



Public Administration and Constitutional Affairs Committee

Oral evidence: [EU Referendum Bill: Part One: Purdah and Impartiality](#)

Tuesday 21 July 2015

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Members present: Mr Bernard Jenkin (Chair); Ronnie Cowan; Oliver Dowden; Paul Flynn; Kate Hoey; Kelvin Hopkins; Mr David Jones; Gerald Jones; Tom Tugendhat; and Mr Andrew Turner

Questions 221 – 443

Examination of Witnesses

Witness: **Sir Jeremy Heywood**, Cabinet Secretary and Head of the Civil Service, gave evidence.

Chair: I invite our witness to identify himself for the record.

Sir Jeremy Heywood: Jeremy Heywood, Cabinet Secretary and head of the civil service.

Chair: Thank you very much for being with us today. You have made it clear to me that you feel there are issues of policy involved with our inquiry, and I would like to make it clear that we are not expecting you to answer on issues of policy. If you wish to defer to Ministers who are appearing after you on any issues of policy, that is exactly what we would expect you to do.

Sir Jeremy Heywood: Thank you, Chair.

Q221 Chair: We have already taken evidence from other individuals, one of whom was personally critical of you, and we want to give you the opportunity to reply to that during our questioning. To start, may I ask why impartiality of the civil service is important and how you, as head of the civil service, think that applies during a referendum?

Sir Jeremy Heywood: Obviously, impartiality is one of our core values set out in statute and it is one of the absolutely critical values of the civil service as it has been for the

last 150-plus years, so it is extremely important. It is, in a sense, one of the things that distinguishes the British civil service from many others around the world. We take the non-political nature of our civil service very seriously. What does that actually mean in practice? It means that our obligation is to serve the elected Government of the day without fear or favour, clearly, but also to maintain an ability to serve a future Government of a different political complexion.

Q222 Chair: What is important about the reputation of the civil service and impartiality that you need to project to the outside world?

Sir Jeremy Heywood: I think it is very important that the civil service is seen to be not the creature of one political party, providing the advice that that political party wants to hear, and is able to provide that sort of continuity by working for Governments of different political complexions over time. It is a meritocracy and that is absolutely core to the values of the British civil service.

Q223 Chair: So how does that apply during a referendum campaign?

Sir Jeremy Heywood: I think there are two dimensions to that. First, our job is to serve the Government of the day, so if there is a Government position on the referendum, we have to support the Government in articulating that, within the constraints decided by Parliament. So on the question of section 125, if that gets resolved in one way or another, that will determine how the Government can operate and therefore what support we as a civil service can provide to the elected Government. Secondly—

Q224 Chair: Your guidance during the Scottish referendum referred to the civil service code and to impartiality, but it also referred to the relationship between the civil service and political parties. Presumably, you are concerned to maintain the impartiality of the civil service with regard to the yes and no campaigns, which in a referendum are analogous to political parties.

Sir Jeremy Heywood: I was going to say that there are two elements to this. First, our obligation is to serve the elected Government of the day, not to go off on our own with a civil service policy that is different from that of the elected Government of the day; we serve the Government of the day. But secondly, as individual civil servants, we have to be very careful that we do not through our behaviour create the perception that we have a political view ourselves. So the civil service code and the purdah guidance that we put in place during the period of the last 28 days makes it very clear that individual civil servants, particularly those at band A and the senior civil service—the most senior 40,000-odd civil servants who are in the more sensitive jobs—cannot take any part in either the yes campaign or the no campaign, whatever the debate is. They cannot take part in national political activity, which clearly involves campaigning in referendums. As individuals, they have to be very careful to maintain their own personal impartiality and not get into a position where they can be perceived to be involved in one side of the campaign or the other.

So you have the two elements. We work for the Government of the day within the constraints which the Government itself has to operate, defined by section 125 or otherwise; then, separately, we are constrained by the civil service code and the civil service management code, which has not come up much in your conversations in this Committee but which is extremely important.

Q225 Chair: Can you explain that?

Sir Jeremy Heywood: The civil service management code is a very detailed document that sets out what civil servants can and cannot do. It is a much more detailed exemplification of what we mean by the civil service code. That also constrains civil servants and their ability to do anything which is construed as a national political activity, which referendum campaigning would be. Then we have the purdah guidance as well.

Q226 Chair: So if a Minister is closely involved in supporting a no campaign or a yes campaign, as we have seen in previous referendums, what is appropriate for a civil servant to do to support that Minister in that role?

Sir Jeremy Heywood: It slightly depends on where we are in relation to section 125. If the Minister is making a speech in the House of Commons, setting out in a sober way the Government's position, I would expect the civil service to support that Minister. If, however, they were working at a campaign or party event, the civil service would not get involved except in the very small role of fact-checking a speech, as we would for a party conference for example. So it would very much depend upon whether the Minister was speaking as part of a campaign or as a leader or a member of a party, or exercising a ministerial function.

Q227 Chair: So how does the dilution or restriction of purdah, or the removal of section 125, affect that relationship in the purdah period?

Sir Jeremy Heywood: It would not affect the civil service code requirements, or the civil service management code requirements. There would still be an obligation on all band As and senior civil servants to personally adhere to the civil service code, obviously, but also to avoid taking part in any national political activity. If section 125 were in place, it would constrain the Government's ability in certain respects. No doubt we can come on to discuss that.

Q228 Chair: What difference does section 125 make to the role of civil servants in respect of Ministers?

Sir Jeremy Heywood: My understanding of the legal situation is that section 125 constrains what Ministers can do as Ministers. If Ministers are entitled, because Parliament has agreed that they can, to make speeches outside Parliament as well as, obviously, making statements inside Parliament in their official capacity, then the civil service would be able to

support them, because they are the Ministers of the Crown and our obligation is to work for the Government.

Q229 Chair: Sorry, but I still do not quite understand. Section 125 is somehow debilitating of civil servants' ability to support Ministers in the ordinary functions of Government—that seems to be the position that Ministers have been advised about. Have I understood that correctly?

Sir Jeremy Heywood: Would you repeat the question?

Chair: How does section 125 restrict the ability of civil servants to support Ministers in their function as Ministers?

Sir Jeremy Heywood: It does not directly affect civil servants; it indirectly affects civil servants. It directly affects what Ministers can do and what the Government can do, and the civil service's obligation is to support the Government. Therefore, if the Government are constrained in what they can do, obviously the civil service is constrained in what it can do. To give a clear example, if section 125 applied, my understanding is that Ministers could make statements in Parliament, because of parliamentary privilege, and they could even issue press notices, I think, under a strict reading of the section, but they would not be able to make a speech outside Parliament advocating a particular position or dealing with a referendum question. Since Ministers would not be able to do that under section 125, obviously the civil service would not be able to support them in that sort of activity. If the Government are unable to do something, clearly the civil service cannot support them in doing it.

Q230 Chair: So what is it that the civil service is concerned that Ministers will not be able to do under section 125?

Sir Jeremy Heywood: I think the civil service's main concern would be in relation to the normal activity in Brussels—maybe not all aspects of that normal activity, but in a typical month there are perhaps 10 or 11 ministerial Councils in Brussels. Some of those will be informal and private, others will be formal ministerial Councils in which legislation is negotiated. British Ministers—sometimes British civil servants but mainly Ministers—will be sitting in those Councils trying to secure the best outcome for Britain. Let us assume that in the last 28 days of the referendum campaign, there are 10, 11 or 12 of those Councils. We need to make sure, in the normal course of business, that our Ministers use whatever are the most potent arguments they can use to win points for Britain in those negotiations—there are minute statements and so on. We would be concerned—certainly our legal advice is very worrying on this aspect—that unless Ministers tread very carefully, they may well end up using arguments in those internal EU discussions that could be construed by anyone litigious as bearing on the question of the referendum. We would have to be incredibly careful about what language was used by Ministers in the ordinary course of business in Brussels dealing with these 10 or 11 ministerial Councils, or responding to ECJ judgments or to Commission proposals, in the 28 days of the controlled period.

In a normal referendum—a non-EU referendum, if I can call that normal—the Government have some control over the agenda, so not much will happen in the 28-day

period, or we can make sure that there are no policy initiatives that bear on the referendum itself, so the issue will not arise. On European business, the Europeans control the agenda, so those meetings will happen even despite the fact that we have our referendum going on, and we will have to have representation there. We might strike lucky and have a 28-day period in which no issue of significance is discussed in any of those 10 or 12 Councils, but in the normal course of European business, whether it is a migration issue, a bailing out Greece issue or a budgetary issue, there will be really contested questions being debated and negotiated in those Councils. Ideally, we would not want Ministers to be constrained in the negotiating points they could make; we would want them to be able to defend Britain and the national interest as best they can.

Q231 Chair: The advice we have taken is that section 125 can be interpreted quite widely, and that the Government's interpretation is taking an extremely draconian view. For example, the issuing of press notices is exempted under subsection (3)(d). The Government could issue any press notice about any Council meeting or European Court of Justice judgment, as long as it did not fall foul of the provisions on material that "is designed to encourage voting at such a referendum" or that "puts any arguments for or against any particular answer to any such question". It seems to me that that is quite a broad exemption.

Sir Jeremy Heywood: That is an important exemption, I agree, and different lawyers will disagree on this, but the Government lawyers that we have consulted and Ministers have consulted and the external counsel that we have consulted think that it is open to a number of different interpretations. There is certainly a very arguable case that, depending on the language being used and the issue being discussed, Ministers could fall foul of this. There is a very clear legal risk of that.

Chair: We will come back to that later in further questions. Can I just ask about code? Do you want to ask about the code, David?

Q232 Mr David Jones: No, I want to follow up on the previous answer. Section 125(1) relates to the publication of material. What do you have in mind in relation to the publication of material? You mentioned discussions in the European Council and so on, but publication of materials is a rather different matter.

Sir Jeremy Heywood: Again, different lawyers will take a different view on, for example, whether all speech is excluded. Some lawyers take one view, some take a different view. As you will know very well from personal experience and so on, often in Council discussions of the sort I have been talking about, you register the UK position by way of a minute statement, or you publish a document that is not technically a press notice, but is a statement of the UK's position set out in writing. Does that count as making something available to the public at large in whatever way—whatever the phrase is in section 125? Clearly, different lawyers will take different views.

As head of the civil service and Cabinet Secretary, I am very nervous about putting our Ministers into a position where they have to tread so carefully in the last 28 days because they could be at risk all the time of someone vexatious coming along and saying, "Actually, that falls on the wrong side of the line. Let's have a legal suit against the Government." It

would be a really terrible thing if a very significant referendum for this country were to be interrupted by litigation, so we err on the side of caution. But I have to say that our legal advice has been that this is a “highly problematic”—I think that was the phrase used—section, with real uncertainty created. Frankly, I think the Government’s view was that you cannot allow that sort of legal uncertainty to hover over the final stages of a hugely significant referendum.

Q233 Chair: Can you give an example of the kind of material that you would need to exempt?

Sir Jeremy Heywood: Well, I have just said: the sharpest case would be where a Minister was negotiating on a highly contentious issue, which everyone on this Committee would agree was vital to the UK national interest, and felt hobbled by being unable to make any points about its importance for the referendum and so on, at precisely the moment when the whole of the British media and body politic is focused on that question. There needs to be some sort of recognition that business in Brussels has to continue as usual during the last 28 days. I do not think there was ever any intention to catch that sort of business. My understanding of section 125 is that it was intended to stop campaigning and promotional material—that sort of thing. The Government have no intention of using the Government machine in the last 28 days of the referendum period for promotional material or campaigning, but there is a risk that the provision will catch normal business in Brussels when Ministers are fighting our corner.

Q234 Mr David Jones: I understand that, but is it necessary to disapply the entirety of section 125 for that purpose?

Sir Jeremy Heywood: Of course, you could come up with an amendment to it, if it was sufficiently clear that it would serve that purpose. That is an issue that Ministers have said that they want to discuss with colleagues in the House and so on and come forward with some amendments. I do not think it is an all or nothing if the issue is to protect business as usual.

Of course, Ministers have articulated a second argument about the reasonableness of setting out in a sober and balanced way an explanation of why the Government have reached the position they have. That is a different argument from stopping business as usual from being interrupted in Brussels. The two arguments are being used.

Q235 Oliver Dowden: One argument that has been put to the Committee is that there has been enhanced judicial activism since the legislation was passed, about 15 years ago. Do you or Government lawyers have an opinion on whether that is a genuine risk—that there is a greater risk now than there would have been 15 years ago of some of these issues ending up in the courts, and the courts having to make a decision?

Sir Jeremy Heywood: To be honest, we have not done a precise calibration of 1999-2000 versus now in terms of activism, but there is a general sense, which has definitely been

in the minds of our lawyers, that in this day and age—2015, 2016 or 2017 as it may be—to have that amount of legal uncertainty hovering over what everybody would acknowledge is important Government business is very unsatisfactory. Leaving that amount of uncertainty would mean either that we run the risk of the referendum in its dying days being distracted by high-profile legal suits, or that Ministers will effectively have to neuter themselves or err dramatically on the side of caution in business-as-usual negotiations in Brussels, which may be on really important issues.

Q236 Chair: The code, as PASC recommended in one of its last reports at the end of last term, refers to impartiality in elections, but it does not refer to civil service impartiality in referendums. What is your reaction to the proposal that the code should include a *mutatis mutandis* reference to referendums and yes and no campaigns as it does to elections and political parties?

Sir Jeremy Heywood: That is something I am considering with our Ministers. We have not yet come to a final view. Personally, I think it will be belt and braces. I do not think it is necessary, because the code is very clear that impartiality is a requirement in referendum periods, general election periods and any other periods. That is a requirement of being in the civil service; it is one of our core values, as we started this hearing by underlining. If I have spotted a lacuna in the whole system, it is that the civil service management code probably ought to refer explicitly to referendums. It is a much more detailed document, and it would be worth looking at section 4.4, which sets out the definition of national political activities in quite some detail. If we are going to make any change, I would want to make it explicit—it is implicit already—that that also refers to referendums.

Q237 Chair: That would seem to make the case for having it in the leaflet that all civil servants will read, so it is more public. And it is, of course, recognised by statute.

Sir Jeremy Heywood: Let's see what Ministers decide. I personally do not think it is necessary, but nor do I think it would do any great damage. That is something we need to discuss with our Ministers. Just to be very clear—

Q238 Chair: If there is a relaxation of section 125, how will you reinforce in the public's mind the idea that the civil service is not being dragged into a closer relationship with one campaign or the other, which may be supported by Ministers?

Sir Jeremy Heywood: What we would have to do is simply publish the *purdah* guidelines when we got to that moment. You will be aware of the *purdah* guidelines we put in place for the Scotland referendum. They are well understood by the civil service and Ministers. I do not think they are necessarily widely known by the general public.

