



Select Committee on the Constitution

Uncorrected oral evidence: European Union (Withdrawal) Bill

Wednesday 13 December 2017

9.30 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 4

Heard in Public

Questions 45 - 54

Witnesses

I: Steve Baker MP, Parliamentary Under-Secretary of State, Department for Exiting the European Union; Robin Walker MP, Parliamentary Under-Secretary of State, Department for Exiting the European Union; Robert Buckland QC MP, Solicitor General; Rt Hon. Baroness Evans of Bowes Park, Leader of the House of Lords.

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Examination of witnesses

Steve Baker MP, Robin Walker MP, Robert Buckland MP and Baroness Evans of Bowes Park.

Q45 **The Chairman:** Good morning and welcome. Thank you very much for coming. We were happy to meet earlier than usual because we know that you have diary commitments. Some time ago we asked David Davis to give evidence and he sent you all, so we are grateful to you for giving up your time. We have a whole range of topics and we have quite some time, so we can go into some detail. Baroness Evans, at the end we will come on to the House of Lords issues and the question of how we deal with the legislation.

Before starting on some of the specifics that we are going to go into, in this very fast-moving situation with negotiations and amendments in the Commons and so on, could you give a view on exactly where we are, given that last Friday we thought that there had been an agreement but now we are told by David Davis that this was a statement of intent? Can somebody perhaps clarify that?

Steve Baker MP: By all means, and thank you very much for the opportunity to appear before you this morning, and to appear as a team. We hope that, with the four of us coming here this morning, we will be able to answer with fullness whatever questions you may have.

The answer to your question is that the Commission, I believe—I do not have the reference to hand—has also acknowledged that it was a statement of intent, much as it is also an agreement. But we need to reach the position where we have complete agreement, hopefully by October next year. Then, of course, we will take that forward into treaty law, and in the UK we will implement the withdrawal agreement in the withdrawal agreement and implementation Bill. I think we have reached a common understanding. We hope to go forward to the Council and formally secure sufficient progress so that we can move on.

The Chairman: I am still not sure that I understand the difference between an agreement and a statement of intent, but perhaps we will cover some of those points as we go through our questions. There is a grey area in a lot of these issues that concerns us.

Baroness Corston: Now we also have “common understanding”. It is all very confusing.

Steve Baker MP: Well, I am not confused. We have a joint report of the negotiators, which sets out where everyone stands. We hope that the Council will agree that sufficient progress has been made and that we can get on to the future relationship talks, nailing down some of the important issues of how we are going to take forward trade and security co-operation and other matters.

The Chairman: As we sit here, I gather that the European Parliament is also trying to get clarification on some of these points. Maybe later we

will be able to do so. Lord Judge, would you like to start?

Q46 Lord Judge: If what was agreed was a statement of intent, or even an agreement in principle, why were we not told that on the Friday by both sides?

Steve Baker MP: The question of what exactly the agreement is has evolved. It is a report of the joint negotiators and it is the basis on which Michel Barnier and Jean-Claude Juncker are recommending that sufficient progress has been made. On the basis of the report of the joint negotiators, we hope it will be agreed that sufficient progress has been made. I am a bit reluctant to disappear down a rabbit hole on the basis of a joint report. I hope that it is the basis on which the parties can reach a political agreement to move forward to the next stage of the negotiations.

Lord Judge: I am sure, but if what there is is a joint report put before the Council, why we were not told that?

Steve Baker MP: That is not a question I can answer, Lord Judge. That would be first and foremost a matter for the Secretary of State. I do not know whether my colleague wants to come in here.

Robin Walker MP: I think it was always clear that that was the process—that the Council would have to sign off this matter at the December European Council. We were always clear that we were working towards sufficient progress on these issues. The key thing is that, on the basis of this joint report, the Commission is recommending to the Council that sufficient progress has been made and that therefore we should move on to the next stage of the negotiations. That is obviously a recommendation that we welcome and one that we have been looking to secure.

It is also important to recognise that there are many areas in the joint report where we have reached agreement—for instance, on citizens' rights. Multiple times we have published a table of the different areas relating to citizens' rights where we have been seeking to reach agreement. It was colour-coded and, over time, you will have seen it looking like a traffic light, gradually converging. At the end of this process we have been able to publish a table where all the boxes are green. That is a significant step forwards and I think it provides significant reassurance for people.

Clearly there is a difference between having reached political agreement on these matters and having a formal, signed withdrawal agreement, which will come later in the process.

The Chairman: Can we move on to another area where we would like to see more clarity, which is general legal certainty?

Q47 Lord Pannick: We all agree that legal certainty is one of the primary objectives of the Bill. We have heard evidence suggesting that the Bill will cause considerable legal uncertainty because, except to a limited extent,

it does not tell us what the status of the retained law will be in domestic law. Will it be primary legislation? Will it be secondary legislation? Will it be a bit of each, or will it have some new status? This is a fundamental difficulty and it will matter because the status that the retained law has will be relevant to whether you can challenge it if you are aggrieved by any of it—for example, if you think that it does not accord procedural fairness or that it is retroactive. Under those principles, the courts will be asked to challenge it. There are also other factors. Are the Government still thinking about whether they can do more to promote the vital need for legal certainty in this context?

Robert Buckland QC MP: I am grateful for your question. This has exercised my mind for some time. I hope you have seen that, helpfully, it has already been aired very comprehensively in the Commons. I put on record my thanks to parliamentary colleagues on all sides for making the debates meaningful, as I hope your Lordships have found. Sometimes the Commons gets a bit of a bad press for giving important aspects of legislation only a cursory glance, but on this occasion I think we are proving somewhat up to the task.

We have concluded that, on balance, it would not be right to give a single status to all the legislation. If you like, it is EU-made law, so, although it will become domestic law, it will have a distinct status from both primary and secondary legislation. Tempting though it is to try to create a one-size-fits-all approach, the sheer scale of the legislation militates against that.

I offer just a quick reminder from EUR-Lex, the database. At the last examination, it appears that we are dealing with 12,280 EU regulations, and 17,505 EU decisions are currently in force. That is a substantial amount of material. Tempting though it is to try to capture it all as either primary or secondary, my genuine worry is that we might do a disservice to some or all of that material by categorising it in that way.

Schedule 8 might give the Committee some assistance, most notably in paragraph 19, which, for the purposes of the Human Rights Act, says that all retained EU direct legislation will be treated as primary legislation. That is important in terms of potential declarations of incompatibility and other matters that flow from those provisions. Paragraph 3 of that same schedule provides that existing powers to make subordinate legislation may be used to modify retained direct EU legislation and will be subject to the same parliamentary procedure.

The interpretation and, if you like, the mechanism are dealt with in paragraph 1 of Schedule 1, which was debated on the Floor of the House of Commons some weeks ago. It provides that direct EU legislation may not in general terms be challenged on or after exit day on the basis that immediately prior to exit day an EU instrument was invalid.

We will also place reliance on Clause 17 of the Bill, which will allow regulations to be brought forward to clarify our approach with regard to the status of retained direct EU legislation.

With regard to challenge, of course judicial review will continue to be available with regard to these provisions of retained EU law, such as challenging the vires of a domestic regulation that implements an EU directive that is now part of our law.

This is very much a day one exercise. We are trying to bring everything down into domestic law on day one, and from there we will, on a case-by-case basis, make sure that the legislation is treated in the appropriate way.

Lord Pannick: That is really helpful. I have read the debates and they are illuminating. They expose the problems, but whether we have answers is another matter. Perhaps I may put some follow-up questions to you on that. You mention paragraph 19 of Schedule 8. For the purposes of the Human Rights Act, the retained EU law is to be treated as primary legislation. Of course, the courts will then have to interpret whether that suggests that, for other purposes, the retained law is not to be treated as primary legislation. That is one of the difficulties.

You mentioned paragraph 1 of Schedule 1, which provides that, "There is no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid". Do I understand correctly that that simply prevents a challenge by reference to EU law and that it does not exclude domestic law challenges?

Robert Buckland QC MP: That is right.

Lord Pannick: You also mentioned Clause 17 and I want to ask you specifically about this. Our understanding from the Government's evidence is that Ministers are saying that, if there is a particular need after exit day to specify whether for a particular purpose a retained EU law should have the status of primary or secondary legislation, Ministers can use Clause 17 delegated powers to achieve that result. Is that right?

