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Select Committee on the Constitution

12th Report of Session 2010–11

The Cabinet Manual

Report with Evidence

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References in footnotes to the Report are as follows:

- Q refers to a question in oral evidence;
DCM 1 refers to written evidence as listed in Appendix 2.

The Cabinet Manual

CHAPTER 1: INTRODUCTION

1. The draft Cabinet Manual was published by the Cabinet Office on 14 December 2010. Its development was first announced in February 2010, when, in a speech to the Institute for Public Policy Research, the then Prime Minister, Gordon Brown, stated that he had asked the Cabinet Secretary, Sir Gus O'Donnell, "to lead work to consolidate the existing unwritten, piecemeal conventions that govern much of the way central government operates under our existing constitution into a single written document."¹
2. The concept of a Cabinet Manual appears to have drawn extensively upon experience in New Zealand. The Foreword to the draft specifically cites the New Zealand Cabinet Manual and describes it as "an authoritative guide to central decision making for Ministers, their offices, and those working within government."² Sir Gus O'Donnell visited New Zealand during the general election campaign, and well-placed commentators such as Professor Robert Hazell³ and Peter Riddell⁴ have suggested that the New Zealand precedent was important.⁵
3. In February 2010 the Cabinet Office published a draft chapter of the Manual on elections and government formation. The chapter was scrutinised by the House of Commons Justice Committee.⁶ The full draft of the Manual (incorporating a revised version of the chapter on elections and government formation) was published with the agreement of the new Prime Minister, David Cameron, and the Deputy Prime Minister, Nick Clegg, and after its text had been approved by the Cabinet following consideration by the relevant Cabinet sub-committee.⁷
4. The draft Manual has chapters on the Sovereign, elections and government formation, the executive, collective Cabinet decision-making, ministers and Parliament, ministers and the law, ministers and the Civil Service, relations with the devolved administrations and local government, relations with the European Union and other international institutions, government finance and expenditure and official information.

¹ http://www.ippr.org.uk/uploadedFiles/events/gordon_brown_ippr_feb_10.pdf

² Foreword to the draft Cabinet Manual. For the full document see <http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-draft-manual.pdf>

³ Professor of British Politics and Government and Director of the Constitution Unit, University College London.

⁴ Chair of the Hansard Society Advisory Council and Senior Fellow of the Institute for Government.

⁵ Oral evidence taken before the Political and Constitutional Reform Committee on the Constitutional Implications of the Cabinet Manual, 13 January 2011, Q 6 (Professor Hazell); *Why fears the Cabinet Manual is a step towards a written constitution are unfounded* Essay by Peter Riddell, Institute for Government www.instituteforgovernment.org.uk/blog/1398/why-fears-the-cabinet-manual-is-a-step-towards-a-written-constitution-are-unfounded/

⁶ Justice Committee, 5th report (2009–10): *Constitutional processes following a general election* (HC 396).

⁷ Foreword to the draft Manual; see also Political and Constitutional Reform Committee, 4th Report (2010–2011): *Lessons from the process of Government formation after the 2010 General Election* (HC 528) Q 167 (Sir Gus O'Donnell, Cabinet Secretary).

5. The draft has been made subject to a public consultation. The consultation has two stated aims: first, to ensure that the Manual reflects an agreed position on important constitutional conventions, and to seek to clarify the position where there is doubt or disagreement; and second, to check that the draft covers the issues that need to be covered in a way which is easy for the intended audience to follow. The Cabinet Secretary has stated that he expects to invite Cabinet to endorse a revised version of the Cabinet Manual in the spring of 2011.⁸
6. The Cabinet Manual⁹ refers to many matters of constitutional significance and the Constitution Committee was invited by the Cabinet Secretary to comment on the draft. This report accordingly forms our response to the consultation. It is also intended to inform Members of the House about the issues which arise from the Manual's publication.
7. In order to assist us in our deliberations on the draft Manual, we heard evidence from former Cabinet ministers Lord Adonis¹⁰ and Lord Wakeham,¹¹ from the former Cabinet Secretaries, Lord Armstrong of Ilminster,¹² Lord Butler of Brockwell,¹³ Lord Wilson of Dinton¹⁴ and Lord Turnbull,¹⁵ and from the constitutional expert, Lord Hennessy of Nympsfield.¹⁶ On 12 January Professor Margaret Wilson, a former New Zealand Attorney-General and subsequently Speaker of the New Zealand Parliament, discussed with us informally her experience of the New Zealand Cabinet Manual. We are grateful for their assistance. Except where expressly attributed to one of our witnesses, the views contained in this report are those of the Committee.
8. We wish to state that none of the comments in this report should be read as an endorsement by this Committee of the draft Manual or its contents. In particular, although we comment on specific paragraphs within the draft Manual, the fact that we do not comment on a particular paragraph or chapter should not be taken to mean that we regard that paragraph or chapter as an accurate statement of the relevant position, nor that we necessarily agree with its inclusion within the text.
9. We discuss in Chapter Two of this report the purpose and status of the Manual. The Manual has been produced by the Cabinet Office primarily as a guide for members of Cabinet, ministers and civil servants.¹⁷ **We therefore consider that a better title for the Manual would be "The Cabinet Office Manual".**

⁸ Foreword to the draft Manual.

⁹ References in this report to "the [draft] Manual" should be read as references to "the [draft] Cabinet Manual". References to "the draft Manual" are to the draft published in December 2010; references to "the Manual" are to the Manual as an ongoing publication.

¹⁰ Lord Adonis was Secretary of State for Transport in the House of Lords. He is currently Director of the Institute for Government.

¹¹ Lord Wakeham was Secretary of State for Energy; he has also been Leader of the House of Commons and Leader of the House of Lords and was appointed in 1999 to chair a Royal Commission on reform of the House of Lords.

¹² Cabinet Secretary 1979–1988.

¹³ Cabinet Secretary 1988–1998.

¹⁴ Cabinet Secretary 1998–2002.

¹⁵ Cabinet Secretary 2002–2005.

¹⁶ Attlee Professor of Contemporary British History, Queen Mary, University of London.

¹⁷ Paragraph 41.

CHAPTER 2: THE PURPOSE AND STATUS OF THE MANUAL

10. In considering the status of the Manual, there are a number of interrelated questions which need to be addressed:
- What is the purpose of the Manual?
 - Does the Manual set out to prescribe rather than describe how ministers and others should act?
 - Is the Manual legally enforceable?
 - Who owns the Manual and should it be formally approved by Parliament?
 - Is it the first step towards a written constitution?

We address these issues in turn, but stress that they are not discrete questions. For example, a document formally endorsed or approved by Parliament or the Cabinet would be regarded as more authoritative and, therefore, more likely to be cited in legal proceedings.

The purpose of the Manual

11. The draft Manual states that it is “A guide to the laws, conventions, and rules on the operation of government.” We have identified a number of different audiences who might be interested in such a guide: ministers, civil servants, parliamentarians, the media, those who study politics and the constitution and other interested parties outside government such as lobbyists. The Foreword to the draft Manual states that the Manual is intended to be of use to those both inside and outside government: “it is primarily written to provide a guide for members of Cabinet, other ministers and civil servants, but it will also serve to bring greater transparency about the mechanisms of government and to inform the public whom the Government serves.”
12. The Manual is therefore intended to have a dual purpose: as a guide to how to act and as a description of how government operates. In determining whether the Manual serves its stated purpose, it must be recognised that there is a tension between these two aims: the content of a Manual written solely as guide for ministers and civil servants would be different to one written solely as a guide for those outside government.
13. The first question to be addressed is how useful the Manual might prove to be as a guide to ministers and civil servants. Neither Lord Adonis nor Lord Wakeham considered that they personally, when in government, would have found it useful, the information being readily obtainable elsewhere.¹⁸ Lord Adonis did consider that “it could be helpful to a minister who is not familiar with the workings of government”.¹⁹ However, he also stressed that:
- “this isn’t desperately good as a guide to practice. This is a setting out of the principles of action on the part of the executive. I wouldn’t recommend to any minister that you read this and then you will become a good minister; I am afraid it is a rather more complex business, being a good minister, than reading a document of this kind.”²⁰

¹⁸ Q 2 (Lord Wakeham), Q 3 (Lord Adonis).

¹⁹ Q 3.

²⁰ Q 4.

14. The former Cabinet Secretaries from whom we took evidence were rather more positive about the use of the Manual as a work of reference, though they stressed that it was a starting point for officials who would need to go elsewhere to discover more.²¹ Lord Wilson said:
- “It is very useful to have the information in one place so that you know where it is ... The truth is that when you have a real problem, you often look at all the relevant documents but none is exactly on the point that is troubling you. Real life obtrudes at that point. But to have a reference document which you can go back to as your starting point, and which is open and people know about, is useful.”²²
15. **As a guide for ministers and civil servants the Manual has some value as a work of reference. This added value must, however, be weighed against drawbacks and concerns otherwise raised by the Manual’s publication or content.**
16. One stated purpose of the publication of the Manual in draft is to achieve “an agreed position” and “common understanding” of important constitutional conventions.²³ Stating this aim acknowledges that such an understanding has previously sometimes been lacking. Lord Hennessy stressed that: “The mere fact that the Executive has opened up this window into what it thinks are the moving parts that matter to it and what the expectations are of proper procedure consonant with past practice is a very significant event.”²⁴ Publication of the draft has therefore led to greater transparency of these aspects of the operation of government.
17. Our witnesses were agreed that the publication of the draft chapter on government formation in February 2010 “was of benefit to all the political parties and to those who report on politics immediately after the election.”²⁵ There was intense media speculation following the May 2010 general election, when it was unclear who would form the next Government. Lord Hennessy stated:
- “If we had not had that scrap of paper to refer to, it would have been very difficult to explain the tacit understandings of the British constitution to tired journalists and, if I can put it charitably, somewhat inflamed political protagonists, some of whom thought that Gordon Brown was a squatter. This scrap of paper ... made a considerable difference.”²⁶
18. Chapter Four of the draft Manual, on collective Cabinet decision-making, also provides an insight into the detailed workings of the Cabinet and its committees. Publication of the Manual means that information on such details is now more accessible and open. However, there are large sections of the draft Manual which provide information already available from other sources: for example, the sections describing the roles of international

²¹ Q 40 (Lord Armstrong), Q 41 (Lord Butler), Q 42 (Lord Wilson and Lord Turnbull).

²² Q 42.

²³ Foreword to the draft Manual.

²⁴ Q 74.

²⁵ Q 3 (Lord Adonis); see also Q 2 (Lord Wakeham), Q 41 (Lord Butler), Q 42 (Lord Turnbull) and Q 75 (Lord Hennessy).

²⁶ Q 75.

organisations. The added value of these sections in terms of greater transparency is limited.

19. **The Manual will bring greater transparency to certain aspects of the operation of government. This is particularly so in relation to Chapter Two on elections and government formation and Chapter Four on collective Cabinet decision-making. However, the further the draft Manual moves from the operation of government (for example, in describing international organisations) the less useful it becomes. The Cabinet Office should give consideration to deleting material which does not form part of the laws, conventions and rules on the operation of government.**

The Manual as a guide

20. The Foreword to the draft Manual states that “It is intended to guide, not to direct.” This suggests that the Manual is intended to be descriptive rather than prescriptive.
21. Lord Wakeham considered that the document should be solely descriptive, and warned of the dangers of describing practices and rules in too “definitive and firm” a manner.²⁷ Lord Butler’s view was that “the Cabinet Secretary has no right to prescribe rules except for the Civil Service itself.”²⁸ Lord Wakeham further stressed that the Manual must not be prescriptive since: “I do not particularly want a document that enables civil servants to tell ministers how they should conduct themselves, other than giving guidance. They are the ones who are responsible; they are the ones who have to come to the House.”²⁹
22. Lord Turnbull argued that the Manual should not be regarded as prescriptive because:
- “Prescription implies that if you deviate from it, you have done something wrong. Some of the things in here are very carefully worded, but there are many other areas where the government are perfectly entitled to do something different. In the name of proper transparency, there may be an obligation to explain what they have done and why, but that is not prescription in the sense that there is a sanction against doing something different.”³⁰
23. Lord Armstrong argued that “it is not an iron prescription, but rather a description of the present and the past on which it is based which, if you like, funds experience. It is useful, when you are in the present situation, to have a guide to what people have done in similar situations in the past.”³¹
24. Even though the Manual is intended to be solely descriptive, it is likely that politicians, the media and other interested parties will rely on it as being an authoritative source of the rules which it describes. As Lord Wilson said:
- “the very fact of publishing the document does, in some way, make an important change. That is because it can be adduced in all sorts of

²⁷ Q 22.

²⁸ Q 59.

²⁹ Q 24.

³⁰ Q 61.

³¹ Q 58.

contexts, not least in the political context, that people may have departed from what is in the Manual. Previously, if it was not written down, it was harder to pin down. I do not think it can be denied that this is a step which in some way slightly changes the status of the conventions.”³²

25. Professor Margaret Wilson gave evidence to the House of Commons Political and Constitutional Reform Committee on the New Zealand Cabinet Manual which has been in the public domain since the early 1990s.³³ She pointed out that “others know that you haven’t followed what’s in the manual, and therefore there might be some political consequences for that, in a negative publicity sense.”³⁴
26. We discuss below the question of references and sources being provided in the Manual.³⁵ The more this is done, the greater the likelihood that any criticism of ministers or officials for a particular act or omission will be based on the original rule, and not on the Manual per se. Despite this, we recognise that the Manual will be adduced by those who wish to criticise the Government. The laws, rules and conventions described by the Manual are themselves prescriptive and the Manual will be an authoritative source. But the statements by our witnesses demonstrate their view that the authority for those rules must exist outside the Manual: it is not the role of the Cabinet or Civil Service to use the Manual to create new rules.
27. **The appropriate function for the Manual is to record rules and practices, not to be the source of any rule. This needs to be stated in the text of the Manual. The Manual should be descriptive and not prescriptive. We are concerned that the current draft does not achieve this distinction.**
28. For example, paragraph 49 of the draft Manual states that “Where a range of different administrations could potentially be formed [following an inconclusive general election], discussions will take place between political parties on who should form the next government.” This is most likely what would in fact happen, but no political party is under any obligation to participate in such discussions, or to negotiate with every party which might potentially participate in a coalition or make an agreement of confidence and supply. It should be noted in the Manual that the statement is simply a description of likely events and not a rule for the political parties to follow.
29. **The Cabinet Office should ensure that the text is written in such a way that it cannot be misinterpreted as itself prescribing what ministers or others should do.**
30. A related question is the extent to which ministers may depart from, and change, the rules set out in the Manual. Our witnesses were agreed that ministers should be entitled to depart from the provisions of the Manual.³⁶
31. Lord Wakeham told us:

³² Q 62.

³³ Oral evidence taken before the Political and Constitutional Reform Committee on the Constitutional Implications of the Cabinet Manual, 13 January 2011, Q 1 (Professor Wilson).

³⁴ *Ibid.*

³⁵ Paragraphs 83–86.

³⁶ Foreword to the draft Manual: the role and content of the Cabinet Manual.

“If ministers feel it is in the national interest that the way some of these things are done has to be altered, then they have to defend in Parliament what they have done and not rely on the ministerial guide if it is thought that it does not fit the circumstances of the time. I am very strongly of the opinion that ministers are responsible for running the government; this is a helpful document, but it is not the absolute rule in every case.”³⁷

32. Lord Armstrong said:

“Insofar as it sets out the present position based on precedent and former practice, there is an underlying thought that this is what will guide you for the future, but it remains the case that each government is at liberty to change and introduce new developments into practice.”³⁸

33. **We agree that ministers should be entitled to depart from the provisions of the Manual (where this would not otherwise be illegal or unconstitutional), and that the Manual should not set existing practice in stone. The Manual should not prevent a government from changing an existing practice where such a change could be made at present.**

Ownership and approval

34. The Foreword to the draft Manual states that the Prime Minister and Deputy Prime Minister

“have endorsed the idea of the Cabinet Manual and agreed that this draft should be published for comment. The three-month period allowed for comments will also provide an opportunity for Parliament to scrutinise the draft. ... [The Cabinet Secretary] expect[s] to invite the Cabinet to endorse a revised version of the Cabinet Manual in the spring of 2011.”

35. It is entirely appropriate for the Government to make the decision as to whether the Manual should exist. However, this is not the same as agreeing that the Cabinet should formally endorse the content of the Manual as happens in New Zealand at the beginning of each new Parliament.³⁹ As a “guide to the laws, conventions, and rules on the operation of government”⁴⁰ there are some parts of the Manual which are in the gift of particular administrations to endorse, such as the procedures of Cabinet and its committees.⁴¹ However, much of the Manual’s content is not suited to Cabinet endorsement. For example, the Cabinet has no ownership over the interpretation of statutes or the working practices of international organisations. Nor should the Cabinet be portrayed as having the power to endorse the position of the Sovereign or the role and procedures of Parliament.⁴²

³⁷ Q 13.

³⁸ Q 58.

³⁹ Oral evidence taken before the Political and Constitutional Reform Committee on the Constitutional Implications of the Cabinet Manual, 13 January 2011, Q 1 (Professor Wilson); see also <http://cabinetmanual.cabinetoffice.govt.nz>

⁴⁰ The sub-title of the draft Manual.

⁴¹ See paragraphs 159–163 of the draft Manual.

⁴² On parliamentary procedures, see below, paragraphs 63–76.

36. Accordingly, **the content of the Manual should not be formally endorsed by the Cabinet.** It follows that, although the political parties may be included in any consultation on the Manual's content, **there should be no formal process by which the official Opposition and other parties should endorse the Manual.**
37. Although the Manual should not be formally endorsed by the Cabinet, it remains, in the words of both Lord Adonis and Lord Wilson, a document which is "by the Executive, for the Executive"⁴³. We discuss below the extent to which the Manual should seek to encompass parliamentary procedures and conventions,⁴⁴ and we do so on the understanding that the Manual is primarily a guide to the operation of government.
38. We note that some of the evidence submitted to the House of Commons Political and Constitutional Reform Committee's inquiry on the Manual suggests that the Manual should be endorsed by both Houses of Parliament.⁴⁵ Our witnesses were unanimous in agreeing that the Manual should not be subject to formal parliamentary approval.
39. Lord Adonis considered that such approval would not be appropriate;⁴⁶ Lord Wakeham "would very much oppose Parliament having any sort of authority over this document";⁴⁷ Lord Wilson said that "It is not something we want parliamentary approval for";⁴⁸ Lord Armstrong said that it was not "a matter for parliamentary approval in the formal sense";⁴⁹ Lord Butler said that "Parliament should not ... be prescribing the contents of this document";⁵⁰ and Lord Hennessy argued that "I do not think that it can be co-owned; I do not think that fits at all well with our system."⁵¹
40. **We are strongly opposed to any suggestion that the Cabinet Manual be formally approved by Parliament or by any of its committees.**
41. **The Manual is an official guide primarily for ministers and civil servants and has some value as a reference work and in illuminating the operation of government. It is, and should be, no more than that. In drafting the final version of the Manual, the Cabinet Office must be careful to bear this in mind.**

Justiciability

42. We have concluded that the Manual must be solely descriptive and not prescriptive: in other words it should be a summary of existing practice and not a normative document. The Foreword to the draft states that: "It is not intended to have any legal effect".

⁴³ QQ 6, 18, 22 and 36 (Lord Adonis), Q 49 (Lord Wilson).

⁴⁴ *Ibid.*

⁴⁵ Political and Constitutional Reform Committee inquiry into the Constitutional Implications of the Cabinet Manual, CICM02, para 7(e) (Professor Rodney Brazier, Professor of Constitutional Law, University of Manchester).

⁴⁶ Q 13.

⁴⁷ Q 13.

⁴⁸ Q 60.

⁴⁹ Q 60.

⁵⁰ Q 60.

⁵¹ Q 79.

43. Lord Butler identified five categories of statement contained in the Manual: statutory provisions; conventions; rules such as the Osmotherly Rules⁵² which could be changed; descriptions of bodies such as NATO which are outside the direct control of the Executive; and a description of “the way in which the administration operates, which is for each administration to decide.”⁵³ Statutory rules and some treaties are directly enforceable without any need for recourse to the Manual. The justiciability of other rules should not be increased by their inclusion in the Manual.
44. There is a risk, however, that if a minister arrives at a particular decision and expresses himself in terms which show that he has not considered the relevant parts of the Manual, it could be argued in judicial review or other legal proceedings that he had failed to take into account a relevant consideration. Lord Butler considered that the Manual might be prayed in aid, but that it would not be decisive.⁵⁴ Lord Armstrong considered that any such risk was “the price of transparency”.⁵⁵
45. **We agree that the risk of legal proceedings being brought on the sole basis of the Manual is low, but there is a risk that it may be relied on or cited as evidence in judicial review or other legal proceedings. This is another reason why the Cabinet must ensure that the text does not itself prescribe what the government should do, but merely describes existing rules and practices and why the Manual should not be formally endorsed by the Cabinet or approved by Parliament.**

Is the Manual a first step towards a written constitution?

46. There was speculation when the draft Manual was published, particularly by the press, that the Manual could pave the way towards the adoption of a written constitution.⁵⁶ The Government stated in a written answer in the House of Lords on 16 December 2010 that “The Cabinet manual is not the first step towards a codified constitution”.⁵⁷ Our witnesses noted that the draft Manual bore little resemblance to a written constitution, being concerned instead with “very detailed matters of procedure”⁵⁸ and containing “nothing declaratory”.⁵⁹ Furthermore, if a written constitution were ever to be produced, it would follow a process of detailed examination of the UK’s constitutional settlement;⁶⁰ the Manual sets out only to describe current rules and practices.
47. **We therefore agree that the Manual is not the first step towards a written constitution.**

⁵² *Departmental evidence and response to select committees*, Cabinet Office, July 2005

http://interim.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/osmotherly_rules.pdf

⁵³ Q 47.

