



HOUSE OF LORDS

Revised transcript of evidence taken before
The Select Committee on Secondary Legislation Scrutiny
Inquiry on
RESPONSE TO THE STRATHCLYDE REVIEW

Evidence Session No. 3

Heard in Public

Questions 39 - 53

TUESDAY 23 FEBRUARY 2016

3.55 pm

Witnesses: Lord Hunt of Kings Heath

Lord Cunningham of Felling

Members present

Lord Trefgarne (Chairman)
 Baroness Andrews
 Lord Bowness
 Baroness Fookes
 Lord Goddard of Stockport
 Lord Hodgson of Astley Abbotts
 Baroness Humphreys
 Lord Janvrin
 Baroness O'Loan
 Baroness Stern
 Lord Woolmer of Leeds

Examination of Witness

Lord Hunt of Kings Heath OBE, Shadow Deputy Leader of the House of Lords

Q39 The Chairman: Good afternoon to you. Thank you very much for coming to help us with our inquiry. I am asked to say that this is a formal evidence-taking session. It is on the record and is being webcast live on audio and video. A verbatim note is being taken, which will be put on the public record in printed form and on the parliamentary website. We shall of course send you a copy of the transcript in case any amendment or correction of errors is needed. Do any Members have any relevant interests to declare? I do not think so, but if anybody does, now is your chance.

The question is whether the Strathclyde review, which this inquiry is all about of course, is the response to a constitutional crisis or whether the events of 26 October were more along the lines of what Professor Russell described as a political moment?

Lord Hunt of Kings Heath: Thank you, Lord Chairman. I see it as a political crisis for the Government, which at some point they found convenient to dress up as a constitutional crisis. Essentially, the Government produced these proposals for tax credit changes and, I am sure, hoped that they would go through Parliament without taking too much time or creating too much fuss. However, as more and more people became aware of the implications it became a very big political issue for them. In essence, the Lords created a bit of space for the Government to think again. The Government could very quickly have brought back a new SI that was slightly differently worded. They chose not to. They took advantage of the space to reverse their policy—to the general pleasure, I think, of concerned members of the public and many Conservative MPs as well. So it is very hard to see an action that led to a change in

policy and drew great approval from both the public and politicians as the basis of a constitutional crisis.

Obviously you might ask what the constitutional proprieties were in relation to what the Lords did. It really rests on the *Companion*, which declares our unfettered right to seek to vote on a statutory instrument. Lord Cunningham is behind me and will give evidence shortly, but I am clear that the Select Committee that he chaired and whose recommendations were accepted by both Houses set out the circumstances in which they thought it would be appropriate, in exceptional circumstances, for the Lords to seek to defeat a statutory instrument and that the Lords' action on the SI and tax credits met the criteria set by Lord Cunningham.

The Chairman: So would you say that the debate about Lord Strathclyde's report is more a debate about the relationship between the two Houses, or is it about the relationship between the Executive and the legislature?

Lord Hunt of Kings Heath: It is not a relationship between the two Houses. That is a fiction. When we talk about the relationship between the Commons and the Lords we are usually talking about the relationship between the second Chamber and the Government or the Executive. That is really what this is about. Frankly, the Commons' involvement in statutory instruments is so scant that it hardly comes into it. Certainly in my experience as a Minister when dealing with disputes between the Lords and the Government, it was rare even for Commons Ministers to be involved in discussions, except perhaps when they were leading on a Bill and had to give approval. Most of the negotiation and agreement is usually between the Lords Minister in charge and the Opposition in the Lords. We need to be very clear that a debate about statutory instruments and scrutiny is about how Parliament exerts influence and scrutiny over the Executive, and because the Commons' role in statutory instruments is so limited the Lords' role is crucial. Indeed, if I may say so, clearly so is the work of this Committee in that respect.

Baroness Andrews: Much was made of the fact that the Commons had voted three times on this SI. Do you have any comment on that?

Lord Hunt of Kings Heath: I think it was twice. The logic is that, with primary legislation, if a Bill has gone through the Commons, MPs have decided, so the Lords should not seek to make any changes to it. Clearly we think that is nonsense, and it is nonsense in relation to secondary legislation, because the Lords clearly has a legal right to debate properly and to come to views on secondary legislation. Whatever has happened in the Commons it is our right to scrutinise and come to a view. So I do not think that logic stands up at all.

Q40 Baroness O'Loan: In your 2004 report on Lords reform, you recommended that we should have a delaying power over secondary legislation along the lines of that recommended by the Wakeham commission. In your speech on 13 January, however, you suggested that we should be wary of getting out the veto. Have you become more cautious?

Lord Hunt of Kings Heath: Yes. In my defence, at the time I was taking a rest from government over the Iraq war. I was chairing a Back-Bench group, and we made a series of recommendations about how the Lords could improve the way it scrutinised legislation, both primary and secondary. Alas, very few of the recommendations were taken up, and that was one of the ones that were not accepted. Since 2004—and I would be the first to recognise that my own Government were party to what has happened since 2004—the balance between primary and secondary legislation has changed, and many more very important decisions now fall to be made by secondary legislation. The Hansard Society very eloquently set out the changes that have occurred and the reasons why. I would just instance two bits of legislation: one, the Public Bodies Act, in which very important organisations can be abolished simply through the use of secondary legislation; and, very recently, the Cities and Local Government Devolution Act. Under that Act, a group of local authorities can be given total responsibility for running National Health Service services. There are arguments in favour of that, but a whole swathe of public services can now be switched from having a national nature to being a local government service simply by secondary legislation. For me, that goes too far. If the delaying power were in addition to a veto, that would be very interesting. The alternative, given the way in which primary legislation is being used now, is where I have my doubts. You will probably come on to this, but Lord Strathclyde's most important recommendation is the fourth recommendation, which was almost an afterthought. It said essentially that government needs to look at the appropriate balance between primary and secondary legislation.

