HOUSE OF LORDS

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Inquiry on

JUDICIAL APPOINTMENTS PROCESS

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10.20 am

Witnesses: Rt Hon Kenneth Clarke QC MP and Lord McNally

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Members present

Baroness Jay of Paddington (Chairman)
Lord Crickhowell
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Norton of Louth
Lord Powell of Bayswater
Lord Rennard
Lord Renton of Mount Harry
Lord Rodgers of Quarry Bank
Lord Shaw of Northstead

Examination of Witnesses

Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and **Lord McNally**, Minister of State, Ministry of Justice

Q373 The Chairman: Good morning, Lord Chancellor and Lord McNally, and welcome to the Constitution Committee. It is good of you to come and give evidence together. As you know, we have been conducting an inquiry into the whole process of judicial appointments and the potential for how it could be altered, and obviously we have been informed by and interested in the consultation paper which you have published. If we may, we would like to pursue with you, perhaps at the end of the session, how the two should lock together in terms of the timing of the publications, and how what we say could be integrated into what you say and so on.

We have reached a stage where the Committee has begun to draft its report. Unfortunately, I was not here last week and Lord Norton of Louth took the Chair at a further discussion on this when some of the questions that we would like to discuss with you this morning were raised as ones that the Committee has not yet taken a particular view on. We therefore thought that it would be useful to ask for your views about where you think the government consultation and projected action will lead. There are other things, of course,

that we have asked most of the witnesses that have come before us because they are of general interest, and one or two questions that we have asked but which were not raised in your consultation paper. Obviously we thought that they were sufficiently interesting to ask witnesses about, but you did not raise those matters in the consultation paper, so it would be valuable to hear your responses to them.

Perhaps I may start with the broad general question. The consultation paper proposes that the Lord Chief Justice should take over the appointment of judges below the High Court or the Court of Appeal, thus obviously removing the Lord Chancellor from that process. Do you think that this would be valuable as a decision and proposal in principle or does it have more to do with practical considerations? For example, the potential addition of resources to the office of the Lord Chief Justice is something that has been raised with us. Lord Chancellor, perhaps you would reflect on that.

Kenneth Clarke: Yes. I proposed this in the consultation document because I think that my role as Lord Chancellor for appointments below the level of the High Court has become largely ceremonial and ritualistic. The whole appointment of the judiciary has changed and there are vast numbers of appointments to be made—not only appointments to the county court Bench and the tribunals, but also legions of appointments of one kind or another. What happens is that the Judicial Appointments Commission makes the selection and goes through its processes. The selection comes up and the Lord Chief Justice and I have a look at them. In theory I could go through them and start rejecting people or seek to exercise some sort of veto or ask the commission to look at them again. However, it would be totally otiose for me to do so. I have confidence in the system that it is selecting people on merit and there are no complaints that we are reducing the quality of the respective Benches. I do not know the people. I have no direct contact with the posts concerned and I do not think that anyone in my department is in any better a position than me to second-

guess what the Judicial Appointments Commission does. Therefore, I think that we should present a little more of the reality to the outside world and concentrate on the High Court and above.

Q374 The Chairman: In a sense, you are saying that this is not a reduction in accountability because, as you say in the consultation paper, your accountability is involved when you reach the higher levels but it is not necessarily involved at the lower ones.

Kenneth Clarke: If something improper happened—if I found that someone had appointed his totally unqualified brother-in-law—the Lord Chancellor would be in a perfectly good position to intervene. But what we do not need is a process of paper going backwards and forwards where I go through the motions of endorsing these appointments. I can conceive of exceptional circumstances where I would have to be accountable for the process because someone had a complaint about what was happening. However, there already is a system for handling complaints about the appointments process, which was also set up by my predecessor. It would get rid of something that is actually a bit of a ritual and concentrate on the reality, which is that you start to get involved in practical terms at the High Court level and upwards. I do not get very involved at that point, but for reasons of accountability I should preserve my role there.

The Chairman: Even though in effect it is really just selection from one proposed candidate.

Kenneth Clarke: Yes. I could veto if I wanted, although I think that I would ask the Commission to think again, but it would be an Exocet missile that I would never fire unless there was some compelling reason. I did have an involvement with a Northern Ireland appointment, rather ironically just before my powers there were completely devolved so that it could not happen again. But that was simply because of a complaint about an incident that occurred in the process.

Q375 The Chairman: An issue that has been raised with us is whether the Lord Chancellor should have the ability or the power to issue targets and give directions to the JAC about appointments that are put to him or her, whoever it may be.

Kenneth Clarke: I am doubtful about the wisdom of that. The debate would be taken over by the question of whether you had hit your target for diversity, for example. I think that it is important to have a clear policy and to try to put some oomph into it so as to make sure that it actually does make a difference, but I am totally opposed to quotas and I do not think that targets would add very much.

Lord McNally: I think that something better than targets is good baseline figures that would give us a proper idea of the direction of travel. Targets are meaningless if the relevant statistics are not sound, valid and up to date. One of the things that we are trying to do at all levels of appointment is to make sure that we have the baseline statistics that allow us to make judgments about whether the policy declarations on greater diversity are matched by the facts.

Q376 Lord Irvine of Lairg: If merit is the overriding criterion for appointment, and it seems generally from the evidence in front of us that it is, I have some difficulty in understanding what the point of any target is.

Kenneth Clarke: I agree with you, Lord Irvine. The approach that I take is that one absolutely immovable thing is that we should appoint on merit. That has to be a fixed point because, if you appear before any kind of judicial tribunal, you trust that the person who is handling your case has been appointed as the best-quality applicant when the vacancy arose. The second thing that I regard as absolutely immutable is the independence of the judiciary. No suspicion of political patronage should be seen. I do not think that there has been political patronage in modern times, but the problem with the structure that we used to have for the Lord Chancellor is that, certainly to a foreigner, it would look like a system of

political patronage. Fortunately, Lord Chancellors did not abuse it. We now have a system that makes it absolutely clear that it is independent of the political sphere.

Once you have protected merit as the overriding criterion and once you have protected the independence of the judiciary, our policy aim is to improve diversity. That follows on from the Neuberger report. We think that we have to speed this up and achieve more on the ground. In terms of gender, we should have a more rapidly rising proportion of women and—this worries me more because the figures are worse—we should have more black and minority ethnic representation. We should be trying to make sure that the Bench starts looking somewhat more like the general population, so long as the most talented and independent people are selected for these posts.