⁵⁴ Q 61.

⁵⁵ Q 63.

⁵⁶ *The nation gets its ‘first written constitution’*, Christopher Hope, Daily Telegraph, 13 December 2010; *‘We the people’ deserve something better than a high-class villain’s charter*, Anthony Barnett, Guardian, 14 December 2010; see also *Written constitution; More mouse than lion*, Editorial, Guardian, 15 December 2010.

⁵⁷ HL Deb 16 December 2010 WA 207.

⁵⁸ Q 24 (Lord Adonis).

⁵⁹ Q 83 (Lord Hennessy).

⁶⁰ Q 24 (Lord Adonis).

CHAPTER 3: THE CONTENT OF THE MANUAL

48. In this Chapter we discuss specific issues raised by the content of the draft Manual. The fact that we do not comment on a particular paragraph or chapter should not be taken to mean that we regard that paragraph or chapter as an accurate statement of the relevant position, nor that we necessarily agree with its inclusion within the text.

Conventions

49. The draft Manual relies heavily in places (notably in Chapter Two) on the conventions of government. The Introduction to the draft Manual describes conventions as “rules of constitutional practice that are regarded as binding in operation but not in law.” Whilst this is correct in so far as it goes, it does not capture the nuances which exist in determining whether, how and to what extent a convention is binding. Many conventions are well understood and generally accepted, such as that listed in paragraph 47 of the draft Manual which states that if a general election “results in an overall majority for a different party, the incumbent Prime Minister and government will immediately resign”. Others, however, are less clear.
50. There is doubt in some cases whether a “practice has hardened to the point where it should go into a Manual of this kind.”⁶¹ In other cases it is clear that a convention exists, but not its precise scope or application to particular situations.⁶² The situations in which conventions become important are those where unusual circumstances apply. When a crisis in government next arises, it is likely that the laws, conventions and rules stated in the Manual will be tested.
51. Furthermore, there are some areas of debate in relation to which no agreed convention exists. Lord Adonis stated that it was not “the role of the Manual to exhibit areas of executive practice that are contested, where there is not a clear view on the part of the Executive.”⁶³ For example, we discussed with the former Cabinet Secretaries the question of what should happen following the demise of the Prime Minister. They agreed that the Manual was not “the right place to resolve what is actually a very difficult question.”⁶⁴
52. **It is necessary for the Manual to set out relevant conventions. It must, however, state clearly where a particular statement is based upon convention and what the extent of that convention is. Furthermore, where no convention exists, or there is doubt as to its extent, this should be stated. As a description of the current constitutional position, it is better for the Manual to be open about areas of debate than to resort to potentially ambiguous wording in order to cloud the issue.** Our discussion below of paragraph 50 of the draft Manual provides one example of this.

Government formation following a general election

53. Chapter Two of the Manual on elections and government formation has attracted widespread public comment since the first version was published in

⁶¹ Q 70 (Lord Armstrong).

⁶² For an example of this, see the discussion below on paragraph 50 of the draft Manual (paragraphs 53–61).

⁶³ Q 19.

⁶⁴ Q 68 (Lord Wilson); see also Q 68 (Lord Armstrong).

draft in February 2010. There are two specific points relating to the paragraphs on the formation of a government following a general election on which we wish to comment.

54. Paragraph 50 of the draft Manual states that “The incumbent Prime Minister is not expected to resign until it is clear that there is someone else who should be asked to form a government because they are better placed to command the confidence of the House of Commons and that information has been communicated to the Sovereign.” This statement has given rise to a significant degree of debate, both amongst our witnesses, and elsewhere.
55. It is generally accepted that, in a situation in which no party has an overall majority following a general election, the incumbent Prime Minister has a right to remain in office “until it is clear that there is someone else who should be asked to form a government.”⁶⁵ On a literal reading of paragraph 50, the draft Manual states this position and goes no further.
56. However, there is a debate about whether a Prime Minister in this position has a duty to remain in post or may choose to resign earlier. Lord Armstrong stated firmly that the Prime Minister does have a duty to stay: “I believe that under current practice an incumbent Prime Minister should not resign office until he or she is in a position to recommend to the Sovereign whom the Sovereign should send for as a successor.”⁶⁶ He went on to argue that the relevant words should be amended to make this clearer and read: “is expected not to resign”. Lord Butler, Lord Wilson and Lord Turnbull concurred. Professor Hazell, giving evidence to the House of Commons Political and Constitutional Reform Committee, has also argued that “it is the duty of the incumbent Prime Minister to remain in office until it is clear who can command confidence in the new Parliament.”⁶⁷
57. Lord Adonis, on the other hand, argued that the Prime Minister has the right “if he or she so chooses, to resign immediately after the election.”⁶⁸ Lord Wakeham agreed, but added that: “overriding all this business of whether you resign or not, I believe most Prime Ministers, faced with the circumstances, will desperately try to do what is right, not what is in their short-term self-interest.”⁶⁹ Lord Adonis stressed that:

“I cannot conceive of a situation where the Prime Minister would wish to resign immediately, before they were in a position to recommend to the Queen their successor. It is not to say that there could not be some wholly exceptional circumstance where that happened—and if that was the case then the Prime Minister would simply do it; they would not be restrained by this Cabinet Manual—but I cannot myself conceive of those circumstances.”⁷⁰

⁶⁵ Q 3 (Lord Adonis). See also, Political and Constitutional Reform Committee, 4th Report (2010–2011): *Lessons from the process of Government formation after the 2010 General Election* (HC 528), paragraphs 17 and 22.

⁶⁶ DCM 1.

⁶⁷ Political and Constitutional Reform Committee, 4th Report (2010–2011): *Lessons from the process of Government formation after the 2010 General Election* (HC 528) Q 133.

⁶⁸ Q 26.

⁶⁹ Q 27.

⁷⁰ Q 28.

58. Sir Gus O'Donnell, the Cabinet Secretary, has stated his view that: "it is the responsibility of the Prime Minister to ensure that the Monarch remains above politics and that when the Prime Minister resigns it is very apparent who the Queen should be calling to produce the next, hopefully, stable government."⁷¹
59. **It is a matter of debate as to whether a Prime Minister has a duty to stay in office until it is clear who might command the confidence of the House of Commons. The Manual should distinguish between the right to remain in office and the duty to do so. Following our earlier conclusion concerning areas of doubt as to the extent of particular conventions,⁷² the Manual should state that there is a degree of uncertainty on this point.**
60. A further related point was raised by the House of Commons Political and Constitutional Reform Committee during its recent inquiry into the process of government formation following the 2010 general election. This was the question whether, if there is a duty on the Prime Minister to remain, that should be only until it is clear who would be the Prime Minister's successor or until there is clarity as to the form of an alternative government.⁷³ The draft Manual does not directly make this distinction, but the reference to "someone else" who is "better placed to command the confidence of the House of Commons" appears to refer only to the question of the naming of a successor, not to the form which that individual's government might take.
61. An incumbent Prime Minister would not be involved in negotiations between other parties as to whether, for example, to form a coalition or for one party to govern with an agreement of confidence and supply. Nor does the Prime Minister have any duty, when he resigns, to advise the Sovereign of the form of a new government, but only of who is best placed to command the confidence of the House of Commons. On this further point, we therefore consider that **an incumbent Prime Minister has no duty to remain in office following an inconclusive general election until it is clear what form any alternative government might take.**
62. On one additional point arising from this section of the draft Manual, our witnesses were unanimous. The footnote to paragraph 49 states that: "In 2010, the Leader of the Liberal Democrat Party expressed a view that 'whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties'." Lord Wakeham described this statement as of no "great long-term constitutional importance";⁷⁴ Lord Adonis said that it "has no constitutional status whatsoever";⁷⁵ Lord Armstrong said that it "does not represent existing constitutional practice and should not be included."⁷⁶

⁷¹ Justice Committee, 5th Report (2009–2010): *Constitutional processes following a general election* (HC 396) Q 109.

⁷² See above, paragraph 52.

⁷³ Political and Constitutional Reform Committee, 4th Report (2010–2011): *Lessons from the process of Government formation after the 2010 General Election* (HC 528) paragraph 27.

⁷⁴ Q 32.

⁷⁵ Q 33.

⁷⁶ DCM 1; see also Q 56.

63. **We agree that the statement contained in the footnote to paragraph 49 of the draft Manual does not reflect the current constitutional position on which party has the first right to seek to govern. The footnote should therefore be removed.**

Parliamentary procedures and conventions

64. There is a question of the degree to which it is appropriate for the Manual to detail the procedures and conventions governing the two Houses of Parliament and the relationship between them. On the one hand, it is necessary for ministers and civil servants to understand some of the basic procedures, such as the different stages of bills, and for rules governing the relationship between ministers and Parliament, such as the Osmotherly Rules,⁷⁷ to be stressed. On the other hand, the Cabinet has no power to prescribe the way in which the two Houses conduct their business. As Lord Adonis stressed, the Manual “is not a guide to Parliament as to how it should behave.”⁷⁸
65. Two particular areas of concern were raised during our evidence sessions: whether the Manual should refer to the Salisbury-Addison convention and the extent to which the Manual should set out best practice in respect of ministers’ dealings with Parliament, particularly in relation to legislation.

The Salisbury-Addison convention

66. The Salisbury-Addison convention is one of the key conventions governing the relationship between the two Houses.⁷⁹ It is not mentioned in the draft Manual. It was described in the report of the Royal Commission on the Reform of the House of Lords as “an understanding that a ‘manifesto’ Bill ... should not be opposed by the second chamber on Second or Third Reading.”⁸⁰ The Joint Committee on Conventions, whose report was endorsed by both Houses, concluded that the convention was of wider application, though it doubted whether it could be defined forensically.⁸¹ Currently there is dispute as to its application in the context of the coalition Government.⁸² Our witnesses disagreed about whether it should be included in the Manual.
67. Lord Hennessy argued that:

“As a very big moving part of the constitution in this House, if we think that they have got us wrong—that their version of Salisbury-Addison does not quite fit with what we think it should be ... —it is very important that there is not a mismatch between what the Executive

⁷⁷ *Departmental evidence and response to select committees*, Cabinet Office, July 2005
http://interim.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/osmotherly_rules.pdf

⁷⁸ Q 6.

⁷⁹ Joint Committee on Conventions, Report (2005–06): *Conventions of the UK Parliament* (HL Paper 265; HC 1212), paragraph 88.

⁸⁰ ‘Royal Commission on reform of the House of Lords, A House for the Future’ Cm 4535, January 2000 (also known as the Wakeham Report after the name of its Chairman), paragraph 4.21.

⁸¹ Joint Committee on Conventions, Report (2005–06): *Conventions of the UK Parliament* (HL Paper 265; HC 1212), paragraph 89

⁸² Political and Constitutional Reform Committee, 4th Report (2010–2011): *Lessons from the process of Government formation after the 2010 General Election* (HC 528) paragraphs 54–59.

think the position is and what we think the position is because it would become inaccurate.”⁸³

68. Lord Adonis disagreed, arguing that:

“The Salisbury-Addison convention is a parliamentary convention and it is for the House and the other place to reach a view on that; it is absolutely not for the Government, in a document that has no constitutional standing, to declare what its view is of how Parliament should behave in contested areas.”⁸⁴

69. Lord Turnbull suggested a compromise position:

“The Salisbury-Addison convention is not something that the Executive can settle, but the Manual does not even mention that this is an important principle, that it is under debate and has been discussed, and that there are reports on it. It is an area which I think should be mentioned as a principle, with footnotes to tell the reader where to go to learn more about it. However, I don’t think the Manual should just say nothing on it.”⁸⁵

70. **It is important for ministers and civil servants to be aware of the Salisbury-Addison convention (and of other conventions governing the relationship between the two Houses) since it is more difficult to plan the Government’s business without a proper understanding of the powers of each House.⁸⁶ However, it is not the place of the Cabinet Office to seek to define a convention which is itself the subject of much debate. In order to inform the reader, the Manual should set out, without making further comment, the conclusions of the Joint Committee on Conventions.⁸⁷**

Procedures for taking bills through Parliament

71. The draft Manual contains a very short section on the passage of legislation through Parliament. This describes the basic stages of a bill’s passage through the two Houses. This section fails to distinguish clearly between the two Houses,⁸⁸ and contains little detail of how bills are taken through either House. Paragraph 208 does refer the reader to the relevant Cabinet Office Guide to making legislation, but only in the context of pre- and post-legislative scrutiny. This section is one example of inaccuracy and poor referencing.⁸⁹

72. Paragraphs 205–208 of the draft Manual concern pre- and post-legislative scrutiny of legislation. Paragraph 205 states that “Ministers should consider publishing bills in draft for pre-legislative scrutiny, where it is appropriate to do so. Reports from the Commons Liaison Committee have identified this as good practice.” Paragraph 206 sets out the Government’s undertaking to

⁸³ Q 80.

⁸⁴ Q 7.

⁸⁵ Q 69.

⁸⁶ The respective powers of the two Houses in relation to financial and other legislation should be equally well understood.

⁸⁷ Joint Committee on Conventions, Report (2005–06): *Conventions of the UK Parliament* (HL Paper 265; HC 1212).

⁸⁸ See Appendix 3 for specific examples.

⁸⁹ See below paragraphs 82–88.

provide “the relevant select committee with a post-legislative scrutiny memorandum, within three to five years of Royal Assent.”

73. These two sections raise the question of the extent to which the Manual should set out the standards for ministers in preparing and presenting legislation to Parliament. Lord Butler argued that:
- “there should be more about the standards that the executive should set for itself in preparing and presenting legislation to Parliament. This is not something where you are prescribing what Parliament should do; you are prescribing what the executive should do in responding to the requirements of Parliament.”⁹⁰
74. However, he went on to state that “that could only be done if the Administration had committed itself” to certain standards.⁹¹
75. In the light of our conclusion that the appropriate function for the Manual is to record rules, not to be the source of any rule,⁹² it would not be appropriate for the Manual to set out the standards which the executive should be trying to achieve in preparing and presenting legislation, where no relevant government commitments have been given. **The Manual should, as in paragraph 206, clearly state relevant government commitments which have been made to Parliament.**
76. It would be helpful for ministers and civil servants to know what Parliament and its committees expect of them. **The Manual should set out the conclusions of relevant parliamentary reports which specify the standards to be expected of government in taking bills through Parliament, particularly those debated in either House.** For example, this Committee has often criticised the Government for failing to subject legislation to pre-legislative scrutiny⁹³ and for the overuse of Henry VIII clauses in bills.⁹⁴
77. **The Manual cannot affect the freedom of Parliament to determine its own procedures and practices and should make no attempt to do so. It should note concerns raised by the two Houses of Parliament and by parliamentary committees without prescribing what ministers must do.**

The respective roles and procedures of the two Houses of Parliament

78. Our witnesses raised a concern over the content of the draft Manual as it relates to the House of Lords.⁹⁵ In many areas the draft Manual correctly refers to Parliament rather than to each specific House, such as in the statement that “It is of paramount importance that ministers give accurate and truthful information to Parliament.”⁹⁶ In other areas, however, the draft Manual is either misleading or inaccurate in the way in which it uses the term

⁹⁰ Q 50; see also Q 69 and QQ 14 and 35 (Lord Wakeham).

⁹¹ Q 69.

⁹² Paragraph 27.

⁹³ See, for example, 7th Report (2010–11): *Parliamentary Voting System and Constituencies Bill* (HL paper 58) and 8th Report (2010–11): *Fixed-term Parliaments Bill* (HL paper 69).

⁹⁴ See, for example, 6th Report (2010–2011): *Public Bodies Bill [HL]* (HL paper 510).

⁹⁵ Q 69 (Lord Armstrong and Lord Turnbull).

⁹⁶ Draft Manual, paragraph 188, second bullet.

“Parliament” or confuses the distinct roles and procedures of the two Houses.

79. We draw attention to four distinct issues:

- There is a lack of clarity in some cases over the meaning of “the House” so that it is uncertain which House is being referred to.
- On at least one occasion, the word “Parliament” is used when the relevant reference is to the House of Commons only.
- The role and procedures of the Lords are too often overlooked.
- In some paragraphs, the procedures of the Commons are conflated with those of the Lords.

Appendix 3 lists specific instances of each of these situations.

80. **The draft Manual must be revised to reflect appropriately the roles and procedures of the two Houses of Parliament.**

CHAPTER 4: THE DRAFTING OF THE MANUAL

81. The draft Manual has been drafted by a number of different individuals and groups within the Civil Service. This has resulted in a lack of consistency across the different chapters which we hope will be resolved prior to the publication of the final version. In addition, the aim of achieving greater transparency on the operation of government will be best achieved if the Manual is drafted in an accessible and easy to read manner.

The need for accuracy

82. As a guide to the operation of government it is of fundamental importance that the Manual be accurate throughout. As Lord Wakeham said: “If it is inaccurate, it is a damn sight worse than saying nothing.”⁹⁷ We point out in the next section a number of inaccuracies in the text. No doubt other respondents will point out other inaccuracies. **The Manual must be carefully edited in order to ensure that it is an accurate description of the laws, conventions and rules on the operation of government.**

Referencing

83. A related area for improvement is that of referencing. Some parts of the draft contain full cross-references to the relevant statute, rule or treaty or provide other relevant information which can be used to follow up the guidance set out. However, this is not universally the case.
84. For example, paragraph 198 states that “the most important announcements of government policy should, in the first instance, be made to Parliament” and a reference is given to the relevant resolution of the House of Commons. However, the following paragraph states both that it is the Government’s decision whether an oral statement is made and that the Speaker may allow MPs to ask urgent questions without stating the authority for these propositions.
85. Referencing is essential, not only to demonstrate the provenance of the text, but in order to enable civil servants and others to find further information. Lord Armstrong argued that the draft Manual “does not cover everything in pitiless detail so there are many points at which you would want to go to other reference material to supplement it.”⁹⁸ Lord Wilson stated that “a lot more needs to be said in subsidiary documents rather than in this overarching document.”⁹⁹
86. Conventions form a significant proportion of the rules stated in the draft Manual. It would be helpful to the reader to know the extent to which the understanding of these conventions is based on previous usage. Lord Wilson noted that there was an issue of “how far one can have sources or precedents for everything, but certainly more could be done to point the reader to other places to justify or elaborate on what has been said.”¹⁰⁰ If the Manual is to achieve its aim of bringing “greater transparency about the mechanisms of

⁹⁷ Q 4.

⁹⁸ Q 40.

⁹⁹ Q 51.

¹⁰⁰ Q 69.

government, and to inform the public”¹⁰¹, the sources of the conventions stated in the Manual must be explicitly set out.

87. The Cabinet Secretary, in a speech on the draft Manual given to the Constitution Unit on 24 February, noted that “It has been suggested that the Manual would be enhanced by adding footnotes showing where further guidance can be found. This is being considered.”¹⁰² We are concerned by this lukewarm response to an issue which we consider to be essential to the drafting of the Manual.
88. **The Manual must be fully referenced throughout. This includes the need for appropriate cross-references to assist the reader in finding more detailed information. Moreover, in the light of our conclusion that the Manual should be descriptive and not prescriptive,¹⁰³ it must also provide explicit authority for every proposition stated.**

Process for publication of the revised Manual

89. The Foreword to the draft Manual states that the Cabinet Secretary “expects to invite Cabinet to endorse a revised version of the Cabinet Manual in the spring of 2011.” It also states that the Cabinet Office will publish “a summary of the issues raised alongside the final version of the Cabinet Manual, which we expect to publish in the New Year.” It is important that the process by which the final version of the Manual is produced and agreed is transparent. We stress here our earlier conclusion that the Cabinet should not formally endorse the Manual.¹⁰⁴
90. **The process by which the final version of the Manual will be produced and agreed should be publicly and clearly set out.**

Review and updating

91. It is important that the Manual be kept up to date. The Foreword to the draft Manual states that it “will be regularly reviewed to reflect the continuing evolution of the way in which Parliament and government operate. We envisage that an updated version will be available on the Cabinet Office website, with an updated hard copy publication at the start of each new Parliament.” This raises two initial issues: how frequently the Manual will be reviewed and whether the Manual could be seen as setting out the practice to be associated with a particular administration.
92. In relation to the first question, it is possible that the Manual will require very frequent updating. It has such a wide scope that it is inevitable that different parts will require to be updated at different times as Parliament passes new laws, new treaties are agreed or the Government decide to revise their internal administration.¹⁰⁵ Such constant revision would be difficult to follow and important revisions could be lost amongst the detailed revisions taking place elsewhere in the document. A summary of the revisions made, to be published at regular intervals, would help to ensure that important revisions were not missed by those inside or outside government.

¹⁰¹ Foreword to the draft Manual.

¹⁰² See <http://www.cabinetoffice.gov.uk/sites/default/files/resources/speech-cabinet-manual-24feb2011.pdf>.

¹⁰³ Paragraph 27.

¹⁰⁴ Paragraph 36.

¹⁰⁵ Q 49.