Q239 Chair: I make the point again that in those guidelines you refer to political parties in respect of the referendum, but that is because you cannot refer to what the code

says in respect of referendums and yes and no campaigns. Wouldn't that be a better way of expressing what you meant?

Sir Jeremy Heywood: I think we make it quite clear that civil servants cannot take part in national political activity, and it is pretty obvious that a national referendum on whether we should stay in the EU or not is a national political activity. As I say, the point at which to make that clarification is the civil service management code. We are definitely looking at it. We are not resistant to the spirit, because we totally agree with you. Civil servants' duty of impartiality has to be there throughout, including during referendum campaigns.

Q240 Ronnie Cowan: Good morning. The civil service, including yourself, attracted criticism for not being impartial during the Scottish referendum. Do you think some of that criticism was fair, with hindsight?

Sir Jeremy Heywood: No, I don't, actually. I welcome the fact that the predecessor Committee to this one congratulated the civil service on the way it conducted itself during that period. It was clearly a period of exceptional pressure, when you have a unified civil service.

Q241 Paul Flynn: I think we'd like to revise that position now if we did say that. We unanimously criticised you for your lack of impartiality on the Sir Nicholas Macpherson affair, if you remember.

Sir Jeremy Heywood: I wasn't head of the civil service then. I think you had a thorough hearing with Nick Macpherson and Bob Kerslake and discussed that. We can go back over that if you wish but there was no code complaint to the Civil Service Commission in respect of any civil servant's behaviour during that period. It was a period of considerable stress and strain in which we tested to the limit what we meant by having a unified civil service. Obviously, the civil servants in Scotland worked for their elected Government and the civil servants down here worked for our elected Government, as is required under our impartiality codes and so on. Co-operation between the civil servants in Edinburgh and south of the border remained good. Basically, the rules of purdah were adhered to.

Ronnie Cowan: Can I—

Q242 Chair: Sorry, forgive me—were you actually notified that Sir Nicholas Macpherson was going to publish his opinion in advance?

Sir Jeremy Heywood: No, I wasn't. I wasn't head of the civil service then.

Q243 Tom Tugendhat: As an individual, though, what was your view?

Q244 Chair: What would your advice to permanent secretaries be about publishing their advice?

Sir Jeremy Heywood: My advice to permanent secretaries will always be that you should only consider publishing your advice to Ministers in truly exceptional circumstances. I share the view with you, Mr Chairman, and the Committee, that civil service advice on the whole should remain confidential. That is definitely my view in relation to freedom of information and other aspects as well. But there will be, as there have been over many years, very exceptional cases, where civil servants—

Q245 Chair: Just to clarify, you were Cabinet Secretary at the time?

Sir Jeremy Heywood: I was.

Q246 Chair: But you were not informed?

Sir Jeremy Heywood: No.

Q247 Paul Flynn: In the interests of accuracy, compared to the fantasy account you have given of the views of this Committee, what we actually said in our report—and I have it before me—was that the “advice should not have been published. Its publication compromised the perceived impartiality of one of the UK’s most senior civil servants.” That was our conclusion.

Sir Jeremy Heywood: That was your conclusion on the Nick Macpherson memo. I totally accept that. I wasn’t suggesting for a minute that you didn’t criticise that. I think you also made a general point that, in general, the civil service comported itself well during that period of stress.

Q248 Paul Flynn: Since then, we have had the other affair of a civil servant leaking an untruth with the co-operation of a Minister who lied about it and a protracted inquiry—in spite of a letter you sent me saying that it was going to be done very urgently—that wasn’t reported until after the election. Don’t you think this means that the view of you, and your lack of impartiality, described by David Owen, is justified now, and you have shown a persistent lack of impartiality over the years since you were employed by Tony Blair?

Sir Jeremy Heywood: I completely and utterly reject that, from start to finish. I don’t know where you want to start. Do you want to start with David Owen, or do you want to talk about the Scottish investigation, which—unlike many leak inquiries—actually got to an outcome? I think that was a very good inquiry, but, in all fairness, it was impossible to complete it until after the general election, because it was impossible to speak to Alistair Carmichael until then. I will go through these points one by one, if you like, but I utterly resent the allegation that I am not capable of upholding the impartiality of the civil service.

Q249 Paul Flynn: The effect of the untruth that was perpetrated by the civil servant, with the encouragement of the Minister—who actually lied to “Channel 4 News” and said that he had no knowledge of it—was that the damage was done during the election period. The result of your inquiry was not published until the election was over, when it could have had a very strong effect on that.

Sir Jeremy Heywood: That was correct.

Q250 Paul Flynn: And you described it as a couple of simple meetings that took place. It wasn’t a very elaborate inquiry that was required. Surely it could have been completed before the election?

Sir Jeremy Heywood: No, I promise you that it could not have been. We tried our very best to complete it before the election. But you have to give people an opportunity to give an account of their own behaviour; you can’t just publish leak inquiry investigations without talking to all the key people who have been accused of things. It is contrary to all due process.

Q251 Paul Flynn: Does the fact that you defend—and continue to defend—the conduct of the civil servant involved call your impartiality into question?

Sir Jeremy Heywood: I am not defending the conduct of the civil servant involved. I am basically defending myself, which is to argue that I think I completed that inquiry successfully, as fast as it could possibly be done, while respecting due process.

Chair: Can we go back to Mr Cowan, please?

Q252 Ronnie Cowan: Perhaps we can accept that mistakes were made and things could have been done better. My question is—given that we are looking towards the EU referendum here—is there anything that the civil service is going to recommend to Ministers or recommend within their own organisation that changes from the previous referendum? Are there ways to tighten these guidelines to make sure that this does not happen again?

Sir Jeremy Heywood: No, I don’t think so. I think the civil service behaved fully consistently with the purdah guidelines and with the code during the last referendum. Obviously, we would have to adjust the guidelines if section 125 were in or out, because there is a difference in what the civil service could do. If you look at the Scottish purdah guidance, a lot of it hangs off the section 125 requirements, so if they are amended in some way, we would have to amend the guidance. By and large, I think the rules of purdah are well understood by the civil service and, indeed, by Ministers, and they are strictly adhered to. I have not a shred of evidence from David Owen or anybody else that they have not been properly adhered to.

Q253 Ronnie Cowan: Is there not a slight danger that if we believe everything is absolutely perfect, we stop looking at it and therefore do not improve it?

Sir Jeremy Heywood: I am not saying that everything is perfect. Of course, if there are—

Q254 Ronnie Cowan: So what can be improved?

Sir Jeremy Heywood: I am saying that if section 125 requirements are changed in some way, we would of course take that on board and listen to the conclusions of this Committee and others, but I do not believe that the current system is broken. I think the system works very well, and civil servants know very well that during a period of purdah, they have to adhere to the rules.

Q255 Chair: Forgive me for harking back to previous evidence sessions, but given that you and the civil service managed to interpret the Spads code of conduct, which bans canvassing, as meaning that they could canvass, does that not suggest that these codes are subject to fairly wide interpretation in practice?

Sir Jeremy Heywood: There is an amount of discretion.

Q256 Chair: How can we have faith that the letter of the code will be enforced when special advisers were instructed that they could breach their contracts of employment?

Sir Jeremy Heywood: We just have a difference of view on that, Mr Chairman. We had an exhaustive discussion about that at our last session in the last Parliament. We just took a different view from you on what special advisers should be allowed to do in their spare time with no increment to official resources.

Q257 Chair: Is it not therefore better to have these things reinforced by statute?

Sir Jeremy Heywood: No, I don't think so. Bringing statute into play and trying to interpret case by case, hour by hour, what activity is allowed during a general election campaign is a recipe for chaos, frankly.

Q258 Tom Tugendhat: In fact, what you are saying is that instead of having a debate in Parliament, it should be decided by unelected officials.

Sir Jeremy Heywood: Not at all. Parliament is entirely the right place to debate section 125.

Q259 Tom Tugendhat: But if you are saying that what special advisers can or cannot do should be decided by unelected officials, rather than by elected representatives, you are effectively dividing what should be decided quite clearly between the elected and the unelected.

Sir Jeremy Heywood: No. If the Government or Parliament decide that they want to put the special adviser code or the ministerial code into statute, that would obviously be a different issue, but I thought we were talking about the interpretation of the current codes and the implementation in practice of the civil service code and purdah guidance. You need a degree of real-time flexibility to implement that hour by hour, because many different decisions come to be made—particularly in the first few weeks of an election campaign. Me and my team are having to deal with lots of different, quite detailed queries all the time on that. Putting that into statute and making it justiciable in some way would be a nightmare, frankly.

I do not think there is any evidence that it is broken. The two cases that have been cited came before the purdah period in Scotland. They were about how you comply with the civil service code generally—nothing whatsoever to do with purdah, and ditto the David Owen complaint, which was a month or so before purdah started.

Q260 Tom Tugendhat: Sir Jeremy, can you give any examples of where you have had to prevent Ministers from using the machinery of government in an inappropriate way in previous referendums?

Sir Jeremy Heywood: I am not going to go into detail about my advice to the Prime Minister and other Ministers on that sort of issue, but that is my job; my job is to make sure that Ministers get proper advice on what is permitted and what is not.

Q261 Tom Tugendhat: So though you are not willing to give examples, there are examples?

Sir Jeremy Heywood: There is a constant dialogue with Ministers about what the right use of official resources and so on is. It is always a very good-tempered and sensible debate.

Q262 Chair: Can you give an example of where you have had to instruct a Minister that he cannot do something under purdah that has inhibited the proper functioning of government?

Sir Jeremy Heywood: I do not instruct Ministers. I am a civil servant.

Q263 Chair: I beg your pardon. I will use a different word. Can you give an example of where you have had to counsel Ministers about the meaning of purdah and how it restricts them from doing something that is the proper function of government at any time?

Sir Jeremy Heywood: I am going to give you some generic examples. These include the use of official cars, or the extent to which civil service resources can be used to provide briefing for events, or the issue of when appointments take effect. Do appointments take effect when the panel makes a decision or from the point when they are announced? These issues are the nitty-gritty of government in practice.

Q264 Chair: Using that example, if a Minister instructed a civil servant to provide a car or to use the facilities of the departmental press office for an improper purpose during a purdah period, what would happen?

Sir Jeremy Heywood: If it was brought to my attention, I would seek to rule that it was not possible. It would be contrary to purdah. That would generally be the end of the matter, but if a Minister persisted—and we are talking very hypothetically here—then obviously in extremis I would have to raise it with the Prime Minister, who stands behind all the purdah rules. In the end, the authority of these rules comes from the Prime Minister's support for them. But it does not come to that because people respect the purdah rules, and do not want to be in that position. It would damage people's reputations to be seen to be using official resources during an election campaign.

Q265 Chair: How often do you think that the conversation has occurred: "I'm sorry, Secretary of State, we are in purdah and we can't do that"?

Sir Jeremy Heywood: I wouldn't want to put a figure on it, but most of the conversations take place with private officers or with other permanent secretaries' officers. They happen quite frequently, because it is not crystal clear in each case. There are quite a lot of grey areas and so on, where judgment is needed. That is why it is best to keep this flexible, in the hands of people who have been used to doing it for a long time.

Q266 Paul Flynn: Another point made by David Owen last week was that he thought that you had some influence on the delays of the Chilcot inquiry. As this matter is now coming up again, as the war drums are beating again, and we are being encouraged to send our troops into a four-sided civil war in Syria, don't you think that it is a matter of even greater urgency that we know now why Parliament was misled into sending 179 of our British soldiers to their deaths in pursuit of non-existent weapons of mass destruction? I understand that you were working for Tony Blair at that time, between 1999 to 2003, as his personal secretary. Is there any possible influence you can exert to accelerate the publication of the inquiry's conclusions? Or are you washing your hands of it altogether?

Sir Jeremy Heywood: No, I am not washing my hands of it, but it is an independent inquiry and the timetable is not in my hands. Having said that, on behalf of the Prime Minister, I have repeatedly offered Sir John extra resources and so on, such as extra legal resources. At the Prime Minister's request I saw him again recently. We had a private meeting at which I repeated that request. I just know that John Chilcot will complete this report as soon as he possibly can. He is as aware as everybody else of the importance of getting this done, and done quickly.

Q267 Paul Flynn: It has been six years now, and this is important. We have not yet started the inquiry into why we went into Helmand province in the belief that not a shot would be fired, which resulted in 450 deaths. Unless we as a Parliament can find out why we made these terrible blunders in the past, the House is not going to take decisions to send

troops into what might be legitimate new wars. Is there anything you feel that you can do, or any influence you can bring to bear?

Sir Jeremy Heywood: The bit for which I was responsible was to consider in good faith the declassification request. I have done this as expeditiously as I could, and I have concluded on the side of transparency. We have repeatedly offered the inquiry further resources, but its members say that they don't need them and they are doing it as fast as they can. It is an independent inquiry, and I cannot do any more than that. Everyone shares your frustration about how long this has taken from the Prime Minister downwards. That includes Sir John Chilcot, by the way.

Chair: This must be the last question on Chilcot.

Q268 Paul Flynn: Okay. I do not know whether you recall that in 2005, this Committee recommended a form of parliamentary inquiry, which would be under the control of Parliament. What we seem to have with Chilcot is a monster of an inquiry with an almost infinite capacity to be delayed by the guilty, including possibly your old boss, so that they can carry on and live their lives prosperously afterwards, and possibly take places in the House of Lords next month. Don't you think that we need to look at a different form of inquiry that is under democratic control, and can be speeded up and not endlessly delayed?

Sir Jeremy Heywood: I don't think that anyone is deliberately trying to slow down the inquiry. I really do not think that that is the position. I genuinely don't think that that is the position at all. I totally take the point that, once the inquiry has completed its work, we need to take a long hard look at why it took so long and what lessons we can learn from that, but not in a way that interrupts the last phase of the inquiry. The inquiry just needs to get its head down and complete its work.

Q269 Paul Flynn: Lord Owen also mentioned the Government's conduct in sending out 2 million letters to businessmen in April, just before the European election, that contained, among other things, a Government mantra, a Conservative party slogan. He thought that that move should not have been allowed. Do you agree that that was a mistake?

Sir Jeremy Heywood: Not at all.

Q270 Paul Flynn: Were you involved in it?

Sir Jeremy Heywood: I was involved in approving it, actually. I thought it was sensibly worded. Let's be clear: the employment allowance was introduced by the previous coalition Government but had cross-party support. It was not a contentious policy. It was a month or so before purdah started, and that was European and local elections, not national elections. It was another way of communicating with small businesses, in an attempt to raise the take-up.

This allowance was not automatically given to people; they had to claim it. Previous experience had been that, without proper marketing, there would not be a very high take-up. Every attempt was being made through marketing, use of intermediaries and this new technique of getting the Prime Minister to write personally. An attempt was made to try a different technique, relatively cheaply compared with other marketing devices. I think it cost around £400,000, for which a mailshot was done for 2 million people. The evidence I have seen recently is that it was actually quite successful. It was much more cost-effective, for example, than TV advertising or expensive marketing.

