



Procedure Committee

Oral evidence: [English votes for English laws Standing Orders](#), HC 410

Tuesday 8 September 2015

Ordered by the House of Commons to be published on 8 September 2015.

Written evidence from witnesses:

- [Sir William McKay KCB](#)
- [Professor Adam Tomkins](#)
- [Watch to the meeting](#)

Members present: Mr Charles Walker (Chair); Edward Argar; Bob Blackman; Jenny Chapman; Nic Dakin; Yvonne Fovargue; Patricia Gibson; Patrick Grady; Simon Hoare; Sir Edward Leigh; Ian C Lucas; Mr Alan Mak; Mr David Nuttall.

Questions 1-69

Examination of Witness

Witness: **Sir William McKay KCB**, Chair, Commission on the consequences of devolution for the House of Commons (February 2012 to March 2013) gave evidence

Q1 Chair: Sir William, thank you for coming before the Committee. We will not delay, because time is short and the demands on that time are pressing. Would you like to make an opening statement?

Sir William McKay: I do not have one prepared.

Chair: Do you feel the urge to say a few words, or are you happy to go straight into it?

Sir William McKay: The only words I will say are about the principal distinction between the conclusions arrived at by the Commission of which I was chairman and the current proposals put forward by **the** Government. The Commission relied on political forces—analogy, so far as we could get them, with the devolution

arrangements throughout the UK—and in the end, as you will see in my paper, that meant giving England a voice but not a veto. I think that is a key difference.

Q2 Mr Mak: Thank you for appearing before the Committee, Sir William. You will have seen that the Government's proposals for handling matters relating only to England or only to England and Wales go further than those suggested by the Commission that you chaired. My first question is: can those procedures be made to work on a practical basis? Secondly, could the objectives of Government policy be achieved through existing procedures?

Sir William McKay: It would be fair to say that the Government go further than the Commission was going to go, but majorities can make everything work. It is a matter of choice whether there is not a better way, but on whether the Government's proposals could work—yes, in general of course they could, and were they found wanting for any reason, they could be put right by a Government majority. But the Commission did not think that that was the right place to start.

Q3 Patrick Grady: There are some practical questions about exactly how this is going to work—if nothing else, in terms of the time to go through the various additional stages. If you have a comment on that, I would be grateful to hear it. The more substantial question is that there have been calls to implement the changes through primary legislation rather than Standing Orders. Do you think there is any feasibility in using statute, or is the proposal to use Standing Orders preferable?

Sir William McKay: On the first point, there is surely a possibility—how strong, I do not know—of what might be described as a pile-up. Again, majorities will get you out of it, but that is not a very satisfactory situation to be in, and I do not think that Chief Whips, in their darker hours, would necessarily thank those who devised these proposals. There are going to be problems, I am sure.

Should the changes be made by Standing Order or by legislation? I am firmly, 100% for Standing Orders, because the minute you legislate, you allow the judges through the door of the Chamber to say, "That was right. That was wrong." In particular, you allow the judges to say, "This Bill was wrongly categorised. I know 15 Members voted for it—or against it—and thought it was in the best interests of their constituents, but I'm sorry, I'm disallowing their

votes.” That is a possibility if you begin to ask the courts to interpret the interstices of the House’s procedures.

Q4 Ian C. Lucas: On that point, in Wales there is a certification process that is somewhat similar to the certification process envisaged in the new Standing Orders, and that is subject to judicial scrutiny. So we would have a situation where, within Wales, a certification process that is judicially reviewable was in place—I think that that is the position in Scotland as well—and in Parliament we would not. Do you see any problem with that?

Sir William McKay: I think the difference is that the devolved legislators are creatures of statute themselves and I can see no way of clawing this decision out of statute, but Parliament is exempt from that by the Bill of Rights. If you give that up, you are giving quite a lot up.

Q5 Ian C. Lucas: Do you think that that is absolute? Could there be a move to try to look at the Speaker’s certification?

Sir William McKay: In the House?

Ian C. Lucas: No, I mean through the courts.

Sir William McKay: I would hope that if anyone tried, it would get short shrift. When the House tells the Speaker in the Chair to make a certain decision about parliamentary procedure, if that is not a proceeding in Parliament, it is difficult to tell what is.

Q6 Ian C. Lucas: On another matter, the Government are proposing two tests, for “separate and distinct effect”, of whether the legislation relates exclusively to England and Wales, for example, and whether it falls within devolved legislative competence. Does this allow legislation with a separate and distinct effect on parts of the UK to be identified adequately?

Sir William McKay: I don’t know. There is a difficulty in that formulation. Although the courts cannot get into Parliament, you are asking the Speaker to give an almost unchallengeable definition of what the law says. Is something devolved or is it not? The devolution statutes try to be clear, but in the nature of things they may occasionally want judicial review to see what they mean. That is the hard bit for the Speaker, but it is not impossible. He has a lot

of legal assistance—he can have his Counsel, the Clerk of the House and the draftsmen, who work with the utmost good faith. Those are servants of the Government and you will get an absolutely candid answer from them. So the Speaker will be taking his decision on behalf of the House with the best possible advice he can get.

Q7 Ian C. Lucas: Do you think that is exclusively a legal decision, or is there an element of factual assessment by the Speaker involved in it, too?

Sir William McKay: I think it is legal—I think. But take something like—it may not be as familiar to this Committee as it was to the Committee to which I gave evidence this morning—the Tweed fisheries. I think I am right in saying that control of the fisheries on the Tweed rests with the Parliament in Edinburgh, but the southern bank is English. There will be difficulties.

Q8 Ian C. Lucas: I represent Wrexham, which is on the border. We have, for example, health services for my constituents delivered from England for specialist cases. These are factual matters. It would be very difficult for the Speaker to be aware of those.

Sir William McKay: Yes. On the Commission we heard evidence about the great pressure put on the Betsi Cadwaladr hospital from people who were, in a sense, outside the jurisdiction. It is always going to be difficult, but every judgment in court is difficult. The Speaker is just replicating within the House that meld of the practical and the legal.

Q9 Ian C. Lucas: So how would Members be able to raise such issues with the Speaker, with these Standing Orders?

Sir William McKay: In a sense, I have a counterproposal. I would say it would be quite a good idea to say to the Speaker, “Just as, before you certify a money Bill under the Parliament Act 1911, you have to consult two other members of the Panel, maybe it should be written into the Standing Orders that before you give a judgment on this, you should consult two, three, four Members who can assist.” The difficulty with the problem you are putting is that the Speaker is, as suggested, giving a non-partisan, legally sound and practically informed judgment, but the row is going to start up on a political ground. Once you start making the Speaker explain to the House, or other than very privately to a Member, the two planes do not meet: the Speaker’s legal, practical view and the House’s or the

complaining Member's political views don't meet, and it involves the Chair in a political row that he did not really want to get into.