93. **We agree that the online version of the Manual should be updated as revisions are made. The Cabinet Office should publish, at regular intervals, a summary of the revisions made.**
94. We are concerned that publication of a printed copy of the Manual at the start of each new Parliament could lead it to become associated with the particular administration then in power. We accept that it is not possible to publish printed copies of such documents frequently, but we consider that **publication of each new printed edition should follow the making of major revisions (whether on a single issue or cumulatively), rather than be tied to the political calendar. This will help to preserve the status of the Manual simply as a guide to the operation of government and avoid each edition being linked too closely to a particular administration.**

CHAPTER 5: CONCLUSIONS

95. **In our view the Cabinet Manual has limited value and relevance. We acknowledge that it provides greater transparency on certain aspects of the operation of government and it is to be welcomed in that context. However, this value has been given undue prominence by the helpful publication of Chapter Two in draft prior to the May 2010 general election; the benefits of the publication of that chapter do not, on the whole, extend to the rest of the Manual.**
96. **In summary we conclude that the Cabinet Manual is not the first step towards a written constitution; it should be renamed the Cabinet Office Manual and its greater relevance to officials than to politicians emphasised; it should only seek to describe existing rules and practices; it should not be endorsed by the Cabinet nor formally approved by Parliament; and it must be entirely accurate and properly sourced and referenced.**
97. We consider that a better title for the Manual would be “The Cabinet Office Manual”. (Para 9)
98. As a guide for ministers and civil servants the Manual has some value as a work of reference. This added value must, however, be weighed against drawbacks and concerns otherwise raised by the Manual’s publication or content. (Para 15)
99. The Manual will bring greater transparency to certain aspects of the operation of government. This is particularly so in relation to Chapter Two on elections and government formation and Chapter Four on collective Cabinet decision-making. However, the further the draft Manual moves from the operation of government (for example, in describing international organisations) the less useful it becomes. The Cabinet Office should give consideration to deleting material which does not form part of the laws, conventions and rules on the operation of government. (Para 19)
100. The appropriate function for the Manual is to record rules and practices, not to be the source of any rule. This needs to be stated in the text of the Manual. The Manual should be descriptive and not prescriptive. We are concerned that the current draft does not achieve this distinction. (Para 27)
101. The Cabinet Office should ensure that the text is written in such a way that it cannot be misinterpreted as itself prescribing what ministers or others should do. (Para 29)
102. We agree that ministers should be entitled to depart from the provisions of the Manual (where this would not otherwise be illegal or unconstitutional), and that the Manual should not set existing practice in stone. The Manual should not prevent a government from changing an existing practice where such a change could be made at present. (Para 33)
103. The content of the Manual should not be formally endorsed by the Cabinet. There should be no formal process by which the official Opposition and other parties should endorse the Manual. (Para 36)
104. We are strongly opposed to any suggestion that the Cabinet Manual be formally approved by Parliament or by any of its committees. (Para 40)

105. One of the dangers of the Manual is that it is seen as very official and important. The Manual is an official guide primarily for ministers and civil servants and has some value as a reference work and in illuminating the operation of government. It is, and should be, no more than that. In drafting the final version of the Manual, the Cabinet Office must be careful to bear this in mind. (Para 41)
106. We agree that the risk of legal proceedings being brought on the sole basis of the Manual is low, but there is a risk that it may be relied on or cited as evidence in judicial review or other legal proceedings. This is another reason why the Cabinet must ensure that the text does not itself prescribe what the government should do, but merely describes existing rules and practices and why the Manual should not be formally endorsed by the Cabinet or approved by Parliament. (Para 45)
107. We agree that the Manual is not the first step towards a written constitution. (Para 47)
108. It is necessary for the Manual to set out relevant conventions. It must, however, state clearly where a particular statement is based upon convention and what the extent of that convention is. Furthermore, where no convention exists, or there is doubt as to its extent, this should be stated. As a description of the current constitutional position, it is better for the Manual to be open about areas of debate than to resort to potentially ambiguous wording in order to cloud the issue. (Para 52)
109. It is a matter of debate as to whether a Prime Minister has a duty to stay in office until it is clear who might command the confidence of the House of Commons. The Manual should distinguish between the right to remain in office and the duty to do so. Following our earlier conclusion concerning areas of doubt as to the extent of particular conventions, the Manual should state that there is a degree of uncertainty on this point. (Para 59)
110. An incumbent Prime Minister has no duty to remain in office following an inconclusive general election until it is clear what form any alternative government might take. (Para 61)
111. We agree that the statement contained in the footnote to paragraph 49 of the draft Manual does not reflect the current constitutional position on which party has the first right to seek to govern. The footnote should therefore be removed. (Para 63)
112. It is important for ministers and civil servants to be aware of the Salisbury-Addison convention (and of other conventions governing the relationship between the two Houses) since it is more difficult to plan the Government's business without a proper understanding of the powers of each House. However, it is not the place of the Cabinet Office to seek to define a convention which is itself the subject of much debate. In order to inform the reader, the Manual should set out, without making further comment, the conclusions of the Joint Committee on Conventions. (Para 70)
113. The Manual should clearly state relevant government commitments which have been made to Parliament. (Para 75)
114. The Manual should set out the conclusions of relevant parliamentary reports which specify the standards to be expected of government in taking bills through Parliament, particularly those debated in either House. (Para 76)

115. The Manual cannot affect the freedom of Parliament to determine its own procedures and practices and should make no attempt to do so. It should note concerns raised by the two Houses of Parliament and by parliamentary committees without prescribing what ministers must do. (Para 77)
116. The draft Manual must be revised to reflect appropriately the roles and procedures of the two Houses of Parliament. (Para 80)
117. The Manual must be carefully edited in order to ensure that it is an accurate description of the laws, conventions and rules on the operation of government. (Para 82)
118. The Manual must be fully referenced throughout. This includes the need for appropriate cross-references to assist the reader in finding more detailed information. Moreover, in the light of our conclusion that the Manual should be descriptive and not prescriptive, it must also provide explicit authority for every proposition stated. (Para 87)
119. The process by which the final version of the Manual will be produced and agreed should be publicly and clearly set out. (Para 89)
120. We agree that the online version of the Manual should be updated as revisions are made. The Cabinet Office should publish, at regular intervals, a summary of the revisions made. (Para 92)
121. Publication of each new printed edition should follow the making of major revisions (whether on a single issue or cumulatively), rather than be tied to the political calendar. This will help to preserve the status of the Manual simply as a guide to the operation of government and avoid each edition being linked too closely to a particular administration. (Para 93)

APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION

The Members of the Committee that conducted this inquiry were:

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

Declaration of Interests

No relevant interests have been declared.

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

APPENDIX 2: LIST OF WITNESSES

Oral Evidence

26 January 2011

Lord Adonis and Lord Wakeham

2 February 2011

Lord Armstrong of Ilminster, Lord Butler of Brockwell, Lord Wilson of Dinton and Lord Turnbull

Supplementary evidence, Lord Armstrong of Ilminster (DCM 1)

2 February 2011

Lord Hennessy of Nympsfield

Written Evidence

Evidence marked * is associated with oral evidence and is printed.

* Lord Armstrong of Ilminster (DCM 1)

APPENDIX 3: SPECIFIC EXAMPLES OF INACCURACIES RELATING TO THE HOUSE OF LORDS

Lack of clarity of the meaning of “the House”:

- Paragraph 189 states that “Government business takes precedence at most sittings of the House, with the exception of 60 days ...” This is a reference to business in the Commons, but this would not be clear to an uninformed reader.
- Paragraph 190 states that “The Leader of the House has a responsibility to support the business of the House”. This appears to be describing the functions of the Leaders in both Houses respectively, but this is not clear.
- Paragraph 209 states that a negative statutory instrument “may be annulled by a resolution of the House”—this reads as though it applies only to the Commons and should instead read “of either House”.

Conflating “Parliament” with the House of Commons:

- Paragraph 215 states that “Parliamentary select committees have a role in scrutinising key public appointments” and goes on to discuss pre-appointment hearings. Pre-appointment hearings are currently only held by Commons committees. The paragraph goes on to refer to select committees taking evidence from serving post-holders: this may be done by Lords committees as well.

Overlooking the role or procedures of the Lords:

- Paragraphs 189 and 190 describe the conduct of government business in the Commons; an equivalent summary for the Lords would be helpful to ministers and civil servants.
- Paragraph 205 refers to the use of pre-legislative scrutiny, noting that reports from the Commons Liaison Committee have identified this as good practice. The Constitution Committee could equally be noted here. Paragraph 211 describes the Finance Bill as being “subject to the normal legislative process” (this is repeated at paragraph 349) whereas the House of Lords does not amend Finance Bills, but does give them a second reading and each bill is examined by a Committee of the House.

Conflation of Lords procedures with those of the Commons:

- Paragraph 203 on the passage of legislation through Parliament refers to bill committees typically meeting four times a week (which is only the case in the Commons) and fails to mention that amendments can be made at third reading in the Lords. These differences are noted in paragraph 204, but it would be less confusing if the detailed procedures were separately described.
- Paragraph 203 also states that a second reading debate is “usually” opened by one minister and closed by another. In the Lords the opening and closing speeches are normally given by the same minister.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE CONSTITUTION

WEDNESDAY 26 JANUARY 2011

Present	Baroness Jay of Paddington (Chairman)	Lord Irvine of Lairg
	Lord Crickhowell	Lord Rennard
	Lord Goldsmith	Lord Renton of Mount Harry
	Lord Hart of Chilton	Lord Rodgers of Quarry Bank
		Lord Shaw of Northstead

Examination of Witnesses

Witnesses: LORD ADONIS and LORD WAKEHAM.

Q1 *The Chairman:* Good morning to both of you. Thank you very much for coming and particular thanks for coming at rather short notice. The Committee decided that we needed to contribute to the consultation that was being held on the Cabinet Office Manual, and having asked ex-civil servants and some of the academics who are also Members of our House to take part, we felt it was very important that we should also have a political input into our consultative process. This session is being sound recorded, so I would be grateful if you would both just initially introduce yourselves. Perhaps I can start with you, Lord Wakeham.

Lord Wakeham: I am who I am, and I think most people know more than they should know about me, but there we are. That's me.

Lord Adonis: I am Andrew Adonis; I think most people know more than they should about me too. I am also, as well as a Member of the House, Director of the Institute for Government.

Q2 *The Chairman:* Well I think, as you say, we know a great deal about you, but what we also know is that you have both had an enormous experience of Government wearing various different hats, and therefore that it is very appropriate that we should ask you about this new Manual that has been created at the centre of Government. I suppose the basic introductory question is, when you were, both of you, in government, would you have found this document helpful? Perhaps I can start with you, Lord Wakeham.

Lord Wakeham: Well that is a question I have thought about quite a lot. I think the document is very interesting and very good, but I cannot think of a time in the 15 years I was a minister that I really needed to use it. The information could have been got from somewhere else pretty easily. There is only one occasion when I think I might have just looked at it if it had been about, and I am not sure it would have given me a great deal of guidance at the time. For what it is worth, I will tell you about that. That was

not the 1974 election or the recent election, but the 1992 election, when I was not standing as a candidate so I was put in charge of Central Office, and then the bureaucracy decided I was the man that they would go to—I was still in the Cabinet—if there was a massive emergency to say they could fire the nuclear bomb or whatever it might be, because the Prime Minister was—God knows where he was. So that was my job and as I sat there—and all the forecasts were that the election was going to be very close—I wondered just exactly what advice the Prime Minister would get, assuming he might not have got a majority but perhaps could have formed some form of coalition, which was a very real possibility in the run-up; in fact, it didn't happen. Of course, the one thing that no manual can tell you is that a Prime Minister in those circumstances is brought a big surprise and may be in a very highly emotional and considered state—I'm not saying might be near to nervous breakdown—and I just wondered whether somebody in the Cabinet Office or in Number 10 would say, "Well Prime Minister, you've been Prime Minister for a number of years. You've done terrifically well; history will write you up as a successful Prime Minister. Are you sure you want to cling on? You seem to be clinging on to office at this particular time." Now, I don't think the book would have helped me very much to find out, so what I did was to go round to the Cabinet Office about every other day and take a cup of coffee off them and sniff out the discussions without telling them what I was after; trying to find out. To be absolutely fair, none of them ever mentioned it, none of them ever said it and the situation didn't arise. So I have no idea what advice they would have given me, but it would not have been constitutional advice I thought they would have given; it would have been what I might call human advice and that would have been maybe very important.

Q3 *The Chairman:* Lord Adonis, I am sure we will come back to that, but just your immediate reflections?

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Lord Adonis: Not particularly helpful, in that it is a statement of existing practice. Before I went into politics, I actually taught politics, so I knew what existing practice was, so it would not have been helpful from that point of view, but I can see how it could be helpful to a minister who is not familiar with the workings of government. Being able to read the whole document would be a very good primer, if I can put it that way, in constitutional practice in so far as the Executive is concerned. However, on John Wakeham's point, I was a minister at the point at which a Government came out of an election without a majority, and the statements in the Cabinet Manual about the responsibility of the existing Prime Minister to stay in office until it was clear that an alternative Government could be formed—and Sir Gus O'Donnell's appearance before the Select Committee¹ of another place, where he made that clear earlier last year before the election—was, I think, extremely helpful, not in establishing new constitutional practice, because that is in fact the established constitutional practice for which there are many precedents going back many decades, but in educating public opinion that that was the case and, in particular, media opinion. It was clear to me in the immediate days after the election that that did have an influence on the way that the media reported the discussions that took place between the political parties; that the role of the party leaders was to conduct these conversations until it was clear that either the existing Prime Minister or the leader of the Opposition were in a position to command the confidence of the House of Commons, and that there need not be an immediate resignation. I contrast that with the position in February 1974, which is the immediate past precedent in this respect, where what happened was almost identical to what happened in fact in 2010: the sitting Prime Minister remained—the only difference is he remained until, from memory, Monday evening instead of Tuesday evening, but he was the sitting Prime Minister—it was not clear who could command the confidence of the House of Commons, there were conversations between the political parties, and after a period of four days in that case—five days in 2010—a new Government emerged. Nonetheless, the debate over that weekend after the February 1974 election was not conducted on the basis that the sitting Prime Minister did have an established right to seek to form a Government and that was the right course. You may remember that Harold Wilson made dramatic statements at the weekend about how it was time for the sitting Prime Minister to move on PDQ. That did not happen this time and I think—and this is a hugely important constitutional issue, the practice that is followed after an inconclusive general election—the fact that the view of what should happen was set

down was of benefit to all the political parties and to those who report on politics immediately after the election. I also think it may have been of benefit to the Sovereign as well in making very clear that this was the responsibility of the party leaders to determine what should happen, and that unless they were in some exceptional circumstance and unable to do so, the Monarch did not become directly involved.

Q4 The Chairman: I think that is enormously interesting and I think there are many members of the Committee who want to raise specific points about the experience in 2010 and particularly, as you yourself mentioned, the contrast or comparison with 1974. But I wonder if we could stay for a few moments, before we come back to that example, with the general perspective of the Cabinet Manual as a document. I was interested, for example, that your colleague at Number 10, when you were working for the Prime Minister rather than as a minister, has written since he left that when he was at Number 10, “I longed for a handbook on how to govern.” “Many excellent books on the theory of government” exist, “but almost none on the practice.” Now, this would not fall into that category, would it?

Lord Adonis: No, this isn't desperately good as a guide to practice. This is a setting out of the principles of action on the part of the executive. I wouldn't recommend to any minister that you read this and you will then become a good minister; I am afraid it is a rather more complex business, being a good minister, than reading a document of this kind.

Lord Wakeham: Can I say about this document, the actual document, in places it is actually inaccurate. If it is inaccurate, it is a damn sight worse than saying nothing. If you look, for example, at paragraph 212—which you don't need to look at; it is about the financial arrangements in the House of Lords—it is quite wrong to say that the House of Lords deals with financial matters in a formal way. Why it is bad that it should say that is that, when I was the Leader of the House, I was horrified that when one of my ministers had to do the second reading of the Finance Bill; we had to make a proper speech. I asked him about the briefing he had got from the Treasury. He showed me the briefing; I put the whole lot in a brown paper bag and I sent it to the Permanent Secretary at the Treasury and I said, “If you think this is the way your officials should brief ministers in the Lords about the Finance Bill, I think it's time you shaped up a bit,” and I got a full apology from him. Now they repeat the same mistake here, because they didn't think it mattered. They repeated the same mistake in Jack Straw's evidence to Cunningham's Committee;² they got that wrong. I had to give extra evidence to point out that the House of Lords has considerable

¹ The Justice Committee—5th Report 2009–10, HC 396.

² Joint Committee on Conventions—2005–06, HL 265-1, HC 1212-1.

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powers over financial matters: to set up select committees and discuss. One thing it cannot do is vote against Finance Bills; they have got a month to approve it, but it is much more considerable than people make out and this document just gets it wrong. So if they get it wrong, it is worse than saying nothing.

Q5 Lord Crickhowell: I am relieved that you have said this, because I was a bit shaken when I think in your first comment you made a remark that you thought the document was quite good. As I had observed just before you came into the room that I would at best have given it a Beta, when it ought to be an Alpha document—and I think as we go through it we will discover a whole lot of other faults in the document—I am relieved at least you have now cruelly demolished one shortcoming, because I think there are many shortcomings that will reveal themselves. Would you agree?

Lord Wakeham: I think you are probably right. I am a much more reasonable person than you are sometimes.

Q6 Lord Goldsmith: It isn't clear to me, reading paragraph 212, whether it refers to the Finance Bill or not; whether its reference to supply estimates is a reference to the Finance Bill.

Lord Wakeham: But it doesn't remotely say what a Treasury official should know about how you deal with the House of Lords, and that is the point.

Lord Adonis: If I could just make one point, though, in that regard. As I see the Cabinet Manual—and it is a guide by the Executive, for the Executive—it is not a guide to Parliament as to how it should behave.

Q7 The Chairman: Well, this I think is a very important point.

Lord Adonis: In the very good debate that took place in the House last Thursday on the constitution, a number of colleagues said that it might be useful if, for example, it got into the Salisbury-Addison convention. I would strongly oppose that view. The Salisbury-Addison convention is a parliamentary convention and it is for the House and the other place to reach a view on that; it is absolutely not for the Government, in a document that has no constitutional standing, to declare what its view is of how Parliament should behave in contested areas.

The Chairman: But I think this is probably more about the confusion.

Q8 Lord Goldsmith: Yes, it is on this broad, general question about what its purpose is and what its value is that I think it would be very helpful to have your views. Lord Adonis, you have pointed to the benefits

of the Manual in terms of a particular issue about formation of government after an apparently inconclusive election, and we know that that is very much the genesis of what this was produced for. What other value does it have? What relationship does this have with the Ministerial Code? If it is just for the Executive, how is it going to be taken by others? One question that inevitably interests me a great deal is could this have any sort of legal force where it says, just to take one example obviously from my own experience, that law officers must be consulted before certain events? What if somebody were to go to the courts and say, "We don't believe the law officers were consulted; the Cabinet Manual says that they should have been, therefore please do something about that"? What is the value of this document and what overall do you see as its purpose?

Lord Wakeham: My view is that it is no more than some form of guide to the civil service, and I think the considerations in it could be overruled by the Prime Minister and the Government of the day if he did not think it was in the national interest to go in that particular way at that particular time. So I would very much oppose the proposition you make: that somebody could go to court and say the law officers should have been consulted. Maybe they should have been, but that is a different issue, not an issue on the basis of a document of that sort.

Lord Adonis: I would only add that it is not a guide only to the Civil Service; it is clearly and it makes very clear that it is a guide to ministers as well. It is a guide to the Executive; both ministers and civil servants. I am not a lawyer, so I could not possibly comment on whether what is clearly a non-statutory guide would be of any relevance to the courts. There are so many distinguished lawyers before me that I would not dream of opening my mouth on that subject, but as I conceive it, it is simply a codification of existing practice and best practice—I would emphasise both of those points—in respect of the Executive. Now, the best practice point does seem to me to be quite important. For example, if you take paragraph 205, which begins with the words, "Ministers should consider publishing bills in draft for pre-legislative scrutiny, where it is appropriate to do so," that happens to be quite a contentious issue, including with your Committee at the moment, with so many bills having been submitted of major import that have not been subject to pre-legislative scrutiny. What is the standing of that statement? I read that to mean that it is best practice and ministers should take proper account of that, and the fact this is now in this Manual means it will be all the more incumbent on them to explain publicly and to Parliament why they have not adopted that course of action if they choose to produce legislation that is not going to be subject to pre-legislative scrutiny. But I do not see it as having any standing whatsoever with the courts and nor does it bind the Executive.

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Q9 Lord Goldsmith: If I just could interrupt you for a moment, I was not asking your view as a lawyer; I was asking your view as a very experienced minister, who has seen how many things get to court, whether you think they should have done or not. But just to come back to this question as to value, I asked about the Ministerial Code. How do you see this manual sitting alongside the Ministerial Code, which ministers, at least in the Government in which I served, did have and were told they ought to comply with?

Lord Adonis: I would see it as having the same status.

Q10 Lord Goldsmith: But does it overlap? The point you referred to, for example, in 205; I cannot recall whether that sentence or anything like it appears in the Ministerial Code.

Lord Adonis: I am fairly sure it does not, because the Ministerial Code does not say much about Parliament. But it would be an important aspect of your scrutiny to analyse the compatibility of this Manual with the Ministerial Code.

Q11 The Chairman: Excuse me, Lord Wakeham. Could I just ask Lord Adonis, you did say that this is a guide to ministers, but of course exclusively in their executive role, because as you have rightly said, it does not have a parliamentary resonance. But how would you in a sense distinguish that in terms of guidance?

Lord Adonis: Well, on the example I just gave of pre-legislative scrutiny, that is the Executive behaving as an Executive, whether it chooses to submit its draft legislation to pre-legislative scrutiny. I think that is very different from the point I raised earlier—

The Chairman: That example is, but there are others that are not.

