

Committee of Privileges

Oral evidence: Select Committees and Contempts, HC 826

Tuesday 30 November 2021

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[Watch the meeting](#)

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

Questions 178-264

Witnesses

I: Lord Gardiner of Kimble, Senior Deputy Speaker, House of Lords; Rt Hon. Lord Judge, former Lord Chief Justice of England and Wales; and Christopher Johnson, Clerk of Journals, House of Lords.

II: Rt Hon. Caroline Nokes MP, Chair, Women and Equalities Committee; Sir Robert Neill MP, Chair, Justice Committee; and Damian Collins MP, Chair, Joint Committee on the Draft Online Safety Bill, and former Chair, Digital, Culture, Media and Sport Committee.

III: Rt Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons.

Written evidence from witnesses:

[Rt Hon. Lord Judge](#)

Examination of witnesses

Witnesses: Lord Gardiner of Kimble, Rt Hon. Lord Judge and Christopher Johnson.

Chair: Good morning. Welcome to the Committee of Privileges. We do not meet very often and, as you know, we are only allowed to consider matters that have been referred to us by the House as a whole. This matter has been sitting around for six years, and it is five years since it was referred to the Committee by the House. We are trying to get to an answer, and we are hopeful that you will be able to do that. Would you like to introduce yourselves?

Lord Judge: I am Igor Judge. I am the Convenor of the Cross Benches, but I am here in a purely personal capacity.

Lord Gardiner: I am John Gardiner, Senior Deputy Speaker.

Christopher Johnson: I am Christopher Johnson, Clerk of the Journals in the Lords. I was also the Lords Clerk of the 2013 Joint Committee on Parliamentary Privilege.

Q178 **Chair:** So you have been round this course once or twice.

Christopher Johnson: Indeed, once or twice.

Sir Bernard Jenkin: You have previous.

Q179 **Chair:** Well, we all have. Sir Bernard obviously sat on—well, anyway.

Can I ask a general question? Do you think that there is a problem? If there is, do you think that the solution that we are suggesting would meet that problem?

Lord Judge: You have a problem—I am sorry to put it like that; we do not have a problem. Your problem is exemplified by one or two people refusing to turn up and whom you would like to speak to, but we do not have a problem. That has never happened with us. Why that should be is an interesting question, but it does not matter. If you have a problem, you have to try to resolve it, because your choice is doing nothing or finding a solution. Doing nothing is obviously a matter for you and then ultimately for the House. What you do will then have to be reflected by us.

My own view is that it is much better for us all to work together or have the same sort of privilege arrangements, but there is absolutely no call for that in our House at the moment.

Q180 **Chair:** If we sort our problem, does that then provide a problem for you?

Lord Judge: If you sort the problem, I expect that Lord Gardiner will tell you that he will go back and we will discuss it. As I say, we do not identify a problem for us. I recognise a problem for you.

If you are going to resolve the problem, you have to do it by statute. When we had a private meeting, I think I said to you—I don't mind

referring to this—that we cannot have some medieval process through which you suddenly become a high court of Parliament and start locking people up. You cannot do that. The Contempt of Court Act 1981 made the arrangements for the courts and modernised them, and you would have to do the same.

Lord Gardiner: In my role, I took your proposal to our Liaison Committee, the Chairs' forum and the Constitution Committee. The responses were very much as Lord Judge has said: that in our House the difficulties have not presented themselves in that we have not been unable to secure the witnesses we wanted. In fact, it would be fair to say that the phasing and timing of ministerial appearances has been our major issue rather than more external witnesses. Perhaps also there is a sense that the House wishes to have willing witnesses in a way that creates the climate in which our reports are produced.

Coming to this completely fresh, I was intrigued by a decision in 1999 and then one in 2013, or a consideration of it. One of the problems is how it plays out. If you decide to have legislation, are there potential consequences in terms of the culture of our end in particular?

I agree again that if the House of Commons was to decide to go down a route of legislation, I would certainly want to be in the position of taking that back to the House of Lords on the basis that there is obviously strong merit in having a bicameral arrangement on these matters. If the decision finally was legislation, I would very much like to have an opportunity to take it back to people who have said to me, "We don't feel the need for legislation, certainly not here." As a matter of good practice, I would need to say, "This is where we are at and where the House of Commons has got to, and therefore we should look at it through that prism."

Q181 **Chair:** You said that you like to have willing witnesses—on the whole, we do as well and the vast majority of our witnesses are willing. Obviously, if somebody is unwilling, that will not necessarily lead to a very productive session. But at the same time, if that person is central to a subject area that we are considering, it is a bit difficult not to require them to come. Do you mean that in the Lords you just steer clear of those kinds of potential confrontations? Or are people more deferential to you?

Lord Gardiner: I think not the latter. One of the things that we have always sought to do is not duplicate in any sense the work that your Committees undertake. For instance, on some of the occasions that are really at the root of this matter, the House of Commons has undertaken some of the characters you wish to ask questions of in a way that we would say was duplicating your work.

From that point of view, I do not think it is a case necessarily of our wanting to have happy, cheerful witnesses all the time; we want a very thorough consideration with witnesses who are going to help the Committee produce the best report possible in the interests of the national discourse.



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I am not aware—obviously, I have asked all the Chairs and the Committees. The only difficulties have been about scheduling Ministers, and those have been resolved with what I call “iron fist in velvet glove”. We have not had to use any draconian threats. We might have said that we were displeased in some manner, but it has never prevented us from hearing from people whom we would wish to hear from.

Q182 **Chair:** I think the Chair of the Liaison Committee is also addressing that issue of ministerial attendance for us.

Christopher Johnson: To supplement what Lord Gardiner and Lord Judge have said, the House of Lords only conferred the power to call for persons, papers and records in 2008, so it is a fairly recent innovation. It was done largely to bring Lords Committees in line with Commons Committees. No Lords Committee has had to use the power to issue a summons since 2008, so it simply has not arisen.

There have been cases of Lords Committees having reluctant witnesses and, as it were, the veiled reference to the possibility of some kind of unspecified sanction down the road has been sufficient to get the witness to come and give evidence. That, I think, is as far as Lords Committees have gone. We have found that the informality of the existing regime suits our Committees pretty well.

Q183 **Chair:** The difficulty for us is that the veil is quite torn from top to bottom at the moment. That leaves us with the problem that Lord Judge was referring to, doesn't it?

If I am reading you right, it is not that you are intrinsically opposed to us going down this route. If anything, you think that there might be a need—that if we consider that we have a problem, the solution of a statutory offence of some kind is the only route to go down—but that if we are going to go down that route, the question is what happens to the Lords.

Lord Gardiner: The answer, very simply, is yes. I think the principle of a bicameral arrangement is very strong. Having heard what our Chairs and Committees would prefer, what I would like—if the route changes and the decision is that you wish to go down the legislation route—is, with due time and proper consideration, to go back to them and say, “This is what the House of Commons views as necessary. With that in mind, how would we all react?” I think there is strong merit in having a bicameral arrangement on these matters.

Q184 **Chair:** And you do not think the Lords would set itself against the Commons legislating in this area, as long as the issues in relation to the Lords could be met.

Lord Gardiner: My view—it is only my view; I have not asked anyone—is that we would see this as your business. It is not for us, as the House of Lords, to opine on what you wish for your House in terms of calling people and witnesses. I think I would call that an impertinence.



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Lord Judge: I am in the same place. I see at as your problem, which you are seeking to address. It is not our problem—we haven't had it. It seems to me that you must decide what you are going to do. The idea that the Lords would then say, "Well, you've made a decision about what you think is best for the running of the House of Commons and we're going to reject it," would seem to me to be unreal. The idea that if any legislation came through, we would then say, "No, we're going to vote against it"—that is not going to happen. Whether the Lords would want to join in bicamerally is a separate question.

Q185 **Sir Bernard Jenkin:** We all have a track record of inconsistency on this subject. I just want to track down something that I think you have indicated in conversations, which is that you would prefer there to be a single statute to cover both Houses.

Lord Judge: That would be my preference, yes.

Q186 **Sir Bernard Jenkin:** How is that consistent with saying, "That's your problem. What we do is our concern."?