Q10 Ian C. Lucas: But that is the product of the Standing Orders.

Sir William McKay: I reckon.

Q11 Edward Argar: You were very clear, Sir William, in your reasoning behind a preference for a change to the Standing Orders, as opposed to primary legislation. Forgive me for returning to that point very briefly, but I think it goes to the heart of this. You mentioned that the devolved Administrations, which are often referenced in this debate, are in fact products of statute granted by the UK Parliament, which I think reflects the constitutionally accepted position that the Crown in Parliament is sovereign. Forgive me if I have misinterpreted your words, but would it be a fair assessment that if primary legislation were used, there would be a very real risk of it, or of decisions, being justiciable, the effect of which would potentially be to diminish parliamentary sovereignty—the fact that the House can make decisions on how it conducts its own business and how it behaves? That parliamentary sovereignty, reflecting the democratic process and the wishes of the people, would to a degree then be diminished.

Sir William McKay: Absolutely.

Chair: That was a very succinct answer.

Q12 Simon Hoare: Sir William, if I correctly understood your response to the question from Mr Mak, you were suggesting that going down the Standing Orders route removes the chance or opportunity of a judicial review of the Speaker's decision, whereas if we were to go by statute law it would be judicially reviewable. Was that what you said?

Sir William McKay: Yes, because I do not understand the Speaker's decisions normally to be reviewable by the House.

Q13 Simon Hoare: Fine. So under the proposals as set out to do it by Standing Order, whatever decision the Speaker takes, in your view, may attract the ire and the fury or the plaudits—it's two sides of the same coin, isn't it?—of elected Members, but the Speaker would not find a decision that he has taken before the courts under a JR.

Sir William McKay: No, I think he would not. The Bill of Rights is not only clear on the matter but is supported by judgments. I cannot see any vulnerability.

Q14 Edward Argar: A point was made earlier about pile-ups, for want of a better way of putting it, of legislation through the process. Going back to what Mr Hoare just explored, were primary legislation used and were that risk to be present, would there not be a greater risk of significantly longer delays, where suddenly the courts potentially have the scope to become involved in what are actually decisions of the House?

Sir William McKay: Yes, and one of them might be, as I said, that votes cast would be disqualified. Really, nothing can go closer to the heart of parliamentary sovereignty than that.

Q15 Patricia Gibson: One of the issues arising from this Bill is the consequences for the devolved Administrations as regards the Barnett formula, and the effect of the Standing Orders for the rest of the UK. Do you agree that this legislation will have or could have unstated and potentially quite significant financial effects on the devolved Administrations? To what extent do you think the Speaker should take consideration of that when he is certificating legislation?

Sir William McKay: The Commission was very keen on trying to work out an answer to this, but it was beyond its terms of reference, so we did the best we could, and the best we could was to say, "The House needs to get upstream of the Barnett formula and the consequentials." Everyone from the House of Lords downwards who has looked at it, and everyone who came before the Commission, has said, "This is unsatisfactory."

I do not think that approaching the problem that you posed on the basis of the present structures will get anybody anywhere, because the present structures are, in many ways, not fit for legislative purpose—not fit for the House's purpose. It seems to me that the House needs to get upstream of all this, which is why we suggested that there should be a Devolution Committee, which among other things would give the House a focus with which they could improve the Barnett formula or replace it—give Members of the House more intervention power in an exercise which, at the moment, goes on within the Treasury alone.

It is all very well to say, "The House can always get at the Estimates or 23appropriation." Well, Estimates—three days, on

topics recommended by the Liaison Committee, which need not all be Barnett-related—and Appropriation Bills, which are not debateable? The House can meet these Barnett consequentialists and, indeed, the Barnett formula as a whole only by taking it by the scruff of the neck with an organ of the House. I am sure—I would hope—that your issue would be solved in that consideration.

Q16 Patricia Gibson: So that—taking Barnett by the scruff of the neck, as you so eloquently put it—should work in tandem with this process.

Sir William McKay: It need not be finished by the same time that this process or something like it is introduced, but I would hope that it could be begun and the process amended when Whitehall and Westminster, and Edinburgh, Cardiff and Belfast, have made up their minds about what a better substitute is. It seems that a more general issue is derived from that: we know, obviously, that devolution changed the British constitution, but we did not know by how much until the English problem came and bit us. That is a good reason for doing something about Barnett.

Q17 Sir Edward Leigh: I am quite interested in this subject because I think that there would be widespread political consequences if the Speaker certificated a Bill as England-only if there was any prospect whatever of there being Barnett consequentialists. I do not know what you think of this—I was thinking of tabling an amendment on this basis—but would it be practical to amend the Bill to say that the Speaker would be required to decline a Bill as England-only if there was any significant risk arising from that Bill of there being Barnett consequentialists? Would that be a practical amendment?

Sir William McKay: I am not pretending to be an expert in Government finance, but I think that you would find that the whole principle of Barnett is that English changes, in the end, equal changes elsewhere. So a Bill that had no financial consequences for England would not change the financing of the devolved Administrations, but a Bill, even if it was England-only, that did have financial consequences would inevitably work through to the others.

Q18 Sir Edward Leigh: I am a bit confused about this, because I have had discussions with the Leader of the House and he has done research on this. His view is that apparently there are never Bills that have Barnett consequentialists, but for instance, we have had a Bill to privatise water in

England, which does not obviously have Barnett consequentials, but it may do, because it may reduce public spending in England. Do you see my point?

Sir William McKay: Yes.

Sir Edward Leigh: I am trying to feel my way around whether this view that there is never a Bill that will have Barnett consequentials is actually right.

Sir William McKay: Yes, I think I would agree with that.

Q19 Sir Edward Leigh: You would agree with me that there are Bills that will have Barnett consequentials?

Sir William McKay: Yes.

Q20 Sir Edward Leigh: Therefore—sorry to press you on this—do you think it is practical for the Speaker to say that as this particular Bill, in his view, has Barnett consequentials and therefore does affect Scotland, it is therefore not England-only and he will refuse to certify it?

Sir William McKay: No. I think you have, first of all, to isolate the Barnett consequentials and put them into the mix that I have just been describing, and work out another system. But I would say that with a Bill that did not, on its face, go across any borders, you would still have to define it as purely English. But my main problem is that the House never knows, when a Bill is introduced, whether it has got Barnett consequentials, and it jolly well ought.

Q21 Sir Edward Leigh: And the Speaker doesn't know?

Sir William McKay: No. Even if all you can say is, "Well, yes, we think probably it will."

Q22 Sir Edward Leigh: That is why I say there is a significant risk. He could make a judgment under advice, could he not, that given the nature of a Bill there might be a significant risk? I am not asking that he should decree that there is going to a Barnett consequential, but he could at least consider that, could he not?

Sir William McKay: It would be sensible to ask the question in order to get a clearer view of the scope of the Bill that he is talking about. But the House doesn't know that, at the moment.