Lord Adonis:—of the Salisbury-Addison convention, which is not about how the Executive behaves, but about how the two Houses interact and how the House of Lords behaves.

Q12 The Chairman: I will just ask Lord Wakeham. I interrupted him; I am so sorry.

Lord Wakeham: I am very clear, as far as I am concerned, that the Ministerial Code is the way in which ministers operate and the Prime Minister has every right to expect any ministers in his Government will follow the Ministerial Code. This I look upon as a guide, which most of the time is right; it may not be entirely right all the way through, but it is a useful thing. I am not sure the wording is right; if you take the paragraph “Ministers should consider”, I should say, “Ministers do consider,” and that is it, where it is appropriate.

Lord Adonis: Actually, my experience was ministers often do not consider and that goes to the heart of the matter, but I think—

Lord Wakeham: Of course they do. Well at least in my experience they always considered, but they most probably didn’t do it.

Lord Adonis: We have different experience in this regard, I fear.

Q13 Lord Hart of Chilton: On this general topic, Professor Hennessy, now Lord Hennessy, the other day said, “Essentially, it is the Executive’s operating manual, describing those moving parts of the constitution and associated procedures that the Executive, both ministers and officials, believe impinge currently on their work,” and I think there is a consensus that that is what it is; it is an Executive operating manual. So what I wanted to know was what is the relationship between this and parliamentary approval? Is it simply an operating manual that should be there simply for the Cabinet to look at and to reaffirm, as it does in New Zealand affirm each session, or is there some need to have parliamentary approval for it as well?

Lord Adonis: Given its status, it would not appear to me that it would be appropriate for it to have parliamentary approval, but the Executive would be well advised to take seriously the opinion of your Committee, this House and committees of the other place as they update and revise it, would be my view.

Lord Wakeham: I would put that more strongly. I don’t mind Parliament saying I think it’s a good thing, but I would very much oppose Parliament having any sort of authority over this document. As far as I am concerned, this is a guide. If ministers feel it is in the national interest that the way some of these things are done has to be altered, then they have to defend in Parliament what they have done and not rely on the ministerial guide if it is thought that it does not fit the circumstances of the time. I am very strongly of the opinion that ministers are responsible for running the government; this is a helpful document, but it is not the absolute rule in every case.

Q14 Lord Hart of Chilton: Right. If that is so, should the manual itself have any reference to parliamentary procedure itself? Because if parliamentary approval is not required, the manual itself in places refers to parliamentary procedure; should that be so?

Lord Wakeham: Well, I think it is important that those civil servants who have dealings with Parliament in preparing bills and matters of that sort should know what is likely to be expected of them in order that they can do the job better and prepare the stuff. I have mentioned already the failure of the Civil Service to understand—and even this document to understand—the role of the House of Lords in finance matters, but there are plenty of other examples where it seems to me it is helpful for ministers to know that civil servants understand what is expected of them and this would be a guide. I

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should be surprised if—because you quoted from the Hansard of the other day—when you have Lord Butler here, he doesn't say to you he thinks in terms of legislation there should be considerably more time spent on the cost-benefit analysis, the public costs of compliance and things of this sort. Civil servants should do better. When I was in Government, they always used to say what the public cost of any bill was, and I thought they were the most phoney figures I ever had to look at. I could never get anybody to explain to me how they worked them out properly; not to my satisfaction, anyway.

Lord Adonis: I entirely agree with what Lord Wakeham has just said. I think it is useful for civil servants to have a guide to the likely expectations of Parliament in respect of their fulfilment of their functions, but this should not in any way affect or limit the way that Parliament itself undertakes its activities.

Q15 *Lord Shaw of Northstead:* Do you believe, therefore, that this document should be discussed in Parliament but no decisions taken on it? Is that a simple—

Lord Adonis: Yes.

Lord Wakeham: Very much so. I think Parliament could give a lot of guidance; there are a lot of people, certainly in the House of Lords, who have had vast ministerial experience and would know how valuable this document is or not to ministers running the Government. That is essentially what it is for; it is to get better performance from civil servants.

Lord Adonis: I entirely agree with that.

Q16 *Lord Shaw of Northstead:* If the custom became, as in New Zealand, that it was looked at every new Parliament, this would incite people to discuss it more and to move alterations, and I think, personally, once it has been established, let it stay there. It may well change, but it just stays in the background.

Lord Wakeham: Well, I hope they put right the things they have clearly got wrong. I have already spotted some and I have not read it as closely as some people have.

Q17 *Lord Shaw of Northstead:* Who will put it right? Not Parliament.

Lord Wakeham: It goes back to the people who wrote it and it is suggested they might, in the light of comments—the light of what people say—bring an updated edition. I think it would be wrong to say it has to stay like it is forever and a day; I think that would be a big mistake.

Lord Adonis: I think it should be updated regularly to reflect changing practice, is my view. But it should reflect changing practice; it should not seek itself to

change that practice. There is a big difference between those two.

Q18 *Lord Crickhowell:* I think we were proposing to raise paragraph 205 when we came to question five—things that were not in the Manual—but it is actually better to do it here. You have said repeatedly, both of you, that it is a guide to the Executive and the Civil Service, and I picked on 205 as being a paragraph that is a very inadequate guide because, particularly if we look at what has been happening since the formation of this Government and with the legislative programme going through at the moment, “Ministers should consider publishing bills in draft,” seems to me a pretty feeble piece of advice in the light of the strength of the conclusions, for example, of this Committee, which are not even referred to. Surely civil servants, particularly at this stage—and, I think, new ministers—should have their attention drawn to the strength of the comments made by committees in both Houses on this particular point. Their failure to actually take note of it on this occasion has had some pretty important consequences for the legislative programme of the Government at the present moment.

Lord Adonis: I think you have put your finger on a very important issue, which is the role of the Manual in areas that are contested between Parliament and the Executive. It is absolutely correct to say that the general view of both Houses of Parliament in terms of reports of committees and general views expressed in debate is that greater use should be made of pre-legislative scrutiny. That is certainly true. However, what is in paragraph 205 is a fair and accurate statement of the view of the Executive as to Executive practice, which is that ministers should consider publishing bills. It was not the view of the Government of which I was a part, and I do not take it to be the view of the current Government, that there should be any default expectation of pre-legislative scrutiny or anything of that kind. So I think what you have put your finger on goes to the heart of one of the issues that needs to be brought out, which is that this is by the Executive, for the Executive; it does not in any way represent the views of parliamentarians or even views formally expressed by select committees as to how the Executive should behave.

Lord Crickhowell: I accept that.

Lord Adonis: If I just elaborate on the point, it may, however, make it easier for those—including, I imagine, this Committee—who wish to see greater use made of pre-legislative scrutiny then to latch on to points like this and say, “We do not believe it acceptable that the formulation in paragraph 205 is so weak. We actually think that the Executive should take the view that it should be something like standard practice that there is pre-legislative

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scrutiny.” That would then focus on what is, at present, a clearly disputed issue in relations between Parliament and the Executive.

Q19 Lord Crickhowell: The point I am really making is, as a guide to what is likely to happen, particularly for new ministers and civil servants and those who have perhaps never served on the Legislation Committee, if you are going to introduce legislation, as has happened in this House, surely it would be useful at least to identify what two major committees of this House have said on the subject so that civil servants and ministers are likely to know what the reaction of Parliament is likely to be.

Lord Adonis: I think that goes to the heart of one of the debates to have about the role of this Manual. I do not personally take the view that it is the role of the Manual to exhibit areas of executive practice that are contested, where there is not a clear view on the part of the Executive. To take paragraph 205, this looks to me to be a straightforward view of the existing executive practice. Actually, I say straightforward; it is not entirely straightforward, because as I said earlier, in practice I am not sure that ministers do always consider publishing bills. But it is certainly the view of the Executive that they should consider publishing bills in draft for pre-legislative scrutiny. It is not the view of the Executive—unless that view changes, in which case it would be reflected—that there should be some default expectation of pre-legislative scrutiny in respect of significant legislation.

Q20 The Chairman: But if it is a guide to good practice, then it has to be more indicative, doesn't it, Lord Wakeham?

Lord Wakeham: Let me go back to my years in Government. As far as I was concerned, pre-legislative scrutiny was very valuable when there were people outside Parliament who had views about things that were not party politically charged, and you could bring them in and you could listen to what they had to say on things like divorce rules and things of that sort, where they are absolutely valuable. As far as I was concerned, as a business manager, I found pre-legislative scrutiny something that I sought to avoid if all it was going to do was to have the same rows at the pre-legislative stage that you were going to have when the processes were then brought before the Houses of Parliament. I could see no great value in that whatsoever and I did my very best to avoid the Government going down that road. But we always used to consider it and come to what I thought were very sensible conclusions. There are times when legislation needs an input from people outside Parliament and that is the time that pre-legislative scrutiny is very valuable; call them as witnesses, find out what they have to say and maybe change your

mind. But if everybody knows where they stand before they start, then Governments have to get on with governing and most of them come to Parliament with as little as they can; they just want to get on with it.

Q21 Lord Renton of Mount Harry: I remember well from some years ago Lord Wakeham's view about pre-legislative scrutiny.

Lord Adonis: I should say it is not my view. My own personal view is that pre-legislative scrutiny should be the norm, but the point I was making was a distinctly different one: that that is not the view of the Executive.

The Chairman: I understand that, yes.

Q22 Lord Renton of Mount Harry: I come back on two points. Very interesting comments made by you both already, but you said that this was really, you thought, by the Executive, for the Executive, this document that we are talking about today. What I think the danger is—and I do very much share the worry about it that you both have—is that it does actually look as a very serious document coming almost from the top, and I would have thought that, if it goes through, there is a danger that it would very often be quoted as, “This is what should have happened. This is what the form is.” I do not really see how you deal with this, because in my experience of years ago, you know that there is a lot in government that is actually only decided on the day; it changes. That leads me on to my second point, that I do think that as to the choice of the Prime Minister, remembering 1974, 1990, when Margaret Thatcher resigned, and 2010, in all of those cases what would be the result as far as the Prime Minister who would emerge was at moments very doubtful. I do not mean doubtful badly; one really did not know. I do not think that you can try in a document like this to spell out how the Prime Minister is going to happen to be chosen, because I do not think life is like that. That again I think is one of the dangers of this document; that it is seen as very official, very important, and that also it will deal somehow with the choice of Prime Minister.

Lord Wakeham: Yes. I am very sympathetic to the question and I think there are some dangers, and I think the drafting wants to be perhaps a bit less definitive and firm than it is, because it is not always the practice. In fact, before I came I wrote down several occasions in my life where no manual would possibly get you out of the difficulties that Parliament gets into with the Government. I will briefly mention them. The first one was when I was having a big row about something in the Commons and Margaret Thatcher, in her way, got hold of Erskine May, opened up the page that covered this and pointed to me there and said, “Show them this page. That'll stop

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them. They'll realise it's wrong." Of course, the truth is they were really upset about something entirely different; they weren't upset about that. This was the vehicle by which they were causing me a lot of trouble and that wasn't the problem. So that is the first one. The second one was when George Cunningham—some of you will remember that—decided to call a vote on every single issue coming before the House of Commons. Now, if somebody decided to do that in the House of Lords—Five hours', two hours' debate? Have to have a vote on that. Will the House go into Committee? Another vote on that. Will the Committee go back into the House? Another vote on that—the place comes to a complete and utter stop. This document gives you the impression that there are a whole lot of rational people looking up the book and saying, "Right, that's what we do." People are not like that and we have to be very human. Politics is a vulgar business; it is a rough business and people behave in all sorts of strange ways because their emotions, their concerns, their lifestyle—everything—is at stake, and they will find arguments to back it up. This document just does give me the impression, however right it might be, that it is rational and reasonable at all times, when it is not.

Lord Adonis: Of course I agree with everything Lord Wakeham has said. No document written by any human being, including Machiavelli, if he were alive, could fully bring to life the life of politics and that is—

Lord Renton of Mount Harry: You have to remember what happened to Machiavelli.

Lord Adonis: Indeed.

Lord Renton of Mount Harry: He got his head chopped off.

Lord Adonis: So it is absolutely not the purpose of this document to be a guide to politics; it has a much, much more limited aim, which is to be a description of good practice by the Executive, for the Executive. In respect of the point that Lord Renton has just made on changes of Prime Minister, it is limited to those procedural issues to do with the action that takes place on the part of the Executive when the Prime Minister is contemplating resignation or has to take decisions in the immediate aftermath of the election. It does no more than that; it is not in any way a guide to politics or political behaviour over and above the rules and good practice that the Executive itself observes.

Q23 Lord Rodgers of Quarry Bank: I have been trying to formulate my question with great difficulty, but now I think I know. The answer is that we should get rid of this document altogether and have a very big book of anecdotes, because the anecdotes—not only yours, but many others round this table—mean you will learn more about how government really works, in my view, than what is found in this book.

At the present time, we have a lot of new Members coming into this House and we have a duty to monitor people; to tell them how it all works. So new Members come in and you spend a day or two and they are monitored, and then they go into the House and find the world is very different. The relationships, the institution and a lot of people moving at different times in different ways. I am not really asking a question. The Manual is okay up to a point. But it is also a mess; it has different sorts of things, but we are not going to discuss them. But you can read that once and then forget it, because if we have more anecdotes—they are missing. Let me just give one example. I remember vividly when a Secretary of State, many years ago, decided he wanted to make an announcement with a view to legislation, and the Permanent Secretary said, "Secretary of State, are you really sure that this shall be the right way of proceeding?" "I am." "Don't you think it should really go to the Cabinet?" "I don't think I need to." "Right, Secretary of State." What then happened was that the Permanent Secretary phoned the Secretary of the Cabinet, and the Secretary of the Cabinet spoke to the Prime Minister, and the Prime Minister decided that the Secretary of State was wrong, and the Prime Minister spoke in a rather informal way to the Secretary of State to stop what was happening. That is characteristic of what government is like, but where is it in the book?

Lord Wakeham: Absolutely right. Our careers have been around the same period of time, but I know of examples where a minister goes to Cabinet, loses the argument in Cabinet; Cabinet decides to do something; it is announced he is going to make a statement in the House that afternoon, and the devil's difficulty is to get him to make a statement that does not very slightly leave open the issues that have been resolved. That is what real politics is about and real fights go on sometimes in the backwards and forwards between them. The Secretary of State is sitting there, and the Permanent Secretary and everybody is around trying to bully him into saying, "You can only say what Cabinet has agreed that you should say." These are the real things of politics and if civil servants are good at dealing with those, they will be really valuable to their government of the day and also to the nation. This will only give them a very, very limited insight into that sort of issue.

Lord Adonis: I think we are basically all agreeing, aren't we?

The Chairman: We are.

Lord Adonis: This has a very limited scope and it is absolutely not a guide to political practice or political experience. I entirely agree with Lord Rodgers that, for any new Member of this House, reading two or three of the classiest political memoirs of recent years is going to be a far better guide to political life and how to be a minister than any number of recitations of the Cabinet Manual.

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The Chairman: Yes, well I have always said frivolously, on Lord Rodgers' point about anecdote, that Gerald Kaufman's book, *How to be a Minister*, was the one that one needed to read. But Lord Goldsmith, you had a more serious point.

Q24 Lord Goldsmith: I'm not sure that *Yes Minister* isn't actually closer to the mark, but that is different. Lord Crickhowell's Beta marking is looking a bit shaky even now, as this debate continues. Can I just shift this, because one of the things people have asked and said about this Manual is, "Is this supposed to be the start of a written constitution?" Now, it is very far from being anything of the sort; it is too detailed, it is not broad enough, it is too fixed in relation to that. But dare I take the opportunity of having you here to say: right, would there be merit then in trying to produce something that is accurate, that is complete, and that actually does set down more what our constitution is, not just for the benefit of the Executive but everybody?

Lord Wakeham: I would be very, very cautious indeed about that. To say that I absolutely would be against it is perhaps being a bit firmer than I want to be, but I would be very cautious indeed and for all sorts of reasons. One is that I am not sure that they should be able to do it; then there would be a strong argument for having it approved by Parliament if it was thought to be that. But what I am concerned about is the relationship between the Civil Service and the Government of the day. I do not particularly want a document that enables civil servants to tell ministers how they should conduct themselves, other than giving guidance. They are the ones who are responsible; they are the ones who have to come to the House. There are things that are not in this document that I can tell you. For instance, as you get nearer to an election—some of you may not even have noticed this in your time—it is surprising how slow civil servants get in giving you the information that you require, because they may suspect that you might be wanting to use it for the hustings that are due to come rather than for your duties as a minister. They don't tell you that; it just does not turn up when you think it will turn up and it is not very good when it comes. I think that is a perfectly sensible thing for them to do. They are not going to be writing your election manifesto for you at taxpayers' expense, but they are not going to come and argue with you; it just doesn't happen. Now, the Civil Service is capable of doing these sorts of things, but this Manual, if it is thought to be the be all and end all, would miss great chunks of what is important.

Lord Adonis: I support a written constitution; I think modern democracies should have a document that sets out the fundamental features of their institutions and constitutional practice, so I support one. I believe we will ultimately have a written constitution

in Britain. A good part of it, of course, is written already, but I think we will have ultimately a single document. In British constitutional practice, saying something will ultimately happen is only a guide to the next thousand years; it is not a statement of likely date, but I think it will ultimately happen. However, the point I would make in respect to Lord Goldsmith's question is that it would only marginally overlap with this document, because most of this document is concerned with the practice of the Executive, which would not conceivably be included in a written constitution, or at least I think would be very unlikely to. The issues we have talked about so far are among them. I think it is highly unlikely that a written constitution would itself get into very detailed matters of procedure for inter-party negotiations where elections do not produce clear outcomes and issues of that kind. So I think a good deal of the content of this manual would not in fact overlap with a written constitution. I think the arguments for a written constitution are more fundamental arguments about constitutional good practice and about what should constitute a self-respecting democracy.

Q25 Lord Goldsmith: So just to summarise, you are in favour of a written constitution, but this is not it or anywhere close to it.

Lord Adonis: Not remotely, no.

The Chairman: May we, if we could—because I am looking at the clock—just focus again on the narrower question about the relevance of the document, which I think everybody agrees was important in the formation of government, particularly in the circumstances that we have heard already; 1974, possibly 1992 as Lord Wakeham said, and then obviously again 2010.

Q26 Lord Shaw of Northstead: The difficulty seems to be that there cannot be an absolute law on this, particularly with regard to the Prime Minister. The Prime Minister is expected to do something; he is expected to stay on and serve. The fact is that it cannot be a law in any sense; it can only be an expectation and an advice for him. He can still resign, is that not true, at any time?

Lord Adonis: That is made very clear. I think paragraph 48, as revised—because this is revised from the previous draft of the Manual—is a good statement of good practice. To quote, "Where an election does not result in an overall majority for a single party, the incumbent Government remains in office unless and until the Prime Minister tenders his or her resignation and the Government's resignation to the Sovereign. An incumbent Government is entitled to wait until the new Parliament has met." So it does not in any way restrict the right of the Prime

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Minister, if he or she so chooses, to resign immediately after the election.

Q27 Lord Shaw of Northstead: Exactly. That should be absolutely clear.

Lord Wakeham: I do not disagree with that, but again I think it does not reflect the real world in this sense. Prime Ministers, in my experience—and I have known a fair number of them—when they have arrived as Prime Minister, they will desperately try to do what is right. They may not agree with it and they may not acknowledge it, but the only thing they have is their place in history books. I remember this came out very graphically when I was doing the Royal Commission on the Reform of the House of Lords and I went to speak to all the ex-Prime Ministers and people. I said to Mrs Thatcher: did she mind the fact that the current Prime Minister had the right to nominate people to the House of Lords without referring it to the other parties and things of that sort, and she said, “Yes, absolutely.” You must realise that Prime Ministers, once they have arrived, are going to try to do their best. Now, I expect there are examples we could give where it does not happen, but that is what is going to happen. I think that overriding all this business of whether you resign or not, I believe most Prime Ministers, faced with the circumstances, will desperately try to do what is right, not what is in their best short-term self-interest. They are interested in their position in history, not in a grubby fix at the last minute, and I think that is an important element in our constitution that should be recognised.

Q28 The Chairman: I think there is concern, isn’t there, about whether paragraph 50, as opposed to 48, actually indicates something new? Shall I read it? “The incumbent Prime Minister is not expected to resign until it is clear that there is someone else who should be asked to form a Government because they are better placed to command the confidence of the House of Commons and that information has been communicated to the Sovereign.”

Lord Adonis: That is a good expression of established constitutional practice, in my view. Lord Wakeham referred to real life situations; I cannot conceive of a situation where the Prime Minister would wish to resign immediately, before they were in a position to recommend to the Queen their successor. It is not to say that there could not be some wholly exceptional circumstance where that happened—and if that was the case then the Prime Minister would simply do it; they would not be restrained by this Cabinet Manual—but I cannot myself conceive of those circumstances. If we look at the real situations that have emerged over the last century or more, there have been a number of occasions since 1910 where an election has not produced a single party majority:

1910, 1923, 1929, 1974 and 2010. On all of those occasions, this is in fact what happens.

Q29 Lord Rennard: I just wondered if Lord Adonis might actually agree that paragraph 50 is probably more a matter of common sense than any actual constitutional conventional practice. I thought you made some very helpful points at the beginning about how perhaps greater public awareness of some of these issues actually helped all the parties in the crux around May 2010. In particular, you referred to the idea that of course—sorry, I lost my train of thought for a moment. Some of those issues I am not quite sure are actually right, and I wonder if perhaps Lord Wakeham and Lord Adonis might actually think some of these things are not right. I am not quite convinced—I am fairly interested in our constitutional conventions—that the Sovereign can dismiss a Prime Minister or put his successor on personal appointment, which it says in the Manual. That might have perhaps been the practice in the 19th Century; I am not sure in the 21st Century that would actually be accepted or understood, and I wonder how the noble Lords might think the Manual might be changed in other respects.