Lord McNally: I have only one problem about the merit criterion. It is often deployed by people who, when you scratch the surface, are really talking about "chaps like us". That is the danger of merit. Who defines it? Merit is obviously the right criterion. I was asked by a very senior judge whether I could guarantee that in 20 years' time, under the kind of reforms that the Lord Chancellor would have carried through, we would have greater diversity, and whether the senior judiciary would still have the same intellectual integrity, respect and international reputation that it does today. What he was basically saying was, "If we have all these women in there, will all these things fall away?" I do not believe that they will.

Kenneth Clarke: I could have an agitated debate with my friend and colleague on this. It is a failure in most walks of life that people appoint people like themselves. I agree that there is a subconscious tendency in everyone to do so. "Chaps like us" is a slight problem which I think has been avoided by having a Judicial Appointments Commission with laypeople on it and a more limited involvement of the judiciary itself. Merit is merit. If a judge asked me whether I think that in 20 years' time the Bench would have the same intellectual quality that

it has now, my answer would be, "I hope the devil it does and that we do not do anything to lower the intellectual standards of the Bench." I have had this debate with Lord McNally before. Having rudely interrupted him to say that I do not think that merit is the same as the "chaps like us" problem, let me readily concede that I agree with him that, subliminally, the urge to appoint chaps like us is always a danger in this area. People expect future judges to look like the present judges, but they are not going to.

Q377 Lord Crickhowell: The question that keeps coming up during our sessions is that, although we all agree on the merit principle, one's experience of judging merit shows that it is often difficult to distinguish between two or three people, since there may be equal merit among a number of candidates. At that point, should one take into account the need to have a more balanced judiciary representing the country and pick from your candidates of approximately equal merit taking that criterion into account? That issue has come up again and again. I should like your views on it.

Kenneth Clarke: In my opinion, yes. I like to think that, in the limited number of appointments that I personally have had anything to do with, it is a principle that I have always applied. I propose in the consultation document that we put in the so-called tipping-point provision as a matter of law. It is taken from section 159 of the Equality Act 2010. Perfectly respectable people will argue that you never have two candidates of the same merit, but I do not agree. Let me take something that is familiar to you, Lord Crickhowell. As you will recall, ministers have a say in who comes into their private office. For years and years I have applied the tipping-point principle. Until the department I am in now, most of the others had underrepresentation of women at the top end of the office. Given that, all other things being equal, I would appoint the woman. But sometimes they were not equal and I never overrode a man who was plainly better qualified and a more ready candidate, as

it were. But if I had two candidates between whom you could flip a coin, I think it is right to go for the woman or the ethnic minority candidate.

The Chairman: You have given us a new phrase with "tipping point" because we have been using the phrase "tie break" from the provision in the Equality Act. In a way, the tipping point is slightly broader.

Q378 Lord Powell of Bayswater: I want to pursue the same point about diversity. You said that you would like to see a more diverse judiciary both in gender and ethnic terms. Do you think that the steps that have been taken so far to achieve that are adequate? You mentioned the tie-break provision, but some of us have doubts as to how real it is. There has been a recent statement by the JAC on the issue of merit, saying that it should, "include an awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs", which is another small step forward. Given the scale of the problem, do you think that what has been done so far is likely to bring us to a more equal situation within a reasonable timescale or do think that something more needs to be done to speed up the process?

Kenneth Clarke: I suppose that is a matter of judgment for us all. The aim is probably widely shared. Any resistance to it in the judicial establishment is purely subliminal and people would deny vehemently that there is any resistance. For quite complicated reasons, it is going too slowly. In other areas of life, we are all getting used to the emergence of women in greater numbers in responsible jobs. We no longer have isolated pioneers and we are used to having women at every level. However, the judiciary does not look good enough. Why are we taking so long to get the proportion up to wherever I presume it is going to go? That is why I have readdressed the problem and I think that we have to give it a little more urgency. We are following the Neuberger recommendations on a number of things, including the tie-breaker or the tipping point.

You mentioned the criteria for selection, Lord Powell. Nowadays, any judge should have reasonable sensitivity and awareness of the multicultural and diverse nature of our society. I think that most judges do, but it is a perfectly useful thing to put in. But somehow we have to speed up the process, and I think that the problems lie not just in the selection of judges. My own personal theory, I have to admit, is that it lies in the career structure of the legal profession, so the problems start lower down. The majority of people being called to the Inns of Court now are women—a slight majority. But will this generation eventually produce about 50% women judges? On all past form, no, it will not. By the time they get to that level, there will be a smaller proportion. I do not think that that is prejudice any longer on the part of the selectors. The women who actually go through a judicial career and then want to sit are somehow thinned out. Again, we have addressed that by saying that we should have part-time working and some flexibility, which I think is a very bold innovation in this area. It breaks with tradition, but it would enable those women who have some family responsibilities, and some men with family responsibilities, to be more able to do the job. What is beyond my reach is that the Bar in particular is such an individual and ferociously competitive career that it appears to be somehow more difficult for the women to rise to the top and become candidates for the judiciary compared with their male equivalents. I am sure that there is no intrinsic difference in ability, merit or anything like that.

Q379 Lord Powell of Bayswater: As I understand it, you are admitting that the process is slow, and possibly unacceptably slow, and yet you are entirely against targets. I quite understand that setting a strict numerical target down to a decimal point would be an absurd undertaking, but targets have worked in a number of other countries in relation to, for instance, women in Parliament, women in business and so on. Would you exclude them entirely from this case, even if they were expressed more in language than figures? Perhaps by a certain date, a certain situation ought to prevail.

Kenneth Clarke: If these proposals, improved as they no doubt will be by the recommendations of this Committee, do not work well, let us try targets next. I have been involved in debates about exactly the same problem of how to increase the number of Conservative women MPs. The one thing that all Conservative women are ferociously opposed to is targets or all-women shortlists. They are opposed to them because what they do not want is for people to be able to say, "Well, she is one of the women we had to have to get up to the target." My view was always that if we could not get associations to shift and if we continued to fail to get women, in the end we were going to have to have targets. Fortunately, we did not have to do that. I should not divert into that kind of political area, but my view is the same for the judiciary. I would rather not turn to targets and I think that quite a lot of the female judges and women candidates would rather not appear as though they were appointed to hit a target as opposed to the basis on which the men were appointed, which was purely on merit. I think that we have to avoid that.

Lord Powell of Bayswater: The argument is much stronger against quotas.

Kenneth Clarke: It is stronger against quotas, yes.

Lord McNally: Lord Powell asked about the experience of the public service. I worked in Whitehall in the mid-1970s and now, 30 years later, I am back. People frequently ask me what the main difference is. The main difference is the diversity. When I was in meetings with Jim Callaghan, they were always made up of chaps around the table. Now I often sit at a table where all or most of my advisers are women and there is a good sprinkling of the ethnic minorities among them. If the public service can do that in 30 years, why can we not have similar changes in the judiciary?