Q23 Simon Hoare: Picking up from what Sir Edward was saying, as I understand it the Law Officers look at a piece of proposed legislation to say that it accords with the Human Rights Act, for example. Could we not see a set of circumstances arising whereby there were precisely that test to see whether consequential in the Barnett formula would arise from that particular Bill as published by the Government, prior to any amendments that might come forward? Is that too simplistic a way of looking at it?

Sir William McKay: I know that could be done. It is just that both the Commission's, and I think the Government's, proposals regard Barnett as a second-order consequence and not one you use as a canon to qualify or disqualify. I think it's probably best to leave it there in the hope that there will be a better bus coming along soon.

Q24 Ian C. Lucas: I have one small point on this Barnett aspect. The Standing Orders that we have now are revised Standing Orders, and in fact they were revised by the Government, in my understanding, to try to address this Barnett consequential issue. Do you think the revision had any effect?

Sir William McKay: Can I do a note on that, Chairman? I haven't got the text in front of me and I don't want to flap around.

Chair: Sure.

Q25 Nic Dakin: You have argued for a Devolution Committee in your report, Sir William. If there is not a Devolution Committee, how should the issues that your Devolution Committee would address be addressed?

Sir William McKay: The Treasury Committee could take that upon itself. But I feel that a Devolution Committee could wrap this up with a lot of other rubbing issues, which, as I said before, reflect the fact that the constitution is now looking different since we are tackling English problems.

Q26 Nic Dakin: Have you identified any other practical changes required in how the House deals with this developing devolution settlement?

Sir William McKay: Yes, there are several possibilities that it needs to look at. There is the whole issue of the borders and legislation. There is the issue of legislative consent motions, and there are the important but bread-and-butter issues of communication between the Parliaments.

Q27 Mr Nuttall: Thank you, Sir William, for your comments so far. I just wondered whether, in drawing this session towards its conclusion, there is any practical advice that you would want to give this Committee, and indeed the Government and the House, on the actual implementation of these proposals and whether or not you think they are going about it in the right way.

We know, for example, that the House of Lords has put forward the idea that there should be a Joint Committee—something I do not personally agree with, but it is beside the point what I think. I just wondered what you think about it.

Sir William McKay: I can see issues on which there could be common ground between the two Houses, but I think this one has really got to be solved in the Commons, because things like the preference for veto rather than voice as far as Commons procedure is concerned seem to me to be the great divide between what the Commission thought and what the Government is proposing. That needs to be got right, because that goes to the heart of devolution. On whether the Lords should be involved—yes, of course, because one does not want Parliament as a whole to be running awkwardly, as it were, with the two Houses regarding different issues as important in this whole big issue. One mind would be better than two.

Q28 Mr Nuttall: Following on from that, do you think that there would therefore be merit—assuming that the proposals are introduced in the fullness of time—in having them time-limited in some way, in the same way as a sunset clause would apply to a Bill? We could have a sunset clause attached to this; or maybe it would only apply to specific Bills, just to test out whether it works or not.

Sir William McKay: I certainly think that any Government bringing in a change of this scope would be wise to say, “We and the House together will look at it after a Session or two Sessions.” The Government have said that this Committee will be invited to assess the new procedure after the first Bills have been passed under the new rules, but that means that the options open to the Committee

will be narrowed—you have got to adopt the system as it is, but fiddle with it at the edges.

I think it might be preferable to say, “We will look at the whole thing again and see if it is working.” For example, there are issues about the coming together of a lot of business at the Report stage of any Bill; we might see for example, when there are several big Bills before the House, the Government’s proposals taking up an awful lot of time, reducing their opportunities to bring in new Bills. There would be possible traffic congestion around Report stage. That really needs to be looked at in a broader way than just the details.

Q29 Chair: Colleagues, do leap in, but I have got some questions for Sir William.

Sir William, first, we received some evidence from Professor Gallagher of Nuffield College Oxford, who says quite firmly, “Most all the debate on whether the government’s proposals have unacceptable implications for finance has been about the Barnett formula. For the avoidance of doubt, the Barnett formula is not the problem...So Barnett is a red herring. It would be better however if the government acknowledged that the Estimates process—under which Parliament confers spending authority might in cases where English votes were relevant might in a few cases have to become more than purely formal if non-English MPs needed to speak and vote on spending consequences.”

I suppose what I am saying is that, as you identified in your evidence, the way we execute Estimates and appropriations is less than satisfactory in the House of Commons, and for those colleagues who are concerned about Barnett consequential, perhaps the concerns could be alleviated if we had proper debates around supply procedure. Have I misunderstood that?

Sir William McKay: No, I think that is absolutely right. One can understand how the House got into the situation it is in, but devolution changed all the questions. As Professor Gallagher says, it would be much better to pull up that plant and look at it again—but, as I say, as well as Barnett.

Q30 Chair: It seems to me, from my 10 years in this place, that the Barnett formula has always been coincidental to debate and not at the centre of debate in a structured way. Again, can I press you on your idea of a Devolution Committee? One of its main tasks would be to look at

issues around the Barnett formula and allow for properly structured representations and discussion. Is that right?

Sir William McKay: Absolutely, yes. The House of Lords Committee—three years ago now, I think—had a go at it. The problem hasn't been solved. If set up, this Devolution Committee, although it would have Barnett in its foreground, would in its background also have appropriation and the Estimates.

Q31 Sir Edward Leigh: On this question of an extra Committee, I did some work for the Chancellor; he asked me to produce a report on improving financial scrutiny by the House of Commons of Government Estimates. Actually, I did it with John Pugh, the Liberal MP, and in our report we said to the Chancellor there should be a Budget Committee. We said the whole Estimates process was just a farce, really; the House of Commons had lost control over it—it took enormous interest in political matters and enormous interest in taxation, and very little in the whole Estimates process.

Our idea was that more time would be spent on Estimates—colleagues and Select Committees would be required to spend more time on Estimates—and there would be a specific Committee, separate from the Treasury Committee, to deal with this. The trouble with the Treasury Committee is that it is unbelievably busy already, because it is dealing with the Bank of England, interest rates, the global economy and so on. You see my point. But it does seem to me that around this debate on the Barnett formula, there might be a prospect for the House to regain some control over the whole Estimates procedure, which at the moment is just farcical.

Sir William McKay: Yes, a decision would have to be made on whether the Committees—the Budget Committee and a Committee dealing with Barnett—were one or two. The difficulty with making them one is that there are other aspects of devolution that need to be kept under control as well as Barnett. Ideally, one would want two Committees, but the manpower of the House is limited. As I say, it is difficult to man them if we keep multiplying them.

Q32 Nic Dakin: In your Commission's report, Sir William, you were very clear about the dangers of creating two classes of Member of Parliament. In moving from a voice to a veto, are the dangers of that increased? If all Members of Parliament are in the Chamber together but only some of those Members of Parliament can vote at a particular time, are there practical problems as well as symbolic problems?