Lord Adonis: Well paragraph 59 says, “Although they have not been exercised in modern times, the Sovereign retains reserved powers to dismiss the Prime Minister or make a personal choice of successor.” I believe that to be an accurate statement of the constitution as commonly understood. Now, if Lord Goldsmith’s point were taken up and we proceeded to a written constitution, this would be a fundamental issue that would need to be discussed and debated, and it might well be at that stage—indeed, I think it is actually quite likely at that stage—that there would be a strong body of opinion that the Monarch should not retain that power. But it is a power that is retained, and of course those of us who study these matters know that, in living memory, precisely that power has been exercised by the Governor-General of Australia, in a situation of huge controversy. Indeed, there is no issue of modern constitutional practice in Australia that is more debated than the Governor-General’s dismissal of the Whitlam Government. But the point in respect of this is that that does reinforce the validity of paragraph 59 as a statement of the existing understanding of the constitution; it does not in any way indicate that this is a practice that it would be desirable for any Sovereign to undertake.

Lord Wakeham: Well, I was going to say I had lunch with Whitlam and he doesn’t talk about anything else ever, as far as I can make out. But you see, again, the reality of this is the Sovereign would consult informally anybody she felt was likely to be given some guidance, and though while these words may well be right, there is a big element in it, and there is

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another big element in it, which is the Monarchy itself is in question; if they make the wrong decisions, there are all sorts of questions that will arise. So a statement like this is slightly trite, I think. It is probably alright, but it is only part of the story.

Q30 Lord Shaw of Northstead: It is guidance, rather than—

Lord Wakeham: Well, it is sort of guidance, yes. Guidance leaving out the difficult bits, yes.

The Chairman: But that raises again the question of its relevance, because as Lord Adonis just said, were you to move to a written constitution, this would obviously be a very significant section related to it, and if it became thought that because this was on the books, as it were—I know not on the statute books, but this was the right way to proceed—it would be an interesting segue way into a written constitution, which I think might be difficult.

Q31 Lord Goldsmith: I think my questions have largely been covered by those questions, but if I could just follow that back and get the contrast between this document and a written constitution. If I understood what Lord Adonis was saying correctly, it included this proposition: that if you moved to a written constitution, then what you would be doing would not simply be trying to write down what the existing practice is but debating what the practice ought to be, which would require approval somewhere, and that is another reason why this document does not get more than close to what a written constitution would be.

Lord Adonis: I entirely agree with that. It is inconceivable, if Britain moves to a written constitution, that the content of that constitution would be debated more widely than any attempt simply to codify existing practice. It is inconceivable.

Lord Wakeham: Your question illustrates for me the difficulties about a written constitution.

Lord Shaw of Northstead: Quite right; that's a very fair point.

Q32 The Chairman: Does any other member of the Committee want to pursue points relating to the 2010 specific post-election Government formation? There was the question about Mr Clegg's statement, which is recorded as a footnote; the point that he said, "Whichever party has won the most votes and the most seats, if not an absolute majority, has the first right to seek to govern, either on its own or by reaching out to other parties." That would not have been the situation, for example, in 1974.

Lord Wakeham: No, it was a perfectly reasonable remark for the leader of the Liberal Democrats at that particular time, but I do not think it is of any great long-term constitutional importance.

Lord Adonis: I think the important point about Mr Clegg's remark is that that was a remark he made about the practice he intended to follow; it was not his view as to the way that other parties needed to behave. I took him to be making a statement about the view that the Liberal Democrats would themselves take in the event of there not being a single party majority.

Q33 The Chairman: I'm sure that is accurate, but of course it is recorded here and this again reflects the uncertain status of what is recorded here.

Lord Adonis: I agree with you; that statement has no constitutional status whatsoever.

Q34 Lord Rodgers of Quarry Bank: I think what I understand you are saying is it does seem to be totally inappropriate to have it in a Manual; the Manual is meant to be a permanent, lasting thing, not a bit of recent history. That recent history may have been totally relevant—and I agree; I do not dispute that—but why should it be in a Cabinet Manual at all? I do not think it should be there.

Lord Adonis: No, I entirely agree; it should be taken out.

Lord Wakeham: It would add a bit of quality to your book of anecdotes though, wouldn't it?

Q35 The Chairman: Questions were raised earlier about omissions. Let us just assume that we all agree that the Cabinet Manual as it stands, or as it is revised, has a limited expectation and a limited value, without wishing to undermine it. But there were questions about omissions—those relating to the House of Lords and other matters—that I know members of the Committee wanted to raise. Apart from the point that you made very forcefully at the beginning, Lord Wakeham, about the inaccuracy of the financial questions on the House of Lords, are there other House of Lords issues that you think should go in there?

Lord Wakeham: No. I think a suggestion that I am sure Lord Butler is going to make, which is that this Manual should set out more instructions to the Civil Service about bills—the cost of bills, the cost to the public and compliance and things of that sort—would have my support.

Q36 Lord Crickhowell: On that very point, can I just follow it up directly, as we skipped past it in our earlier question? Going back to chapter five on the opposite page, there is a thing about the process of dealing with orders and there is a description of the process of how business is brought to the House, but there is not a single reference there to the rather contentious issue of Henry VIII clauses. It did seem to me extraordinary that if guidance was being given—and this, we are being told, is a guide to the

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Executive and civil servants—at least there should be some identification of the fact that not only Committees of both Houses have expressed themselves but the Lord Chief Justice and the former Lord Chief Justice have expressed themselves very strongly. So there are some very extraordinary omissions. In my view, that was one such omission. Do you agree or do you think there are any others?

Lord Wakeham: I agree. I have not studied every single word and every single page, I have to admit. I have brought up the ones I have thought of, but I am sure there are others.

Lord Adonis: I think those are matters that it is highly relevant for parliamentary committees to raise, not least to draw out the view of the Executive as to where the practice should change in these regards. I think Lord Crickhowell's point is an important one. The point I would reiterate, though, is that the guide itself, as I understand it, is no more than a guide by the Executive, for the Executive, in respect of what the Executive itself regards as good practice. What Lord Crickhowell is drawing out—and Members of the House are only too well aware of in respect of the Public Bodies Bill—is that Government at the moment have no problem with Henry VIII clauses; indeed, I have rarely seen so many Henry VIII clauses in so short a bill as in the Public Bodies Bill and the House is debating this legislation with great concern. But to retreat from the widespread use of Henry VIII clauses would involve a substantial change in Executive practice; a change that I believe it is utterly appropriate for this Committee and the House to raise with the Government, but it would be a change in Executive practice.

Q37 Lord Crickhowell: But when I became a Cabinet minister, I do not recall I was ever shown paper guidance of any kind at all. I had never been a minister; I became a Cabinet minister; I had a meeting with my excellent Permanent Secretary on the Sunday and there I was doing a job. One later learnt pretty quickly; I learnt sitting with Willie Whitelaw on the Legislation Committee. But surely if you are going to have a guide to government, whatever the view of the Government, what they should have surely is some guidance of what the likely reaction may be in Parliament if they proceed in a particular way, otherwise why publish it; why have it?

Lord Adonis: I think that is a matter that you may well wish to raise.

Q38 Lord Irvine of Lairg: May I expressly support that? It is all very well to say that the Manual is a statement of good practice by the Executive, for the Executive, but would it not be wise for civil servants and indeed new Cabinet ministers to have flagged up what the likely parliamentary reactions to a particular course of action are, as evidenced by the

opinions of select committees—authoritative committees—in both Houses?

Lord Adonis: It might well be wise to do so and I think that is a point that is well worth reflecting on.

Lord Wakeham: I think that is right, but there is another thing that comes into this general area. I think there is a question about what a Government—“So long as there is any significant doubt”—paragraph 54—“following an election over the Government's ability to command the confidence of the House of Commons, certain restrictions apply. In some jurisdictions, this is referred to as a ‘caretaker convention’.” The reality of it—and civil servants ought to know this—is that some of these issues that come up at that time, there is sometimes an urgency to get them done. In a proper government arrangement, what happens is the Home Secretary, or whoever it is, talks to the Shadow person and gets his agreement before they move forward. I think that civil servants ought to know that and ought at certain times to say to ministers, “Look, the practical difficulty you are in at the moment is there is an urgent need to appoint a chairman of something or other—a real pressing need—but you are not sure whether the Government is going to survive more than a few days. It would be dangerous for you to appoint the new chairman without consulting the Opposition spokesman on the issue and getting their agreement to do it.” Now that is a real practical issue that comes up from time to time, and civil servants should understand that is where they can give some helpful advice. Now it is not exactly in this book, but that is what I would have liked to have seen.

Lord Adonis: I think there are two distinct points. The first point is whether the Manual is a sufficiently accurate and comprehensive statement of Executive practice. I entirely agree with Lord Wakeham and his experience actually closely mirrors mine. During this last election campaign, I had to deal with a very major crisis; the ash cloud crisis. Indeed, I was at the Council of Ministers, negotiating fundamental reforms to the regulation of European air space, the day before the general election and this was not a meeting that could be delayed or decisions that could be postponed. I briefed my Conservative opposite number at regular intervals on what was happening, because I regarded that as very important for being able to take decisions in what was clearly a period when the future of the Government was in doubt. So there is an issue about the accuracy and comprehensive nature of the Manual and the Committee can, I think, make valuable points in that regard. There is also the issue that both Lord Irvine and Lord Crickhowell have raised, though, which I think is well worth reflecting upon: whether there is any role for the Manual to highlight areas of likely parliamentary concern about certain areas of government activity without in any way binding the

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Government to particular courses of action. I have been reflecting on that during this hearing and I think there could well be value in that, because that would be of value to civil servants and ministers in understanding likely parliamentary reactions to their behaviour and I think that is well worth reflecting on further.

Q39 The Chairman: I think what you are suggesting really comes back to one of your earlier points about really just enhancing the language around, for example, the points that were made about pre-legislative scrutiny; that it may be that the Manual in being descriptive can also be prescriptive but indicative in a gentle way.

Lord Adonis: Indeed.

Lord Wakeham: From my perspective—I don't know whether this could go in or not—I can think of many an issue, not just because the Government was in doubt, where the minister in charge of some policy did have considerable discussions behind the scenes with his opposite number in order to try to find a common policy forward. For example, something like pensions; it is miles better if we can get some sort of understanding of what we are going to do. That happened; Lord Whitelaw was a great exponent of those sorts of techniques, but he would take the Shadow man out to lunch and talk to him and in the

end they would work out a sensible way forward to deal with something. Now that is real and that is what some civil servants should be able to say to a minister who is a bit inexperienced: "Look, why don't you ask your Shadow man round for a cup of coffee and a talk and see just where the situation lies, what are his worries, what can we do to help him and can we get a better outcome?" Now this does not give much guide to that sort of thing, but it is a real part of politics.

The Chairman: Well, we are enormously grateful to you both; you have both been very, very generous with your time, with your history, your thoughts and your political observations, which have been very valuable, particularly in the context of our session next week with the previous Cabinet Secretaries, who I think we will be able to ask some pointed questions on the basis of some of the things that you have said. I don't know if any Member of the Committee feels there is a point they have not covered that they wanted to express? Lord Adonis, Lord Wakeham, is there anything further you would like to say at this point?

Lord Wakeham: Thank you very much for inviting us; I have enjoyed it.

Lord Adonis: Thank you.

The Chairman: Thank you both for coming and again, many thanks for coming at such short notice. It has been very helpful. Thank you so much.

 WEDNESDAY 2 FEBRUARY 2011

Present	Baroness Jay of Paddington (Chairman) Lord Crickhowell Lord Hart of Chilton Lord Irvine of Lairg	Lord Norton of Louth Lord Pannick Lord Powell of Bayswater Lord Renton of Mount Harry Lord Shaw of Northstead
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Examination of Witnesses

Witnesses: LORD ARMSTRONG OF ILMINSTER, LORD BUTLER OF BROCKWELL, LORD WILSON OF DINTON, and LORD TURNBULL

Q40 *The Chairman:* Good morning, and welcome to the Constitution Committee. I thank you all very much for agreeing to take part in this panel session. The members of the committee are looking forward very much to what you have to say. We took evidence last week from two former Cabinet ministers, Lord Adonis and Lord Wakeham, and we are now anxious to hear from all of you. As you will have realised, the placement of your positions on the table has nothing to do with anything other than the time when you served in office from left to right, so we are grateful to you for sitting in that way. I should mention that the session will be televised and therefore, when you first speak, I would be grateful if you could each give your name and when you served as Cabinet Secretary so that it is clear that this is a session of evidence from the Cabinet Secretaries. We have three absentees this morning: Lord Rennard, who may be with us later; Lord Rodgers of Quarry Bank, who is unwell; and Lord Goldsmith, who is not here today. This session is part of our attempt to get some external input into our response to the consultation process that is being conducted on the Cabinet Manual and which will be completed by the beginning of March. As I have said, we are anxious to have some relatively brief conversations with people who are able to enhance, in a sense, our own reflections on the Cabinet Manual and what we would want to say in the process of consultation. The best thing to do is to plunge straight in as we have a slightly constrained time period. I am grateful to you all for agreeing that we might stray a few minutes over the allotted time, until around 11.25 am. That should give us approximately three-quarters of an hour. A sensible start would be to ask the purely practical question of you all: if the Cabinet Manual had been in existence or if you had created the Cabinet Manual when you were in office, would you have found it useful? Perhaps I may begin with Lord Armstrong of Iminster.

Lord Armstrong of Iminster: I think the answer is yes. It is a work of reference, not something that you would read from cover to cover. But I think it would have been useful as a work of reference, partly because very few people know the whole of the map

fluently, as it were, and it would have been convenient to have been able to look up some of the bits that you did not know in detail using an immediate point of reference. For the most part, I would say that that would have been a starting point. It would send you back to other sources if you wanted to probe deeper, and I think that that applies throughout the Manual. It does not cover everything in pitiless detail so there are many points at which you would want to go to other reference material to supplement it. But as a general conspectus of what the Executive wants to be able to read, it would be useful.

Q41 *The Chairman:* But it is exclusively intended and written for the Executive.

Lord Armstrong of Iminster: I think so, yes.

Lord Butler of Brockwell: I am Lord Butler of Brockwell and I was Cabinet Secretary from 1988 to 1998. I succeeded Lord Armstrong, who was Cabinet Secretary from 1979 to 1988. I agree with what Lord Armstrong has said. Some of the Manual is familiar to all of us because it existed in various forms before. It has been brought up to date and there are some new sections on freedom of information and so on, but it would have been useful in the way that I find it useful now. I shall put it on my bookshelf and, when I want to remember what the conventions are for use in Parliament or other ways, I shall look at it. In that respect, as Lord Armstrong said, it is a useful work of reference. It is useful in one other respect, which was illustrated by what happened before the last election. It is useful in creating public understanding of the way in which the Executive works, and there can be moments when, if there is not public understanding of that, it can be difficult. That was notable over the last election when the publication of the chapter in draft was very helpful. Another one that took my eye was the Osmotherly Rules about officials giving evidence to Select Committees. Very often, officials appear before Select Committees and then their members get very cross because the officials will not answer questions. Unless there is an understanding on both sides about the way in which officials have to operate, you can get unnecessary trouble.

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Q42 The Chairman: You have both said that you would have found it useful, but obviously you did not feel that there was such a large gap that you needed to stimulate such a process yourself. We will come back to that.

Lord Wilson of Dinton: I, too, think it is a modest but useful contribution to running the Executive. There are sections which I really would refer to, such as the statutory limits on ministerial salaries: one of those things that you have to watch very carefully if, say, the Prime Minister is having a reshuffle. It is very useful to have the information in one place so that you know where it is. When I became head of a secretariat in the Cabinet Office in Mrs Thatcher's time, it would have been helpful to have had this as a point of reference when some points about Cabinet committees came up. The truth is that when you have a real problem, you often look at all the relevant documents but none is exactly on the point that is troubling you. Real life obtrudes at that point. But to have a reference document which you can go back to as your starting point, and which is open and people know about, is useful. I am sorry. I am Lord Wilson of Dinton and I was Cabinet Secretary from January 1998 until September 2002.

Lord Turnbull: I am Lord Turnbull. I succeeded Lord Wilson of Dinton in September 2002 and retired in July 2005. I would have found it useful. In 1992 I was the Principal Private Secretary at No. 10. That was one of those rare contested elections where the result was possibly in doubt, so having this material would have saved time and given added confidence that I was thinking along the right lines. On the other hand, there were people who knew all the answers, such as the Office of the First Parliamentary Counsel, the Privy Council Office or even the Cabinet Office's own Ethics and Propriety Group, but it would have been good to have drawn it all together. I also agree with Lord Butler that, in the particular case of 2010, it was very useful, in particular to explain why it was entirely legitimate that Gordon Brown was still in No. 10 on Wednesday, which a lot of people either misconstrued or deliberately misrepresented.

Q43 Lord Powell of Bayswater: Thank you. I think that I could pick you all out in an identity parade. You have all said that, with hindsight, a Cabinet Manual would have been quite useful, which is very fair, but you did not feel a pressing need for it at the time. What does that say about the reasons for producing it now? Do you think it was only because of the likelihood of a hung Parliament and therefore the need for guidance on that specific issue? But if that was the only reason, is it really necessary to have a Cabinet Manual? Or would it have been quite enough to settle for Chapter 2 with its specific guidance on that issue, thus avoiding

some of the noise that is around the Cabinet Manual itself?

Lord Turnbull: Perhaps I can suggest an answer to that. The answer may go back to October 2007. There was a brief period when Gordon Brown displayed a great interest in constitutional issues. That may reflect his own particular friendship with the Smith Institute and Wilf, now Lord Stevenson of Balmacara, who in 2007 produced a series of essays about the constitution. He may have been thinking that, without necessarily proposing a written constitution, it would be worthwhile to stimulate a debate about it. That may lie behind some of the reason for this. The acceleration of the chapter on a change of Government was made necessary by the circumstances of the time, but I think it had a wider origin than that.

Lord Wilson of Dinton: Perhaps I could add a point to what Lord Turnbull has said. If you look at the last 15 to 20 years, you will see that there has been a progressive process of putting the way that the Executive works into documents. It began with the Ministerial Code, which used to be a published document known as *Questions of Procedure for ministers*. There was a code for special advisers, the Civil Service Code under Lord Butler, and of course there is now the Constitutional Reform and Governance Act 2010. All these have been a way of slowly pinning down, educating the public, and informing the Civil Service itself of the framework within which we operate. One of the important aspects of the Civil Service is its role as the corporate memory of how things are done. What these documents do is underpin that memory.

Lord Butler of Brockwell: I should like to add two postscripts to that. The first is that there is a New Zealand precedent, which was seen and thought to be useful. I think that was an inspiration for the Manual. The other is that Lord Armstrong and I go back to a time when these things were shrouded in impenetrable mystery. There is now much more of a custom of publicising and publication, and that has been a very good thing, not least under the impetus of Lord Hennessy, who campaigned for ages for *Questions of Procedure for ministers* to be published. So times have changed and this is a further step on that progression.

Q44 The Chairman: I know Lord Powell wants to come back on this, but on the point about being "shrouded in mystery", is the Precedent Book still relevant? We hear about it as a sort of dusty feature of the secrecy about ways to act, but has that now been completely discarded?

Lord Butler of Brockwell: The answer to that is that I do not know. I wouldn't have thought so because it was the best reading in the cupboards of the Cabinet Secretary. But, of course, it was an account of the scrapes that ministers got into and how they were

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resolved. I think that there are pretty good personal reasons for it remaining a confidential document, so I should be surprised to see it published.

Q45 *The Chairman:* But it is still a useful one.

Lord Butler of Brockwell: Yes, it is still useful.

Q46 *Lord Powell of Bayswater:* I want to come back on two points. Lord Turnbull suggested that instead of the production of the Manual being an initiative of the Civil Service, it probably has a political origin. That is somewhat at variance to the evidence we have heard so far. Secondly, returning to my earlier point, if the real stimulus for it in practical terms was the prospect of a hung Parliament and a coalition Government, was it really necessary to have all the rest? Quite a lot of it, to be honest, is a bit of a Janet and John guide to the Queen and so on. In that sense it is almost like a guidebook for foreign tourists.

Lord Armstrong of Ilminster: I do not think it was stimulated just by the prospect of a hung Parliament. No doubt that prompted the publication of the draft chapter on that matter, but there was more behind it than that, so it was not the only reason for bringing all this stuff together. Although it is a long time since I left the office, we had a principle of what was called “funding experience”. Indeed, that is one of the reasons why I wrote the memorandum to which the Chairman referred. There was a conscious decision, when there were particular episodes or policy matters, to ensure that there was some kind of funding of that experience so that a record was available for the future. I see this Manual as very much part of that tradition, so it goes further than dealing merely with the business of a change of government.

Q47 *Lord Powell of Bayswater:* I have just one more question. There have been some suggestions of an element of Civil Service power grab in this, and that some of the things put into it have been the Civil Service view of how the constitution ought to work. Perhaps one small example is one that Lord Butler will be familiar with, which is the rather prim wording covering how ministers should meet, Cabinet committees and so on, when in practice a number of Prime ministers have preferred to make much more use of informal meetings of Cabinet ministers, particular colleagues and so on. Do you think there are any grounds for people to suspect a Civil Service power grab, or is that just the sort of speculation that one reads in newspapers?

