

Procedure Committee

Oral evidence: Definition of parliamentary proceedings, HC 1325

Wednesday 17 March 2021

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Members present: Karen Bradley (Chair); Kirsty Blackman; Jack Brereton; Bambos Charalambous; Sir Christopher Chope; Nigel Mills; James Sunderland; Suzanne Webb.

Questions 1 - 31

Witnesses

I: Chris Bryant MP, Chair, Committee of Privileges; Sir Bernard Jenkin MP, Chair, Liaison Committee; Eve Samson, Clerk of the Journals, House of Commons.



Examination of witnesses

Witnesses: Chris Bryant, Sir Bernard Jenkin and Eve Samson.

Q1 **Chair:** I welcome everybody to this afternoon's evidence session. As a Committee, we are looking at the definition of proceedings of Parliament. It is therefore very informative for us to have these witnesses before us today: Eve Samson, Clerk of the Journals; Sir Bernard Jenkin, Chair of the Liaison Committee; and Chris Bryant, Chair of the Committee of Privileges. The Committee has been looking at and assessing what would be the most appropriate way to codify the issues.

If I may start with you, Eve, perhaps you could talk us through the general issue. Then I will turn to Sir Bernard and Chris for examples and their thoughts on it and where it has come up in the Committees they chair.

Eve Samson: The issue crystallised in the pandemic when we had to start using modern communication methods a lot more, but as a troubling issue it predates that. The general principle is that proceedings in Parliament shall not be "impeached or questioned" in "any court or place out of Parliament." It is a fundamental constitutional principle and a piece of legislation that dates from the 17th century. The problem is that proceedings are not defined, and indeed cannot be defined, because if you are dealing with something that lasts over centuries the way we communicate inevitably changes over time.

We have a prospect where we know for certain what proceedings are. We know that formal discussions like these with a Hansard reporter are proceedings, whether or not the Committee is in public or private; we know that for a Committee meeting privately to be a proceeding it must have only staff and advisers there, and there is a great mass of things in the middle where we do not know whether or not they are proceedings. In the past, our practice has been to assume they are not. I think that is dangerous. We will be drawing the net of privilege ever narrower, just as communication methods get wider and more varied, and just as Committees are increasingly reaching out to lots of people who do not necessarily want to sit round an evidence table in a formal setting, or be immediately on the internet on Zoom.

As for the definition, it is ultimately for the courts to decide what proceedings are, but interpretation of article 9 of the Bill of Rights is evolving. One of the things that the courts will look at in connection with Parliament is what Parliament thinks its privileges are. They are not determinative, but the courts are willing to look at them and see what the parliamentary view is.

It would be really helpful if the Committee and the Committees of the House could come to a view on whether it wishes to be restricted to the current position or take a step back and acknowledge that communications methods and contexts have changed radically since the



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last time anything was done about proceedings. That was in 1852 when the House passed two Standing Orders. One was the entry on the record of evidence of a Select Committee: "That the names of Members present at each sitting of a select committee shall be entered on the record of the evidence, if any," and the other was an entry on questions asked: "To every question or series of questions asked of a witness in proceedings of a select committee, there shall be prefixed the name of the inquiring Member." That was in response to the fact that about 50 years earlier shorthand had got a lot better so you could now have transcripts, and possibly now we ought to accept that we have the internet and other forms of communication.

Chair: That is very clear and sets out the issues. Sir Bernard, could I bring you in?

Sir Bernard Jenkin: You were asking about examples where Committees are having difficulties. Like you, we have had a little difficulty in engaging Chairs actively on this topic. I do not think that is at all surprising because everyone is so busy. Until they come across something that really causes an issue, it is not an issue. The Petitions Committee in particular engages with a very large number of people on quite an informal basis, far more individuals than would be practical in the form of formal evidence, so how to manage all those raw submissions, emails and signatures on petitions is a complicated area.

The Committee also holds online virtual discussions with a number of high-profile stakeholders and they take place outside the normal bounds of the Select Committee. They cannot be reported as evidence, so I do not imagine they can be privileged, but it favours being able to accept video as evidence and, therefore, privileged. It is very important to be clear, particularly when engaging with members of the public, that there remains a choice—whether it is privileged or not is a separate matter—as to whether or not it is published. With the ease of submitting evidence now electronically and digitally, I think Committees are being much more careful about what they publish, so that they do not just provide a platform for people to slag off other people.

My own experience as chairman of PACAC was that we did quite a lot more informally than previously. I think in particular of the Kids Company inquiry where people were not prepared to talk in public, but were prepared to talk privately. I think that is a grey area. I would like to think that taking evidence in private informally counts as evidence, and that whatever note is tabled is protected, and the people giving evidence under those circumstances are protected, by parliamentary privilege. Those are the kinds of issues that arise.

In particular, the Chair of the Science and Technology Committee, Greg Clark, is strongly in favour of taking video evidence. I would have thought that where people are dealing with more technical subjects, where you would expect a presentation, perhaps a PowerPoint



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presentation or a video, to explain something technical, that should be able to be taken as evidence.

Chair: Thank you, Sir Bernard. Chris?