Baroness O'Loan: But you are saying that on the current operation of the division between primary and secondary legislation—

Lord Hunt of Kings Heath: I would be very wary of going down the route that option 3 is concerned with.

Q41 Baroness Andrews: Of the three options, clearly option 1 has not found much favour. Could you pursue, from your experience as a Minister, what the impact would be of accepting option 1? What was your experience as a Minister of dealing with secondary legislation and the role of scrutiny? In relation to that, what was your judgment of the quality of, extent of or engagement with scrutiny in the House of Commons? You described it as “scant”.

Lord Hunt of Kings Heath: My experience as a Minister is that no Minister likes dealing with secondary legislation—the eyes of Commons Ministers glaze over whenever it is mentioned. I am afraid that also applies to officials, so it is not surprising that your Committee often comments on the drafting and ambiguity of some of the proposals in secondary legislation. The fact is that, throughout the machinery of government, secondary legislation is not given the importance that it warrants. When it comes to the role of the Commons—clearly, I am not an expert in Commons procedure—my understanding is that, as the Hansard Society has shown, very few negative SIs are prayed against by MPs and even fewer lead to debate in the appropriate Committee. Very, very few indeed ever reach the Floor of the House of Commons. I thought that Lord Lisvane was very interesting at your last meeting when he talked about the pressure on MPs' time and on parliamentary time in the Commons. It is clear that, unless there is a fundamental change in philosophy, option 1 would effectively mean that you would be getting rid of scrutiny of secondary legislation in Parliament. I thought it was interesting when Chris Grayling said that negative SIs are technical and mundane. Yes, many are, but, equally, some of the negative SIs on which there have been prayers, full debates and sometimes votes in the Chamber have been about pretty important things, such as legal aid and a number of other important measures. Equally, yesterday I debated a pharmacy regulation, which was a minor regulation but for some reason was affirmative. I do not agree with the judgment that all negative SIs can be delineated as technical and mundane. I think this shows that at the moment there is no appetite in the Commons for any change in the way in which it approaches statutory instruments.

Baroness Andrews: What you have said is that essentially the only organisation that would benefit from option 1 is the Government.

Lord Hunt of Kings Heath: The only benefit would be to the Executive. If we were taken out of the equation altogether, essentially there would be no scrutiny of statutory instruments at all. I have to say that what the Government would then do would be far from reviewing their use of primary and secondary legislation in the balance. If I were a Commons Minister, I would go for skeleton Bills every time, because I would know that that would give me huge powers in the future. Much though I admire the Executive and the way in which they work, the point about the Executive and the role of the House of Lords is that the only reason why the Executive ever listen to the Lords is that they fear defeat or are defeated, apart from minor, useful stuff, which they will obviously listen to. When it comes to substantive issues, they have to feel that their legislation is at some risk, which is why it is important that our role is maintained.

Baroness Fookes: I speak as a guest on this Committee in my role as Chairman of the Delegated Powers Committee. One thing that has concerned our Committee is that, as you say, wide powers are given without any indication of how that might work out in practice. We often feel that it would be valuable if the Government were prepared to set out draft regulations so that they could be considered and debated before everything got set in stone. Do you feel that that might be a valuable thing to do?

Lord Hunt of Kings Heath: I think it would be. I have taken part in many debates in your Lordships' House in which the Bill contains a lot of regulatory powers and Members of the House have asked to see the regulations. Governments are very resistant to this, because they do not want the detail to be debated fully in Parliament. It would be very valuable if there was an understanding that if Governments are to have really important powers set out in regulations, those regulations should be available to Members.

Baroness Fookes: Do you think that they do not want them debated or that they have not got to the point at which they have anything on paper?

Lord Hunt of Kings Heath: It is a combination of both. Clearly, officials' efforts are concerned with the detail of legislation, instructions to parliamentary counsel and handling the Bill. There is clearly a capacity issue about their ability to write regulations at the same time as they are involved in the drafting of a Bill, which you have to take into account. But principally I would say that the last thing a Minister wants is to have to debate those draft regulations, as that would increase the House's ability to scrutinise, and I am afraid that is not what government Ministers are about.

Q42 Lord Hodgson of Astley Abbotts: Perhaps I could move forward one stage from there. Lord Lisvane has described this thing as "pilot error". One of the recommendations in Lord Cunningham's report was that we might have a gradation of scrutiny, and he talked about the situation in which, "Parliament was only persuaded to delegate the power in the first place on the express basis that SIs made under it could be rejected". Would there be value in having a super-super-affirmative procedure, or some new category to deal with certain types of statutory instruments, and the problem of skeleton Bills being filled in subsequently?

Lord Hunt of Kings Heath: That is a very interesting suggestion. If you come back to Lord Strathclyde's fourth recommendation, as I call it, I do not think that the Government are prepared to take this seriously. So far, I do not detect any interest in it and I do not think that Baroness Stowell, the Leader of the House, made any reference to it in her winding-up speech. If the Government are serious about looking at the balance between primary and

secondary legislation, I would have thought that this suggestion would have been very helpful. But it will not work unless the Government are prepared to talk turkey.

Just to pick up your question, let us take the transfer of NHS powers in, for example, the West Midlands, where I live. If there was a proposal in the next year that the West Midlands local authorities should take on the strategic and funding responsibility of NHS England for NHS bodies locally, an extra degree of scrutiny would be required before such a change took place. I am sure there are other examples where that might occur.

Q43 Lord Bowness: Lord Hunt, as you know, Lord Strathclyde's second option is to re-establish the convention—if it has ever been disestablished. He says that it is doubtful whether the House could achieve that. Do you agree? If so, why, and do you think that the difficulty would lie here or in the other place?

Lord Hunt of Kings Heath: I agree with him that it would not be possible to find agreement on that, partly because I do not really accept that there is a convention. I know that Lord Strathclyde has ascribed almost mystical qualities to what he called—I think—"a political understanding" in 1968 following the rejection of the Southern Rhodesia order. But the fact is that our *Companion* declares that we have an unfettered right.