Robert Buckland QC MP: Yes, that is right. The procedure will be the negative procedure.

Lord Pannick: As the Constitution Committee, we are asking ourselves whether it is appropriate that a Minister has the power—of course, subject to approval by Parliament—to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation. That is the constitutional question.

Robert Buckland QC MP: It is a very important question, Lord Pannick. Starting with first principles, Clause 17 is nothing special; we have seen this type of provision in many other Bills, now Acts of Parliament. From my own specific experience on Bill Committees, I can remember the Immigration Bill, now the Immigration Act 2016, where just such a provision exists. We all know how complicated and difficult immigration provisions can be. I do not recall a hint or squeak of objection from the Opposition in that debate. Indeed, Sir Keir Starmer was my opponent on

that occasion and, as you know, he takes great care in everything that he does. However, I am not singling him out, because there are other such measures. I think that the Protection of Freedoms Act 2012 has a similar provision. In short, there is nothing unusual about these powers. However, I accept that the way and the context in which they are used is somewhat unusual.

Lord Pannick: I am sorry to interrupt but surely it is unusual for a Minister to have a power to specify that something is to be treated as primary or secondary legislation. That, I think, is unique, is it not?

The Chairman: And for it to be amendable.

Robert Buckland QC MP: I accept that we are in new territory here. Having said that, I think that, when embarking on new territory, all Ministers tread extremely carefully. To use a word that was the subject of much anxious debate yesterday, as Mr Baker will testify, we are talking about something that is somewhat “technical” in its provision. This is not an attempt by the Government somehow to change the constitutional landscape deliberately, or unintentionally, which in some ways is worse, to reduce the level of scrutiny and challenge that can be afforded to particular pieces of retained EU law. As I said, a case-by-case basis will be adopted, and the Government’s watchword is: does this increase certainty and improve continuity? If it were clearly taking us in the direction of a policy change, that would be something that we would not want to use these provisions for.

The Chairman: You mentioned paragraph 19 of Schedule 8 and said that that was nothing unusual, but you did not deal with Lord Pannick’s point. Would that lead to an interpretation that anything that was not the human rights side of things might not be considered as primary legislation?

Robert Buckland QC MP: We have to start from a fundamental principle here, which is the effective challenge that you could make. I have already mentioned that judicial review will be available. Importantly, paragraph 19 was put into the schedule to the Bill to provide reassurance—indeed, it has been welcomed by leading Members of the Opposition in the Commons—that there is a mechanism by which provisions can be challenged in a way that we are now very familiar with as a result of the Human Rights Act. That is new, and I think it is welcome, but it does not preclude or reduce other opportunities for legal challenge in the usual way.

The Chairman: But we do not want to get into a situation where there is judicial review after judicial review on a whole range of matters.

Robert Buckland QC MP: I accept that, Lord Chairman, and everything that the Government are trying to do seeks to minimise that. One reason why I am grateful for the opportunity to be here before you today is that I can listen very carefully to potential alternatives by which we can achieve the same goal—namely, maximising legal certainty.

The Chairman: We will produce a fulsome report on these and other issues.

Q48 **Lord Beith:** Clause 4 appears to preserve and protect existing rights. Indeed, the Government's written evidence says that this is a broad-sweep provision for that purpose. Some of these rights have been extensively discussed in talks held by the Prime Minister, and I hear that reciprocity crops up quite regularly. Does that mean that in some way the effectiveness of this clause will be diminished at some stage in the future because reciprocity has not been achieved in respect of a particular provision and therefore delegated powers elsewhere in the Bill will be used to deny the effectiveness of Clause 4?

Robert Buckland QC MP: You touch on a very important point: what does reciprocity mean? It means the ability to enforce your rights either here or, if you are in another member state, in another member state. Clause 4 represents a very open and generous position on the part of the Government. It says that, although we are leaving the EU, we are going to continue to stick by many of the obligations that were predicated upon our membership—not just by way of EU treaties but by way of other treaties signed by the United Kingdom, such as on Euratom, that will be relevant to our position.

It was important that we adopted a belt-and-braces approach by having Clause 4 in the first place. Not having a sweeper provision could have led to holes and gaps and the sort of problems that I know you, as a prominent pro-European, would be very concerned about—namely, that we would be abandoning positions and rights that we had accrued as a result of our membership of the EU. I am thinking, for example, of the directly effective rights such as the one on equal pay, which is a very important principle that we want to retain. Indeed, in the Explanatory Notes to the Bill, which I know you will have seen, we have tried to set out on page 24 a non-exhaustive list of the sort of rights that we are dealing with.

I read with interest some legal articles on this issue about whether or not the fact that we leave the EU means that there is anything for these provisions to bite upon, and that the text of these particular rights becomes somewhat meaningless because we are no longer members. However, as the Explanatory Notes set out, we are talking about the right itself being converted rather than the text, so concerns about the detail of the text somewhat fall away when looking at the essence of what is being converted. In effect, we are using Clause 4 to replace Section 2(1) of the European Communities Act to retain and save those important rights that have direct effect.

By way of what I hope will be further reassurance, Lord Beith, in paragraph 13(b) of Schedule 7 to the Bill there is a provision for regulations to be made so as to make any provision that restates retained EU law to be clearer and more accessible. For example, some of these directly effective rights, whose wording might appear to be a bit weird because we are no longer a member, can be amended to make

them understandable and accessible to retain their force. In other words, there can be reassurance that we are not going to tamper with them; we are just going to ensure that they are as clear as possible. This is very much a starting point. It is not where we are going to gradually end up as the law evolves but, in doing the best that we can, we have to start somewhere, and I think Clause 4 achieves that to a very large measure.

Lord Beith: That is a very helpful explanation of the context and reasoning behind Clause 4 and I do not dissent from much of it, although Governments should always be careful about using the word “generous” when they are talking about human rights—human rights should not depend on the generosity of Governments. Still, that does not quite answer my question as to whether you envisage some particular thing not going well in the negotiations, in which reciprocity is not satisfactorily secured, leading to the Government coming to Parliament and using the most limited procedures, which we will be talking about later, in order to abridge in some way what Clause 4 is trying to confer.

Robert Buckland QC MP: What I meant by being generous is being generous to our international partners, in the sense that we seek to honour these particular obligations even though the basis on which we were parties to the treaties will disappear. I agree that it is not a question of the Government being generous when it comes to rights. Inevitably, this clause has to be somewhat more of a framework than descending to particularity. As you rightly said, we do not yet know the full outcome of what the final relationship might be. We have perhaps stepped a little closer towards understanding the sequencing of events over the next few years as a result of the events of the last week, but for the Government somehow to deal with Clause 4 in a more exhaustive way at this stage would be difficult and would not be the right approach with regard to allowing us to create a framework rather than the policy itself. Still, we bear very much in mind what you say, and I can repeat the assurance, which we give repeatedly but importantly, that we do not intend to use the provisions in this Bill to sneak through substantial or substantive policy changes in a way that would not pass the test of proper parliamentary scrutiny.

Steve Baker MP: I would just like to pick up on a point that you made about coming back to Clause 4 using the powers in the Bill and say something about each of the powers. Clause 7 powers cannot be used to amend the Bill itself. Clause 9 powers can amend the Bill itself but, in doing so, must be implementing the withdrawal agreement and would be subject to the affirmative procedure in doing so.

Lord Beith: I assume that this will arise from the withdrawal agreement, by the way.

Steve Baker MP: Thank you, yes. It would be conceivable that Clause 9 could be used to amend the Act, but that would be subject to the affirmative procedure. It is for your Lordships to determine how you do the scrutiny, but our own House would have the opportunity to vote it down. It is not our intention to do that, and I am not clear how it would

arise from the withdrawal agreement, but we are in the business of listening to Parliament on all these points. We have given a number of concessions that I am happy to run through. We want a Bill that works, so if you have particular concerns on this then we will look extremely carefully at what the Committee says.

Robin Walker MP: We have spoken about the withdrawal agreement and the implementation Bill that will implement the agreement, and it is very clear that the intent of the Clause 9 power is to allow for preparation on the withdrawal agreement and that side of things, not to make any major policy changes. The types of changes that you are suggesting in terms of any reciprocal arrangement on citizens' rights require primary legislation and therefore would be included in the withdrawal agreement and implementation Bill rather than being carried out under Clause 9.