Lord Judge: I was answering Mr Bryant's question. The answer is that you will have to decide what you think is appropriate. My preference would be for us to take the same view, but I don't think we can tell you at this stage that we are in the same place, because we are not.

Q187 **Chair:** I think one of the objections historically has been that the danger with any kind of statute is that the courts would start inquiring into proceedings in Parliament, and that gets us into difficult territory with the Bill of Rights and so on. Is that your take on the draft that we have done?

Lord Judge: Article 9 is very sensitive. I think you—or the legislation, to forget about who—would have to be absolutely clear about whether there could be any cutting down of article 9. If there is, I would say—if I were drafting it—it has to be absolutely explicit and limited to whatever it was that was thought to achieve your purpose.

I am worried about the situation that could arise. I am assuming that there will be a defence to any charge—which is, "I had reasonable grounds for refusing"—but let us say that we get to the stage where someone says, "The reason I don't want to give evidence is that I saw Mr X or Mrs Y being very badly treated by one of the Commons Committees." That happens from time to time, that the witnesses are bullied in a way that would not be allowed in court. Who decides whether that is a justified reason, and how do you establish whether the belief that you have that it is justified? You would then have to look at—of course, a matter of public record—how Mr X or Mrs Y had been treated.

Those are minor problems at this stage, but if you actually got to a prosecution—which I would very much hope that you never did—you would have to be very careful not to cut down on the right of the defendant to present his own case and to invite the jury to consider it.

Q188 **Sir Bernard Jenkin:** You are basically advising the House of Commons to consider that once this statute is on the statute books, there are risks,



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that they are attached to how we behave and how we conduct ourselves with regard to these powers, and that we would be tempting the courts to interfere in, or at least to scrutinise, our internal processes if we do not behave very well?

Lord Judge: That is part of it. I have given a “for instance” as an excuse, but people can dredge up all sorts of excuses, I assure you of that.

Q189 **Sir Bernard Jenkin:** Supposing a Committee is divided on political lines and the choice of the witness is a very political choice being imposed by a single-party majority—it is not impossible—and the summons is being resisted, I imagine that the courts would be tempted to think, “This is a political situation”, but would that tempt them to say, “We have to protect the witness”, or would they say, “That’s politics and nothing to do with us”? I do not know how the courts would behave in the present day.

Lord Judge: The difference is that when you are dealing with the witness, he is a witness to the Commons, to the Committee, but once you are in prosecution mode, he becomes a defendant, and then the courts have to be sure that his trial is a fair one and that he can advance the defence he wishes to advance, which is, “These are my reasons—”. That might sound like poppycock to you, but, “These are my reasons—”, and then you are in a different world. Then the courts’ obligation is obviously to make sure that the trial is a fair one—then he is a defendant. That is the difference—he is a witness at this stage but, if he is prosecuted, he becomes a defendant.

Q190 **Chair:** Reasonable excuse is dealt with quite often by the courts, isn’t it?

Lord Judge: Yes, and all sorts of reasonable excuses are offered up.

Q191 **Chair:** And lots of them are determined not to be reasonable excuses.

Lord Judge: Yes. Then they are—

Q192 **Chair:** There is quite a lot of case law or thought already.

Lord Judge: There is. For instance, the jury acquitted people who were—was it—creating a lot of noise in support of some demonstration or other, to the extent that there was a prosecution. The defence was, basically—I am paraphrasing a rather complicated defence—“We are saving the world.” The jury said not guilty. Juries do not have to give reasons for their decisions.

Q193 **Sir Bernard Jenkin:** On the question of summoning Members of Parliament or Members of the upper House, traditionally a Member of Parliament is immune from a Committee summons. I think that we would want that to continue, except where a Member of Parliament—more likely, a Member of the upper House—has a responsibility, a public office, for which they are paid. That might be in a public corporation or a non-departmental public body, chairman of the BBC perhaps. Do you think the statute should be able to differentiate between different kinds of Member of Parliament or peer, such that if they have a responsibility for which they are paid, for which they should be accountable to Parliament in



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some form, they should not be exempt, or do we just leave that alone?

Lord Judge: Forgive my saying so: you have to decide whether you are going to apply whatever rules you produce to Members. If you are, that raises huge questions, doesn't it, just by itself? If we summon a Member of our House to come and give evidence to us, it is quite a step. And if it is the other place, it is the same issue, but if you did, you would have to recognise the distinction—if I may say so, Bernard—that you make.

Q194 **Sir Bernard Jenkin:** There are instances where, for example, the chairman of the BBC has refused to appear in front of a Select Committee on the grounds that they are a Member of the upper House. How do we address that?

Lord Judge: Well, that is what you are trying to address—forgive me—but if you are going to have this situation, I think you then have to be very careful not to run a system that says, "Everybody else can be summoned to attend and everybody else is liable to be prosecuted, but not Members of our House and not Members of the other place." So your legislation would have to take that into account and you would have to decide whatever you thought appropriate for that.

Q195 **Sir Bernard Jenkin:** You don't have a view on that matter.

Lord Judge: I have a view on it. My view is that it depends on what the reason really is. I am sorry, but I cannot be more—it is too nebulous a situation.

Sir Bernard Jenkin: Lord Gardiner, do you have a view on that?

Lord Gardiner: I think I would say, with its being a convention, that one should have a very strong reason to start breaching or changing a convention about not having powers to summon. In other words, one would want to have very compelling reasons, and perhaps issues that had gone dramatically wrong, to make one feel that the convention should no longer be the convention.

Sir Bernard Jenkin: Thank you.

Q196 **Alberto Costa:** Might I suggest that a solution to the problem that Bernard has raised is that if a Member of either House has an outside interest—as the chairman of the BBC does—and they are asked to come before a Select Committee, they are asked in their capacity not as a Member of one or other House but as an office holder, director or consultant in whichever industry the Select Committee is seeking evidence from? Surely that would be a reasonable solution, and I think that was what you were alluding to, Lord Judge, was it not?

Lord Judge: If I may interrupt, that is the point. The legislation will have to be very clear about what it is you are doing, but I agree with you if you are saying, "We are investigating this issue, and you have a particular role that can throw light on it. The fact that you're a Member of the House of Lords doesn't preclude us from asking you to come, because what we're



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asking you to do is to come in your capacity as X.” That’s fine, or would be fine, as far as I’m concerned.

Q197 **Chair:** But we might be able to deal with that particular element through means other than legislation.

Sir Bernard Jenkin: There could be some Standing Orders.

Chair: For instance, both Houses could agree some kind of memorandum or a convention that says that if a Committee of one or other House wants to summon somebody from the other House, it is expedient for the dignity of both Houses that the other House will enable that person to come—or some such formulation.

Lord Judge: As I said, I think the idea that somebody in either House who had or appeared to have a significant contribution to make on an issue that you were seeking to resolve could say, “Well, I’m not coming, but my managing director is obliged to come”—that is a very tricky situation, which I wouldn’t support.

Q198 **Sir Bernard Jenkin:** That was exactly the situation.

Lord Gardiner: I am not aware—Chris may be able to help me with this—of any case where it was because of their membership of the House of Lords that they sought not to attend.

Sir Bernard Jenkin: I will furnish you with that if you wish.

Christopher Johnson: I think the case Sir Bernard is referring to is probably the case of Lord Patten of Barnes—

Sir Bernard Jenkin: And then Lord Hall.

Christopher Johnson: And their reluctance to appear before the European Scrutiny Committee. A key point is that I think they gave evidence on a regular basis to the Culture, Media and Sport Committee, but in a specific set of circumstances, there was a reluctance to give evidence before the European Scrutiny Committee in the run-up to an election, because they were concerned about BBC editorial independence. So it gets to the point of whether there is a reasonable excuse in that situation to decline to comply with a summons. It is political, really.

Q199 **Chair:** I think the Foreign Affairs Committee wanted to see—oh, Lord. I think it was a Government Minister in DEFRA who then went off to run a Russian business. He refused, and he has now taken a leave of absence. It took us nearly 18 months to force him to come before us. Now it is a moot point, because he has taken a leave of absence, whether he is still covered by the exemption or not. I cannot remember his name, so it is not a very helpful piece of information that I am giving you.