Secondly, Lord Cunningham's Committee looked at the 1968 agreement—if there was an agreement—and I believe that it was subsumed into the Committee's recommendations, which were accepted by both Houses. So I agree with Lord Strathclyde; I just do not think that there is any hope of getting an agreement between the principal parties on that. I just do not see option 2 flying at all.

Lord Bowness: In your report of 2004, you suggested that a reconciliation machinery should be established to help resolve differences between the Commons and the Lords. Is that dead in the water, too?

Lord Hunt of Kings Heath: I refer you to my previous answer on the fact that I was chairing a Back-Bench Committee. It was very much a Back-Bench view that these discussions should not always take place behind closed doors. We were mostly concerned with primary legislation and with the ping-pong process. If you recall, particularly before fixed-term Parliaments came in, a general election could be called very quickly, and sometimes earlier than expected. The Opposition then is in a hugely powerful position, because there is a process called strike-out. In essence, the Opposition will say which Bills that are currently in process they will agree to, and which bits of clauses need to be taken out. Sometimes the Bill has gone through minimum scrutiny in both Houses. But if agreement is reached between the Opposition and the Government, parliamentary processes will make sure that it proceeds

through both Houses within, I think, 48 hours. Now, individual Members can sometimes become very frustrated that all this has taken place, and quite momentous legislation has been agreed to, without them being involved at all. So we were reflecting a concern about whether it is right that it should be done without individual Members having any say at all. I would imagine that fixed-term Parliaments have rather changed this, given that we now know when the next election is going to be. I thought it was clear from the last Session of the last Parliament that Governments now deliberately make it a very light legislative Session. We did not have that frenzied ping-pong. So it is an open question as to whether it is no longer simply a usual-channels process. I think the Scottish Parliament has a committee; instead of the usual channels, you have a business committee where things are rather more transparent. But frankly, since it comes down to negotiation between the Government and the Opposition, it will always be done in the corridor. So the risk is that the reconciliation machinery will be a legitimisation of what has already been agreed.

On ping-pong, my experience is that negotiation takes place not between the Lords and the Commons but between two Members of the Lords. One is the Minister and one is the opposition spokesman. If the Bill team Minister is a Commons Minister, he or she will at some point have to give their approval to what has been agreed. But the key players are the key spokespeople in this House, encouraged by the usual channels to reach a deal.

Lord Bowness: If we had a mechanism whereby our House could ask the Commons to think again, what sort of procedures and mechanisms should there be to let the Commons know why we have made our decision?

Lord Hunt of Kings Heath: If you look at option 3, this is a very important question. There is not much point going down the route where the Lords is sending an SI back to the Commons unless there is then a proper debate in which MPs are involved. But of course I would still pray in aid my previous answer. In essence, if the Lords does not like a statutory instrument and decides under current arrangements to vote it down, or, if you pick up any of the Strathclyde options, deals with it in those circumstances, the Commons would not be in this conversation at all. This is a debate between the Lords and the Executive. It would simply be how ping-pong works. The conversation would be between whoever moved the Motion defeating the SI in this place and the representative of the Government. That is how it is done.

Lord Goddard of Stockport: The Strathclyde review was prompted by a vote on instruments that would have had a significant financial effect. Is there an argument for saying that any proposed limitations on the powers of the Lords in respect of secondary legislation should be confined to financial instruments?

Lord Hunt of Kings Heath: I would be very wary of going down that route. First of all, there is no definition of a financial instrument. Obviously, we have the Parliament Act definition of a money Bill. We also have procedures in relation to instruments that fall to the Commons alone to deal with. I imagine the Committee has also seen the Note by the Clerk of the Parliaments on financial privilege generally which he published in 2012, to which Lord Strathclyde refers and which is very helpful. It makes it clear—and this is apposite to your question—that many amendments passed by the Lords are financially privileged but the Commons waives its right to treat them as such. That suggests to me that if you were to say that we were not able to deal with a statutory instrument in which finance was involved—or at least that our powers were limited—you would take us out of many important statutory instruments. So you come back to the substantive issue here, which is that if the Lords is not involved, who is going to scrutinise instruments properly?

I will refer you to one statutory instrument that I have just prayed against. It is non-fatal, so the Committee can relax. The NHS mandate is the mandate by which government tells NHS England what it wants from the health service. The current mandate sets out the money that the NHS is going to get for five years. That is a jolly important statutory instrument on which it is right that we have a proper debate. In fact, I am glad to say that your Committee drew the attention of the House to it. But my assumption is that, under Lord Strathclyde's proposals, the Lords' powers in relation to it would be less because it would be defined as a financial statutory instrument. You expressly reported on the bit that the Government need to get through, which is the £3.5 billion care fund. But the mandate itself refers to all the money going to the NHS for a five-year period. Would that mean that we could not debate it? Many of the statutory instruments that are listed at the moment have financial implications. So I would be very wary of going down that path.

Lord Goddard of Stockport: Lord Strathclyde's report recommended that the Government hold a review on powers over statutory instruments in consultation with the House of Commons Procedure Committee, and that this should be subject to Commons-only procedures. Is it appropriate to exclude the Lords from those discussions?

Lord Hunt of Kings Heath: No, I was disappointed to see that. I hope that your Committee will comment on it, and perhaps on reflection Lord Strathclyde will recognise that it is something into which the Lords as a whole should have an input.

Lord Goddard of Stockport: Finally, what is a financial instrument? We have statutory instruments. How would you define a financial instrument?

Lord Hunt of Kings Heath: I would simply take it that a financial instrument is one in which public expenditure is concerned. But that is a very rough definition, and I am not sure that I would hold to it. It is very difficult to know what is meant by it.

The Chairman: That would be a very wide definition.

Lord Hunt of Kings Heath: It would be a very wide definition, yes—even in the era of austerity.