Q49 **Lord Hunt of Wirral:** Turning to exit day and transition, our inquiry into the Bill is against a background of what appears to be a fast-moving situation. What do the Government intend to achieve by stipulating exit day for all purposes in the Bill? Does that not bind the Government's hands in the negotiations, making it more difficult to accommodate any implementation or transition period?

Steve Baker MP: First, these amendments do not change the date on which the treaties cease to apply to the UK. As you know, that is a matter of Article 50. It is our policy not to extend the period and, as I think I said earlier, Michel Barnier agrees with us that we should get an agreement by October next year. So this amendment brings clarity. Some confusion appeared to emerge in debate about the potential differences between the meaning of "exit day" in the Bill and "exit day" for the purposes of treaty law, and with these amendments we have sought to bring clarity so that everyone can understand exactly when exit day is for all purposes, in one place and consistent with the Government's announced policy.

Lord Hunt of Wirral: So if the Article 50 negotiating period were extended by mutual consent, how would that affect the situation?

Steve Baker MP: It is our policy not to extend the period.

Lord Hunt of Wirral: We have to inquire into a Bill that has to be a Bill for all seasons, to cover all eventualities. It is possible that the Article 50 period could be extended, so how would that fit in with putting exit day for all purposes in the Bill?

Steve Baker MP: From the point of Article 50, you are of course correct that exit day could be postponed by mutual consent, but we do not think it is in the UK's interests to approach negotiations that way. We believe that it is right to conclude our agreement in time to exit the European Union in March 2019.

Robin Walker MP: The feedback that we have had from EU institutions and indeed member states is that there is a strong desire from their perspective to ensure that the UK is out of the institutions—for instance,

out of the European Parliament—ahead of the European parliamentary elections that year. That is something that we see reflected in our conversations on both sides, and the joint agreement reflects the fact that there is agreement on the timetable for the process. We need to make sure that we provide maximum clarity and certainty through this legislation, so that has a bearing on this. Crucially, we have seen a bit of a red herring in the Commons debate in the idea that having a date would preclude an implementation period. Again, it is very clear from the joint statement last week that that is not the case and that we can legislate for an implementation period through the withdrawal and implementation Bill.

Lord Hunt of Wirral: I suppose that I am asking whether, if events unfolded such that it became unhelpful for exit day to be the date specified in the Bill, it is the Government's view that Ministers would be able to amend the Bill using delegated powers so as to change the exit day.

Steve Baker MP: The only power that can amend the Bill is the Clause 9 power, which can only implement the withdrawal agreement. So the delegated powers will not be able to amend the exit day in the Bill.

Lord Hunt of Wirral: Moving on to the possibility of an implementation period, how do you see the powers in the Bill being used if such a period is agreed? It would be helpful to have clarity on whether the idea of a transition period is the same as an implementation period. Does transition require a deal to be agreed before such a period starts, or does it mean a period of continuing negotiations with the implementation period beginning only after they are concluded?

Steve Baker MP: The substance of the EU withdrawal Bill is the business of making the statute work for exit day. We would expect any matters relating to the implementation period to be dealt with in the withdrawal agreement and implementation Bill. The Clause 9 powers relate to things that we simply must have done by exit day or perhaps some preparatory measures that we might need to take by exit day that, for reasons of time, might need to run in parallel with the passage of the Bill. The substance of the implementation period is really a matter for that subsequent piece of legislation and would not be dealt with in this Bill and I would not expect us to use the Clause 9 powers to bring it forward.

Lord Hunt of Wirral: So when we now seek an assurance that the proposed withdrawal agreement and implementation Bill to implement the deal is brought before Parliament, will that be before 29 March 2019 and will there be an opportunity for proper scrutiny and examination?

Steve Baker MP: Certainly. It is our intention that the Bill should go through Parliament in the usual way and receive Royal Assent by exit day. We believe that that is possible within the timescale that is before us, which is that, as agreed with Michel Barnier, we would like to conclude a withdrawal agreement by October next year and then proceed

through the sequence of votes that was announced this morning in a Written Ministerial Statement.

Lord Hunt of Wirral: We need to ask whether, if no deal is reached with the EU, it is still the Government's intention to give Parliament a vote prior to exit day.

Steve Baker MP: The votes that we have pledged are on the withdrawal agreement. We can only vote on the withdrawal agreement.

Lord Hunt of Wirral: Presumably that would require a meaningful vote in both Houses of Parliament.

Steve Baker MP: Perhaps it might be helpful if I drew the Committee's attention to the Written Ministerial Statement that came out this morning. The first pair of votes would be a resolution in each House on the agreement reached. Then we would have the passage of the withdrawal agreement and implementation Bill, and of course we would have the CRaG process to approve each treaty that we had concluded.

The Chairman: That Statement was put out because of the amendment that is in the Commons today, was it?

Steve Baker MP: It is a Statement that we always intended to make and it has been made this morning.

Baroness Drake: I want to push further on Lord Hunt's point about a Bill for all seasons. Your response was, "Well, the Government's approach to negotiations is that that's our position and that's our exit day", but of course the reality of the outcome of the negotiations will not necessarily be the same as the Government's stated approach, because you have to control the behaviour of other parties. So, even though that is your assertion, we have to think about what the outcome of the negotiations could be. I am not quite clear about what you are saying. Are you saying that once the exit day is in the Bill, the only way it can be changed is under Clause 9 through the withdrawal agreement?

Steve Baker MP: Sorry, I was trying to make it clear that, if a withdrawal agreement had been concluded, the Clause 9 powers could not be used because they are clear that they relate only to implementing the withdrawal agreement. The only clause that allows the Bill itself to be amended by statutory instrument is Clause 9, so there would be no power available to amend the Bill itself through secondary legislation.

Lord Beith: Could I be clear about what legislative steps would be required if that situation arose?

Steve Baker MP: That is something that we would need to announce as the point approached. The point, really, is that it is our clear intention to conclude a deep and special partnership that works for all parts of the UK and all the nations of the EU. As we saw last week, we have taken important steps towards concluding that agreement and I very much hope and expect that, as we go to the Council, the Council will agree

sufficient progress. However people voted in the referendum, I hope that they will be glad that we have made this important progress, which dramatically reduces the prospects of a no-deal situation.

The Chairman: But you said that an agreement was necessary by October next year. You are almost implying that there are no contingency arrangements, including in terms of Parliament's role, if does not happen.

Steve Baker MP: We are contingency planning right across government, but we are clear as we proceed through negotiations what the timetable is for exit day. We wish to put into the Bill the reality under international treaty law of our exit day, which is as announced, and to give people clarity that there is one exit day and that it is 29 March 2019.

Lord Dunlop: I have a couple of points. Do you envisage a single implementation period? There have been references in the past to different implementation periods. Secondly, I would like clarified a couple of points from the Prime Minister's Florence speech. She said that during the implementation period access to one another's markets should continue on current terms and that the framework for this strictly time-limited period would be the existing structure of EU rules and regulations. Could you help us to understand how that works if the treaties cease to apply on exit day?

Steve Baker MP: On your first question, it is our intention to have a single implementation period, but this is a matter for the negotiations and we need to get through this Council and get into that conversation about both the implementation period and the future relationship that is to follow after it. Again, forgive me if this is a slightly frustrating answer, but the exact terms of the implementation period and how it will work are to be negotiated. On the point that the Prime Minister hinted at briefly in her Florence speech, as I expect the Committee knows, the EU needs us to become a third country in order to sign and ratify our future relationship agreement. The trick here in order to give a smooth exit—one that gives certainty to individuals and businesses and that gives the Government time to adjust—is for us to become a third country, ratify the future relationship agreement and then move smoothly from membership to implementation as a third country to a new future relationship as a third country. That is what this is about, but the precise details of how the implementation period works are yet to be negotiated.

Lord Pannick: I understood you to say, Mr Baker, that if, unhappily, there is no agreement by October 2018, the Government are not committed to bringing a Bill or even a Motion before Parliament in order to get parliamentary approval for Britain's decision to walk away.

Steve Baker MP: We hope and expect to conclude an agreement. I hope that I have conveyed a spirit of optimism and hope.

Lord Pannick: Of course, but if.