Chris Bryant: If I go down a slightly different route, I hope that is okay, Chair. I draw a distinction between proceedings in Parliament and proceedings of Parliament. The concept of proceedings in Parliament makes people think that it is something that physically happens in the parliamentary building and somehow that is what grants you privilege, but lots of meetings happen in Parliament with lots of members of the public at them, and they are not proceedings of Parliament in any sense at all.

It is important that we have privilege, and that it extends to a fairly substantial degree; otherwise, you cannot ensure freedom of speech, which is essential to the way we do our business, but I am conscious of it being abused over time. I thought that John Hemming was abusing parliamentary privilege when he broke a court injunction. Whatever the rights and wrongs of the individual case, I thought that was inappropriate. I think a question is whether it should be possible to strike something from the record so that it no longer has parliamentary privilege. There is a question, I think.

I have sat on several Select Committees in my time. When I was on the Culture Committee, we were very aware that some people who wanted to give evidence to us intended to use parliamentary privilege for their own purposes, which I would argue was, in the end, a contempt. We had to be very careful about what they were allowed to say. The charring of anything that will attract privilege is really important; you have to be able to stop some areas of inquiry, otherwise it is an abuse of parliamentary privilege.

It is important that we are able to innovate in this field. To go back to the early 19th century, before the 1840 Parliamentary Papers Act lots of committees of inquiry were run by the House on such things as the prison system and the policing system. For instance, the one on Newgate absolutely required that the evidence being given had parliamentary privilege attached to it, because even though it was the ordinary—the chaplain of Newgate—and the governor himself, they were basically showing that the prison was breaking the law, and they needed protection to be able to say that in a parliamentary inquiry.

I pose two questions. I think it is standard practice that any emails that go out between the secretariat of a Select Committee and the members of the Select Committee about potential questions that might be asked are privileged. I think that is established, but what about the WhatsApp groups that I guess go on in every Select Committee? Are they privileged or not? I do not know.



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The final question is about all-party parliamentary groups. They have a kind of imprimatur because the word “parliamentary” is there, but I would not myself consider them to be a proceeding of Parliament, because there is no sense in which Parliament has expressly sanctioned them.

Q2 Chair: But you often find witnesses who think they are addressing Parliament and, therefore, may feel that they have more licence to speak freely than perhaps they would otherwise.

Chris Bryant: Which is why some clarity is needed. It is vital for the individual giving evidence that they know on what basis they are giving that evidence or speaking frankly.

Q3 Chair: Do any of the witnesses want to add anything in light of those comments?

Eve Samson: Some of them are quite clear. First, all-party parliamentary groups are not privileged. The point Mr Bryant made about clarity is exactly the reason why I have raised this. It is increasingly the case that we do not have clarity on novel approaches, which means we have to assume that the only thing the Committee can do that is privileged is something it has done before. That seems unsatisfactory, but the House could give more clarity.

On things like WhatsApp groups, the issue is not the medium but the message. I would say that a WhatsApp group discussing things that are very close to privilege is itself privileged. A WhatsApp group that strayed into “Where are we going out to dinner?” or logistics for a particular inquiry would not be. I think the distinction between “in Parliament” and “of Parliament” is quite good. Select Committees have been given a job to do by the House and where they do it varies. As Mr Bryant said, they can go on visits to prisons; they can even take evidence overseas; but that does not stop it being what we term a proceeding in Parliament.

Chris Bryant: Of Parliament.

Sir Bernard Jenkin: I think Eve’s adage about it being the message, not the medium, is a very good adage in terms of what is and is not privileged. That means you cannot categorise certain forms of communication as being privileged or not privileged unless they are very clearly proceedings in Parliament, like giving evidence in a public session of a Committee. There needs to be a way of sorting the wheat from the chaff, and I guess that is one of the things you are looking at.

Secondly, if I am correct, there was a principle established by the Duncan Sandys case in the 1930s when an MP was arrested on his way to Parliament and what was in his briefcase was regarded as a breach of the Official Secrets Act. He was prosecuted and he argued, “I was on my way to make a speech in the House of Commons using these papers and, therefore, these papers are proceedings in Parliament.” The courts upheld that understanding. Eve will correct me if I have got the history wrong.



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The important question is what a Select Committee is doing for a purpose. What we want is a system where, if the Speaker signs under either section 34 or section 36 of the Freedom of Information Act—Eve, remind me—a certificate of effective conduct of public affairs, which exempts advice to Ministers for example, the courts will have confidence that that is a reasonable certification and will want to uphold it.

The point I want to land is that Eve's caution about what we currently assure people is privileged is very understandable, but we do not want that to define what the courts understand to be privileged. If we are receiving cautious advice, we do not expect the courts to say, "That means they don't think that is privileged," because we will find the privilege net closing ever more upon us, and less and less will be privileged. Therefore, we need the House, by resolution or by adopting a very clear report, to redraw the boundaries of what is in the exclusive cognisance of Parliament and what falls outside.

Q4 Chair: We have a WhatsApp group, as you can imagine. One of the comments is from a Member who cannot speak today, unfortunately, but is listening in and asks, "How much do witnesses understand privilege and how much do they know?" All the things that are being stated and said, we need to make real and understandable for people. Eve, you were waving to come in.