Q44 Baroness Stern: Lord Hunt, in your speech on 13 January, you said: “However rarely it is used, we currently have an unfettered right to veto secondary legislation. I believe that is a safeguard for both Parliament and the public”. I will ask you two questions. You said after that: “If that safeguard were lost, what could take its place?” Before that, I will ask: what actually is being safeguarded for Parliament and the public by our unfettered right to veto secondary legislation?

Lord Hunt of Kings Heath: I talked earlier about what makes a Government listen to the House of Lords. If you think about primary legislation to start with—this is relevant to your question—and look at amendments that are made to Bills either in this place or in the other place, but often in the Lords, there are three categories. In one category is the fact that inevitably officials discover mistakes in legislation after the Bill has been published, so a lot of amendments come about to put them right, and they go through either House very easily. Secondly, during debate, particularly in the Lords, noble Lords raise interesting but not mega-important issues that Ministers realise have some sense to them. Usually you are then able to get some kind of change. With big issues that are about substantive areas of policy, my experience is that the Government will listen only if the Lords Minister in charge of the Bill as it goes through says, “We’re going to lose a vote on this. It’s quite clear we’re going to have to make a concession”.

Bill team Ministers in the other place are not always sympathetic to their Lords colleagues when they are told this, because they do not like to change anything substantive in legislation, so sometimes they listen and sometimes they do not. But what makes them agree in the end to make changes is defeat or the threat of defeat. When it comes to a statutory instrument, of course at the moment most go through without concerns on the part of the Government, apart from the fact that the Minister has to come and defend it. But I do think that at the end of the day—and it will be in exceptional circumstances—the fact that this House does have the right to reject a statutory instrument gives us an element of leverage in the system that makes people take account of what we do. I would be very cautious about getting rid of it.

Baroness Stern: If that safeguard were lost, could you think of anything that could take its place that you would consider a reasonable compromise?

Lord Hunt of Kings Heath: Well, not really—and I have to say that there are no signs so far that the Government want to think about this in a rounded way. There has been no positive response whatever to Lord Strathclyde's core recommendation, which is about the balance between primary and secondary legislation. Although Mr Grayling said in his evidence to you that he recognised that some options would involve the House of Commons in changes, I did not get an indication that he recognised that to get anywhere near justifying getting rid of the veto the Commons would need a wholesale change in its approach. I just did not get that sense. So at the moment I have to say that while clearly we could start again and ask Lord Cunningham to set up a new Committee to look at the balance between primary and secondary legislation and construct a new model, I just do not see that happening.

Baroness Andrews: My question is slightly different. Lord Strathclyde made it clear that option 3 would include legislation to enforce it and make a real difference. How do you see that working?

Lord Hunt of Kings Heath: I cannot see the House of Lords voluntarily changing its power. If the Leader of the House moved an amendment to the *Companion* and said that they were going to remove our unfettered right, I simply see no prospect of that passing this House. And it would be momentous. So for the Government to enforce option 3, clearly they would have to use primary legislation and we would have a huge constitutional crisis. I simply do not see the votes in this House supporting a change to our *Companion*.

Baroness Andrews: So when you talk about primary legislation, you clearly do not think that this can be done by amending the Statutory Instruments Act 1946.

Lord Hunt of Kings Heath: It does not seem appropriate, does it? No.

Baroness Andrews: So what are we left with in relation to primary legislation, setting aside the reaction of this House?

Lord Hunt of Kings Heath: I suppose you would then be looking at an amendment to the Parliament Act. But of course the circumstances in which the original Parliament Act was put through were very different from this occasion, when public opinion was on the side of the House of Lords and its actions led to the withdrawal of tax credit proposals—which, as I said earlier, was much supported by the people of the country and actually in the Commons. So it would be quite remarkable, on the basis of what happened on tax credits, to come forward with an amendment to the Parliament Act. But one way or another, as I read it, this would be a momentous constitutional Bill, with all that implies for both the Commons and the Lords.

Lord Janvrin: Lord Hunt, I want to return to the question of balance. In a way, we have touched on this a number of times. Even if it does not appear that the Government are picking up what you described as Lord Strathclyde's fourth option or recommendation, what steps, given your knowledge of the system as a Minister taking legislation through, do you think could be taken to try to ensure that Bills contain the appropriate level of detail?

Lord Hunt of Kings Heath: It is a question that I would like to put to Lord Strathclyde—you might have that opportunity: whether he had some ideas about how it might be put into practice. Clearly it would not be sufficient for a Government of whatever colour simply to say, "We're going to do better in the future". You would need some tangible evidence that this was going to be done. I thought that the Committee's conversation with Lord Lisvane last week was very interesting, because I think he was suggesting that, with some of this, as long as it was agreed in principle, the guidance given to officials on how legislation is drawn up would be very important, because officials tend to follow guidance.

You would then look for Select Committees of both Houses to enforce this. Baroness Fookes is here. My experience is that by and large her Committee's recommendations are taken very seriously by the House and by government and tend to be put into practice. I would expect there to be a system whereby, if the Select Committee charged with reviewing whether the balance between primary and secondary legislation was appropriate felt that in some cases proposals were being made that were far too important to be left to secondary legislation, we would have to have some kind of process whereby that was drawn very much to the attention of both Houses and that each House had the ability to say to government, "Actually, we're not going to put up with it". I think you would rely very strongly on whatever memorandum of advice is given to officials, backed up by very strong Select Committees that enabled in part the enforcement of that. I have not given it great thought, but it seems to me that it would be a combination of those things.

Lord Hodgson of Astley Abbotts: When we heard from Lord Lisvane on an earlier date, I think Willie Whitelaw was quoted. He said, "If the regulations are not ready, the Bill is not ready". Given the new balance, and wearing your hats both as an ex-government Minister and as an opposition Back-Bencher now, would you say that the reintroduction of that sort of agreement would be a practical proposition in today's environment?