Q271 Paul Flynn: Apart from the timing of the letter, don't you accept—

Sir Jeremy Heywood: The timing of the letter was determined by the start of the financial year. That was 5 or 6 April and it was sent to coincide with that, not with purdah.

Q272 Paul Flynn: Would you accept that politics is now conducted in subtle ways, such as propaganda by mantra? Certain phrases are used over and over again, as was demonstrated in recent coverage of this House by Michael Cockerell, where Conservative MPs were told to include something about the economic plan in every parliamentary question. A long list was given of this great litany of people repeating the same words. Those words appeared in the letter. Don't you think that is political abuse of the Government's position, which you approved of?

Sir Jeremy Heywood: Not at all. I looked again yesterday at the letter. I don't think it is written in a partisan way. It is not a political letter; it is not a partisan letter.

Q273 Paul Flynn: It contains a party political slogan.

Chair: For clarification, Lord Owen was concerned about the timing of the letter, less concerned about its content.

Sir Jeremy Heywood: The content is completely unexceptionable, I think. Any reasonable, fair-minded person—not steeped in politics anyway—would look at that letter and think it a perfectly reasonable letter to write. The great news, which the Committee should be interested in, is that it succeeded in raising take-up of a cross-party-supported allowance. What is not to like about that?

Chair: Final question, Mr Flynn.

Q274 Paul Flynn: This is my final question. The general judgment of you by Lord Owen was "I think his capacity to make a judgment between the interests of a Prime Minister and the wider Cabinet, for example, or between the interests of Ministers collectively and civil servants is open to question." He went on to say that your whole career "has been spent in the hothouse atmosphere of politicians' private offices and three successive Prime Ministers". He went on to say that you were private secretary to Tony Blair. Don't you think

that you have been so marked, and that your character has been shaped in such a way, that you are not really fit to carry out your duty in an impartial manner now?

Sir Jeremy Heywood: No, I don't think that is the position and I don't think that is the Prime Minister's view or that of the previous Prime Minister. I have served to the best of my ability successive Governments of different political complexions and have had no complaints on that score. I believe I can do the job very well. I have never met David Owen. If he has those sorts of concern about me, I wish he would come and talk to me about them. He has no idea what I do day to day.

Paul Flynn: I think we will make our own judgments on that. Thank you.

Q275 Oliver Dowden: I will return to section 125. Mr Lidington, the Europe Minister, gave evidence that it provides a wide-ranging ban. I know that you have talked about normal activity in Brussels, but could you provide further details in relation to that or, more broadly, other activities that could be caught by section 125?

Sir Jeremy Heywood: As a civil servant, the main area I am concerned about is the inability to do normal business on behalf of the country in Brussels. Clearly, the Prime Minister has also drawn attention to a number of other problems. In particular, while the Government would be able to set out in a clear, balanced way the Government's position in Parliament, because of parliamentary privilege—and probably also by press notice, as a result of the exemption there—they would not, for the last 28 days, be able to set out in a clear way the reason why they have taken the position that they have in other forums. I think that the Prime Minister, David Lidington, the Foreign Secretary and others do not believe that that is a very sensible way of doing something.

That is very different from campaigning though, just to be very clear. The distinction that has been drawn is between setting out in a balanced and sober fashion the Government's position in a variety of forums, not just in Parliament, and paying, using taxpayers' money or using civil servants to write campaigning literature and just being part of the campaign. That is not what Ministers want to do—that is what the campaigners and political parties are supposed to do. I think that is the distinction that they have been seeking to draw with this.

Q276 Oliver Dowden: Do you think that problem is best dealt with by a disapplication of section 125 or amendment of section 125?

Sir Jeremy Heywood: The Government's opening position was that disapplication was the right thing and to handle the rest by the purdah guidance. If the House would like a different approach, I think that Ministers have agreed to take away that issue and consider whether an amendment would strike a better balance. That is a very open discussion.

Q277 Oliver Dowden: What is your view?

Sir Jeremy Heywood: I think that either could work. I believe that guidance can be very potent if it is fully adhered to, but if the House and the Government take the view that

amending section 125 would be better, fine. Obviously I am more interested in the outcomes and that the normal business of government is not fettered by an unintentional piece of legislation.

Q278 Oliver Dowden: Just on these outcomes, can you provide further clarity on the legal advice that you have received on this matter, or indeed what precedent this advice is based on?

Sir Jeremy Heywood: I cannot give you full details because we do not publish our legal advice, as you know. The advice that we have had from external counsel is that, as drafted, section 125 is incoherent and highly problematic for the conduct of normal Government business, at least potentially. Legal views can differ on this, the issue is whether there is enough legal doubt that a litigious person, in today's modern world as it were, would have a reasonable cause for action that could then complicate the last 28 days of the referendum campaign in ways that no one, I think, would want.

Q279 Oliver Dowden: Where does that incoherence lie? What is the source of the incoherence?

Sir Jeremy Heywood: Incoherence in relation to what it is applied to—why press notices but not other forms of written correspondence? Is it promotional material or any material? It is incoherent within the substance of the section, it is inconsistent. But different people take different views. I have to say that, up to now, it has not been a huge problem. It is more of a problem in relation to a European referendum because the timetable of what the Government will get up to in the last 28 days is not under our control. We will find ourselves having to respond to things that are sprung upon us by emergencies in Brussels or somewhere else in Europe or by the steady, routine pattern of EU Councils. During the Scottish referendum, the UK Government would not, of course, come out with some new policy on Scotland in the middle of that referendum campaign. We are in control of our own business—

Q280 Hon. Members: They did.

Sir Jeremy Heywood: No they didn't.

Ronnie Cowan: They gave the vote.

Sir Jeremy Heywood: The vote was done by party leaders—it is a very good example. It was not permissible within the purdah guidelines for the Government to do that as the Government with civil service support.

Q281 Chair: And you would not expect something similar to be permissible under the purdah period, however it is constituted, whether under a code or management guidance, you wouldn't expect the Government to announce a change in the terms of membership of the EU halfway through the purdah period?

Sir Jeremy Heywood: No, I wouldn't.

Q282 Chair: So that would be contrary to purdah? They would not be allowed to do that through the civil service?

Sir Jeremy Heywood: Yes, we expect Ministers to observe a period of restraint during a period of purdah.

Q283 Ronnie Cowan: So, for clarification, they would not be allowed to do that standing in the House of Commons, but would they be able to do that back in their constituencies talking to their constituents?

Sir Jeremy Heywood: They can do something as party leaders or as part of a campaign but without civil service support.

Q284 Ronnie Cowan: So what is the point? Surely the Prime Minister's view is the Prime Minister's view whether he is standing in the House of Commons expressing it or whether he is back in his constituency expressing it. It still carries the same weight.

Sir Jeremy Heywood: I am just explaining the law and what the role of the civil service is. The civil service cannot support the Prime Minister if he is acting as leader of the Conservative Party or as part of the campaign. That is my responsibility—what the civil service can and cannot do.

Q285 Kate Hoey: Sir Jeremy, I am sorry that some of us left just after you had started, it was not to do with you, we wanted to make sure that Bill Cash was re-elected as chair of the European Scrutiny Committee. You mentioned you were concerned about the inability to do normal business in the EU. I have just seen my first documents from the European Scrutiny Committee—what is apparently normal European scrutiny business. If we have such a good relationship with all our other European Union members and we are having a referendum on a hugely important issue about leaving or staying, do you not think that we might expect them to behave in a way that would mean their not trying to put anything through that would cause Her Majesty's Government difficulty during that election period?

Sir Jeremy Heywood: It is possible that they might exercise some constraint, but that is not within our control. Often, it is not programmed business that causes difficulty; it is unexpected developments. Time and again, we find a new proposal that we have not heard of before that has to be responded to immediately. We would not want to be in a position where it was illegal for a UK Government Minister to set out a defence of the UK's position for fear of falling foul of purdah. That is the risk we are trying to guard against.

Q286 Kate Hoey: Do you really think the public will understand that? If the public were listening in—presumably, some of them are—do you really think they would

understand that purdah can operate normally in general and other elections and referendums, but somehow, because it is the EU, we have to do things differently? Do you not think that they will find that a little strange?

Sir Jeremy Heywood: I would not presume to speak about what the public would think, but I think the public would expect that the last 28 days of a referendum on the European Union should be not blighted by legal challenges left, right and centre. They would expect Parliament, the Government and the civil service to have sorted themselves out so that we could focus purely on the issue at hand, not on legal suits from left, right and centre trying to take advantage opportunistically of business that we have to transact because we have no alternative, because the agenda is not under our control.

Q287 Tom Tugendhat: During the purdah period in the 2010 general election, you will remember that there was a certain frisson about the banking crisis, and yet Mr Darling was able to conduct his business as the Chancellor of the Exchequer, admittedly in consultation with shadow finance Ministers. Do you feel that purdah hindered his ability to act?

Sir Jeremy Heywood: As we discussed earlier, purdah is not completely binding. It is a flexible concept in the sense that, if there is emergency business and everybody agrees it is emergency business—if you can find a way of ensuring the Opposition are happy with that—you can transact the business. You have to give yourself a little wiggle room in the national interest.

Q288 Tom Tugendhat: You do not feel that section 125, which was then binding on Mr Darling, actually hampered his ability to use Government resources to transact the business of government, in this case with the IMF and other world leaders?

Sir Jeremy Heywood: No, it did not. The problem in relation to section 125 is not how the Opposition, the civil service or Ministers might respond, but that some third party might decide to litigate.

Q289 Tom Tugendhat: Indeed. But you do feel that the same Act, which did not impact on Mr Darling's ability to act as Chancellor in that extraordinary crisis, would impact on Mr Lidington's ability to negotiate fish quotas.

Sir Jeremy Heywood: I am not saying it would. I am saying there is a real risk according to our legal advice.

Q290 Chair: To be clear, statutory purdah does not apply in a general election. You are saying that if section 125 had applied during the general election, it might have caught those negotiations. Is that your argument?

Sir Jeremy Heywood: I am not going into a hypothetical situation.

Q291 Chair: But that is your whole argument, isn't it? If section 125 was applying, it would catch things like those negotiations.

Sir Jeremy Heywood: I do not quite see how section 125 would apply in that situation, to be honest.

Q292 Chair: It obviously does not apply statutorily in a general election, but you are saying that if the same issue arose under an EU referendum and section 125 was in force, that kind of discussion about restructuring and rescue plans for the euro might be caught?

Sir Jeremy Heywood: Yes, indeed.

Q293 Chair: That is your argument.

Sir Jeremy Heywood: That is my entire point. If the debate that we have had over recent days about whether Britain should contribute to the Greek bail-out started to come up in the last 28 days, of course Government Ministers would want to take a strong line on that.

Q294 Chair: You are saying that section 125 could impair Ministers' ability to deal with that crisis.

Sir Jeremy Heywood: That is the advice that we have had.

Q295 Oliver Dowden: I just want to explore the potential impact of the disapplication of section 125. Would the civil service code require an amendment in those circumstances, or would additional guidance be required in the event of a disapplication?

Sir Jeremy Heywood: No, I think the civil service code covers the situation perfectly well. There is, perhaps, a belt and braces case for changing the civil service management code to make it absolutely clear that when we are talking about national political activities, we are talking about referendums as well as election campaigns and so on. I would have no difficulty putting out very clear purdah guidance, even if section 125 was not in place. I think that would constrain the work of the civil service in the ways that you would want.

Q296 Oliver Dowden: Do you think then that the civil service code of conduct restrains the conduct of civil servants more than the application of section 125?

Sir Jeremy Heywood: Absolutely. That is the core thing as far as the civil service is concerned. Having said that, if section 125 were disapplied, the Government would be able to do a greater range of activity than if section 125 were in place. Therefore, the role of the civil service would expand to support whatever that Government activity was. Our job, as civil servants, is to support the elected Government. If Parliament has allowed the Government to

do certain things, we cannot just down tools and say, “Sorry, we are not going to support you on that, even though it is perfectly legal and Parliament has agreed you should do it.” Our job is to support the Government; that is what we are here for.

Q297 Mr David Jones: To pursue that point, the concerns that you have expressed about the impact of section 125 seem to be very narrow—that is, essentially, relating to the Government’s actions in Europe. Do you accept, therefore, that if section 125 were disapplied in its entirety, you would have far more latitude than the problem merits and you would effectively have a free-for-all?

Sir Jeremy Heywood: Are you talking about the civil service or the Government?

Mr David Jones: Both.

Sir Jeremy Heywood: The civil service’s activity is constrained by the civil service code and our duty of impartiality. That will be unchanging, regardless of whether section 125 is there or not.

Q298 Mr David Jones: So if section 125 is disapplied in its entirety, the Government effectively have a free hand to do whatever they want in relation to the referendum. You, of course, as civil servants, would be duty-bound to support the Government in whatever they sought to do.

Sir Jeremy Heywood: That is correct but the Government have made it crystal clear that they would not use that flexibility to campaign or to do things that are the province of the campaigns.

Q299 Mr David Jones: So the question is, why does it need that flexibility?

Sir Jeremy Heywood: As I have explained, from my perspective, the most important thing is to ensure that business as usual in Brussels is not constrained. I think the Ministers set out two reasons: first, the practical arguments, which I have been laying particular emphasis on; and, secondly, the issues of principle that a Government should be able to set out their position and explain that not just up to, but during that final period of 28 days. They have made it absolutely clear that they have no intention of campaigning or using Government resources for door drops and all the rest of it. That distinction has been drawn. In this sitting, we have not spent as much time on the second argument as on the first, but I feel that it is more of a political argument of principle, which you can ask the Ministers about later.

From a civil service perspective, the issue that would most concern me is something that made it very difficult in those last 28 days to cope with a crisis in Brussels that required the full weight of the national interest to be applied or, indeed, routine business that we could not persuade our Parliaments to reschedule to a later stage. It is quite difficult for Brussels to reschedule these things because they have 28 countries and, at any one time, several countries could have different elections. As a matter of principle, they do not schedule business around

other people's elections, referendums and so on. It would be completely impossible for them to do so.

Q300 Mr David Jones: As head of the civil service, you have to distinguish between what constitutes everyday Government business and campaign-related activity. What sorts of challenges did that pose in the context of the Scottish referendum?

Sir Jeremy Heywood: The main issue was around the wording of the leaflets, which—I hasten to add—the Government paid for well before the last 28 days. At a stage in the campaign, the Government paid for a door drop. I spent quite a lot of time with officials and special advisers ensuring that that was a fact-based, evidence-based document, and not a campaigning document. That is our job. We do not want to see Government resources used for campaigning, propagandist purposes. I am happy to say that Ministers agreed with that.

Q301 Mr David Jones: And would you see any difference in the context of the EU referendum?