Eve Samson: I realised that I had not picked up Mr Bryant's excellent point about the misuse of privilege and the need for a firm Chair. That is why in my paper I suggest that one of the definitions, when you are thinking about what you think should be privileged and what should not, would be the Committee's or the Chair's power to withdraw permission to speak, cut somebody off and, if necessary, eject them from the room. It seems to me that a public meeting where anybody can turn up and say anything they like is not by definition privileged, even if it is called by a Committee.

Witnesses understand; indeed, they are often quite surprised when they get cautioned by Committee staff that they should not rely on privilege as much as they wish to, because the Committee does not necessarily want them breaking court orders all the time, or being rude about people on the record, or because if they are from a foreign jurisdiction parliamentary privilege will not help them, or because of the rules about effective repetition. It is what you say to Parliament that is protected. If you maliciously repeat that outside, you have no privilege protection. As I say, witnesses are surprisingly aware of privilege; equally, they are frequently surprised by quite how narrow it is.

Chair: Bambos Charalambous has a problem with his camera, so we may be able to hear him and not see him. Can I bring you in, Bambos?

Q5 Bambos Charalambous: Thanks, Chair. I was interested in Chris's example of Select Committees going to a prison to take evidence from people there. I did just that about two years ago. I went to Birmingham



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jail when they had a problem with their estate. I do not know what status those interviews had.

Sir Bernard, is this an active problem now? Is it something that exposes the work of Committees at the moment, or is it something that you anticipate will be a problem in the future?

Sir Bernard Jenkin: I am not aware of any particular issue that has arisen, but unless we maintain the boundaries and are clear about them, and keep renewing our understanding with the courts of where the boundary lies, we will find that the boundary has disappeared. If we allow it to fall into what they call desuetude because we do not think it is an issue, suddenly one day we will wake up and find that we do not have that privilege anymore. It is very important that we maintain the boundaries.

Chair: Eve, do you want to come in?

Eve Samson: Two things were thrown up by the pandemic. The first was that Committees were meeting privately with Ministers on Teams. They had to do that because at the beginning of the pandemic we did not have resources for Hansard and for broadcasting to be ramped up. A note was taken and published, but the advice we had to give was that the private meeting with a Minister was not a proceeding. It seemed to me to be very peculiar advice that it wasn't a meeting because, although a recording was made and a note was taken from the recording, it was not transcribed. I have told you about the Standing Order on transcriptions. That seemed odd to me.

The other thing is that one Committee wanted a closed internet group where it had a conversation with invited experts. Therefore, only the Committee, its staff and the invited experts had access. In the past, we would have said that was not a proceeding. I said, "No. What we are going to say about that is that we don't know whether it is a proceeding. We are not going to say it wasn't," because we would be doing exactly what Sir Bernard said. If we say it is not a proceeding, we are self-inflicting the narrowing. It probably is a proceeding; it is a private conversation of the Committee directly related to an inquiry, but I have no authority on which I can say that other than common sense.

Q6 **Bambos Charalambous:** So, as things stand now, it is a problem.

Eve Samson: The Committees are curtailing what they do. If you wish to do something that is privileged, this is the way you have to do it. For example, if you have a roundtable discussion, say, with a tape recording of people who have non-disclosure agreements and you want to discuss, in quite a sensitive way, those NDAs, which might be about quite sensitive things, you take a recording, because it is important that there is some sort of record, but you do not do it with listed questions. It is more of a conversation. We would have to say now that that is not a proceeding. It seems odd to me.



Chris Bryant: In a way, the Zircon affair in 1987 might be a bit more relevant. Some Members wanted to show a film in the Palace of Westminster that might have been deemed a breach of the Official Secrets Act. They hoped they would attract parliamentary privilege by doing so. In the end, the court refused to intervene so as to allow the Speaker to take a view. The Speaker decided that it could not proceed, and it was decided that the showing of a film in Parliament did not attract parliamentary privilege. A modern version of that could be all sorts of different things, couldn't it? I think we would need to change the rules.

In my head, there are four things that I think are necessary for something to attract privilege in that way. The first is that there is a decision either by the House or a Committee that the event is part of their business. Secondly, there is a clear understanding on the part of those who are participating of the nature of the rules governing how they participate. Thirdly, there is proper chairing or invigilation of some means, so that there can be no abuse of the right of privilege. Fourthly, there should be some proper record or recording. I do not mind whether it is a transcript or a recording.

Q7 **Jack Brereton:** As you have detailed it, the current structures in which we operate are based more on precedent in many cases. Even, do you think that there could be a greater risk in codifying and putting more into the rules? Would we potentially risk restricting ourselves more, and not having the flexibility we currently have? We have seen more recently, with the challenges around the pandemic, that we have been able to adapt, and a lot of what we see is subject to interpretation at the time. Would you suggest that, if we codified more of it and moved further away from our current approach, it would potentially risk restricting us more in our abilities?