Lord Hunt of Kings Heath: I do not know. It has never been tried, has it? Who knows what the Government will decide, but one option is for them to pause and to ponder on whether we should be looking at this subject in the round. That would be a very good question to put to whatever process they might agree to. I hope this happens. What has come out of this debate,

for all the noise, is a real concern about Parliament's role in the scrutiny of legislation, and we are seeking to come out with a better scrutiny that holds the Executive more to account. That must be the outcome that we all want to see.

Q45 Baroness Humphreys: This is the final question. Following on from the Strathclyde review, what would you like to see happen next?

Lord Hunt of Kings Heath: I think I have hinted at that. This has been an incredibly valuable process in which we have had a much wider debate about legislation and the role of the Executive and Parliament than was probably envisaged when the Government responded to what happened on tax credits. I would very much like to see something genuine. I am not sure how. The Hansard Society suggests an independent review. Well okay, that is fine, but in the end parliamentarians really have to grapple with this and negotiate with government on it. I would love to see some very substantive work done now that picked up Lord Strathclyde's fourth recommendation and looked to see whether we can rebalance primary and secondary legislation. You cannot really answer the question about the Lords' role on secondary legislation until you have gone back to the form of legislation and the best way in which we might approach it. Traditionally, British constitutional change has been piecemeal, which has some advantages, but here I would like to see a much more fundamental review of legislation generally and the role of Parliament in it.

The Chairman: Thank you very much indeed. We are enormously grateful to you.

Lord Hunt of Kings Heath: Thank you, Lord Chairman.

Examination of Witness

Lord Cunningham of Felling DL, Chairman of the former Joint Committee on Conventions

Q46 The Chairman: I apologise for shooing you out earlier.

Lord Cunningham of Felling: I have suffered much worse.

The Chairman: Among other things, we are considering the referendum statutory instruments on Thursday, which are causing a certain amount of controversy. It will all be very smooth when the time comes, I am sure.

Anyway, good afternoon to you. Thank you very much indeed for coming to talk to us. Ten years ago, the Joint Committee on Conventions, which of course you chaired, made clear statements about the Lords' powers to reject secondary legislation, which have been widely endorsed. Are you therefore a bit surprised that we are looking at this same issue yet again?

Lord Cunningham of Felling: Lord Chairman, I would say that I am disappointed that it is being examined in this way again, particularly by the mode of the examination. But I am not surprised. In the immediate aftermath of what happened in the House of Lords, where no convention was broken—let us be clear about that; the Lords had every right to vote the way it did, as the *Companion* confirms and as the Joint Committee report on the conventions of the UK Parliament confirmed—what disappoints me is this. First and foremost, there have been five defeats of Governments of this nature in the last 50 years. Three of them involved defeats for Labour Governments. One defeat was a defeat for a coalition Government. Yet the very first time any Conservative Government are defeated in this way, they throw all the cards up in the air and their toys out of the pram and call it a crisis. Well, I was in the House of Commons for 35 years. Baroness Fookes is a contemporary of mine, although she may not have been there for the same length of time.

Baroness Fookes: Not far off.

Lord Cunningham of Felling: There was a crisis when Turkey invaded Cyprus. I have lived through some crises. I was in the Foreign and Commonwealth Office at the time, when the late Lord Callaghan was Foreign Secretary. There was a crisis when the late Lord Callaghan was Prime Minister and I was his PPS in 10 Downing Street and there was an almighty row—Baroness Fookes will remember this, too—over the vote on the Aircraft and Shipbuilding Industries Bill. That was a crisis. There was a crisis when the Argentinians invaded the Falkland Islands. They were real crises. To call what happened with one vote in this House a crisis frankly beggars belief.

So I think that the Government got that completely wrong. The contrast in the disappointment is this. In the then Labour Government, some of my former Cabinet colleagues were quite keen on the idea of codifying conventions, so when the Government set up their inquiry into the conventions they established a Joint Committee of 22 parliamentarians from all parties, including Cross-Benchers. We took wide-ranging evidence over many months. The disappointment is that in this case, after one defeat, the Government set up an inquiry by one member of their own party. No one knows exactly who was met and what evidence they gave. The result is the Strathclyde report. The contrast between the two is frankly stark. That is why I am disappointed.

Q47 Lord Hodgson of Astley Abbotts: Inevitably, some of my questions are going to re-plough ground that we ploughed with Lord Hunt half an hour ago. My question is whether this was to do with the relationship between Parliament and the Executive or between the two Houses of Parliament. I think you are on record as saying that it would weaken not just this

House but the position of the other House. I think I know what your answer will be, but it would be helpful to have it on the record.

Lord Cunningham of Felling: This is a dispute principally between the Executive and the House of Lords, although inevitably there are consequences in that for the House of Commons as well. I am not sure that is a satisfactory answer to your question, but that is my view. The proposal—and in my view there is only one proposal in the Strathclyde report that is worth discussing—in effect is to remove long-standing, rarely used powers of the House of Lords to the advantage of the Executive. There is no other way to describe it.

The Chairman: By that do you mean option 3?

Lord Cunningham of Felling: Option 3, yes. Well, Lord Chairman, option 1 is a straw man. But before I get into all that, let me say that the whole Strathclyde report is a thinly disguised trap. There are far more than three options facing Parliament and the Government. To limit it to three is the trap. “You must choose one of these three unpalatable options”. Well, I do not think that Parliament or the House of Lords should accept that for a moment. We have heard many people—parliamentarians and others—talk about a further Joint Committee. There is a simple, quick way of reaffirming the commitment of Parliament to the conventions by tabling a Motion in both Houses and asking the parties to reaffirm their unanimous acceptance of the interpretation of the conventions set out in the joint report. There may well be other options, too. So to narrow it down to three is a trap, in my judgment.

Lord Janvrin: I would like to pick up on option 1, which you perhaps rightly described as a straw man. If it were adopted, what would the consequences be for effective scrutiny of secondary legislation?

