

Committee of Privileges

Oral evidence: Select Committees and Contempts, HC 826

Tuesday 26 October 2021

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[Watch the meeting](#)

Members present: Chris Bryant (Chair); Andy Carter; Alberto Costa; Mark Fletcher; Yvonne Fovargue; Sir Bernard Jenkin.

Questions 94 - 177

Witnesses

I: Professor Tom Hickman QC, Barrister, Blackstone Chambers; Joshua Rozenberg QC (hon), Legal journalist; and Professor Alison Young, Professor of Public Law, University of Cambridge.

II: Mark Hutton, former Clerk of the Journals, House of Commons; and Paul Evans, former Clerk of Committees, House of Commons.

Written evidence from witnesses:

[Professor Tom Hickman QC](#)

[Joshua Rozenberg QC \(hon\)](#)

[Professor Alison Young](#)

[Mark Hutton](#)

[Paul Evans](#)

Examination of witnesses

Witnesses: Professor Tom Hickman, Joshua Rozenberg and Professor Alison Young.

Q94 **Chair:** Good morning and welcome to the first evidence session of the Privileges Committee—not the Standards and Privileges Committee, but the Privileges Committee—on Select Committees and Contempts.

I thank the three witnesses for attending; I see that the later two witnesses are in the second row already.

Will you briefly introduce yourselves?

Professor Young: I am Alison Young, Professor of Public Law at the University of Cambridge and a legal adviser to the Constitution Committee in the House of Lords. I speak today in a personal capacity.

Professor Hickman: I am Tom Hickman, Professor of Public Law at UCL, and a barrister at Blackstone Chambers. I, too, will speak in a personal capacity rather than on behalf of those institutions.

Joshua Rozenberg: I am not an academic. I am a freelance legal journalist and I describe myself as a legal commentator.

Q95 **Chair:** Thank you very much.

I thought it might be helpful to provide some context for the Committee's inquiry and clarify some aspects of the proposals that we published earlier this year, which you have had an opportunity to read.

The Committee is dealing with the specific matter referred to it by the House. As you know, the Privileges Committee in the Commons can consider only matters referred to it by the House, in the terms referred by the House, namely, "the exercise and enforcement of the powers of the House in relation to select committees and in contempts". As such, the recommendations that the Committee can make are curtailed by the scope of the referral from the House.

This has been interpreted by the Committee to date—as you know, this has been going on for several years, with Committees looking at it previously—as considering the exercise of powers in relation to contempts before Select Committees and clarifying how existing powers for Select Committees "to call for persons, papers and records" should be exercised and enforced in a modern context. The Committee's proposals, published earlier this year, were deliberately minimalist and focused on resolving the problem of how to enforce the power to call for persons, papers and records, rather than seeking to acquire new powers such as to summon Ministers or Members of the Lords, or to require witnesses to answer questions when they appear before Committees. You might want to refer to all those issues in the next few minutes.



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We are keen to hear your views on our proposals. We will not bombard you with quickfire questions, but brevity is the soul of wit, as somebody once wrote.

You suggested, Mr Rozenberg, that our proposals would “cause more harm than good.” Explain.

Joshua Rozenberg: I am concerned that they would change the nature of Select Committees and that you would soon get to the stage where people were bringing their lawyers to defend them and you would perhaps need lawyers to ask questions of witnesses. Sooner or later you would come into some conflict: somebody would refuse as a matter of principle, this procedure would be tried and there would be problems.

As you know very well, in most cases most people turn up. If a Minister does not turn up, you have all sorts of sanctions short of forcing them to do so. You would admonish them, and a refusal to give evidence by a Minister or anybody in public office would be damaging to that person and therefore they would not do it.

If you want a controversial member of the public to come along but they refuse, if they’re going to refuse they’re going to refuse. I am concerned that it is unnecessary to do more.

Q96 **Chair:** To push back briefly, one of the pieces of advice on lawyers that we have had from several people is that lawyers of predominantly non-ministerial witnesses with deep pockets will advise: “The only question for you is whether there is more reputational risk from not turning up than from turning up. The Commons has no powers. It cannot force you to attend, so it’s just a decision for you.”

Joshua Rozenberg: I am not surprised; I think that is right. I would say that most people invited to give evidence to a Select Committee should do so, but if they refuse they refuse. You cannot force somebody to answer questions.

I don’t know how you are dealing with the problem of people lying in evidence to Committees. If you bring somebody in and say that they have to answer questions, what if they tell you an untruth? What will you do about that? How would you expose it as an untruth? How would you punish them?

Yes, people will decline to come and you will put political pressure on them to come, but if they refuse, the reputational damage is to them, and if that is what happens, it is up to them.

Q97 **Chair:** If there were an offence, the reputational risk of not attending would be considerably higher.

Joshua Rozenberg: Yes, because they would be punished—they would be sent to prison—for refusing to answer your questions.

Q98 **Chair:** No, not for refusing to answer our questions but for refusing to attend or produce papers.



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Joshua Rozenberg: Okay, so they would attend and say, “No comment.” Where does that take you?

Q99 **Sir Bernard Jenkin:** One or two of the witnesses, including you, concatenate being required to attend or to provide papers and being required to answer questions. Will you explain why you join those two things? Surely they are separate. Surely if we get a witness in front of the Select Committee but they refuse to answer any questions, that is the end of the matter. We cannot force them to answer questions. Or does that become subject to some legal sanction?

Joshua Rozenberg: That is up to you. As things stand, you cannot force them to answer questions, and you simply get them saying, “No comment.” Whether they would be allowed to say, “I refuse to answer on the grounds that it might incriminate me,” remains to be seen.

Q100 **Sir Bernard Jenkin:** That is a common law right, isn’t it?

Joshua Rozenberg: Exactly, so they may well say that. That in itself is potentially damaging to them, but less damaging than giving evidence that could be not used against them directly—perhaps it would be privileged—but could provide help to the police investigating some crime that they are accused of.

There are practical difficulties in what you are proposing. You cannot force people to give you information if they are going to refuse, as things stand, beyond simply admonishing them for failing to do so.

Q101 **Sir Bernard Jenkin:** Will you explain a little further the example you give in your paper of the chief executive who is invited to explain something done by a subordinate who has been disciplined and fired?

Joshua Rozenberg: This is the example of the Committee that wants to know whether a company was to blame for a failing of some sort. The company refuses to co-operate. Unsure of who is responsible, the Committee issues a summons to the chief executive, who has ultimate responsibility for the failing but no direct knowledge. The chief executive discovers that another executive was responsible for the failing, but that executive has been paid off with a non-disclosure agreement. The chief executive takes the view that the Committee has chosen the wrong target, but for commercial reasons does not want to identify the executive responsible.

Does the chief executive have a reasonable excuse for non-attendance? The courts may be able to decide that, but only by considering the nature and purpose of the Committee’s summons. The only way of deciding whether the chief executive can reasonably argue that the Committee has summoned the wrong person might be to ask what information the Committee is really trying to find, but that might be regarded as any other aspect of the Committee’s proceedings is—as an area that is barred to the judges.

When you apply your Bill to circumstances in the real world, you have the problems that you might be summoning the wrong person or you might be



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summoning somebody who has a good reason for not answering and is not prepared to tell you why.

Q102 Chair: That is a fairly common, amicable arrangement that happens all the time. Select Committee Chairs go through that process all the time. There is always an element of give and take. I cannot see why that would change. At the moment we pretend to have powers but have none, so the decision is solely down to the person being summoned. That is the danger we are trying to rectify.

Joshua Rozenberg: Yes, but you do pretty well at the moment. As you say, you negotiate with people; you warn people of the likely questions, and so on.