Sir Bernard asked earlier about the effect that it might have, which might be a positive effect. It might mean that MPs do not bully witnesses when they come to Committee. I think, broadly speaking, that is the point he made. There might be a countervailing argument that it might lead to a



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chilling effect on the way we deal with witnesses. Do you see that or not?

Lord Judge: Speaking for myself, I do not think that is the problem. The problem is that your Committees split on party lines, and from time to time one side or the other wants to make a significant point, possibly for the media, rather than to ask a question of the witness—forgive me. I think more people will have been put off by the cross-examination of Dr Kelly all that time ago than would be put off by the fact that you have the power, because most citizens would be happy to co-operate. You are dealing with a very small number, a tiny percentage of people, who just do not want to. Most citizens would be perfectly happy to come and give evidence to a Committee. As I say, they are more likely to be put off by the way some witnesses are treated than they are by the fact that you have a power. That is my view.

Q200 **Chair:** But if we were introducing Standing Order changes, which meant that any kind of bullying could be prevented, and if we were also having a memorandum of agreement between Committees and witnesses about their treatment and so on, that could, we hope, obviate some of that.

Lord Judge: Yes. As I say, I don't think most people are going to be worried one way or another by your having additional powers. I suspect most people think that if you ask them to come to give evidence to you, they have got to come. They may not know why they have to come. It might just be a matter of public duty, but I do not think there will be a chilling effect.

Q201 **Sir Bernard Jenkin:** Do you think Rupert Murdoch would have come if there had been a statutory process that enabled him to fight the summons? That seems to me the danger, the risk we are entering into. At the moment the lawyers say, "It's nothing to do with me. You either go or you don't go. It is up to your reputational damage." He did not want to suffer the reputational damage of refusing, and as a broadcaster there was a threat over the Ofcom licence. But what will be the situation when he has a statutory process to avail himself of?

Lord Judge: I think that if it is a statutory process, the idea is to make it more likely that he will give evidence than not.

Q202 **Sir Bernard Jenkin:** You think it does?

Lord Judge: That is the objective, isn't it? You cannot do away with the fact that some people—this is what we are trying to avoid. You introduce a statutory power and make it an offence, and then you hope it will never be prosecuted because nobody will ever in the end refuse a summons that ends up by saying, "And if you do not respond positively, you are liable to a fine, imprisonment" and so on. But there will be people who would be happy to take you on, if only for the publicity for some of them.

Chair: Rupert Murdoch was a US citizen, so it is slightly different, but the point remains about—

Sir Bernard Jenkin: Actually, I think it should go on the record. In my view, he enhanced his reputation by coming to the Committee and taking

a hit.

Chair: A hit? It was a custard pie, in fact. I am not sure he did. You could argue that he had been evading—He had been a senior figure in British broadcasting and newspapers for many decades. It was only after 37 years of doing that that the Committee managed to get him before it.

Christopher Johnson: I agree with what I take to be the thrust of Sir Bernard's question. There is a risk here, but I am sure it is a risk that can be managed. It is important to bear in mind that the key benefit of Committee proceedings is their informality and the fact that we do not have to rely on hard and fast rules—statute—to conduct the process. If you compare a Committee inquiry with a statutory inquiry under the Inquiries Act 2005, you have a very different ethos. You want to preserve some of those qualities that have value in terms of Committee work. I am sure it is a risk that can be managed, but it is important to think about it.

Lord Gardiner: If I may—I rarely, if ever, contradict Lord Judge—but a number of Chairs of Committees were concerned—the word “chilling” was not used—that, certainly in the House of Lords, they would not want to change the sense of a culture of “we get more out of witnesses using a certain approach” and that we need to be cautious. It was put to me that you should sometimes be careful of what you wish for and that you might change the environment unwittingly, just because you are trying to crack the nut of a few—I will use the word—difficult people.

It would be fair to say that this worry was one of the genuine concerns that came through the forum I had with the Chairs. I do not think anyone who is fair-minded has anything to fear from this, by the way, but it is a matter of the spirit in which people come. I would not be correct in not raising that. Chair, you mentioned the word “chilling.” That was not used, but it was sort of expressed.

Chair: I have sat on Select Committees most of the time I have been an MP. In my experience, at nearly every session the Clerk has briefed the witnesses who are coming beforehand, so that they are able to give of their best and all the rest of it. The number of confrontations has been remarkably few across the years.

We were keen to keep that mostly informal, until it gets difficult and then it has to become a formal process. In essence, that is what we are trying to create. Lord Judge is absolutely right. Our hope would be that this would never, ever be used, because everybody will go, “Alright, it is now both expensive and reputationally risky for me to go to court for refusing to attend a Select Committee.”

Q203 **Sir Bernard Jenkin:** Presumably the Speaker would not be offering a certificate unless everyone was satisfied that it was a legitimate reason? Sorry, I interrupted.

Lord Judge: I don't think Lord Gardiner and I are in a different place. What we are addressing is the deeply recalcitrant person about whom you cannot just say, “Well, forget about him. We can get that evidence from



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her.” We are talking about the deeply recalcitrant witness whom you regard, or the Committee regards, as an absolutely essential witness to make whatever findings you think are appropriate. That is the only time that you start showing any iron fist.

The whole system works on the basis that—I mean, the Clerk kindly gave me some idea of what you were going to ask me this morning and one of the questions was about the chilling effect. This informality works very well. What we are dealing with is the extreme situation and whether you are going to have a different regime in place other than being told, “Well, I’m not coming,” and that’s the end of it.

Chair: I think that has been very helpful. I am struck by your metaphor about the iron fist. I cannot remember whom I am quoting who says that a politician is a “quilted anvil” on whom “the blows are never heard.”

Q204 **Alberto Costa:** Can I ask a question about sanctions? I am keen to learn from the panel their views on the sanctions as set out in the Bill. Do they consider them to be appropriate?

Lord Judge: Let us assume that there is a conviction and we have got to the stage where there is a conviction, in the event of a prosecution, which should never happen. I would have thought that the first power that the court should have would be the power to make an order conditional on your giving evidence. The court order itself would say, “You will be on probation,” or, “This will be conditional discharge,” or whatever it might be, “provided that within three months you respond to this summons by the House Committee.” But beyond that, then I think a fine—I don’t know what level—or imprisonment.

I would like this to be equated with the Contempt of Court Act, not just because it is an historical link, but because that seems to work pretty well as a penal system in the event of a conviction. I do think the first power that if I were—I am not—the judge, I would want to have would be to say, “All right, Mr Costa: you have now been convicted by the jury. You still get a chance to give evidence. I will make it a conditional discharge, on the basis that you give evidence within”—whatever may be an appropriate time.

Q205 **Chair:** Do we have to put that in the Bill?

Lord Judge: I don’t think you do, because imprisonment or fine seems to me to cover just about anything. One thinks of absurd examples, but those are the two issues, really. But I think they should be subject to imprisonment; it is a deliberate contempt of Parliament that we are talking about, and that is quite serious, even today.

Q206 **Alberto Costa:** If it is a fine, is it a fine plus you need to give evidence, or does it end with the fine?

Lord Judge: Probably if you were making the option open—you might even adjourn, to give an opportunity for the witness to give evidence, and then say to him or her, “If you haven’t given evidence within three months you will be brought back to court, and then these are the options open to



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the court. Yes, it could be a fine, it could be imprisonment; but the best thing would be for you to give evidence."

May I just add one thing, if you don't mind? You have to be very careful in this process to check whether the first thing the Chairman would have to say to a witness who you thought had been behaving in a rather strange way—to use a relatively neutral term—is, "Mr Smith"—or Mrs Smith—"you don't have to give evidence that might incriminate you." If you are trying to get to the bottom of what looks like nefarious activity, that is likely to be something you would have to say. So before you decide that you are really going to go the full way down the road of summoning and so on, you would have to just check whether the first thing that you wouldn't say is, "You don't have to incriminate yourself."

Chair: Yes, I sort of presumed that, but you are right that that is part of what we would have to be saying to witnesses, isn't it? Unless anyone has any further questions, thank you very much for your time.

