HOUSE OF COMMONS

Committee of Privileges

Oral evidence: Select Committees and Contempts, HC 864

Monday 8 July 2019

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Watch the meeting

Members present: Kate Green (Chair); Sir Christopher Chope; Stewart Malcolm McDonald; Bridget Phillipson; Sir Gary Streeter; Liz Twist.

Questions 1-63

Witnesses

I: Dr John Benger, Clerk of the House of Commons, and Mark Hutton, Clerk of the Journals, House of Commons.

II: Chris Bryant MP, Chair, Finance Committee, and Sir Bernard Jenkin MP, Chair, Public Administration and Constitutional Affairs Committee.

Written evidence from witnesses:

– Dr John Benger, Clerk of the House of Commons

Examination of witnesses

Witnesses: Dr John Benger and Mark Hutton.

Q1 **Chair:** Good afternoon and welcome to the Committee of Privileges inquiry into Select Committees and contempts. We are very grateful to have you here this afternoon. Can I start by inviting each of you to introduce yourselves for the record?

Dr Benger: I am John Benger, and I am the Clerk of the House.

Mark Hutton: I am Mark Hutton, and I am the Clerk of the Journals in the House of Commons.

Q2 **Chair:** You are very welcome this afternoon. Can I start by asking you to comment, Dr Benger? There have been a number of recent high-profile cases of people summoned to attend Select Committee hearings and refusing to comply—or, at best, showing great reluctance to do so. Indeed, this Committee recently reported on Dominic Cummings, who was admonished by the House. Do you think this is an increasing problem? If so, why might that be? Are Committees becoming more assertive, or witnesses more recalcitrant?

Dr Benger: It does seem to be becoming an increasing problem. As part of my preparations for this session, I looked up a little table of summonses that have been issued. Between 1992 and 2007, there was one summons issued, in 1992. Since 2007, we have issued 11 or 12 summonses. Certainly, statistically, there seems to be more of a problem.

The nature of the reluctance has changed a bit. Sometimes in the past there was confusion, and I think we have moved more into open defiance with the Cummings case, which is quite seminal. His words to the Committee were very clear: "If you had wanted my evidence you would have cooperated over dates. You actually wanted to issue threats, watch me give in, then get higher audiences for your grandstanding. I'm calling your bluff. Your threats are as empty as those from" Theresa May, and so on. It is a very different character.

I think Committees are more assertive. With elected Chairs and so on, and greater media and social media interest, there is much more general interest in what goes on in Committees. To that extent, it is more of a challenge, I suppose, for witnesses to appear. There is definitely an increasing trend.

Q3 **Chair:** Anything you would like to add, Mr Hutton?

Mark Hutton: The one thing I would say on that—this is anecdotal, rather than a scientific assessment—is that, linked to the point about elected Chairs, Committees have taken on a wider range of activities, and a wider range of types of activity, too—very often in response to public pressure. That has made them do things where they are behaving less like the traditional investigative Select Committee that we know and love from the

past 40 years, and more like something that you might almost call an agent for change. They know what they want to try to achieve on behalf of their constituents or the public, and they are going out to try to do so.

Q4 **Chair:** On that point, do you think Committees have a remit to scrutinise individuals or organisations other than Government Departments—to call to account private companies, for example, for their treatment of their staff?

Dr Benger: Yes, I do. Mark is absolutely right: the conventional notion of a Select Committee—holding a Government Department to account and making recommendations for the Government to action—has shifted quite dramatically, as indeed has lots of activity within the Chamber as a whole. Some of that investigative activity is in response to public demand, and often it is in areas where, if there is not direct regulation, people think there ought to be. A really good example was the Work and Pensions Committee inquiry into BHS pensions. Sir Philip Green came eventually to that Committee, the Committee challenged his approach to the BHS pensions, and, in the end—Frank Field, the Chair, I think is on the record as saying this—they secured £350 million. That has made an enormous difference to people's lives. Whether it is an area of direct Government responsibility or not, the Committee was an agent for change, to use the phrase Mark used.

The other thing is that Committees—again, in common with other areas in Parliament—air controversial issues and sometimes raise public awareness. That is an important role of Committees. The session I think of is Katie Price's evidence to the Petitions Committee, when she talked about online bullying in respect of her son. That was an incredibly moving occasion and had huge impact and huge coverage. It is not just straightforwardly about recommendations to Government.

Mark Hutton: On a very narrow point, it has always been the case that Committees interpret their own remit.

Q5 **Chair:** In your written evidence, for which we are very grateful, you refer to the need to "clarify what is expected of Members and witnesses regarding their behaviour, what happens under current processes and what would happen if there was a breach of these arrangements". What specifically do you have in mind there, and how do you think the House can ensure both that Committees can do their job and that witnesses are treated fairly and with respect?

Dr Benger: I think getting this balance right is quite tricky. This is the second Committee I have been before in a week, by the way, so I am getting more experience of this than I expected. You can put it in Standing Orders. That is what has happened in New Zealand and Australia. You can set out requirements for fairness. In the News International case, this Committee set out a very clear, very specific procedure you wanted to follow in that area to try to ensure fairness. That is one important aspect.

You can issue guidance and make sure that guidance is followed. The 2013 Joint Committee set out a range of possible Standing Orders and

resolutions. Although those were not brought in, the Liaison Committee in 2015 said it would act in accordance with those principles. I have looked at the guidance they put on the website, and I do not think it is all there—some of it is there.

The final thing is more about behaviours and whether Committee members are always aware of the power they wield and the potential impact of that on witnesses. I have worked in this area for a very long time, and so has Mark, so we are very well used to what is coming our way if we are before a Committee. It might be more daunting than perhaps sometimes Members realise when they are possibly carried away in the heat of an inquiry and passionate about asking their questions.

I think the training around valuing everyone that we are organising, which is part of the countering bullying and harassment training, has wider benefits beyond the simple, straightforward bullying and harassment. I think it would be quite useful for Members generally to go to that training, to see it and just to realise the impact, sometimes, of the actions of someone with more power on someone with less. That is not the case for some of these characters we are talking about, who are hugely powerful, and very well advised legally and so on in practice, but it may be for other people.

Mark Hutton: It seems to me that one of the things a Committee needs to determine is what mode it is operating in. The vast majority of Committees, the vast majority of the time—perhaps except when they are taking evidence from Ministers—are operating in a consensual, collegiate, collaborative mode with their witnesses. They are trying to find out more about the subject they are investigating and trying to get the evidence on which to draw conclusions. But sometimes Committees may, as I said, be acting as agents for change, in which case they have a very clear agenda, and there is no real point in hiding the fact that they are behaving in pursuit of that agenda. At other times, they are in a position, when they are investigating something, where they genuinely are doing a more traditional, quite forensic examination of an issue. In each of those cases, for the person the other side of this table, it is a very different experience. It seems to me that you are not necessarily talking about a single set of guidance, rules or protocols.

For me, one of the drawbacks of the Standing Orders at the end of the 2013 Joint Committee report was that you could see that they had been drafted with the idea that someone was being really critically examined in front of a Committee. But you could also see that if they were put in front of someone who was being invited to a Committee to share their knowledge, they might make them feel even more intimidated than they would otherwise be. It was creating a bureaucracy around a process that does not need one.

I think the trick is to get the right level of intervention in what, at one end of the spectrum, can sometimes be a very informal exchange of views that needs very little guidance or intervention, whereas, at the other end,

something like the resolution that you had for the Dominic Cummings inquiry is much more appropriate.

Q6 **Chair:** Do you think that more could or should be done to prepare or inform witnesses about what I think you have described as the mode that the Committee is in, and about what they should expect in an evidence session?

Dr Benger: I will let Mark carry on, but my impression is that the Committee staff do a really good job on this, on the whole. We are very reliant on them, and very often they have talked to witnesses beforehand and taken them through this, but sometimes sessions are arranged in a hurry, so I am not sure whether best practice is universal.

Mark Hutton: I think it is something that Committee staff do very well. It is sometimes a bit awkward for them, because they are not necessarily in a position to say that they know that the Committee will want to have a go at a particular witness on some particular ground, if that was even an appropriate thing to do.

I think that there is more that Committees could do to explain what their inquiry is about and what sort of inquiry they are conducting. Some of them do; Frank Field was very explicit all the way through the BHS inquiry about what he and his Committee were about.

Q7 **Sir Gary Streeter:** The Liaison Committee has suggested that something must be done—the cry went up, "Something must be done." However, one of your predecessor's three options was to do nothing. Is that still a realistic option? What are the arguments for and against doing nothing?

Dr Benger: I think it is nearly a realistic option. For myself, I don't think that doing absolutely nothing is appropriate, but let us put the arguments for it.

One argument for doing nothing is that we examine hundreds of witnesses all the time without any problem. I think that, on average, about 3,000 witnesses per Session come through Parliament, so if we are issuing one summons for those 3,000, is that a sledgehammer to crack a nut?

Another argument is that, as soon as you do something that involves some form of legally enforceable power, you risk eroding the comity—the normal balance of power between the courts and Parliament. I think it is fair to say that this is a sort of zero-sum game: the exclusive cognisance of the House on the one hand and the power of the courts on the other. It has been said in the past that you trade off one for the other; if you surrender some of the House's power to the courts, that does limit the exclusive cognisance of the House.