Steve Baker MP: Indeed, if. The vote that we have committed to is a vote on the withdrawal agreement, but I would say that both Houses put through the European Union (Notification of Withdrawal) Act unamended, and the House of Commons voted for it by a very large majority. The terms were clearly known to parliamentarians at the time, which are that the treaties would cease to apply—you know the terms of Article 50—either when a withdrawal agreement came into force or after two years. The House of Commons in particular voted by a large majority to exit the EU on that day. That decision has been taken.

Lord Pannick: But with the constitutional implications of leaving with no agreement being so enormous, would it not be constitutionally appropriate to seek the approval of Parliament for something like that?

Steve Baker MP: The point that I am making is that, thanks to that process of a Bill—now an Act—going through Parliament, Parliament has approved our exiting the European Union on that date. That is my fundamental point. As a matter of law, as you know, we have approved the notification of withdrawal, and the treaty terms were clear to parliamentarians.

Lord Pannick: So it is all water under the bridge.

Steve Baker MP: I would not say that it is water under the bridge, because it will all be subject to the closest political and, no doubt, legal scrutiny. I have no doubt whatever about that. I am just making the point that, with the passage of that Bill, Parliament expressed the view that we should leave the European Union within the terms of Article 50.

It is my hope and expectation that we will conclude a good-quality deal that works for everyone. Throughout the campaign and previously, it has always been my personal intention, and certainly my intention as a member of the Government, to have high-quality relations with our European neighbours but on a different legal basis. I very much hope and expect us to do just that. This week I am far more hopeful and optimistic than I was prior to the joint report being issued.

The Chairman: But the date is the date regardless of the agreement.

Steve Baker MP: The date is as defined by treaty law and we wish to put that on the face of the Bill. When we conclude the agreement, it will need to deliver the arrangements that I set out a moment ago enabling us to move from membership to an implementation period as a third country and to a new set of relationships. The point here is to nail down this process and to give people clarity on what is going to happen.

Q50 **Baroness Corston:** One thing that will be determined by exit day will be the functioning of the European Court of Justice. Thinking about the transition arrangements, which will obviously be extremely important, it has been said to us in evidence that it does not seem sensible, to put it mildly, to disable the European Court of Justice at midnight and then to have to find a way of enabling it a millisecond later, should we be in the

happy position of having transition arrangements. How on earth does that help to lessen the constraints on the Prime Minister in the latter stage of the negotiations?

Steve Baker MP: I think that this is generally a point for the Solicitor-General. The point I would make is that it is necessary for us to become a third country. Although it is a frustrating answer, I am afraid that the terms of our implementation period are still to be negotiated.

Baroness Corston: So what would we do?

Robert Buckland QC MP: That would be one of the potential functions of Clause 9, which would deal with some of the necessary and important technical provisions that would ensure continuity so that ongoing cases were not disrupted. It is not at all the intention to upset the apple cart when it comes to cases that have been commenced prior to exit. But obviously, pre and post exit day, we need clarity on how to treat different aspects of the law. That is why the interpretive provisions have to be set out in the way that they have been.

Baroness Corston: Yes, but if the court is disabled at midnight, because it would have to be, what do you do during the transition arrangements? What effect will this have?

Robert Buckland QC MP: I do not think that it would have any effect on ongoing cases. If you are already a litigant and your case has been referred to the CJEU—that is, you have commenced your case pre exit—it will carry on.

Robin Walker MP: In the event that an implementation period is agreed between us, it will be enabled in UK law through the withdrawal agreement and implementation Bill, which will specify the role that the European Court of Justice will have during the implementation period, as recognised under UK law. This Bill sets out to deal with the arrangements for our exit without regard to the outcome of the negotiations and the deal.

Clearly, in the event that there was no agreement, it would be right for the UK to end the role of the European Court of Justice in our law because we would be a third country—we would be outside the European Union. But there is absolutely an intention to use the withdrawal agreement and implementation Bill to legislate for that role and to be clear that, as I think the Prime Minister has made clear, there will be a role for the European court in enforcing those rules and regulations during an implementation period. That would be by agreement and as a result of the implementation period, not by default in UK law. That is perhaps where the distinction is: ending the role of the European Court of Justice in UK law at the point of exit but then potentially having an agreement that allows it a role over the time-limited implementation period.

Lord Judge: According to reports on the report, not only will the Supreme Court be allowed to consider the decisions of the European

Court—in the way that it can consider the decisions of the United States Supreme Court or the court in Australia or anywhere else that it might choose—but it may refer to the European court for its views in relation to the rights of EU citizens here. What is not clear from the report—at least I do not think it is—is whether the Supreme Court will be bound by the decision of the EU on the question of the surviving rights of an EU citizen who is here or whether that decision will simply be treated as advisory. Is it likely that the European court will accept a situation in which it merely gives advice to our Supreme Court?

Steve Baker MP: The terms of the joint report are as set out and we will need to nail down all those details in treaty law by, as you know, bringing forward the withdrawal agreement and implementation Bill. I will ask the Solicitor-General to come in on the final point about the Supreme Court. From a political point of view, this is a voluntary referral on a narrow and contained set of points of law and it is time-limited. Personally, I think that it is reasonable to establish a body of case law in relation to citizens' rights under the withdrawal agreement. I think that is reasonable, and people who take strong view about—

Lord Judge: I am not challenging the reasonableness of it; I am just asking how we envisage our Act of Parliament defining the position as between the EU court and our Supreme Court.

Steve Baker MP: I should turn to the Solicitor-General on that point.

Robert Buckland QC MP: Mr Baker has outlined the essence of the report and he is right to say that there is a reference in it to a mechanism that needs to be agreed. As a first principle, the fact that the European Commission has agreed to this position must, by implication, mean that the CJEU is content to deal with this discrete area in the way envisaged—in other words, we are not suddenly going to turn up at Luxembourg and be asked, "What are you doing here?"

Lord Judge: As a solicitor, you might, but let us assume that you are right.

Robert Buckland QC MP: Therefore, in that eight-year period we will be dealing with the rights of EU citizens in a particular way, should there be a need for a reference to the courts by our domestic tribunals. On that basis, the position of EU citizens continues as before for that eight-year period.

Although the mechanism has not yet been precisely established, let us assume that it is not dissimilar to the one that we have now. There is obviously no direct right of appeal, which is often misunderstood by lay observers, but, as you well know, Lord Judge, this is a mechanism that the court can use to refer an ambiguity. That will be where we are. Because the period is time-limited, my understanding of the position taken in the report is that for that particular category of person, case and type of issue—namely, citizens' rights—the status quo ante will continue.

Robin Walker MP: The other point that I would make on this is that the detail of the citizens' rights areas and the areas that we have now agreed on shows that many of them use definitions in EU law to define the status that will continue to exist. The real point here is that we respect the fact that the CJEU is the body that is empowered to define and explain definitions in EU law, so there needs to be that process in law for our courts to refer to it if explanations are required. If our courts are confident that they have the exact meaning of the EU law in those circumstances, there is no need for there to be an automatic referral. That is the point about having the eight years to build up the necessary case law to ensure that our courts will have very clear guidance as to exactly what those terms mean and to follow through on that. It relates very specifically to where EU law, and definitions of EU law, will continue to apply in the citizens' rights agreement.

Lord Judge: Thank you. Can I move to a slightly broader question rather than the specific issue that was agreed last weekend? As everyone knows, following the 1972 Act the law of the EU was in effect vested with statutory supremacy over domestic law. It is pretty obvious that that cannot continue when we leave the EU, but on the other hand some EU law will be retained. Where does the supremacy principle then stand? Is it modified and, if so, how?

Robert Buckland QC MP: Well, Lord Judge, supremacy as retained under the Bill will plainly not apply to every aspect of retained EU law. For example, domestic regulations that have been made to implement EU law do not have a supreme status after exit day that they did not have before, so there is no change there. However, the principle of supremacy will continue to apply in so far as it is relevant to the interpretation or disapplication of any enactment or rule of law—our wording, “rule of law”, has attracted a bit of criticism, but we are mindful of the fact that not all our law is in statute and there are common-law principles and other aspects that need to be embraced by this legislation—that is passed before the day of exit. In essence, it will apply in the same way as it does now. We all know—certainly those of us around this table who have immersed ourselves in this over the years—the principle of what supremacy means: it is, if you like, a hierarchy in which particular aspects of law, particularly directly applicable EU law, have to take precedence over pre-exit domestic law in the event of a conflict. That will carry on. Our aim—Clause 5 is where we deal with this—is to retain that, subject to the particular exceptions that we have set out in Clause 5. So in the main yes, but with that exception with regard to the domestic regulations that I have referred to.