The Lord Chancellor asked me to do this job 18 months ago. When Julia Neuberger gave evidence, she said that not much had been done, and I told her that I found that rather hurtful. As the Lord Chancellor has indicated, what we have had is some healthy and robust

discussions between ourselves. He brings his experience as a distinguished QC and a member of Gray's Inn, and therefore part of the profession. I come as a layman to this. One thing that I have come to a conclusion on over the past 18 months is that there is no silver bullet, and that is why I am against targetry. But I think that a number of things can be done, that we are in the process of doing them, and that they will start moving the logjam.

With no disrespect to such a distinguished profession, my reaction when I first came across this reminded me of the old story of meeting the sleeping pig on the road. You give it a kick to move it, it gives a contented grunt and then goes back to sleep. Somehow we have to get buy-in. I agree entirely with the Lord Chancellor that part of that buy-in is from the professions themselves. There is the Magic Circle, or whatever it is called, of solicitors and the Bar Council. In meetings, they profess great enthusiasm. During a previous exercise I heard Lord Hart's comment that, when he tried to do this seven or eight years ago, he found the door shut in his face. Now they say that they are doing it or that they are going to do it, and they invite us to come and see what they are doing. If we can get that at the beginning of the profession, if we can get more flexibility—we will rely on your report for that—and if there are any catch-22s in the process that prevent women's progression, then a broad-based approach, including judicial training and judicial appraisal, will move the logjam. I will concede to the Lord Chancellor that his profession is not inherently prejudiced, but there are problems which need to be unstitched. Other professions have done it, so why not the law?

Lord Powell of Bayswater: Would you be a happy man if it took another 30 years to produce a situation of equality in the judiciary?

Lord McNally: No.

Kenneth Clarke: Neither would I. When I started in practice, parts of the profession were very prejudiced and things are now quite transformed. Lord McNally is quite right to

provoke me and remind me of the position, but things have changed. However, I agree entirely that they have not changed enough. It is just a question of what can be done practically to speed it up without diminishing merit and without going to political patronage in the appointments process.

The Chairman: I know that Lord Hart and other Members of the Committee will want to come back to the whole issue of expanding the base for appointments, the question of the Magic Circle solicitors, which you mentioned, Lord McNally, and appraisals. But both Lord Shaw and Lord Renton wanted to come in on this point.

Q380 Lord Shaw of Northstead: I wanted to make a point on the length of career that anyone has before they become a judge. If one looks back to when they started their career, one sees that how many men and how many women were involved in those days is reflected in the number of male judges later on. The same applies to the lower ranks. It takes longer to become a member of the lower rank, but if you look back to when they started, you will see that there were fewer women then than there are today. As the number of females at the baseline, at the start of careers, increases, surely the number of female judges would, equally, increase.

Kenneth Clarke: I accept that up to a point. There are those who take the view that the only problem is a generation thing and that, if you were appointing a senior judge now, they would have started at a time when there were not very many women in practice. I accept that up to a point, but it should go quicker. I think that that is over now. If you look lower down, you see people getting appointed to the Bench in their late-30s and 40s, so I do not think that it should be a problem. I am dealing with the Bar, but I agree that solicitors are equally important. I think that a little over 50% of those now called to the Bar are women. You have to ask yourself whether, in 20 or 30 years' time, 50% of the Bench will be women. In my opinion, they should be. Do I feel total inner confidence that that will occur? No.

Therefore, this is an area that needs speeding up and I concede to Lord McNally that some of these views need to be challenged. One cannot just wait for it to sort itself out.

Lord McNally: It is not just prejudice. We really need to dig into this. One thing that keeps coming up is that, although there is a goodly intake of women and of black and ethnic minorities, they do not last the course. Why are they not lasting the course? Is the career break for motherhood more disruptive in the law than it is in other professions? I have listened to some senior civil servants say that it is, and that women find a career break easier in the Civil Service because it is more understanding of the calls made on a woman when they bring up a family and is more flexible. I hear judges say, "Ah, but you can't have flexible judges, as that would totally disrupt the processes of the court." We have to find out why what is already a healthy intake is petering out somewhere halfway along the career path.

Q381 The Chairman: There are other professions, as I am sure you realise, such as the medical profession, where the intake of women is higher at the undergraduate level. The flexibility that has been introduced into a lot of the working practices that were traditional, for example, in the health service has produced a much greater throughput of women to senior consultant levels.

Kenneth Clarke: I agree entirely. I had involvement with the same subject in the medical profession. That profession had people in it who were as ferociously prejudiced against the promotion of women as they used to be at the Bar. I had bizarre conversations many years ago with senior consultants and senior members of the Bar who were definitely prejudiced. I had a consultant once who decided to support my proposal for a sub-consultant grade in the medical hierarchy because that would be for "the women and the ethnics". Nowadays, if a member of a royal college said that to you, you would think either that he had been drinking or that you were dealing with a madman. This was 20 years ago. I shall not quote similar shattering revelations that I had 20 or 30 years ago from members of the Bar. I agree with

you that the medical profession has done better. The majority of people who study in medical schools are women and that is beginning to be reflected in the career structure. I concede that the judiciary is going too slowly. As you may gather, Lord McNally and I totally agree that we have to look down below. Why do the better women drop out somewhat and lose interest in a judicial career whereas men do not?

Q382 Lord Renton of Mount Harry: I wanted to move on—I am no lawyer myself—and ask you what you saw the future position of the Lord Chancellor as being. The Ministry of Justice's consultation paper states: "Furthermore the Lord Chancellor … has a statutory duty to maintain the independence of the judiciary which also applies to the appointments process". But you are also saying, I think, that the Lord Chancellor may in future no longer be a lawyer. Is that going to work?

Kenneth Clarke: I think that we will have a Lord Chancellor who is not a lawyer. The lawyers that we have, including me, will not be as senior and distinguished as they used to be. I do not sit as a judge in the highest court of the land or anywhere else and I am not the head of the legal profession. I am only the second Lord Chancellor, I think, who is in this quite different position whereby I am really the Secretary of State for Justice. If you recall, there was rather agitated debate about whether the title of Lord Chancellor should be dropped when those changes were made. Part of me is rather glad that the old title was retained, as I am a traditionalist, but it is a bit of a misnomer. A better understanding of my role would be to describe me as Secretary of State for Justice, which is why I am a Member of the House of Commons—it is no longer necessary for me to be a Member of the House of Lords. My day-to-day responsibilities and those of Lord McNally are very much concerned with the content of criminal justice, with the Prison Service, with the legal aid system and with all the business of government that involves interrelation with the law. I regard the Lord Chancellor as being the obvious person to whom the judiciary and the legal profession

look first as their contact with the executive, and I regard myself as the voice and face of the executive towards the judiciary and the legal profession, but any resemblance between my job and that which was carried out by Lord Irvine is not too close. It is a quite different function, really.