Where I really would say that you need to do something, at least, is around the language of it. I think Committees issuing summonses, hearing evidence and calling witnesses suggests that this is a quasi-judicial process. You can make arguments that this is the high court of Parliament and that Parliament still has those powers, but I think it is a bit misleading

if someone gets a Serjeant at Arms, which, again, is a very odd idea, serving a summons on them to appear, when actually what it really means is, "If you don't turn up"—as we found out with Dominic Cummings—"we will publish a criticism of you." To me, that should be explicit and straightforwardly set out, not pretending to be something that it is not.

Mark Hutton: The only thing that I would add—slightly facetiously, I am afraid—is that, in a way, you have passed the point of doing nothing. You have done an inquiry into Dominic Cummings failing to appear before the Digital, Culture, Media and Sport Committee and not complying with an Order of the House, and you are doing this inquiry. If you came to the end of this inquiry and said nothing, you would have done something even so. I think it is about what scale of "something" you end up doing now.

Q8 **Sir Christopher Chope:** What do you think the current powers of sanction and enforcement actually are?

Dr Benger: Well, I am sitting next to one of the two editors of the 25th edition of "Erskine May", which I am sure you all have your signed copies of by now. I am fairly confident that the editors of the 25th edition of "Erskine May" say that the powers to fine and the powers to imprison still obtain. At least on a theoretical level Parliament possesses those powers. Is that right, 25th co-editor?

Mark Hutton: On a theoretical level, it is, but right back as early as the middle of the 18th century, the power to fine in the House of Commons was doubted by the courts, and I think the 1999 Joint Committee said it did not really exist anymore. It has not been exercised since 1660 or so. The power to imprison, even more than the power to fine, has terrible difficulties in conflicting with rights under the Human Rights Act and the European convention on human rights, depending on how it were exercised, and certainly the House has made no effort to use it since the 19th century.

The idea that if the Speaker were to issue a warrant on behalf of the Committee or anyone else to commit, to arrest or to bring somebody to the House, any civil power would actually exercise that warrant in this day and age, is probably very doubtful. I do not think they would feel they were able to, even if they wanted to. I think they would feel they operate within the statutory legal framework that pertains across the rest of society, and that this was not something they could do with the sort of protections they would require for themselves, let alone for the people they were asked to arrest.

Q9 **Sir Christopher Chope:** Going back to my question, you are effectively saying that we do not have any powers. You are saying we have theoretical, historical powers, but there is a concept called desuetude. Do you think that is now taking effect in relation to the powers that we have?

Mark Hutton: No, as John said, the powers are there in theory. The problem comes when you try to work out how they would be exercised in present society, with the present tools available to the House. That is

where the problem lies: we do not have in our own hands a mechanism for the enforcement of those powers.

Q10 **Sir Christopher Chope:** So it is the tools that we need to exercise the powers, because, obviously, there is not much point in having power unless you can use it.

Mark Hutton: You would probably also want to consider whether the powers that, historically, the House has claimed to have are the powers that you still want, or whether you want to think about whether they are the appropriate powers.

Dr Benger: I was looking at the historical use of the powers, and the last imprisonments were in 1880, as I think Mark mentioned. A chap called Charles Grissell was imprisoned, I think for trying to pretend he could have undue influence with a Private Bill Committee for a couple of thousand pounds, which was a lot of money. However, Charles Bradlaugh, who was a Member and a notorious atheist, was imprisoned here in the Palace overnight for one night, and it did occur to me that if you want to make your most radical recommendations about restoring that, with restoration and renewal in the air, it is not too late to design a prison cell back in the Clock Tower.

Q11 **Sir Christopher Chope:** Theoretically, it was possible to sentence people to capital punishment for committing acts of treason long after people thought capital punishment had been abolished. Parliament then decided that, because there had not been abolition of capital punishment for treason, it would be necessary to legislate for it, and that is what eventually happened. Unless we have legislated to remove these powers, they are still there, so can you give us more encouragement as to trying to find ways of ensuring that we could exercise those powers as an ultimate sanction, going back to that old dictum that there is no point in having a power unless you have a sanction through which you can enforce it?

Mark Hutton: I think you have some sanctions that do not allow you to enforce the power, but the sanctions are those that have meant that almost all those people who have been summoned have turned up. They are to do with things like wanting to be of good standing, wanting to be a fit and proper person, or wanting to not refuse to comply with the order of the democratically elected House of Parliament or the Committee representing that House. There is quite a lot of pressure on an individual to turn up in those circumstances if they have a public standing, and possibly one of the exceptions with Dominic Cummings was that he has a particular position in society, compared with most people that Committees would wish to take evidence from. It's not, perhaps, for me to say.

So there are sanctions available—there is a sanction of admonishment, which your Committee has recommended and has been used. What I am saying is that I do not think the civil power would act in furtherance of a warrant or order by the House to arrest, commit or bring an individual, or their papers or possessions, to the House as things currently stand,

because the legal framework within which those civil powers operate would not allow them to do so, or they would perceive that they would not allow them to do so.

Q12 **Sir Christopher Chope:** Those civil powers would then be in contempt of Parliament.

Mark Hutton: Notionally, they probably would. Were we to issue an order, they would not be complying with it.

Q13 **Sir Christopher Chope:** Are we content with such a situation of the supremacy of Parliament being undermined?

Mark Hutton: I think if we were content with it we would probably not be having this inquiry and discussing these issues. I would not say we are content. This situation has pertained in effect for more than a century. It has been looked at from time to time. The lack of enforcement has been challenged at various points and considered by various Joint Committees, but so far the decision has been either that the situation we have where we have persuasive powers backed up by historic powers has been sufficient, or not to take a decision to do anything else. Those two things are not quite the same.

Q14 **Stewart Malcolm McDonald:** This feels like Parliament's very own Schleswig-Holstein question. Hopefully more than three of us can understand it. If Parliament were minded, could it legislate to overcome all of this—the civil aspects you mentioned, Mark, that prevent this from happening at the moment—creating legislation that allows Parliament to impose fines or imprison individuals?

Mark Hutton: Parliament could certainly legislate. It would have to legislate within the framework within which we operate, with the Human Rights Act and the European convention on human rights, so it could not simply legislate to do things that would be in conflict with the European convention on human rights. Or it could, but it would end up in some difficulty.

Dr Benger: The other problem with that is how it looks. If you think of the reputation of Parliament, would bringing powers onto itself just like that enhance its reputation?

Q15 **Stewart Malcolm McDonald:** Could it be worse? Let's be honest, Dr Benger.

Dr Benger: That is a defeatist attitude.

Q16 **Stewart Malcolm McDonald:** Maybe that's a political point. You mentioned the obvious point of the Human Rights Act and the ECHR. If the Committee were minded to pursue that, what other considerations would we need to look at in terms of how it would pan out in real life?

Dr Benger: I think it depends on what model of legislation you go for. There is the model you just described where Parliament brings those powers, as it were, in-house. A model I would favour—I do not know whether Mark agrees; we should have checked beforehand—is what the

Green Paper described as criminalising specific contempts. To me, the mischief, if you like, that we are trying to remedy is people not turning up or papers not being submitted. As it happens, we have not had many problems with papers, but people not turning up seems to be a big problem. You could criminalise that specific contempt.

I noticed that in your written evidence from the Lord Chief Justice he mentions one or two analogous Acts of Parliament, and one that struck me as being relevant is the Inquiries Act 2005. If I may, I will read a bit about what that does.

That Act gives a public inquiry constituted under the Act a wide range of powers to obtain evidence on matters within its terms of reference. In particular, section 21 says that the chair of an inquiry under the Act may order "a person to attend at a time and place stated in the notice…to give evidence" or "produce…documents", and order a person within a period specified in the order to produce "a written statement" or "documents" or other material specified in the order. Failure without reasonable excuse—that is an important proviso—to comply with a section 21 notice is an offence under the Act, which can prompt a level 3 fine or imprisonment for up to 51 weeks. That is the public inquiry: there is a clear legal onus on the individuals to turn up.

The problem will be that if you legislate in that sort of manner, which would be my preference if I had one, that will not stop the court from going behind the decision of the House to summon an individual. If the court felt that in some way the order was inappropriate or a wrong use of powers, it may decide or choose not to enforce the order. It is difficult to stop the court going behind the order.

Mark Hutton: I think I would agree with that. As John read that out, there were at least two points: first, the inquiry has to be acting within its terms of reference, so already we have removed responsibility for interpreting the terms of reference from the Committee—we'll say it's a Committee—to a court, in the final analysis; second, if it was a reasonable request, so now an exercise of reasonableness over the conduct of the Committee towards the individual has been applied.

The analogy with the Inquiries Act, to go back to my first point, works fine if the Committee is conducting something that is itself analogous to a public inquiry; some Committees sometimes are. It works much less well if the Committee is not doing that. It would be quite hard for a Committee that was adopting the approach that Frank Field's Work and Pensions Committee adopted towards BHS to conduct itself in accordance with the expectations of an Inquiry Act. It is not set out to do that; it doesn't want to do that; it's not what it thinks it is trying to achieve.

It would also be interesting to apply those conditions to a Committee's desire to take evidence from Ministers. They don't necessarily wish their Committees to behave in the same way to Ministers as they would to other witnesses. I think that is probably the simplest way to achieve a statutory

end, if you wish to achieve a statutory end, but it does carry with it significant other risks.

Dr Benger: One way of moderating those risks would be for your Committee to have an intermediate role, for example. You could say, well the Culture Committee wants to summon this particular individual, but first it has to be cleared by this Committee. That might be a way of getting some sort of internal assurance over due process. At that moment you might allow representations to be made to deal with issues of fairness and due conduct.