I am concerned that it would change the nature such that a Committee would see a high-profile case in the media and say, "Oooh, we'll get that person in, or we will embarrass that person if he or she refuses to come. We'll show how we can get information that nobody else can get; we'll embarrass that person; we'll humiliate that person," and so on. Once you have those powers, somebody on a Committee will want to use them in that way.

Q103 Andy Carter: I will put this question to our other witnesses. You broadly support legislation, so how do you respond to what Mr Rozenberg has said?

Professor Young: First, you would have to say that part of this is to do with the assessment of how you think Committees will behave when given this power. That is not for me to assess; I am a legal academic, not a politician. It is for the Committee to assess how it thinks Committees will respond to being given this backstop power.

Secondly, we must recognise that this is not just the Bill; it is the Bill on top of the procedures you already have. There are possibilities of gatekeeper functions beforehand. The idea, I presume, would be that be some Standing Order explained what you do if a Committee had summoned a witness, the witness had not turned up, and you were then in a situation of them refusing to attend the summons. You had tried informal mechanisms, so what else could you do? I presume there would be an element of a gatekeeper function. I know there are suggestions of it coming to the Committee to scrutinise, and then you have the Speaker's certificate.

There are already mechanisms within Parliament such that if you thought that a Committee was abusing its powers and creating a wonderful, topical inquiry to "get" public figures, there would be a gatekeeping function to take a step back and say, "Why are you doing this? Is this really within the proper remit of the Committee?" before we got to the element of the legal sanctions. It would be very important to ensure that was in place.

A further aspect is to think about what you mean by "reasonable excuse". Again, examples of a reasonable excuse can be developed, such that you

can imagine scenarios where there might be difficulties that would make it easy to enforce in those circumstances.

You have to assess how you think Committees will respond to the new powers, in the context of their not being the only power but coupled with what goes on at the moment and possible gatekeeping functions within Parliament itself.

Professor Hickman: I certainly broadly agree with the proposal. I have some comments on the way the draft legislation is framed and two broad points in response to what has been said.

First, it is important to emphasise that it is not being suggested, obviously, that there should be any power to enforce the findings of Committees. That is really important. Committees can already make criticisms of people. That can be damaging and it can be very unfair, but Committees already have obligations to ensure that their procedures are fair and that everyone has an opportunity to respond to criticisms that may be made against them. It may be thought that that, in a sense, is the most important aspect of fairness in Committee proceedings. I do not think that that will change. What is being suggested here is simply a power to back up a request for documents or for the attendance of witnesses. I do not think that would have a transformative effect on proceedings or on the need to ensure fairness during proceedings. That is already present. Committees can reach those sorts of conclusions.

The associated point is that, because the power is limited in that way to the enforcement of calls for persons or documents to be produced, it is not a power that is different from that which Parliament itself has bestowed on many bodies. I have given evidence and my co-author of the evidence, Harry Balfour-Lynn, has produced an illuminating analysis of the various bodies that have similar powers. They include, at one end of the spectrum, the Letchworth Garden City commissioner and, at the other end, the devolved legislatures—the Scottish Parliament and the Senedd. It is difficult to understand why Parliament is prepared to confer the powers on those bodies, but is not prepared to give itself those powers. I find that—

Q104 **Sir Bernard Jenkin:** It is because they are statutory bodies. They would not have those powers unless we conferred them on them.

Professor Hickman: Exactly.

Q105 **Sir Bernard Jenkin:** But we are not a statutory body.

Professor Hickman: It is difficult to understand why Parliament is so concerned about giving itself powers which it is happy to confer on bodies that include the Scottish Parliament. That is my point.

Sir Bernard Jenkin: We can come back to that point.

Professor Hickman: Yes, we can return to it, but first may I make another point partly in support of what Joshua said? He was told that we are not saying that people have to turn up and answer questions, but



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there is an element in the proposed Bill that goes beyond some of the powers that I have discussed. That is the power to request information as well as documents and the attendance of witnesses. That aspect of what is being proposed needs careful consideration. It may well be said, therefore, that you are required to go beyond the current powers to ask for documents and records and the attendance of witnesses.

Q106 **Chair:** I don't think we intend it to be any different. The word "papers" is obviously not a very useful one, given the Victorian era has now passed.

Professor Hickman: I have mentioned it in the evidence and it is something that needs to be considered. It may be a question of wording. For example, the concept of documents is given a very, very broad meaning these days in statute. It includes any form of electronic communication and so forth.

Chair: Indeed, so we need to look at that. I think we are aware of that, but thanks for pointing it out.

Q107 **Andy Carter:** I want to come back to the point that Professor Young made about the way the courts interpret "reasonable excuse". Can you give the Committee more detail on that? That is something that is highlighted as potentially an area of concern. It is regularly discussed in courts, isn't it?

Professor Young: If you are thinking in terms of what we mean by "reasonable excuse" generically, obviously there are lots of situations in which a court will be asked to determine what is meant by "reasonable excuse" in the particular circumstances. To that extent, the courts are used to thinking about similar situations in which there may or may not be a reasonable excuse for not producing documents, for example. The complexity stems from the fact that you are dealing with a parliamentary Committee that will originally be thinking this is not a particularly reasonable excuse, and you will then have whatever gatekeeping function you have and then a Speaker's certificate saying, "This person failed to attend without reasonable excuse." That might be more problematic with regard to the court analysing it, because it then brings in aspects of parliamentary privilege and the extent to which the courts will be able to assess the assessment of a Committee that an individual had a reasonable excuse. It is that element, rather than terminology itself, that might potentially cause problems.

Q108 **Andy Carter:** Joshua, you talked about changing the culture of Select Committees. Would you mind explaining what you think the current culture of Select Committees is and how you think that might change as a result of this?

Joshua Rozenberg: Your first question to us was: what are Select Committees for? Most people say it is to hold Ministers to account, and I accept that. I concentrate on finding information from witnesses that enables Members of Parliament to do their job.

Q109 **Andy Carter:** May I interject there? You talk about holding Ministers to



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account, but many Select Committees invite people well beyond those who have ministerial responsibility.

Joshua Rozenberg: Exactly. I see the role of Select Committees as finding out information to enable Members of Parliament to scrutinise legislation, represent their constituents and do all the work of a Member of Parliament. I see that as their prime purpose. I see it as a way of getting information on to the public record for the benefit of the public and certainly for the benefit of journalists. You do that with the co-operation of witnesses who are prepared to put themselves through what some may see as a bit of an ordeal in giving live evidence and obviously written evidence as well, to make you and the wider public better informed. That depends on co-operation.

If you are telling people that they face a prison sentence if they do something wrong—if they fail to provide you with the information that you have required, and the Bill does refer to information—then they are going to be cautious. They are going to be reluctant, they are going to be nervous and worried about what may happen to them if they inadvertently mislead you. This fairly friendly co-operation that the Chair refers to, when you summon a witness and the witness says “No, you want another witness and here that person is,” will go, because the whole thing will become adversarial. Because you will be relying on the courts to buttress your authority, you will become more like a court and less like an information-gathering service.

Q110 **Chair:** I don’t know whether I speak for everyone on the Committee, but my working assumption is that we would probably never need to use this power, because once it existed it would sort of resolve itself. I note, of course, that the United States of America is going through this process with Steve Bannon. I think I am rather on the side of Congress, you will be shocked to hear. Professor Hickman, am I being completely naïve?

Professor Hickman: No I don’t think so. I would be surprised if this power is used regularly, or even at all. It is precisely as you say. It is there to ensure that when you ask for documents or for a witness to attend, they adhere to that request, which is almost always the case anyway. It is only going to be a few recalcitrant individuals where it will make a difference. My assumption, like yours, is that the existence of this power would see a change in practice.