Sir Jeremy Heywood: We haven't remotely started to think about what would happen in the period prior to the 28 days. But again, yes, I imagine that if I were called on for advice, my job would be to ensure that any literature produced was sober and balanced, that every assertion in it could be traced to a point of evidence and so on.

Q302 Mr David Jones: Even if section 125 had been completely disapplied?

Sir Jeremy Heywood: Section 125 only applies for the last 28 days.

Q303 Chair: Could you answer the question in relation to the last 28 days? What will be different between the EU referendum and the Scottish referendum that requires a different arrangement for purdah?

Sir Jeremy Heywood: Of course, on the Scottish one, section 125 did not actually apply to the UK Government, as I think previous witnesses said.

Q304 Chair: But it applied through the Edinburgh agreement.

Sir Jeremy Heywood: Indeed.

Q305 Chair: Therefore, I imagine that civil servants applied it as rigorously as they would have done had it been statutory.

Sir Jeremy Heywood: We absolutely did.

Q306 Chair: So what will be different in the EU referendum from the Scottish referendum?

Sir Jeremy Heywood: I tried to answer this a bit earlier. In the Europe context, we are not in control of the business, so we cannot guarantee that for the 28 days that we are talking about here, there will be no European business—

Q307 Chair: But the whole question of whether Scotland could be a member of the European Union after an independence vote was right at the heart of the campaign.

Sir Jeremy Heywood: It was not being discussed in Councils in Brussels.

Q308 Chair: Exactly. Are we expecting Britain's membership of the European Union to be discussed in Council as part of the normal course of Government business?

Sir Jeremy Heywood: There could well be issues that come up in those Councils on which the UK has a very strong perspective, whether it is the Greek bail-out, banking regulation, migration—

Q309 Chair: Yes, but those things occurred during the Scottish referendum, and were as about as related to Scotland's potential membership of the European Union as an independent country as they are to the question in this referendum. What is the substantive difference?

Sir Jeremy Heywood: I do not think any issue came up in the last 28 days in Brussels that really bore on that question. We certainly got no legal advice to that effect.

Q310 Kate Hoey: But in that last 28 days, what could possibly happen that could not wait 28 days?

Sir Jeremy Heywood: If we were in control of the timetable, I would agree with you, but the fact is that we are not. If there are 10, 11 or 12 Councils like it—it depends on when it is. If the 28 days falls in August, we might be okay, but if it happens at a busy period of European business, the Commission will meet every week, the European Parliament will meet for two weeks every four weeks, the ECJ will issue judgments several times a month and, above all, ministerial Councils will meet 10 or 12 times a month. The UK must be represented in those discussions. We cannot just leave an empty chair there.

Q311 Chair: Scotland has agriculture, fish, industrial policies and grants from the EU. Any of those things could have been discussed during the Scottish referendum.

Sir Jeremy Heywood: The legal risk is not regarded as—if it was, no one ever brought it to my attention.

Chair: Okay. You think there is a substantially different legal risk.

Q312 Mr David Jones: Sir Jeremy, you have just explained that the EU tries to arrange its business in such a way that it does not affect domestic elections and referendums.

Sir Jeremy Heywood: No, I said exactly the opposite, actually.

313 Mr David Jones: Really?

Sir Jeremy Heywood: I said it could not do that, because there are 28 countries. It could not possibly dodge and weave so that at no stage does it hold a Council when anyone has an election or a referendum. It just cannot do that, and it will not. Obviously, we will try. If we get into a situation in which we have to do things in that way, then we will try our very best with the Commission to prevent anything from being scheduled that could possibly impair the ability to have a referendum focused solely on the question. We are talking about legal risk here. All I can do is give you in good faith the fact that our leading counsel has warned us that there are severe legal risks.

Q314 Kelvin Hopkins: One suggestion that I made in a previous meeting was that if anything significant cropped up during the 28 days, a written statement could be submitted—just a factual statement of what had happened—and that just for that time, Ministers could abstain from making oral statements in the Chamber during which they might be questioned and have to put a strong political point of view. That would be one way of overcoming it for that short period of time, surely.

Chair: And indeed you could issue a press notice under section 125.

Sir Jeremy Heywood: I think a written statement probably would fall foul of section 125.

Q315 Chair: Not if it were a statement to Parliament, because that is privileged.

Sir Jeremy Heywood: Indeed. Absolutely. The issue is not so much reporting what is going on or being able to abstain if we can; it is what happens if we end up in that 28-day period with a decision that must be taken, because it has come to a vote.

Q316 Oliver Dowden: Just to clarify on that point, when Ministers are at the Council making decisions, what pieces of material do you fear might come out of that Council that would be subject to section 125?

Sir Jeremy Heywood: In some lawyers' interpretations of section 125, the speech that the Minister makes—a lot of these Councils are televised. That will be making public by whatever means necessary.

Q317 Chair: Do you seriously believe that a court might serve an injunction to stop a Minister speaking in public at a council meeting?

Sir Jeremy Heywood: There is a real risk—I am saying that some lawyers believe oral statements of that sort could be caught. Others will say that a minutes statement would certainly be caught. There is legal uncertainty; that is what I am saying.

Q318 Oliver Dowden: I just wondered whether you had any further examples.

Sir Jeremy Heywood: We are saying that there is legal uncertainty. What constitutes a publication—making something public—is unclear. What is absolutely clear is that in a defined 28-day period, there could well be occasions when Government Ministers have to say things on the record that will be extremely interesting from the point of view of the referendum. We do not want to be in a position where Ministers are unable to defend the UK's national interests on important dossiers in Brussels for fear of crossing that line. There is a legal uncertainty around that which, all other things being equal, as the head of the civil service and the Cabinet Secretary, I would like to see sorted out. That is one of the arguments. The other argument was the one about appropriateness and the issue of principle that the Prime Minister set out.

Q319 Chair: I want to summarise, to make sure that we have the right idea. We have given you every opportunity to give us examples of things that you think will be caught. You have given us some, although I think you will find that the Institute for Government, the Electoral Commission and Speaker's Counsel do not agree with you. Many other representations received do not accept that this legal risk exists, but you are saying that there will be legal challenges left, right and centre.

Sir Jeremy Heywood: No, I am not saying that, nor do I think that the people you are citing necessarily disagree with me. Speaker's Counsel, as far as I know, has not said there is zero legal risk. I am saying that there is a real legal risk. That is the legal advice we have had.

Q320 Chair: You said that there could be legal challenges left, right and centre.

Sir Jeremy Heywood: There could be. I have said that there could be.

Q321 Chair: There could be—okay.

Sir Jeremy Heywood: Mr Chairman, I am acknowledging that my position is one of considerable risk aversion. It would be extremely unfortunate if the last 28 days of a very, very important referendum were marked by even one legal challenge.

Q322 Chair: We know—Ministers tell us frequently—that legal advice from civil servants and, indeed, obtained by Whitehall tends to be very risk averse. Is this not just another example of very risk-averse legal advice?

Sir Jeremy Heywood: This is legal advice that, risk-averse though it may be, has been fully accepted by Ministers and properly stress-tested. I ask you to consider this: it is very important to avoid a situation where the last 28 days of a referendum are caught up in a legal quagmire, however small the risk. That is what we are trying to achieve. That is the point we are trying to make.

Q323 Chair: We have got the message. There is another clarification that I think is quite important. Whatever the statutory arrangements, you do not envisage civil servants supporting Ministers in the last 28 days to explain the outcome of the negotiations, the merits of the deal and why we should stay in the European Union, or the other side of the argument. You do not expect the machinery of government to be used in that way.

Sir Jeremy Heywood: It will be used for whatever the Government is permitted to do.

Q324 Chair: Earlier, you said that you want to maintain the impartiality of the civil service, particularly in the last 28 days, under the purdah regime.

Sir Jeremy Heywood: Correct, but if the Prime Minister is making a statement to Parliament, I do not believe it is wrong for the civil service to respond to his requests for briefing material on that subject.

Q325 Chair: I accept that, but you would not expect, for example, the Government's communication service to be used in the last 28 days to promulgate the merits of the renegotiation.

Sir Jeremy Heywood: That depends on what is meant by the press notice exemption, for example.

Q326 Chair: By what?

Sir Jeremy Heywood: The press notice exemption. On the face of it, section 125 seems to allow press notices to be issued.

Q327 Chair: So there is an exemption for that under section 125.

Sir Jeremy Heywood: This is why our legal advisers say that this thing is a bit incoherent. On the face of it, parliamentary privilege allows parliamentary statements.

Q328 Chair: But you would not expect the civil service to be used to help to persuade voters in any way, directly or indirectly.

Sir Jeremy Heywood: No. Civil servants will not take part, either personally or as a civil service, in campaigning events or party events. They will only do, in support of Government, what Government itself is allowed to do.

Q329 Chair: But the Government will have to account to Parliament and to the public for the outcome of the negotiations. You seem to be saying that the civil service would be constrained from assisting Ministers in that explanation for the last 28 days, in the spirit of purdah.

Sir Jeremy Heywood: If Ministers are doing something that Parliament has agreed the Government can do, if they ask for our assistance, we will give it, but as individuals—

Q330 Chair: That suggests that you will take any instruction from Ministers, however, and that the overriding principle of your conduct of the civil service is to support the Government of the day, so if that compromises what was previously understood as the impartiality of the civil service through purdah that would be a secondary consideration.

Sir Jeremy Heywood: Not at all—equally important. We adhere at all times to the civil service code and the civil service management code, so civil servants will not take part in national political activity, and I do not believe that Ministers would ever ask us to do so.

Q331 Chair: Or support Ministers taking part in national political activity.

Sir Jeremy Heywood: If Ministers are operating as Government Ministers then we will support them; if they are operating as part of a campaign, or in their party roles, we do not support them.

Q332 Chair: I am sorry, but to be absolutely clear—do help me if I am not asking this very clearly—the machinery of government would not be available to Ministers to explain the outcome of the negotiations during the purdah period. You are saying that.

Sir Jeremy Heywood: No, I am not saying that—

Chair: Right. So you are saying that the machinery of government would be available.

Sir Jeremy Heywood: If the Prime Minister or another Minister spoke to Parliament, that is the clearest case—I think we are agreed. Section 125 or not, either way, there is nothing to stop the Prime Minister explaining his position on behalf of the Government to Parliament. In that case, if he asks for the civil service's support, that support will be provided.

Q333 Chair: What about explaining to the public?

Sir Jeremy Heywood: That depends on whether section 125 is in place or not.

Q334 Chair: So section 125 will constrain the Government from explaining as Government the merits of the deal during the purdah period.

Sir Jeremy Heywood: On some legal interpretations, definitely section 125 would stop the Government outside Parliament.

Q335 Chair: Yet if Ministers after removing section 125 then instruct the government machinery to be used in that way, you would agree with that.

Sir Jeremy Heywood: No. The civil service code would come into play there—the civil service code and the civil service management code.

Q336 Chair: No, you said before that you would do whatever is permitted to do. What if section 125 were removed? In 1975, for example, when so many people would argue that there was a stronger tradition of the impartiality of the civil service—you might dispute that, but I am aware of what I am saying—the civil service was deeply involved with explaining the Government's position right up to polling day, because there was no restriction and purdah did not exist in referendums. You are saying that you could go back to that position.

Sir Jeremy Heywood: Certainly not, no. In 1975, the civil service was much more involved in the campaigning, particularly the campaigning to stay in. It would not be at all possible nowadays.

Q337 Chair: But if you got rid of purdah, that would be permitted.

Sir Jeremy Heywood: We are not getting rid of purdah. No one is suggesting for a minute that we get rid of purdah.

Q338 Chair: But we can get rid of section 125.

Sir Jeremy Heywood: Let me repeat what I said, because I did not express it clearly enough. The civil service will do what Parliament has agreed the Government can do—we will support the Government in that—but of equal importance is that we will always adhere to the civil service code.

Chair: Am I missing something—some ambiguity?

Q339 Oliver Dowden: So, you are saying that if you are not subject to 125, the civil service code remains extant as it were.

Sir Jeremy Heywood: Correct.

Q340 Oliver Dowden: You are still subject to that, regardless of the decision that Parliament takes on 125.

Sir Jeremy Heywood: Correct. Exactly right.

Q341 Chair: But without section 125 Ministers would be permitted to use the machinery of government to do rather more than they can in conjunction with referendum campaigns than they can now or would be able to under section 125.

Sir Jeremy Heywood: In support of government, yes.

Q342 Chair: I am bound to say that I do not feel that you have been 100% clear about what you have said.

Sir Jeremy Heywood: Well, I am trying to be clear. What remains that is unclear?

Q343 Tom Tugendhat: Would it be fair to say that nothing changes except that it is not judiciable?

Chair: If it does not change anything, why not keep section 125?

Sir Jeremy Heywood: Section 125 does constrain what the Government can do and what they can therefore ask the civil service to do by way of support.

Q344 Tom Tugendhat: But ethically you are saying that it is not changing anything you do. All you are doing is imposing the potential for legal intervention through judicial review or—

Sir Jeremy Heywood: No, I am not making that point. Clearly, the difference between section 125 and not section 125 will have some effect on what the Government can do and therefore on what the civil service can do.

Q345 Chair: For example, during a general election, Ministers cannot do press releases from their Departments concerning the issues being discussed in the campaigns. How much do you think that will apply without section 125 during a referendum?

Sir Jeremy Heywood: Without section 125, Ministers could in theory not just speak in Parliament and issue press notices but undertake official events in which they speak in

explanation of the Government's position. If that were the position, the civil service could in principle support them in that.

Q346 Chair: So ministerial tours to discuss the outcome of the negotiations during the purdah period could be organised by private offices and supported by the taxpayer.

Sir Jeremy Heywood: If it were a Government activity that Parliament had agreed the Government can do, it would be wrong for me to say to the civil service, "You can't support that sort of thing."

Q347 Chair: You are just confirming that you would approve the government machinery being used for exactly what purdah intends it not to be used for.

Sir Jeremy Heywood: No, I haven't.

Q348 Chair: Yes you have.

Sir Jeremy Heywood: If Parliament has agreed that the Government can do certain activities, the civil service's job is to support the elected Government, and that is what we will do.

Q349 Mr David Jones: If section 125 were to be disapplied in its entirety, would the civil service code preclude the Government Communication Service, for example, issuing press notices supportive of a yes vote, if that were the Government's position?

Sir Jeremy Heywood: The Government Communication Service does not act independently of the Government. If a Government Minister is allowed by Parliament to issue press releases in support of a Government position, it would be wrong of the civil service to say, "Sorry, Parliament has agreed that you can do this, but we're not going to do it."

Q350 Chair: That would be a breach of purdah.

Sir Jeremy Heywood: A breach of purdah would be outwith what has been agreed the Government can do. On a personal basis, it constrains what civil servants can do as individuals.