Q383 Lord Renton of Mount Harry: Given the duties that still fall on the Lord Chancellor, is it not much more likely that a Lord Chancellor who is and has been a lawyer will be nearer to understanding what to do? What about judicial appointments, for example, if the Lord Chancellor is not a lawyer?

Kenneth Clarke: I am sure that Lord McNally would quite rightly accuse me of subconscious bias. I personally think that the Lord Chancellor and the Secretary of State for Justice should be a lawyer, but I am quite resigned to fate. There is no rule now; there is no particular reason why everybody is going to keep to that. I have to guard against the fact that I am a lawyer. I have not practised for over 30 years. At least I had a serious practice—I can attest to that—but I have to be careful that I suddenly do not start taking on myself some assumption that I am a lawyer and that that enables me to challenge everything that is coming out of the profession. I am an out-of-date lawyer. I have done two stints at the Health Department, but I was not a brain surgeon; indeed, I have no clinical ability whatever and have never worked in the health service. The British system of government, to the bewilderment of a lot of people, has always worked on the basis that you get reshuffled around areas where you adapt to the culture, and that it is what you bring to it as a politician and a political leader, and whatever executive skills you have, that really counts in the end.

The Chairman: In a sense, that brings us to the issue that has been raised by a number of our witnesses about accountability and the relationship with Parliament, something that we talked about briefly earlier. Lord Crickhowell, do you want to take that up?

Q384 Lord Crickhowell: One of your predecessors, Jack Straw, expressed the view that the Lord Chancellor should be involved in some way and that there had to be a connection between Parliament and the appointments system. Generally the view that has been expressed very strongly to us is that politicians must not be involved in appointments. Even the suggestion that perhaps the Chairmen of this Committee and a corresponding Committee in the other House should sit in on the process would appear to be undesirable. Therefore, the first question that I would like to ask is this. If, at the end of the day, that is the position, do you think that the relationship, the responsibility and the connection with Parliament is as it should be or do you have any views as to what the relationship should be? We all agree that for political reasons politicians must not individually make appointments, but we have a parliamentary system that ultimately must be responsible for ensuring the effective working of a good judicial system. Would you first make a general point about the parliamentary/judicial link?

Kenneth Clarke: I agree with what you have said. I am all in favour of having no political patronage in appointments. Our consultation document has two separate elements to it. One makes it clear that normally the Lord Chancellor himself does not play a direct part in the selection of judges, but it readdresses the role of the Lord Chancellor when it comes to the President of the Supreme Court and the Lord Chief Justice. We suggest that perhaps there should be a greater involvement of the Lord Chancellor than there is now because the executive has to have some involvement in that, but not a decisive one. The relationship between the President of the Supreme Court and the Lord Chief Justice as it is working now is really quite important because it is where the interface occurs a great deal of the time. It reminds me of the relationship that I used to have with the Governor of the Bank of England when I was Chancellor of the Exchequer. He was totally independent and I could not tell him what to do. In my day I was supposed to, but I was acting on a quite different basis because I

disapproved of that. I was in favour of an independent Bank of England, and I still am. But, nevertheless, we had to meet each other quite regularly because stuff was always coming up that had to be sorted out. The executive and the judiciary need to know what their respective views are on particular things.

So far as Parliament is concerned, the involvement of the select committees is important. The fact that you can have the Lord Chief Justice and the President of the Supreme Court along here to give evidence is important. But when it comes to appointments, I react to that. There would be a danger that confirmation hearings would become political. Perhaps it is a slightly exaggerated view, but the American experience is just shocking and anything that got remotely near that would be deplorable. All Members of Parliament and Peers are extremely wise and detached people, but sooner or later you would have a stray Member of Parliament who would ask a judge about his or her views in sensitive areas. If it becomes partisan, obscure events in the history of the lawyer will suddenly be ferreted out. So far as I can see, some American confirmation hearings are totally consumed by the social attitudes of the judge and his sexual history. That is not a basis on which you should be appointed to the Bench. Of course, the British Parliament is not silly and would not go anywhere near that and I have no fear that it would happen in a modern Parliament, but after a while a certain partisanship could creep in, and I would not like that.

Q385 Lord Crickhowell: The weight of the evidence that we have received entirely goes along with that. On the appointment to the Supreme Court, again there is broad agreement with what your consultation document addresses, which is that it should have some lay representation, that it should not be chaired by the outgoing President and that it should have these two lay members. We seem to have been heading in the same direction. But I note that in the proposals the selection committee would include the Lord Chancellor. Earlier, you spoke of being the voice of and link with the executive. Presumably the proposal

is that you are there not to get Parliament involved but in some way as a link with the executive. I am not clear why the presence of the Lord Chancellor in the selection process at that point is considered to be a sensible involvement in view of all that has been said about avoiding any sense that political influence is being exercised rather than simply selection by merit.

Kenneth Clarke: Also, I mentioned the views of the Committee. In the course of this we seem to have gone around and around on the question of the exact composition of the group of people who should be involved in the selection of the President of the Supreme Court and the Lord Chief Justice. We have proposed that the Lord Chancellor should be a member of the selection panel as a representative of the executive, the reason being—going back as briefly as I can to what I just said—that there will need to be a personal relationship between the Lord Chancellor, the current holder of the post and his or her successors, because the executive has to interact with the judiciary. That is because the duties of those two very senior posts involve some court management, case management and general accountability for the performance of the Bench. If you become the President of the Supreme Court or the Lord Chief Justice, you will no longer just be trying cases. They have a much wider role. The Lord Chief Justice nowadays is the head of the legal profession. As Lord Chancellor I am no longer head of it, as my predecessors used to be.

I am interested in what you have found from the evidence. I do not think that the leading judiciary are opposed to this. There is a general acceptance that there must be an executive role, and before I put out the consultation paper we had already debated exactly where to slot the Lord Chancellor in. I have tentatively put forward that I do not think that the Lord Chancellor should chair the selection panel but that he should be a member of it. I do not think that the present President or the Lord Chief Justice, certainly those who are serving in office, should be involved in the choice of their own successors, so we have altered their

role quite considerably. We are making quite important constitutional proposals when it comes to the appointment of these two very senior judges because I think that the position is different from that of the other appointments.

Q386 Lord Crickhowell: Should the chairman of the JAC chair it?