Eve Samson: I totally agree that you cannot codify what is a proceeding, because things change, but the pandemic response was based on the rules. The reason I am able to sit here now and talk to you on Zoom is that the House passed an order allowing the Speaker to authorise Committees to communicate via electronic means. Before that, we would not have been able to meet like this. The problem would not have been me appearing, because witnesses could videoconference in; it would have been that Committee members could not dial in. While I agree that we have to be quite careful, in this area the effect of not considering the rules is that we are stuck; if we want privilege, we have to have a formal meeting with a transcript if we want to be confident that something is privileged.

It is absolutely fine if Committees think that will do, and there is no need for roundtable meetings and they do not need that flexibility, but I think Committees are already to an extent chafing at the bit about it. It does not come up because Committees arrange their business in ways that work within the existing confines. Can I add that I thought Chris Bryant's principles were excellent?



Chair: Thank you. Bernard or Chris, do you want to come in?

Sir Bernard Jenkin: I agree. I thought the four principles brought out by Chris are absolutely right. To clarify, when Bambos asked whether there is anything urgent now, I took it to mean whether we were being attacked by a court in any particular area. I cannot think of anything that has happened recently. As to whether Committees feel that a proceeding they are engaged in is privileged or not, I think that is giving rise to anxiety.

The WhatsApp issue was raised recently. I come back to the adage that the message and not the medium is what matters. There needs to be clarity that, if what you are doing is contributing directly to the work of Parliament and will be used in a formal proceeding of some form, it should be privileged. We want people to feel that, if they are talking to us in private about things that are the subject of a parliamentary inquiry by a Committee, what they are saying to us is privileged and they do not need to be subject to some controlling injunction. It is like speaking to a public inquiry except that they are talking to us in private, or as if they are talking in court but they are talking to us in private. They should have that freedom of speech.

Q8 **Nigel Mills:** Can I get clear in my head all the situations where we think there might be a bit of uncertainty? I want to ask about video evidence. I think the Petitions Committee raised it. Is that where someone, rather than submitting written evidence, submits a video of themselves making a presentation or speaking about a subject? Is the big concern we have there that technically that video is not covered by privilege, but if it had been transcribed and sent in written form it would be? Eve, you are nodding.

Eve Samson: Yes, I think that is the case, although I have to raise a caution because there are two issues. One is the privilege attached to video evidence. I do not think there would be any problem if the House just said, "Yes, we accept video evidence." The other thing is publishing it, which technically is harder than you would think, but that is different—a second-order question. We could not even be certain, as it stands, that the House would consider video evidence to be privileged.

Sir Bernard Jenkin: I am very happy for you to have the letter that the Petitions Committee sent. It talks about hybrid and virtual Committee proceedings making it easier for Committees to hear from witnesses who have been reluctant or unable to come to Westminster. Bear in mind this is very much about giving the public access to Parliament: "For petitioners who may want to tell us their story but not be part of detailed scrutiny of policy proposals it has been possible to hold various panels with them online." This would seem to be a good thing for the Petitions Committee to be able to do, but if they do that within the present framework it is not privileged. Whether or not they choose to publish that is a separate matter. I imagine they are not published, but it would be nice to be able to assure members of the public that they can raise their



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issues. Suppose it is a petition about fire safety in tower blocks and the negligence of local authorities or fire authorities. Having petitioned for a debate in Parliament, they do not want to be in a position where they could be sued for what they said in private to a Select Committee.

Chris Bryant: The Foreign Affairs Committee regularly holds a formal session every week, broadly speaking, but it probably has about five or six informal sessions when the Chair meets the ambassador of X, and it is an informal discussion. I would not want all of those meetings automatically to have parliamentary privilege attached to them. There needs to be a mechanism whereby if you want to make those, in a sense, more formal, you do so. It goes back to my four principles; otherwise, it will restrict the free flow of information that can happen in those kinds of informal meetings, and I think it confuses the message.

The other thing I am nervous about is that sometimes parliamentary privilege works enormously to our advantage, because people will say things in a Committee meeting that they might not say anywhere else, but sometimes it means they cannot then be questioned about what they have said in that Committee anywhere else, including in a court of law or a judge-led inquiry. I am only asking a question, but I wonder whether there is a need for Parliament to be able to say, "In this particular regard, we waive our privilege." Eve can now tear chunks out of me.

Eve Samson: They tried waiving privilege in the Defamation Act and they repealed it. It is difficult, but those are problems with the current system; they are not about this. As regards informal meetings with Chairs, there is the quorum mechanism; a Committee meeting is not a formal proceeding unless it is quorate. I think that is quite an important protection.

You could go further. Some Committees have experimented with rapporteurs to go off and look at things in depth. You could say that things done by rapporteurs should count as privilege, but we have never gone that far, and I am not sure I would be happy about that. The fact that it is done officially by a Committee really does matter.

Chris Bryant: I think it requires an express decision of a Committee.

Eve Samson: Precisely.

Sir Bernard Jenkin: I agree with the last point. On the question of waiving privilege, this is dangerous because it could lead a court to feel that privilege should have been waived in a certain matter and it was not, and we are into a new ballgame.