Q111 **Chair:** The process would be that the Committee would have its normal way of doing things and that is fairly informal. “Would you be prepared to come?” “Could you come next Tuesday, the week after or whatever?” When that fails, it gets a bit more formal, and then more formal yet when somebody refuses point blank to provide a date when they might come, and then it goes so formal that it has to go to whatever gatekeeper process we pursue. By the time it gets to the gatekeeper, the lawyer to the individual will be going, “Honestly, I think this isn’t worth the candle. You are better off turning up, even if you just sit there and say ‘no comment,’ ‘no comment,’ ‘no comment,’ ‘no comment.’ You’d be better off doing that.”



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Professor Hickman: That's right. The way you framed it in your Committee's draft is that it would be an offence to fail to comply with a summons. Now, there are different ways of doing that. Obviously, I understand that a summons would be something of last resort; it would not be the first thing that is issued by the Committee. The Committee would initially write out in the normal way, informally, and say, "Can we have x, y or z, or can you come and attend?" You would never get to that process. On Joshua's point about lawyers becoming involved, I predict that it would only be if it gets to that point of receiving a summons that most people would seek legal advice and ask, "What do we have to do?"

Q112 **Sir Bernard Jenkin:** I started out down this track as a member of the 2013 Joint Committee and was absolutely determined that we should have statutory powers. I changed my mind as a result of the evidence we took.

On this point, can we talk about some hard examples? Supposing Rupert Murdoch had been summoned by a Committee and these procedures had been available to him to contest the legitimacy of the summons, how long could he have strung it out for?

Chair: Thirty-seven years, which is how long he did string it out for.

Sir Bernard Jenkin: Hang on. I am asking the witnesses, not the Chair.

Chair: Sorry. Fair point.

Joshua Rozenberg: The answer is a very long time. As the Chair has explained, it would be a lengthy process. You then have the practical problem that he might not be in the United Kingdom and what you are going to do about that if you can't get him here. Sooner or later, somebody will test this—somebody who has plenty of resources and can afford lawyers. As a matter of principle, they will decide that whatever the Committee is trying to find out is something that they don't want to say. I don't think it is a good reason to take a power simply to have it as a threat that you are not going to use. You have to be aware of the law of unintended consequences. Sooner or later, somebody will test it.

Professor Hickman: It partly depends on how the law is drafted. One of the things we have said in our evidence is that the law in the draft Bill invites a challenge on article 6 grounds. Drafted as it is, someone could string matters out for quite a long time. But there are other ways of drafting the legislation, and it does not necessarily have to be the case that individuals will be able to string things out.

Q113 **Sir Bernard Jenkin:** You can guarantee to give us that drafting for an article 6 defence?

Professor Hickman: I have done my best, and you have it.

Q114 **Sir Bernard Jenkin:** I think that has made my point.

Professor Young, you have said that it all depends on how Committees will behave with these powers. How do you think the judiciary is likely to judge the legitimacy of Select Committees?



Professor Young: You have to take into account the context of the legislation, the purpose that it is trying to achieve, the backdrop of article 9 of the Bill of Rights 1689, and the general way in which we now have in the common law the development of accountability. As we know from the second Miller case, we have the common law principle of political accountability. My guess is that the courts will not see this as a great way of being able to challenge and criticise the assessment of a Committee as to whether there was or was not a reasonable excuse.

I think they will see the purpose of the Bill as being there as a backdrop. If you are going to create a new criminal offence, you need a safeguard to ensure that you don't have Committees randomly dismissing what would be perfectly reasonable excuses. You need that safeguard, and the courts will realise there is a backdrop and the safeguard is not there to question; they will read it against the backdrop of the Bill of Rights. They are very reluctant to question political material, but they are happy to use it as evidence in very narrow circumstances. Some of the most recent Supreme Court cases and the two-child benefit case of SC and CB involved a long discussion by the president of the Supreme Court, who agreed on the use of parliamentary material. The courts are wary of holding Parliament to the same standard of scrutiny as the courts when it comes to assessing whether they are complying with the Human Rights Act provisions and they are wary of questioning of what is going on.

Sir Bernard Jenkin: I suggest they rather changed equation. But may I just—

Q115 **Chair:** Before you do that, Professor Young, will you clarify the case you just referred to?

Professor Young: This is the case of SC and CB in the Supreme Court. It was decided in July and I have sent an email to the Clerks about it.

Chair: Grand. I just wanted to make sure that we had that.

Q116 **Sir Bernard Jenkin:** Can you reiterate the point of that case?

Professor Young: The case shows that the courts are wary and understand that Parliament reasons in a different way from the way in which the courts reason, and that there is a need when dealing with human rights cases and looking at the backdrop of parliamentary material to assess whether there has been a breach of human rights. They are wary of holding Parliament to the same standard of scrutiny as you might with court reasons, so they will be aware that Parliament reasons differently and that will potentially influence the extent to which they interpret how far they will look at the information.

Q117 **Sir Bernard Jenkin:** I am asking a slightly different question. Who is it most legitimate for Select Committees to scrutinise?

Professor Young: Primarily, the role of the Select Committee is to scrutinise the activities of Government, but that does not mean to say that there isn't the element of scrutinising private individuals who might be involved in those governmental activities. There are also topical inquiries



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into a particular area that might involve scrutinising private individuals. You are not in the main business—

Q118 Sir Bernard Jenkin: Supposing a judge is confronted with a summons from a Select Committee that is visibly furious with the subject of the summons. Take the example of the DCMS Committee and Dominic Cummings. By that time, Dominic Cummings was a private individual. I have no brief for him, but how legitimate was it that he should be summonsed in front of a furious Select Committee?

Professor Young: If you can show that there is information that they might have that is necessary for the Committee to investigate, it is important for you to be able to question those individuals.

Q119 Sir Bernard Jenkin: So you think that the judge would have upheld that summons?

Professor Young: In those circumstances, I don't think they necessarily—

Q120 Sir Bernard Jenkin: You're 100% certain?

Professor Young: I don't think anybody can be 100% certain.

Professor Hickman: I do think that a judge would have upheld that. Judges generally give a very wide berth to questioning summonses issued by Select Committees. One of the things we have suggested is that there are formal requirements for a summons—it has to stipulate certain things. That would be almost a tick-box exercise—has it done those things?

On questions of policy, the courts would apply a rationality threshold. Unless the Committee has completely taken leave of its senses or done something plainly improper, which is hard to imagine, I don't think the courts would consider that they had any ability, role or legal authority to step in and question a summons.

As the draft stands, the courts would not be considering that question; the only role for the courts would be where there is a reasonable excuse. One of the difficulties with the drafting at present is that, first, it is effectively a jury question. All the issues would be loaded into that question; any concerns about the propriety of the proceedings are loaded into that issue.

We have tried to separate the two issues, which is similar to the way it is done in a planning and enforcement notice. The notice or summons is issued and at that point, in theory, there is an ability to challenge the issue, but it must be done quickly. Judicial review has wide margins, largely the formal challenge—the rationality challenge. If that challenge fails, it is an offence to breach the summons or the notice.

It is the same with reasonable excuse. The basis on which you could raise a defence would be very limited—"I couldn't comply as I was out of the country," or something practical of that nature. You couldn't go back and try to challenge the legitimacy of the notice. Unlike a planning enforcement notice or a summons, you can't go behind it.



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Q121 **Sir Bernard Jenkin:** So you are confident that even in a very political situation, the courts will say, "That's the politics; we're not going to be involved in that. We're just looking at the black and white letter of the law."?