Sir William McKay: This would be a completely new element in the history of the House. Once you say that a Committee can end a Bill and the House can do nothing about it, I think you have certainly created two classes of Member. Never mind where they represent, it's the powers they can exercise. The further development of that is this: if the House of Commons, in a Committee, can put an end to a Bill, what about the case in which the majority is a coalition and the Conservatives are in the minority but in the majority in England? One of the English Committees that has an Opposition majority kills a Bill, and there is the Government, unable to pursue its policy with what, after all, Arthur Balfour called the predominant partner in the Union. That's a funny outcome, to say the least.

Chair: Quite a few people want to come in quickly, but Bob hasn't come in yet. We have 10 minutes, so could you be short and snappy?

Q33 Bob Blackman: I have just one question on the whole process, Sir William. If the Speaker decides that this is an England-only Bill and then, during the process of going through the House of Commons, an amendment is made that renders the Bill not an England-only Bill, what problems do you foresee in that respect?

Sir William McKay: The draftsman would have to be very clear in his drafting that this was an England-only Bill, and then to expand the Bill beyond England would require an extra leg of procedure. I do not have my "Erskine May", and I couldn't find the relevant page if I did, but I seem to remember a Bill that was extended to Northern Ireland halfway through its career, and we had to go through several hoops separate from the Bill to get there. That is not a bad system, because if you have to go through hoops separately to extend the geographical scope of a Bill, that is not really at odds with our suggestions. If you wanted to add Northern Ireland to the Bill, the separate hoop that you would be jumping through would raise the issue. Whatever Standing Orders we had could be looked at and tweaked in that context. It is not a thing that you would do on the hoof, but there is an extra little bit to do, which gives you the opportunity to vary the Standing Orders, or whatever it is you need to do to draw attention to what you are up to.

Q34 Bob Blackman: Building on that, what happens if the other place adds clauses that broaden the scope of an England-only Bill? What would be the impact there?

Sir William McKay: Broadened out to other places? You couldn't expand to Northern Ireland a Bill that deals with England if Northern Ireland wasn't in the title, or unless it was a UK Bill. If the long title says "This is a Bill to do x for England," before you could get on the Floor of the House to move an amendment to say, "Yes, and Northern Ireland as well," you would have to go through some extra procedures.

Chair: We have Simon, Ian and Patrick. We have nine minutes, so short and sharp.

Q35 Simon Hoare: I can be. Going back to Barnett very quickly, we have a 21st-century proposal—English votes for English laws—to address the democratic deficit post the devolution settlement, and we seem to be twisting ourselves into all sorts of shapes to try either to retrofit it or to retrofit the Barnett formula, which is 40 years old, to meet it. Wouldn't it just be better to get rid of the Barnett formula, full stop, and to create something new?

Sir William McKay: That was the purpose of the Devolution Committee.

Q36 Ian C. Lucas: English MPs, as you said, have the right to end a Bill through their veto. I have asked the Government whether, in non-devolved areas that affect Scotland and Wales, they will give that same right to MPs from Wales and Scotland, and they have said that they won't. I am a little bit upset by that, as an MP from Wales, because I feel that I am being treated as a second-class MP. Do you think I have a case?

Sir William McKay: I don't think that I would like to be drawn on that question. You are making a political point.

Q37 Ian C. Lucas: But there are matters that affect only Wales or Scotland. For example, in the Chamber I referred to the Welsh language within the courts in Wales, which is a non-devolved area that specifically affects Wales. I would argue that MPs from Wales should determine policy in that area, but English MPs, through their Committee, could block policy in another area.

Sir William McKay: In a sense, the solution exists. We have a series of Standing Orders that are not used very much and that, with a few tweaks, would more or less allow a Bill to change the law on non-devolved matters that affect only Wales—exactly as you

mentioned—to go through the House with only Welsh Members being involved.

Q38 Ian C. Lucas: But that is not the procedure the Government propose to use.

Sir William McKay: It is there in the Standing Orders. They may not use it, but—

Q39 Ian C. Lucas: But they are using this for English MPs.

Sir William McKay: Well, yes.

Q40 Patrick Grady: On relating the issue of parliamentary sovereignty with the creation or effective appearance of two classes of MPs, from a purely procedural and practical point of view, does Parliament have the power to distinguish among its Members? Can the House say, “You are excluded from these votes” in exactly the way that you describe, and not necessarily just on the basis of where someone comes from or what party they belong to? I am interested in the precedent that this could set and whether it opens things up to any kind of legal challenge. If on one level I have been elected to the House of Commons under this set of Standing Orders to represent my constituents in the way that they expect me to do and then half way through I get told by the rest of the House of Commons that, in fact, I will not be voting in a whole pile of procedures, is that fine? Can the Commons just do that without any concern of legal challenge?

Sir William McKay: Yes, that is right. The Bill of Rights protects procedures whether you like them or not. It is an absolute defence.

Q41 Patricia Gibson: My question relates to the point Ian made earlier about how we safeguard against political game-playing. For example, what would happen if a party had a majority in the House of Commons, but, when you stripped out its Scottish MPs, it no longer had a majority and, in effect, its programme for government in England could be blocked by Opposition parties, perhaps for purely political purposes?

Sir William McKay: I do not see any way under the Government’s proposals of stopping that.

Q42 Patricia Gibson: So does that mean that EVEL could be used as an instrument to paralyse a Government?

Sir William McKay: Paralysis would depend on the circumstances, but it is plain that a majority of English Members can kill a Bill in a Committee, and that is new. And I do not see any way of stopping it if that is what the House's rule says. The only recourse that a Government would have would be to change the Standing Orders. That is why I think the Commission's principles are better. It does not give anybody a veto; it says that the majority of the House has resolved that it will usually not disregard the voice for England. The Commission hoped that that would become a constitutional convention, just as no Government since devolution started in the '90s has tried to undo what a devolved legislature has done. So maybe the House of Commons would learn not to undo what the English voice wanted.

Q43 Chair: May I ask you a final question on certification? We received evidence from the Welsh Assembly, where attached to Bills there are up to 400 pages of certification notes. Also, in the various Assemblies and Parliaments, the Speaker, or their equivalent, likes to receive a Bill between two and four weeks before it is presented so that the process of certification can be undertaken. How do you see these issues impacting our Parliament, given your vast experience of Government Bills that tend to get larger and larger?

Sir William McKay: They do. I think it will be very difficult to work for a new Government, new Session and new Parliament. You would have to send the House away for a very long time before it first met after the election in order for 400-odd pages to be digested.

Q44 Chair: Do you think 400 pages are necessary? They might be necessary in Wales because that is a different set-up, but do you think that could be excessive?