I am not absolutely convinced that courts would be falling over themselves to obstruct Parliament if a duly issued order was made. Courts don't like what are called ouster clauses—you have probably had some learned advice on this—that say, "You can't look at this, you can't go there." We've had a very recent example where courts have resiled at that. None the less, I think it is quite conceivable that if it's done with a due process at this end that the courts won't want to get in the way.

Q17 **Stewart Malcolm McDonald:** Do you know of any international examples that get this right, have a good balance and allow that legislature to operate effectively when its presented with these kinds of circumstances—refusal to appear and such?

Dr Benger: I'm really tempted to say there is an example in Scotland, but I don't know if you would call that an international example or not.

Stewart Malcolm McDonald: Not yet; we're working on it.

Dr Benger: Okay, so Wales, Northern Ireland and Scotland have all got powers within the relevant legislation, but these haven't been tested by events; ditto New Zealand and Australia, which have had Privileges Acts since 1987, in the case of Australia and—

Mark Hutton: 2014.

Dr Benger: 2014 in the case of New Zealand.

You could either argue that the presence of the statute as such means that everything is going swimmingly, or you could say, "Maybe they won't need it in the first place; why have they even bothered with them?" In Australia and New Zealand they are part of much wider legislation about privilege.

What happens in Congress might be worth looking at; it's quite tricky and complicated, but the powers are used both in Congress and in the Senate to get individuals before House Committees and so on. I don't really know enough about it to know whether they are functioning completely to everyone's satisfaction or not. Do you know, Mark?

Mark Hutton: I don't think I could claim to be able to cite somewhere where it is known that they are. If you take the United States, as John says, where there is a process, it has been used and it seems to work, it is a process that provides witnesses in a very different context. An American

Congressional Committee is not like a Select Committee in the way it treats its witnesses and the way the witnesses expect to have certain rights. We are talking about very different circumstance. That is one of the problems.

There aren't very many Parliaments, if any, that I am aware of that have the sort of Select Committee structure that we have, where there is such a wide range of Committees broadly doing scrutiny work of that character, and working in such a flexible and varied way.

Stewart Malcolm McDonald: That's a few good fact-finding visits there, Chair. Thank you very much.

Q18 **Liz Twist:** At present, Select Committees can automatically refer to the Committee of Privileges an alleged contempt arising from the leak of a Committee paper but all other alleged contempts must be referred by a specific decision of the House. Is there a case for allowing Committees automatically to refer alleged contempts arising from a refusal to obey an order to attend or to provide papers?

Dr Benger: I think there is a case, for the reasons I outlined a few minutes ago. Maybe Mark has stronger views on that than I have.

Mark Hutton: If you were to create a system in which there was a statutory enforcement regime in which the Committee of Privileges had a role, as John described, I can see that making sense. I wonder whether in other contexts you would really wish to have referred to you, albeit not many but effectively, repeats of the Dominic Cummings inquiry if a Committee had failed to obtain the presence of a witness they had asked for—in the present regime, before a statutory intervention. That is the position I fear you would find yourselves in and I am not sure that it would be enormously something you would want to take on, but that is more for you than for me.

Q19 **Liz Twist:** Okay, so would that be a case of being seen on paper to do something but, in effect, not having any practical use? Is that overstating it?

Mark Hutton: It may be overstating it. Of course, your Committee's intervention will always be of value and importance. It is a bit like the guidance you have given to the Liaison Committee about the leaks of Select Committee reports and papers, which is, effectively, "Don't pass them to us unless you think there is something we can sensibly investigate". I think the same would apply with this. You don't want to be given inquiries where there isn't much you can usefully do except go around the same course again.

Q20 **Liz Twist:** So that would really need to be part of a wider package of changes that would strengthen the powers.

Mark Hutton: *indicated assent.*

Q21 **Liz Twist:** Can I ask you what your opinion is of the 2013 Joint Committee draft resolutions and draft Standing Orders?

Dr Benger: They are very exhaustive and I think they follow the Antipodean model fairly closely. Mark made a very good point when he talked about creating a whole bureaucracy for an issue that generally isn't an issue for the great majority of witnesses—most Committees work consensually and want to find things out, and most witnesses want to tell them things.

I suppose one advantage of putting things in Standing Orders is that you can be confident, at the very least, that Clerks will read them. Clerks like nothing more than to read a Standing Order. Equally, if you put things in statute you can be reasonably confident, I think, that judges and courts will read them. One issue we have had over the years, and in a way this is what prompted the legislation in Australia and New Zealand, I think, is judicial ignorance of some aspects of parliamentary privilege. Equally, if you get the process set down clearly somewhere, people will be much more likely to follow it. That would be an advantage of putting things in Standing Orders, I suppose.

Mark Hutton: I would counter with a disadvantage, which is that the trouble with Standing Orders is that if you were to do that you would be giving people the impression that you were creating a set of rules to which the ordinary processes relating to rules might apply. In other words, they could consider whether the Committee had complied with them, and if they thought they hadn't there would be a route they could take to appeal the behaviour of the Committee. Standing Orders don't work like that, really. That is not what they are for. By putting them into Standing Orders I think you would be creating something of a false premise for witnesses. Also, as I said before, I think that, as drafted, they are for the vast majority of cases overly bureaucratic. I think there are individual faults with them. For example, one small fault I might point out to you is that they appear to suggest that if a Committee was taking evidence in private, and in that private evidence one of the witnesses made allegations against a third party, which might be why you were taking evidence in private in the first place, that third party would be entitled to know about the allegations and have a chance to respond. Given the nature of some of the inquiries that Committees do—into workers' conditions, non-disclosure agreements and all those sorts of things—that might not be a position they would want to find themselves in. I use that example simply to show that, when you draw up very prescriptive rules, you have to be absolutely sure that they will apply in all the circumstances that they will be applied to. I do not think that these do, but the underlying principles—natural justice, fairness, allowing people a chance to reply to serious criticisms made against them—are sound.

Q22 **Chair:** Do you think the House is vulnerable at the moment to challenge at the European Court of Human Rights arising from its treatment of witnesses?

Dr Benger: Yes, I do. Mark knows more about this than I do, but the European Court of Human Rights showed, in the case of A *v.* UK, that it has a fairly wide margin of appreciation for parliamentary proceedings.

That said, to put it at its starkest, Strasbourg does not recognise article 9. Strasbourg could intervene. Individuals could take a case.

I thought it was quite interesting that in your News International inquiry you set some clear processes and protocols. The lawyers for the witnesses kept hinting—or more than hinting—about article 6-type concerns about whether this really met modern standards of fairness. Human rights law has been an area of huge expansion in law since 2000 or so, so I think there is a risk there. Mark, do you want to expand on that?

Mark Hutton: I think there must be a risk. The ECHR has shown itself willing to look inside the proceedings of member state Parliaments and, where it finds something it considers to be an injustice, to find it so. Although there is a wide margin of appreciation for individual jurisdictions, that has not stopped it from applying the standards of the convention.

One case that I think is an interesting analogy, although it is not actually an EHRC case, is a recent case in Dublin called Kerins. Kerins was an official head of company that got Government money, and she was invited—not summoned, in the end—to a Public Accounts Committee hearing, where she was interrogated on a variety of issues, and not simply those she had been told that she would be asked about, for seven hours. She had some sort of breakdown as a consequence and took a case against the Parliament.

There is a constitutional difference, in that the court had some access into it, but not a very different access from that which the European court might have. They were concerned both about the extent to which the Committee had asked questions beyond and on different topics from those Kerins had been warned about, and about the behaviour of the Committee in the way it treated her. They were also concerned about remit, but that is a slightly more specific Irish issue.

Dr Benger: There was a case in the early '90s, which I am sure Robin has picked out, called the Demicoli case, when a Maltese journalist made satirical comments against a couple of Members, who were very indignant and essentially tried to haul him over the coals within the Maltese parliamentary system. In the end, Strasbourg intervened and said that it was not a due process. That is a landmark case from 1992.

Q23 **Stewart Malcolm McDonald:** Subsequent to that question, where it has been found that a witness has been treated unjustly—I get that it depends on the specific circumstances of the case—who could be held responsible? Individual Members? The Chair of the Committee? The Speaker?

Mark Hutton: That is a very good question. In fact, that question taxed the court in Ireland during the case I just described. The original case was taken against the members of the Public Accounts Committee, and the Oireachtas came in and said it should be a corporate thing against all of them—against the institution. In the end, the court accepted that it was against the institution, which slightly changed the nature of the case and

made more important the extent to which the institution had or should have exercised some sort of supervisory role over the conduct of the Committee. So it did try. That is a good question, and there isn't a simple answer to it.

Q24 **Stewart Malcolm McDonald:** So if the House of Commons was found to have treated someone unjustly and was, say, fined subsequently, how would it pay that fine? Where would the money come from?

Mark Hutton: The accounting officer would pay.

Dr Benger: I am the accounting officer. This line of questioning has taken a very uncomfortable turn.

Q25 **Stewart Malcolm McDonald:** Let us say it is a Committee, then. Let us say the DCMS Committee is found to have done something. How would the fine be paid? Does it matter?

Mark Hutton: Unless we are thinking of a very different regime, there probably would not be a fine but damages or some sort of recompense. I think that in short, the House itself would have to treat it as a liability, which it would be obliged to find.

Dr Benger: Mrs Kerins is pursuing damages in the Irish case that Mark mentioned.