Professor Hickman: Yes, absolutely.

Q122 **Sir Bernard Jenkin:** That's not what they did on the Gina Miller cases.

Chair: Discuss.

Joshua Rozenberg: You don't need to speculate on what the courts would do because you have very wisely taken evidence from the Lord Chief Justice of England and Wales and the Lord President of the Court of Session. Your Clerk kindly sent me what they said. You haven't published it yet, so I'm not sure whether I should read it. May I summarise?

Chair: It's fine. Carry on. As long as you do not paraphrase, which sometimes varies.

Joshua Rozenberg: Let me read you the key paragraph of what Lord Burnett says:

"The proposal in the draft legislation that a certificate of the Speaker would be conclusive proof that a person failed to attend or provide documents etc. would, at first blush, deny a potential defendant the opportunity of challenging one of the ingredients of the offence. It would determine a fact which would ordinarily be within the province of a court to decide upon as one of the ingredients of the offence. That, at least, is unusual. Moreover, to determine whether it was reasonable for a person not to attend, etc., might well take a court into territory protected by Article 9. The implications of these provisions would have to be worked through in the usual way should there be any prosecutions."

I infer that he is pretty sniffy about what you are proposing.

Q123 **Sir Bernard Jenkin:** One anomaly that we would create is that we would have the statutory power to summon anyone except Ministers and other parliamentarians. Incidentally, I note that it doesn't exclude judges.

What would happen, culturally, to the feeling of the legitimacy of a summons? We do not have the power to compel a parliamentary witness, but what happens if there is a statutory power to compel other witnesses?

Joshua Rozenberg: It is not in the Bill. It just refers to "an individual", which includes a Member of Parliament and a Minister, presumably, unless you exclude them—but that's a drafting point. It is curious that you have absolute privilege as a Member of Parliament to speak here without being punished for what you say, whereas under the Bill as it stands, you would be summoning a person here and if they refused to answer questions they could go to prison. That person could be a Member of Parliament or a Minister of either House.

Q124 **Chair:** That is not quite right, because either House could, if it wanted to, use other powers. If the Home Secretary refused to attend a sitting of the



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Home Affairs Committee when asked to do so, it would be open to the Committee to table a motion in the House, or the Liaison Committee could do it or there could be a Privileges report. There are various different ways the House is able to exercise its discipline over individual Members.

Joshua Rozenberg: So you don't need these powers.

Chair: Exactly. I don't think we are intending to take them. It is not within our remit to address that issue. I accept that.

Q125 **Alberto Costa:** Mr Rozenberg, you referred to the Lord Chief Justice as well as the Lord President of the Court of Session. For what it's worth, I agree with your inference from what the Lord Chief Justice stated in his letter, but will you comment on what the Lord President of the Court of Session said?

Joshua Rozenberg: I do not have that in front of me, although I can look it up. The Lord President was much more accommodating and thought that the thing could be worked out.

You ask me about that, but I am again rather confused about how this legislation would work. You clearly want it to apply across the United Kingdom. Somebody who refused to come here to give evidence would presumably face prosecution here. If they were in Scotland, they would face prosecution there. How would it work if somebody was simply between the two jurisdictions or going to Northern Ireland? Where would they be prosecuted, and how would it work if they simply moved from one to the other?

I think that this needs a great deal more thought before giving courts these powers without working out how they would be used in practice.

Q126 **Alberto Costa:** That is a very fair point that I assure you the Committee is considering. We are considering the three systems, not just the Scottish and the English and Welsh ones.

I want to go back to your comments about the Lord President. You indicate that there seems to be a difference of view between two senior members of the UK judiciary. As a Committee, we need to consider both views and reach a holistic view.

I understand that you are giving your own views, but do you accept that you are seeing this through the optics of the media? That is your role.

Joshua Rozenberg: Yes.

Q127 **Alberto Costa:** I find myself in a different position. I see this through the optics of a lawyer and solicitor. The Chair stated at the beginning of this session that we are devoid of any authoritative process in calling witnesses. I think that is odd. As a solicitor I want to reach out and grab the rulebook, but there is no proper, credible process.

On the issue of reputation, we have the case of Dominic Cummings, who used reputation as a reason not to attend—to show Parliament up as a weak institution. That is the risk. It is not that we are doing a power grab.



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We want, in balancing interests, to ensure that the democratic institution is not seen as weak, as it was with Dominic Cummings. Do you see that?

Joshua Rozenberg: I certainly see that. As you make clear in your report, after he was admonished, he was given a parliamentary pass by the Prime Minister. It demonstrates how weak Parliament is in those circumstances, because of the role of Government.

That is certainly true. I can see that putting these things on a proper, formal basis, going much further than the area the Committee is examining at the moment, would be a good thing so that everybody knew where they were.

That is all true. I speak as a journalist, but I speak as a journalist reporting what others say, and I much prefer to report what others say to giving my own views. It is as a journalist that I am reporting to you that the Lord Chief Justice of England and Wales is concerned and that there are some concerns of the Lord President, which you can read as well as I can and take further evidence if you wish.

Professor Hickman: With all due respect to the Lord Chief Justice, as I read his remarks one of his principal concerns was about the conclusive certificate, which raises the article 6 point and which could be redrafted and done differently, avoiding one of the criticisms. I am not sure he is directing his comments—

Q128 **Chair:** I don't think he meant it to be a killer argument. I think he meant it to be a tidying-up argument.

Professor Hickman: On a Bill of Rights, there are ways of formulating legislation that would not raise issues of freedom of speech, which is protected by the Bill of Rights, but will represent some encroachment on to exclusive cognisance. Parliament is able to waive the principle of exclusive cognisance in any event. In issuing a summons, that would be the appropriate act of waiver that would trigger a theoretical, potential role for the courts down the line. It would not be inconsistent with exclusive cognisance because there would be an overt act by Parliament that would trigger any potential legal consequences.

I don't see either of the issues that are mentioned in the letter as being seriously problematic.

Q129 **Chair:** I have some tidying questions. For the avoidance of doubt, do you think that the House of Commons has the power to arrest?

Professor Young: No.

Professor Hickman: No.

Joshua Rozenberg: You detain for a few hours strangers who throw things at MPs, don't you? I don't know on what authority. Whether you do or not, it is a good idea to clarify it.

Q130 **Chair:** Someone told us that we have the power to summons somebody to



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the Bar of the House. I guess we have the power to summon, but if we don't have the power to enforce the summons we don't really have the power to summons, do we? Or have I got that wrong?

Professor Hickman: That's correct. You could probably admonish them.

Q131 **Chair:** To reprimand. Sir Stephen Irwin, Chair of the Independent Expert Panel, said to me that they have the power just to say nasty things. Select Committees can criticise, and they do so with parliamentary privilege, which is not an insignificant thing in itself.

For the avoidance of doubt, we don't have the power to imprison?

Professor Hickman: No.

Joshua Rozenberg: It is certainly not something you have done for 160 years. It might well be challenged if you tried it.

Q132 **Chair:** I would challenge it if somebody tried to imprison me. What about fines? Do we have the power to fine?

Professor Hickman: You have a power to fine Members but not non-Members.

Q133 **Chair:** Indeed.