Examination of witnesses

Witnesses: Rt Hon. Caroline Nokes MP, Sir Robert Neill MP and Damian Collins MP.

Caroline Nokes: Caroline Nokes, Chair of the Women and Equalities Select Committee.

Sir Robert Neill: Bob Neill, Chair of the Justice Select Committee.

Damian Collins: Damian Collins, former Chair of the Digital, Culture, Media and Sport Select Committee, and current Chair of the Joint Committee on the Draft Online Safety Bill.

Q207 **Chair:** Lovely. Thank you. You know what we are engaged in, and it is partly because of your Committee originally, Mr Collins, that this has been referred to us. We have been doing this for about five years now, but do you want to lay out for us how it got to the difficult point for you?

Damian Collins: Yes. The reference you are making is to the DCMS Committee's investigation in 2018—the inquiry into disinformation and fake news. During the inquiry, the Committee had been asking questions about Cambridge Analytica to Facebook, and then there were public revelations about inappropriate use of Facebook data by Cambridge Analytica, which were of interest to the Committee, and of considerable public interest here and around the world. As a consequence of that investigation, we became interested in the role of a company called AggregateIQ, which had partnered with Cambridge Analytica and had also worked for Vote Leave during the referendum. The Committee's interest was in understanding the nature of the work that was done, and whether it had included data that Cambridge Analytica had wrongly acquired from Facebook that could have been used by AggregateIQ as well. We felt that there was a legitimate area of public interest in this.



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As a consequence, we questioned Alexander Nix, the chief executive of Cambridge Analytica. We spoke to Arron Banks, because Cambridge Analytica had done some work with UKIP and with Leave.EU. We asked some questions about that, and had a wide range of witnesses, some of whom were former employees of Cambridge Analytica.

As a consequence, we wanted to ask Dominic Cummings, given his role as campaign director of Vote Leave and the central role that he played in commissioning and overseeing the work that was done, about the nature of the work, the nature of the relationship with AggregateIQ, and the nature of the use of data in that campaign and in politics. As part of that inquiry, we made a request that he appear before us. He declined to appear. Then we followed the procedure of escalating the request, ultimately resolving that he was not going to come, and that we would request that he be held to be in contempt of the House. That was then investigated by this Committee and, by unanimous vote of the whole House, Mr Cummings was admonished for his failure to appear. That was, in brief summary, the steps that were taken that led to that decision.

Sir Bernard Jenkin: May I declare an interest? I was a director of Vote Leave.

Q208 **Chair:** Admonishment didn't really have much impact, though, because he subsequently turned up for a completely different Committee and spoke for eight hours, or whatever.

Damian Collins: Absolutely. Also, in the course of our correspondence about the request to come, he said that he might come, but some sort of special Committee should be formed just for the purpose of questioning him. He thought that members of the Committee should take an oath before they asked him any questions. It became quite clear that he had no intention of coming, and that his behaviour was contemptuous of the Committee and of the House as a consequence.

Q209 **Chair:** At the end of that, did you feel that we still have the powers that we have had historically?

Damian Collins: Mr Cummings was a private citizen at the time; he did not have a public position as the director of a company, I don't think, and he certainly was not employed at that point as a Government adviser of any kind. If a private individual just says, "I'm not going to come," the process demonstrated to me that there is ultimately very little that you can do about it. Therefore, the question is whether that will have a chilling effect on other witnesses who may not want to come. If it can be demonstrated that there is no real method of compelling them to come, or no sanction for refusing to attend, they may decide not to attend either.

Informal pressure applies to the chief executives of companies, who fear reputational risk and damage. Rupert Murdoch, whom you were talking about earlier, holds a UK broadcasting licence. The pressure and the reputational consequence of not appearing can encourage someone to come, but the case of Dominic Cummings demonstrated that sometimes people will refuse to come. The question is what sort of power the House

should have then. If a Committee of the House, using the delegated powers of the House, feels that a witness should attend, and that request has been regarded as reasonable by the House itself, at that point there should be some requirement or sanction for failure to attend.

We see an interesting live parallel case in America at the moment with Steve Bannon, who similarly has refused to attend the Congressional Committee on the 6 January investigation. That has been referred to the courts.

Q210 Chair: Caroline, have you any experience in this field?

Caroline Nokes: Through the Committee, yes, but not when I was Chair. There is a really interesting parallel with what Damian was just saying. Back in 2018-19, the Women and Equalities Committee was doing an inquiry into sexual harassment at work and was trying to get Sir Philip Green in front of it. He deployed a range of tactics. It started off with delaying tactics; then it just became a flat no. I was struck that he did later appear in front of the DWP Committee, and Frank Field had success where my predecessor Committee had not. It boiled down to pretty much what Damian was saying: there were tactics around embarrassing him into attending. With somebody like Philip Green, ultimately Frank Field was very successful in doing that, but it should not come to that when a Committee wants a witness who could provide useful information.

The Committee had been quite clear to Philip Green that it was not about specific cases; it was about the principles under which you might want to institute non-disclosure agreements, and about why they might be useful when settling employment disputes. However, first, the response was obfuscation and delay—lots of questions to the Clerks of the Committee about what would be entailed—and then it just became, “No, I am not coming.”

Q211 Chair: Our understanding has been that he was given direct legal advice that it was just a question for him; because the House has no powers, it was a matter for him to decide whether there was more reputational risk in attending or not attending. It was down to his own personal predilection as to whether he wanted to come or not.

Caroline Nokes: Absolutely. There were no powers that the Committee could have deployed to force him to attend. He clearly took the view that it was worth the reputational hit, and that he would potentially damage himself more by turning up to a Committee and either refusing to answer questions or giving evidence that damaged him further.

Sir Robert Neill: The Justice Committee has not had any experience of that, but maybe that is because of the nature of the interlocutors that we tend to have. That is why the evidence I submitted in writing on behalf of the Committee talks more about the principle of the thing, in terms of proportionality, clarity and the article 9 points, rather than any issue that the Committee has experienced.

Q212 Chair: Why don't you lay out the article 9 point for us, because others



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have felt that point has been met? Lord Judge clearly indicated that the only route to solving this problem is statutory, but you have a concern about that.

Sir Robert Neill: I think it is a concern; I do not think it is a deal-breaker. I think it is something that, as Lord Judge said—I particularly wanted to listen to his evidence—needs to be treated with some care. I am fortified in that by the written evidence of the Lord Chief Justice, Lord Burnett, and of the Lord President, Lord Carloway; Lord Burnett also references the previous memorandum, submitted by Lord Thomas of Cwmgiedd. It encapsulates it in this way: once you make part of the process justiciable, unless you are very careful in the wording of any statute, can you reasonably prevent other parts of the process being justiciable? The point that was made by Lord Thomas is an important one: once you make someone a defendant, then the court's duty is to the trial process and not to this House. You run the risk, and you may think it is a risk worth running if it is proportionate to the number of people who are recalcitrant and refuse, that the Crown Prosecution Service, or the Crown Office in Scotland, would have to apply the normal test as to whether it is both evidentially there to bring a prosecution, and in the public interest. It is almost inconceivable that they would not say it was in the public interest—but be alert to the fact that that is a step that must be taken.

If the court is going to look at “reasonable excuse”, I think in most circumstances it is inevitable that it will be legitimate to look at the context of and motive behind the request, in order to say whether the refusal to comply was legitimate. That may be a risk worth running, and if you get the legislation drafted carefully enough, then it will probably be okay. However, be careful what you wish for—that is the way I would put it.

Q213 **Sir Bernard Jenkin:** If I had given my advice to either of the two individuals already named, then I would have advised them to attend, but I do not think I got the opportunity. The question I will ask Sir Robert is whether he thinks that, if the statute as drafted had applied to those individuals, it would have guaranteed their attendance—or would they have been provided with exceptions and exclusions that would have exempted their attendance? There is a saying: good cases make bad law.