Kenneth Clarke: I canvassed views all over the place before I came to canvass public views and the views of the select committees of Parliament. The present proposal is that he or she should chair it. The Judicial Appointments Commission is working well now, but I think it has got to work better. If you have a Chairman of a Judicial Appointments Commission, it is difficult to find anyone more obviously objective and in touch with the system to chair it.

Lord McNally: In opposition, we supported the then Labour Government in their constitutional reforms that separated these powers and, looking at it first hand now, I have to say that it works very well. I do not think that there is any idea of going back, although after I had to face hostile questions in the upper House on some recent appointments to the Supreme Court about gender, Michael Howard sidled up to me and said, "Of course, if you had left the job with the Lord Chancellor, you could have had all the women you wanted in the Supreme Court", but I think that he was just being mischievous.

I think that the structure works well. As a purist I would say, "Yes, there should be absolute separation", but the point just made by the Lord Chancellor that there are aspects of his job, the Lord Chief Justice's job and the President's job which overlap means that it makes common sense to have the Lord Chancellor there.

There are always parliamentary ambitions, and I see myself first and foremost as a parliamentarian rather than a temporary minister, and we should resist letting Parliament in. I was speaking yesterday to the members of the parliamentary delegation to the Council of Europe and they asked why we could not have hearings for nominations to the European Court. I would worry about any move to a form of Americanised politicisation of

appointments because what we have now is so much better. It is something that we should preserve if we can.

The Chairman: Lord Norton, did you want to pursue anything about the Supreme Court?

Q387 Lord Norton of Louth: Yes. Taking the conversation about the selection committee a bit further, there seems to be general agreement among the witnesses and, indeed, the President of the Supreme Court himself. He says that he should not be involved in the appointment of his successor. But I presume that to achieve that, you will have to amend Schedule 8 to the Constitutional Reform Act 2005. Perhaps I could also pursue the point that you were making about the composition of the selection commission itself. As I understand it from the consultation paper, you have a view that there should be a minimum number of lay members and a minimum number of judicial members, but you do not seem to have a view as to where the balance should lie. Should it be a majority of lay members or judicial members who form the selection commission?

Kenneth Clarke: I think that your first point was that Lord Phillips agrees that he should not be involved in the choice of his successor. He has expressed that opinion on more than one occasion. That is certainly his view. I think that the Lord Chief Justice takes the same view about his position as well. In fact, I am sure that he does. We are consulting. I think that I revealed that this went through one or two stages before we put this forward for consultation. I think that it is important that we have lay members as well. That was one of the big innovations when the Judicial Appointments Commission first started appointing everybody else, but it has worked. The Judicial Appointments Commission is improving the way in which it works. Not everything works perfectly there, but as far as the actual appointments are concerned, there is nothing wrong. Having laymen is probably quite a good thing. I keep referring to Lord McNally, but the fact is that he answers this argument that

people keep appointing each other—people in their own image whom they have known all their life at the Bar—all the time.

Q388 Lord Norton of Louth: Would that be an argument for having a majority of lay members? A minority might offset choosing people in the same image, but if you have a majority that wants to choose in the same image, you have a problem.

Lord McNally: I think that we are consulting on it.

Kenneth Clarke: I am glad to say that Tom cannot remember any more than I can quite where we came down in the final document. It sounds as if we have left it open.

Lord McNally: Perhaps we are waiting for your report. There is an argument both ways. There is a danger that if you put a legal majority on, it will dominate and people will say that it is just tokenism. I would be interested to hear your opinion.

Q389 Lord Norton of Louth: If the majority is judicial members, the danger is that they will then choose in their own image, but if you have a majority of lay members, is there a danger of not having the confidence of the profession?

Lord McNally: Starting from scratch 18 months ago, I am very impressed by the way in which the JAC is working. I have great confidence in developing that. It is finely balanced, and that is one reason why we should consult on this and listen to opinion.

Lord Norton of Louth: It would presumably require an amendment to Schedule 8 to achieve that.

Lord McNally: Yes

Kenneth Clarke: I have been reminded that it is pretty open in the document. The wording is quite obscure. It is quite clear that it does not come to any firm conclusion about the balance between lay and legal.

The Chairman: One thing that you are both very firm about is your enthusiasm for the way in which the JAC is working. I know that Lord Rennard wants to pursue some points on it—

Kenneth Clarke: Before you say that, it is improving. I have some reservations about the JAC. I have no reservations about the appointments. The quality, as far as I can see, remains the same, and it is a better and more transparent process and all the rest of it. When I arrived, I was worried about how much it was costing and how long the appointments were taking. It seemed to me that it was all a bit process-dominated and that not all the process was essential. I have asked the Chairman—who is independent, so it is entirely up to him—to see what he can do to address those reservations. Some of the minor appointments should not take 18 months to fill. It is not necessary for every commissioner to be involved in every appointment. There were some suggestions from lawyers that when they fill in the forms, go through the process and do the role playing, which the Commission is frightfully keen on to see what they would look like on the Bench and all that sort of thing, the process is slightly taking over from the point. It does not damage the outcome, which is the most important thing. I have no reservations about the outcomes that are being produced, but I have asked the Commission to think about whether it could do it rather cheaper and quicker and could perhaps cut out a little of the form filling and the process that are dominating it. Just in case we have given unstinting praise—

The Chairman: You may have answered some of the points that Lord Rennard wants to make, but I will let him speak for himself.

Q390 Lord Rennard: Most of the points have been answered, because you have both been very generous in your praise for the process of the Judicial Appointments Commission and have suggested that it has worked well over the past five or six years. Just for the purposes of the inquiry, it would be helpful if you could say whether you think that there

should be any specific changes to its remit or composition. People are talking about perhaps loosening the way in which people can become members of it. Do you have any comments on the remit or the composition that you would like to add?

Lord McNally: I fully endorse what the Secretary of State has just said. We did not say, "Carry on, you are doing just wonderfully." Going to Julia Neuberger's criticism that we have done nothing, the Secretary of State himself took leadership in trying to sharpen up the process. That goes back to the point that I made earlier. One suspected that there were some catch-22s in the process that lost women and black and ethnic minorities: the process of the forms, the explanation of why you did not get through at a particular time or a lack of data. It is now producing some very good data on the selection process but also some very worrying ones. The last quarterly report that I saw showed going through the process from the right-hand side to the left-hand side. On the right-hand side—the applicants—there was a goodly number of women and black and ethnic minorities. The final column was those selected, and the same bias was still there. It showed: black and ethnic minorities selected, nil; women, three; men, 27. You think, "Well, what's happening along the way? Is it really winnowing out duds or are there some problems?" I think that the Chairman is addressing that. On the diversity of selection, I am told that the four new commissioners are extremely good and very diverse. There are three senior civil servants and one former Governor of Jersey. It looks a very narrow group, but I am assured that the diversity comes in other experiences.