Let me riff for a moment on Select Committees. Modern Select Committees, most of which are departmental Select Committees, are select because there is a select number of Members. The ones that exist are written in Standing Orders, but we often create other Committees—sometimes Committees of both Houses—to investigate a particular matter. All this stemmed historically from the right of Parliament to redress grievances in any sphere. There were Select Committees even if they were not called Select Committees. They were Committees of the House with selected Members appointed by the House to sit on a Committee to look at, for example, the state of prisons, which at the time were not run by the Government, schools and education, which was not run by the Government and not a ministerial responsibility, or slavery. In all those, all sorts of people were brought in and nobody ever said no. Am I being unfair in challenging the idea that Select Committees are only there primarily to look at Government Departments? Is that fair or unfair? Joshua, you probably disagree with me more.

Joshua Rozenberg: I don't always disagree with everything said here. I don't know the answer to that. Select Committees are there to find out what Ministers are doing, to supervise their work, to test what they are doing, to ask questions of them and to obtain information from them, but I don't see any harm in the Committees going wider than that.

Q134 **Chair:** But if you are doing a report on broadband in the UK, you cannot do that without having in the senior executives who run the broadband companies.

Joshua Rozenberg: Sure. I don't see any problem with that. Flexibility is a great asset of the Committees and it is one of the things that I am concerned to preserve.

Q135 **Sir Bernard Jenkin:** Are you seriously suggesting that someone from a broadband company like BT would not appear before in front of a Select Committee—that seems to be an unreasonable suggestion—or that they would only come because we have these powers? Are any of the witnesses suggesting that?

Professor Young: I think the suggestion was more that historically Select Committees have looked at topical issues in addition to shadowing Ministers. What Select Committees do will change over time as society changes over time and we have different responsibilities.

Q136 **Sir Bernard Jenkin:** How often do witnesses refuse to come?

Professor Young: It is incredibly rare that witnesses refuse to come. The suggestion was that you should have the ability to call someone from a broadband provider if you are looking at the topical issue of broadband provision. We are not saying that they are always going to refuse to attend. My understanding of this proposal is that if, after informal discussion about getting someone to attend, you were in the rare situation of someone still refusing to attend without reasonable excuse, the power would be there to require them to attend if that is necessary for you to carry out your job.

Chair: In our report we mentioned four Select Committee Chairs who had written to say that they had had problems in the last year alone. Perhaps a broadband operator has not refused or would not refuse to attend, but lots of other companies might not want scrutiny and they would delay, delay and delay until such time as the moment has passed.

Does anyone else have any questions for our witnesses? If not, may I thank you very much for coming along today? We are grateful for your time and we may want to follow up individual bits and pieces about drafting because we are conscious that we will not have got everything right in our first go. This has been a nut that people have been trying to crack for many years, and we are grateful to you for your help today.

Examination of witnesses

Witnesses: Mark Hutton and Paul Evans.

Q137 **Chair:** Thank you very much, Mr Evans and Mr Hutton. It is good to see you back. It would be great if you could introduce yourselves briefly.

Paul Evans: I am Paul Evans. I worked in the House of Commons for 38 years as a Clerk and retired as Clerk of Committees in 2019.

Mark Hutton: I am Mark Hutton. I worked in the House of Commons for only 35 years and retired as the Clerk of the Journals last year.

Q138 **Chair:** That seemed like a bit of one-upmanship. I did not know that



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Clerks did that kind of thing.

You were sitting behind the previous witnesses, so is there anything from what you have just heard that immediately springs to mind that you would like to comment on?

Paul Evans: I think the Committee has indirectly, perhaps, faced up to what we have just heard, but we need to reinforce the point. The choice before Parliament is between abandoning its claim to have PPR powers and taking legislation. As long as you face up to the fact that that is the choice you are making when you make your recommendation, that is fair enough, but there isn't really a middle way that the existing powers cover.

Q139 **Chair:** In fact, I think it is the Lord Chief Justice who says, "If the House considers that the status quo is not a tenable option and that change is required, then we agree that a legislative solution is preferable to the second option discussed."

Paul Evans: I am always happy to be endorsed by senior judges. The other point that came out is that the power to punish any witness does apply to parliamentarians. It is a curious situation at the moment, but either House could sanction a Member of its own House for refusing to attend a Select Committee but not private individuals outside the House. That power already exists up to and including expulsion I assume, though it has not been tested. It certainly includes the power to suspend without pay in the case of the House of Commons, so in effect there is the power to fine.

A very good point was made particularly by Mr Costa about the lack of Standing Orders showing the process of exercising the PPR powers to summon witnesses. That is a gap that could well be filled.

Finally, on the point of accountability and your series of questions at the end, Standing Order No. 152 undoubtedly says that the purpose of the departmental Select Committees is to examine policy, money and administration of the Government. A lot of how they do that has been demonstrated simply by how they approach that task, and it would include the necessity or desirability of hearing from individuals who are either in charge of companies standing in the feet of Government, as is often the case nowadays, or other bodies that are under the regulatory control of the law. As you say, it is a common factor and it would be a loss if Select Committees ceased to talk to people other than Ministers and civil servants.

Q140 **Chair:** Thank you. Mr Hutton.

Mark Hutton: I fear that both Ben and Robin know that Paul and I are not going to agree on very much in this area, apart from the analysis, which we will agree on. To start with his last point, a Select Committee's function is determined by its remit. That is quite simple; you are absolutely right. Select Committees have been sent off to examine all sorts of things, some of which have no Government engagement at all. That would be reflected in their remit. The current departmental Committees have a very clear remit, which is, as Paul says, to examine the policy, administration and



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expenditure of any defined Government Department. How they interpret that remit is up to them, and it has long been the case that no one interferes with how a Committee interprets its remit, apart from your own, which is determined by a reference. If a departmental Select Committee wanders quite a long way from its departmental responsibilities, it is unlikely to cause any problem unless another departmental Committee thinks it is encroaching.

If you were to go down anything like a statutory route for powers, the remit would again become important. It would be a reasonable excuse not to appear before a Committee that was exceeding its remit. In a way, that is what the Kerins case in Ireland was partly about.

That answers the question about what Committees can do: they can do what the House has asked them to do. That is what they are there for. As I state in my paper, I do not think that option 1 need be that we throw our hands up in despair, walk away and say that Committees have no powers at all. Committees are essentially parliamentary and political creatures that operate in a parliamentary and political sphere.

I quite sympathise with Mr Costa not finding a legal or lawyerly set of proceedings around how they function, and I fully endorse the argument that there should be much better procedures for the protection and guidance of witnesses than there currently are, but if Select Committees start to behave in a legal way, with legal or quasi-legal procedures, they will lose a great deal of what they have gained over the past 20 or 30 years: flexibility, agility and the ability to operate in different ways. Many Committees nowadays obtain their best information not through evidence but through seminars, visits and all sorts of other activities. They open themselves up to all sorts of individuals and they deliberately engage with them informally.

You describe the route you would go down to get to the certificate as being stage by stage by stage, but if someone ends up at the end of it, they surely have the right to go back to the beginning and say, "When I started talking to you, you never said I might end up in this place." If you are going to treat people in a legal way or a lawyerly way, with them being subject to those proceedings, you have to do so from the start. You can't suddenly change the way in which you treat people.

A lot of flexibility could be lost. Committees have a lot of options around what you call option 1—do nothing—to emphasise their role, their importance, their links with communities, groups and so forth, and the way in which Members of Parliament of all parties come together on behalf of their constituents and nations to try to examine issues and come to conclusions and resolutions that are, broadly speaking, normally consensual, positive and constructive. They do that in the expectation that they will be co-operated with by Government and others, including private citizens.

Where those people don't co-operate, there are various things that Committees can do to encourage them to do so, and possibly even to put



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a bit of political pressure on them to do so. I am not an advocate of empty-chairing, but there is a range of things that can be done. Most of the time, those things work—even with quite recalcitrant people they mostly work—and when they don't, they tend not to because the Committee has let itself be drawn into a political game.