Sir William McKay: I am not really qualified to say. I would have thought not, but if it happens—

Q45 Chair: If you were minded, having left this Committee, to exercise an hour of your time, I would be grateful if you could turn your great brain to looking at that—there is no obligation, but you could send a letter, having considered it. Your view would be much appreciated by the Committee.

Sir William McKay: Of course.

Chair: Colleagues, we have used our time magnificently. Thank gosh you arrived a minute early, Sir William; otherwise we would have overrun.

We will now have a short break as we set up the satellite link to Scotland, which is exciting. Things have changed a lot since you were here, Sir William—it's this new-fangled modernity. Thank you so much for your time.

Examination of Witness

Witness: Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow (via video-link), gave evidence.

Q46 Chair: Professor Tomkins, thank you for joining us from Scotland. The Committee has just heard evidence from Sir William McKay, which was extremely interesting. We have also read your written evidence, and we have a few questions for you. Would you like to make an opening statement first?

Professor Tomkins: Only to say that, as I set out in my written evidence, the evidence I am giving you this afternoon is strictly in my personal capacity. I do not seek to represent any party or any Government, or anyone else. I am certainly not seeking to represent my employer. The only thing I should add is that since I sent you my written evidence I have been selected as a parliamentary candidate for the Scottish Conservatives for the Holyrood 2016 elections. I am a Conservative party candidate but that is not the capacity in which I am appearing before you today.

Chair: Okay. Let's crack on then.

Q47 Edward Argar: Professor Tomkins, in your written evidence you called for a change in legislative drafting practice to make EVEL work effectively. I think that was the phrase you used. Could you give the Committee a few examples of what drafting practices you think might have to change, and how?

Professor Tomkins: The reason why I said that in my written evidence is because, as you know, the Government's proposed Standing Order 83J talks about provisions of Bills—or, indeed, whole Bills—that "relate exclusively" to England or to England and Wales, and are within the devolved legislative competence. Bills that come before the United Kingdom Parliament are not currently drafted with

those tests in mind. As you all know, the territorial extent of legislation if it were to be passed unamended is set out on the face of the Bill, but we know that territorial extent is not what is meant by “relates exclusively to Wales”. So it seems to me that if this scheme is to work in such a way as to mitigate some of the concerns that you were just talking about with your previous witness, it would be prudent, shall we say, for the legislation to make it clear on its face whether in the Government’s view—I assume that we are talking about Government legislation—the legislation is designed to relate exclusively to England or to England and Wales. Perhaps the reasons why that conclusion has been reached should then be included in the Bill’s accompanying explanatory notes.

Q48 Edward Argar: Thank you. With that in mind and to a degree following on from that, how common do you believe it would be that Bills which extend to the UK or Great Britain had provisions which would in practice apply to England or England and Wales only, and would therefore meet the certification test?

Professor Tomkins: I think it could apply to a lot of legislation, most obviously in the fields of health, education and local government, which as you know are devolved in their entirety to the Scottish Parliament so far as Scotland is concerned. Some of the provisions would be England and Wales provisions, and some would be England-only provisions. I think that, more often than, not legislation in those three fields would not apply to the whole of the United Kingdom.

Q49 Simon Hoare: The proposed process which we have before us requires certification by the Speaker, who would give his opinion on the territorial application of the Bill and on the competence of the devolved legislatures. What advice do you think ought to be available to the Speaker of the Commons when making that determination, in order to put him beyond what I suppose could be called common criticism?

Professor Tomkins: I certainly would not want the Speaker to be subjected to common criticism—uncommon criticism, perhaps. Ordinarily this will be straightforward. If there is a Bill to release state schools in England from local education authority control so that they can become academies, for example, it is pretty clear that that is an England-only measure. Likewise, if there is a Bill which, for the sake of contrast, is about the United Kingdom’s future membership of the European Union, then clearly that is not an

England-only measure. It may well be the case that in a large percentage of cases there will be no difficulty and the Speaker will not need any advice, very much, beyond the advice of someone who has read the Bill and who is competent to read Bills. But in all instances where there are border disputes and it is not clear on the face of the Bill whether the measure in question is England and Wales-only, or has consequences for other parts of the United Kingdom, or has consequences for other parts of the United Kingdom that are more than merely minor or consequential—those are the terms that are used in Standing Order No. 83J(2), but they are not necessarily as clearly defined as they might be—the Speaker is going to need extensive legal and expert constitutional advice.

These are issues, of course, that, in the context of navigating the boundaries of devolved competence—both in Scotland and more recently and more problematically in Wales—have detained the attention of the United Kingdom Supreme Court on numerous occasions in the past few years, and have sometimes divided opinion among the justices of the Supreme Court. There will be cases where these things are finely balanced and require expert judgment that should be taken, in my view, on the basis of expert constitutional and legal advice. The Speaker's Office would need to ensure that it was adequately equipped to meet that challenge.

Q50 Patrick Grady: I think some of my colleagues might come back to these consequential effects, especially through the Barnett formula. Sticking with the advice available to the Speaker and the determination that the Speaker is going to be expected to make, that determination will have the effect, on occasion, of excluding certain Members of the House from participating in certain proceedings on the legislation. Do you think that there is any risk to the legislative process if a certificate that the Speaker gives turns out to be in conflict with a judgment from the Supreme Court? We were advised by the previous witness that the sovereignty of Parliament was absolute and the courts would simply kick out any attempt to challenge a decision by the Speaker, but do you think there would be any risk? Do you think if the Speaker was to indicate the reasoning behind any decisions on certification, that would increase the risk of judicial challenge, or would it possibly decrease it, if people thought, "Oh, that's fair enough"?

Professor Tomkins: As you will see from my written evidence, I am not comfortable about the rule in the proposed Standing Orders that says that the Speaker shall not give any reasons for his decision to the House. It seems to me that it is in the interests of transparent parliamentary Government that reasons for decisions

are given, even if the underlying detailed legal advice is not always—or indeed not ordinarily—made public. But I think that proceeding by way of changing the Standing Orders of the House, rather than by legislating in primary enactment, is the right way to go to deal with this problem, partly because it is increasingly difficult for the United Kingdom Parliament to legislate so as to oust the jurisdiction of the courts effectively. Parliament has tried in a number of different ways and in a number of different pieces of rather important constitutional legislation.

I gave the example in my written evidence of the Freedom of Information Act. There is not an ouster of judicial review in the Freedom of Information Act, but there is a very unusual provision in that legislation that grants Ministers and the Attorney General the right to veto the decision of a tribunal to disclose information where the tribunal has decided that it is in the public interest for that information to be disclosed. The Supreme Court, in a case that was famous because it involved the heir to the throne, Prince Charles, earlier this year, overturned the exercise of that veto by the former Attorney General, Dominic Grieve.