The Chairman: Baroness Corston, have you covered all your core points?

Baroness Corston: In his evidence to the Committee, discussing the Court of Justice to the European Union, Lord Neuberger said that there was a need for clearer guidance to the courts on the interpretation of CJEU judgments after exit day. He is right, is he not?

Robert Buckland QC MP: I take everything that Lord Neuberger says with the utmost seriousness; even though he is no longer President of the Supreme Court, naturally his view will carry weight. I preface my remarks by saying that there is continuing engagement with the senior judiciary on this issue, because we want to get this position right. However, I will say at the outset that, although it is tempting to try to create some sort of list of dos and don'ts for the judiciary, that in itself is fraught with danger. The lesson that I have learned in the years that I have had responsibility for the passage of legislation in the other House is that less is more. I am conscious that the Government could be properly criticised for unduly fettering the discretion of courts and judges, who, frankly, can and should be trusted to interpret the law as they have done for many generations. I am therefore of the school of thought that errs on the side of brevity when it comes to directions or provisions of this nature. Having said that, tempting though it might be to adopt the approach that we took with the Human Rights Act with regard to cases from the Strasbourg jurisprudence, the fact is that we are leaving the EU, so we cannot draw that direct comparison. Therefore, the distinction between the approach taken in that Act and the approach that we take in the Bill is entirely justified.

I note the arguments about the use of the word "appropriate". Having been through my thesaurus, I know that it is difficult to find a word that carries the sort of objectivity that some who have taken part in this debate are seeking. I do not think that there will be a perfect solution to this, but I am all ears when it comes to phraseology that—subject to my rule about brevity—could be used to achieve the desiderata not just of Lord Neuberger but of all members of the judiciary who might be faced with this task in future.

Baroness Corston: So the courts will be able to take CJEU judgments into account when making their decisions but they will not be required to do so. What effect will that have?

Robert Buckland QC MP: With respect, I would have thought that it was obvious that, because we are leaving the EU, the idea that they would be required to take into account the judgments of another jurisdiction would not be true to the purpose of Brexit. Having said that, there is nothing to stop judges considering the case law, as they do with case law from a number of jurisdictions. Inevitably, because of our 43-year relationship with the EU and the closeness of it, the case law of Luxembourg will continue to be germane in some cases, but a clear line has to be drawn post exit as to its effect. Anything that would lead a court to consider itself bound by the jurisdiction of Luxembourg would contradict the aim of Brexit.

Lord Pannick: That is very helpful. Could I put to you this concern of the judiciary, which is that the Bill as drafted would impose on them what is a very sensitive, and in many cases political, choice to make as to what weight to give to judgments of the Court of Justice post exit on the meaning of retained law? Judges do not want to have to make decisions

that will expose them to challenges from those who are pro-Europe or anti-Europe, in simplistic terms. It might therefore be better to say in the Bill, as a political choice, that the courts of this country should normally follow—not always, but unless there are exceptional circumstances—judgments of the CJEU given post Brexit on retained law.

Robert Buckland QC MP: It is tempting to go down that line, Lord Pannick. While I absolutely understand and accept the point that judges are not willing to charge in to political sensitivities and that UK judges are not itching or champing at the bit to get involved in high politics—in my experience the contrary is the case; sometimes members of the senior judiciary feel that they are being backed into positions that they do not want to find themselves in—I have to say that my experience of the decisions of our courts is simply that they seek to answer the question in front of them. They do not seek to be the lions of the constitutional savannah, wandering around making general sweeping statements. That is not how our judiciary behaves and I do not expect it to behave like that in future.

It would be tempting—I think I have alluded to this—to try to create the sort of approach that we have taken in children’s legislation; I think that that is the analogy I would draw. Judges are given a whole checklist of considerations that they should go through before reaching a decision. That is, frankly, a Sisyphean task.

Although I accept the concerns of Lord Neuberger and others about the political maelstrom and the economic and industrial considerations that surround EU law, and I accept to a degree the distinction that he draws between that context and the context of the European convention, I do not quite buy it, because I see the European convention as highly politically charged as well. We know from recent experience the number of controversies that have been created, although in the latest example—namely, prisoner voting rights—the lack of a press reaction to the Government’s sensible solution, now approved by the Council of Europe, shows that, when it comes to it, the rule of law will and must triumph.

To come back to my point, I err on the side of caution when trying to set out something that judges can use as a how-to-do-it guide for this type of case. I do not think we can do that, but I think we can trust our judiciary to get it right.

Lord Judge: I entirely agree with you on the point about whether there needs to be a great framework with 32 dos and 37 don’ts, but a single provision explaining how our courts should address the decisions of the CJEU would be sensible, would it not? We are told that in the Human Rights Act there is a provision on this. Surely we need such a provision or one that says, “are entitled to take account of the decisions of the CJEU but are not bound by them”, or perhaps something else. There needs to be a simple formula without a huge framework.

Robert Buckland QC MP: That is what I think we are achieving with the current wording. We are trying to keep it simple. We are making the

point implicitly that we will have left this institution, so let us remember that. Keep that in your mind when considering the case law but, at the same time, you are free, if you think it is relevant, appropriate or germane, to apply case law to assist you in coming to a conclusion.

As I said at the outset, I am all ears when it comes to different formulae, provided that they are suitably brief and concise. I am sure that when the Bill comes to your House your Lordships will, in debate, be able to help in that iterative process. The Government remain very open to other ideas to reach the same outcome.

Baroness Corston: In his oral evidence to this Committee, Lord Neuberger told us that, if judges are not given guidance, “they will have to do their best”. You have just referred to press reaction. Can you imagine what the press reaction might be to judges doing their best with European law?

Robert Buckland QC MP: I absolutely accept that sometimes the press behave in a way that, frankly, does not respect the rule of law. The sorts of headlines that we saw last year were inappropriate. They contained personal attacks on judges, who cannot answer back in these situations. Their judgment is their public statement and it should not require any further elaboration. I take a very clear view about the importance of not just defending individual judges but defending the rule of law. That leads me, with very high confidence, to trust the judiciary to make the best possible decisions in the circumstances. It is up to us here, in both Houses, to make sure that their position is defended against ill-informed and intemperate attacks on them.

Q51 **Baroness Drake:** Clause 5 states that the European Charter of Fundamental Rights will no longer apply in domestic law. The Government have said that they do not intend that substantive rights protected in the charter will be weakened. I know that the Government have published a rights analysis, which will be scrutinised. However, the removal of the charter will result in the relevant rights being scattered across the domestic legislative landscape. If the Government really intend no diminution of rights, would there not be merit in listing in a schedule to the Bill all those rights in order to keep them readily accessible and to provide a sort of repository or codification? Would the Government not consider that to be a good idea? Have they reflected on that point?

Robert Buckland QC MP: That is a very interesting question, Lady Drake. I have reflected on how we answer the question about accessibility. I do not entirely accept the premise that currently everything in the garden is rosy in this respect. I do not think that the current picture is terribly clear. If you asked a reasonable person in the street where their rights emanated from—and I would not expect a reasonable person to give a lawyerly answer—I think that even a person with a reasonable acquaintanceship with the law would have difficulty in saying precisely where they would find them.

In other words, the landscape is complex. For example, the charter itself is often misunderstood. It is not a free-standing set of rights; it applies to EU institutions and then it applies to member states only where they act within the scope of EU law. So its own sphere is limited, and people are to be forgiven if that is sometimes misunderstood. Of course, we are all familiar with the regular elision of the charter and the convention, which still comes up time and again in everyday conversation. So I do not think that we start from a very clear position.

I think that our intention is to try to make things a little clearer. Although it might sound almost counterintuitive not to include the charter as we download EU law, it is the substantive rights that individuals have as a result of EU law that matter to people and it is those substantive rights that will continue to apply, and be applied, in our domestic legislation.