The Dominic Cummings case was quoted. As someone who is now retired, I can say that I think that the Committee got itself into a political game and lost.

Q141 **Chair:** You are critical of the Committee.

Mark Hutton: I am critical of the Committee thinking it was going to get what it wanted out of that, given the way in which it approached the issues.

Q142 **Chair:** But it couldn't, legally, could it? It had no power to do so.

Mark Hutton: It had the power to summon but no way of enforcing it, which amounts to the same thing, you may say. I am suggesting that it did not set itself up to succeed or to put Mr Cummings in a position in which not turning up was much the worst of the two options.

Q143 **Chair:** I thought he didn't come the first time. He then came a second time and stormed off halfway through.

Mark Hutton: No, that was someone else.

Q144 **Chair:** And then he came before another Committee and sat there for eight hours.

Paul Evans: Mark said we wouldn't agree about much. I agree entirely with Mark about Committees promoting their extremely useful functions more widely and better, securing co-operation.

The Dominic Cummings thing happened on my watch, as it were. I'm pretty sure that if we had proceeded as advocated by the Committee in its report, it wouldn't have happened.

Chair: I am sorry but I didn't understand that.

Q145 **Sir Bernard Jenkin:** Can we just clarify that? Would he have been summoned or would the summons have worked? What are you saying?

Paul Evans: I am saying either he would have come or he wouldn't have been summoned.

Sir Bernard Jenkin: You have dodged that one very nicely. Thank you very much. If you had been advising, the Committee—

Paul Evans: I was advising it.

Q146 **Sir Bernard Jenkin:** So what was your advice to the Committee?

Paul Evans: If it is all right, I would rather not go into that.

Sir Bernard Jenkin: I can understand that, but I take it from the way



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you have phrased this that maybe the advice would have been "Don't bother." Certainly, my advice to the Committee was, "Do not bother. He will enjoy the spectacle of not coming."

Q147 Alberto Costa: Good morning, gentlemen. That you very much for appearing before the Committee.

First, may I ask you a question, Mr Hutton? The Chair described the Committee's proposal at the outset, and you may have heard this when we questioned the earlier panel of witnesses. If we were to proceed with some form of statutory requirement for witnesses, the process that we currently adopt as a Parliament would broadly continue, in that we would invite witnesses to come initially in an informal approach. That is all part of the continuing culture by which Select Committees operate. I do not think that what we are proposing is to move to a court model, where there is a formal citation of witnesses at the outset. We would treat people in the same way as we do now.

My second point is that, in my six years as an MP, I have formed the view that most witnesses who come before Select Committees that I have been a member of—particularly the Justice Select Committee—probably assume that there is some legal power behind the request to attend a Select Committee hearing. Is that a view you formed in your years as a Clerk here?

Mark Hutton: I think that it has been the case that Select Committees have quite frequently hinted at the expectation that a witness has to attend and that Committees have residual powers. That is one of the problems. They have hinted at some sort of residual mysterious power—"If you don't do what we say, terrible things may happen"—but they are not very specific about what they are. I don't think that is a good place to be. If you've got a power, you should be clear about it.

I absolutely concede that I do not think that Committees will suddenly send five pages of detailed terms and conditions to anyone they wanted to hear from. I just think you change the nature of the engagement.

Q148 Alberto Costa: How do you change the nature?

Mark Hutton: You change the nature because for some people you will be aware that right from the outset you may have to push the process all the way down the line—perhaps not all the way down to a legal summons, but quite a long way. You might have a regime that you will use for the recalcitrant and the intractable to say, "Of course we want you to co-operate and we will be as helpful as we can to help find a suitable time—blah, blah, blah—but these are the consequences that flow, right up to a statutory power if you do not." If you have to say that to some people, you will be inclined to say it to them sooner rather than later, because you want to make it clear that they had better turn up. You don't want to spend six weeks going slowly through the stages and finishing one inquiry and getting half way through the next one before they actually realise that they have to come. You are going to have to do that quite early for some people, but that creates a position in which you are treating some people



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differently from others. That may become a legal position that causes difficulties.

Q149 **Alberto Costa:** With respect, Mr Hutton, I think you are making assumptions about what the process will be.

Mark Hutton: I am.

Q150 **Alberto Costa:** I don't think that is helpful. We are saying we don't want to change the culture of Select Committees. All that we want is a clear, modest power for possible very minor potential cases where individuals might act in a most unhelpful manner towards Parliament. I still do not see from the evidence that you are giving to the Committee how that would change the terms of engagement.

Mark Hutton: I am saying I think it probably would. It might. I am not saying absolutely—

Q151 **Alberto Costa:** You are saying it might.

Mark Hutton: As I said in my memorandum, there is the risk of unintended consequences. The risk is that you will change the nature of the engagement with those with whom you engage. You will change it from being one in which at the moment most Committees may say that they have residual powers when they don't put them front and centre. They engage with people in an open, friendly and co-operative way. You have got this superstructure behind you and you have to be aware of that, but unintended consequences happen.

Q152 **Alberto Costa:** Thank you, Mr Hutton. Mr Evans, do you agree with that or do you think, given the potential for a very small number of cases to go through a formal process if we change the rules, that that will change the terms of engagement?

Paul Evans: I don't. You can always fear unintended consequences but it is obviously in their nature that you can't predict them. Most witnesses are climbing over each other to have the chance to give evidence to a Select Committee. That won't change.

Q153 **Chair:** My working assumption is that it would actually be quite a good idea in most cases. There is nearly always a conversation between the Clerk and a potential witness about what the hearing is about, when they have to be here, what it will feel like and all that kind of stuff. Sometimes these witnesses come every two years because that is a standard part of going before a Business Committee or whatever. That need not change. Would it not be quite helpful to have a sort of terms of engagement letter that goes out normally anyway? It would be a sort of "This is what you can expect from our end".

Paul Evans: My biggest problem with PPR powers, and the reason that I am very pleased that the Committee undertook this inquiry, relates to what Mark was talking about. When a witness says, "Do I have to come?" "Yes, it is an inherent power of Parliament to summon you." That is the



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official answer. Then they say, "Okay. Well, what happens if I don't?" And you say—

Chair: "Err—". How do you transcribe that shrug of the shoulder?

Paul Evans: *Hansard* are brilliant at that kind of thing—"He shrugs". I have always felt uncomfortable being in that position.

Alberto Costa: And rightly so, I would say, because it demonstrates that the emperor is naked in this place. We are weak when it comes to the process of calling witnesses.

Q154 **Chair:** Mr Hutton, you were nodding at what Mr Evans said, in a breaking out of unanimity.

Mark Hutton: I agree with the description of how we have operated with PPR powers. I don't agree that we are naked. I don't think that the PPR powers are, as Paul says, what bring most people before a Committee most of the time. What brings them to a Committee is a desire to engage and to be helpful the vast majority of the time. For those who do not want to do that, what brings them is not the threat of being summoned. Anyone of any standing who is threatened with PPR powers goes to their lawyer, who tells them, "They can't summon you." It is not that, but the reputational balance: "Is it better that I go or don't go?" That is a judgment that they make with their lawyers and their PR people as well.

What Committees collectively can do if they don't take the statutory route is to work to shift the balance of that reputational judgment. Most of the time, for most people, the judgment is that it is better to turn up than not. We saw that with Mike Ashley, Philip Green and others. For some people, for some of the time, the judgment is the opposite. The way in which Committees behave will affect that balance of judgment. The way in which Committees are perceived will affect the reputational consequences of co-operating or not co-operating with them. There is a lot that the Committees collectively and individually can do to demonstrate that it is the duty of anyone of any public standing or public responsibility to co-operate with their legitimate and important inquiries. One of the things they can do is around the process with which Committees treat witnesses. Yes, there are Standing Orders for that, and we might want to come on to them separately, but the whole of that paraphernalia can be much improved.

