than the Court of Appeal or the Supreme Court where contact with the public is really very small, and that people's faith in the judicial system depends much more on the adequacy of the more junior appointments?
Lord Phillips of Worth Matravers: I think it depends on your starting point and how you define what is important. Obviously they have an enormous importance so far as contact with the public is concerned because they are the judges who are coming into daily contact with the public in a way which certainly members of the Court of Appeal do not; we are dealing with appeals from their decisions. So to that extent one can say yes, so far as the direct impact on the public is concerned and the way we run our judicial system, those judges who are dealing directly with the public are more important. But if you are looking at the global picture and saying, "Who is in a position to have a more significant effect on the way the country runs"—"runs" is not quite the right word, judges are not concerned with running the country—a decision of the Court of Appeal or the House of Lords/Supreme Court can have immense implications for the country as a whole, *viz* the recent decision that said that anonymous witnesses were not compatible with a fair trial under the Human Rights Convention.
Chairman: Thank you very much. Supreme Court appointments. Lord Peston?

Q38 ***Lord Peston:*** You have answered quite a lot of the question I was supposed to ask you earlier but can you take me through it step by step. At the moment you are still the Lord Chief Justice?
Lord Phillips of Worth Matravers: Yes.

Q39 ***Lord Peston:*** Although I did see you attending the Law Lords at least once a few weeks ago to see what was going on.
Lord Phillips of Worth Matravers: I sit occasionally with the Law Lords.

Q40 ***Lord Peston:*** So the first question is, when will you cease to be Lord Chief Justice?
Lord Phillips of Worth Matravers: On 1 October, or 30 September more accurately.

Q41 ***Lord Peston:*** This year?

Lord Phillips of Worth Matravers: Yes.

Q42 ***Lord Peston:*** And then you will become the Senior Lord of Appeal in Ordinary?
Lord Phillips of Worth Matravers: Yes.

Q43 ***Lord Peston:*** Do we know, I have forgotten, when the Supreme Court will come into operation?
Lord Phillips of Worth Matravers: We know that the Supreme Court is intended to come into operation on 1 October next year.

Q44 ***Lord Peston:*** So that gives us the progression?
Lord Phillips of Worth Matravers: Yes and the change is automatic under the statute. The senior Law Lord automatically becomes President of the Supreme Court.

Q45 ***Lord Peston:*** Nonetheless your appointment is historic in a sense, because we have never had a Supreme Court before, but you have been given both this job and told you will be the President?
Lord Phillips of Worth Matravers: It is the statute which says that providing I am still the senior Law Lord when the Supreme Court comes into existence I will turn into the President.

Q46 ***Lord Peston:*** The process of getting you appointed in the first place involved this committee you told us about and you also referred, I thought at first apropos of other appointments, to the relevant criteria being in statute for those appointments. Are the criteria for your appointment written in statute?
Lord Phillips of Worth Matravers: The statutory requirements as far as appointing judges is concerned are pretty simple. The appointment has to be on merit and that is what I was referring to when I was talking about the Judicial Appointments Commission having a statutory mandate or criteria in relation to their appointments. It is spelt out absolutely clearly, you appoint on merit, you cannot have a requirement that X per cent of those you appoint are criminal for instance.

Q47 ***Lord Peston:*** I understand that, but there is nothing more in the legislation other than "merit"? It does not say "by merit we mean"?
Lord Phillips of Worth Matravers: No, there is not.

Q48 ***Lord Peston:*** Does that apply to Sir Igor as well? Are you also there on merit, end of story?
Sir Igor Judge: I hope so!
Lord Phillips of Worth Matravers: Yes, it does. Could I just add a cedilla, my appointment as a senior Law Lord was by the process which the statute lays down for appointing the President of the Supreme Court. Now as a matter of strict law, that does not come into effect until we have a Supreme Court, but there was agreement between Lord Bingham and the Lord Chancellor that it would be appropriate that that machinery should be used to appoint his successor.

Q49 ***Lord Peston:*** Just before I come to you, Sir Igor, just to clarify it to a total lay person, is there a legal literature on what the word "merit" means? As a layman I can think of at least two concepts. One is the person is a brilliant lawyer but the other is the person has very sound judgment, and the two do not seem to me to be the same. In other words, if I were the lay person on one of these committees, I might well say that X is the better candidate, if that is what we are doing, because he, she seems to show sound judgment even though Y seems to know more about the law.
Lord Phillips of Worth Matravers: There is no statutory definition of merit, it is really a matter for the relevant body, which would normally be the Appointments Commission, as to the elements which go into make a meritorious candidate. At the same time for a particular vacancy there may also be other specific requirements for a particular expertise in a particular area which have to be considered.
Chairman: The seminal work on the rise of the meritocracy says that merit is IQ plus effort.

Q50 ***Lord Peston:*** Sir Igor, was your experience pretty much the same?
Sir Igor Judge: There was what I would describe as a job description provided both for those who were consulted and of course for the Judicial Appointments Commission panel which undertook the process. There is a job description currently available for the President of the Queen's Bench Division who will replace me. That job description has been at least partly drawn up in the light of the fact that I am now moving to be Lord Chief Justice and I will take some of my own current responsibilities with me as Lord Chief Justice so we will need a different job description. But there is a job description available—I do not know whether it is common knowledge but anyway there is one and there was one—and there is one for the President of the Queen's Bench Division.

Q51 ***Lord Peston:*** Are you interviewed as well?
Sir Igor Judge: I was.