Q351 Mr David Jones: But nevertheless the Government Communication Service could actually issue streams of press notices supportive of a yes vote.

Sir Jeremy Heywood: Government Ministers have made it absolutely clear that they do not intend to campaign during that period.

Q352 Mr David Jones: But if the Government Minister changed his mind, the Government Communication Service, in those circumstances, would be obliged to issue those press notices.

Sir Jeremy Heywood: I cannot do anything other than repeat what I have already said. If Parliament, at the end of the debate about whether section 125 should be amended, disapplied or whatever, concludes that the Government can do certain activities, it is the civil service's role to support the elected Government. Individual civil servants—

Q353 Chair: You have just confirmed to us that Parliament has a very important role in creating laws to constrain Ministers from what they can do during purdah.

Sir Jeremy Heywood: Of course. Individual civil servants are then subject to the rigours of the civil service code and can take no part personally in national political campaigns and so on.

Q354 Oliver Dowden: Just to clarify, what is the restriction provided by the civil service code, absent section 125?

Sir Jeremy Heywood: We have to adhere to the values of impartiality in this context and take no part in national political activity as individual civil servants.

Q355 Chair: But if a civil servant is being instructed by a Minister to issue a press release that effectively supports the yes campaign—

Sir Jeremy Heywood: If Parliament has allowed the Government to do that activity—

Q356 Chair: That seems to be a very good reason not to change the law.

Sir Jeremy Heywood: Well, what are you suggesting? That the civil service should say, "Parliament has agreed that, the Government has asked us to do it, but we are not going to do it"? That is not a position for the civil service to take. We do not operate independently of the elected Government.

Q357 Chair: We accept that, but it does suggest that the civil service on its own will not keep purdah. It will not make Ministers keep purdah. You have just confirmed that, absent section 125, civil servants would obey instructions from Ministers to issue press releases that could be construed to be supporting a yes vote or a no vote.

Sir Jeremy Heywood: If that is what Parliament has allowed Ministers to do, yes.

Q358 Chair: Isn't that rather disappointing?

Sir Jeremy Heywood: What the civil service code does is to say that individual civil servants cannot themselves take part in political campaigning.

Chair: I understand what you are saying. So the code is no protection for purdah.

Q359 Kate Hoey: Sir Jeremy, can you honestly tell us that you feel really comfortable about the discussion about removing section 125? Do you feel that would be a sensible thing to do, given the fear and worry that there will be bias within Government and the civil service, despite all the codes?

Sir Jeremy Heywood: I am absolutely clear that the civil service code protects the impartiality of civil servants. I think there is a legitimate debate between Parliament and Government about the right parameters for section 125. In addition, the Government has made it clear that it has no intention of campaigning, using Government money for leaflet drops and so on. That is an important aspect of this debate, which we have hardly touched on today. Taking all those things together, I think this is a good process, and we will get to the right outcome.

Q360 Kate Hoey: And did you advise the Prime Minister that this is the right way?

Sir Jeremy Heywood: I am not going to go into my advice to the Prime Minister. That's confidential.

Q361 Kate Hoey: Did the Prime Minister advise you?

Chair: We do respect the private conversations between Ministers and officials.

Kate Hoey: I am just asking for detail.

Q362 Chair: Sir Jeremy, you have been very forthcoming.

Sir Jeremy Heywood: That worries me.

Q363 Chair: But I just have to be clear. You have told us that in the event of lifting statutory restrictions, Ministers will be free to instruct the government machinery to issue press releases that will have a bearing on the referendum campaign, and to use the government machinery to brief the press. That is what you are saying, that you as a civil servant would feel obliged to support the Government of the day in their task?

Sir Jeremy Heywood: Yes, that is the job of the civil servant. Parliament has agreed the framework within which the Government should operate and allows the Government to

operate in that way—issuing press notices and so on—and the civil service supports the Government of the day in doing that.

Q364 Chair: You haven't been evasive at all. You have been very clear.

Sir Jeremy Heywood: I am never evasive.

Q365 Chair: I have just one final question about freedom of information—sorry that I have not given you warning on this. There was a statement issued on Friday. The Government has set up a panel to investigate—and this is something which the Justice Committee did not reach a conclusion on in its review of freedom of information because it did not feel it had enough evidence—the possibly chilling effect on discussions within Government of freedom of information. As head of the civil service and Cabinet Secretary, would you like to put anything on the record about that at this stage?

Sir Jeremy Heywood: I am sure that I will talk to this group of independent people. I have had some concerns over the last few years in some areas. I think that, by and large, the Act has worked well. I can quite see why it is well supported in Parliament and in the media. By and large, I think it has been a good thing, but there have been one or two areas, particularly when we are talking about speaking truth unto power in relation to projects, for example, or the risks of certain activities, where the fear that that might then be published within a year or so, I think, probably would lead people to be less candid in writing than they otherwise would be.

There are also some questions around the processes by which the veto is used. Parliament intended there to be a perfectly workable veto and that is proving increasingly difficult to use in practice and, indeed, de jure, following a recent case. I think there are one or two issues to be looked at, but I do not want to prejudice this. There is a group of independent people of great eminence who have been asked to look at it. I hope to provide evidence to them in due course and then we will see what they come up with. We have no idea at this stage where they will come out. I think it is a first principles look.

Chair: Sir Jeremy, thank you very much indeed.

Examination of Witnesses

Witnesses: **Rt Hon David Lidington MP**, Minister for Europe, Foreign and Commonwealth Office, **John Penrose MP**, Minister for Constitutional Reform, Cabinet Office, **Mark Sweeney**, Constitution Director in the Cabinet Office and **Vijay Rangarajan**, Europe Director in the Foreign and Commonwealth Office, gave evidence.

Chair: May I ask each of our witnesses to identify themselves for the record?

Mr Lidington: David Lidington, Minister for Europe.

John Penrose: John Penrose, Minister for Constitutional Reform.

Mark Sweeney: Mark Sweeney, constitution director in the Cabinet Office.

Vijay Rangarajan: Vijay Rangarajan, Europe director in the Foreign Office.

Q366 Chair: Mr Lidington, how concerned are you that this debate about possibly weakening the rules on purdah could lead to the perception that the referendum is going to be conducted on an unfair basis?

Mr Lidington: Clearly, that is something that we do not want to see. That is one reason why at the conclusion of the debate in Committee on the referendum Bill, I undertook to consult widely among Members of the House of Commons, and for the Government to come back on Report with amendments of their own that would try to command the widest possible consensus within the House.

Q367 Chair: You yourself told Parliament that you believe that section 125 potentially casts a very wide-ranging ban on what the Government can do during a referendum campaign. Can you provide some specific examples?

Mr Lidington: Yes. I think I should start, because this was significant in terms of the legal advice that I received, by drawing the Committee's attention to those particular elements of section 125 that cause the greatest problem. There is subsection (4)(a), where "publish" is defined as to "make available to the public at large, or any section of the public, in whatever form and by whatever means". In the advice I have received—Sir Jeremy told you earlier that we have more than one lawyer on this—that would certainly catch any written or electronic communications other than those that are specifically exempted by the section, and there is a risk, although it depends on which lawyer you seek advice from, that it would apply to verbal communication, speech, as well.

The other element of the section that causes concern is subsection (1)(b), where the restriction is held to govern material that "deals with any of the issues raised by any question on which such a referendum is being held". That takes things more widely than the question being put in the referendum question to the British electors.

From a Foreign Office point of view, when I look at how business is conducted in the European institutions, it seems to me that there are a number of significant risks to our ability to carry out normal business. First, we often table minute statements during Council of Ministers meetings. Those are important because we use them in particular to signal our concern about risks of competence creep and about the delineation of competencies as laid down in the treaties between the European Union and member states. They are an important point of reference to have on the record. Those, we think, could well be caught.

Secondly, we often circulate papers to other Governments or to members of the institutions to advocate particular policy outcomes. This was done with considerable success, for example, over the digital single market recently. Again, we fear those would be caught.

Thirdly, judgments from the Court of Justice of the European Union are handed down and Advocate Generals' opinions are presented within a timetable that is not in the least

within our gift or influence. Those can have a very significant impact on British interests. I am thinking of the Dano case on benefit claims recently. There is another case—the Alimanovic case, which concerns in-work benefits—that is pending before the Court. We have had recent rulings from the Court about the European Central Bank's clearances policy. We have infraction proceedings against the United Kingdom on a number of issues ranging from air quality through to the habitual residence test. Those, or other relevant Court judgments or Advocate Generals' opinions, could fall within the 28-day period.

Fourthly, there are external crises. If one looks back at recent months, we have had events to do with Greece and the eurozone, events to do with Libya and migration, and events to do with Russia and Ukraine and the EU's response to that crisis, which have required the British Government to communicate—to publish in terms of section 125.

Fifthly, we will in the second half of 2017 have the presidency of the EU. That certainly requires a great deal of communication and publication, from a former work programme through to many other communications in writing, verbally and electronically. And even in the months leading up to a presidency, any incoming presidency—ourselves included—would be expected to indicate what their plans and priorities were, and to do so in writing, to do so electronically and to do so in speech.

Then there are questions about the impact of either Court judgments or legislation. When these are known to us, we sometimes feel we have to write to businesses or other groups in the United Kingdom that are affected to notify them and to tell them about the risks, opportunities or obligations that may fall to them. For example, had the ECB clearances case gone against us, there would have been a very urgent need to notify City institutions formally of the implications of that judgment for them, to avoid the risks of instability in the markets.

Finally, as members of the Committee know, a lot of EU business is handled at the European Parliament. We are very active in briefing MEPs from all political parties about matters that pertain to UK interest, suggesting supporting or opposing particular amendments that are due to be discussed, even suggesting helping them with drafting. We think that circulars and briefing notes to British MEPs could well be caught by the pretty all-embracing terms of the section as it stands. I do not think that this was envisaged by those who drafted this 15 years ago. There may be a separate issue here for the Committee about having a look at PPERA 2000, and this section in particular, to see whether it needs revision and being brought up to date. From a Foreign Office business as usual in Europe point of view, those are some of the things I had in mind.

Chair: That is a very full answer; thank you very much. We will move straight on.

Q368 Tom Tugendhat: What legal advice have you taken on this and what was the nature of that advice? Was it internal or external? Was it the Attorney General? I shall follow up on the Speaker's Council, but if you could start on that, I would be grateful.

Mr Lidington: We took advice both from internal legal advisers and from external counsel.

Q369 Tom Tugendhat: And from the Attorney General?

Mr Lidington: Ministers of successive Governments never comment on whether they have had advice from the Law Officers.

Q370 Tom Tugendhat: Okay. You will have seen the advice of Michael Carpenter, the Speaker's Counsel, and his view that "the reasons advanced for the complete disapplication of section 125 suggest that the section is being read more restrictively of the ability to report EU business than is really justified on a true construction of its terms". It seems, as was suggested to Sir Jeremy earlier, that the lawyers are putting a fence around the law.

Mr Lidington: I think that Sir Jeremy was right to say that lawyers can and do disagree. It would have been irresponsible for the Government to have simply ignored advice that was expressed in pretty firm terms. This is about managing risk. We do not know for certain that, if section 125 stayed in its current form, there would be this nightmare of constant litigation, or even one important case of litigation in the last 28 days. Equally, we cannot be certain that there will not be. The European debate is an issue that arouses passion on both side; there are people in both camps over our membership of the EU who have deep pockets and we are a more litigious society than we used to be.

Looking back, there are precedents for this. As recently as 2014, we had *Wheeler v. Office of the Prime Minister* and another; in 2008, we had *Wheeler v. Office of the Prime Minister*; going back to 1994, we had *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg*; and it is not only in the United Kingdom. A challenge in the Republic of Ireland to the conduct of a referendum actually led to the Irish Constitutional Court declaring that referendum entirely invalid. I accept that we cannot read another country's constitutional tradition across to ours, but it suggests that people who are litigious and have deep pockets are going to take an interest in matters pertaining to Europe, and the very clear advice I had is that the risk of litigation is real and something we need to consider seriously.

John Penrose: May I pick up on that point briefly? Thus far and historically in this country, British elections have been—mercifully—free of hanging chads and stuff like that, and lawyers circling. We do occasionally have legal cases, usually to do with individual constituencies and allegations of—usually small-scale, mercifully—fraud and that sort of stuff. But, broadly speaking, the credibility of elections has been pretty high and has been free from those sorts of legal challenges during the election campaign itself and then very, very rarely on a small scale afterwards. I just think it is really important for the ongoing health of our democracy that we try to maintain that. I think it is something that is to be aspired to and admired in history.

Q371 Tom Tugendhat: So, your argument, Mr Penrose, is not simply that litigation could be used to intervene in the advice that Ministers may or may not choose to give on

various European affairs, but in fact that legal action could be used in a vexatious manner in order to influence the outcome of the referendum—

John Penrose: I think I am saying that anything that increases the risk of—

Tom Tugendhat: In either direction, by the way.

John Penrose: Anything that increases the risk of legal cases in the run up to a poll or questioning the validity of that poll afterwards in a serious way, we have been free of that in the past and I think it only makes sense to try to manage that risk downwards, for the Government of the day, in any case, to want to try to reduce that chance of it ever starting to happen in future.

Q372 Oliver Dowden: Just two small points. On the very long list that you provided of potential examples that are caught by section 125, just to confirm, does your concern lie with 125(1)(b)? Is that the most problematic area?

Mr Lidington: In terms of what you describe as the Government's day to day business as usual in the European Union, yes. Because reading that subsection together with the definition of what is caught in subsection (4), I think you have got a very wide range of things. And it almost leads you to the situation where if one or other of the campaigns were to seize upon something happening at EU level anyway and say, "This is really important. This proves our case"—for yes or for no—that brings it within the ambit of section 125(1)(b), because it then becomes an issue raised by any question on which the referendum is being held.

Q373 Oliver Dowden: Related to that, John Penrose, you were talking about the risk of litigation. Have you had any advice as to whether that could impact the outcome of the referendum? For example, could there be a consequence that, somehow, the outcome would have to be postponed—an outcome that would have a substantive consequence on whether it was a valid referendum or not, if you see what I mean?

John Penrose: My point was a slightly longer term one, which is about erosion of trust in our democratic process and the validity of our polls in general and of any individual election. Over time, that could be very dangerous, but I do not think it went wider than that.

Chair: Sorry, you will have to speak up little bit.

Mark Sweeney: Just to add one thing to what the Minister said, there is, I think, a specific provision in the Bill for challenge to the result after the referendum on the grounds, I think, that it has been illegitimately conducted. I am not a lawyer, but I think the legal risk here is a slightly different one, which is that, in theory—I think Speaker's Counsel mentions it in something on your website—of injunctive relief: somebody going to the court in the 28 days, arguing that one or other statement breaches the terms of section 125 and seeking an injunction or some kind of undertaking from the Government to prevent acting in that way.