Q26 **Sir Gary Streeter:** Can I come back to the earlier conversation? You mentioned that Select Committees are expanding their remit—it is a bit mission creep. That is society and the way that all things are going—new seasons. Is there a case then for looking at Standing Orders, legislation or putting a new framework around what Select Committees do and, as part of that, setting out new powers for sanctions and so on? It seems to me that it does not matter much that in 25 years, 11 people have not turned up to give evidence, but it matters a lot that although we and the public think that Parliament has powers, we do not really. That is not sustainable. Is there a case for looking at this in the round to describe the role of Select Committees, embrace the new mission creep and put it all in some kind of framework?

Dr Benger: I think there is, yes. The formal powers of Select Committees include powers to send for persons, papers and records. Those were the powers that the House granted to them in 1979. It would seem a bit perverse if that were meant just to be illustrative and just some of the things that they might do. The House clearly intended for them to be able to do that. Putting that into an overall framework would, I think, be helpful.

There are no totally easy solutions to this. The 1967 Committee said, "We really need to get these things on to a formal basis." There is a very good book by the authors of "Supergeeks", called "How to think like a geek". They say that when you have got a really difficult problem—an apparently intransigent problem—the best thing to do is to ignore it and find another problem. I am tempted to say that to you—"Just find a different

problem"—but I think the moment has probably come and you need to at least recommend a way forward.

The Liaison Committee has not got a single view on this, but its majority view is that it needs some help. I agree with what you say: it would be best to do this in the round and not just say, "We'll do this here and this there," but to think overall about general principles, fairness and what Committees aim to do. As Mark said, we must remember that 99% of Committees are not adversarial.

Q27 **Sir Gary Streeter:** One final question. As we approach the reconstruction of the building—someone has got to sit down and draft this and it will take years—could you tie this in to a modern Parliament, with modern Select Committees and a new set of rules and procedures?

Mark Hutton: I think that there are several different things in what you are asking. There will be some difficulty but no harm in setting down very clearly what the current position is, holding up our hands and saying, "We don't have enforcement powers and that is fine, but we still expect people to comply with a reasonable request from the democratic institution at the heart of our society." You could do that without changing anything and you could make it clear. You could answer some of your concerns about no one knowing quite what the powers are, about it being a bit like smoke and mirrors, and about how that is surely unacceptable in a modern society. You could solve quite a lot of that without really changing where we are but just making it clearer and more transparent, and the House admitting that does not have some of the grander, more far-reaching powers that it seems to be holding in reserve at the moment.

At the other end, you can go right down towards the legislative solution and pass an overarching Act in which you set out the nature of the powers and how they are enforced, describe why they are appropriate, and put in the rights checks and balances. If you did that, you would create a much larger role—if they wanted to or were asked to—for the courts to interpret how Committees and other parts of Parliament were functioning. You might say that that is a bad thing; we tend to start from the premise that it is a bad thing and has many risks, but it is not a thing that the rest of society is excused from. The House of Commons is excused from it for good reasons, but if you are taking your overarching view, you may want to think about how much those reasons apply to the extent that we assume they need to in this day and age. But you are taking on quite a large task in either case, and Committees that have tried to do something similar in the past have found it difficult.

Chair: Thank you very much for your evidence. I don't know whether there is anything that you want to add, but obviously if further thoughts occur to you, we would be very happy to receive further written submissions. In the meantime, let me thank you for your very clear and comprehensive answers. We appreciate your time.

Mark Hutton: Thank you.

Dr Benger: Thank you.

Examination of witnesses

Witnesses: Sir Bernard Jenkin MP and Chris Bryant MP.

Q28 **Chair:** Welcome to this evidence session for the inquiry that the Committee of Privileges is carrying out into Select Committees and contempts. Can I start by asking each of you to introduce yourself for the record?

Sir Bernard Jenkin: My name is Bernard Jenkin. I am Member of Parliament for Harwich and North Essex, and for the last nine years I have been Chairman of the Public Administration Select Committee, or PASC, which is now PACAC, the Public Administration and Constitutional Affairs Committee. I am here speaking on my own account, but drawing on work that I also did with the Joint Committee that produced a report on privilege in 2013, a Committee on which I served.

Chris Bryant: I am Chris Bryant. I am the MP for the Rhondda, and I am also here in an individual capacity—though I am Chair of the Finance Committee in the House of Commons, so I am not sure that I could answer the question that was asked earlier about who would pay the fine if we were fined.

Q29 **Chair:** During the course of this inquiry, we will endeavour to find out the answer to that.

As you will be aware, there have been recent high-profile cases where people have been summonsed to attend Select Committee hearings and refused to comply, or at least have shown considerable reluctance to do so. This Committee, indeed, has recently reported on the Dominic Cummings case; Mr Cummings was admonished by the House at the conclusion of that inquiry. Do you think that the refusal of witnesses to attend is becoming an increasing problem? If so, why might it be happening?

Sir Bernard Jenkin: Certainly on the Committee I chair it has never been a problem. When we have invited a witness who has been reluctant to come, they have generally had a pretty good reason, and we have to satisfy ourselves that making a fuss about it would be worth the candle. Recent cases have involved foreign citizens—such as Mark Zuckerberg or the CEO of Kraft—who have declined to attend, but they have at least sent representatives. It is difficult to see how one could address that problem by any means, particularly if they are citizens of the United States, from which it is extremely difficult to extradite anybody for a political purpose.

I do not wish to comment in detail about the Cummings case—I was a director of Vote Leave, and he is a good friend and former colleague—but he did appear before a Select Committee while he held office with Vote Leave, which was then the official leave campaign. Whether it is the job of a Committee to summon any private citizen to cross-examine them about anything has at least a question mark over it.

Sometimes Committees make their own problems. I could have predicted that Mr Cummings was unlikely to appear, because that suited his own purposes. Did the Committee fail to learn anything significant by being unable to cross-examine him? They had quite an intercourse with him by letter, which I think showed that any hearing would perhaps have been entertaining from Mr Cummings's point of view, but not as worth while as the Committee might have hoped.

I think the answer is that the people who Select Committees really need to summon—public officials, Ministers, people with responsibility for public policy or public money, or people with a reputation to defend because they have a public role—have shown no sign of being reluctant to attend. One figure who was reluctant to attend was the chairman of the BBC, because he is a peer of the realm. These problems usually get themselves solved one way or another when it is in the public interest to resolve them.

Chris Bryant: I take a rather different attitude on every single element of what has just been laid out for you. First of all, one of the great innovations of the Select Committee system is that it is not just the Ministers and those who spend public money who are brought before Committees. Increasingly, over the past 10, 15 or 20 years, it has also been those who exercise a great deal of power in the land because they run major corporations. That started, in particular, because many of the utilities were privatised, so they were no longer public servants but were still people who were of significant interest to our constituents. Now, my constituents would expect me, if I were on the relevant Committee, to be able to ask questions of somebody who ran TK Maxx, Asda, or any of the major corporations in the land. That ship, as it were, has already sailed, and I think we need to recognise that.

I was struck, when I was on the Culture, Media and Sport Committee from 2001 to 2005, that everybody else on the Committee seemed very reluctant to summon Rupert Murdoch. Now, it is true that Rupert Murdoch is not a British national, but he was regularly in Britain; he regularly met Prime Ministers and all sorts of other people, but the one place where he was very reluctant to appear was before a Select Committee, even though he ran a 40% share of the national newspapers and the largest broadcaster by value by some significant measure. Rebekah Brooks also sought to not appear before the Culture, Media and Sport Committee—after I'd already left—and Rupert Murdoch only ended up appearing before the Committee once there was already a major scandal about phone hacking at his newspapers, and he'd already closed one of them down, the *News of the World.*

Those are the big, high-profile cases that we have discussed. I am on the Foreign Affairs Committee at the moment, and we are doing a report on South America. One of the major interventions that British businesses do in Latin America is in the extractive industries, whether mining or oil extraction, and it seemed to us quite important that we should have somebody from one of the mining corporations to come and give evidence before us. I have to tell you, it took the threat of a summons before

anybody was prepared to come, and I think that happens on a regular basis in most of the Select Committees: you have to start doing the threatening business before you get anywhere.

I think that is because increasingly, witnesses know that we do not really have any powers—that Parliament does not really have any subpoena powers any longer. We are, if you like, a dog that is chained up on a chain that reaches five metres away from the gate, so you can open the gate and walk in for five metres perfectly easily without being attacked by the guard dog.

Q30 **Chair:** Do you think that a consideration in deciding whether to summons a witness is, as Sir Bernard suggested, whether or not there is anything additional and useful that can be learned? If there is another way to obtain information, isn't the Committee just grandstanding by insisting on an individual coming before it?

Chris Bryant: No. I think it is a fundamental principle that we, as the elected representatives of the commons of England, Wales, Scotland and Northern Ireland, have a duty to stand up wherever power is being exercised in the land, to be able to question it and pose legitimate questions.

There is an important question about how we should be polite and how we should conduct our business, in a way. Often, that is a question of good Chairs exercising their role properly, and I have seen instances in which witnesses have been hectored and bullied. That is inappropriate, but in the main, I worry now that the powers we have always historically relied on no longer exist. To use another metaphor, we are like the Wizard of Oz: when you get behind the curtain, there is just somebody playing a mouth organ.