Chair: I think we are all agreed on that.

Mark Hutton: If nothing else happens, I would recommend that as a first step. If you do that and still do not get the people you need, that would be the point when you would possibly want to think about going down the statutory route.

On separate point that I know is beyond your brief, I am not a fan of legislating on a particular piece of parliamentary privilege in isolation to the rest. That causes difficulties. Whether it would in this case would depend on the drafting, the content and all sorts of other things.



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Q155 Chair: As you say, we don't have any choice on that matter. There is a reputation risk for a Committee as well if they overplay their hand. I do not like the term "grandstanding", because some might have accused me of grandstanding at some point.

Alberto Costa: Surely not, Chair.

Chair: That wasn't inviting a comment. Bernard's doing a Paddington stare.

For any Select Committee at key moments, there is a judgment call to be made about whether we pursue something: is it really worth the candle? On the whole, I would say that Select Committee Chairs and Members are pretty rigorous about exercising due diligence. Is that fair, or am I being too nice?

Mark Hutton: I think that is fair.

Paul Evans: I think it is fair, but there are some exceptions.

Q156 Chair: Do you want to list the exceptions?

Paul Evans: We have discussed one of the most obvious cases. By slightly raising the stakes, by putting a real power in place via legislation, you encourage Committees to behave more responsibly. When the power is so vague and so ill defined—

Chair: All you've got left is grandstanding.

Paul Evans: All you've got left is grandstanding. That is a fair way of putting it.

Mark Hutton: I worry that that would not be quite how it would work.

Paul Evans: It's a fair worry, but when I was giving advice, which Sir Bernard asked about, I felt that the shots in my locker were fairly few.

Q157 Sir Bernard Jenkin: Mr Evans said that it would be a great loss if Select Committees ceased to talk to people other than Ministers and officials, but, Mr Hutton, you seem to be suggesting that the informality of those arrangements will become a risk if we have statutory procedures that people feel they can use to protect themselves.

Mark Hutton: I do fear that if there were statutory procedures in place of the sort described in your report, despite the fact that you hope and even believe they would be used rarely, if at all, they would be used more than you expect. I would cite the example of the Recall of MPs Act 2015, which was passed in the expectation that it would never happen. There now seems to be a daily conversation about how it is going to happen next, and it did happen three times in the space of six months, coming out of the blue. I would not be confident that it would be a very rarely used piece of legislation.

As soon as you do get into using it, you have the problem of what the legal process turns out to be like. I took the inference that Joshua



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Rozenberg took with the Lord Chief Justice, particularly as he referred back to the view of the earlier paper from the former Lord Chief Justice, which was even more forthright in stating, quite candidly, that the courts had a duty to see that natural justice was followed. I took that to mean that they had a duty to see that the process behind the summons—the detailed proposal in front of the former Lord Chief Justice—had complied with the principles of natural justice and had been fair. As soon as you get a case like that happening, as soon as it becomes a known end to the process of engaging with a Select Committee, if it works it risks being a deterrent to people who are slightly nervous of coming forward to Select Committees because they are naturally nervous or they have reasons to be nervous. Many of the people that Committees want to talk to fall into those categories.

Or it becomes almost an encouragement if it doesn't work. If in one of the first cases the court decides there was a reasonable excuse, suddenly there is a "get out of jail free" card for all those people who do not want to appear in front of Committees. I think the risks around creating the process outweigh the likely benefits to Committees in the round. Also, it is a risk. You naturally focus on the Committees where this has been a real issue, where the non-attendance of individuals has been a real issue to them. I know you have had several Select Committee Chairs say that they have had that problem in the past year, but most Select Committees most of the time don't. I think it is important to have in your minds the breadth of Select Committee activity and the fact that the vast majority of it happens very effectively and very constructively without any reference to any power.

Q158 Sir Bernard Jenkin: Can I put a supplementary question to Mr Evans? Could you address the argument that in fact this will have a chilling effect on the relationship between Select Committees and their witnesses in a way that you don't intend? How confident are you that that will not happen?

Paul Evans: I am fairly confident. I cannot predict the future, but I am fairly confident that it will not have the chilling effect feared, because 99.9% of Select Committee witness interaction is informal. It is as described: you phone them up and say, "Would you like to come next Tuesday?" They say, "Could you make it Wednesday?" And you say, "Okay," and all the rest of it. It will never even arise.

To make a further point in response to that, it is not the end of the world if the courts find that the witness hasn't committed an offence in the end. It is not a total constitutional disaster. I don't believe that this offence, if created, will ever be prosecuted. If it were prosecuted and the courts found that no offence had taken place, then fine.

Q159 Sir Bernard Jenkin: You said it would be a loss if a Select Committee ceased to engage with people.

Paul Evans: Yes.

Q160 Sir Bernard Jenkin: What is the risk that that is going to occur without



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this legislation? How serious is that risk?

Paul Evans: That they won't engage. I don't think there is a huge risk.

Q161 **Sir Bernard Jenkin:** Right, so there is some risk if we have the legislation, but you don't think there is a risk if we don't have the legislation.

Paul Evans: You are talking about two different risks, Sir Bernard.

Q162 **Sir Bernard Jenkin:** No, I was talking about this informal—

Paul Evans: No, there is no risk to the conduct of Select Committee inquiries from either having the legislation or not.

Q163 **Sir Bernard Jenkin:** That is a different question. I was asking about this. It would be a terrible loss if we ceased to talk to people other than Ministers and officials. That is not a risk?

Paul Evans: That is not a risk in either scenario.

Sir Bernard Jenkin: Right, okay. Some people say it is a risk in the legislative scenario.

Chair: I don't think they have.

Q164 **Sir Bernard Jenkin:** I think that is what Mr Hutton said. He said it would have a chilling effect on the openness of conversations.

Mark Hutton: I think, if you create a statutory power and that statutory power becomes—

Q165 **Chair:** Witnesses will suddenly clam up.

Mark Hutton: If it becomes something that witnesses are conscious of. In an ideal world, you pass a statutory power, it sits on the books, no one ever uses it, but everybody who might think they don't want to come, or might get out of coming, realises it is there, and they come. If that doesn't happen, I do think you have created an environment in which some people will be less willing to come forward.

Chair: Okay. I am going to Andy and then Alberto. Then I will come back to Bernard, if that is okay.

Q166 **Andy Carter:** I think, Mr Evans, you just said that 99.9% of conversations are informal. Are we using a sledgehammer to crack a nut here? Do we really need legislation in place to deal with the 0.1% of times when we tend to have a problem? Are they not dealt with in the media or other areas?

Paul Evans: If you are happy to accept that Parliament has no power of compulsion, fine. If you want Parliament to have a power of compulsion, this is the right way to do it. It is taking a fine chisel with a carefully controlled hammer to a legal problem. It is not taking a sledgehammer to crack a nut.

Q167 **Andy Carter:** I understand what you say there. If we are handing out



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hammers to Select Committee Chairs, they are the ones who decide how they use those hammers. The Select Committee Chairs change regularly. Although we might have a nice group of Select Committee Chairs today—

Sir Bernard Jenkin: A very nice group.

Andy Carter: Absolutely. But there is no certainty that that same approach will be taken by future Chairs. Are you absolutely certain that that is the route to take?