That is just an illustration of how difficult it is for Parliament effectively, robustly, in a kind of watertight way, to legislate to oust the jurisdiction of the courts. So any kind of primary legislation, no matter how carefully drafted, would run the risk, if that legislation included a Speaker's certification process, of ending up with the Speaker being challenged by judicial review or other action in court. That is why I support moving by way of Standing Order rather than primary legislation.

I do not know if that fully answers your question, Mr Grady, or if you want me to go further.

Q51 Patrick Grady: That is helpful, but could you elaborate a bit more? You say that there is merit in the Speaker publishing the reasons, but if it wasn't open for review or challenge, what would be the purpose or the benefit publishing his reasons for certification?

Professor Tomkins: To inform the House. As I said in answer to a previous question, it is inevitable—we shouldn't be embarrassed or shy about it or even particularly worried—that from time to time it will be controversial whether a matter is UK or England-only or whatever. The more information the House has about the reasons underpinning the thinking as to whether a measure is UK or

England-only, the better informed you and all your colleagues, wherever you represent, will be.

Q52 Ian C. Lucas: The current test for the Standing Orders determining whether legislation is England or England and Wales only, appears to exclude consideration of consequential effects, such as cross-border effects, when the Speaker makes his decision. Do you think that that is the correct approach or do you think that such issues should be taken into account by the Speaker when he makes the decision?

Professor Tomkins: I think it is really difficult. I don't have a clear view about this. It is for those sorts of reasons that it might be thought prudent to proceed by way of a pilot or case study in this area. I don't think that cross-border effects, so far as Scotland and the rest of the UK are concerned, are as liable to cause difficulties as the cross-border effects between England and Wales. The nature of the border between England and Scotland is very different from the nature of the border between England and Wales. For one thing, the Anglo-Welsh border is crossed many more times every day than the Anglo-Scottish border. I think that something like 48% of the Welsh population lives within commuting distance of England—lives within 25 miles of England. That is half the Welsh population. That is certainly not the case in Scotland; the borders are of course populated, but they are thinly populated.

When it comes to thinking about consequences, being based in Scotland, I thought much more about the Barnett consequentials, which you may want to come on to, than the cross-border implications. We are all aware of the fact that in north Wales and south Wales there are significant cross-border implications, with regard to health for example, and whether all those issues have been fully thought through in the drafting of these Standing Orders will need to be tested.

Q53 Ian C. Lucas: That is very helpful. What would you like to say about the Barnett aspect of this?

Professor Tomkins: I could not catch all the evidence from the previous witness, but I did manage to catch most of it online. I heard some of what was said about the Barnett formula. I endorse what your previous witness said, in the sense that no independent expert, commentator or Committee that has looked at the Barnett formula thinks that it is fit for purpose. There is no other country in the world, whether federal or quasi-federal, that operates its distribution of national resources in the way that the United

Kingdom seeks to do through the Barnett formula. There is nothing wrong with being different. There is nothing wrong with being unusual, but sometimes it does make you pause and think about whether you are really getting it right.

The critical problem with the Barnett formula is its opacity. People who say that it is very clear and straightforward are people who do not really understand what the Barnett formula is. I am one of the people who does not really understand what the Barnett formula is, but I know enough about it to know that it is neither clear nor straightforward. The problem with the Barnett formula in this context is that spending in Scotland is determined by reference to certain aspects of departmental spending in England. If there are significant legislative changes to the national health service in England for example, it may be that they will have consequential effects in terms of the money that flows down the pipe to the Scottish Ministers through the transfer of the block grant.

It won't be the legislation itself—it won't be the Health and Social Care Act 2012—that changes the block grant; it will be the supply process that follows the enactment of the legislation. As you discussed with your previous witness, the way in which the House of Commons deliberates upon supply—the Estimates process—is even more opaque than the Barnett formula. It may be that one unintended consequence of English votes for English laws is that the House of Commons finally, if I may say so, wakes up to the reality of the fact that it doesn't do a very good job of voting supply and makes the supply process more transparent and open—an outcome that involves effective parliamentary scrutiny. For an outsider like me, that would be a good thing, but, as I say in my written evidence, I suspect the Treasury will take a different view.

The point is this. At some point, Members of Parliament from the whole of the United Kingdom will have to have the chance effectively and robustly to debate the financial consequences of legislation, even if that legislation is England-only. If those Members of Parliament are excluded from aspects of the legislative process when the Bill in question is going through—because it has been certified as an England-only Bill and they happen to represent constituencies where I live, for example—they will have to have their chance to deliberate those matters effectively and robustly when the Barnett consequentialia are debated because of the supply question. It doesn't matter to me which occasion is taken, but one of those occasions will have to be taken. It would seem to me very unsatisfactory indeed if, for example, Scotland's MPs were denied both the opportunity to debate Barnett consequentialia when the

legislation is going through by virtue of EVEL, and thereafter also denied the opportunity to debate it in the supply process, because the supply process is effectively controlled by the Treasury and not by the House.

Q54 Ian C. Lucas: But isn't that the situation that is being created by these proposed Standing Orders?

Professor Tomkins: The situation being created by these proposed Standing Orders is an opportunity, which I hope you and your colleagues in the House of Commons take, to revisit and revise—i.e. blow apart—the current supply procedure.

Chair: There seems to be a uniformity of view in the evidence we have received from academics and interested observers.

Q55 Sir Edward Leigh: On that point, I don't know whether you heard the questions I was putting to Sir William earlier, but this seems to be the nub of the problem. The Leader of the House tells me that his advice is that there is no Bill on its own that he is aware of that would have Barnett consequential. But we know that, for instance, if you change the funding of the national health service or something, ultimately—although it does not mention Scotland and on the face of it is only concerned with England—because it affects spending on the national health service, it will have Barnett consequential. The Leader of the House said, "To get round that problem, I am going to allow all Members of Parliament to take part in the Estimates procedure." The trouble is that during the Estimates procedure—I did a report on this for the Chancellor—the one thing you don't discuss is the Estimates. You discuss everything else. You discuss whether we should bomb Syria and things such as that. Frankly, it is just a three-day general debate. When my colleague, John Pugh, did a report with me on this, he did an experiment: he went along to the Estimates debate and started to talk about the Estimates, and he was immediately drawn up and called out of order because it was a debate on something that wasn't Estimates. See what I'm getting at? I think we have a real problem here.

Professor Tomkins: What you are getting at is a very important point, but it doesn't have anything to do with English votes for English laws. The problem you are identifying here is not a problem with the Leader of the House's proposed Standing Orders. The problem here is with the way in which the House of Commons deliberates or does not deliberate upon Government spending.