Sir Bernard Jenkin: Can I just come back on that? I think it is a very broad thing to say that a group of MPs—as the BBC likes to refer to Select Committees—should be entitled to call before them and arraign any person whom they regard as exercising power in our land. There are, of course, a host of regulators and legislative arrangements that regulate the behaviour of people doing all kinds of things as private citizens or as businesspeople, and it is not the job of Select Committees to be the judge and jury over the behaviour and conduct of anybody we choose.

I think that that is why people are reluctant to come: they think that the procedures or the questioning of the Committee will not give them what they regard as a fair trial. We have seen examples where individuals have been extremely unfairly treated by Select Committees, and that should be dealt with.

The Murdoch case is interesting, because in the end his reputation was going to be damaged if he refused to come. That might have affected his ability to hold a broadcasting licence, which is regulated by Ofcom. There was therefore an incentive for him to come, because he was in a quasi-public role as the holder of a broadcasting licence.

I do not think that there is any instance of a director of a privatised utility refusing to attend. As for the people representing the extractive industries in South America, I think the example that my colleague here gives is instructive: a summons under the existing regime was issued, and representatives duly appeared. I think that that demonstrates that if we are trying to solve a problem, it is a very isolated one. It would be a shame to upset the present situation for the sake of a problem that hardly exists.

Chris Bryant: I think my point was that there are more instances than we know of where Committees have had to flex their muscles. That is all I was trying to say.

Sir Bernard Jenkin: Well, I hope that this Committee is going to use the evidence, rather than what we don't know about.

Q31 **Chair:** One of the suggestions made by Mr Hutton, who gave evidence in the previous session, was that Committees are taking on a role as agents of change and that that is a desirable thing for them to do. Is that extending the remit too far, Sir Bernard, given what you were saying, about it not being the job of Committees to—you used the word "arraign"—question individuals with important positions who are not necessarily in the public realm but have a significant impact on the day-to-day lives of our constituents?

Sir Bernard Jenkin: I think we are the agents of change, but there are plenty of things to try to change that are motes in our own eye here in the Westminster bubble, without branching out into directly intervening in things that are not directly under the remit of a Select Committee.

Each Committee is set up to shadow a Government Department or the whole of Government, and each Committee can bring Ministers, officials and others in front of it. I know of no instance where the Government has refused to field a Minister at all; there is be a question about whether we get the right Minister or official, but that is a matter for discussion between Parliament and the Executive. We can instruct the Executive what to do in the end, in that respect: we can order an individual Minister to appear before a Select Committee if necessary, without recourse to legislation.

The question is, what is our main role? It is to scrutinise public policy and public institutions on the basis of what we can learn about the world at large and what we want to change about it. Our job is to hold the Government to account and make recommendations to Government and about legislation. Ultimately, if Parliament does not like the way that some South American extractive industries are behaving, or the way some newspapers are behaving, we can pass legislation in order to change the way they behave. That is the correct way for us to fairly deal with those persons in extreme circumstances.

Having said that, the vast majority of people who are invited to attend Select Committees, however difficult they are going to find it, tend to

come in the end. Before we change anything, let's just remember that the problem we are seeking to solve—I repeat—seems to be a very small one.

Chris Bryant: Yes, but we cannot legislate with regard, for instance, to extractive industries in South America—not that I have any particular intention of doing so, but we could not do so without gathering some evidence, and we could not gather the evidence unless we had the people appear before us. That is a constant issue for us.

Actually, I think there is a philosophical difference between the two of us. I think that the job of Select Committees is at one with the job of Parliament, which is to try to improve the lot of our constituents in so far as that is possible. Some of that is about public policy and Government Ministers; some of it is about the way corporations operate within our lives. For instance, having the chief executives or chairmen of banks sitting in front of the Treasury Committee is an important part of the Treasury Committee doing its job. Likewise, supermarkets—if we want to tackle the use of plastics, their ending up in the sea and so on, you cannot do that without having the chief executives of supermarkets before us.

I do not like the word "arraign", because I think it is a complete misunderstanding of our job. Our job is to seek evidence so as to be able to make our inquiries more effective, and so as to be able to inform public policy more effectively. There is one bit that has been referred to a couple of times, which is peers, and because obviously we cannot force either a Member of the Commons or a Member of the House of Lords to appear before us, there is some anomaly here—in particular, oddly, in relation to some public bodies that are chaired by Members of the House of Lords.

Q32 **Stewart Malcolm McDonald:** My first question is to Sir Bernard. Should we codify in law who can and cannot be requested to appear before Select Committees, or summoned to appear before Select Committees?

Sir Bernard Jenkin: No, because it seems to me that that would restrict the choice of Select Committees about who they choose to invite. I am certainly not in favour of restricting who Select Committees can invite, because of course if the representatives of South American extractive industries refuse to come, they are damning themselves by their own absence. I certainly think they should be inviteable; I just question whether a legal codification of how they are summoned is actually going to improve the situation.

Q33 **Stewart Malcolm McDonald:** The same question to Mr Bryant.

Chris Bryant: I would not codify who a Select Committee can invite, but I believe it is now time for a proper codification—we need some form in writing that expresses the powers that we genuinely believe we have, rather than some kind of fictitious understanding. Every time one of these rows happens, every newspaper brings out Charles Grissell and says how he was arrested, and that the Serjeant at Arms was sent off to the south of France to find him and all the rest of it. It is all very hilarious, but it just all feels a bit like Alice in Wonderland. Really, we need some kind of proper codification.

Q34 **Stewart Malcolm McDonald:** I asked the two witnesses who appeared prior to both of you about any kind of international best practice they thought might be worth adopting. Does either of you have any views or advice on any lessons that can be learned from other legislatures around the world to try to solve this problem?

Chris Bryant: I believe in the exceptionalism of the British system to some degree. There are elements of the way that the United States of America functions that would be wholly inappropriate for us, because we do not have a separation of legislature and Executive. We lost that vote in 1713.

However, I think we should now be using some elements so that the courts—which are the proper body to ensure there is a fair trial, a proper process and all the rest of it—are able to consider two things. The first is whether a contempt of Parliament by refusing to attend has occurred, and the second is whether a contempt has occurred because somebody has perjured themselves after taking an oath before a parliamentary Committee. I think those are two fairly simply laid out concepts that should be introduced as proper offences now. The one thing I don't think is that you can really, in the modern era, have a system of trial by Parliament. We did away with that many centuries ago.

Sir Bernard Jenkin: Sorry, what was the question again?

Q35 **Stewart Malcolm McDonald:** Are there any lessons or examples internationally that you think would be worth adopting or looking at?

Sir Bernard Jenkin: I do invite you to study the evidence that the Joint Committee in 2013 took from the American Congress, from New Zealand, from Canada, I think, and from Australia. I went on that Committee determined that Select Committees should have statutory powers, but it all got rather complicated when you started listening to the evidence, because it turned out that nothing was as cut and dried as it might have at first appeared.

Many of the problems that people think will be resolved by having statutory powers—I presume that is what you mean by codification—are in some ways magnified by recourse to the courts. Statutory powers immediately legitimise delay. At the moment, somebody who receives a summons from a Select Committee goes to a solicitor, and the solicitor will say, "Well, this is Parliament. This is nothing to do with the law; this is the law of Parliament. It's up to you whether you go." If you don't go, you could be struck off your professional body, or you could suffer this, that or the other, but there's no legal process to get into. If Murdoch had had recourse to a solicitor who could have said, "No, no, let's take them through all the hoops; let's stop them summoning you for at least two years," he could have done that. It legitimises delay.

Chris Bryant: That is exactly what he did.

Sir Bernard Jenkin: He didn't, actually. He turned up in good time. I remember watching him.

Chris Bryant: No, no—

Sir Bernard Jenkin: I don't remember watching you; I remember watching him.

Q36 **Stewart Malcolm McDonald:** Can I ask a question on that case, then? Christopher, you mentioned that when that Committee was deciding whether to invite Mr Murdoch, there was a reluctance on the part of members of the Committee to do so—presumably because they feared what might be done to them in his various publications. I wonder whether that is related to something else that you mentioned in passing, but is it the case, perhaps, that parliamentarians are almost being pre-emptively intimidated into not inviting certain witnesses to appear before Select Committees, for fear of what might occur afterwards?

Chris Bryant: Just to clarify, I was on the Select Committee between 2001 and 2005, when I am not sure that anybody appeared from Sky or News International, as it was then called. The inquiry that Mr Jenkin was referring to was in the 2010 to 2015 Parliament, when I was not a member of the Committee. The Committee itself in, I think, the 2005 to 2010 Parliament tried for the best part of two and a half years to get Rebekah Brooks to give evidence, and she point-blank refused. I think that the evidence is already there, in terms of all the legal letters that were sent between the two. So I think it is quite a material point. You might briefly have noticed me, because I was sitting behind Mr Murdoch when the pie was thrown at him, which I think was a disgrace and a contempt of Parliament as well.

My biggest anxiety is this. It is perfectly possible that, in that period, up until 2010, when the *News of the World* closed, there were people who were intimidated, and certainly—other members of the Committee referred to this at the time—that one person owning far too much of the newspapers was a means of protecting the broadcast interest. However, I don't think that that is really all that significant to this inquiry—if I may suggest that—because, in the main, these are not people who can intimidate MPs; it's just people who don't want to appear before MPs, because they don't want to be asked very difficult questions in the public domain.

Q37 **Stewart Malcolm McDonald:** In terms of genuine reasons for not wishing to appear—perhaps, in particular, where a witness a Committee wishes to hear from is outwith the borders of the United Kingdom—do you think that Select Committees could make better use of technology, both abroad and in different parts of the UK, to facilitate witnesses giving evidence through video linking and that sort of thing? Do Committees, in your view, make enough use of that technology to facilitate better evidence gathering?