Lord Butler of Brockwell: One element of this is the kind of procedures by which a particular administration operates. That is a category of things which it is entirely open to any administration to change. I would have thought that that would not be

included without the approval of the Prime Minister. That would be consistent with the Ministerial Code by which each Prime Minister operates. That is really a decision for the administration of the day, and the Civil Service is simply recording it. As I read through the Manual, I thought there were different categories of things. I have identified five categories, which I shall describe, if members can bear it. The first category is things that are prescribed by statute—for example, the Ministerial and Other Salaries Act—where there is a description of them. The second category is things that are not prescribed by statutes, but conventions which are so established that they really have become part of the constitution, like the role of the Sovereign in the appointment of the Prime Minister. Then there are less established conventions like the Osmotherly Rules, which could be changed, but that is the way things have operated and it is useful to have them recorded. There are also purely descriptive chapters on, say, the European Union and the OECD, and lastly a category about the way in which the administration operates, which is for each administration to decide. So it is quite an amalgam of things which have different status, but it is useful to have them set down.

Lord Armstrong of Ilminster: But all are, I think, descriptive and not prescriptive. When I read through it, I was conscious that the words “ought”, “must” and “should” appeared very infrequently.

Q48 *Lord Powell of Bayswater:* Would it have benefited from a slightly more modest title? “Cabinet Manual” suggests something of very weighty constitutional significance, whereas what you are describing is more of a handbook for civil servants.

Lord Armstrong of Ilminster: I have been thinking about that, Lord Powell. I have been trying to think whether there might be a better title but I have not come up with anything better. I think that the subtitle is very good, but whether “Cabinet Manual” is perfect, I doubt. However, I have not been able to think of anything better than “The Way We Live Now”.

Q49 *Lord Shaw of Northstead:* Arising out of that, I took the trouble to look up in the dictionary the meaning of “Manual”. It is a book of instruction or a book of information. I hope you all feel that it is a book of information, not instruction. Following on from that, in New Zealand it is now presented to Parliament at every new Parliament. That worries me considerably because, if you present something to Parliament, it gets discussed and various views are forcefully put forward. Is it not a fact that the Manual contains lists of practices already decided and practised, rather than a drawing up of new rules? In

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other words, writing the Manual comes after the event and not before it.

Lord Armstrong of Ilminster: I agree with that. The Chairman said at the beginning that we were talking before the first edition was produced. I think that with the miracles of modern technology, this document will be constantly revised, updated and re-edited as a description of what goes as things change and as new administrations come in.

Lord Turnbull: This is explicitly recorded on the last page of Gus O'Donnell's foreword: "It is important to remember that the Cabinet Manual is intended to record the current position on the operation of central government. We are not seeking comments on laws, rules or conventions that people may wish to see changed in the future". That is very clear.

Lord Wilson of Dinton: But it is by the Executive for the Executive. Parliament may be interested and select committees, such as your good selves, may wish to comment, but it is by the Executive for the Executive.

Q50 Lord Crickhowell: Picking up on Lord Armstrong's reference to the word "should", one place where it does appear is in paragraph 205 on pre-legislative scrutiny. It has been quite clear from the answers that this is a useful prompt to the Executive—both civil servants and ministers, I think—about how things are best conducted. It seems very curious to me—we discussed this at our last session—that there is this very anodyne statement that ministers should consider publishing Bills in draft. On the opposite page is a large paragraph about statutory instruments but with absolutely no clear guidance about what might be sensible. There is no reference to the fact that committees of both Houses, including this one, have issued rather strong guidance on the subject and that very strong views are held about, for example, Henry VIII clauses. Many civil servants and, I suspect, many new ministers are perhaps not sufficiently aware of some of the hurdles that they will meet in this House, particularly if they ignore them, so surely, if this is going to be a useful guide, it should go rather further in indicating what sensible conduct should be.

Lord Butler of Brockwell: If I may say so, Chairman, I agree with that. If, later on, you ask what should be in the document which isn't already in there, I shall say that there should be more about the standards that the executive should set for itself in preparing and presenting legislation to Parliament. This is not something where you are prescribing what Parliament should do; you are prescribing what the executive should do in responding to the requirements of Parliament. So I would like to see that section expanded and, if we get on to that, I shall

be a little more specific about the ways in which I think it should be done.

Lord Armstrong of Ilminster: I feel rather differently. I noticed the way that this was drafted when I read it. I thought that here was some civil servant treading rather delicately in a field where there were dragons, and I felt that it was just about right. As a matter of fact, this is something that ministers ought to consider when preparing legislation. However, although they should consider it, it does not say that they should do it. That is for them to consider and I think that that is exactly right. Clearly ministers will differ about the extent to which they wish to go in for pre-legislative scrutiny. Many of us would like them to do more of it than they are doing or have done. I agree that it is questionable whether this is exactly rightly phrased but the thought behind it is pretty well right as a description of what the Executive ought to do in these circumstances. What they actually do is say to ministers, "Have you thought about pre-legislative scrutiny?"

Q51 Lord Crickhowell: Should they not at least consider strongly worded reports from committees of both Houses? Wouldn't that be a sensible thing for them also to consider? They may well not feel that they have been obliged in a particular circumstance, but we are in the middle of a situation at the moment where perhaps rather more consideration of those matters might have avoided difficulties.

Lord Wilson of Dinton: There are quite a lot of places in this document where what is said is just the bare bones of the overall picture but a great deal more could be said. If I have one suggestion about the document, it is that there are occasions when it might refer the reader to more detailed documents. My recollection is that there is guidance—or there certainly used to be—for people putting a bill through Parliament, and I think that a lot more needs to be said in subsidiary documents rather than in this overarching document.

Q52 The Chairman: But we are still on the point about whether or not it should be prescriptive, which I think is Lord Crickhowell's point, or, as I understand it from all of you, simply descriptive, which in a sense is a completely different theoretical way of looking at it.

Lord Turnbull: Shouldn't there be in here a cross-reference to the Government's response to any of these committee reports? To some extent, the Government has accepted this, in which case it doesn't have to look as though the author is pressing it. There ought to be a cross-reference in a footnote to whatever the Government has undertaken to do.

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Lord Armstrong of Ilminster: I think that the intention is descriptive and that the intention of this paragraph is descriptive. I think that it goes beyond the terms of reference of this document to be prescriptive about whether there should be pre-legislative scrutiny. Clearly, when a civil servant says to a minister, “Have you considered pre-legislative scrutiny?”, he may then go on to say that there’s a good deal of parliamentary advice, recommendation, guidance and views on that. But, as a description, I think that this is pretty well on the mark and that the whole document is basically descriptive.

Lord Butler of Brockwell: Just before we lose that point, I think that this goes back to the issue that Lord Powell brought up: it should be descriptive of what the administration has committed itself to. I happen to think that administrations should commit themselves to better preparation of legislation, but of course that would be for them to decide and then, if they do decide to do that—which I wish they would—for this Manual to describe what they have committed themselves to.

Q53 Lord Irvine of Lairg: I accept that the Manual is essentially a statement of good practice by the Executive for the Executive but wouldn’t it be wise for civil servants and new Cabinet ministers to have flagged up for them in the Manual what the parliamentary reaction to a particular course of action is likely to be, as evidenced by the detailed opinions expressed by select committees of both Houses?

Lord Armstrong of Ilminster: Well, you could certainly add here, “ministers should consider taking into account the views that have been expressed by the two Houses of Parliament on the matter”.

Q54 Lord Irvine of Lairg: And give specific references.

Lord Armstrong of Ilminster: And give a reference, but I do not think that it should go from that point to saying, “And this is what you ought to get on and do”.

Lord Butler of Brockwell: That’s right. Take, for example, Henry VIII clauses. It would be useful if it said somewhere in here that Parliament, over the years, has shown a very strong dislike of Henry VIII clauses. That would be a useful thing for people who are preparing legislation to know.

Lord Wilson of Dinton: Cabinet Secretaries and others develop their views, particularly after they have left the job. However, I do not think that this is the place to go into controversy in depth; I think that that needs to be dealt with elsewhere. Lord Powell described this earlier as Janet and John. The point about Janet and John statements is that quite often, when they really come alive, there’s much more to

them than appears on the surface. Simple statements can prove to be very pregnant with implications. I think that this is the place for general statements and that debate needs to be kept out of this document.

Q55 Lord Norton of Louth: I have two points. As I understand your description of the Manual, you see it as, if you like, the Executive equivalent of *Erskine May*—it’s a guide. The point I draw from that is that *Erskine May* is very well sourced. There are lots of footnotes and everything is based on precedent. With a Manual, what’s notable is that there are very few footnotes and very little where the source is given. I wonder whether it would be valuable for it to be the equivalent of *Erskine May* in terms of sourcing so that one can distinguish between those parts of the Manual which are precedent-based and those which are not and merely reflect the understanding of what the constitution position is. There is an important distinction there. On the point about description and prescription, would it not be better for the Manual to state that, as at the last election when there was no overall majority, the parties did get together to enter into discussions? The way it is worded makes it so that, if there is no overall majority, the parties “will” enter into discussions. That strikes me as rather prescriptive because presumably it should be open to the parties to decline to do so.

Lord Turnbull: Can I take up the point about this being *Erskine May* and go back to Lord Butler’s point that this Manual has material in it of different kinds? I can agree that it is an *Erskine May* as regards the way the Cabinet and the Civil Service run their affairs and how the Executive works, but I do not think it can be *Erskine May* about other people’s affairs. It can deal with the way the Executive relates to the legislature, but in the way the legislature works, it is for that body to produce the definitive statement. That is why I think the title, the Cabinet Manual, is a nice title borrowed from another country where it works quite well, but it is not quite right. It is a Manual in that bit where the Executive can be authoritative, namely, about its own affairs, but I think it is a guide when it comes to the way other parts of the constitution operate. The subtitle is actually a better description than the main one.

Q56 Lord Norton of Louth: Perhaps that reinforces my point about making the distinction between precedent and that which is not based on precedent.

Lord Butler of Brockwell: One has to draw a distinction between things that are based on precedent and things that are not. Clearly, it would not be helpful to say, “In this way of Cabinet proceeding, the last Government did such and such”. That does not establish a precedent that a subsequent administration needs to follow. But in cases like the

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formation of a government, that has been built up into a constitutional convention over many years and is therefore a different sort of thing where it may well be more useful to refer to precedent.

Lord Armstrong of Ilminster: I do think that the Manual strays over the line when it quotes what Mr Clegg said after the election. I do not think that that fits in this document.

Q57 Lord Irvine of Lairg: Do you not think that if the Manual were better sourced, as Lord Norton of Louth has suggested, that would enable the Civil Service to demonstrate that it had retained a collective memory in some detail on recurrent issues?

Lord Butler of Brockwell: This comes back to Lord Wilson's point and to my earlier example of the Osmotherly Rules. The Manual refers to and summarises those rules, which can be looked up. I agree with Lord Wilson that in some cases it would be useful for the document to lead on to areas where the precedents are set out in more detail.

Q58 Lord Pannick: I wonder whether the contrast between something being descriptive and something being prescriptive is as clear-cut as is sometimes suggested. In a system in which legitimacy is based on convention or on precedent, or going down in scale, it is based on practice, surely to a large extent to describe in a formal document of this sort will inevitably convey the impression that you are prescribing.

Lord Armstrong of Ilminster: That is a very fair point, although I still think that the intention of this Manual is to be descriptive rather than prescriptive. Insofar as it sets out the present position based on precedent and former practice, there is an underlying thought that this is what will guide you for the future, but it remains the case that each government are at liberty to change and introduce new developments into practice. In that sense, it is not an iron prescription, but rather a description of the present and the past on which it is based which, if you like, funds experience. It is useful, when you are in the present situation, to have a guide to what people have done in similar situations in the past.

Lord Wilson of Dinton: I think that what Lord Pannick is saying is to some degree correct in that these things are more nuanced than just black or white. What the Manual says is, "This is how we run things". I shall go back to Lord Butler's very helpful categories. Some of it is prescriptive because it is in the law, some of it is pretty powerful because it has become a well-established convention. Some of it is a description of how we do it, but the fact is that over time, and very gradually, things evolve. The role of the royal prerogative for the Monarch has been a great triumph for evolution in constitutional practice

without—or usually without—any headlines. The flexibility within these conventions means that you can continue to adapt, so you do not want to go too deeply into describing where you are on the scale of prescription and description because you have to understand that this is quite carefully nuanced. Some bits are firmer than others, but at the moment, this document covers what has been agreed and what is generally regarded as the current best practice.

Q59 The Chairman: Perhaps I may go back to pick up the point raised by Lord Norton in his specific example about what would happen if there wasn't a clear cut election return. You have a clear difference—we have all read Lord Armstrong's helpful note on the 1974 experience where there is the fund of experience on the record—which is clearly deviated from in the Cabinet Manual as it is now published.

Lord Butler of Brockwell: Time moves on. That underlines the point made by Lord Wilson. This thing cannot be set in stone for ever and cannot be inflexible. I want to go back to Lord Pannick's point, which is a very good one. The point we were answering is this: is this the Civil Service getting above itself? Is this Civil Service trying to prescribe things? My view is that the Cabinet Secretary has no right to prescribe rules except for the Civil Service itself, because he is the head of the Civil Service. In other respects, he is recording the way in which things work or the way in which the present administration has decided that they should work.

Q60 Lord Hart of Chilton: I want to raise a small point on which Lord Wilson has touched already. This is a toolkit exclusively for the Executive and the Civil Service. It refers to parliamentary procedure, but parliamentary approval is not involved in it, and nor should it be. I think that that is the position taken by Lord Wilson, and I think we would all agree on it.

Lord Wilson of Dinton: I would agree. This is not about Parliament, but about civil servants writing for other civil servants an operational Manual and informing them about some aspects of dealings with Parliament. It is not something that we want parliamentary approval for.

Lord Armstrong of Ilminster: It is a management document within the Executive. I am glad that it has been published and I am sure that Parliament is going to take an interest in it, but that is the way it should be. Parliament should be aware of and know about it, but I do not think that it is a matter for parliamentary approval in the formal sense.

Lord Butler of Brockwell: I would agree with that as well, although, as we said earlier, it is perfectly right and helpful for Parliament to comment on it. It is for the Executive to decide whether it adopts those

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comments and it should give a lot of weight to the comments of a body like this. So I think the comments are helpful, but Parliament should not, as it were, be prescribing the contents of this document. *Lord Turnbull:* I would not downplay the educative role of the Manual. It is not simply a document for insiders, telling them how Parliament works and how the Executive works. I think that A-level students all the way through to Lord Hennessy's PhD students will be reading it. It can have a helpful function in giving people a better understanding of the constitution that they are living under.

Q61 Lord Hart of Chilton: If there were to be any breach of it, what sanctions would apply? I would not imagine that it is a justiciable document.

Lord Turnbull: This is where prescription begins and ends. Prescription implies that if you deviate from it, you have done something wrong. Some of the things in here are very carefully worded, but there are many other areas where the government are perfectly entitled to do something different. In the name of proper transparency, there may be an obligation to explain what they have done and why, but that is not prescription in the sense that there is a sanction against doing something different.

Lord Butler of Brockwell: Again, we have to distinguish between the categories. If you breach some of the things in the Manual, where they are descriptions of the law—such as if the Prime Minister appoints more ministers than Parliament entitles him to pay—that would be a breach of the law and clearly justiciable. I can imagine some things that might be subject, where a decision was contested, to judicial review. If someone asked whether the Executive had followed the proper procedure in reaching a decision, this might be quoted in aid of someone who is contesting that case by saying that the procedures of governance in the Cabinet Manual suggest that the Government should operate in this way and they have not. But I do not think that it would be decisive. It might just be something that was produced as evidence. However, the lawyers will have a much better view of this than I do.

Lord Armstrong of Ilminster: I can envisage a situation in which the Cabinet Secretary or the head of the Civil Service, currently the same person, might say to another Permanent Secretary, “Couldn't you have consulted another department on this? See paragraph X of the Cabinet Manual”. Or perhaps, “Shouldn't you have consulted the law officers about this? See paragraph Y of the Manual”. But I think that that is as far as sanctions go.

Q62 Lord Pannick: Could I ask you to comment on the following? The very existence of a document like this, one that formally states what the practices and

principles are, will be likely to encourage those lawyers who are bringing forward judicial reviews of government decisions in areas that a generation ago would have been regarded as purely political, will it not? They will have material that can be put before the court. I agree that it will not be decisive, but it might just possibly promote legalisation, which may not be a wholly good thing.

Lord Wilson of Dinton: It is probably beyond our compass to predict the behaviour of lawyers. A certain modesty is required at this point. However, the very fact of publishing the document does, in some way, make an important change. That is because it can be adduced in all sorts of contexts, not least in the political context, that people may have departed from what is in the Manual. Previously, if it was not written down, it was harder to pin down. I do not think it can be denied that this is a step which in some way slightly changes the status of the conventions.

Lord Turnbull: Perhaps I may look at a different perspective. I think that the ambition of the civil servants who have worked on this document is that virtually every sentence can be referenced back to something else that already exists, and therefore the extent to which it adds something new on which judicial process can be hung is actually rather limited.

Q63 Lord Irvine of Lairg: In the real legal world, is it not pretty obvious that if a minister arrives at a particular decision and expressed himself in terms which showed that he had not considered the relevant part of the Cabinet Manual, it might well be argued persuasively in a judicial review case that he had failed to take into account a relevant consideration; namely, what the Manual says?

Lord Armstrong of Ilminster: That is the price of transparency. For good or ill, that is the risk created by doing this.

The Chairman: I know that we could discuss this point at some length, particularly with our distinguished panel of Members of the House of Lords, but perhaps we might return to Chapter 2 and to the formation of Government. I know that Lord Renton wants to raise a point.

Q64 Lord Renton of Mount Harry: The question in front of me states, “Do you think that Chapter 2 is an accurate reflection of constitutional practice in terms of how the Government formation process works?” What I would like to do is to add a question of my own and refer to a time when both Lord Butler and Lord Turnbull were involved. What happens when a Prime Minister is almost required to resign during the course of a Parliament, and required to do so because it is a question of the leadership of his or her party? Lord Butler will remember well the discussions we

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had in November 1990 when the vote on whether Mrs Thatcher should remain the leader of the party went by a small majority to her. She accepted the result and then resigned the next day, having come to the conclusion that she did not have a large enough majority. That led to a position where Michael Heseltine was then the second choice, but there was an insistence that there be a further vote, by which John Major became the leader of the party and hence the Prime Minister. You could say that it was not exactly the same when Gordon Brown followed his predecessor, but again, it was a contest. It seems to me that in your extremely interesting draft, this situation is not covered at all. And yet, in my experience, in some ways it is the most difficult of them all.

Lord Butler of Brockwell: You have made a very good point, if I may say so. Of course, in the circumstances of 1990 that we can all recall, Mrs Thatcher did not resign immediately. She announced her decision to resign when the process of appointing a successor had been completed. That is how Mr Major emerged. Similarly, with Gordon Brown and Tony Blair, Tony Blair announced his decision to resign first.

Q65 Lord Renton of Mount Harry: Let us remember that that was not true of Mrs Thatcher. She resigned after one day. She was in France for a day and she that would be going on, but overnight she changed her mind.

Lord Butler of Brockwell: But she remained Prime Minister for another week.

Q66 Lord Renton of Mount Harry: She remained Prime Minister, certainly, but then the process of who would follow her started.

Lord Butler of Brockwell: Yes, but fortunately none of us has ever had to face that precise situation. What should happen if the Prime Minister dies, particularly these days when in parties there is a protracted period of electing a new leader? I remember being concerned about this after the Brighton bomb. If the Prime Minister were assassinated, what would happen in the interim? I tried to suggest some procedures but at that point the Cabinet was not really inclined to take them seriously. I am quite sure that the Cabinet would have had a discussion and the Queen would have sent for a member of the Cabinet—someone whom the Cabinet had agreed on—to hold the position in the interim while the election procedures were gone through. However, I could foresee that that might be untidy, so, as I said, I made a suggestion. It would be a good idea if the Cabinet were to take a decision about who would act as the interim Prime Minister in those circumstances, but, for understandable reasons, they weren't inclined to go down that road on a hypothetical basis.

Lord Turnbull: I have two points. One is that you are absolutely right that there is this glaring omission, and this is something that I was going to say in my own submission. The Manual talks about the resignation of a Prime Minister after an election but it doesn't cover something that has happened three times in the past 30 years, which is a Prime Minister standing down for one reason or another in the middle of a Parliament. On the demise of a Prime Minister, I think that the expert is Lord Norton of Louth, who I know is working on this. I thought that at some stage he was going to produce a paper but I don't know whether he ever did.

Lord Norton of Louth: Not yet.

Q67 Lord Renton of Mount Harry: Does that mean, Lord Turnbull, that you are suggesting fairly strongly that the position we are talking about—1990 being a good example—should be covered?

Lord Turnbull: Absolutely. The key point is that Prime ministers rarely resign. They may die or be taken ill, or the reason they resign is so egregious that they have to resign immediately. If they are losing political support, which is unlikely, they announce an intention to resign and then do so when the leadership processes are complete. I can't understand why that is not in here.

Lord Butler of Brockwell: I can understand why—it is because it would be very difficult to prescribe. Should the document say that when the Prime Minister is going to stand down in the middle of an administration, they should remain as Prime Minister until the party's procedures have been adopted? Who is to prescribe that? Those circumstances might not be tolerable to the public—witness President Mubarak at the moment. I don't think that the Manual could say that, so what then should it say about who should take over in the mean time? Again, I think that that would be very difficult for the Manual to prescribe. With deference to Lord Norton, I think that this question is too difficult and that it would have to be solved pragmatically in the circumstances in which it arose, but perhaps Lord Turnbull has a better idea.