Sir Robert Neill: I think that is true. Not knowing either of the individuals personally, and what their motives might have been, it might well have done. Equally, there is a risk the other way—they might have sought to litigate and challenge the reasonableness of the summons. You can imagine that Mr Cummings might have been tempted to say to his lawyers, “This summons is based on a political motive to discredit me and a campaign with which I was associated, and I therefore had reasonable grounds not to come.” I don't think for one second that that would be true, but it might not stop someone who wished to make a point from trying to use the courts as a vehicle to obstruct. It might have got there in the end, but perhaps at the risk of the courts reluctantly being dragged into being a vehicle for someone to argue a political point about why they

should or should not be summoned. That is why I think you have to be careful.

The other point on that, Sir Bernard, which is linked and important, is the issue that Lord Burnett raises about the Speaker's certificate and the fact that it is conclusive proof. That troubles me a bit, because you are then on the face of it restricting the ability of a defendant to say, "The Crown must prove, and I must be able to test, every element of the offence set out against me." A better route to go down, and I can see the arguments for doing so, might be to say—

Q214 **Chair:** It is a fairly settled legal concept, presumably.

Sir Robert Neill: The concept of reasonable excuse is well defined—

Chair: No, I mean that a Speaker's certificate is settled.

Sir Robert Neill: Yes. If it is a criminal offence that attracts a penal sanction, might you say that it is easier to think in terms of a rebuttable presumption? The difference may be limited, but I suspect that that might meet any concerns that the court, or the jury, has about fairness. That is the other point. As Lord Judge said, the jury would not have to give their reasons, if they were to acquit. Just think about the reputational risks for the House if a summons were issued, a recalcitrant witness said, "I had a reasonable excuse not to come", and the jury said, "We're not satisfied that there wasn't a reasonable excuse."

Q215 **Chair:** In the two cases we have heard about so far, people chose which Committee they wanted to give evidence to, rather than the House choosing. Then their reasonable excuse might have collapsed.

Sir Robert Neill: It might well have done.

Q216 **Chair:** Damien, did you want to comment on Bernard's question?

Damian Collins: Yes. It might not be possible to separate these two things, but I would say that the offence, if one is created, is contempt of Parliament. The trigger for that might have been non-attendance at a Committee, but I don't think we should say that the offence is non-attendance at a Committee. Ultimately, it is not for the Committee to decide; it is very important that, at the end of the day, it is the House that decides. The House might take the view that the Committee's request was unreasonable.

Also, when a witness attends, they are not forced to say anything that they do not want to say. I can think of plenty of sessions that I have chaired in which a witness said, "I regard that as commercially sensitive information. I don't wish to disclose it to the Committee", or "That may prejudice proceedings I am involved in, so I won't comment." Indeed, we might have said to witnesses beforehand, "There are certain things we won't discuss," because it would not have been appropriate to do so.

Often, it might be for a court to determine whether a witness should have the absolute right, if they are in contempt of the House, to refuse a

request that the House has made. As Bob has said, they may find legal grounds to challenge it, and ultimately that will be a matter for the courts, but the question for Parliament should be: is there any sanction for contempt of the House, or is it something that just exists on paper and will be in the obituary of the person concerned, but is otherwise not particularly actionable?

There is another side to this. Sometimes, you get witnesses who want to attend, but are in a sensitive position—they might be whistleblowers. We ordered the production of some papers by an American businessman staying in London. He was the director of a company called Six4Three, which was involved in litigation with Facebook in California. One of the challenges that Facebook made to him was for the act of releasing the documents. The published documents were covered by parliamentary privilege, but his action of giving them to us wasn't. In the courts in America, that case is still going on, three years later. Facebook asked, "Did you have to comply? Could you have just ignored them, got on the plane, gone home and left it at that?"

The powers exist, but there are challenges. If a whistleblower wants to comply, wants to release sensitive information and believes that to be appropriate, if there is no real legal compulsion for them to do so just because they are asked to by Parliament. Could they be committing—

Chair: What defence do they then have?

Damian Collins: Exactly. Certainly, that is unclear.

Chair: Caroline?

Caroline Nokes: I am conscious that Bob is the lawyer on the panel and has given a very comprehensive answer. I do not think that there is anything that I can add. I can only note the extreme frustration when there is information or an individual we want and, simply put, the powers are not adequate for us to get that. That is how it feels to me, as a Select Committee Chair. I can well envisage a repeat of the Philip Green situation, when somebody who we really want to appear before us simply says "No", and we would be stymied at every turn in trying to get them in front of us.

Q217 **Sir Bernard Jenkin:** I have two questions. Sir Robert, you were implying that there is a risk that statute might make it more difficult to bring the witness.

Sir Robert Neill: I think there is a risk. It is maybe a risk worth taking for the reasons that Caroline has set out. If you balance that against the thought that others, when confronted with the possibility of a conviction—

Q218 **Sir Bernard Jenkin:** So if we offer that option in our report to the House, we ought to advertise that as a risk?

Sir Robert Neill: I think you should simply flag it up, because some people will try to game the system. We all know that unscrupulous



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defendants will, because they are entitled to, put prosecution to proof at every turn if they so wish, so just be alert to that.

Q219 **Chair:** Risk is always difficult to quantify, isn't it? Sometimes if you say there is a risk, people think, "Oh well, that's the end of it." But you are not saying that.

Sir Robert Neill: I am not saying that at all. I am saying just be aware—

Chair: You are saying that there is a risk and that we need to quantify it.

Sir Robert Neill: Quantify it, and make sure that everything is drawn tightly enough to minimise that risk arising as a result of the process being abused.

Q220 **Sir Bernard Jenkin:** Ms Nokes, when I was chairing a Select Committee and we could not get witnesses in front of us—this was about the compliance of former Ministers and officials with ACOBA rules, which was obviously reputationally toxic for them—I found that the best way was to approach people in private and take notes that we could then use as evidence in our inquiry and report. Have you any experience of operating in that way? We did that on the Kids Company case with several witnesses who did not want to appear in public.

Caroline Nokes: Not specifically for those reasons. Of course, we take evidence in private. I am conscious that on many occasions the Women and Equalities Committee deals with witnesses on sensitive issues where there may be serious safeguarding issues—our inquiries at the moment include one on the Gender Recognition Act 2004 and conversion therapy. We take very seriously our duty of care to our witnesses, and the need to ensure that they are closely looked after. There have been occasions when we have not taken evidence but have had informal meetings in private to give the Committee a better understanding of and background information on the issues.

It is absolutely fair to say that one of our challenges has been getting Ministers to appear in front of us. I sometimes find that a private word to them helps—saying, "I am going to be really difficult if you don't turn up." That is one of the stark realities. It is not just the Sir Philip Greens and the Dominic Cummings of this world. The Chair of a cross-cutting Committee will sometimes find that Ministers say, "Well, that is not really our job. Find somebody else; go to a different Department."

Sir Bernard Jenkin: We are dealing with that.

Caroline Nokes: Yes, indeed, and thanks for that.

Q221 **Sir Bernard Jenkin:** On taking evidence in private to inform a Committee's inquiry and report, do either of the other two witnesses have anything to say?

Sir Robert Neill: Certainly, the Justice Committee has done that. I deliberately characterise it in the same way as Caroline, in the sense that formal evidence has to be taken publicly, but we do use roundtables for



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people who have been through the criminal justice system, for example, and who are willing to help and inform us, but might, for perfectly good and sensitive reasons, not wish for their identities to be public, given the nature of what they have gone through. Our Clerks will take notes that can then inform our public evidence sessions. I find that very useful, and I certainly would not want to do anything that made that harder to achieve, because it can be valuable.

Q222 Chair: There is another element here, isn't there? Sometimes witnesses want to use parliamentary privilege to say things that they would not be able to say anywhere else. As Chair, you have to be cautious about that and steer your way around it. Damian?

Damian Collins: Absolutely. Certainly, when I was Chair of the DCMS Committee, we received evidence in private on some occasions. Often, it was because of somebody's position. In one particular inquiry on doping in sport, we had private meetings with some of the regulatory bodies so that we could openly discuss some of the issues that were too sensitive to discuss in a public forum. We sort of had a policy that if someone approached us and gave us anonymised written evidence, as long as we knew who they were and that it was legitimate, we would be prepared to take it. There were very particular reasons around doing that.