Chris Bryant: I think the new Digital, Culture, Media and Sport Committee, under Mr Collins, have been very clever in how they have brought together various different Committees, either of this House or of different Parliaments. There are legal issues to be addressed there as well

about where parliamentary privilege lies in relation to what is said in a proceeding in Parliament under article 9 of the Bill of Rights. That might not apply as fully if you are holding a joint session with a Senate Committee, for instance. I would very much welcome a further expansion of, for instance, the UK Defence Committee meeting jointly with the Estonian Defence Committee, whether in Estonia or here. There are issues you might be able to explore more fully alongside another Parliament, and I think that this is one of the areas where there will be more innovation in years to come.

Sir Bernard Jenkin: Funnily enough, the Joint Committee that looked into the whole privileges question and the powers of Select Committees took evidence via video link, but we did not need to persuade the Clerks' counterparts from the other Parliaments to appear before us—they were very willing to do that.

On the codification question again, I am not against codification in other forms. What the Joint Committee in 2013 recommended was that we could do much more without recourse to statute, clarifying our own Standing Orders. We drafted Standing Orders that remain as a suggestion; they have never been implemented. They might encourage witnesses to attend. If we had Standing Orders for Committees that made it more difficult for Committees to treat witnesses unfairly, that would reduce the excuse of, "It is going to be prejudicial to my interest to appear before this Committee." Incidentally, even when witnesses are summoned, and they come, they are not obliged to say anything. They are obliged to tell the truth, but there have been occasions when witnesses have sat there and been advised by a lawyer sitting next to them to decline to answer any questions.

Of course, if we had legal codification, a court that contested the summons might, in the end, set conditions about which questions the Committee was allowed to ask. I would say that that was interference in the proceedings of Parliament. I would say that it was a breach of article 8—

Chris Bryant: Nine.

Sir Bernard Jenkin: Article 9 of the Bill of Rights. We are tempting the courts to start intervening in our own procedures by legislating in this area. The evidence we took, which was overwhelmingly persuasive in my view, and changed my mind, was from a former Lord Chief Justice, who was very eloquent in explaining that, if there is a proper understanding between Parliament and the courts, these matters can be settled, but if we invite the courts into parliamentary proceedings by passing statutes of the nature proposed by those who want to give Committees statutory powers, we are blurring those understandings and perhaps eroding the rights of Parliament itself and our right of free speech.

Q38 **Stewart Malcolm McDonald:** Do you think it would be possible to legislate very narrowly to prevent that from happening?

Sir Bernard Jenkin: I think that, once you start legislating, you open the thin end of a wedge. Once you start legislating, you can't unlegislate. Parliament is protected by a boundary around what is known as its exclusive cognisance, which you are probably familiar with, and once statute has invaded that exclusive cognisance, there is no way known to man to get it back. The trend has been to limit the exclusive cognisance of Parliament, because of the more and more laws we produce. For example, we no longer have Sessional Orders—I think that's a mistake, personally—but we rely on the statute law and the statutory authorities to keep the peace outside Parliament, and to not block the alleyways and passages to Parliament. We can no longer mount posses of armed people to go and arrest people; it is all done under a statutory framework now. If we want to protect our right of free speech, we must bear in mind that the unique thing about our arrangements here in Westminster, compared with any other country that we could look at, is that we still have a largely uncodified constitution, and the sovereignty of Parliament is itself an uncodified point.

The more we legislate, the more—as we see in written constitutions—we are putting the courts in a position to overrule Parliament. I do not think that that is what Parliament really wants, and I do not think that it serves the purpose for which these matters are being considered in the first place.

Chris Bryant: If I might—

Sir Bernard Jenkin: If you are in favour of a written constitution, we are going down a different alleyway.

Chris Bryant: I wasn't going to talk about that; I was just going to say that my suggestion is that we should have a fairly simple statute that lays out two offences. One, as I said earlier, would be the offence of refusing to attend. I guess it would be along the lines that a named person, when summoned in the prescribed form, refuses to attend without due reason. It would be fairly similar to what was referred to earlier in relation to the Inquiries Act.

Of course, the court would be able to inquire whether it was a named person, whether it was the right person, whether the person had actually been summoned at all, whether the person had been summoned in the prescribed form, and whether they had a valid reason for not attending, such as being bedridden, terminally ill or not in the country. I do not have a problem with the court inquiring into that; the courts have already inquired into other elements of parliamentary privilege, such as whether letters between a Member of Parliament and a constituent have full or partial parliamentary privilege attached, as well as various other issues.

I also remember that I asked Rebekah Brooks in a Select Committee hearing on 11 March 2003 whether she had ever paid a police officer for information. She said yes, and Andy Coulson agreed that they had. Interestingly enough, when it came to the inquiry into phone hacking, they were not able to refer to that moment, because it was a proceeding in

Parliament and parliamentary privilege attached to it. Sometimes I think parliamentary privilege cuts in two directions at the same time.

Q39 **Chair:** Sir Bernard, you were suggesting that we should be setting out in Standing Orders, if not in statute, ways of working for Select Committees. How would such Standing Orders bite? Would they be more than just declaratory? Would there be any way of compelling their being followed? What would happen if a Committee did not?

Sir Bernard Jenkin: Standing Orders are, of course, binding upon proceedings in the House and proceedings of Committees. They would provide assurance to witnesses whom Select Committees wanted to have that they were more likely to be treated fairly. There would therefore be less excuse, and the reputational damage that Parliament has suffered because one or two witnesses have been spectacularly badly treated would be less likely to occur. There would be less incentive for people to decline to come and more incentive for people to expect that they would be fairly treated—that is the purpose of it.

These were quite carefully researched recommendations. I think most members of that Committee would be sorry that the House has not at least tried these proposals before revisiting the whole question of whether we should resort to statute.

Q40 **Chair:** Couldn't what you are suggesting be done through principles-based guidance rather than Standing Orders?

Sir Bernard Jenkin: Principles-based guidance would not be binding on the proceedings and the conduct of Members, so I think it would have more force if this were in Standing Orders; it would at least be expressed in the law of Parliament, within our exclusive cognisance. If it is just guidance, it does not have any force at all—it has even less force.

Q41 **Chair:** Do you think the Standing Orders could be worded in such a way that they would be specific and tight enough?

Sir Bernard Jenkin: It would depend how they were drafted, but I suggest that you look at the drafting that we proposed. If the Chair or any other member of the Select Committee were straying outside the Standing Orders, the Clerk sitting next to the Chair would have an obligation to advise the Chair that the Standing Orders were in breach. I do not think they could do that about guidance; it would not have the same force.

Chris Bryant: I think guidance already exists, to all intents and purposes. It could maybe be strengthened, but I am not sure it would make a great deal of difference. My anxiety about merely restating our powers in the Standing Orders is that they have no more force than they did beforehand, and they are equally likely to be ignored.

I happen to think that our Standing Orders are a bit of a mess at the moment. They are far too lengthy—lengthier than in any other Parliament in the world—and they really do need a radical overhaul. I am not sure that that really answers our question, except in so far as, if we were to legislate in the way I have suggested for a contempt of Parliament in

relation to refusal to attend, you would have to have a stipulation in the Standing Orders as to what the prescribed form was for being summoned.

Q42 **Sir Gary Streeter:** Two quick questions from me, gentlemen. You clearly do not agree on very much in relation to this issue—or perhaps in relation to anything—but do you both agree that doing nothing now is not an option, and that we have to actually tackle this?

Sir Bernard Jenkin: I would go for the draft Standing Orders that were in annex 2 and annex 3.

Q43 **Sir Gary Streeter:** But doing nothing is not an option.

Sir Bernard Jenkin: Why do nothing? Well, actually, doing nothing is an option. We have done nothing for a few years since this report was issued, and the sky has not fallen in and Select Committees continue to do an extremely worthwhile job. Parliament has not fallen into complete—well, for other reasons, Parliament is not perhaps so well regarded by the public, but Select Committees remain one of the most respected functions of the House of Commons, in particular, even though we have done nothing. Doing nothing is an option, but my preferred option would be to adopt the draft resolutions in annex 2 and annex 3 of the Joint Committee report.

Chris Bryant: We actually agree on lots of things, and he likes me much more than he pretends. I think that we have no option but to do something. There is a fourth version, which is a sort of version of doing nothing. That is to say, "All right, hands up: we haven't got any powers. Let's just forget it."

Q44 **Sir Gary Streeter:** Is one of the reasons why you do not agree on the solution to this predicament that, in fact, you do not agree on the role that Select Committees should actually be doing, and that that has become quite a difference between you?

Sir Bernard Jenkin: I think we probably agree on the role of Select Committees.

Sir Gary Streeter: I am not sure that you do.

Sir Bernard Jenkin: Well, let's just distil that for a minute.

Q45 **Sir Gary Streeter:** Hang on. Let me ask the questions, Bernard. Is, therefore, one of the ways forward—one of our options—to try and set out what powers a Select Committee should have within a wider framework of what a Select Committee should be doing? We asked this of earlier witnesses. Is there some benefit in trying to look at the role of Select Committees, given that there has been mission creep and we are living in this modern world? It is not just about shadowing a Government Department; it has gone well beyond that, certainly for some more than others. Is there a case for reviewing the whole role of Select Committees, and as part of that building in of new powers to replace the ones that are theoretical but not really practical?