Kenneth Clarke: One change that we are making to address some of the things that I was talking about is that we are proposing to reduce the size of the Commission—the number. The present statute is too rigid in the criteria for selection, so we are altering it. Lord McNally has touched on a much more important point. We have more lay members on this and other bodies, but we have to be careful when selecting lay members for all bodies. I do

not criticise anyone. The quality of appointments is very good, and the four people who have been appointed will be excellent. Neither Lord McNally nor I chose them. There was a proper process for selecting them. There is, as we all know, a tendency for the quangocracy to be self-perpetuating, and people run up a tremendous score of public roles that they have fulfilled on one body or another. If it comes to people appointing people in their own image, there is a slight tendency for the new, totally non-political or detached and objective selection of laymen to produce a lot of people who look very like recently retired senior civil servants for all these roles. Sooner or later, and not just in this area, we are going to have to address that.

Q391 The Chairman: It is one thing to say that we would like the appointment set-up to be less rigid—to be based on less rigid criteria, precisely addressing the points that you have just made—but it is difficult to identify how you would redefine it.

Kenneth Clarke: We are consulting on whether we should repeal the rather narrow boxes that we are in at the moment. It is the process that has then got to get people who look a bit more to Lord McNally and me like laymen as a representative body of experts and high-quality laymen.

Lord McNally: We can give you a paper on it. Camisha has just helpfully given me a whole load of statistics showing that there is still a problem. What I am confident of is that the JAC is aware of the problem and it is now able to produce statistics and dig into the process to see if some of the fault is in its own processes—these rather complicated forms with tick-boxing and the rest—or others. Going back to Lord Powell's original question, I suspect that there are some quite easy process changes which could help to unblock the logjam. The other is for people to speak out in the professions and say that the judiciary is not just for senior barristers, which is still an impression that deters others from trying. I think that that is part of it. I do not see the JAC, certainly under its present Chairman and with its present

terms, as a barrier to what we are trying to do. In fact, I think that its shoulder is to the wheel as much as ours is.

Q392 The Chairman: You have both been very critical of the United States' processes, and I think that we are agreed on that, but there has also been some evidence on Canada, for example. The role of political leadership in all these matters has been very important in exhorting the different institutions not simply to do things differently but to make a tremendous solemn dance about it from the senior political point of view. You have both been quite hesitant, for example, in response to Lord Norton, about saying whether you think that the Supreme Court appointments arrangement would be different if there were a majority of laypeople. I am hearing from you a degree of aspiration but not particularly practical proposals on that, for example.

Kenneth Clarke: When it comes to the appointment of somebody to the judicial office, we appoint some lay members and some judicial members. My guess is that it is not very often that all the lawyers agree with each other and all the non-lawyers agree with each other. It is a bit like working in a coalition Government: when you have a discussion, you suddenly find that the people on the two sides seem to come from both parties. Perhaps because of my legal background I am blind to the problem, but I do not think that there would be such a rigid division between the lawyers and the laymen on every aspect of the appointments system.

Lord McNally: My experience of coalition Government is that not all the radicals are on one side and not all the conservatives are on the other. Camisha is very worried that I misled the Committee when I said that only three women got through in the most recent exercise. Eleven of 30 names got through the selection process for circuit judges.

Kenneth Clarke: I think that there were no ethnic minorities.

Lord McNally: There were no ethnic minorities.

Kenneth Clarke: Throughout all this I am more concerned about the slow progress with ethnic minorities—just look at the figures. Although I resist targeting and so on, we are going very slowly on ethnic minorities. Somebody was telling me the other day that 40% of those called to the Bar are ethnic minorities, a slight overrepresentation, but the proportion on the Bench is absolutely tiny.

Lord McNally: I know that Lord Rodgers wants to come in on this, but one thought that we had when discussing this yesterday was perhaps to bring together a group of black and ethnic minority lawyers in the middle rank, as it were, at the point where they do not move forward to apply, and simply ask them: "You've come this far in your career. Are you thinking about the judiciary? If not, what is putting you off applying? Do you think it is a closed shop? Do you think it is weighted against you?" I wonder what Lord Hart thinks. I know that the witnesses are not supposed to question the Committee, but he has been around the track.

The Chairman: Perhaps I may park Lord Hart for a minute, because I know that Lord Rodgers wants to come in on the previous point, and then we will come to Lord Hart.

Q393 Lord Rodgers of Quarry Bank: We have been discussing the performers—that is the nature of it—but we do not think much about the customers: those on the other side in the court, for example. If I were in a court, whatever the circumstances might be, I would say: "I'm not very interested in your diversity. I'm not very interested in your age. I am interested in how good you are in the process of justice." We somehow lose that. We are discussing each other, who performs best and how competitive they are, but what is the measure at the end of the day? On the last occasion that we took evidence we had Mr Justice Toulson, and I will take just a sentence. He said: "One has to bear in mind that judges, as you well know, are irremovable unless they have done something truly awful. It is therefore important that one avoids making mistakes." I think that that is a very important

sentence, if you would like to comment on that. I am rather disturbed about this. There is a degree of gradations of awfulness. If I were in front of a court and I discovered someone being eliminated because they were "truly awful", that would be one thing, but what if one of the judges was pretty awful? I do not like the idea of pretty awful judges either. So there are bound to be gaps in the appraisal system, with bad judges appointed. Can we do something to make sure that bad judges become better?

Kenneth Clarke: I agree with the first part of your question, Lord Rodgers. That is why I began by saying that it seems to me that two things have to be immutable. The first is that we appoint on merit. I agree with you that the litigant likes to believe that the judge has been appointed because he or she is good and was the best candidate at the time. The second is independence: the judge was appointed without political patronage and sits there independently of the government and the executive of the day, and will sometimes give judgments that the executive and the government do not like. That is an absolute test in any country where the rule of law applies. After that, we have a policy of diversity. That is why I have made it subject in that way. Diversity is a problem. It does not mean that we do not have any policy of diversity, but it must not compromise merit or independence. That is where we are.