Q56 Sir Edward Leigh: But in a way it does have something to do with English votes for English laws, because the Leader of the House tells us that he cannot conceive of any Bill that does have direct Barnett consequential, but he says, "If there is such a Bill, don't worry, because you Scottish Members can take part in the Estimates procedure", but we know that the Estimates procedure has nothing to do with Estimates. Do you see my point? I think you are right in saying that one indirect effect of all this might be that we reform the Estimates procedure, but can I put the same question to you as I put to Sir William? Do you think that, in order for there to be a safety valve or back-up, it would be practical to give the Speaker power to refuse to certify a Bill if he was advised that there was any significant risk that there would be Barnett consequential? Would that be practical, do you think?

Professor Tomkins: As I understand it, the phrase "Barnett consequential" is not used in the proposed Standing Orders—I am happy to be corrected if I am wrong about that. What the proposed Standing Orders talk about are "minor or consequential effects". It seems to me that it would be within these proposed Standing Orders for a Speaker to refuse to certify that a Bill was England-only, or indeed England and Wales-only, if he thought that a major effect of the Bill would be to considerably slash public spending in another part of the United Kingdom. It seems to me that that would already be within the rules. That is part of the problem in that what you are doing in these Standing Orders is investing in the Speaker a very great deal of discretion and judgment as to which Bills and which provisions of Bills qualify as being England-only or England and Wales-only.

Q57 Sir Edward Leigh: Is there not a risk, therefore, that you are in danger of politicising his office?

Professor Tomkins: Yes. Undoubtedly.

Q58 Chair: Surely you are always going to politicise the Speaker on that basis, if he makes a decision that someone does not like. The nature of making decisions is that there is always someone out there who does not like your decision. Couldn't that be applied to any decision the Speaker makes in the House?

Professor Tomkins: One of the ways in which you depoliticise decision making, or take away the risk of the appearance of politicising an office such as that of the Speaker, is by requiring decisions to be reasoned. I again come back to the point about the

Speaker not being permitted, as these rules are currently drafted, to give reasons for his decision. When judges give reasons for their decisions they can often—not always—take the political heat out of the consequences of their decision making.

Q59 Edward Argar: I will be very brief. Professor, this goes back slightly to what we were talking about earlier. You may have seen Sir William's comments on this. One of the suggestions that has been made in the course of this debate, and was put to Sir William, is that there would be a risk, depending on the electoral arithmetic that produced a particular House of Commons, you could have a UK Government that found certain key parts of its legislation or legislative programme not able to be put through by virtue of the proposals under Standing Orders here.

I think Sir William was clear in saying that, while that could happen, actually it would always be within the power of the House as a whole to reverse the Standing Order change and pedal back from there. So actually you would not see a Government paralysed, for example, by virtue of this. I would welcome your observations on his point: that while an individual piece of legislation could be blocked, depending on whether a Government was relying on Scottish MPs to give it its majority, there was always the possibility of repealing the Standing Orders or changing them, if the Government did become paralysed by virtue of that.

Professor Tomkins: There is that, but I would not use the language of Government paralysis. I would rather say "parliamentary strength". *[Interruption.]*

Chair: We are back after losing the feed for a moment. Professor Tomkins, you were responding to Edward's question.

Professor Tomkins: How far did we get?

Chair: I think you mentioned parliamentary strength.

Professor Tomkins: Ah yes, Government paralysis. A future Labour Government, for example, that was reliant for its majority in the House of Commons on MPs in Scotland and did not, in other words, have a majority in England, there is concern in some quarters that such a Government might face paralysis. But it would not face paralysis; what it would face is the obligation to negotiate with democratically elected representatives of England which aspects of its programme it could get through. Why would it have to do that? It would have to do that because it had failed to win a majority of seats in England. That is not paralysis; it is democracy,

in the same way that you have already have with a minority Government.

We had a minority SNP Administration in Scotland for four years. That Government never struggled to get its Budget through, because every year the Cabinet Secretary for Finance negotiated with the leaders of the other parties—principally, as I recall, the Scottish Conservatives—so majority support could be formulated within the Scottish Parliament for those Budget proposals. That is not Government paralysis; it is parliamentary democracy. Everything that weakens the hand of Government and strengthens the hand of the House of Commons in Parliament, it seems to me, should be looked at positively rather than negatively.

So I am very sanguine—very relaxed indeed—about it and would actually encourage making it more difficult from time to time for Governments to steamroll their legislation through the House of Commons. More to the point, underlying that, it is correct that Standing Orders made by one House of Commons can be revoked by the next House of Commons. Any Government that was struggling to get its legislative programme through because of the Standing Orders would be at liberty to come to the House of Commons with proposals to revise or indeed revoke those Standing Orders.

Q60 Patricia Gibson: Just a quick point, Professor Tomkins. If a Government was struggling to get its legislative programme through and decided that that the best way forward was to suspend Standing Orders, would Scottish MPs, in your view, be permitted, or be eligible—or should they be eligible?—to vote on the suspension of those Standing Orders?

Professor Tomkins: Oh, goodness, that is a good question. I had not thought of that. May I do so? So we are talking about a future, hypothetical Government that does not have an English majority.

Patricia Gibson: That's right.

Professor Tomkins: I do not think there would be constitutional answer to that question. I think that is a political question. I'll have to think about that.

Q61 Patricia Gibson: In your view, could that precipitate a constitutional crisis?

Chair: I have thought about this. Let me help. Standing Orders belong to the House of Commons; they do not belong to the Government. This issue is not going to arise. Any Member of the House of Commons can put forward a motion to change Standing Orders. Indeed, it does not require a future Government to change Standing Orders: we could change Standing Orders tomorrow and then on Thursday change them back again, if we so wished. So really, for the Government to get its Standing Orders through, it has to have the House of Commons behind it, as with this legislation. Standing Orders, unlike legislation, very much belong to the House of Commons.

Patricia Gibson: But my question was really about whether that should be the case in this discussion and scenario.

Chair: Hmm, I think we are straying into very hypothetical territory. Professor Tomkins, I cut you off mid-steam.

Professor Tomkins: We do deal with hypotheticals from time to time in the academy. Regarding the use of the language of a constitutional crisis, these proposals are not designed to trigger a constitutional crisis; they are designed to prevent a constitutional crisis. We have at the moment, in the shape of our territorial constitution of the United Kingdom, a democratic deficit in England. These proposals are designed to try and find a way of dealing with that problem without creating a new Parliament for England, for which there is very little support, and without dividing England up into regions, for which there is even less support.

My view is that these proposals do not create two classes of MP, which is one of the phrases that has been used in some previous discussions, but they recognise that what the House of Commons already does is legislate for two different sorts of law. The House of Commons legislates for law that pertains to the whole of the United Kingdom, but it is also England's legislature, and some way must be found to ensure that the dual role of the House of Commons, as both England's Parliament and the Parliament of the whole of the United Kingdom, can be made more manifest, so as to address this democratic deficit that I think the English suffer from, because devolution has not been extended to England, for the reason that the English do not want it.