Chris Bryant: I do not like the term "mission creep", because it implies that you should not be enlarging your role, whereas in actual fact I think it has just been a natural development. Power is no longer just in the hands of the Government; it is in the hands of many different organisations in society. I believe in that, so yes, there may be a difference of view between myself and Sir Bernard as to how that should go forward.

Incidentally, I am not sure that Select Committees do enough of the shadowing of Government, and in fact there is probably more to do. For instance, close examination of departmental expenditure rarely happens now in departmental Select Committees, and probably ought to. I would say that in this Session of Parliament, it has been particularly difficult for Select Committees to find time to be able to do their work properly, because the weekly diary of Parliament has been so chaotic. I would prefer to see a fundamental shift. I think our best work as a Parliament at the moment is done, not in the Chamber of the House, but in the parliamentary Select Committees.

Sir Bernard Jenkin: In terms of the role of Select Committees, the Liaison Committee periodically does a review of the role and effectiveness of Select Committees, and it is currently completing a report. My view is that the role of Select Committees has expanded, particularly as a result of the Wright reforms, that it will continue to expand, and that it will become substantially different in character in terms of the work that they carry out. At the moment, all the members are engaged in all the inquiries. At the moment, all the members are engaged in all the inquiries. That is not the case with the Public Accounts Committee, which divides responsibilities among its members. Of course, the Public Accounts Committee has the NAO very substantially at its disposal and quite a large staff. It is producing a very large number of reports that have a significant amount of influence.

I think the House Service is anxious to limit the ambitions of Select Committees so that they do not exceed the capability they have to produce quality reports. For example, financial scrutiny is substantially delegated to the Financial Scrutiny Unit of the Committee Office. That capability should be dramatically extended and Committees ought perhaps to have sub-committees to conduct sub-inquiries. There could be more flexibility given to Select Committees to operate sub-committees. I do not suppose we will go as far as the American model, where we would control budgets and vire expenditure from different budgets and control whole programmes in the federal Government. I do think that Select Committees will delegate more and more of their day-to-day work to staffs who can conduct the detailed kind of scrutiny that I think often is lacking. The members of Select Committees will act more and more as oversight of the work that is being done and only be conducting the major inquiries.

In my Committee, we have already started doing paper-based inquiries into statistical matters, simply because we do not have the time to have oral evidence sessions. A great deal can be achieved by gathering evidence on paper and then producing a report based on the paper-based

evidence. That has just as much authority and has enabled us to increase the workload of a Committee with relatively limited resources. Those are the kinds of trends that we will need to see, but we will also need to see Committees being able to recruit and retain more permanent staff. The vast majority of Committee staff in the House Service tend to roll their way through. Over my period of nine years as Chair of a Select Committee, I have had perhaps four or five sets of Clerks. The corporate memory of the Committee and the historical expertise of the Committee rests with me and a few Members and one or two advisers, not with the so-called Committee specialist who has recently joined the Committee and very rapidly and ably gets hold of the subject. We have a slight cult of the generalist among the staffs of Select Committees. Perhaps we need to develop more specialist capability that is permanently attached to the Committee—more like the American model, where people might have a whole career attached to one Committee.

Chair: We are straying slightly outside of the nature of this inquiry, but your point is very interesting.

Sir Bernard Jenkin: You asked about the role of Committees, and I think this is where the imagination is required. The powers of Select Committees are a relatively small slice of what defines our role.

Q46 **Liz Twist:** I suspect we have covered these issues fairly comprehensively, as you have expanded on other questions, but perhaps for the record we can condense them. What is your opinion of the 2013 Joint Committee's draft resolutions and draft standing orders? I think you have both covered that in previous answers, but if you would not mind, perhaps you can summarise that briefly.

Sir Bernard Jenkin: My overlay would be to add that if we were to start legislating, we would be opening a Pandora's box that we can never close again. Having been someone who was previously convinced that legislation was the right route, and knowing that several former Clerks of the House have argued very strongly in favour of the legislative route, I have been persuaded we should not legislate, at least for the time being. The longer we can put off legislation, the better. Unless there is an urgent need to legislate, we should not legislate. We should try other means as far as possible, and that would be my summary of what the 2013 report arrived at: try other things first, but don't go down the legislative route until you have proved that nothing else works and that it is an absolute necessity to legislate, because it is changing the nature of our constitution.

Chris Bryant: I want a strong Parliament, and I think that means in the modern era that you have to have strong parliamentary Select Committees with clearly defined powers and a power that can be enforced. As things stand, the House has no powers to imprison. It certainly cannot fine. It cannot enforce anyone's appearance before a Select Committee or, for that matter, before the Bar of the House. It cannot enforce any kind of punishment for somebody lying to it. Even if we were to try to do any of those, they would be the equivalent of Acts of Attainder, which I thought we had done away with in the medieval era. That is why I am perfectly

relaxed about courts being able to make a decision as to whether somebody has offended in any of those ways. The one thing I would say about Pandora's box is that everybody forgets that at the bottom of Pandora's box there was hope.

Q47 **Liz Twist:** Just a bit more specifically: Sir Bernard, what is your response to the argument that the House cannot extend its powers by resolution, that only legislation can do that and that trying to extend its powers by resolution would be simply rhetoric?

Sir Bernard Jenkin: You can dismiss it as rhetoric. Parliament can create enforceable powers that are enforceable through the courts only through statute. The question is whether it is worth it, whether the benefit to Select Committees will justify the attendant risks of inviting the courts to interfere in our proceedings. That is the question, and I would say that that case is not made.

Q48 **Liz Twist:** Mr Bryant, if it is not possible to secure legislation as you would like to see happen, would you regard the 2013 proposals as an acceptable second best?

Chris Bryant: It is patch and mend. To all intents and purposes, it is just shouting and screaming and keeping on doing so while we stick our fingers in our ears and cover our eyes. The truth is that we cannot exercise any of the powers we pretend we have. They are phantom powers that do not exist and just writing them down in another Standing Order is not going to make the blindest bit of difference to any of that. Why this matters to me is because we probably manage to achieve more as a House through our Select Committee system and the reports and evidence-based inquiries we produce than through any other measures in the House.

Q49 **Sir Christopher Chope:** Why do we need to have a power to imprison, which I think Chris Bryant wants to legislate for? Why do we need to have a power that could result in people going to prison and why should we be fining people? If you accept that the current rules are in desuetude and are unenforceable, why can we not just recognise the reality of that and persuade people to come and give evidence and behave honourably before Select Committees on the basis that this is the Mother of Parliaments and is under great public scrutiny, with a press out there that will bring them to account if they don't comply? Why do we not then rely upon Select Committee Chairs to bring witnesses to order and ensure that unbecoming conduct on their part or that of other Members of Parliament in the Committee is not allowed, thereby giving greater confidence to witnesses that when they do come they will be treated in a civil way?

Chris Bryant: I guess that is mostly a challenge to me, as it were. It is not that I particularly want to imprison lots of people for refusing to attend. I suspect that imprisonment for refusing to attend would not be a proportionate sentence, but it would be part of the process of legislating for us to decide what was proportionate. I do not understand why it is fine to lie to Parliament with impunity but not fine to lie to a court, when the implications of your lying to Parliament may be far more significant for the

whole of the nation than the implications of lying to a court. The Perjury Act 1911 is pretty clear. It is arguable that some of it could apply to lies in Parliament, but it has never been interpreted as such. We have the Parliamentary Witnesses Oaths Act 1871 but, again, it is not used. All of this, therefore, to my mind needs rectifying and tidying up.

Sir Bernard Jenkin: The answer to your question is that it kind of offends us, doesn't it, that we were all brought up to believe that Parliament could execute someone, and could fine someone, and then we find out that in the modern world that is not the case. The reason why it is not the case, even though we still refer to Parliament as the high court of Parliament, is that a court can do those things within the law, but Parliament really is not a court.

Least of all are Select Committees constituted like courts. We do not take evidence like courts, and we do not saddle our proceedings with procedures in order to ensure a fair hearing like courts. We act much more informally because we are gathering evidence about policy rather than people's individual conduct, their morals and so on. In terms of what Select Committees are really concerned with, we have the powers necessary and the procedures necessary to enable us to do 99% of what the public expect us to do.

Where we think people should be fined or imprisoned, we should pass legislation and require people to appear before courts before they are subjected to such punishments. That seems to me a far more democratic way of proceeding. Incidentally, whatever legislation or Standing Orders we were to present, so long as we remain a member of the United Nations Commission on Human Rights, and subject to the European Court of Human Rights, our proceedings, were we to take such powers, would be subject to judicial review under the Human Rights Act.

We could well find that we take legislative powers in order to enforce our will and are then overruled by the courts, under another statute that this Parliament chose to produce in order to protect the rights of citizens from unfair treatment. I come back to the question of whether it is really worth the candle of going through all this, or whether we should accept that we do 99% of our job perfectly well without recourse to statute, which I think is an answer to your question.

Q50 **Sir Christopher Chope:** Picking up on that point, why do we need to complicate matters further by having extensive Standing Order changes, which could result in a lot more bureaucracy than we have at the moment? As for the idea is that a Clerk sitting next to the Chair of a Select Committee will advise the Chair on the formatting and order in which questions can be asked, who has had fair shares of questions and all that sort of stuff, and what to do if the witness refuses to answer, isn't that going to create an extra burden that is unnecessary because, as you just said, 99% of this can be done without making any change at all?