Lord Turnbull: Given the relative frequency with which this has happened, I don't think you can simply pass by on the other side as though it wasn't a problem. It has occurred more frequently than hung Parliaments. Perhaps one can indicate that this situation has to be handled differently from that of losing power at the end of an election, even if there is simply a reference to past incidents or precedents. However, simply saying nothing on something which is not at all unusual seems rather strange.

Lord Armstrong of Ilminster: In a sense, this is covered by the general rule that a Prime Minister is expected not to resign unless and until he can make a

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recommendation to the Queen about whom she should send for to be his successor. Where a Prime Minister has announced his or her intention to stand down—as with the situation in November 1990—the right course has been followed. The Prime Minister should remain in office as Prime Minister until the process of election for a new leader has been completed and then the new leader can be sent for to be the successor. Like Lord Butler, I was very much involved at the time of the bombing of the Grand Hotel. There was about half an hour in the middle of the night when news had come through about the bomb but I didn't know whether Mrs Thatcher was still alive until Lord Butler rang me up at about half-past three to tell me. During that half hour, I thought rather hard about the situation and came to the conclusion that the Queen's Private Secretary, possibly aided and assisted by the Cabinet Secretary or someone else, would have consultations with leading members of the Cabinet, from which would emerge a recommendation to the Queen as to whom she should send for as an interim Prime Minister until a successor was elected. We can all speculate about who that might have been in 1984. One can see that two or three people might have been consulted. I think that the situation would have reverted to something like what happened after Sir Anthony Eden resigned in 1957. The record shows that Sir Winston Churchill and Lord Salisbury at least were consulted, and, as a result, the Queen was recommended to send for Mr Macmillan.

The Chairman: There are three people who I know wish to pursue this matter, and I know that Lord Powell wanted to speak about the prerogative. I shall ask Lord Renton to come in and then Lord Crickhowell.

Q68 Lord Renton of Mount Harry: Can something be added to cover the situation, in so far as that is possible?

Lord Armstrong of Ilminster: I don't think that it is for this document to do that, as I think that it goes beyond its range. For this document, the right stopping point is that the Prime Minister is expected not to resign until a successor can confidently be recommended, as Lord Butler has suggested. In the case of the demise of a Prime Minister, you can't describe what happens, except in terms of 1957 when we were near that point, although of course Sir Anthony Eden was not dead. I think that that has to be left outside this Manual and dealt with separately.

Lord Wilson of Dinton: Many situations which are not covered in this document could arise. This document remains on firm ground and does not stray into the many marshy areas where Cabinet Secretaries tread warily—with occasional splashes. I think you have raised a very important point but I don't think this

document is the right place to try to resolve what is actually a very difficult question.

Q69 Lord Crickhowell: This fascinating exchange on the change of Prime Minister takes us back to the wider question to which Lord Butler said he would like to return. Are there any serious omissions in this document—things that you would like to see in it—or are there things in it that you think really shouldn't be in it?

Lord Armstrong of Ilminster: If I may start on that, I think that what is said about the House of Lords needs to be sharpened up and perhaps increased so that it is more parallel with what is said about the House of Commons. I think that that is an area that needs to be looked at again.

Lord Butler of Brockwell: I would like the document to say more about the standards which the administration should adopt for the introduction of legislation. Legislation should be properly prepared; there should be adequate consultation, if possible, beforehand; there should be a statement regarding why legislation is necessary; there should be a statement of the costs; and there should be a statement of the objectives against which the legislation can be tested. But that could be done only if the administration had committed itself to those standards first. It isn't something that the Cabinet Secretary could write into this Manual unless the administration had committed to do that. I very much hope that in the future administrations will commit themselves to better standards of preparation of legislation.

Lord Armstrong of Ilminster: But until that happens, it is not something for this Manual.

Lord Butler of Brockwell: I agree.

Lord Wilson of Dinton: As I said earlier, more cross-references would be helpful. It's interesting to think about how far one can have sources or precedents for everything, but certainly more could be done to point the reader to other places to justify or elaborate on what has been said.

Lord Turnbull: The section on the House of Lords is relatively weak. The Salisbury-Addison convention is not something that the Executive can settle, but the Manual does not even mention that this is an important principle, that it is under debate and has been discussed, and that there are reports on it. It is an area which I think should be mentioned as a principle, with footnotes to tell the reader where to go to learn more about it. However, I don't think that the Manual should just say nothing on it.

The Chairman: I am aware that time is passing and that some of our panel have other engagements. I am also aware that Lord Hennessy is kindly available to take the next evidence session. I know that Lord Norton and Lord Irvine are both anxious to come in

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again. Lord Powell, are you anxious to come in again?

Lord Powell of Bayswater: If there is time.

The Chairman: Lord Norton, do you want to start?

Q70 Lord Norton of Louth: You have dealt with all the points that I would have raised. Presumably one value of this draft Manual is that it identifies the gaps where things need to be filled in. In terms of precedent for the demise of a Prime Minister, the last Prime Minister to die in office was Palmerston, although things have moved on since then. So, to cover that particular point, agreement would need to be reached between the different parties involved, because the main aim presumably would be to protect the Palace from involvement in making a decision. Therefore, you have to reach agreement in advance and several parties will need to be involved in reaching that agreement. I suppose that the question then is: at what point is that sort of agreement included in the Manual?

Lord Armstrong of Ilminster: That will have to be judged when it happens. It is very difficult to say in advance whether the practice has hardened to the point where it should go into a Manual of this kind.

Q71 Lord Norton of Louth: So there would be some agreement but it would be kept distinct from the Manual. That's the point.

Lord Armstrong of Ilminster: Yes.

Q72 Lord Irvine of Lairg: Lord Armstrong, you said that what is said about the House of Lords in the Manual needs to be sharpened up. More specifically, Lord Turnbull referred to the Salisbury-Addison convention. I regard this as too good an opportunity to lose not to ask you not for an exhaustive account of the omissions but for the headlines that you think need to be sharpened up in relation to the House of Lords.

Lord Armstrong of Ilminster: It should say that it is House of Lords convention that legislation foreshadowed in the Government's manifesto will not be opposed or subject to fatal amendments, although it may be revised. I think that the differences

in procedure on Bills should be made quite clear. This may already be clear but the fact that in the House of Lords amendments can be put down at Third Reading should be stated.

Lord Wilson of Dinton: It is in there.

Lord Armstrong of Ilminster: Perhaps a little more could be said about the implications of the fact that the House of Lords does not have timetable procedures and so in that respect is unlike the House of Commons. That is the kind of thing that I would like to see gone into a little further—things which are established practice and which are different from procedures in the House of Commons.

Lord Turnbull: I don't think it says enough about money bills. It mentions money bills but it doesn't set out the principles that decide whether a bill is a money bill and who is responsible for deciding it. I think that that should be spelled out.

Q73 The Chairman: I think, Lord Powell, that we should move on to Lord Hennessy. As a bit of committee advertising, we are about to publish a guide on financial privilege and money bills. I hope that that will be of use to the House as well.

Lord Butler of Brockwell: May I clarify one point where I realise I may have given a misleading impression? When I was talking about addressing the hypothetical question of what would happen in the case of the demise of the Prime Minister, I said that I addressed the matter following the Brighton bomb. I meant that I addressed it when I was Cabinet Secretary. Immediately after the Brighton bomb, it was Lord Armstrong's business, not mine.

The Chairman: Of course. I think we understood that. Lord Armstrong, Lord Butler, Lord Wilson and Lord Turnbull, we are very grateful to you. It has been an enormously interesting discussion, drawing on your invaluable extensive experience. At the moment, we are not drafting our response to the consultation. We have already heard from Lord Turnbull, although he may submit his thoughts individually to the consultation. However, if there is anything further that any of you would like to add to this discussion, it would be very useful indeed if you were able to write to us. In the mean time, thank you all very much.

Supplementary memorandum by Lord Armstrong of Iminster (DCM 1)**ELECTIONS AND GOVERNMENT FORMATION**

This note is submitted in response to the Clerk's e-mail of 3 February 2011 inviting comments on issues in Chapter 2 of the draft Cabinet Manual which were not fully covered in the session of oral evidence on 2 February 2011. Lord Butler of Brockwell, Lord Wilson of Dinton and Lord Turnbull have authorised me to say that they concur in this note.

Subject to the following comments, I do not think that the description of constitutional practice in Chapter 2 of the draft Cabinet Manual differs significantly from what I believed the practice to be in 1974 or later while I was in government service.

Specifically:

- (i) I do not think that the sentence in paragraph 50 to which reference is made represents a constitutional innovation. I shall, however, be suggesting to the Cabinet Office that it should be slightly amended so as unambiguously to reflect current practice. The statement that: "The incumbent Prime Minister is not expected to resign until it is clear that there is someone else who should be asked to form a government . . ." might be read to suggest that the incumbent Prime Minister is free to resign before that. I believe that under current practice an incumbent Prime Minister should not resign office until he or she is in a position to recommend to the Sovereign whom the Sovereign should send for as a successor. I think therefore that the sentence would more accurately reflect what I believe to be current practice if it was altered to read: "The incumbent Prime Minister is expected not to resign until it is clear that there is someone else who should be invited to form a government because he or she is better placed to command the confidence of the House of Commons . . ."
- (ii) The view expressed by the Leader of the Liberal Democratic Party does not represent existing constitutional practice and should not be included in the Cabinet Manual. It expresses his view on a political matter at the time. That matter is what should happen when a General Election results in a "hung Parliament"—a Parliament in which no one party has an overall majority. The "default" expectation would be that the leader of the party with the largest number of seats in the new parliament should be invited to become the new Prime Minister, either strengthening his or her position by forming a coalition with one or more of the smaller parties or taking office as the leader of a minority government. The crucial factor is the number of seats, not the number of votes. In March 1974 the Conservative Party won slightly fewer seats than the Labour Party but gained a larger number of votes overall. That fact was used as an argument to justify Mr. Heath's attempts over the weekend of 1 to 4 March 1974 to form a coalition with the Liberal Party which would have given him the largest number of seats (though still not an overall majority). There were, however, those who thought that those attempts showed him in the light of a bad loser and that he should have resigned immediately and advised The Queen to send for Mr. Wilson, the Leader of the Labour Party, which had won the largest number of seats.
- (iii) This does not seem to me to represent a constitutional innovation.

On paragraph 10, I do not think that the constitutional principles underlying the government formation process have changed as between 1974 and 2010, but the practice certainly has. In 2010 the Cabinet Office provided rooms and administrative and secretarial support for the teams from the political parties involved in the negotiations in a way for which there was no precedent in 1974. This may have been partly because the possibility of the forthcoming election resulting in a hung parliament was foreseen much earlier and more widely in 2010 than it had been in 1974, and there was more time and opportunity to prepare for it.

On paragraph 11, I believe that the Sovereign retains the power to appoint a Prime Minister. In these days the exercise of that power is constrained by the fact that the leaders of all political parties are elected: the Sovereign will normally be recommended to send for the leader of the party with an overall majority or the largest number of seats in the House of Commons. If a Prime Minister were to die or to become suddenly and permanently incapacitated while in office, the Sovereign could be expected to appoint a member of the existing Cabinet as an interim Prime Minister until a new leader of the party had been elected; the choice would be made after and on the basis of consultations with senior members of the Cabinet.

I believe that the Sovereign also retains the power to dismiss a Prime Minister, but it is difficult to envisage circumstances in which it might be exercised. It seems to me that it could be exercised only if there were compelling and generally accepted reasons for exercising it: if (for instance) a Prime Minister was generally recognised to be acting with persistent and dangerous irrationality or with deliberate and persistent disregard of constitutional conventions and was refusing to resign, and then only after consultations with other senior political figures. The very existence of the power should serve to ensure that it never needs to be exercised.

I believe that the Sovereign retains the power to withhold consent for a request by the Prime Minister for the dissolution of Parliament. In most circumstances the case for a dissolution and the reasons for the Prime Minister's request will be straightforward, and consent will be granted almost as a formality. It is possible, however, to envisage a situation where a new Government formed after a General Election had lost the vote in the House of Commons on the Address in reply to The Sovereign's Speech at the opening of Parliament. Having lost such a vote of confidence, the Prime Minister would be expected, indeed even obliged, to tender his resignation and request a dissolution. Another General Election following so soon after its predecessor would put the country (and the parties) to further expense and would prolong political uncertainty, without necessarily producing a significantly different outcome. In those circumstances the Sovereign might think it right not immediately to grant the Prime Minister's request for a dissolution but to hold the request in suspense while seeking by consultations to establish whether some other person might be able to form an administration which could carry on the government at any rate for a period of months without the need for an immediate General Election.

Such a situation could have arisen in March 1974 if the minority Labour Government under Mr. Wilson had lost the vote on the Address in reply to The Queen's Speech. In fact he did not lose the vote (nor did it ever seem likely that he would); and even if he had lost the vote, it was questionable whether Mr. Heath, having tried and failed to stay in office as Prime Minister at the beginning of the month, could credibly have been thought to have a better chance of forming an administration at the end of the month.

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Examination of Witness

Witness: LORD HENNESSY OF NYMPSPFIELD

Q74 *The Chairman:* Good morning, Lord Hennessy. It is very good to see you. You are, in a sense, the author of all these discussions. As we know and as was said in the previous evidence session, you have been very much involved in trying to stimulate something like the Cabinet Manual that we now have before us as a draft. We are very grateful to you for coming and for taking a little time out of your part of the proceedings so that we can develop a few points with the former Cabinet Secretaries. I am sorry if we kept you waiting. You heard that discussion and you probably read the discussion that we had last week with Lord Adonis and Lord Wakeham. One thing that seems, perhaps unfairly, to emerge is that this Cabinet Manual has limited scope and therefore limited application but it is given enormous authority by its very publication. Do you think that that might lead to a lot of problems?

Lord Hennessy of Nympsfield: I hope not, although it might do. I was very interested in the discussion on judicial review but, quite apart from judicial review, it creates expectations—it did so at its very moment of publication, as did Questions of Procedure for ministers, when John Major published it after the 1992 election. The press, for example, which we haven't mentioned this morning, go straight to the Ministerial Code, as it now is, when a story breaks which may or may not involve a breach of the conventions or individual ministerial personal behaviour. If I remember correctly, this happened within a few weeks of Questions of Procedure for ministers appearing, and I am pretty sure that the same will happen with this. The mere fact that the Executive has opened up this window into what it thinks are the moving parts that matter to it and what the expectations are of proper procedure consonant

with past practice is a very significant event. Could I declare a brief interest? I did help a little bit with the "Formation of Government" chapter—chapter 2—in the draft Manual, and I was at the Ditchley conference in November 2009 on government transitions. I am not breaking any confidences here, as the list of people who were there from the Cabinet Office and the Palace has been published. Also, the director's report publishes the degree to which this was discussed. It was recommended that the Cabinet Office should do something in case the next election was hung. I was party to that discussion and I also helped in a tiny way on chapter 2 as one of the outsiders. So, if you will forgive me, I shall declare that interest.

Q75 *The Chairman:* That is very helpful. Thank you very much for doing so. In a way, it leads directly to the point that Lord Powell raised with the Cabinet Secretaries—that is, would it have been most useful simply to publish the chapter on the change of government, rather than the other areas which were described by Lord Powell as being slightly Janet and John?

Lord Hennessy of Nympsfield: Chapter 2 addressed the burning question of the hour, and indeed it was brought out ahead of time. It was an extraordinary way of proceeding—only the Brits would do it. It was refined during a 90-minute sandwich lunch in the Cabinet Secretary's office on 16 February, if I remember rightly, shortly before it was sent to the Justice Select Committee. But, again, that in itself was quite unusual because it brought in a number of outsiders. However, I think that Lord Powell's point was covered, because that is the bit that Gus O'Donnell realised had to be got out quickly. Indeed,

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it made a huge difference to those of us—I think that Lord Norton is included in this group—who had to impersonate the British constitution across the five days in May. If we had not had that scrap of paper to refer to, it would have been very difficult to explain the tacit understandings of the British constitution to tired journalists and, if I can put it charitably, somewhat inflamed political protagonists, some of whom thought that Gordon Brown was a squatter. This scrap of paper—I sound like Neville Chamberlain—made a considerable difference. That bit of contingency planning by the Cabinet Office was crucial. It is Janet and John in many ways, but when you describe the British constitution, not only is it Janet and John-ish but it doesn't draw the rapt attention of the nation. One has only to look at the benches behind us—the public is somewhat absent from our discussions. That is not to diminish in any way the significance of all this, because one of the virtues of the Brits is that they are perhaps not obsessional or nerdy about this, but they do like proper procedure. Going back to your first question, Lord Chairman, if in future something happens, it will be the Ministerial Code that the press will go for and the Cabinet Manual, first edition. If they had the Precedent Book, they would go for that too. Can I make a brief footnote on the Precedent Book? It has only been declassified up to the mid-1950s. It used to have about five chapters and it overlaps with this document quite a lot, if the 1950s one is any guide. The particular instances of behaviour that Lord Butler suggested made for racy reading are annexes, I think. If I may respectfully suggest, if you wanted to ask for the Precedent Book to compare the two, they can keep back the fruity bits and give us the nerdy bits. I think it would be a great advantage if that could be let out.

Q76 Lord Powell of Bayswater: I think we all agree on the importance and usefulness of Chapter 2; it served a dramatically useful purpose. My point was more whether it was necessary to attach all the rest. You have made a point on the public education side, but the public can educate itself from your books or Lord Norton's books. The danger is that it is rather ambitious to bring it all together and dress it up as a Cabinet Manual. Which Member of Parliament would not want to get into discussion of the Cabinet Manual? I think you are going to find that this will now become a tug of war between Parliament and the Executive. Parliament will demand over time a right to express views and, possibly, eventually to vote on the Cabinet Manual. That in turn could lead you down the path of a written constitution. Everyone who is involved with this says that they do not want a written constitution and that this is not a first step towards it. I am sure that it is not intended to be a first

step towards it, but do you not think there is a danger that it will lead us down that path?

Lord Hennessy of Nympsfield: The law of unintended consequences, yes. You may be on to something because, as they say at the beginning, the Executive want the Cabinet Manual to reflect, as far as possible, "an agreed position on important constitutional conventions". They probably do want our validation—I do not think we can give it to them for the reasons that have already been discussed—but this is a handsome offer to us which has never been made before in this country. Therefore, it is a moment of considerable significance constitutionally. The Executive has offered us—certainly when compared to the past—a plate-glass window into their world. I am not sure that when they gaze into our world they have got it entirely right. There are one or two other bits missing that I would mention if you give me the chance.

Q77 The Chairman: Do so now, please.

Lord Hennessy of Nympsfield: War and peace. After the Iraq war, the House of Commons had a resolution saying—I am not sure whether these are the exact words—that it was inconceivable that the precedent set, with three specific votes on the road to war in Iraq, would not hold in the future if time allowed. There was discussion when Gordon Brown became Prime Minister on whether or not we would have a statute equivalent to the United States War Powers Act, and it was decided that we would not. However, it stopped short with the resolution. It seems to me that that resolution should be reflected in here, and Salisbury-Addison should be, too.

Lord Hennessy of Nympsfield: Their view on what they think Salisbury-Addison is would be very interesting and timely for us. Admittedly, it was in the first weeks of the Attlee Government and it was specific between two parties—it was an agreement of its time—but it has mutated into a convention. Salisbury-Addison had never before been touched by a coalition, until May. Given what we have all been experiencing here recently, I think that would be all to the good. Money bills have been mentioned and it is very important that we have their definition of what they think are Money bills. Those are the main gaps that I would look to. I was fascinated by last week's evidence to you which brings in the human side of this—the human geography and, you might say, the emotional geography of the constitution. On a wider point, it reminded me of something that Lord Wakeham and Lord Adonis were talking about. Gladstone made a point in 1879 on the human side which I think still holds true. He said that the British constitution "presumes more boldly than any other the good sense and good faith of those who work it"—and the verb is "work it". That is what this is about, too. Those of you with ministerial experience or the quartet of

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Cabinet Secretaries we have just heard—the Amadeus of the British constitution, I thought they were—will know that it is the people who have had experience of working it, which I have not had, who bring that human overlay to bear, as your two witnesses did last week. It does not quite reflect that. I am not sure how you would phrase that in there, but it would be good if there was a Gladstonian acknowledgement—what used to be called, in a faintly sexist way, “the good chap theory of government”. The good chaps know where the lines are that you do not cross. That could be reflected in here as well, but that would stretch any draftsman or draftswoman and is perhaps asking too much.

Q78 Lord Shaw of Northstead: I would have thought that the simple question arising from what you have said is how far these discussions should be formalised in Parliament. We have had the New Zealand experience; would you wish to follow their example? I hope not.

Lord Hennessy of Nympsfield: Again, it is in the draft Manual and Lord Butler mentioned it. The idea is that it is updated as we go along. It used to be said that we make up the British constitution as we go along and call it being flexible. If there is a change between a Parliament being formed and dissolved it should be in here. As Clement Attlee famously said about the H-bomb, “It needs watching”. It really does. You cannot expect even a Committee as assiduous as this one to do a rolling audit on it. However, it might be an idea if once a year, albeit briefly, the Committee in the other place and your Committee do an audit on it to see if the moving parts have shifted. It will be affected by particular instances, and the big Bills we are seeing now will affect it when they become law.

Q79 The Chairman: If I understood Lord Shaw’s point, when we heard evidence from Professor Wilson, who had been very heavily involved in New Zealand, there was this formal process whereby a given Cabinet document—which was obviously different from administration to administration in some respects—basically had to be formally approved by Parliament at the beginning of each newly elected Parliament.