In recent weeks—I think it was on 5 December—we set out a memorandum, which I hope members of the Committee, and indeed others, have found helpful, on guidance on the context of the Bill. I do not pretend that it is an authoritative and final statement of law—that is not the job that we need to fulfil. It is something that ultimately the courts will have custody of. Perhaps that illustrates the answer that I am about to give to your question on whether we should list the rights as a schedule. Seductive though that argument is—

Baroness Drake: You are repeating the reasoning that the Government have made elsewhere, which I have been reading.

Robert Buckland QC MP: Forgive me; I think that you have anticipated my answer. The danger of putting a list in a schedule is that it becomes an exhaustive and final authoritative list, rather than something that is meant to be guidance. Again, if we try to do that, we are getting into the territory of fettering the discretion of the courts in a way that I think would be unhelpful.

Baroness Drake: Obviously Parliament will have the chance to go through the rights with a rights analysis. However, because the charter acts like a scaffold and pulls the rights together so that there is clear visibility of the rights, one concern over the loss of the charter is that there would be a problem in the UK if the rights were scattered and people had to work through them. I am not persuaded by the man-in-the-street argument. The man or woman in the street often does not know their rights; they just tend to feel aggrieved and then someone explains to them what their rights are. I do not see that as a defence of or an argument against not seeking to have good law. If you do not want the charter, there is a real concern about just trying to capture the rights across a whole range of the legislative landscape. It then becomes very difficult for people to see those rights holistically and the premise of support.

Robert Buckland QC MP: I understand that argument.

Baroness Drake: This is a widespread concern that has been articulated

across a wide group of people.

Robert Buckland QC MP: What matters to the person in the street is whether their rights are preserved. The underlying principles and rights are preserved, so the outcome for the person in the street is a good one. My concern about the charter is that if we download it wholesale, the context is lost, because the context of the charter is to bind EU institutions and to apply to member states in the context of EU law. We will no longer be a member state, so we have to accept the reality of exit and what it means. At the same time, we should preserve the rights of the person in the street so that they do not lose out and their position is not diminished unfairly. That is the objective of the Government and it is what we believe we are achieving as a result of Clause 5.

The Chairman: But a repository, such as has been suggested, could make it clear that this was not an exhaustive list.

Robert Buckland QC MP: I come back to my concern that if we in effect bring this down, we are in danger of creating a misleading perception of what the charter is all about. It is the outcome that I am interested in, which is the preservation of those existing rights that predate the charter—we must remember that the charter is a fairly recent invention of EU law. If that is done, that outcome is a good one for the rights of individuals in our country.

Baroness Drake: But there would be a concern that scattering equals diminution.

Robert Buckland QC MP: I understand the concern; I do not agree that it leads to a diminution in any way.

Baroness Drake: Another area of concern expressed to us is that the rights and remedies not covered by the Human Rights Act 1998 risk being lost by not being included in the charter. What is your response to that? How would you address those concerns?

Robert Buckland QC MP: I think that, as a consequence of leaving the EU, change will come. I accept the point about Article 47. Indeed, there was a recent Supreme Court authority where a distinction was drawn between the rights and remedies under the convention and those under the charter. However, I am still of the view that, to the very greatest extent, the charter does not add anything substantive to our law. As long as the Government are preserving the underlying rights, there are remedies in domestic law that those rights can be applied to by way of interpretation that preserve the position of the ordinary person in the street when it comes to either Acts of the state or other rights that have arisen as a result of our membership of the EU.

The Chairman: I think that we will have to move on to devolution.

Q52 **Lord Dunlop:** Concerns have been raised that Clause 11 does not respect the devolution settlements and that the Order in Council release mechanism is more akin to a conferred powers model than the existing

the reserved powers model. I wonder how you respond to that and how you are going about addressing the concerns of the devolved Administrations.

Robin Walker MP: We have acknowledged some of the concerns raised in the debate on Clause 11. Clearly, the Scottish Secretary has indicated that we will bring forward amendments on that, but the premise of Clause 11 is established in the model of devolution. The Orders in Council power is modelled on the power in the Scotland Act, which is very clearly a reserved powers model and not a conferred powers model. I have given evidence to Select Committees in both Wales and Scotland to address some of those concerns, because it is important that we address the concern about some sort of power-grab narrative. Importantly, the current status of these powers is that they are all sitting at the EU level—we are talking about retained EU law here. That framework is shared across the whole of the UK by default because it is above us at the EU level.

The purpose of the Bill is to provide continuity and certainty. So maintaining that framework first and foremost is the logical conclusion of a Bill designed to provide continuity and certainty, but we are clear that there are mechanisms in the Bill to increase the competence of each of the devolved Administrations through that power, which is modelled on a power which exists in the Scotland Act. It certainly is not any move from a reserved to a conferred power. We think that it reflects the existing constitutional arrangements, but we want to provide the maximum reassurance possible.

Very important is the JMC process. That met yesterday. The initial agreement on the JMC process, on the principles under which some powers would be agreed for shared frameworks and some released so as to increase the competence of the devolved Administrations in this respect, is really important. That process is running alongside this legislation, but, clearly, progress with that will allow us to provide further reassurance. I said to the Scottish Parliament's committee on delegated legislation that by taking forward the JMC process and the conversation about where frameworks need to be shared and where they do not, where they need to be legislative and where they do not, we can significantly limit the scope of Clause 11 of the Bill, which I think will answer a lot of the questions and concerns that have been raised during the debate.

Lord Dunlop: I suppose that the problem is that, if there is not agreement, the default position is that the powers remain at Westminster. You mentioned yesterday's JMC. Can you say a bit more about how the process for agreeing the common UK frameworks is getting on? What progress has been made? You also referred to the commitment that the Scottish Secretary gave about amending the Bill. Again, some more on that would be very helpful.

Robin Walker MP: Obviously, I cannot pre-empt amendments that have not yet been published. In terms of the JMC, the crucial area is the

agreement reached at the previous JMC on key principles, which acknowledged that we want to strengthen the devolution settlement and to ensure that, where common frameworks are required, they will be there.

As has been said, there is an understanding that many of the various lists of the powers—I think that there are more than 140 in the case of Northern Ireland, around 111 in the case of Scotland and 64 in the case of Wales—would not require common frameworks. That is an indication that we have already given. The joint communiqué from yesterday's JMC reflects the fact that there was a meeting and that there has been progress, but it does not go into great detail about where agreement has been reached, so I cannot go into much detail on it. Importantly, there is that agreement in principle on taking this forward. There is an absolute desire from our side—from the Government, from the First Secretary of State and all the territorial Secretaries of State—to reach agreement on these things. I said to the Exiting the European Union Committee that I see no reason why that should not be in place and why we should not have a very clear understanding of where common frameworks are required and where they are not well before any of the existing sunset clauses in the Bill.

This is an area where I think we can move forward at pace and ensure that we have an agreement on where that Orders in Council power will then be used to ensure that the devolved Administrations are able to take their steps. As you will know very well from recent legislation, we are absolutely committed to moving towards a reserved powers model for Wales; we are protecting the reserved powers model for Scotland. There is no question of intruding on that or on the existing competence of the devolved Administrations. It is very important to reflect that the Bill explicitly protects their existing competence.

Lord Dunlop: Can we move on to Northern Ireland? Clause 7 powers cannot generally be used to amend or repeal the Northern Ireland Act. Clause 9, which provides for implementation of the withdrawal agreement, does not contain a similar caveat. Can you explain the rationale behind that?

Robin Walker MP: You are right to acknowledge that Clause 7 has that specific caveat. Wherever possible, in the Bill and through part 2 of Schedule 3, we have endeavoured to set out what we think the required technical changes to the devolution statutes would be, because it is important to be very clear about that. There is that extra protection in Clause 7 for the Northern Ireland Act, because we recognise that it is the reflection of an international agreement through the British-Irish agreement and the Belfast agreement.

The provisions under Clause 9 would allow us only to implement the terms of the withdrawal agreement and the result of negotiations with the EU. It is therefore important that any changes to the Northern Ireland Act that might be needed to give effect to the agreement can be made. Unlike the known amendments that were made in the Bill to correct

deficiencies, we cannot know exactly what amendments would look like until an agreement on our withdrawal from the EU has been made, but we have been very clear that any changes would have to be devolution-neutral—they would not make any change to the competencies in that respect—and of course would have to be compliant with our international obligations under the existing international agreements between Britain and Ireland and our obligations under the Belfast agreement. So we are talking about very minor technical things that would reflect the withdrawal agreement reached between the UK and the EU.