Sir Bernard Jenkin: I am just glancing through what we proposed. These are a clarification of what should exist in any case—for example, making

sure that witnesses have fair access to information before they appear in front of the Committee; making sure that they are not asked prejudicial or unfair questions; and making sure that they have a legitimate right of objecting to answering a particular question. Those things already exist, but they are not explained or set out anywhere. This is just a clarification of what parliamentary privilege means, and what free speech means in the case of parliamentary privilege.

Q51 **Sir Christopher Chope:** Would you accept that they could be set out somewhere other than in Standing Orders? We have heard evidence that Standing Orders are not a comprehensive rulebook, which is what you are trying to create.

Sir Bernard Jenkin: The point is that you already have a Clerk sitting next to the Chair who will advise the Chair to pull up the question if, for example, there is a breach of the sub judice rule. That is not a new thing. It is to provide witnesses with a clearer understanding and framework that they can trust, because it is enforceable and binding upon Members, and that would give witnesses confidence that they have a right to be fairly treated.

Indeed, you could argue that our Standing Orders are not human rights-compliant at the moment. That may not matter to my hon. Friend, but there is an argument that, by setting this out, we are actually updating our Standing Orders to make them more fit for purpose in the 21st century.

Chris Bryant: Just to be absolutely clear, I do not want to take legislative powers into the hands of MPs. My anxiety is that, just by changing Standing Orders, that is the route that you are going down. I think it falls foul of exactly the same problems that you raise, Sir Christopher. That is why I say that if you want to make sure that there is due process, fairness and all the rest of it, but also that the power of Parliament to summon people and require them to tell the truth is upheld, the only way to do so is by legislating and letting the courts make those decisions in a fair, judicious and judicial way.

Q52 **Sir Christopher Chope:** You have cited the Inquiries Act as a possible precedent, but that would be on a very narrow basis. I do not know how often those powers have actually been exercised to compel witnesses to come who would otherwise not have wanted to, or how often sanctions have been used when they have refused to come, but is this not a sledgehammer to crack a nut? We are not a court; we are a set of individuals who, on behalf of our constituents, are ultimately trying to hold the Executive to account, are we not?

Chris Bryant: I think that that is the point that Sir Bernard was making, in a sense: we are not a court, and it is difficult to turn us into a court, even though the old-fashioned term has been bandied around for centuries. We were the highest court in the land, in particular because the House of Lords was the final adjudicator on issues, but it no longer is.

It really brings me back to the fundamental point. We are now at a place where we have phantom powers that we regularly assert that we have, but that we do not have. In the end, that means that the law is an ass. We need to make sure that it is no longer an ass.

Q53 **Sir Christopher Chope:** Would you be happy if our Committee reached the conclusion that we should recognise that the powers are phantom or theoretical, that we will never be able to use them, and that, therefore, we will no longer rely on them as an unseen, potential sanction? Should we just carry on from there, saying, "We recognise that we will operate without the need for the power to fine or imprison, so just come along through the force of persuasion"?

Chris Bryant: I am not particularly arguing for fining or imprisoning people. What I am arguing for is for a power to be vested in an independent body that is able to adjudicate on whether somebody has refused to attend a proceeding in Parliament when duly summoned in the proper fashion and/or has lied to Parliament. Those powers exist in other Parliaments; we have already discussed the United States of America, although it is different because of the separation of powers and so on. I would be very reluctant for us to say that we do not want any powers whatsoever, because every second witness would say no.

Q54 **Sir Christopher Chope:** That is the issue, isn't it? You are saying that every second witness invited to give evidence to a Select Committee would refuse if they did not think that there were these phantom powers that would be exercised against them. Is that really correct? Surely the sanction is there of the court of public opinion.

Chris Bryant: The court of public opinion is an interesting one. Whether it is due process or not is an interesting matter: it is unreliable, sometimes it manages to completely miss things, it is not often necessarily based on evidence, and I would argue that some people relish their shameless attitudes in such matters and can be extremely blasé about it.

Personally, I would prefer elected representatives to be able, on occasion, to question, query and challenge those people who exercise significant influence over the way we live our lives. I think we need an element of a power, but I do not think that we should be the adjudicators as to whether an offence has been committed. That is the simple difference between us, I think.

Q55 **Sir Christopher Chope:** The important things are things like holding the Prime Minister to account. Sir Bernard had this fantastic response from the Prime Minister when she admitted eventually that what she said about no deal was in circumstances that were not related to the reality. Holding people like the Prime Minister to account is surely much more important than trying to deal with what is happening in South America.

Chris Bryant: To my constituents, it is probably just as important to ask questions of the fuel companies about why it is more expensive to buy petrol in the Rhondda than it is in Birmingham.

Q56 **Sir Christopher Chope:** Okay, ask questions, but the fuel companies come along, stand before the Committee and refuse to answer the questions. There is nothing wrong with that, except in the court of public opinion, so again, the idea of being able to have powers to fine or ultimately imprison people for not turning up is not really going to work if they turn up and then do not perform.

Chris Bryant: But why should a company that refuses to attend a court case considering whether fraud has been committed not be able to decide to do that? The court of public opinion will judge them badly. Why is there one set of rules there, and not the same in Parliament?

Q57 **Sir Christopher Chope:** I think you are emphasising the difference between having a court system—the legal system—and the political system. They are two separate parts of our constitution.

Chris Bryant: Yes, but I am trying to say that, in the interests of our constituents, it should be wrong and punishable, whether the chief executive of whatever company lies to Parliament or lies in a court of law. I do not think it should be MPs who decide whether the person has committed that offence, or for that matter what the punishment for that person should be. I think that should be a court of law.

Q58 **Sir Christopher Chope:** So you would like to see all witnesses before Select Committees on oath, and subject to the Perjury Act if they were found to have perjured themselves.

Chris Bryant: I would want to renew the legislation, but that is, in essence, the sum of it, and in many legislatures, all witnesses give evidence on oath. We could do that now, of course; I think most Select Committee Chairs have decided not to go down that route, but they could if they wanted to.

Q59 **Chair:** Sir Bernard?

Sir Bernard Jenkin: Briefly, on the question of whether we should take evidence on oath, we want our witnesses to speak as freely as possible. When they appear before a Select Committee, they are protected by parliamentary privilege from any possible legal consequence of whatever they say. For example, I had an ex-police witness blow open the whole business of police-recorded crime; I do not think I could have done that if he had been on oath. If he had been on oath, his privilege would not have been protected in the same way. Putting people on oath could actually limit the conversation, and limit the evidence we collect.

However, I want to take issue with one thing. You keep referring to these as phantom powers, which I think is a mistake. These powers reflect the law of Parliament, and if Parliament goes to such lengths as to pass a resolution to issue a writ and send the Serjeant at Arms to serve a writ, that is a very strong declaration of intent and seriousness by the democratically elected Parliament of the United Kingdom.

I do not wish to impugn the oil companies, because I am sure they are all very good people, but the sanctions against the oil companies, were they

to refuse to attend, are indirect. The Select Committee can make recommendations that might damage the interests of the oil companies, in the absence of proper evidence: that they ought to be brought to heel by a regulator or Government Department, or by fresh legislation. The reputation of those fuel companies would be damaged as a consequence, so I do not think these are powers without sanction. They may be powers without direct power of enforcement, but these are very real powers.

Do not underestimate how much indirect power a Select Committee has to make its presence felt on reluctant witnesses. I think that is why even the most reluctant witnesses, in the end, prefer to come rather than suffer the indignity or consequences of not attending.

Chris Bryant: You see, I think that just exposed exactly why that is the wrong course to go down, because it would be absolutely and wholly inappropriate for a Select Committee to make recommendations that damaged the fuel companies because somebody had refused to attend. That would be the worst form of parliamentary intervention. What would be appropriate, if they had refused to attend, would be that we went through a due process here, and the court then decided whether there was a punishment that should be attendant upon them.

Q60 **Chair:** Parliament would have decided whether the process had been correctly followed.

Chris Bryant: Yes.

Q61 **Chair:** And then the court would merely be deciding on the penalty.

Chris Bryant: Yes.

Q62 **Chair:** Which is different from the court deciding whether there had been wrongful behaviour.

Chris Bryant: Yes.

Q63 **Chair:** Just to be clear, are you saying that the courts should be able to do both those things—judge whether there had been wrongful behaviour and then impose a penalty—or would Parliament decide that the behaviour had been inappropriate or incorrect, and then the court would impose the penalty?

Chris Bryant: I think there are two different offences. On the offence of refusing to attend, it should be an ipso facto decision. However, the court would always want to make sure that the person in front of them was the person named, the person had been correctly named and correctly identified, and so on, so it would be inevitable that the court would want to inquire into certain aspects, as I think the Clerk said earlier.

Sir Bernard Jenkin: Can I just clarify something? I take it as read that no Select Committee would act capriciously or arbitrarily against the interests of a business or private citizen merely for their non-attendance. No, what I am suggesting is that the failure to make their case may result in recommendations about public policy—based on the evidence, and in

the absence of other evidence—that might be detrimental to the interests of that company. That's what I mean. I don't think any Select Committee report would have any authority at all if it looked like retribution for failing to attend. That's not what I meant at all.

Chris Bryant: Indeed.

Chair: Thank you very much. This has been an extremely comprehensive evidence session, and we are very grateful to you both for your contributions.

Chris Bryant: We have just been admonished for talking too much.

Chair: If there are any further ideas that you would like to put to the Committee, we will of course be very pleased to receive more information from you in writing, but in the meantime, that concludes the evidence session.