Lord Cunningham of Felling: Pretty disastrous, in my judgment. It would mean effectively that probably this Committee and the Committee chaired so effectively by Baroness Fookes would become redundant; there would be no work for them to do. It would mean a huge additional workload being passed along the corridor to the House of Commons. Now everyone knows—I am as guilty of this as anyone, since I spent far too much time in opposition in the House of Commons, but also some time in government—that the treatment of secondary legislation in the House of Commons is minimal to the point of being superficial. I think it was Lord Hunt of Kings Heath who pointed out that the average length of time for which a statutory instrument Committee sits in the House of Commons is 23 minutes. There is no comparison between the diligence and assiduity of House of Lords examination of secondary legislation, thanks to the work of this Committee and others, and what happens in the House of Commons. The consequences for scrutiny would be appalling.

Baroness Andrews: Mr Grayling thinks that he has given us an opportunity for even greater scrutiny by requiring the Commons to have another go and think again. Lord Lisvane was quite clear that there was no appetite, time or resource in the Commons to make that a reality. He said that there needed to be a cultural and behavioural change in the Commons. Do you agree? What are the real, practical problems with the Commons doing it?

Lord Cunningham of Felling: Yes, I agree wholeheartedly with that. There is no doubt that over a period of time the use of what some people describe as Christmas tree Bills—on which Ministers hang things like baubles through statutory instruments and secondary legislation—has become almost the norm. It used not to be the case, but while I wholeheartedly agree that there is an overwhelming case—I said this in the debate on the Strathclyde report in your Lordships’ Chamber—who would not want to see major reductions in the amount of secondary legislation that this House and the other place have to deal with? It is common sense to say that if it could be reduced it would be beneficial to everyone. The question is whether there is any definitive, concrete proposal to do that. I think that Lord Hunt dealt with this point earlier, and I agree with him. There is no evidence that there is; there is no evidence of any desire on the part of the Executive to go down that route. So while I would certainly support it—it would make a big difference—I see no practical proposition in sight to bring it about.

Q48 Lord Woolmer of Leeds: Your Joint Committee said that you could not offer a definition of a convention but that you knew one when you saw one.

Lord Cunningham of Felling: Yes.

Lord Woolmer of Leeds: How do you think this uncertainty about the meaning of a convention affects the viability of option 2, which, to remind you, is to retain the present role but for the House to set out in a resolution and in a more precise way what the convention is?

Lord Cunningham of Felling: I know there has been significant comment from Lord Strathclyde and others—Ministers and the Government—about the convention having broken down, convention no longer being convention and other phrases to that end. I see no evidence to substantiate those comments, frankly. Not at all. Lord Strathclyde himself described the convention just before the establishment of my Committee. He said that the convention had been “surprisingly robust over the decades”, so there is no substance at all to the argument that it suddenly broke down after the veto was used once to defeat the Government.

As for your question about what we said about “convention”, we saw no need to spend the Committee’s hours, let alone days, seeking a definition of “convention” when there is a perfectly good one in the *Oxford English Dictionary*: “a general agreement, especially ... on

social”, or other conduct; “a custom or customary practice ... by implicit consent of the majority”. That fits perfectly well.

Lord Woolmer of Leeds: If there was an attempt to set out—I would not say “more clearly” but in some way—what is meant by “convention”, what would be the principal points of tension? What would be the difficulties in achieving that?

Lord Cunningham of Felling: I do not think I fully answered your first question, so I will refer to that for a moment, if I may. The second option on page 5 of the Strathclyde report is “to revert to a position where the veto is left unused”. There were some nine occasions during the prime ministership of Tony Blair when fatal Motions were moved, unsuccessfully, in your Lordships' House, three from the opposition Dispatch Box. There was a perfect willingness on the part of the then Opposition and their Leader Lord Strathclyde to use this power of the House of Lords, or to try to use it, so to say that option 2 is “to revert to a position where the veto is left unused” is simply untrue. It is a statement of fact that the veto has been used very sparingly—five times—in half a century. There is a big lacuna right in the middle of the second option. If it was to be codified, which I take to mean that it would become statute and would be enforceable, that would be even worse, because sooner or later that would involve the courts and the judiciary in disputes between the Houses of an independent Parliament, which I cannot believe anyone in their heart of hearts wants.

I referred to the Joint Committee on Conventions. When we are asked to work on this report, there was some pressure from the then Government for us to codify the conventions. We looked at this very seriously and thoroughly, and the Committee concluded unanimously that it would be an error of significant proportions to codify any convention, for the reason I have just given and which I think others have supported.

Another important thing about this report is that every conclusion and recommendation in it was agreed by unanimity. There was not a single vote throughout the many months of the inquiry, and of course both Houses endorsed it unanimously. I am not sure what the case for codifying conventions is, but I would be implacably opposed to it.

Q49 Baroness Fookes: What is meant by the term “codify”?

Lord Cunningham of Felling: I assume it means statutory underpinning of the convention, but it is not spelled out in the report, as I am sure you have noticed.

Baroness Fookes: Yes, but to me that simply means writing them down in some sort of order.

Lord Cunningham of Felling: The report says, “A third option would be to create a new procedure—set out in statute”. That is plain. But higher up, the second option “seeks to codify

the convention”. The Joint Committee on Conventions took “codify” to mean “put right into statute”.

Baroness Foakes: That is why I asked the question.

The Chairman: It could be something short of statute, I imagine; a resolution of both Houses, for example.

Lord Cunningham of Felling: Yes, Lord Chairman. This may be my error, but I have never seen a resolution on an Order Paper that indicated that it set out to codify something.

The Chairman: I guess there is a basic principle that no Parliament can bind its successor.

Lord Cunningham of Felling: That is certainly true.

The Chairman: So a resolution binding this Parliament would not—

Lord Cunningham of Felling: There is a problem with resolutions of the House, as Lord Strathclyde says in his report under option 2: “since a resolution of the House could be superseded, or standing orders could be suspended, by further decisions of the House, it would not provide certainty of application”. Those are the very words he uses.