Q52 ***Lord Peston:*** You were?
Sir Igor Judge: Yes.
Lord Phillips of Worth Matravers: I was not.

Q53 ***Lord Peston:*** What is lying at the back of my mind, which you can probably guess, is the extraordinary contrast between your experiences and what happens when a member of the US Supreme Court gets chosen. Much as I admire the American constitutional system the contrast, again speaking as

a layman, just seems to me to be entirely right on our side as opposed to theirs.
Lord Phillips of Worth Matravers: I think we would both agree with that!
Chairman: Counter-Terrorism. Lord Morris?

Q54 ***Lord Morris of Aberavon:*** Some of us have come hot foot from discussing the Second Reading of the Counter-Terrorism Bill last night. I am not going to ask you about the merits, as that is the word we are talking about, of the 42-day period which has been proposed, but what I want to know is the implication of having a parliamentary debate during the course of an investigation and the fears attached to that. I am not asking you about how a judge will decide in a particular case but in this unprecedented situation of a parliamentary debate, which would be very wide ranging according to the indications given by the Home Secretary, could that cause as a general matter problems about a fair trial and an abuse of process argument?
Lord Phillips of Worth Matravers: Less frequently now than used to be but there is quite often an application made to a judge on behalf of a defendant that it is impossible to have a fair trial because it would be impossible to get a jury which has not been biased by what they will have read or seen in the media. It is very rare that a judge accedes to such an application. Judicial experience tells judges first of all that if there has been a significant period of time between something being in the newspapers and the trial the likelihood is that the jury will have forgotten all about it. Secondly, experience tells us that juries are very good at putting out of their minds, or out of consideration, matters they may have read in the papers some months before. The first thing which happens in any criminal trial is that counsel for the prosecution gets up with all the majesty of the law and tells the jury what the prosecution case is about the defendant, and nobody has suggested that this is unfair prejudice as far as the jury is concerned. The trial then proceeds. So it would only be in an extreme situation that facts which might have been stated in debate in the House subsequently reported by the press could lead to an application that it is no longer possible to have a fair trial. I imagine there would be precautions anyway taken by way of anonymising names and so on in debate but I am not conversant with the details of what is proposed.

Q55 ***Lord Morris of Aberavon:*** I appreciate, Lord Phillips, the issue of delay between a particular press reporting and an actual trial, and when I was Attorney one had issues of contempt to consider, sometimes happy and sometimes unhappy experiences in applications to the Court of Appeal. There it is. Is there any parallel you can think of where in the middle of an investigation there is a parliamentary debate, whatever the guidelines, which was triggered off by a specific case and sought to be justified by the Home Secretary and inevitably there would be not only publicity but the whole atmosphere that this is an extraordinary situation calling for special measures and that in turn would make it difficult to have a fair trial?
Lord Phillips of Worth Matravers: I do not think that I am really competent to give an answer to that question; it would call for quite a lot of historical research. I did preside over a trial in which two of the defendants were alleged to have conspired with the late Robert Maxwell; it was after his death. I have not researched what may have been said in Parliament about Robert Maxwell but I suspect he was the subject of some parliamentary discussion which may well have been reported.

Q56 ***Viscount Bledisloe:*** I would like to ask you a question of which I am afraid you have received no warning, and that is about the funding of civil litigation. First of all, is it right that the funding of criminal legal aid and the funding of civil legal aid comes from the same source and that, as the criminal legal aid consumption goes up, so only the residue is left for civil legal aid? When the amount needed for criminal litigation is really a product of the activities of the Government and the police, is it right that civil legal aid should be eroded by that? Slightly related, what is your general view of the desirability and efficacy of contingency fees?
Lord Phillips of Worth Matravers: On the first one, I think all legal aid comes out of the Ministry's budget. I am not aware of any instance of the Ministry saying, "We have to cut back on civil legal aid because we have had an overspend on criminal legal aid." There has been an instance when the Ministry has said they have to make economies—they call them "efficiency measures"—because of the expenditure which has taken place on criminal legal aid. There has however been a cut-back on civil legal aid, particularly in the area of personal injuries, on the basis that this is replaced by the conditional fee system. The conditional fee system is not a perfect replacement for civil legal aid, you can get up to double what would be the appropriate fee as an enhancement for success if you agree to act on a basis you will get paid nothing if you lose. You are not going to be prepared to accept instructions on that basis unless the prospects of winning look pretty rosy. That means that cases where there is a very strong case are likely to go for trial because there will be lawyers who are prepared to act, but sometimes you will have a case which ought to go to trial which is not all that strong but it does raise an important issue of principle. The conditional fee system does not cover that. I know the Master of the Rolls at the moment is very concerned about the whole area of fees and at the

moment he is conducting an inquiry into it but we have not got a perfect system of public funding of civil litigation.

Q57 ***Viscount Bledisloe:*** It can only be anecdotal but are you saying that contingency fees in certain circumstances lead to abuses of process by the contingency fee lawyer?
Lord Phillips of Worth Matravers: There is a concern about this and this is why it would have been unlawful to have such a system in the past. I have not come across any case where it is suggested that because the lawyer was only going to get paid if he won, he has behaved in an improper or objectionable fashion.
Sir Igor Judge: My position is exactly the same. Suspicious but no evidence.

Q58 ***Chairman:*** Lord Chief Justice and Sir Igor, can I thank you very much on behalf of the Committee for joining us this morning and for the evidence you have given us. Thank you very much indeed.
Lord Phillips of Worth Matravers: Thank you.

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