It is important to be very clear about what privilege actually does. It protects what you say under privilege. It does not prevent you from being cross-examined on the same matters in a different forum; it just means that they cannot use the words you use under privilege as the basis of any evidence for a prosecution, for example. It does not



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immunise you from prosecution. If you incriminate yourself under privilege, it means you have not incriminated yourself in a court, and if you are invited to incriminate yourself in a court you can incriminate yourself by using the same words, or you can refuse to say and the court can draw whatever inference it likes from the fact that you refused to say, but it cannot use the words you uttered under privilege as evidence against you. That is the difference. It does not prevent anybody from doing anything they would otherwise do, had they not said anything under privilege.

Eve Samson: If you tell a Committee that you have buried a body under a patio, it does not stop the police digging up the patio.

Chris Bryant: But if you tell a Committee that you paid police officers for information it means that Lord Justice Leveson cannot ask you about it. That was his decision.

Eve Samson: Perfectly true.

Q9 **Nigel Mills:** We went off on a tangent. I was asking about a video. To explore that question further, if someone submits video evidence and the Committee transcribes it and regards that written transcript as written evidence, presumably that would be okay, or would the video itself still not be covered by privilege but the transcript might be?

Eve Samson: The trouble there is that lots of things are going on that are quite hard to disentangle. You have inherent privilege for what are proceedings, which is expressed in statutory form by the Bill of Rights, which is that proceedings in Parliament shall not be "impeached or questioned in any court or place out of Parliament," but that does not protect the publication of proceedings, which is protected by the 1840 Act. While these things remain within the Committee, and only the Committee and the witness know about them, in a way it does not matter whether they are privileged or not if the Committee behaves responsibly. It is only when somebody else knows about it that it becomes an issue.

The answer to your question, assuming publication, is that you could publish the transcription and it would be protected under the 1840 Act. Your video would not be protected, not because the 1840 Act does not extend to videos, because we think the wording of the Act is such that it would extend to videos, but because the House has not said it is happy with videos being proceedings—I think.

Q10 **Nigel Mills:** What if the House said it was happy to accept video or recorded evidence rather than written evidence?

Eve Samson: Then when I went into court I could point to that and say, "The House is happy with videos. We've published a video. The 1840 Act just says things that are published." It would ultimately be for the court. You probably ought to have Speaker's Counsel here as well, but I think she and I would be fairly happy that that was a very defensible position.



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Q11 **Nigel Mills:** It seems quite clear that with written evidence somebody sends it in to X Committee and that is the document. If I said something stupid on Twitter, videoed myself saying it and posted it, and then submitted it to a Select Committee as evidence and they accepted it, can I get immunity for the stupid thing I should not have said? Presumably, it would have to be only video for that Committee.

Eve Samson: It does not work like that. You cannot retrospectively cast privilege over something stupid you have said beforehand.

Sir Bernard Jenkin: Bad luck, Nigel.

Chris Bryant: You also cannot presume that because you have submitted something to a Committee, it will publish it. Indeed, if you were to set about publishing it yourself as evidence that you had given to the Committee, you could be in contempt of Parliament.

Eve Samson: And the Committee does not have to accept it.

Chris Bryant: Exactly.

Eve Samson: The Committee can send it back. Until the Committee has accepted it, it is the act of sending the thing to the Committee that is privileged, not the thing itself. Nobody can stop you saying what you like to a Committee, but it is up to the Committee whether it accepts that as evidence.

Sir Bernard Jenkin: Can I say something about the nature of our thoughts that might be important in all this?

Q12 **Chair:** Of course, Bernard.

Sir Bernard Jenkin: The Miller 2 case involving Crown prerogative in the Dissolution of Parliament demonstrates something very important. All the conventional legal thinking was that, however much the Government were abusing Crown prerogative, and that was a matter of opinion, the courts could not go there. The courts decided to redraw the boundaries to decide that they could go there because it was not Parliament's intention that the Crown prerogative should be used in that way.

We can go back to the Pepper v. Hart case where the interpretation of tax law now reads as what the Minister passing the law in Parliament actually told Parliament it was intended to do. Courts draw on Parliament's intention to interpret what Parliament intends. That is why it is important that all this uncertainty is addressed by Parliament, to create some certainty for the courts to lean against, some authority, so that they can say, "This is what Parliament intended." In the end, the courts will decide what they want to decide. They give us permission to have this area of exclusive cognisance inside the boundaries of privilege because of article 9 of the Bill of Rights, which was turned into an Act of Parliament in 1689. That law is seen to be immutable over all other law in an



extraordinary way, but only because the courts have got into the habit of doing that. We need to reinforce that habit.

Q13 Sir Christopher Chope: This is a fascinating academic discussion, but if we want to modernise the definition of a proceeding in Parliament for the purposes of parliamentary privilege, that is within the exclusive cognisance of the House. I cannot understand why the Committee of Privileges is not drawing up a list of what it wants to add to what is currently regarded as a proceeding in Parliament. I do not quite understand why we are involved in this. My question really—

Chair: Can I bring in Chris Bryant who is desperate to come in at this precise point?

Chris Bryant: Because we are not allowed to. The Committee of Privileges can only deal with things that have been referred to it by the House. There is a good argument, which I would tentatively advance, that we should change that ruling, so that the Committee of Privileges can decide to launch inquiries of its own, but at the moment we are barred from doing so. That is an easy one.