The problem you have sometimes is that someone might try to say, "I will come and give evidence to you in private," because they do not wish to be questioned in public or for what they say to be a matter of public record. I would have a concern about establishing that as a fair precedent, because I think it is one that a lot of people would take, unless there were very good reasons. If a witness says, "I can't give evidence to you in public session. I can't discuss the things you want to discuss because of their sensitive nature, but I will talk to you informally about it," I think that is fine. What it can't be is the idea of a private meeting as a fair, reasonable alternative to giving evidence in public, because that would then become the default. People seeking to protect their reputation would say that they would do it but not on the record.

Q223 Alberto Costa: Going back to Sir Robert's point about being careful about process, the type of interlocutors that the Justice Committee would typically have tend to be based in the England and Wales jurisdiction, rather than Scotland and Northern Ireland. I presume Ms Nokes's and Mr Collins's former Committees might have seen more residents based in different parts of the UK, given their nature.

My concern is how to have a process that is harmoniously applied across the three jurisdictions of the UK, particularly Scotland, given the clear differences in Scotland's criminal and civil law systems from those of England and Wales. In criminal law, the buck stops in Scotland in the High Court of Justiciary; there is not a reference to the Supreme Court, unless there is an HRA issue.

I tend to be in the camp where I would prefer to do something rather than nothing. If we go into that camp, we need to take into account the possibility, first, that the prosecuting authorities—the Crown Office in



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Scotland and the CPS here—might take a different view from the public policy test and, secondly, that there are margins of judicial discretion that apply slightly differently in both jurisdictions. It might be unlikely, given the number of recalcitrant witnesses, but could it be reasonably foreseeable that you would have a different outcome from a Scottish court, where the House is seeking assistance, from one in England?

Sir Robert Neill: I think that is possible. I agree with your basic view, Mr Costa, that it is better to do something rather than nothing. That is why, in my written submission, I say that, on balance, the legislative route, subject to the safeguards that I flag up, is probably the most effective to do that. I do think that is right. I think the Lord President of the Court of Session rather suggests that in his written evidence—that there is a different test, both in the prosecution commencement and in the way it is applied. We have seen that, after all, in the Prorogation cases and in some of the Miller litigation, where the Court of Session came to a different view, for example, from the Court of Appeal in England and Wales. That is a risk that you always have to bear in mind. You might also have to think about where you start the prosecution—where is the offence committed?

Q224 **Chair:** I think there was a similar issue in relation to a Member of Parliament's travel, wasn't there? Exactly the same issue.

Sir Robert Neill: Exactly.

Damian Collins: Picking up on that and following Bernard's previous question, the House would have to consider whether the Committee has got the reasonable right to expect the witness to appear in person on the record. If I were advising someone who did not want to attend, I would suggest that they make the offer to meet in private; it is not a complete refusal, but it is not meeting in the way the Committee wants you to.

For some of this to be effective, it would have to be clear that it was reasonable to expect the witness to appear in a live public forum, rather than just a private briefing. I don't think that is clear at the moment. When I have been Chair of a Committee, trying to see how we can compel a witness who doesn't want to come, the concern has always been raised that, if they offer to come in private, that might be seen as a reasonable offer and, therefore, the case for saying they are in contempt is less clear. It would be useful if, in your deliberations, you give some guidance on that.

Q225 **Chair:** You are right that we are quite keen to have a series of steps that something must go through before it gets to the Speaker's certificate. So it is not just the whim of the one Committee or Chair; it is the settled view of the House. Then, as Lord Judge said earlier, it is a deliberate contempt of Parliament that is being entered into. That is the substantive point.

All the evidence we have had, both in writing and orally, has said that the more robust we are about the way we treat witnesses, and the clearer the processes are for getting to that final point, the less likely the court is to need or want to go behind the final decision. Is that a fair judgment?



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Damian Collins: With a defined process like that, the Clerks of the House are able to advise the Committee, "If you wish to pursue this, these are the steps you are going to have to go through in order to pursue it to the end of that line." Then that would be clear.

Sir Robert Neill: I am sure that is right, Mr Bryant, in terms of limiting the risk that I referred to, and the use of the certificate.

Q226 **Sir Bernard Jenkin:** On that last point, Sir Robert, would that make you more comfortable with having the statute?

Sir Robert Neill: Yes, it would. I have never objected to the principle of statute. It has been a question of flagging up the warnings as to what could happen, if we are not very careful, both in the drafting of the statute, but also—you are right—once you get to the possibility of a prosecution, in the evidential steps. The more care you have taken with that, the better.

Q227 **Sir Bernard Jenkin:** Copper-bottom it.

Sir Robert Neill: Indeed.

Chair: That has been very helpful. Is there anything else you want to say to us? No? We are very grateful to you for coming along. Thank you.

Sitting suspended.

Examination of witness

Witness: Rt hon. Jacob Rees-Mogg MP.

Q228 **Chair:** Welcome, Leader of the House. It is very good to have you with us on an issue that has been vexing and troubling the House for many years through many processes. We are keen, if we possibly can, to help the House get to a settled position on all of this without undermining our historic powers. Do you think that the House presently has the powers that it needs?

Mr Rees-Mogg: In a way, this is the work that you are doing to try and establish whether the powers that are currently there, even if they are more theoretical than actual, achieve the objective of getting witnesses to come before Select Committees. We have discussed privately the reality of the powers—whether they could be used and whether they would survive challenge—but what would be interesting to see from your final report is not the anecdotal experiences of Select Committees, which tend to focus on a very small number of high-profile cases, but whether, year in, year out, most witnesses who were summoned actually attend, including the low-profile ones, or whether there is a real problem for Committee after Committee of not getting the people that they want. That statistical analysis would be incredibly useful.

Q229 **Chair:** All the evidence we have had so far is that the vast majority of



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witnesses come without any bother, and it is a pretty simple, straightforward, relatively informal process. The problem is that a theoretical power, to use your words, is quite difficult to enforce, and that leaves us with the hard cases. I know that makes it look anecdotal, but it is none the less a series of hard cases. In fact, the two cases that we just heard about were both people who said, "I'm not coming to that Select Committee," and then a while later decided that they were going to another Select Committee, so they are picking and choosing which inquiry they will participate in.

Mr Rees-Mogg: Again, an important part of what you are doing is to understand both the scale of the problem and also whether changing things would make it better. By getting the one difficult person, do you make it a different atmosphere for the others who have come willingly? Would a formalisation undermine the informal system that is working very well in most cases? Or would it simply work in the cases that need it? Again, I think that is something that your report needs to work out because that will be essential to deciding whether legislation helps or hinders.

Q230 **Chair:** I think I would be right in characterising the evidence we have had from everybody today as pretty much that there might be a risk that having a more formalised system, because otherwise there is no sanction, might do two things: it might invite the courts to enter into questioning elements of proceedings in Parliament, and it might make for a more formalised setting for all questioning. There are ways of mitigating both of those risks in terms of the way we draft the legislation and the way we make sure that it is not just a decision of individual Committee, on a whim, whether or not to have an individual come along, but a decision of the whole House. Then, as Lord Judge put it to us, that is a deliberate contempt of Parliament, and the question for the House is, do we really want to put up with deliberate contempts of Parliament without sanction?

Mr Rees-Mogg: Then sanction becomes very important, because the sanctions that do exist—theoretically—have not really been used since Sir John Junor's case because the sanction made the House look more ridiculous than powerful. In the Dominic Cummings case, a very mild sanction was applied because of the risk of appearing ridiculous with a different sanction. I think that the draft legislation, with the prospect of two years' imprisonment, risks going to the other end of the scale. It is hard to see what level of contempt would warrant two years in prison.

Q231 **Chair:** What sanctions do you think are available now?

Mr Rees-Mogg: I am sure you have discussed this with the Clerks, but Parliament has never formally given up its ability to imprison during the Session of Parliament. It is not, I believe, a power that has been used since the 17th century.

Q232 **Chair:** Do you think we still have that power?



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Mr Rees-Mogg: I think the power still exists. Would it be subject to challenge? Almost certainly. Would the challenge succeed?