I think it would probably be quite unlikely, although we can provide a note to the Committee if that would be helpful on this aspect of the legal risk that the whole referendum could be struck down on that basis. But I think the risk is the one the Minister refers to, which is the difficulty in perception terms of either side in the referendum campaign feeling that it was illegitimately conducted as the courts had to get involved and injunct one side or the other.

Mr Lidington: So you have those legal risks. In terms of policy risks, I would not like to be in the position where I am sitting in the UK seat in the Council of Ministers and I am having to think about whether I really ought to be putting down a minute statement to protect our position on EU and member state competence because section 125 is in force and I could fall foul of that.

John Penrose: Or, alternatively, knowing that you jolly well need to, but you are prevented because you have been injuncted from doing so.

Q374 Kelvin Hopkins: It is very simple, really—the Government just has to avoid any mischief during the 28 days and not push the envelope during the campaign.

Mr Lidington: The problem with that is that we are talking about a statutory prohibition. The section does not make any distinction in terms of whether something Government does is mischievous; it says nothing about intent or purpose, but simply catches certain—most—types of publication, very broadly defined.

Q375 Kelvin Hopkins: But common sense would tell you where you are behaving in a risky way and where you are not, surely?

John Penrose: I completely agree with your starting point, but the question is: will everybody trust any Government in any poll if they stand up and say, “We promise we will behave terribly well in the last 28 days—just trust us.”? I suspect the answer would be, “That’s very kind of you, but we would like some sort of further guarantee please.” Normally that is provided in a general election by purdah guidelines; in referendums it is provided by 125, plus potentially purdah as well. We probably want to have—I suspect the country will expect us to have—some sort of stronger guarantees than warm words.

Q376 Kelvin Hopkins: Are you suggesting going beyond section 125?

John Penrose: No, I am saying that if we were starting from a position where there was no history of purdah guidelines or anything else and we simply promised to behave well, I suspect that this Committee and others would take a rather dusty view of that and would want to see some of the protections that are already in place being put in place.

Kelvin Hopkins: I suspect the public would rather like to keep section 125.

Q377 Chair: May I just ask three little supplementaries? The first is to Mr Sweeney. How high is the threshold for obtaining injunctive relief during a purdah period? What is the advice you have received on that?

Mark Sweeney: As I said, I am not a lawyer, but I would refer you back to Speaker's Counsel's own advice, which talks about the remedies available to the courts. In a theoretical case where the Government did something that was held by someone to be in contravention of section 125, then if someone were to be able to get a JR off the ground, as Speaker's Counsel—

Q378 Chair: But the Speaker's Counsel actually says that the threshold is very high.

Mark Sweeney: Well, the Government legal advice is that there is a risk of this and that there is a theoretical risk of an injunction being granted. What I am describing, or what I was going to describe, is Speaker's Counsel's description of the risks. I take your point that Speaker's Counsel is giving a particular legal view. Our legal view is slightly different. As the Minister has said, it is a view that has come from internal Government legal advisers; we have also gone to external counsel.

Chair: But it comes as no surprise that Government legal advice is so ultra-cautious, because it always is.

Q379 Kate Hoey: Is this the usual thing of a lawyer knowing what you want to hear before giving his advice, so they were pretty clear that you wanted to get it as narrow as possible?

Mark Sweeney: It is usual to have a discussion with colleagues in Government who are legal advisers and say, "These are the sort of issues we are concerned about," but neither we nor Ministers said to legal advisers, "We would like the answer to be, 'This is terribly risky. Can you tell us that, please?'" We simply said, "Look, here is the provision. What do you think the degree of risk is?" The advice that has come back is that because the section is, as Sir Jeremy and Mr Lidington have characterised it, very broadly drawn, in theory these risks exist. If as a Government you want to minimise those risks, you need to do something about that.

The other point I should make—I am not sure it came out in the earlier session, but I think the Electoral Commission made this point to you last week—is that there isn't a great deal of case law, if any, on section 125, so there isn't anything that either our lawyers or, I imagine, Speaker's Counsel, has been able to look at and say, "In the 15 years since PPERA was passed, here are the seven cases under which 125 has been tested." That kind of history does not exist, so we are left with a potential disagreement between Government and others as to the degree to which the risk is significant or not.

Q380 Chair: Why do you think no one has ever sought injunctive relief under section 125 in previous referendums, given that we live in this very litigious age?

Mark Sweeney: Who would you like to answer?

Chair: Anybody.

John Penrose: I cannot answer the question because I do not know who considered it but decided not to go ahead, but the number of referendums that have taken place since this thing was passed is not that large. You probably need to ask some of the people who might have brought cases in the past. I am afraid I cannot speak for them.

Q381 Chair: Excluding the numerous mayoral referendums that have taken place, there have been four major referendums when section 125 has been in force, and there has not been a single application. Does that not tell us that this is rather an alarmist view?

Mark Sweeney: I can add one point, which is slightly speculative. It goes to something that Sir Jeremy explained in his evidence session. This may not go, I imagine, for the Scotland referendum necessarily, though that is a matter for others to debate. If you look at the AV referendum or the referendum in the north-east, as with the Scotland referendum, there was a degree to which Government could act with restraint in terms of its normal business.

Thinking about Scotland, it was possible during the period running up to 18 September last year for the Cabinet Office to say to Government Departments, “You need to exercise real care, because under the Edinburgh agreement we have said that we will honour the spirit of section 125, even though it does not apply to the UK Government, so Government needs to seek not to make announcements in the course of business as usual that could appear to impact on the campaign.” Here, as Jeremy was explaining, we do not have the luxury of a degree of control—I am not talking about total control; we do not have a degree, even, of control—over what will happen in the wider world.

As for other referendums, for AV, I venture the opinion that it was possible for the Government to run for a month without needing to make pronouncements about the electoral system for the House of Commons, so there was not a particularly high risk of Government straying into that territory inadvertently, or needing to stray into that territory because of force majeure.

Mr Lidington: There was no Government position, of course, on the outcome of the AV referendum, because the two coalition parties took opposite views.

Q382 Chair: But during the north-east referendum, there was an allegation of breach of purdah. We have received evidence from somebody who worked in that campaign. They made complaints but they never considered applying for judicial relief. In fact, John Prescott got away with announcing a change of Government policy during the purdah period. There could not have been a more blatant breach. Why do you think that they did not take legal action?

Mr Lidington: I have no idea why people chose not to take legal action in those circumstances.

Q383 Chair: Maybe it is because it does not provide much purpose.

Mr Lidington: The difference, Chairman, is that in the referendum on our membership of the EU, we first have ongoing business, the timing and content of which we do not control, which will be in our interests. Also, there is a track record of litigants going to the courts over important constitutional European matters. I have no reason to think that people have become less litigious in the years since the last such attempt.

Q384 Chair: Just for the record, NO2AV also notified us of a breach of purdah under the AV referendum. Again, they did not decide to go for judicial relief. The absence of applications for judicial relief rather suggests that the provision of section 125 is effective and sets a high threshold for such applications. The absence of any case law is an argument against changing section 125. Why is that not the case?

Mr Lidington: Because we have a track record of people seeking to litigate on matters to do with European treaties.

Q385 Chair: So the EU is an exceptional case.

Mr Lidington: I think the EU is an exceptional case. Of course, the disapplication that the Government proposed in bringing the Bill forward applied to this referendum only, and was not a permanent change to the statute.

Q386 Chair: Why isn't the exemption under section 125(3)(d) for the issue of press notices sufficient?

Mr Lidington: I have asked lawyers about this, and the advice I have received is that there is ample case law about how the courts should interpret exemptions to a general prohibition. Apparently, the courts have ruled many times that they should be interpreted narrowly, because otherwise you defeat the intention of the statutory prohibition. If, therefore, the Government simply reformulated everything and put it forward as a press release, you would actually add to the risk of a successful application before the courts, because it would be seen as a very deliberate attempt to find a way around the statute.

Q387 Chair: But if section 125(3)(d) is not sufficient, is that the exemption that needs to be expanded to give you comfort to allow for some of the examples that you gave us earlier?

Mr Lidington: The ideas that have been put to Mr Penrose and me when we have been consulting Members of the House of Commons about the way forward following Committee stage include the idea of maintaining a general prohibition, but having a range of permitted exceptions to try to capture those things on which there would be agreement that the Government should be permitted to act. Alternatively, others have suggested a general

disapplication, but then a list of specific prohibitions on Government campaigning that would, again, be defined on the face of the legislation. Those are the ways of approaching it.

John Penrose: May I just challenge you as well, Chairman? There is also the other camp that says that the press notice exemption is potentially quite dangerous in being too broad-ranging and might allow the Government, on their own, to do things that would count as campaigning. Clearly, that would create a different set of problems.

Q388 Chair: So section 125 is not tough enough.

John Penrose: I guess our point is that—this is the reason why David Lidington made the point that he did in Parliament—there are criticisms of section 125 from both sides: it is said to be both too broad and too narrow.

Q389 Chair: But what is the Government's position? Is it too tough or too narrow?

John Penrose: We have already said that we will table some amendments in due course. I think that the tabling deadline is 2 September, so we will endeavour to come up with our answers by then.

Q390 Chair: I thought that the Government's argument was that the restrictions are too narrow.

Mr Lidington: The Government's approach was—

Chair: You are now saying that they are not narrow enough.

John Penrose: I am saying that both sets of criticisms can be applied to section 125, which is why it is problematic.

Mr Lidington: Those are comments that have been made to us since the Committee stage. The Government's approach in bringing forward the Bill is the one that the Foreign Secretary and I explained on Second Reading and again in Committee: we think that the current wording of section 125 would pose a significant legal risk to European business as usual in the interests of the United Kingdom. We also argued that the Government should be free not to campaign, but to express the view that they had come to about the outcome of the referendum.

Q391 Mr David Jones: Mr Lidington, would you accept that the principal mischief at which section 125 is aimed is that of the Government, during the purdah period, seeking to use the vast machinery at their disposal to influence the outcome of the referendum?

Mr Lidington: That is certainly the fear that has been expressed to us by—

Mr David Jones: Forgive me, but I asked you whether you would accept that that is the mischief at which the section is directed.

Mr Lidington: I think the section was intended, as its heading says, to restrict the “publication...of promotional material” by public authorities. As I have described, I think that the way in which it is worded goes a lot wider than that.

Q392 Mr David Jones: Yes. Your point is that there is collateral damage, if you like, to the extent that, as you very amply described, it could influence the day-to-day business of Government as far as Europe is concerned.

Mr Lidington: Yes.

Q393 Mr David Jones: But when you wrote to Conservative MPs on 16 June, you expressed another concern: you said that not to disapply section 125 would be “inappropriate because the Government, having taken a position on the outcome of our negotiations with the rest of the EU, will naturally be obliged to account to Parliament and the British people.” Pausing briefly, I think you would accept that the Government would not be inhibited from accounting to Parliament as a consequence of section 125. Your chief concern must therefore be that you wish to account to the British people. What do you mean by that?

Mr Lidington: As has been said in the House—by, I think, the Prime Minister and the Foreign Secretary, as well as by me—the Government, having made an analysis of the outcome of their renegotiation and a recommendation one way or the other, should be able, as the Government, to continue to express that view, including during the final 28 days. What we sought to do in bringing forward the disapplication, while bearing in mind that there would continue to be guidance during a general election campaign, was to allow a distinction to be made between those things that I think most members of the public would regard as campaigning and those things that would be the reasonable expression by the Government of their preference and the reasons for that preference. I will be quite open to the Committee about this: most of the debate in Committee and in the conversations that Mr Penrose and I have had with parliamentary colleagues since then was on that point.

Q394 Mr David Jones: But isn’t that the very reason why section 125 was enacted in the first place—to prevent Government from doing just that in the last 28 days?

Mr Lidington: It is not for me to comment on the intentions of people in the then Government in 2000, but there is a perfectly respectable case for the Government, when it is the Government that have called the referendum and have conducted the negotiation, to be able to express their view. I actually think that there would be a public expectation that the Government should not get out there and compete with the Yes or No campaigns, but simply be able to say, “This is our view. These are the reasons for it.”

Q395 Mr David Jones: I think that everyone fully understands that Government Ministers will have a view and will continue to express that during the 28 days. The big concern, however, is that the Government machinery will be deployed during that 28 days to influence the outcome of the vote. I am sure that that is not what you want, but that is the concern, isn't it?

Mr Lidington: Yes, that is the concern. It is understandable but misplaced, because things can be done in a way where, as the Foreign Secretary described on Second Reading, the Government would act with restraint. They would be able to express a view without looking over their shoulder at lawyers the whole time and be able to respond factually to criticisms that had been made. We are not in the business of talking about the Government going for mass email campaigns, leaflet drops, glossy brochures, advertising or anything like that.

Q396 Mr David Jones: You say that the Government would “act with restraint”, but isn't section 125 there to provide that very restraint?

Mr Lidington: But as I said, the rigidity of section 125 imposes its own problems.

Q397 Mr David Jones: It certainly does, and you have been quite forthcoming about your concerns regarding your day-to-day business in Europe, but there is a great deal of concern that if you were unhindered by the presence of section 125, the Government would be at complete liberty to use the Government communication service to provide strong support for whatever position they had taken.

Mr Lidington: That was why in Committee I undertook to take the issue away and to examine, after consulting Members of Parliament, how we could come back with amendments on Report that would address the concerns that MPs on both sides of the House expressed during those debates so that we had a process that commanded confidence but did not actually inhibit what I think most people would regard as reasonable Government activity.

Q398 Mr David Jones: So therefore you accept that the complete disapplication of section 125 is not the answer.

Mr Lidington: I said what I said on Second Reading—I said that I would take the issue away. The Government will obviously consider what views have been expressed to us during the consultations. We will obviously want to see what the Committee reports on in due course and to take account of that. We will then come to a decision, and it is our intention to publish Government amendments sufficiently far in advance of the debate on Report that MPs have the chance to consider them and to decide what their view is well ahead of the date of the debate.

Q399 Chair: Just to come back to the point you made in your letter, you are saying that you expect to be able to use the machinery of government during the purdah period to explain the Government's case for the deal they have reached.

Mr Lidington: Yes.

Q400 Chair: Just to reiterate, I think that most people would think that that is exactly what the Government should be prevented from doing. Ministers should not have the machinery of government and their spin doctors and special advisers available to brief the media about their case in the run-up to the referendum. A point was made to us in evidence concerning the Yes side. Assuming that the main political parties are for staying in the EU, the two main political parties can spend up to £7 million each, the designated lead group can spend £7 million, the Liberal Democrats £3 million, and the SNP, Green and Plaid Cymru £700,000 each. That adds up to £26.1 million. The designated lead group on the No side can spend £7 million and UKIP can spend £4 million, which is less than half—£11 million—so the spending rules are already stacking the field in favour of one side, but you want the machinery of government to be available to Ministers, however much that would cost, to support the yes campaign as well. Why do you think that is fair?