Lord Woolmer of Leeds: Does not the example from October last year point to the difficulties of having anything that seeks to set out what the convention actually is? Your Committee’s report said that in extraordinary circumstances a veto, a defeat, would be—

Lord Cunningham of Felling: Justified.

Lord Woolmer of Leeds: October was an example of the Government proposing in secondary legislation a major change of policy from the intention in the original Act affecting millions of people and involving a lot of money. The Government and Lord Strathclyde drew from that case the conclusion that it was precisely that circumstance that meant that we should not have used the veto, but any outside observer, and clearly the general public in my experience, judged that it was precisely those circumstances that meant that it was an extraordinary use of statutory instrument and that the veto was precisely justified. If you have a situation where the Executive can conclude that it is not an extraordinary case and that the use of the veto is actually a misuse, and other people judge that it was an extraordinary case and that it justified a veto, how could you have written anything down, with the agreement of the House, in any kind of resolution of the House that could have been to the satisfaction of the Executive of the House of Lords? Does that not indicate the folly of trying to set out in exact detail what the convention would be?

Baroness Andrews: Perhaps I may add, before Lord Cunningham replies, that this is something which Lord Strathclyde himself in that very section—this reinforces what Lord Hunt said—says would be so difficult. “I am doubtful whether a solution can be devised by

which the House can qualify its powers by convention alone”—because it would require cross-party support. That is precisely the point that is being made. There is no agreement. He was very doubtful, I think, about whether his option 2 would work.

Lord Woolmer of Leeds: But my point is that as the October example showed, no matter what you write down, somebody can disagree with how it is interpreted. Lord Cunningham, do you think that you could set out in some clear way something that everybody would agree to and that would always resolve the question of whether this was a justified use of the veto?

Lord Cunningham of Felling: The Committee of which I had the privilege to be Chairman pondered long and hard on this, as you would expect, and came to the conclusion that we should say something about exceptional circumstances. I am not saying that that cannot be improved upon, as my good friend Lord Hunt said. He was speaking for the Labour Party, and I should emphasise here that I am speaking just for myself. Perhaps it could be improved upon, but writing it into statute has all sorts of other implications, as I have already said. The real test of the understanding, nature and availability of the convention is in the records. That veto has been used five times in 50 years, so for anyone to say that that is excessive or not well understood seems to me to be looking for excuses to get rid of the veto.

Baroness Andrews: I think my question has more or less been asked and answered by Lord Cunningham’s response on codification.

The Chairman: Shall we move to question 6?

Q50 Baroness O’Loan: Lord Cunningham, I would like to ask you more about option 3, which would replace the Lords’ power of veto with a statutory power of delay. If that were to happen, three questions follow. Would there be any Bill of Rights implications? How easy a passage would an option 3 Bill have through the House? And how important would it be to have a statutory minimum period of delay? So the first question is: would there be any Bill of Rights implications if we had a statutory power of delay?

Lord Cunningham of Felling: Yes, I believe that there would. I am sure that you will do this, but the evidence you took from Lord Lisvane has not been published. Perhaps you have taken a decision today to publish it. In any event, on issues of this kind I am not putting myself in the same league as Lord Lisvane. I am a Sunday pub team and he is a Premier League team when it comes to these issues. But he has made it quite clear that he believes that there would be Bill of Rights issues. I have heard him speak on this before, although I could not attend when he was giving evidence here. I think he referred to Article 9 in the Bill of Rights as being the key to this. So I think the answer is yes, there would be implications for a Bill of

Rights—but I am sure you explored that in depth with Lord Lisvane, and I would not contradict him.

Baroness O'Loan: So how easy a passage would an option 3 Bill have through the House?

Lord Cunningham of Felling: An option 3 Bill—and here I strongly agree with what Lord Hunt said—would have grave difficulty in passing through your Lordships' House. Looking forward, the Government would be ill advised to force such legislation through the House, because the case in Lord Strathclyde's report is not made for this change. That is the first and fundamental point. There is no substance in the arguments, as I have been trying to emphasise. Secondly, I am sure there is no substance in the argument that strengthening the Executive and weakening Parliament is a good thing for a democratic nation to do.

Baroness O'Loan: Perhaps I might ask you to bear with us and accept the fact that Lord Strathclyde has recommended that we might consider a statutory power of delay. Do you think it would be important to have such a power? What you think a minimum period of delay might be to enable proper consideration by the Commons?

Lord Cunningham of Felling: That sounds like a simple question but it is not easy to answer, Baroness O'Loan. Forgive me, I am not saying that you have to ask me easy questions. That is a matter of judgment. In some cases it might be a month and in some cases six months, depending on the seriousness of the issue. I am not saying that there is a one-size-fits-all answer to your question. None of that would matter as long as the powers of delay were themselves set down in statute, because if that was not the case the Government or Ministers could simply ignore them.

Baroness Stern: The instrument on which we voted that led to the Strathclyde review undoubtedly had significant financial effects; I do not think that we could question that. Therefore, is there any merit in the argument that any proposed limitation of the power of the House of Lords with respect to secondary legislation should be limited to “financial” instruments?

Lord Cunningham of Felling: Statutory instruments are not covered by financial privilege. They never have been, contrary to what the *Times* wrote in a leading article in the autumn of last year. The *Times* accused your Lordships' House of voting down a money Bill. Well, it was not a Bill and it was nothing to do with money, except in the implication of affecting, as Lord Woolmer said, many millions of people who could ill afford to take that kind of hit. I believe that both you and Lord Woolmer are right to press on this point, because if the proposal would be to start having different categories of statutory instrument with different powers in this House to deal with them, I am not sure that is going to clarify or simplify the

situation at all. On the contrary, there would be endless rows about whether something was or was not of financial significance. And incidentally, the original legislation from the Labour Government in respect of all this was not a money Bill, either.