Q14 Sir Christopher Chope: Okay. Going back to 1852, who initiated the changes made at that time? Was that a resolution of the House asking the Committee of Privileges to take action, or whatever Committee was in place at that stage? Perhaps Eve can answer that question.

Eve Samson: I cannot. I tried to look at the *Journal* just this morning to find out precisely what it was in 1852. I discovered that they seemed to be doing wholesale changes to their Standing Orders and rewriting all the Standing Orders about private business. I simply did not have time to go through the *Journal* and find out about this different one.

The House looks at its Standing Orders. It is an interesting fact that, because of the way privileges and complaints of breach of privilege were dealt with, the Committee of Privileges does not have an own initiative to look at general matters to do with privilege. That is a bit of a pity. I can quite see why the House wanted to stop the Committee of Privileges deciding to go after anybody it thought might or might not have committed a breach of privilege. It would be a bit judge and jury-ish, but it is a shame that it cannot make an assessment of what we might call principled matters.

Q15 Sir Christopher Chope: I am getting distracted from what I was originally going to ask about. If, as Eve said earlier, the House has not said that videos are proceedings of the House, who could decide that they were proceedings of the House, and how do we know they are not proceedings of the House at the moment just because nobody has opined on it?

Eve Samson: It is an interesting question and it comes rather embarrassingly to what the Clerk of the Journals is and how far my responsibilities run. I could just say, and am very tempted to say, that



videos are proceedings. I just feel that when the inevitable court case came up and they said, "Who decided they would be proceedings?", and I said, "I did; it was obviously ridiculous that they were not in 2021," I would feel rather exposed.

I would not like to see an attempt to set in stone what are proceedings and what is privileged. I am not suggesting codification of privilege, but I think a sensible Committee report could say, "This is the way Committees work now. In our opinion this, this and this is privileged; this, this and this is not." We are not pinning everything down; we recognise that there will always be boundary issues, but let's be clear about where a 21st century boundary is, rather than what we have now, which is a mid-19th century boundary.

Q16 Sir Christopher Chope: If you decided that you thought video evidence was a proceeding in Parliament, what would be the process for somebody who wanted to challenge that ruling in Parliament, not through the courts? Which Committee would it be referred to? Would the Speaker be able to refer that issue to the Committee of Privileges to look at? Who would be able to police your judgment on that?

Eve Samson: First, I have to say I am so risk averse that I would not decide it, but let us assume I had a rush of blood to my head and said, "Fine. Videos are evidence." You could raise it with the Speaker as a matter of privilege: "The Clerk of the Journals has gone mad and decided unilaterally to redefine parliamentary privilege." The Speaker might give you a chance to raise it and refer it to the Committee of Privileges, or you, as the Procedure Committee, could report on the matter. I would have had to agree it with the Clerk of the House, but if we had gone mad and the general view was that it was a mad decision, I am sure the Speaker would just tell us to unmake it.

Chris Bryant: Sir Christopher, the difficulty is that often these issues end up being resolved by cases. For instance, you may recall that during the expenses saga two of the MPs, when they came to court, sought to claim that their expenses were part of a proceeding in Parliament and, therefore, privileged. That decided an element, because it was decided that they were not covered.

Q17 Sir Christopher Chope: Yes. To go back to the example of video evidence, if a Committee decided that they wanted to allow video evidence and treat it as a proceeding in Parliament and that Committee was overruled by the Clerk on the instructions of the Clerk of the Journals, would the Committee Chair, or the Committee, be able to raise that as an issue of privilege through the Speaker?

Eve Samson: I do not think any Committee has power unilaterally to decide what is or is not a proceeding. It is for the House, and that is why I would not be making those decisions. That is the problem. In a way, it is not a pressing problem; because you can do things formally, there has not been an incentive to look at it, and I would like somebody to think



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about that. If having thought about it, Committees and the House decide, "Actually it is absolutely fine. This way it is very clear what is and is not a proceeding," that is fine, but I do not want myself and my colleagues to have to say, "Well, these videos are not proceedings," which is what we have to say.

Chris Bryant: I want to try to give an instance because it might help. Let us say, for the sake of argument, that the Home Affairs Committee was doing a report on the treatment of refugees and they had video footage from a refugee camp and wanted to publish that, but they knew that the people concerned would be frightened of prosecution and, therefore, they wanted to attach parliamentary privilege to it; they wanted to include it as part of the report. They might ask the Clerk, who might ask Eve, who might ask the Clerk of the House, and they might get an uncertain answer.

That is the point at which a Committee might, legitimately I would have thought, write to the Speaker and say, "We think this needs to be resolved and, therefore, we want it to be a decision from you, Mr Speaker." My personal view is that just the decision of the Speaker would be a sufficient decision, but he might at that point say, "I think this should be referred to the Committee of Privileges," and the Committee of Privileges should get a move on. Does that help?

Q18 **Sir Christopher Chope:** It does. What we are really saying is that Eve does not want to have all these issues dealt with on an ad hoc basis. She wants the House to codify the additions to what would be regarded as a proceeding in Parliament, and that codification, if she had her way, would include video recordings in evidence. Is that right?