On the second point, we are proposing to have a system of appraisal. That is actually quite a bold innovation. You can accuse us of doing nothing, but it would be harsh in the light of what we are proposing. I think that the judiciary is happy to contemplate the proposal, which I think should be done. It is a process of continuous appraisal. You will occasionally be disappointed by the people whom you have appointed. It is not true that all of them will maintain the same high standards. In most walks of life now, appraisal becomes part of the system. In the case of the judiciary, it is appraisal of the judiciary by itself; it is the other members of the judiciary who will appraise you. We are getting near to starting that at the

very junior levels. I get no opposition to this. I look forward to the day when, at the very highest level, they do a bit of mutual appraisal. I can see that several members of the Committee share my view, having gone through this somewhat uncomfortable process of introducing what is now quite widespread—this kind of appraisal. In prospect, it is always slightly disturbing, but in practice most people find it very useful and beneficial in maintaining standards and drawing people's attention to areas where they are perhaps not doing as well as they could, whereas they used to, or whatever the issue might be. So we are moving towards a proper system of appraisal of the judiciary by itself.

Q394 Lord Rodgers of Quarry Bank: What is the measure of success? If the appraisal works well and we have your appointments, what is the measure of their competence?

Kenneth Clarke: Off the cuff, I hesitate to reel off a list of qualities that a judge has to display. Just to give you a terribly general reply, I have always thought that the most important thing that a judge has to have is good judgment. It sounds corny and it sounds silly, but they should have good judgment in the ordinary, layman's sense of the word. There are all kinds of other frightfully important things that they must have, like knowledge of the law, case management and all those kinds of things, but good judgment is the most important. That is the most difficult thing to appraise. I do not envy the Judicial Appointments Commission. Some of the most brilliant advocates that you could find at the Bar turn into the most dreadful judges when you appoint them. Some of the most pedestrian advocates turn out to be absolutely marvellous at being good, sound people applying good, sound judgment to the problems before them. It is part of the appointments process to guard against that. Some people know their own positions. I have known plenty of people at the Bar who were brilliant advocates and had no intention of ever applying to be a judge, because they just happened to know that their own skills were far better used in the field of

advocacy than if they were going to sit there all day handling a case sensibly and detachedly and deciding an issue.

Lord McNally: I think that appraisal has become much more a part of modern life in business, in the Civil Service and in all professions. We have made it clear that we want the judiciary to have ownership of appraisal and that it is not a matter of men or women from the ministry coming along to appraise them. We are working with the senior judiciary on how it could be implemented. Dame Hazel Genn at University College London is also working on how the structure could work and doing some interesting work on judicial training which might help people to dip their toe in. When Lord Hart and I were at University College, the legend was that lecturers could be sacked for indecency but that professors could be sacked only for gross indecency. Whether you would have such gradation in appraisal of judges, I do not know. I will remind the Secretary of State that he was talking of his own experience on the senior board of a company where the board was appraised. He said that it was rather like jumping into a swimming pool—a little bit of a tiptoe at the edge, but once you were in, it was quite an interesting experience. I think that that would improve the judiciary—I do not think that you will see situations where Judge X gets nine out of 10—just as it has other areas. I heard one senior civil servant say that she did not think that she would have got to the position that she did through promotions without the benefits that appraisal had given her to up her game. That is the benefit of appraisal and why it has spread out into other professions. All we are suggesting is that the judiciary is not a closed profession and could use some improvements in appraisal, selection and diversity.

Can I make just one other statement about what you do when you go into court and who you are being judged by? It is 30 years since I first asked the question in the other place about diversity in our police force, because I have always passionately believed that you

cannot police areas with an all-white police force without causing tension. I do not think that you can have a really harmonious society if the judiciary, however excellent, does not seem to reflect the society to which it is dispensing justice. You do not sacrifice quality for that aim, but I think that we are right to point in the direction of having a judiciary that in some ways reflects the society to which it is delivering justice.

Lord Renton of Mount Harry: That is a very important statement

Lord McNally: That is my opinion, but it is one that I feel very strongly about, because I think that that is how you keep a society harmonious. Again, I came to this as a layman. One of my privileges is that I get invited to the service at Westminster Abbey. At the end, the judges all file past. The first time I went, just over a year ago, it felt like I was watching that scene in "Fantasia" where all the mops come down. If you see the full serried ranks of the judiciary, they all look an awful lot alike. In the long term, that is a threat to the harmonious nature of our society unless we address it. But that is a personal opinion.

Kenneth Clarke: You say that it is a personal view, but it is pretty well government policy. So long as all the judges are wearing long wigs and tights, they all look fairly similar on ceremonial occasions. Lord McNally may give a give a personal opinion, but it is not far removed from the approach that we are trying to adopt in the consultation.

The Chairman: I know that Lord Hart and Lord Renton want to raise something. Lord Renton, is your question on this point?

Q395 Lord Renton of Mount Harry: Yes, it is. I was just wondering how, at this stage, you think the appraisal will work.

Lord McNally: We want to give the judiciary ownership of this, so it would be a judge-to-judge appraisal. My own instinct is that it would be a private exercise in that it would not be a matter of, "Unless you pass this, you're fired". Hopefully, it would be an attempt to make sure that colleagues were aware of changes, up to the mark and thinking through their role.

As the Secretary of State was explaining to me, FTSE 100 companies increasingly deal with their senior management in that way, as does the Civil Service—again, I do not want to ask for evidence from the Committee, but I am sure that Lord Powell would be able to tell us how the senior Civil Service now appraises. Right up to permanent under-secretaries, appraisals take place. People see it as a proper part of career development. It is not any kind of quiet inquisition to root out the bad judges; it is designed to make good judges better.

Kenneth Clarke: It does not apply to ministers of the Crown, of course.

Lord McNally: Of course, not—my God, no.

Kenneth Clarke: No qualifications or experience required; no appraisal carried out.

Q396 Lord Hart of Chilton: I am very interested in this because in the old days there was a certain amount of resistance to the appraisal of the judiciary. Are you saying that the judiciary has welcomed this in principle, before you get down to how it is going to work in practice? Is it signed up to the appraisal system?

Kenneth Clarke: The ones whom I have met are. There have been attempts in the past—there was an attempt to get a recorder appraisal system, which did not work—but we are back again. We have got an advisory group, and it will certainly come in. I just have not done a wide enough survey. Whether every High Court judge thinks that this should apply at the level of High Court judges, I do not know. The flippant remarks that I made just a few moments ago rather reflect what I always find: the sense that it is a terribly good idea for the staff or the lower ranks, but surely you do not mean it to apply to us. I think that that is changing. I personally have not encountered any resistance. I do not know whether Tom has.

Lord McNally: The ever helpful Camisha reminds me that tribunal judges, magistrates and deputy district judges are currently appraised. The senior judiciary—

Lord Hart of Chilton: That is what I am talking about.

Lord McNally: It came up with an idea that I think the department termed "gold-plated". That is why it would be expensive and elaborate. I have not seen the details of this "gold-plating", but that is why we pushed it slightly back, to see whether we could get something that was more practical and user-friendly, as it were. We are in discussions with them, but I am not aware that any of the senior judiciary has said, "Over my dead body".