Lord Hodgson of Astley Abbotts: Could I ask you about definitions? We have just been struggling with the question of what is financial. The second recommendation that you made about this in your report refers to an occasion “when the parent Act was a ‘skeleton Bill’ and the provisions of the SI are of the sort more normally found in primary legislation”. That also sounds difficult to define. My point is that it is very difficult to define what is financial and it is quite difficult to decide, I suspect, what provisions are “of the sort more normally found in primary legislation”. Is there an answer to that, in your mind?

Lord Cunningham of Felling: In the case of the 26 October measure—

Lord Hodgson of Astley Abbotts: Sorry, I am trying to see whether there is any way through the thicket. Is there any way that something could be drawn up to show what should be in primary legislation and what should be in secondary legislation, or is this as difficult as defining whether there are financial consequences?

Lord Cunningham of Felling: I am not trying to be evasive here, but I think this takes us back to an earlier exchange when we were talking about the need or desire to reduce the amount of secondary legislation. That is the way to deal with that issue, if a way could be found, although I repeat that I do not think there is any proposal in the near term that would have that effect. If nothing changes and the amount of secondary legislation continues to flood through Parliament, there will always be disputes about the nature, significance or importance of any particular statutory instrument. It is inevitable.

Baroness Fookes: It is much easier to find the definitions when you have actual examples in front of you. It is not easy to do it as an abstract principle. You get to a Bill with something in it and then you can say.

Lord Cunningham of Felling: I agree.

Q51 Baroness Fookes: Referring to the Joint Committee report, there is reference to the advice given by the then Clerk of the Parliaments, who made this point: “the power to reject informs the decision [by the House] whether to delegate”. If we reduced the powers of the House of Lords, might this lead to Parliament, or at any rate the House of Lords, being less willing to have provision in secondary legislation? In other words, it might get tougher.

Lord Cunningham of Felling: Baroness Fookes, I am almost tempted to ask you to answer the question, since you have so much experience in this field and I have very little. In my

judgment, I think that, yes, the House would be far more circumspect about delegating things if the other powers had been changed.

Baroness Fookes: I suspect I know what the answer would be from my Committee, but that is the start of the process. It then goes to the House as a whole. What do you think the considerations of the House might be in those circumstances?

Lord Cunningham of Felling: It is difficult to avoid the conclusion that if the House thought that its powers had been reduced in one way, it would look for other opportunities to exercise powers that remained, including ways of making it difficult for the Government to get their way.

Baroness Fookes: You may have seen the report of Professor Russell's evidence that, if we followed option 3, it could be said to have retrospective effect.

Lord Cunningham of Felling: I have seen it and I have thought about it long and hard. I then found some other statement or report that Professor Russell had made or given when she spelled it out in more detail, effectively saying that if it was argued successfully that it could be retrospective, the whole body of statute law could be drawn in. Ministers could go back decades, if they so choose, to use that retrospective power.

Baroness Fookes: Yes. It opens what we might more familiarly call a can of worms.

Lord Cunningham of Felling: Indeed.

Q52 Lord Bowness: In our debate on 13 January, you said that you would be in favour of cutting the number of statutory instruments. Indeed, Lord Strathclyde asserted in his report that it would be appropriate "to take steps" to ensure that Bills contained the appropriate level of detail and did not leave too much to regulations. How could we achieve a lesser number? What could be done to achieve Lord Strathclyde's aspirations? Lastly, do you think that anyone has an appetite for doing that in any event?

Lord Cunningham of Felling: No. Perhaps I pre-empted your question by saying earlier that I do not think there is any evidence that anyone has an appetite for that. The Strathclyde report does not make anything other than a passing reference to it. It does not propose any practical actions that might be taken. All this has gone through very quickly and, for all I know, someone may be working away somewhere, in the Cabinet Office or elsewhere, grappling with this problem and hoping to come up with some proposals. The first thing that the House needs is for some of that kind of work to be done and a willingness on the part of the Government to accept that there is a problem that needs urgent and serious address. Presumably your Committee can pursue those matters with Lord Strathclyde, who I think is coming before you, Lord Chairman, and other people from the Administration.

Q53 Baroness Humphreys: You have indicated that you think that re-examination of these issues is sensible but should not be done in a piecemeal way. What do you think the next steps should be?

Lord Cunningham of Felling: You are quite right: I did say that in the course of debate. I have no objection in principle to these matters being examined again. I said at the outset that I do not believe that having one person rushing through something like this is a coherent way to address a serious problem for Parliament—not just this House, but the other place as well. Many people have mentioned a Joint Committee. The Hansard Society suggested an independent committee, but at a meeting that I was at—I was listening, not giving evidence—it went on to suggest that an independent committee could include Members of the House of Commons and the House of Lords. What does that do for independence? I think it was somewhat confused, especially given that in the reply to the debate the Leader of your Lordships' House immediately, almost without any consideration, ruled out the idea of a Joint Committee, which makes it less likely that the Government could be persuaded to set up a totally independent committee outside Parliament altogether. Indeed, I would not particularly be in favour of an independent committee outside Parliament, because it may well come forward with proposals about statute law and the last thing we should be thinking about, as I said, is having legal, judicial disputes between the two Houses of an autonomous, sovereign and independent Parliament.

The Chairman: Lord Cunningham, thank you very much indeed. We are most grateful.

Lord Cunningham of Felling: May I make one final comment? I was asked a few moments ago about next steps: what should be done and how things should be taken forward. First, your proceedings are one of the next steps. The commendable decision by this Committee to inquire into these matters is an important step in its own right. This is a pivotal inquiry and your report will be eagerly awaited. I do not think that there are any simple ways forward, except perhaps to refer to the late Lord Healey's comment that when you are in a political hole, the first thing to do is to stop digging. That should be impressed on the Administration. They have created this hole for themselves and they have tried to dress it up as something that it is not. If they stopped digging, reflected and sought consensus about the way forward—whatever the mechanism for establishing a consensus might be—then Parliament as a whole would be a lot happier.

The Chairman: You may not be alone in that view. Thank you very much indeed.