Lord Hennessy of Nympsfield: I think we would be reluctant to do that, because it is their document, not ours. We can be a running commentary on this and also, as Hugh Dalton called Treasury officials when he was Chancellor, we can be the congenital snag hunters. We can say, “That is not quite right. You have got that wrong. Would you kindly think again?”. However, I do not think it can be co-owned; I do not think that fits at all well with our system. I am with Lord Shaw on that one.

Q80 Lord Crickhowell: I was looking, rather unsuccessfully and hurriedly, through the evidence from Lord Wakeham. I think I am right in saying that he was entirely against a reference to the Salisbury-Addison convention because he saw this as getting us into an involvement of Parliament and the Cabinet Manual which he wanted to keep wholly separate. He felt that this was, as has been described earlier, an Executive guide. Once you start dealing with what he saw as a purely parliamentary exchange—yes, it involves the Executive discussing with the other parties in Parliament and so on—he thought we were on to dangerous ground. There are other areas at the moment where some would argue that the fact that there is an automatic guillotine in the House of Commons is having catastrophic consequences for the House of Lords. If you get that sort of exchange into the Manual, are not the separate roles of Parliament and the Executive going to become dangerously entangled?

Lord Hennessy of Nympsfield: I can see the force of that. The purpose of the Cabinet Manual is for the Executive, but it is for us to know what the Executive thinks are the moving parts of the constitution that impinge upon their work. As a very big moving part of the constitution in this House, if we think that they have got us wrong—that their version of Salisbury-Addison does not quite fit with what we think it should be, or what it might be if discussions take place, on the back of what we have been experiencing, to have another look at the work that this and other committees will be doing—it is very important that there is not a mismatch between what the Executive think the position is and what we think the position is because it would become inaccurate.

Q81 Lord Crickhowell: So you are suggesting that we have to have a clear description, without any suggestion that somehow there is any commentary on whether it is good, bad or needs alteration?

Lord Hennessy of Nympsfield: I am. But it is very difficult to do it because the Joint Committee of the two Houses that Lord Cunningham chaired on the conventions in 2006 produced a description of Salisbury-Addison and suggested that it should be a communication from our House to the other place and that they would then accept what we thought it was. That did not happen. Both Houses noted it, but nothing happened. With retrospect it is easy to say, but I thought that was a great missed opportunity. Out of recent events here, I hope that some serious thought and clarification will be forthcoming about Salisbury-Addison. That is why in a debate the other day I called for a Strathclyde-Royall-McNally convention. If we can do that, it will certainly have to be in here because, above all, it has got to be realistic; it has got to be a portrait of reality rather than wishful thinking or Janet and John or Blue Peter—a “Here’s

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one we made earlier, isn't this jolly?". It must not be like that at all.

Q82 Lord Norton of Louth: Part of the problem, of course, is that quite often there is nothing made earlier. I want to pick up on some of the points you have made and draw them together. The Manual itself is not working on a blank canvas; there is certainly material out there. There are various texts you have written about the constitution and there are also quite substantial texts on constitutional and administrative law. So much is already in there. It is well sourced; you can take it from the shelves; you can get the precedent. The question therefore becomes: what is the value-added element of the Manual? Would you agree that that value-added element has to be balanced against the potential for legal challenge of something that is embodied in the Manual? So as long as there is a concern that there might be a legal challenge, it is sort of bouncing up the tube. Is the value-added element such that it is worth having the Manual and outweighs that potential threat of being subject to judicial review?

Lord Hennessy of Nympsfield: I think it is, in terms of transparency. There may well be unintended consequences and a great deal of bumping and grinding, but in an open society it is a good idea to know what the assumptions are and to have the tacit understandings made to some degree explicit. My friend and colleague Andrew Blick did this taxonomy of the sources that you have before you—60 per cent of it conventions. Conventions are always tricky because they require continuing consent, and if consent is withdrawn by one party to a convention you are in trouble. Twenty per cent statute; 10 per cent international law; and 7 per cent that extraordinarily mysterious but important notion of the Royal Prerogative—it is not a notion, it is an entity. The Ministry of Justice can never put down on paper what is prerogative and what is not. Every time it tries to do taxonomy it melts like snow in April. We then have rules and codes with a statutory back up, 1 per cent; and international conventions, not treaties, 1 per cent. Andrew Blick's work was illustrative of the multiple sources in here. I also accept your point that it would be a good idea to have footnotes. I know that you and I live or die by footnotes in our trade but it would be a very good idea to have that so that we know the sources.

Q83 Lord Norton of Louth: Coming back to the point that you have made, given that very useful taxonomy of where the material comes from, is it really a value of transparency or simply a matter of convenience?

Lord Hennessy of Nympsfield: I think it is both. It is a great service to us. It has concentrated our minds to the extent that both Houses of Parliament are having

a proper investigation into this and will keep an eye on it. It has thrown into relief certain gaps and problems. Perhaps I was too unkind when giving evidence in the other place when I said that it is not set to the "Sound of Music"; the Cabinet Office corridors are not alive with the sound of music on this one—but, there again, that is not what they are there for. It is very practical. We have not yet come, as we may do, on to whether it is the beginning of a written constitution. There is nothing declaratory; there is no golden prose of aspirations that we hold these truths to be self-evident. Its very prosaic nature—which is not a criticism because I am full of the admiration for the work that has gone into it—is not only very British but also what you would expect from this. The bit about proper Cabinet discussions is hugely aspirational because, as we know, in the past when *Questions of Procedure for Ministers* was declassified, if certain of the commanding Prime ministers that we have known in our various capacities were in full cry and a Minister said, "Well, paragraph 1 of *Questions of Procedure for Ministers on Cabinet Government* says the following", it would not have gone down terribly well. I cannot imagine any single secretary of state, however robust, doing that. That is the Blue Peter bit. I am a great believer in collective Cabinet government. If short cuts are taken with it, it always ends in tears. So I am very pleased with that chapter, but those of you who have been on the inside and know what it is actually like in tough times with a commanding Prime Minister, know that it is Janet and John on stilts, as critics might say.

Q84 Lord Hart of Chilton: You said earlier that it was desired to have approbation of this Manual, which, as we have all agreed, is for the Executive by the Executive, and that parliamentary approval does not come into it. Just for the record, I think the New Zealand position is not that there is parliamentary approval; it is that in every Parliament, the Cabinet reaffirms the Manual, subject to change, but it never goes to Parliament. Here it is not suggested that it should go to Parliament, even though the wish to have approbation of it could and, in certain circumstances, would lead to conflict between propositions put forward in the Manual and the views that parliamentarians may have of it.

Lord Hennessy of Nympsfield: It turns on that sentence that I quoted a moment ago, "an agreed position on important constitutional conventions to reflect as far as possible". I do not know if you are calling Sir Gus O'Donnell to give evidence, but it would be nice to know precisely what they had in mind for that. If we were drawn into that, it would be like a rolling permanent Magna Carta. We would be asserting and de-asserting things and so on, which would be terrific for me and my students—it would be a Keynesian

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make-work scheme of glorious proportions—but we do not want to get into that circumstance.

Q85 Lord Powell of Bayswater: I was going to come back to the same question as Lord Hart. First, if you have the New Zealand document always cited as the great model and the New Zealand Parliament approves it every time there is a new Parliament or a new government, and if you include in the Cabinet Manual a lot of stuff about parliamentary procedures and conventions—the evidence we have heard today suggests there should be more about that in the Manual—it seems inevitable that Parliament will steadily move, perhaps justifiably, towards a claim to approve it. Your aim of it not being co-owned by the Executive and Parliament cannot in the long term be realised because Parliament will have a claim to a document called the Cabinet Manual, which has also comments and descriptions of its own procedures. How can you avoid that?

Lord Hennessy of Nympsfield: Maybe we cannot. It would be a great inconvenience to the Cabinet Office and the Cabinet of the day and the Prime Minister of the day if we said, “Push off. We do not accept any of this. It is your draft. Thank you for sending it to us”. Maybe we will be drawn into that and maybe we will get used to it. Parliament in the past 30 years has become much more attuned to constitutional questions. The select committees of both Houses have done enormous work in getting involved in these discussions. When I was first a journalist watching Parliament, they very rarely got involved in any of this. We have come a long way. Maybe that will be an organic change, but it will not be an easy one. There really will be bumping and grinding.

Q86 Lord Pannick: I, too, am concerned about this whole issue of co-ownership and I agree on the problems you have identified. I am also concerned that we will have a document which, as you said in your opening remarks, will inevitably be highly influential in setting the terms of debate and providing easy solutions to complex problems as perceived by outsiders. And yet this document will be controlled and governed by the Executive, and the Executive, therefore, will be setting the terms of that debate. That does concern me.

Lord Hennessy of Nympsfield: Indeed. But most of us—I cannot speak for anybody else—feel that the Executive has tendencies towards over-mightiness at the best of times. In recent years, despite the post 1997 constitutional changes, all of which I was in favour of—as I was of the 1979 House of Commons Select Committee system—the balance of advantage is still with the Executive. If we engaged in tussles and asserted ourselves using this as an instrument, maybe

that would be beneficial. Maybe they have opened up a front, without realising it, for a better balance between the legislature and the Executive. Maybe it will be a better thing after all, but I share everybody’s anxieties.

The Chairman: You said right at the beginning that you were part of the sandwich lunch gathering that produced this crucial chapter 2, which of course does lead to a great deal of discussion about not only the principle but the wording around the resolutions of the Prime Minister resigning at what point, which we discussed a little with the Cabinet Secretaries. I know, Lord Norton, that you have a question on that point.

Q87 Lord Norton of Louth: It is really on Cabinet formation and how it has changed between 1974 and 2010; indeed, on how the wording has changed in the draft, compared with the original chapter that was prepared during the election itself.

Lord Hennessy of Nympsfield: It is a remarkable change since 1974. Lord Armstrong’s memorandum is a fascinating document, including the human side. It is not just a constitutional fund of experience, it is a moving document. I remember talking to Lord Charteris, who was the Queen’s Private Secretary at the time. If I remember rightly, the Queen flew back from Australia on the Friday. Martin Charteris said it was a “very dicey weekend” and recounted how he walked through St James’s Park with the Cabinet Secretary, and Lord Armstrong who was the No.10 Principal Private Secretary working out what the constitution was. They rang up two authorities. It is always an Oxford number—it was 0865 then—the first was Sir Jack Wheeler-Bennett, who said, quoting Arthur Balfour, “No Parliament can long survive on a diet of dissolutions”. In other words, we are not going to have multiple dissolutions. They also consulted Robert Blake. That is the way it was done—a couple of phone calls and get the files out. We have moved a long way since then, and that was really unexpected. It was not quite a bolt from the blue. It was structured busking. I think they did it very well, but we have shifted from that, and it is as well that we have, given what happened last May. It may be that coalition-ism will now become part of the more familiar menu of British political choice of the current generation. It is an entirely good thing that we have moved from the 1974 position. Even more amazing is that in 1964—there is a file in the Prime Minister’s office files—Derek Mitchell, the Principal Private Secretary at No. 10, realised in the small hours of, I think, 17 October that the outcome might be inconclusive. He drew up what the options were. The registry rushed to get the files, and then he did a little diagram, which I reproduced in one of my books, about who you ring up, who you send for and who has to be consulted. It was the classic back-of-the-envelope way of doing it; but we cannot rest on

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the back of the envelope. We could say that it has served us very well in the past by not being overprescriptive, but that era has passed. I also think the refinement between the version that was given to the Justice Select Committee before the election and paragraph 50 of this one is necessary. It makes explicit what was implicit in the draft that went to the Justice Select Committee. That is all to the good. This has entered into the warp and woof not just of the constitution, but the bloodstream of the commentariat. If we go through another inconclusive result and the parliamentary arithmetic is tricky, we will be much better primed on this than we all were before. So it is all to the good.

Q88 *The Chairman:* I am coming to Lord Renton, but on that specific point, one of the Cabinet Secretaries—I am sorry, I think it was Lord Armstrong—said that they thought, in the context of that paragraph, it was wrong that Mr Clegg’s point was recorded.

Lord Hennessy of Nympsfield: It should not be there. I suspect it is there because he is chairing the Home Affairs Cabinet Committee which did the work on this. I do not want to be unkind to him, but he is not Dicey on stilts, is he? I take that back. I know you can’t expunge it from the record, but that footnote stands out in a very odd way—if I can put it tactfully. It would be better if it were not there.

Q89 *Lord Renton of Mount Harry:* Just to share a little bit of history with you, I became an MP on 28 February 1974. I remember very well three of us for the following two days trying very hard, on instruction, to talk to Liberal MPs, to see whether we could get them into a coalition. It was my entrance into Parliament. You heard what was said earlier in relation to paragraph 50. Do you pretty well agree with what the four witnesses were saying? It covers the case well enough, does it not?

Lord Hennessy of Nympsfield: Yes. The death in office contingency is very interesting. When Churchill had a stroke in June 1953, and it was thought that he might not last the weekend, the idea was that the Queen would be advised by the senior privy councillors to send for Lord Salisbury, as an interim, because Anthony Eden was in Boston, I think, waiting to go under the surgeon’s knife. All of that is in the archives. But that, again, was a very different era. In 1976, Harold Wilson was the first Prime Minister to signal an intention to resign in the middle of a Parliament. He was leader of a party where votes were taken for the leadership. In 1963, as you will remember, your party still did not have votes—leaders emerged. Ken Stowe, who was then the Principal Private Secretary at No. 10, and Martin

Charteris in the palace came up with what I later christened “Stowe’s concentric circles”. They had a proper discussion on what the constitution should be on this, because the circumstance was unprecedented. The concentric circles are these: a Prime Minister remains Prime Minister until he or she resigns, which is the same as this, and the alternative Prime Minister is obvious only when the party concerned, after however many ballots are necessary, has chosen its leader. By becoming the leader of a party in circle one, you immediately trigger command of the House of Commons in circle two, which immediately triggers the Queen to send for you to ask you to form an administration. The Lord Chairman’s father was the one who triggered the Stowe-Charteris concentric circles. Again, it was a classic example of what Philip Ziegler once called the “golden triangle” that looked after these things—the golden triangle being the Queen’s Private Secretary, the Principal Private Secretary at No. 10 and, usually, the Cabinet Secretary. It is priming the pitch, not in a Civil Service power-grab way, but trying to make it fit with past precedent and practice. So the entirely unusual circumstances in 1976 set the position. It was quite difficult for some. I think Enoch Powell was very critical when John Major had his “put up or shut up” leadership election. That was quite tricky. I cannot remember his exact words, but Enoch Powell was very critical of the Prime Minister of the day for doing that, because he thought it did not fit with the constitution, and a bit of a row ensued.

Q90 *Lord Renton of Mount Harry:* That is quite true. But do you feel now that what is in the draft code is adequate, not only in terms of death, but in terms of a leadership election in a party, just like in 1990 which I mentioned earlier, when, you know, Margaret wanted to go on, but felt after a day under advice that she couldn’t because she had not got enough votes?

Lord Hennessy of Nympsfield: It may be a good idea—I had not thought of it until listening to the Cabinet Secretaries and your questions to them—if the contingency of resignations within a Parliament is covered. Also, although it is a grim thing, it should cover the demise of a Prime Minister. There are quite a lot of files declassified now in the National Archives called “Demise of the Crown”, which are essentially procedural. The files which I do not think have been declassified yet are for the Regency—heaven forbid. King George VI’s death, even though he had been very ill, took people by surprise. Sir Norman Brook, the Cabinet Secretary of the day, who was a great continuity man of the British constitution and everything else, really, set up a special committee to make sure that there was a procedure for the demise of the Crown. It had not occurred to me until I listened to you and your witnesses earlier, but a

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couple of extra paragraphs on that would be all to the good.

Q91 Lord Renton of Mount Harry: You also made the point about electronic news in one of your earlier answers. Everything now happens very much more quickly and everyone expects an answer. You know—the Prime Minister resigned yesterday evening and there are demands almost straight away. You need to know who is going to be there, because of the internet and so forth. That also seems to make it that much more difficult in relation to waiting for a party to have a leadership election and all that. But I do not see that there is any way around it.

Lord Hennessy of Nympsfield: No, I don't. When you think of the economic circumstances that we could be facing—and that we were facing in May—with the bond markets looking at us with a great deal of intensity, many will say that the clock was ticking. Although many say that the five days was tremendously rushed compared to continental systems, it was pretty precarious. It is difficult for us, because we are used to clean breaks. David Butler called them “civilised evictions”, although they do not always seem entirely civilised to those who are going through them. Our political nervous system is attuned to quick, clean breaks with no interim and no handover period. It may be that we have learnt from the five days in May, but the markets are pretty unforgiving. The clock does tick. In the days of the floating pound it is easier, because one of the great worries when King George VI's secretary, Sir Alan Lascelles sent that letter to the “Times” under a pseudonym, which is the way they did constitutional change then, was the precarious economic position, and there were fixed exchange rates. Again, that world has changed. Going back to the transparency question, it is all to the good that 60 years on from the Lascelles letter explaining the constitutional position, it is much better to have a thing called the draft Cabinet Manual than a pseudonymous letter to the “Times”, is it not? I make an obvious point.

Q92 Lord Norton of Louth: Paragraph 59 states, “Although they have not been exercised in modern times, the Sovereign retains reserve powers to dismiss the Prime Minister or make a personal choice of successor, and to withhold consent to a request for dissolution”. Is that an accurate statement of the constitutional position?

Lord Hennessy of Nympsfield: Yes, I do think so. Lack of use does not mean demise.

Q93 Lord Norton of Louth: It comes back, perhaps, to the point we were making earlier about the demise of the Prime Minister, if there has been no agreement as to how that should be handled.

Lord Hennessy of Nympsfield: Yes. One of the most extraordinary versions I have ever seen—although it has not been declassified yet—is if World War III had come. The Prime Minister and the inner War Cabinet would have gone to a particular bunker—under Box Hill, during the Cuban missile crisis—and the Queen would have been on the Royal Yacht in the sea lochs, out of the reach of Soviet radar. You had to keep the Queen separate from the War Cabinet, because the War Cabinet's bunker would have been very obvious to the Soviets. The moment the signals traffic started pouring out of it they would put an H-bomb on the top and seal them in. The Queen on the yacht, with her Private Secretary and her husband—both Privy Councillors—and the Home Secretary, in the mid-60s, attending, is a quorate Privy Council. Out of the rubble, if she could find a living politician, she could make him or her Prime Minister. The beauties of the constitution, including those prerogatives, were taken care of unto Armageddon.

Q94 Lord Norton of Louth: Would you agree that that case illustrates the dual nature of the document? It is called the Cabinet Manual, but part of it is actually guidance with an index of how officials should proceed—enforceable through, say, the Cabinet Secretary. That part which is to do with the overall operation of the constitution, is therefore not enforceable by the Cabinet Secretary, but is material on which the Cabinet Secretary would provide advice to the Prime Minister on what the constitution is.

Lord Hennessy of Nympsfield: Yes, absolutely. The Cabinet Secretaries and the golden triangle of the day are the continuity men and women of the entire system—the repository of knowledge. They also send for the files. To a degree, this, together with Questions of Procedure, is the first time that there is an element of sharing of this. This again is all to the good. Returning to what I said earlier, I do not think that this is a Civil Service grab, I really don't. I can see why some people might suspect that it could be. I noticed that the recent Prime Minister Tony—no, it was, I think, Lord Powell's brother who said that getting the Prime Minister to do the last-resort, nuclear retaliation letters was a bit, in a way, of the Civil Service asserting itself. I don't agree with that. I am rather relieved that Prime ministers do that sort of thing in the first few days of their premiership, if indeed we remain a nuclear weapons state. I have often been accused of being soft on Permanent Secretaries. It may be that that is true—someone has to be well disposed towards them in an unkind world—but I do not see elements of the Civil Service power grab, because, in many ways, it is doing what the Civil Service does best, which is pulling things together. Also, the Civil Service attracts very tidy-minded people. They like things to be orderly, understood and with process. They are natural

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creatures of process. I am sure that those human factors are very much behind all this.

Q95 Lord Powell of Bayswater: You have to remember the context of one of the Cabinet Secretaries criticising something he called sofa government, thereby establishing a sort of Civil Service view of the conduct of the Prime Minister and ministers. That is now embodied in the Cabinet Manual. As I think I said in an earlier session, I am not sure that all Prime ministers would accept that as being the right way to run a Government or the best way to run it; but there it is, embodied in the Manual.

Lord Hennessy of Nympsfield: I can see that, but as I said in the debate that we had the other day, the Civil Service is almost always entirely herbivorous to a man and woman, and herbivores like due process and collective discussion, proper papers and proper minutes. I am a fully paid-up herbivore myself, Lord Powell. I prefer it that way. In practical terms, I think that it always ends in tears if you take shortcuts with

collective Cabinet government. It is only a matter of time, because the Gods of politics are wrathful gods.

Q96 The Chairman: That sounds a very apocalyptic statement—it is the “let these truths be self-evident” type of statement we should end on. It is certainly very resonant. Do other members of the Committee have anything further they would like to raise with Lord Hennessy? Thank you, Lord Hennessy. I do not know whether there are any points that we have failed to cover, either with you or in the previous discussion, which you kindly sat in on, or whether there are any obvious gaps in our pursuit of this issue.

Lord Hennessy of Nympsfield: Some have come to me, thanks to hearing your discussion, but I cannot think of any more at the moment. If they do come to me, I shall write a note.

The Chairman: That would be very kind. Thank you so much for your time and for generously waiting while we finished the discussion with the previous group of ex-Cabinet Secretaries.