Chair: Would you ever advocate using it?

Mr Rees-Mogg: Do we have the power to fine? I think the power to fine is more debatable. I cannot remember when it was last used, if ever—you will know from your Clerks. The House of Lords made a very interesting argument in relation to fining its own Members, which you will remember. Whether that argument would apply in relation to the Commons and recalcitrant witnesses, I do not know. I think the reality of our powers is that we do not know whether they are there until they are used. Then you might find that they are upheld by the courts, or you might find that they are not. This is an argument where learned lawyers disagree.

Q233 **Chair:** I am not sure many learned lawyers disagree, do they? The last time there was a fine was 1665, and I think imprisonment was 1891—

Mr Rees-Mogg: So sorry, I was wrong on the last imprisonment, which if it was 1891 is only just beyond living memory.

Q234 **Chair:** I think the last imprisonment was 1880, which was Charles Grissell. You are saying you think that, if the House were to come to you, as Leader of the House, you would table a motion that would say, "We are now going to imprison such and such for refusing to attend."

Mr Rees-Mogg: I could not predict whether that motion would get through, and I could not predict whether the courts would maintain it. This is all very theoretical.

Q235 **Chair:** But you think that that power still exists.

Mr Rees-Mogg: The power has not been formally abandoned by Parliament.

Q236 **Chair:** I am going to try again. So you think that it is still a power that we hold. Do you think it would be morally okay for Parliament to imprison somebody?

Mr Rees-Mogg: I repeat what I said: Parliament has not formally abandoned this power. But I am not saying with any degree of confidence that the power, if used, would not be challenged. Is it an effective power? I do not know. But has it formally been abandoned by Parliament? No, as you know.

Q237 **Chair:** I think nearly every Committee that has investigated fining has said that we no longer have the power to fine, and I think that is written in "Erskine May". You can argue about the legal status of "Erskine May" if you want to.

You have used the word "theoretical" several times, but I am not sure whether you are advocating that we should reassert our historic powers and say, "We now have the power to imprison," so that is the sanction that would be appropriate for somebody refusing to give evidence.



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Mr Rees-Mogg: But I have just said that, in the draft Bill, the potential of two years in prison is entirely disproportionate to failing to appear as a witness. It is very hard to see the circumstances where two years in prison would be a suitable penalty.

Q238 **Sir Bernard Jenkin:** First, I apologise for missing your opening remarks. How theoretical does something need to be and how long ago does it need to be, before we start using a term I learned during the consideration of this matter in the 2013 Joint Committee—"desuetude"?

Mr Rees-Mogg: I was just thinking of the word "desuetude". Is there an option of desuetude in terms of the powers of Parliament? That is a question for the Committee.

Q239 **Sir Bernard Jenkin:** You yourself say the powers are theoretical. When you say that, what do you mean?

Mr Rees-Mogg: What I mean is that if the powers had been used, when they were used, in the 19th century, there was no question that they would be challenged in a court. We live in a very different era in terms of courts' exercise of their powers, and we have the European Court of Human Rights, which is currently considering a case relating to Sir Philip Green. Therefore courts are able to go where they would not have dreamed of going in the 19th century, and that is why I think it is a theoretical power and that you do not know whether it would survive challenge until tested.

Q240 **Sir Bernard Jenkin:** Is it your view, in that case, that we need to test this before we resort to statute?

Mr Rees-Mogg: I think this is an important part of your Committee's report, as to whether you think that is a course worth using. But you may come to the conclusion that it is not. You may come to the conclusion that desuetude is the right answer in this case.

Q241 **Sir Bernard Jenkin:** And if the powers have fallen into desuetude, what should we do about it?

Mr Rees-Mogg: I think the next stage in that is to consider whether the current situation is in fact working. That's the bit I was saying earlier: if this is just a very small number of very high-profile cases—

Q242 **Sir Bernard Jenkin:** I heard that bit. I think we accept that it is a very small number of very high-profile cases, but the question is to what extent that discredits Parliament as a whole. If there was a statutory process, to which the Speaker would only give access if we had been through a series of hoops, so it clearly was not a vexatious summons, over-political or designed to bully the witness, but to get on public record evidence that is legitimately required for a legitimate inquiry, and if all those hoops had been gone through and the person is still refusing, do you not think the additional persuasive power of embroiling a potential person in a statutory process might act as an encouragement for them to attend?



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Mr Rees-Mogg: Possibly. There are obvious risks—the risks that we discussed briefly—of formalising it with other witnesses, who feel that this is a more intimidating experience than it currently is, and I think, for many witnesses, it is already quite an intimidating experience. And there is always the issue of exclusive cognisance of our proceedings, and how we lock in with the courts, which I do have a nervousness about, because once you let the courts in, how far are they able to go? Our ability to run our own affairs is fundamental to how Parliament works, both Lords and Commons.

Q243 **Sir Bernard Jenkin:** The courts might do that if we try to fine a witness for non-attendance anyway.

Mr Rees-Mogg: They might. That bit is untried, and you may come to the conclusion that you think it is so unrealistic as not to be worth trying. You may think that the untested nature of it actually in and of itself provides an incentive to attend, because people are not entirely sure whether it would be effective or not.

Q244 **Sir Bernard Jenkin:** To be clear, if the Committee proposes that the House adopts a report that supports legislation, are the Government predisposed to resist that?

Mr Rees-Mogg: No, I am not saying that at all. What I have been trying to set out is what I think is necessary to make the case for legislation. There are three points: first, the legislation would not affect the exclusive cognisance of the House; secondly, that it would be more effective than the current system in terms of witness attendance and the information that they were willing to give—it needs to be actively better than the current system. And that leads to the third point: I think we need a statistical analysis of who has not been appearing and who has been appearing. It is quite hard to make the case to legislate for a very small percentage of cases if most people are in fact turning up and the system is working well.

Q245 **Chair:** In which case you are saying no to legislation? We have said it, and every report has always said it: it is a very small number, but they are hard cases that make a mockery of our theoretical powers.

Mr Rees-Mogg: I think your report needs the numbers, so that we have the context. Is it that 1,000 have come and there is one who refused? Is it that 100 have come and one has refused? What is the proportionality? I don't think legislating on one or two high-profile cases is a sufficient case.

Q246 **Chair:** In which case you are saying no to legislation. Incidentally, I am still in a bit of shock at your belief that Parliament has the power to arrest and imprison, because I think that certainly went with the Human Rights Act 1998 and arguably went with the European convention on human rights.

Mr Rees-Mogg: But I note you use the word “arguably”, and that is exactly what I have been saying.

Q247 **Chair:** I don't think anybody is arguing it—you are quite unusual in that

position.

Mr Rees-Mogg: I have not been saying that I think these powers would survive test; I am simply saying they have not been tested and they have not been abandoned by the House.

Q248 **Chair:** But do you think they should stand the test?

Mr Rees-Mogg: I would not want to imprison for non-attendance, as I have already said. Could the House have a system where it had some penal mechanism for people who failed to attend that was entirely a House matter? I don't personally think that would be unreasonable, but it is a matter for your Committee to work out how that could be done in a way that was fair.

Q249 **Chair:** Do you think it would be reasonable for the House to arrest?

Mr Rees-Mogg: I am not advocating arrest. I think imprisonment for non-attendance would be an extreme procedure. I am not advocating going back to the days of Peter Wentworth.

Q250 **Chair:** What penal power would you suggest?

Mr Rees-Mogg: I think it is not unreasonable for the House to fine people for failing to attend.

Q251 **Chair:** Wow! That is pretty extraordinary.

Mr Rees-Mogg: I don't think it is. I would much rather the House did it and maintained its exclusive cognisance than that the courts did it. But that may in itself need legislation because, if the powers have fallen by the wayside, they cannot just be magicked up.

Q252 **Sir Bernard Jenkin:** But if the offence being committed was not failure to attend, but first of all contempt of Parliament, it would secondly be contempt of court, because the court would order the person to attend.

Mr Rees-Mogg: That gets very difficult. If courts start ordering people to attend Parliament, we are getting the courts directly involved in our proceedings, which I would be very nervous about.