Lord Dunlop: So, from what you have said, Clause 9 could be used to cater for any special arrangements that may be required for Northern Ireland as a result of the withdrawal agreement.

Robin Walker MP: First, it is important to reflect the wording in the joint statement about the fact that we are looking at an agreement between the UK and the EU; we have to understand the unique circumstances of Northern Ireland and the arrangements there. Secondly, the key piece of legislation for dealing with the withdrawal agreement—specifically, any policy change required under that agreement—is the withdrawal agreement and implementation Bill rather than this Bill. The Clause 9 power would allow us to reflect the kind of technical changes that we might need to implement the withdrawal agreement on these matters, and that would be in very limited circumstances.

Lord Dunlop: Obviously, EU membership was an underlying assumption of the Irish peace process, and in the Belfast agreement there are lots of references to the EU. Can you tell us a little more about how that process for amending the Belfast agreement might be handled?

Robin Walker MP: I do not think anyone is talking about amending the Belfast agreement.

Lord Dunlop: I am talking about the references.

Robin Walker MP: From the start of this process and all the way through it, the Government have set out our absolute commitment to the peace process in Northern Ireland, to ensuring that we can avoid creating a hard border on the island of Ireland and to respecting the very specific relations that exist between Britain and Ireland, which are different from many of our other EU relations. We need to ensure that through the withdrawal Bill we create certainty and continuity for every part of the UK. As you rightly say, the peace process was in the context of our EU membership. So was the existing devolution settlement, including devolution to Northern Ireland. That is where the focus on having common frameworks is important for certainty and continuity. It is important to respect that.

However, as you pointed out, we have a limitation of the Clause 7 power so we have given extra protection to the Northern Ireland Act because we recognise that it is a reflection of that process and therefore of international agreements. We will seek, and I think the joint communiqué

reflects this, to ensure that we are protecting at every stage of the process all our commitments under the Belfast agreement and its successors. That is something where there is a chorus of agreement when we have talked to people, whether in Dublin, Brussels or in Belfast; they absolutely want to see those arrangements fully protected. It is the means to get there that we need to get on and discuss.

The joint agreement published last week says that the first and foremost means of addressing these issues about the border and about our commitments is through a future partnership between the UK and the EU. That has always been our position, and it is what we set out in our Ireland and Northern Ireland paper. It then goes through a hierarchy of what would be achievable if that were not possible. We have made that commitment but we will do everything to ensure that there is no return to a hard border and, if necessary, that will be delivered through regulatory alignment between the UK and the EU on those issues that are pertinent to the Belfast agreement. That is an important commitment to provide reassurance that, whatever happens in the negotiations, the first objective is to secure the best arrangement for free movement and other issues that are required through a strong partnership between the UK and the EU.

I think that intergovernmental relationships between the Irish and UK Governments are in a good state—indeed, a better place than they have been for many years—and we need to continue to work very hard on that relationship, whatever the process and the outcome of EU negotiations. That is something that, as a former PPS in the Northern Ireland Office—a mere PPS rather than a Minister—I have always been very keen that we should take forward throughout this process.

The Chairman: Can we perhaps ask you about the Sewel convention and legislative assent? What happens if you do not get it?

Robin Walker MP: It is absolutely our intention to work with the devolved Administrations. I have referred to the JMC process and the agreement on where there are going to be common frameworks and where there are not. We can and will seek consent through that process and I think we can get it. We are committed to the Sewel convention. We as the Government helped to write it into legislation in the Wales Act 2017 and the Scotland Act 2016. We want to ensure that every part of the United Kingdom is able to get its statute book into the right shape for exit, and that is something that we will continue to work towards.

Q53 **Lord MacGregor of Pulham Market:** Moving on to delegated powers, we accepted in our earlier reports that significant delegated powers are required to transfer EU law. However, we are clear that a distinction should be drawn between technical and policy changes and that the powers should include restrictions to limit their use to purely technical changes. Why does the Bill not include such restrictions?

Steve Baker MP: The Government do not propose these powers lightly, and we want to limit the powers that we take simply to those that we

need in order to meet the purposes of the Bill. There are significant inherent limitations on the powers, particularly that we can correct only those deficiencies that arise from our withdrawal from the EU, and, as you know, there are further additional restrictions to the powers.

Yesterday I rose to answer amendments on this area; I think there were over 130, and it took a little while to work through them all. This was a good example of the House of Commons rising to its line-by-line scrutiny responsibilities. If I may say so, your own House has usually done that far better than we have, but on this occasion the Commons could be said to have taken its scrutiny duties very seriously on the balance between the scope of powers and the scrutiny that they receive. In the end, we think that the powers that we have proposed to correct deficiencies should be drawn as they are if we are to ensure that we do what is appropriate to deliver a working statute book.

Lord MacGregor of Pulham Market: Clause 7 enables the Minister to make regulations when he considers it appropriate to do so for the purposes of addressing deficiencies in retained EU law arising from exit. Why can this not be framed as when they are “necessary”?

Steve Baker MP: These two points are interrelated. It is conceivable that in bringing back powers from the EU, Ministers could face a choice in how to allocate them within the UK. A power relating to financial regulation might conceivably be allocated to either the PRA or the FCA, and the Minister would need to make a choice. As I explained yesterday, we think “necessary” could be interpreted as “logically essential”, and if there were a spectrum of choices then one could say that one of them was logically essential because there was a choice. So we think it is right to say “appropriate”.

From my own point of view, it would be wonderful to be able to tell you that we would make strictly no policy changes—I would love to say that—but I have to accept that I can say only that we will not make major policy changes, and that those would be brought forward in primary legislation. We accept that people will argue that a decision to allocate a financial regulation power to either the PRA or the FCA could be described as a policy choice. That is why these two issues are interrelated, and both Houses of Parliament will need to make a judgment on all the evidence and the risks about what powers the Government should have to place instruments before Parliament for approval, which of course we will be doing, in order to ensure that the law works appropriately once we have left the EU. But I accept that the two questions that you have asked me are interrelated.

The Chairman: Before we move on to scrutiny in the Lords, can I go back to what you said earlier about the Statement that David Davis has made today? We have just had the opportunity to look at it. In it he says, “The Government will not implement any parts of the Withdrawal Agreement—for example by using Clause 9”, until after a vote in both Houses on the final deal. You have given us a lot of assurances today and that is another one. Why is that one not on the face of the Bill? It would

be helpful if some of the assurances that we keep being given were in the Bill. We are told, "It's not our intention to do this", or "We are not thinking of doing that". A lot of the time you say, "Trust us and we'll get it right". It would be helpful to have more of those assurances on the face of the Bill.

Steve Baker MP: Your point is well made and heard, Lord Chairman. As you know, it is a matter of the foremost interest to the House of Commons today. If you will forgive me, I do not think that I should preempt any discussions that we might have on this matter in the Commons today. We are setting this out as a Written Ministerial Statement. It is a matter of policy, as set out in the Statement, that we will have these votes on the resolution of both Houses on the agreement, the CRaG process and the primary legislation. Having given those assurances and made them both at the Dispatch Box and in a Written Ministerial Statement, we believe that it is reasonable to rely on those comments.

Lord Judge: You have just referred, and you referred much earlier in your evidence, to a resolution of both Houses. What will the position be if this House disagrees with your House?

Steve Baker MP: That would be a very interesting situation. Those are circumstances that we very much hope will not arise. I hope that we will place before your Lordships' House an agreement that you feel able to accede to and will resolve to support. I hope that it will be a resolution that is very clearly in the national interest.

Lord Judge: I am sorry. That is lovely but it is not an answer to my question.

The Chairman: Did you think that you were going to get much more?

Steve Baker MP: I am afraid that I really cannot go much beyond that. You have alighted on a matter that raises important questions about the relationship between our two Houses—of course you have—but I am afraid that I am not in a position to answer your question.

Lord Judge: Very well, thank you.

The Chairman: We will move on to our scrutiny role.

Q54 **Lord Norton of Louth:** I want to ask you about your intentions on the actual process. Focusing particularly on the Lords, obviously we are in a novel situation in terms of what faces Parliament quantitatively and qualitatively regarding the scrutiny process. In your memorandum, you stress the importance that you place on Parliament and scrutiny. What evaluation has been made of whether the existing procedures are sufficient to the task, given the expected scale of the orders?