Paul Evans: You are asking me a slightly unfair question. I am not absolutely certain about anything in the future. I am reasonably confident, within my experience, that there will be more inhibition on Select Committee Chairs going rogue if we have this law than if we don't.

Sir Bernard Jenkin: Ah, so it is about controlling Select Committee Chairs.

Chair: Stop being naughty, Sir Bernard.

Q168 **Alberto Costa:** I find your evidence persuasive, Mr Evans, not least because you are the only Clerk present who has experienced the most concerning of all recent cases. I am persuaded that your evidence is very carefully reflective of the challenge that you faced in dealing with a recalcitrant witness.

I just want to clarify with both of you a point that I made earlier. We keep hearing that, if we bring in this power, it will change the way in which Select Committees and potential witnesses interact. However, both of you agree, do you not, that most witnesses today assume that, if they are invited to attend a Select Committee, Parliament has the power to oblige them to attend, and secondly, that they are falling over each other to attend for reputational reasons and for their advantage?

If we accept those two premises—that they want to attend in most cases, and that they assume there is a power to compel them to attend in any event—having this legal base to underpin the process is not using a sledgehammer to crack a nut. Indeed, we would have to decide what the process is and the gatekeeper and so on. The Select Committee Chairman may not be the only gatekeeper; there might be another process.

Chair: Well, indeed, I think we have always asserted that there would be another process.

Alberto Costa: Using Andy's phrase, it is not the case that we are giving a hammer to Select Committee Chairmen, or taking away a hammer. There would be a process. Do you agree that, given that most witnesses probably assume that there is an obligation for them to attend in the first place, it just does not change the terms of engagement? Forgive me: I am repeating myself, but I want to push this point.

Mark Hutton: I'm afraid I don't accept the premise that most witnesses think they have to attend. I obviously do not know the Justice Committee as well as you, but I think most Committees, most of the time, make it



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clear to witnesses that they are being invited, and that if they do not want to—because they are nervous or they do not think they have anything to say; whatever it might be—no pressure will be put on them. That is the case for the vast majority of witnesses in most Committee inquiries. Obviously, it is not the case for all witnesses. You are much more keen, as the Clerk of a Committee, to persuade some witnesses to attend than others. I do not accept the first premise. I do not think that Committees now operate on the basis of telling everybody that they have to attend. Most of the invitations are genuine invitations.

Q169 Alberto Costa: Do you agree with that, Mr Evans? Do you think that most witnesses assume that there is an obligation for them to attend or not?

Paul Evans: It's what we tell them if they ask. I am not sure if the question often comes up, but yes, broadly. What exactly they think the obligation consists of, I would not like to speculate, but I think they assume that an invitation from a parliamentary Select Committee is a formal obligation.

Q170 Alberto Costa: Would you therefore agree that legislation underpinning the process would not significantly alter the terms of engagement with the vast bulk of witnesses?

Paul Evans: I honestly believe that you are right.

Alberto Costa: Thank you.

Chair: Bernard has a couple more questions, and then I am afraid that we have some private business that we need to do by 11 am.

Q171 Sir Bernard Jenkin: Just coming back to this question of a reasonable excuse and the Cummings case, one of his arguments was that the Electoral Commission was still pursuing Vote Leave—of which I was a director during the referendum; I declare that interest—and that there was therefore a sub judice element. Would that be regarded as a legitimate excuse?

Mark Hutton: Paul finds it awkward to answer because he was actually advising the Committee; I was only advising the advisers at the time.

Sir Bernard Jenkin: I shan't ask Mr Evans to reply to that.

Mark Hutton: I don't think—

Chair: Sorry to stop you, Mark. Mr Evans, if you would like us to have five minutes in private session, I am very happy to do that towards the end.

Sir Bernard Jenkin: I think that should be for you and him.

Chair: No, it should be for the whole Committee. Just ruminate for a few moments on whether you want that to happen or not, Mr Evans.

Mark Hutton: I don't think the House's sub judice resolution was engaged, and I do not think that, if it was, there was not a way around it.



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Whether a court would have thought the same, you would have to ask a lawyer.

Q172 Sir Bernard Jenkin: Can I just deal with the question of unintended consequences? Mr Evans, you say we can't predict unintended consequences. That is certainly true. We are just undoing the Fixed-term Parliaments Act because that had unintended consequences. If I remember correctly, we legislated on privilege in respect of defamation. We had to undo that. Mr Blair himself says devolution and the Freedom of Information Act were full of unintended consequences. So, particularly in constitutional statutes, it is not unusual to have unintended consequences. Could we undo this if we did it?

Paul Evans: The short answer to that is that parliamentary sovereignty says yes. If you feared all unintended consequences, you would never legislate at all, because you can never know whether there are going to be unintended consequences.

Sir Bernard Jenkin: That is why I ask this question.

Paul Evans: But yes, you can undo it. Interestingly, the FTPA is an example where what Parliament intends to do—and hasn't quite finished doing—is to say, "The situation will return to the status quo ante," which many lawyers disputed could ever be said.

Sir Bernard Jenkin: That is why I ask the question.

Paul Evans: Well, if they are doing it with the Dissolution and Calling of Parliament Bill, you can do it with this.

Mark Hutton: The culture of Select Committees has changed over the years and is changing all the time, to some extent. My fear is that at the moment huge benefits are coming from a culture of openness and engagement and not a big emphasis on compulsion or requirement. If you introduce that by statute and then decide you don't like what it has done and undo it, you won't go back to the status quo ante culturally, even if you say you have. I think you would go back to a different place. Whether it would be a worse place or not—

Q173 Sir Bernard Jenkin: But politically rather than legally.

Mark Hutton: Yes, politically.

Q174 Sir Bernard Jenkin: Because the argument about the FTPA is that you might not be able to get back to that.

Mark Hutton: From my perspective, the problems for Committees are largely small p political around this issue, not legal.

Q175 Sir Bernard Jenkin: Thank you very much. A fascinating conversation—I have really enjoyed it.

Mark Hutton: One point I wanted to make, if I may—

Chair: You are certainly not being a recalcitrant witness.



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Mark Hutton: I would be very nervous about a regime which sought to argue that Standing Orders, however well drafted—all Standing Orders are of course excellently drafted—had the same level of protection as anything approaching a legal proceeding would have. The enforcement of a Standing Order is a very difficult thing to do, as you will be aware. A Committee's operations are run by the Committee and the Chair; there is no external authority that can enforce compliance with a Standing Order. The Clerk does their best, the Liaison Committee might do its best, but in practical terms, it is not the same thing. Saying it was the same thing to a witness or to anyone else would risk being misleading.

Q176 **Sir Bernard Jenkin:** It's accepted, as Mr Evans said, that we don't have the power.

Mark Hutton: What I am saying is slightly different. If you propose a Standing Order that says, "Committees will only behave like this," and a Committee does not behave like that, there is really no way of redressing or making that happen, unless you introduce a separate regime.

Q177 **Chair:** And also, the only power that the Chair has is to suspend the meeting.

Mark Hutton: Yes.

Chair: If a member of the Committee were to start screaming at me now, all I can do is suspend the meeting. I can't suspend the Member from the meeting. All I can do is suspend the meeting.

Alberto Costa: You see, I wasn't aware of that, Chair. *[Laughter.]*

Chair: So stop screaming. I have faced that once on a Committee.

Mark Hutton: I think that saying that we have this set of legal powers and that we provide balance and fairness to the witness by having this set of internal processes, and that no one need look at these internal processes because they are ours and they are robust and adequate, is simply unlikely to be true.

Chair: We are very grateful to you both for not being recalcitrant and for clambering over each other to give evidence to the Committee. Thank you very much. We will have further deliberations. I am very grateful.