Eve Samson: I would not like codification, because that sounds like an attempt to avoid evolution and fuzzy boundaries, which will always happen. The real danger is that the footage gets shown and it contains a picture of somebody defaming somebody. It goes to court. The Committee or I say, "This is proceedings in Parliament," and the court says, perfectly reasonably, "Why is this proceedings in Parliament? How can you prove that this video is a formal proceeding in Parliament?" "Well, it was a formal proceeding in Parliament because the Committee said it was."

The court might go with that, but it probably would not, because individual rights are also very important, and the video might have been produced for a different period. What you have at the end of all this, I am afraid, is the court. I do not want that to sound as if the court is a bad thing and a danger. The court is not a bad thing; the court is not a danger, but it has the crucial job of looking after individual rights, and parliamentary privilege can at times be in tension with individual rights, so it is important that we are as clear as possible about what we think proceedings are, to help the courts and to help us think about it.

Q19 **Sir Christopher Chope:** This brings me to what was originally going to



be my first question. You say, in paragraph 20 of your evidence, that the courts would be likely to respect any view Parliament had on such an issue, but surely the evidence of the court's perverse behaviour, in my view, in deciding that Prorogation was not a proceeding in Parliament shows that the courts will go off on a frolic of their own regardless. How did it come about that they decided Prorogation was not a proceeding in Parliament, against all the conventional wisdom of both Houses, and carried on? What can we do about that?

Eve Samson: I could talk at length about the Miller judgment, but I do not think this is the place. There was not a parliamentary view about Prorogation. There is nothing written down about using Parliament in that rather odd sense of the House of Commons and the House of Lords without the Executive. Parliament has not actually said that Prorogation is a proceeding in Parliament. A lot of people in Parliament may think it is, but, as far as I know, there has not been a Committee report saying that Prorogation is a proceeding; it certainly was not adduced in evidence.

The other thing is that there is emerging an approach to article 9 that says that when we want to find out what Parliament, or rather a House of Parliament—we have to be a bit precise here—thinks about privilege, we will actually look at parliamentary materials. This is a permitted use of parliamentary materials. If we do not have those parliamentary materials showing them what we think the boundaries are, we are not helping.

Q20 **Sir Christopher Chope:** So that was the problem with the Prorogation issue; we did not have any materials saying that we thought it was a proceeding in Parliament.

Eve Samson: We were not parties to that case, nor did we intervene. The House of Commons and the House of Lords did not intervene in the Prorogation case; it was a case against the Government.

Q21 **Sir Christopher Chope:** On the direction of the then Speaker, I suppose.

Eve Samson: I do not even know whether we would have wanted to intervene; I am merely saying that we did not.

Q22 **Sir Christopher Chope:** But who would have taken a decision to intervene or not intervene?

Eve Samson: Ultimately, if the House intervenes, we will put up a recommendation to the Speaker, but I am not in a position to know whether or not the House wanted to do so. I was not Clerk of the Journals then, so I do not know whether it crossed anybody's mind.

Q23 **Sir Christopher Chope:** Members who were present at the time missed a trick on that, or may have done.

Eve Samson: I have no idea what an intervention would have said. It is an interesting question. When we intervene, it is factual and impartial and to assist the court. I would hope to assist Parliament by saying, "You



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cannot look at that; it is a proceeding of Parliament," or, "Please remember article 9 of the Bill of Rights." That is the sort of intervention we make.

Q24 **Chair:** I realise that we are looking at one specific issue. There was no vote on Prorogation; Prorogation was a decision by the Executive. Therefore, Parliament did not opine on it.

Eve Samson: Prorogation is done by a commission from Her Majesty. The finding in Miller 2 was that Prorogation was done to Parliament, not by Parliament.

Q25 **Chair:** It is not a proceeding because it did not happen in Parliament or at Parliament.

Chris Bryant: It is a proceeding in Parliament, not of Parliament.

Chair: Quite.

Chris Bryant: Thank you very much. I rest my case.

Q26 **Chair:** Sir Bernard, you wanted to come in.

Sir Bernard Jenkin: It was a fairly new doctrine for the court to establish—what Parliament was for. That had never been expressed as obiter dicta in any judgment before, and it was interpreting to some extent what it thought Parliament really wanted. There probably was not a majority in the House of Commons in favour of Prorogation. To that extent it was a very political judgment, but I think that is the nature of modern judicial thinking and practice.

If we want clearer boundaries, we have to express them. We cannot rely on a single Committee's in-the-moment expression to have much authority, or nearly as much authority, as a considered report of, say, the Procedure Committee, which lays a report before Parliament for approval by resolution of the House. That is a far more authoritative expression of opinion about what privilege should mean than ad hoc pleas at the last minute from a single Committee, or even from the Clerk of the Journals in a particular situation.

Chris Bryant: I agree with Bernard.

Eve Samson: That is a very good example. We have talked hypothetically of an intervention in Miller, but an intervention in Miller would have said, "Look at this. Look at this and look at this." It would not have advanced an argument. I would have been extraordinarily surprised if the House authorities had wished to tell the Supreme Court which way it should jump. They would have drawn to its attention materials and said, "You might be interested in these materials and it is proper for you to look at them," or, "You might be interested in these procedures or materials, but do recollect when you are deciding whether it is proper for you to look at them that article 9 of the Bill of Rights still exists." That is a big hint that it probably should not be looking at them. I am not sure



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about an intervention by the House. Our interventions are unexciting, I fear.