Baroness Evans of Bowes Park: I am absolutely committed to ensuring that this House continues to play the role that it has done. As Leader, I will look to work across the House and make that happen. I accept that we are moving into uncharted territory on the level of

scrutiny and that interest will be high. However, it is worth noting that it is quite common to have about 1,000 SIs in a one-year session, so one could say that in a two-year session 2,000 is not extraordinary. But I accept that we are in a different situation, which is why we are taking our role seriously.

As a Government we are looking at the part that we play to make sure that SIs come to the House in a much better state than perhaps they have done in the past. That is why the Parliamentary Business and Legislation Committee, of which I am a member, is now overseeing secondary as well as primary legislation, which is a new departure for us. That is partly because we want to improve the quality and ensure a consistent flow of SIs to Parliament and make sure that as a Government we are managing what comes through more effectively than perhaps we have done in the past.

That function is also part of a wider change in Whitehall. We have the head of the Policy Profession, First Parliamentary Counsel and the head of the Government Legal Department overseeing a panel of civil servants who are reviewing the quality of Explanatory Memoranda. In every department we also now have a nominated Minister who is in charge of secondary legislation in their department and a senior responsible civil servant working with them. So there is now a process in each department to look at these matters properly. They are accountable for the secondary legislation and must ensure that it is stress tested and prioritised and that it meets deadlines. We will have a rolling programme of when SIs are due to be tabled so that we can make sure that the flow is much better. Over the last two months to six weeks, the Leader of the House of Commons and I have had meetings with all the relevant Ministers and civil servants to stress again how important this is. If we have concerns, we will be calling Ministers to appear in front of the PBLC to explain the situation.

So I hope that I can assure you that the Government recognise what is coming. Within this process we have tried to make sure that we can allow Parliament to do its job more effectively by producing high-quality SIs, as well as ensuring a much better flow process. I am not saying that that will solve everything, but I hope that it will help to make things a bit easier.

Lord Norton of Louth: That covers the input side from government—you are seeking to enhance your internal processes. There is then the question of what happens when the legislation comes here. If we get 800 to 1,000 orders in respect of the transposition, those will be on top of what we are already doing with our existing resources, and the level of scrutiny required on some of those orders will be quite challenging. We have looked at this and have mentioned it in our report. The Commons Procedure Committee has done the same, and the Commons will be considering that later today with Charles Walker's amendments, which are not dissimilar from what we suggested in an earlier report regarding what we might do at this end in terms of the sifting process. If you do

that, not only do you change the process but there are resource implications. Do you have a view on that? In your discussions with your opposite number, have there been any discussions about, or has any thought been given to, a joint procedure?

Baroness Evans of Bowes Park: Certainly we want to ensure that both Houses have an equal scrutiny role. I am sure that noble Lords will know that discussion on the Charles Walker amendment took place yesterday and the Government have indicated that they will accept it. So there will be a new European Union statutory instruments committee, which will sift SIs under the withdrawal Bill. Obviously we want to make sure that the Lords has a comparable role in relation to SIs under this Bill.

There has been a lot of helpful thinking and we have to discuss the Bill in this House, but at this stage I am minded to look at building on the work of the Secondary Legislation Scrutiny Committee, enhancing its resources so that, hopefully, it can play a comparable role in dealing with the SIs. We will need to talk to the usual channels and discuss the matter with the various Committees of this House that have an interest in it, but I am very alive to what you are saying, and certainly as a Government and as Leader of the House I am committed to making sure that we can do this job effectively.

Lord Norton of Louth: So it could be parallel to what the Commons does.

Baroness Evans of Bowes Park: Yes, we already have a system in place. We have a highly regarded Committee structure. I think that there is a unique role and voice for the Lords and we will be looking to build on what we have and to ensure that we have a comparable process to that in the Commons for these particular SIs under the Bill.

Lord Norton of Louth: And the resources as necessary for the Committees to do that job.

Baroness Evans of Bowes Park: Yes.

The Chairman: Can I just follow that up? I want to ask about the designated Ministers who have responsibility and the civil servants. One measure that would help would be if the designated Minister were to give some form of certification for those SIs in which there was no change at all. Those could then be fast-tracked in a way that would be helpful to everyone and highlight those where there was an amendment or a change so that we could have greater scrutiny. Where there is going to be a change to the SI, it would be useful if we could see those in draft and make suggestions as to how they could go forward, rather than it being a question of accepting or rejecting it.

Baroness Evans of Bowes Park: These are some of the things that we have already taken on board, but maybe Steve would like to talk about that.

Steve Baker MP: We are already putting into the Bill a requirement for information to be published in Explanatory Memoranda to assist Parliament in scrutinising this legislation. Forgive me, but when you say no change at all, do you mean no policy change at all?

The Chairman: Yes.

Steve Baker MP: In the course of specifying the information required, we will say what the legislation did before, what we are changing and so on, as set out in the amendment. I think that that would be very helpful to that point and would illuminate the discussion.

The Chairman: It needs to be done very clearly, which is why I say that it should be signed off by a Minister, so that it could be challenged if it were found to be not just a small change. It might give people more confidence in what was being said.

Steve Baker MP: May I just draw the Committee's attention to the Secretary of State's Amendment 391, which we will be voting on later today but which I expect to be accepted? It sets out that, "the relevant Minister must make a statement ... explaining ... the instrument ... the reasons for it ... the law before exit day which is relevant to it, and ... its effect (if any) on retained EU law". Of course we intend that job to be done diligently and you will pick us up on it if it is not. We intend to drive up the quality of both Explanatory Memoranda and SIs themselves and, in answering those questions, I hope that we will satisfy both Houses.

The Chairman: That is a long overdue process, which needs to be fully completed. I would also put in a word for draft proposals so that we could see things beforehand and sort out any difficulties.

Lord Beith: I think that the Charles Walker amendment has as its primary purpose allowing instruments that are subject to the negative procedure to be promoted to the affirmative procedure. In my view, that is a very necessary condition. However, do you recognise that as far as Lords scrutiny is concerned there might be instruments which qualify for the affirmative procedure but which are considered by the sifting committee, or whatever it will be, to be sufficiently wide and significant that the normal way in which we deal with affirmative resolutions would not be sufficient and something further would be required?

Baroness Evans of Bowes Park: I have no doubt that these will be things that we discuss when the Bill comes to the House. I hope that the Lords will see, from the Government's proposed acceptance of the Walker amendment and some of the things that I have suggested we will be looking at, that we are taking this issue seriously. I am not making any commitments around that, not least because, as I think we have all discussed, a lot of work will be coming our way and there will need to be a balance between effective scrutiny, resources being applied and the ability to work in an efficient and effective way. I expect these to be discussions that we will have on the Floor of the House, and we shall listen very closely, but I hope that the Committee can see the spirit in

which we are approaching this. We want both Houses to do their jobs effectively. This is an incredibly important time for our country and the role that we have to play and we will try to help Parliament to do its job.

Lord Beith: In that spirit, let us imagine a situation in which a statutory instrument has been considered in the Commons where it has prevailed, but criticism has been made of some aspects of it. In the Lords, the criticised aspect looms larger and Peers begin to say, "We shouldn't agree this instrument unless the Government are prepared to correct this drawback or weakness in it". Are you really expected to make the stock speech that says that for the Lords not to accept this statutory instrument would be to interfere with the constitutional relationship between the Lords and the Commons, or do you recognise that in this situation the powers and procedures that you have described have to have some value and capacity to work in cases where it is necessary?

Baroness Evans of Bowes Park: I remain sure that the Lords will recognise its constitutional position and the primacy of the House of Commons, but we will have a lot of debates and discussions. I hope that we will come to a position where it would not arise. I am not going to give any commitments now, but I think that this House—certainly from conversations that I have had with Peers across the whole House—recognises the constructive role that we have to play. I hope that we will continue to do so.

Lord Beith: A careful answer.

The Chairman: This Committee will certainly try to play a constructive role. We hope to produce our report before Second Reading, but that depends on the timing; we have had an awful lot of evidence. I hope that some of our questions have prompted some thought in terms of how you might deal with some of the issues that are still outstanding. Thank you all very much for coming along to give evidence.