John Penrose: Can I take on the point about the spending stuff and come back to you for the final point?

Chair: Can you answer the question—how can that be fair?

John Penrose: I will address the point about spending being fair and will ask David to deal with the other point. The spending rules basically have limits per organisation, but there is no limit on the number of organisations that can be involved on each side. That is the same in general election, too: we have individual constituency spending limits and other bits and pieces, but you can have multiple different organisations contributing to a Conservative election campaign, a Labour election campaign, or whatever it might be, so we do not have in this country a tradition of an overall, national, aggregate cap on spending, and we are not planning to apply one here. The question is therefore whether the yes or no campaign can muster more forces and more people.

Q401 Chair: Yes, I accept that. I am only making a very simple point: the probability is that the yes campaign is going to be able to muster far more resources than the No campaign, particularly given that it is impossible to bind the EU under purdah rules. How is it fair to give the yes campaign yet further fire power by making available 5,000 people in the Government communication service, 80 special advisers and so on to make the Government's case?

John Penrose: I was quibbling with your presumption about the financial fire power on each side. I was saying that I am not necessarily sure that is the case.

Q402 Chair: It ain't necessarily so; it's conjecture. But on the main point about fairness, how does allowing Ministers to use government to make the Government's case make the referendum fairer?

Mr Lidington: I think that the general public would expect that the Government, having made a recommendation for one side or the other—I am not going to prejudge that at the moment—will say what their view is. I do not think that has to involve spending vast sums of money.

Q403 Chair: The Prime Minister was bound by purdah in the Scottish referendum, but he said whatever he liked. Ministers can say whatever they like; they just can't use the machinery of government to say it in the last 28 days. What is wrong with that?

Mr Lidington: We are not saying that there should not be purdah guidelines. The argument is about the extent to which there should be a statutory prohibition in addition to those things that are governed by PPERA guidance. We have always accepted that there is going to be guidance about what is proper for the Government to do. It becomes an issue of propriety then, rather than of statute. It works very well during elections.

Q404 Chair: But you have already confirmed, as did the Cabinet Secretary a few minutes ago, that the machinery of government will be available to Ministers to explain the Government case during the purdah period. That is what your letter says.

Mr Lidington: This is not some great secret; it is something that the Prime Minister, the Foreign Secretary and I have all said at the Dispatch Box. There are two limbs to the argument for disapplication, one about business as usual and the other so that the Government are able to express an opinion. I think there is a case that if, for example, we were to come forward on Report with either of the models to which I alluded earlier, you would be looking at limiting by law Government activity in certain ways, and there would then still continue to be guidance that would define what it was proper for the Government to do in terms of permitted activity. Just as even under section 125 unadulterated, guidance would continue to bite on what it was proper for the Government to do within the permitted exceptions.

Q405 Mr David Jones: There must have been a good reason for Parliament to enact section 125 in the first place. It seems to me that the mischief it was aimed at is the one that I have just described: Government being able to express its opinion, backed up by the machinery of government, during the last 28 days of the campaign. What has changed since 2000?

Mr Lidington: First of all, I think that there is something about this referendum, which I described earlier, that adds to the legal risk involved. Secondly, I am no expert in the detail of PPERA—John is closer than I am to this—but reading this section in the context of doing EU business has convinced me that, after 15 years, the Act is, probably, worth a further

look. To take one very obvious example, the Act predated the explosion in electronic communication, social media and the like.

Q406 Mr David Jones: Which is surely, therefore, all the more reason to constrain Government?

Mr Lidington: But we are having to deal with the issue facing us now about this particular referendum. We are trying to bring forward proposals that suit that in a way that I think is fair, but without prejudice to examining the Act further in the future.

Q407 Mr David Jones: But, Mr Lidington, surely if we have all these additional means of communication, electronic and so on, all the more reason for there to be controls over what the Government can do. The tools that are available to Government are huge—vast—and surely it is still the case that the Government should not be able to use that vast machinery during the last 28 days in such a manner as might be seen to influence the outcome of the referendum?

John Penrose: If I may take half a step back for a second, I think that the point of David's comment at the Dispatch Box, which came after the letter that you are talking about, indicates that there clearly is concern about how section 125 would bite and how any civil service purdah rules, non-statutory, might interact with it. It is not just concern among Government Ministers, the Prime Minister and anybody else; it is also concern among many other parliamentarians in different ways.

I completely hear what you are saying and one of the reasons why David made the pledge that he did at the Dispatch Box was that we want to make sure that we are listening to those concerns and taking them into account. You asked questions, Chair, about the applicability and the validity of purdah, which goes, in some respects, broader and wider than section 125 and whether that would provide additional constraints. It probably would, but would it be enough? That is the sort of thing that we need to listen to and understand before we bring forward our proposals. I do not think we are saying that we are ignoring that problem at all.

Chair: Okay. We have got the point and we need to move on. Mr Cowan, do you have a quick interjection?

Q408 Ronnie Cowan: It is not necessarily quick. Going back to what Mr Penrose said earlier, something that I think we should all agree with—you said that it would be nice if we could just trust the Government. We voted not to bomb Syria but now we know, through a freedom of information request, that we are playing an active role in bombing Syria. We know that the civil service has promoted the Government's views in previous referendums. So my question is, is there any written agreement or legislation that can guarantee an unbiased referendum, or are we just pretending that there is?

John Penrose: I think my point was slightly different from the one you make. Such is the reputation of politicians in general that I think the public would expect us to have

constraints on any Government, be it in Holyrood, Westminster or anywhere else. Also, part of the function of Parliament is to stop Ministers behaving like Henry VIII—to provide constraints on ministerial actions as well. The only way you are going to ensure good behaviour, equal force of arms and fair elections is by a mixture of civil service codes of practice and, if necessary, statute in some cases, but not in all; we don't have statute applying to general elections, for example. If you did not have those things, you would have to invent them to make sure that you had a democratic system that inspired public confidence. At the moment in this country, we are blessed with a system that, through long, repeated successful holding of different forms of polls, is reasonably widely trusted. It's not perfect. There are problems, but they are individual and localised, and we need to make sure it stays that way. That was really the broader point I was trying to make.

Q409 Ronnie Cowan: But surely that is a very good argument for keeping section 125 in.

John Penrose: We are looking at options for how we can make sure that the legal risk is reduced, but public confidence in the outcome of both this referendum and future referendums is maintained. The difficulty is not the mischief that we are trying to address or the probable cross-party consensus on what we want to achieve. The question is how and whether 125 is, in some people's view, too wide and, in other people's view, too narrow to do it for this particular poll. There are criticisms on both sides, as I have said. Plenty of people think it needs to be toughened up dramatically, and other people think it is wildly too hard. Clearly, it is not necessarily going to deliver what we want, but if it isn't going to do that, we need to find ways of changing it so that it does.

Q410 Mr Turner: I understand that the Scottish referendum was not under part VII of PPERA, but something akin to that. It was a deal, if you like, between Scotland and the United Kingdom. Why were there no circumstances that you could envisage, or at least I guess you could envisage, that said that nothing that happens in Scotland can be a nuisance in Europe at this time—that is, the time when the referendum was about to take place?

Mr Lidington: First, as the Cabinet Secretary said in his evidence session, the Government of the United Kingdom was not bound by section 125 for the Scottish referendum. It agreed to abide by the spirit of 125, but what that meant was that the legal risk was not the same as it would have been had 125 applied directly. It was not legally binding, but the Government chose to act in a way that sought to comply with the spirit of 125.

There is a difference between the two referendums, in that here there is, I think, a clear risk that many items of EU business will be seized upon by the contending yes and no camps as arguments for or against their particular case. It will be, I think, very hard to separate those items, whether its fisheries, migration or budget contributions, from the referendum debate, including in the last 28 days. I think it is that that makes the difference. I was not personally involved in the Scottish campaign, but my understanding is that the issue simply did not arise in the same form there and there was not thought to be a serious risk—

Q411 Mr Turner: I wasn't involved, either, but I would be surprised if fisheries were not one of the issues in Scotland and in Europe at the same time; that could have emerged. Why are you saying that it was a waste of time to think about it?

Mr Lidington: No, I'm not saying it was a waste of time to think about it, but in any case, as the UK Government was not bound by section 125, there was not a legal risk.

Q412 Mr Turner: I called this a "deal," and you are saying that a deal could be created on the Europe referendum. Would the arrangements be more or less the same, or would they be more onerous or less onerous? Or is that a matter that is still to be decided?

Mr Lidington: The arrangements for what?

Mr Turner: The arrangements for the European referendum.

Mr Lidington: The risk would be greater and more difficult to manage than it was with Scotland. To start with because, without whole or partial disapplication, section 125, in all its rigour, would potentially apply to Government EU business, and anything that qualified under the terms of the section at EU level, as "publication." At the time of the Scottish referendum—I do not know about other Ministers—I certainly did not have legal advice to say that there was a risk of the kind that Mr Turner has described. I have had very clear advice in the context of this referendum.

Q413 Mr Turner: Yes, but I am sorry, I was moving on to apply the kinds of arrangements for the European referendum that pertained for the Scottish referendum. In other words: this is not legal, it is just a deal. I am trying to work out the sorts of conditions, or is it merely, "We are going through this, and you can trust us"?

Mr Lidington: That is precisely one of the things that we are seeking to address following the debate in Committee. It seems to me that, if I am looking at this in terms of process, there are two questions. The first is the extent to which there ought to be statutory constraint on the Government's freedom to act. As I mentioned a few minutes ago, that could be either a general prohibition from which there are permitted exceptions or a general disapplication, to which is appended a list of prohibited activities for public authorities. Secondly, we need to take into account the extent and content of guidance to civil servants and Ministers in the context of this particular referendum. We are looking at those two things together, and we will obviously come back to the House ahead of the debate on Report in September to state our conclusion. Obviously, the House will take its view.

Q414 Mr Turner: Yes, and I take it that we will be back that day. Although some people may have more to do in London, most of us have many things to do in our constituencies. What I am trying to work out is what notice you are giving about the way in which you are thinking. You said that it will be in advance. Are you giving us seven days? Twenty days? How much information will be available and, most importantly, when will it be available?

Mr Lidington: I would genuinely like to be able to give that certainty, but I am not in a position to give that certainty at the moment. I am well aware that if this were to come forward at the last minute, that would of itself arouse suspicions, so I would like to have this out in public and available to all Members of the House sooner rather than later. I also want to take account of whatever this Committee reports and of other views that may be put to us.

Q415 Ronnie Cowan: Going back to section 125, it did apply to the Scottish Government during the referendum.

Mr Lidington: Yes.

Q416 Ronnie Cowan: Yet they went about their daily business during purdah and did not attract any legal challenges. What is so different for the UK Government?

Mr Lidington: In the EU context, the UK Government is occupying the chair at Council meetings and is briefing Members of the European Parliament. The Scottish Government, like all public authorities, the other devolved Administrations and local government, is caught by section 125 and is subject to its restrictions. Now, it is obviously for the Scottish Government to decide, based on its own legal advice, the extent to which there is a legal risk attached to the positions that it takes, but what both I and the Cabinet Secretary tried to set out earlier was the fact that we have had very clear legal advice from more than one adviser that there is a significant legal risk about section 125 as it currently stands.

Mark Sweeney: Just to add to that, it is the EU context that is slightly different. Obviously I cannot speak for the approach the Scottish Government took to announcements during the 28 days. The approach taken by the UK Government at the time was that although section 125, as Mr Turner was saying, did not apply in law to the UK Government, we had agreed to be bound by its terms, so civil servants were all advised in guidance, which was made public, that any announcement that they thought might impinge on the question of Scottish independence should be avoided during the 28 days. I have seen the Scottish Government's guidance. It was longer and followed the same lines, and was similarly intended to be restrictive. The difference, I guess, certainly for the UK Government—and, I imagine, for the Scottish Government—during those 28 days was that, bluntly, they had a fair degree more control over the way that they sought to announce and do things, whereas we will be in a more reactive posture, with 27 other member states and the Commission and Court.

Vijay Ranganathan: May I just add one thing to that? We kept quite a close eye on what was going on in Brussels during that period. Two particular strictures were much easier. One was that there were not things coming up that, to use the wording in 125, dealt with the issues raised by the question on the ballot paper in Scotland. There were peripheral issues, and you are right that there were fisheries discussions. Secondly, we did not feel, and the Scottish Government did not appear to feel, the need to publish material during that period that was directly relevant to the European debate. As the Minister has said, during this European debate, every European issue will be open, so it is much higher risk, mostly because European issues are reserved, so HMG, caught by 125, will be in the position of potentially having to publish such material.

Mr Lidington: May I just address in this context a point I know members of the Committee were asking about earlier, namely the extent to which we could affect the European timetable for discussing issues that might be caught? One can seek to do that. There are some institutions—the Court, most obviously, and the Parliament—where the business is completely outwith our ability to shape the timing. But as Jeremy said, there are 28 member states with their own systems. If I look at the next six months, we have elections pending in Poland, Spain and almost certainly in Ireland. The EU cannot and will not simply stop transacting its normal business for each of those member state’s polls to take place. Those Governments are going to have to respond to and say and publish things about EU business during the run-up to their elections.

I had a look at what some other European countries that have referendums do. It is quite interesting. Denmark, Ireland and the Netherlands do not have statutory restrictions. They rely on non-statutory guidance and custom, *purdah*-style. They do not have the equivalent of 125.

Q417 Chair: I think that is incorrect. There have been cases brought in Ireland, under statute, about *purdah* and the use of Government resources. It is a much more draconian regime.

Mr Lidington: In Ireland, the challenge was brought over the Government publication of promotional material. My understanding of the Irish legal and constitutional position as a result of the McKenna case is that the machinery of government in Ireland can still be used legitimately to advocate a particular outcome, but public funds cannot be used to publish campaigning material of any kind. That is the distinction that the Irish constitutional court recognised and drew.

Vijay Rangarajan: That is right. We have looked at other member states and that is also the case in quite a few. For example, the Austrian public authorities can campaign but there is case law limiting disproportionate mass information. Quite often they are trying to strike a balance, but in almost all other member states and almost all those that follow the Venice Commission guidelines, which go into it in some detail, Governments are allowed to have a position and to set it out. The particular thing that they are trying to avoid is dominance of one side of the campaign by overt campaign material.

Q418 Oliver Dowden: Mr Lidington, during the Second Reading debate on 16 June, you mentioned an alternative clear mechanism. Can you explain what you meant by that? I noted that you seemed to be suggesting that you will no longer advocate completely abolishing section 125, but will instead advocate amending it. Will you give the Committee any further suggestions about where the Government might be headed?