Chair: I am conscious of time. We have a couple more questions to get through and I do not want to keep the witnesses beyond four o'clock. Do you have anything else, Sir Christopher?

Sir Christopher Chope: No, I am satisfied. Thank you.

Q27 **Bambos Charalambous:** In Sir Bernard's letter, he says that Erskine May says "it has been concluded that an exhaustive definition [of privilege] could not be reached." Eve, in your notes you reference the Australian and New Zealand Parliaments, which have enacted legislation that gives a very broad definition of privilege; they say "proceedings...means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee." Are you aware how the Parliaments of New Zealand and Australia have fared with that wide interpretation of privilege?

Eve Samson: My understanding is that they have not had problems. I would have to talk to colleagues in Australia and New Zealand, but both those Acts were in reaction to judgments about the scope of proceedings that the respective Parliaments had not liked. It would be nice to get there before we had an adverse judgment.

Q28 **Bambos Charalambous:** It would be interesting to find out what their thoughts on it were.

Eve Samson: I am very happy to discuss that further.

Chair: Thanks, Eve. It would be helpful to the Committee if we could get more information about how it is working in practice.

Q29 **Suzanne Webb:** Sir Bernard, towards the end of the letter you refer to not waiting for the Government to propose legislation. Would not a legislative solution be more watertight?

Chair: This is your letter to the Committee, Sir Bernard.

Sir Bernard Jenkin: What would be more watertight?

Suzanne Webb: Towards the end you say: "While it would be for the courts to decide whether a matter was a proceeding if a case came to court, the courts will take seriously Parliament's own stated position, and recent decisions of the House in relation to both virtual proceedings and sanctions for breaches of the behaviour code demonstrate that the House retains a role in expressing its view of what constitutes a proceeding." It is the second paragraph before the end of your document. Then you refer to not waiting for the Government to propose legislation.

Sir Bernard Jenkin: There is an ongoing argument about relying on article 9 and a series of understandings. All we would be doing if we



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passed another resolution would be expressing another understanding, which we hope the courts would share with us. The question is whether that should be replaced with legislation, but given compression in the legislative timetable, I do not think it is likely that Parliament will legislate shortly. The whole question as to whether or not we should legislate on privilege is something we have been asked to look at in the Privileges Committee. I do not know whether the Chair of the Privileges Committee wants to add anything. My own view is that it is a long way off.

Chris Bryant: It is true that the Privileges Committee has been charged by the House to deal with the issue of recalcitrant witnesses—those who do not want to come. We are inching towards a solution. At the moment, the only solution that seems to be on the table is a legislative one. Who knows when that legislation will be advanced? I hope we will be reporting in the not too distant future. Bambos makes a very good point. Lots of people have written books about privilege; they can go on for many pages and still end up with no solution at all.

One thing the Privileges Committee will undoubtedly do is in relation to witnesses. We have looked at lots of other Parliaments around the world and they have a much more robust set of protections and guarantees for the way witnesses are treated. For us, that is probably long overdue.

Q30 **Chair:** Eve, do you have anything to add? I think you were Chair of the last Joint Committee on this, weren't you?

Eve Samson: Not the Chair—that would be great.

Chair: Sorry, not the Chair, the Clerk. I've just promoted you.

Eve Samson: For my sins, I have been Clerk on both Joint Committees that looked at this recently. The first recommended legislation and the second did not. Basically, it will never be high in a Government's programme; there will always be something better for a Government to do, unless it is very small and specific or, as in the Australia or New Zealand case, there has been a crisis that everybody agrees needs to be addressed.

Given that I think you could make things a lot better by taking what for the House would be quite low-impact decisions—just having a resolution to approve a Committee report, if the Committee wanted to report in that way—you could improve things. I do not see any reason why not, even if you think legislation would overall be a better solution in the fullness of time.

Q31 **Chair:** The trouble with these sessions is that more questions are raised all the way through. My WhatsApp is going wild with lots of people talking about lots of different things, but I am conscious of time. It is perhaps time for the Committee to reflect on the evidence we have heard. Do any of the witnesses want to add anything before we conclude this proceeding of Parliament?



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Sir Bernard Jenkin: If you were to conclude as part of this that the Privileges Committee should be enabled as a procedural matter to initiate its own inquiries into these matters, it would be important to make sure that we cannot launch ad hoc inquiries into who has breached privilege. That can only be referred to us. That is the distinction we need to make. Somebody referred to it earlier. It is a very important distinction to make, but it would be quite useful if the Privileges Committee could look at these things at the same time.

Chris Bryant: It was Eve who made that point. I completely agree. There would be value in the Privileges Committee being able to initiate inquiries into areas of substance, but not into specific cases. Specific cases should be only on the basis of their having been referred to us by the House.

Chair: I thank all the witnesses. I suspect we will continue these conversations in both a privileged and a non-privileged way. This has been extremely informative. All three witnesses have been able to provide real depth to the discussion and give us lots of questions as well. I thank everybody for their time, and apologise for keeping you slightly longer than we had hoped. This concludes the proceedings today.