Q253 **Chair:** I am still in a bit of shock, I'm afraid.

Mr Rees-Mogg: I think the high court of Parliament should exercise its powers as a general principle. We are a sovereign Parliament: we are higher than any court in the land, and we should not be mealy-mouthed about being a Parliament.

Q254 **Chair:** I think that is very difficult, but—

Mr Rees-Mogg: I may be less committed to the niceties of human rights law, but I think a supreme sovereign Parliament with a democratic mandate is the greatest protection of human rights in this country.

Q255 **Chair:** Okay. If we were to go down the route of the proposal we have come up with, I accept your point that two years may be excessive and that may need to be looked at. Indeed, Lord Judge made a sensible



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suggestion.

My assumption is that this law would never be used; I think it would make it easier to get the difficult people to come, because the advice they would then be given by their lawyers would be that there is more reputational and financial risk and risk of criminal sanction if they do not turn up than if they do. I think it would improve things, and there is no reason why that would necessarily have an effect on all the other people with whom, in the normal course of things, it just happens very simply and informally.

One of the things we have suggested to mitigate the problems and some of the risks that you and others have referred to is ensuring that there is a proper gatekeeper role, so it is not just one Committee deciding on a whim to summon somebody, but there would be a gatekeeper to go through before you get to the Speaker's certificate, and then it is a deliberate contempt of Parliament. Does that process, if we were to go down that route, seem sensible to you?

Mr Rees-Mogg: I have a couple of things to say. First of all, if you are creating a power that you think would never be used, you are in much the same position as we are already, and then you get into the question—the Scottish Parliament has the power to fine, which I understand it has never used on a witness—of whether powers that you intend never to use are any better than the powers that you may or may not have that you never use. That is a matter for you.

On the gatekeeper Committee, it depends on how it would interrelate with the court.

Chair: Go on.

Mr Rees-Mogg: Well, looking at the legislation, it doesn't interrelate with the court; the court just looks at the fairness of the summons. So how does the court determine that and how do the two fit in together? That I am not clear on.

Q256 **Chair:** So the bit for the court would be whether there is a reasonable excuse—something courts decide all the time is whether somebody turns up to court. Was it the 1948 contempt of court Act that basically formalised a set of agreements that had existed for a long time?

Mr Rees-Mogg: Would the court be looking at the gatekeeper Committee having decided the summons? How would that be formalised? Would that be formalised in Standing Orders? It's the question of how these two relate, because that is obviously where you get to the exclusive cognisance issue.

Q257 **Chair:** Our working assumption has been—I think I am right, unless anybody corrects me—that if we were going down this legislative route, we would have to do some Standing Order changes so that there was a new process that got you to the Speaker's certificate.

We use the Speaker's certificate because that has been an accepted



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system for some time and it limits the engagement of the court in the background to the decision. But it is undoubtedly true, as Lord Judge said earlier, that the defendant in a case might want to say, "Well, my reasonable excuse is that I think you're all just engaged in a party political ding-dong and I don't want to get involved in that." Whether that would count as an excuse would be a matter for the court.

Mr Rees-Mogg: Yes, and you would hope that the Speaker's certificate, like the Speaker's certificate under the Parliament Act or to money Bills, would not be challenged. This may be a more litigious area than money Bills if you have somebody who is very determined not to come. I think one has to be quite cautious about extending the remit of Speaker's certificates. Just because they have not been challenged in a very specific area does not mean that they could not be challenged in another area. As I have said throughout, exclusive cognisance is very important.

Q258 **Sir Bernard Jenkin:** You are setting some very important hurdles for legislation, but I think they are hurdles we may have to jump. I agree with you that Parliament is sovereign; Parliament is, in fact, the greatest guarantor of human rights in this country. After all, the only reason we have the Human Rights Act is that Parliament passed an Act. But doesn't that also demonstrate that actually the only way Parliament can assert its sovereignty is through statute? While history may be littered with examples of how Parliament used to assert its sovereignty in different ways, statute has become the habit.

Mr Rees-Mogg: Well, even article IX is statute.

Q259 **Sir Bernard Jenkin:** Indeed, but article IX has a peculiar constitutional status, which also hitherto observed a self-restraining ordinance in respect of exclusive cognisance.

Mr Rees-Mogg: Even the Act on tallage is statute. You go all the way back, and statute is of course how powers within the different arms of the state are exercised. That is absolutely right.

Q260 **Sir Bernard Jenkin:** But there are all kinds of non-statutory powers that Parliament used to exercise that we don't exercise anymore. I think if we sent a posse into the street to arrest somebody, the posse would not have any statutory authority and would not be regarded as a legitimate force. But that used not to be the case.

Mr Rees-Mogg: This is the argument about Sessional Orders.

Q261 **Sir Bernard Jenkin:** Which I hope you will restore.

Mr Rees-Mogg: I am very interested in that.

Sir Bernard Jenkin: Not because they have any statutory force, but because they would inform the police outside the Palace that whatever statutory rules remain in force, they also have a public obligation to Parliament to secure the passages and so on—within the law, within statute law.



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Mr Rees-Mogg: The moral authority of Parliament should not be underestimated, even when the powers are not codified. That is an essential part of this investigation.

Sir Bernard Jenkin: I look forward to your implementing the 2013 recommendation to restore Sessional Orders.

Q262 **Chair:** That rather makes the point that we have been going around this track for a very long time—longer than I have been in the House and much longer than you have been in the House. I have an anxiety about that—that we will just be doing this again in 10 years' time, 20 years' time and 30 years' time, by which time desuetude itself will have fallen into desuetude.

On Scotland, the Scottish Parliament is of course set up by statute, so it is somewhat different. There is a reasonable excuse provision in that as well. It is all justiciable. It feels to me that we have three routes: one is that we can just accept desuetude and live with it, which I think is sort of where you are at, because you are reluctant to legislate unless it is absolutely necessary. Basically, you are saying to us, we have to prove to you that it is absolutely necessary.

Mr Rees-Mogg: I do not think that that was an unreasonable challenge.

Chair: I am not objecting to that—

Sir Bernard Jenkin: For the record, Chair, I do not think it is a no, but you are taking it as a no. I do not think it is a no.

Q263 **Chair:** We will do our best to persuade, if that is the route that we want to go down. But you have reinvigorated a bit the argument that we could just reassert our powers today, which was considered in previous versions of this inquiry. It is just that when we have said we would reassert them, we have never done anything about reasserting them and, personally, I am very sceptical that that really meets—it feels a bit like an Act of Attainder.

Mr Rees-Mogg: If all court judgments always went the way one thought in advance they would go, one would never go to court. Therefore, until you do this, you do not know whether it would work. We all have our views, and mine may not be that dissimilar from yours, but you do not know, and it has not been tested. Whether it is worth testing is a different question, because Parliament always has to make sure that it does not look ridiculous. That is why we have to be so careful about this. Whatever powers we have, if we use them aggressively or arbitrarily, we look ridiculous. We remain scarred—it is a long time ago now, but the John Junor case has scarred Parliament's use of its powers ever since.

We always face that problem, as we would with legislation. What would we actually want to do when someone refused to come—who was it, which Committee was it, and so on? I doubt it would be as simple as someone not coming, therefore we automatically go through this process and take them to court. There would be many political considerations we would want to take into account about the reputation of Parliament.



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Chair: You know how this ended up with us, which is basically that people worried that the dragon has no teeth and no flame-throwing ability, so it ends up being just a rather limp dragon.

Mr Rees-Mogg: That is why I think it needs to be shown statistically what the real level of the problem is.

Q264 **Chair:** I will ask you a completely different question, unless anyone has anything else they want to ask. As you know, the Committee of Privileges may only consider things that have been referred to it. There have been various suggestions that we should have a bigger power, so that, like most other Select Committees, we are able to consider things that interest us. Would you welcome that, or do you think that that is unnecessary?

Mr Rees-Mogg: I think that the Privileges Committee is a particularly and singularly important Committee because it has that very narrow remit to do things specifically charged to it by the House. I think that is a good thing for the Committee and strengthens your reports.

Chair: Anyone else? No. In which case, we are done. Thank you very much, Leader of the House.