Q62 Ian C. Lucas: But isn't one of the issues that in England, under these proposals, the additional rights that will be given to English MPs but not to the MPs from Scotland and Wales do not take into account the changed electoral system that was introduced in Wales and Scotland with

devolution? So we have an overwhelming number of Conservative MPs elected on a first-past-the-post basis, whereas when the Labour party introduced devolution in Scotland and Wales, it introduced list Members to compensate and ensure representation for what were then minority parties. These proposals contain no balance of that nature, and they give to English MPs an enormous amount of power which the Government refuse to give to Scottish and Welsh MPs.

Professor Tomkins: I suppose part of the answer to that might be that these proposals pertain to the lower House in a bicameral Parliament, and the electoral systems for the Welsh Assembly and the Scottish Parliament, which you have just talked about, are electoral systems for unicameral Parliaments. There is no revising Chamber; there is no check and balance above Holyrood. What Holyrood says is what the law of Scotland is. Please do not think that I am making an argument for a Scottish House of Lords, because I am not. We need to think very carefully in Scotland about the lack of checks and balances in the Scottish element of the constitution, but I think that the revising function that the House of Lords plays in the United Kingdom Parliament should not be underestimated.

Chair: Jenny, do you want to bring this to an end?

Q63 Jenny Chapman: I will try—actually, I would love to. I come from the north-east, where the Barnett formula certainly preoccupies colleagues in local government rather a lot of the time. Both you and our previous guest, Sir William McKay, seem to suggest that it is desirable that the Barnett formula is changed. He said that it should be improved or replaced, and I think you have said that EVEL should be made to work in the light of and taking into account the operation of the Barnett formula. Are we to read into that that you think that, if we do not reform Barnett or reform the way that we deal with Estimates, these proposals are less desirable than they would be if we were to make those changes?

Professor Tomkins: No. I would not start from Barnett, and I am in a lot of good company in that—nobody who has looked at Barnett would start from Barnett—but there is a political commitment to maintain the Barnett formula. It was in the Conservative party manifesto and the Labour party manifesto; it was also in that front page *Daily Record* thing called “The Vow”, which some of your Committee members will remember from last year. There is a cross-party political commitment to maintain the Barnett formula for the foreseeable future, so there is no point starting from a position of saying, “Oh, let’s get rid of the Barnett formula and then we can

make EVEL work,” because the Barnett formula is not going anywhere any time soon.

That is why I say in my written evidence that whatever we do with English votes for English laws has to be made practicable and operational in the light of and through using the Barnett formula. I think that can happen, but I think it can happen only if there is a clear opportunity for MPs representing constituencies from across the whole of the UK effectively and robustly to engage in deliberation and debate in the supply or Estimates process. At the moment, it seems that there is no such opportunity because, as we have heard from your colleagues earlier this afternoon, Estimates debates tend to be very wide-ranging—about everything other than the Estimates, as it was put a few moments ago.

So that is the bit of the puzzle that I would change. I am in favour of English votes for English laws; I am broadly in favour of this scheme for English votes for English laws. I recognise that the Barnett formula is not going away any time soon, so we have to put all these pieces together and make them work. The fly in the ointment is to have this current inability or unwillingness to debate robustly and effectively parliamentary Estimates.

Q64 Jenny Chapman: So it all comes down to that, for you?

Professor Tomkins: This aspect of it comes down to that, yes.

Q65 Jenny Chapman: And if we were not able to change that, what would that mean?

Professor Tomkins: It would mean that there was a problem in the United Kingdom’s parliamentary government, in the sense that our elected representatives were not able effectively and robustly to debate Government spending.

Q66 Jenny Chapman: It might mean other things, too.

Professor Tomkins: It might precipitate a constitutional crisis; you never know.

Chair: Jenny, you have the final question to Professor Tomkins, but your line of questioning has initiated one further question from Sir Edward, and it is going to be a very brief one.

Q67 Sir Edward Leigh: I do not know whether you have read Professor Gallagher's evidence to us. It is quite interesting because although he says he supports the principle of English votes for English laws, he identifies serious problems to do with the sovereignty of Parliament, secondary legislation and income tax, and he concludes: "As a result, if any government were ever in the position of depending on Scottish members for a majority...it would be unable to govern with these Standing Orders in place." Do you agree with that?

Professor Tomkins: No, I do not agree with that. I do not agree with Professor Gallagher's evidence in two respects. Jim Gallagher is an old friend of mine and I disagree with him only with very considerable regret. First, I do not think that it has got anything to do with the sovereignty of Parliament. The sovereignty of Parliament is about the supremacy of legislation over the common law, and it is an instruction to the courts not to invalidate properly enacted legislation that Parliament makes. I think that the sovereignty of Parliament in Professor Gallagher's written evidence to you is a complete red herring. I will not take that any further.

On the point about income tax, I have already talked about that. If you have a Government that does not have a majority of English MPs, and we have the full devolution to the Scottish Parliament of rates and band thresholds of income tax, which we are going to have as soon as you get on with passing the Scotland Bill—and the sooner the better, please—it will be the case that any such future United Kingdom Government will have to negotiate with English MPs about which aspects of the Budget have the parliamentary support of the British Government. That is not ungovernable; that is parliamentary democracy.

Chair: Professor Tomkins, one last question from Jenny.

Jenny Chapman: I can't quite imagine that last scenario that you described working in practice, Professor Tomkins, but I did not have a further question.

Q68 Chair: Well then, I have the last question, Professor Tomkins, and I am going to read it to you. Is there merit in time-limiting the operation of the Government's proposals via a sunset clause or piloting the new arrangements on specified Bills only?

Professor Tomkins: Yes, there is merit in that. For many years I worked for the Constitution Committee in the House of Lords, and

one of the many reports that the Committee produced when I was one of their legal advisers was a paper on the process of constitutional change. English votes for English laws is a significant constitutional change. It should be treated sensitively and in a manner that is consistent with the United Kingdom's constitutional traditions, and that includes the constitutional tradition of trying things out and experimenting. I think there is a strong case for treating English votes for English laws as a significant constitutional reform that should be implemented sensitively.

Chair: I promised you that that was the last question, but being a politician, it was a lie, because there is another question from Patrick.

Q69 Patrick Grady: I appreciate your giving us your time today and the fact that you are, as you said at the start, giving evidence in a purely personal capacity, but it would be helpful to know whether in any of your professional capacities, particularly in relation to your relationship with the Secretary of State for Scotland, you have given any advice to him on this matter.

Professor Tomkins: Have I given any advice to David Mundell on English votes for English laws for English laws? Is that the question?

Patrick Grady: Yes.

Professor Tomkins: No, I have not.

Chair: Professor Tomkins, thank you for a good-natured and sparkling evidence session. I wish you well in Glasgow. I cannot wish your campaign well, because that would upset a few of my colleagues here, but whatever happens, I am sure you are a great addition to public life in Scotland. Thank you very much.

Professor Tomkins: That is very kind of you to say. Thank you very much.