Mr Lidington: I do not mean to leave Members in doubt at least for that question, but I will be somewhat coy in my answer, because I cannot prejudge the eventual collective Government decision on that. What we have tried to do in how we have thought about this is to draw the distinction that Mr Rangarajan made a second ago between the Government taking a position and the Government campaigning. We have also tried to think how we can do things in a way that does not pose a risk to business as usual at European level.

Broadly speaking, there are two approaches. One is to have a general prohibition on Government activity—publication or however you define that—and then to permit certain exceptions. You could define those exceptions in terms of a method of communication, or you could define them in terms of intent. Secondly, the other approach could involve a general disapplication, and you could then have a specific list of things which it is prohibited for public authorities to do. Again, you could define those in terms either of intention or of the mode of communication. In either model and in any of the circumstances that we are looking at, we are considering having non-statutory purdah-style guidance to govern propriety—what it is right for Ministers and officials to do—within that area of activity permitted to Government by the eventual shape of the package that Parliament agrees.

John Penrose: Whatever you do to section 125, it does not cover use of ministerial cars, to give one of the examples used by Jeremy Heywood. That has nothing to do with section 125. You would still need to have something dealing with those sorts of propriety issues as well.

Q419 Oliver Dowden: This non-statutory guidance has been described as a code of conduct to prevent the Government from conducting a range of campaigning activities. How would that code of conduct differ in effect from section 125—I know that you have touched on that a little—and who would be responsible for enforcing it?

John Penrose: That would be the direct read-across from what we would all recognise as normal general election purdah rules. It would be a specific application of those to this particular referendum. It is slightly more complicated because in a general election, obviously, Parliament is stopped and there is no Parliament for that period; amazingly, the country manages to survive briefly without Parliament. In this case, Parliament continues and there is more Government business to carry on with at the same time, so it is more complicated, but broadly speaking, those purdah rules, which inspire quite a lot of public confidence in general elections, would be needed in a modified, lemon-flavoured version for this as well, in order to fill in the gaps that section 125 does not pretend to cover, because it is mainly to do with communications rather than all the other bits and pieces that need to be governed for propriety's sake.

Q420 Oliver Dowden: On the enforcement point, would that be for the Cabinet Secretary or the Prime Minister?

John Penrose: The way that purdah normally works in general elections—I think you are covering this with Sir Jeremy—is that a series of questions comes up, and there are some very senior civil servants who need to meet to reach judgments in those particular cases. Clearly, the rules are available for people to see beforehand and in between, and if Parliament disagrees afterwards with how that stuff has been done, I am absolutely certain that Parliament will express a strong view. But when it comes to an individual case that needs discussion and agreement this morning, you need people who can come up with an authoritative judgment this morning. That is what has been happening for years and years in many general elections up until now.

Q421 Oliver Dowden: One further point on the list of European activity that could potentially fall foul of 125 as things stand. Your thinking is to put that in amendments to 125 or in the code of conduct, whichever way round you do it.

Mr Lidington: You could do it either way. There are two challenges to be thought through. One is the political one: what content is going to command the necessary degree of consensus in the House? Secondly, there is the question of drafting. My legal team keep telling me that it is always much easier to define things in terms of process than intention. We will look at both options, both in terms of statute and guidance.

Q422 Mr David Jones: If you are contemplating moving from a statutory structure to a code of conduct, how would ensure that that code of conduct applied to devolved Administrations?

Mr Lidington: I am looking at a statutory framework of some kind; even if a general disapplication were maintained, I would add a list of statutory prohibitions. Those would apply to all public authorities.

Mark Sweeney: And purdah guidance is generally agreed for the unified civil service for Great Britain between the different Administrations. Northern Ireland tends to follow that. I imagine there would be some kind of discussion between the Cabinet Office and the Office of the First Minister and Deputy First Minister in Northern Ireland about what their purdah guidance might say. Generally, as you will know, the different Administrations take care not to do, say or act in ways that would prejudice an election campaign, and vice versa in relation to devolved elections.

Q423 Mr David Jones: My concern is that if you disapply section 125 in its entirety, not only is there a free-for-all so far as the UK Government are concerned, there would also be for the individual devolved Administrations. I know, for example, that the Welsh Assembly Government are extremely enthusiastic about Britain remaining in the EU. If Welsh Ministers were to decide to pursue a certain course, we have heard from Sir Jeremy that, if section 125 were completely disappplied, the civil service would be obliged to carry out their instructions.

John Penrose: I was listening to Sir Jeremy but I was not clear about his point.

Q424 Chair: He was perfectly clear. There was no doubt about what he was saying.

John Penrose: I know you thought he was perfectly clear. I was not quite as clear as you were about his clarity. We must ask him, rather than have me try to interpret him. You are absolutely right.

Mr Lidington: May I respond to Mr Jones? If we were to go down the route of general disapplication with a list of prohibited activities—paid advertising and whatever—that would as a UK-wide statute be a prohibition on all public authorities engaging in those

prohibited activities. Similarly, if we were to adopt an alternative approach, and go for a general restriction, coupled with certain permitted activities and exceptions, then the general prohibition would apply to all public authorities, and the list of exceptions would apply to all public authorities.

The question of how to deal with local and devolved Governments comes back to what Mark was talking about. You would be looking at how you devised rules of conduct and propriety for whatever statute left as permitted areas for the activity of public authorities.

Q425 Mr David Jones: So really general disapplication doesn't work, does it?

Mr Lidington: The Foreign Secretary said on Second Reading that we would act with restraint and not engage in certain types of activity, even in the event of general disapplication.

Q426 Mr David Jones: Indeed. But you couldn't constrain the devolved Administrations.

Mr Lidington: We are in the position now that I set out at the conclusion in Committee, whereby we are consulting, in the light of parliamentary comment, and we will bring forward Government amendments in due course.

Q427 Kate Hoey: On the devolved Administrations, Mr Sweeney mentioned Northern Ireland first, which he knows extremely well. How would we deal with the situation of the Republic of Ireland where literally there is no border and which has a very strong view on the European Union? How do we prevent them from getting involved in our referendum, particularly as there are thousands of Irish citizens in this country? How do we stop that in Northern Ireland?

John Penrose: I had better make a practical political point, which is that it is open, in theory, to all sorts of foreign organisations and, perhaps, even Governments, to intervene. I suspect that whichever side they thought they were helping might not be terribly grateful for the supposed help. I suspect that it might be a kiss of death in many cases. From a purely practical point of view, it might not be advisable for them to try it; that would be my suggestion.

Mr Lidington: I think—

Q428 Chair: I am sorry but we must move on, unless you have something urgent to say.

Vijay Ranganarajan: May I just go back to a question you asked earlier, Mr Chairman, about the European Commission and others being able to donate and blow the campaign finance limits? They will not be—in the current version of the Bill, you will see that they are not—permitted participants or on the list of permitted donors.

Q429 Chair: They are not bound by purdah or by UK domestic legislation.

Vijay Rangarajan: But the people who would receive such donations are bound by that, so they could not funnel money to anyone who was a permitted participant.

Q430 Chair: The European Commission has its own office in Smith Square. It can do what it likes, can't it?

Vijay Rangarajan: It has its privileges and immunities there. They have not intervened in the domestic referendum campaigns of other countries. They cannot send money to the campaigns. As they are operating within UK law, they cannot, for example, run great advertising campaigns or be involved in any other campaigning that goes on, because they are not a permitted participant in the referendum. Separately, under the Minister's direction, we have been discussing with the Commission what sort of a posture they would take. Obviously, the posture that they have adopted in the past is as minimalist as possible. I think they will adopt that again for the reasons that Mr Penrose mentioned, that their intervention in most referendum campaigns—

Q431 Chair: In order to create a fairer referendum, just as the United Kingdom Government had an agreement with the Scottish Executive to apply purdah voluntarily, have the Government sought a similar agreement with the European Union?

Mr Lidington: We are talking to the European Commission in particular about this. This has to be handled diplomatically, rather than through legal means, because of the requirements of international law. The intimation so far from the Commission is that they do not intend to try to play an active part in a UK referendum and they understand that it almost certainly would be counterproductive for a yes campaign were they to do so.

Q432 Kelvin Hopkins: It seems that the Labour Front-Bench team has already taken up one of your alternatives. They have tabled new clause 2, which would give the Government the power to exempt from section 125 by regulation material that the Government “intend or expect to publish in the ‘purdah’ period”. That seems to allow the Government to exempt anything that they want. The phrase “coach and horses” comes to mind.

Mr Lidington: I have seen the amendment. I have not discussed it in detail with those on the Opposition Front Bench. It is an interesting contribution. I think, in fairness, they say that there needs to be an order to specify a category of permitted publication. We will come forward with a Government position in due course. I will obviously take account of the views of the Official Opposition, but I will also take account of the views of many other Members of Parliament.

Q433 Kelvin Hopkins: It hasn't arisen through the usual channels between the two Front Benches.

Mr Lidington: I can assure Mr Hopkins that neither I nor my officials have played any part in helping to draft the Labour party's amendment.

Q434 Kate Hoey: But have you had a meeting with our shadow Europe Minister to discuss the EU Referendum Bill?

Mr Lidington: I have asked them for their views, as I have asked the Scottish National party's spokesman for the views of the Scottish National party. I am asking Conservatives and Liberal Democrats for their views. The first I knew about the amendment was when I saw it on the order paper.

Q435 Kelvin Hopkins: So, you do not have a specific view at this time—not one you can divulge, at least?

Mr Lidington: At the moment, the Government is consulting. We will come forward with our own views in due course.

Q436 Kelvin Hopkins: Just in case it did come forward and the Government did think it was a good idea, how could such a mechanism remain properly accountable?

Mr Lidington: I think that is a question that Mr Hopkins needs to put to his own Front Bench in the first place.

Kelvin Hopkins: I certainly do.

Q437 Chair: If you come up with a scheme that requires clarification by order, which is what the Labour party has recommended, how important is the advice of the Electoral Commission on anything that you would want to exempt?

Mr Lidington: Obviously, we will take the advice of the Electoral Commission very seriously. In the last resort, of course, it is for Parliament to take its own decisions on these matters, but the Electoral Commission is there as an expert adviser and we will obviously take their advice into account.

Q438 Chair: How late—in other words, how far in advance of the actual referendum—would it be acceptable to change the purdah rules?

John Penrose: The Electoral Commission generally says that they would like the detailed rules around any poll—that includes purdah but is much wider; there are all sorts of other administrative rules—to be clear six months in advance of the poll. That is an aspiration to be aimed for; it is not essential in every case. We all remember that before the Fixed-term

Parliaments Act came into play, general elections were called with much less notice than six months, and they went fine. It is not essential, but the Electoral Commission says that in general, for administrative ease and the smooth running of elections, they would prefer six months' notice or so.

Q439 Chair: What does the period have to be between the conclusion of the negotiations, publication of the conclusion of renegotiation and the referendum? What is the minimum acceptable period, in your view?

Mr Lidington: There is a 10-week statutory minimum campaign period.

John Penrose: There are two elements to this. One is that we would have to pass a statutory instrument under the terms of the Bill, which we hope will become an Act, to fix the date. Assuming it follows the normal timetables, that typically takes about six weeks. Once that is passed, we would have, as David says, a 10-week minimum period. If those two things happen sequentially, 16 weeks would be the expected time.

Q440 Chair: And you would not table the SI in advance of the conclusion of the negotiations?

John Penrose: I think that would be politically rather difficult, would it not?

Chair: I think it would be politically very difficult.

Mr Lidington: You could not do that unless you were clear about the outcome. The negotiations would have to be over in substance. Whether there was then some ceremony thereafter, I do not know, but I do not see how you could set the date until you knew the outcome.

John Penrose: It would be difficult for both sides to say, "We're going to have a debate and a poll but we're not quite sure on what."

Q441 Gerald Jones: You have covered some of this, but could you explain how you would propose to amend section 125 in order that a proper purdah period be respected, while allowing the Government to continue in their ordinary activities and business?

Mr Lidington: I have to be somewhat cautious, because the Government is still consulting and will then need to discuss this and come to a collective Government view. You could do a number of things. You could either have 125 or an equivalent general prohibition and then exempt certain types of business or certain means of publication from that. Alternatively, you could continue with the general disapplication of 125, as it is currently phrased, but you would write into law a number of things that the Government and other public authorities were banned from doing for those final 28 days. There are pros and cons to both those models, and there are different variants to them.

Q442 Gerald Jones: Why do you believe that the principle of purdah is different for general elections and referendums? Can you give any examples of that?

John Penrose: I don't think the principle is different, but the legal vehicles are. In a general election, section 125 doesn't apply. Only the civil service code and guidelines are enforced. That is, broadly speaking, widely held to have high credibility and seems to have worked over many years and many elections. That is the general election example.

If you take that set of civil service guidelines and codes and apply them to a specific referendum poll, you have to adjust them a bit because the question being asked is much narrower. Incidentally, referendum questions vary referendum by referendum, so it's very hard to come up with something that works for all referendums. You may have to tweak it to apply it to a specific referendum, depending on the width of the question being asked.

Also, as I mentioned earlier, Parliament is still sitting, which is not the case in a general election campaign—the short campaign. Although the Government carries on during a general election campaign, it is hugely dialled down, and there is not very much going on, except in emergencies and that sort of thing. You are under much more control of the agenda, and you dial things right down. Therefore, you need to adjust all that for those different situations and circumstances in a referendum.

On top of that, in a referendum we have section 125, which, as I said, has noble intentions and is aiming at a particular set of mischief but is quite narrow in some respects and mainly talks about communications, rather than things such as the use of Government cars, which Sir Jeremy mentioned earlier. There are criticisms of it. In this particular case, some people are saying it is too broad and others are saying it is too narrow, for different reasons. The principle behind it—trying to achieve a fair result that everybody accepts, where the only differences between the two sides are those of democratic force of argument, rather than a slanting of the playing field—still applies. But the means that you use to get there has to be different, partly because of the width of the question and partly because we have inherited a different statutory framework in section 125 for referendums.

Q443 Chair: I think we are done. In summary, you are concerned about the potential for litigation against the Government in respect of things the Government have to do in a timetable it can't control in the European Union. The other thing you are very plainly saying is that whatever the fairness or unfairness of it, the Government as Government should be able to continue to make its case about the outcome of the renegotiations throughout the purdah period. I just want to make sure that is absolutely clear, because I think we will have something to say about it.

Mr Lidington: I think that is a fair summary of the case that we put in debates on the Floor of the House.

Chair: Thank you very much indeed. You have been very helpful and forthcoming. That is the conclusion of the public session. We are now quickly going to try to conclude a letter so you have our view very speedily indeed, and we will report that letter to the House.

John Penrose: Is that letter your part 1 report, or are you going to publish something broader than that in due course?

Chair: It will be an interim expression of our opinion, because we don't think we will have an opportunity to conclude a fuller report.

John Penrose: So therefore that is our opportunity to take the views of the Committee and factor them into our conclusions.

Chair: Yes, indeed.