Q397 Lord Hart of Chilton: Does that mean that there would then be a formal record of this appraisal, and would it be used in promotion exercises?

Lord McNally: I think that that would have to be true for internal use. Whether it would be open to a freedom of information request—

Kenneth Clarke: We and the judges would have to think about that. It is a question that we perhaps should not answer; it has not been addressed to us before and we should think about it before we start this debate. I entirely agree with what has just been said. There is a danger that we will have a frightfully expensive system. That is why the recorder appraisal system failed. They went in for a tremendously elaborate system that cost too much. The moment that people start getting nervous about what is going to happen to the appraisal, you have to be careful, and I think that, understandably, we were not careful. Half the judges would insist on the most amazing system, a right to appeal and all that sort of thing, if they felt that their appraisal was on the record and would affect their future judicial career. It is much better as a tool to be used by the judiciary as a body, like any other professional group as a body, to raise the quality of performance and to bring home to colleagues the areas where they could perhaps hit the best standards of their colleagues and so on. Once it starts being a path to promotion and allocating where you sit in the system and so on, people will understandably start getting much more nervous about it.

Lord McNally: I am told that, as you will probably recall, in September 2004 a recorder appraisal working group chaired by somebody called Mr Justice Leveson went to work. The

working group agreed that the basis for any appraisal scheme must be that the appraisal of judges can be done only by judges. They alone are in a position to distinguish between legitimate variations of style and either praiseworthy or unacceptable performance. Of course, I take advice from my legal adviser that this is still work in progress.

Kenneth Clarke: That cost £150,000 a year and was abandoned, so we are starting again.

Q398 Lord Crickhowell: The caution that you have just expressed about how you use the appraisal is rather important. I thought that Lord Powell might come in at this point because he provoked a very vigorous debate in the Committee last week about whether, having done these appraisals, they could or should be used in the appointments process. One argument was that if you have appraisals and you know a lot about someone, surely they should be used. Lord Powell put that argument rather effectively. There was an opposite view.

Kenneth Clarke: I look forward to your advice. I am just nervous. This is a completely new question to me. I had not previously thought about it and, if I am not careful, I shall give an answer, walk out and find half the judiciary quizzing me about this great announcement that I have made—so I look forward to your Committee's conclusions, if you have had a vigorous debate about it. I do not know about Tom, but it is the first time that I have turned my mind to the question of whether you keep a record and use it at later stages.

Lord McNally: I have been in government long enough now to know that if the boss says he is still thinking about it, you shut up.

Kenneth Clarke: We shall have to see what our mutual view is.

The Chairman: Lord Powell is indicating that he is resisting the opportunity to develop this argument again, so this is obviously something that we shall discuss when we come to the publication of our report and the outcome of your consultation. I am also very aware of the time.

Kenneth Clarke: I hope that in a few minutes you will excuse me. I have a Statement after Prime Minister's Questions. I may leave Lord McNally to continue the rest of the session.

Q399 The Chairman: I have two very practical questions; I am not sure which of you you feel would be most sensible to answer them. We are slightly concerned about the timing of the end of your consultation period, which, as I understand it, is 13 February. You said several times this morning that you hope to include our report in that. However, if our report is delayed—thank you very much Lord Chancellor, Secretary of State, whatever you prefer.

Kenneth Clarke: I am sorry that I have to slip away

The Chairman: It was very nice to see you. Thank you so much.

How do you see these two processes integrating in a practical way? That is our concern.

Lord McNally: We have always welcomed the fact that you have gone ahead with this inquiry. It would be extremely helpful if you could publish as close to our own timeline as possible. It would be most helpful if you could publish your report in March, because we would like to start the next stage in April.

Q400 The Chairman: In the same way that you need to take the advice of the Secretary of State, I need to take the advice of our advisers, but we have registered the point. You said in the consultation paper, although this is obviously irrelevant to the Constitution Committee per se, that you hope that you might be using more secondary legislation in respect of judicial appointments. Our concern is what aspects of the process you would regard as being of sufficient constitutional importance not to be included in that, because obviously if there were a lot of Henry VIII clauses in secondary legislation around these issues, that would not be viewed with great enthusiasm by this Committee.

Lord McNally: I am reasonably confident even in his absence to say that the Secretary of State would be totally against using Henry VIII clauses in this exercise.

The Chairman: That is a very clear steer. Thank you.

Lord McNally: Let me also say that one of the joys of trying to push through this particular direction is that the Secretary of State has been entirely supportive. As I said at the beginning, the search for a silver bullet will be frustrating because I do not think that there is one, but if we can keep up the momentum and look for the obvious wrinkles and hidden barriers, we can make progress. The report that you are going to submit will be very important in this.

The Chairman: I am grateful that you think so. We have covered a great deal of ground this morning, and I thank you for that. I should have thanked the Lord Chancellor, or the Secretary of State, as I hear he prefers to be called, more formally. I do not know whether any Member of the Committee feels that some of the subjects that were discussed in relation to the agreements on our own report have not been covered with the two Ministers.

Q401 Lord Hart of Chilton: I would like to ask a question, please. You referred to Baroness Neuberger's report. One of the issues that she raised when giving evidence to us goes back to the wide pool in which you want to fish for merit, which would include the solicitors' profession. You referred to the fact that in one of her recommendations she had the agreement of all the Magic Circle of solicitors' firms to sign up to investigating how further progress could be made to encourage solicitors to pursue a judicial career. There was to be a series of meetings, but not one has taken place. We quizzed the President of the Law Society about it, and generally the feeling was that although the solicitors may have signed up, a lot more work needs to be done to cajole and explore why it is not possible to recruit more solicitors. My firm produced the first solicitor Supreme Court Justice and did make progress in encouraging that as a career path, but the feeling is that there is a dragging of feet and that it does not really concern the big firms. There is a sense that they are money

machines that train people at great expense to be solicitors and to conduct the practice of a solicitor, but not to consider the opportunity to take up a judicial career. That seems to me a pity, because there are a number of very talented people in the profession who could make excellent judges, but the monopolistic view seems to be that, "It is not really for us to play a part in providing candidates for judicial preferment".

Lord McNally: I agree entirely, and what I said earlier is true. There have been a lot of bold declarations. The Prime Minister made Downing Street available to me to hold a meeting with solicitors, ILEX, the Bar and others. Everyone was all in favour of this, but it is a question of whether we can get to the next stage. I was very interested in your experience. It is easy to get declarations of good intent but then to leave it. Just for the record, I am told that that the group known as the Magic Circle did meet once, but only once, and that no action points arose from the meeting. That is exactly what we are dealing with.

Lord Hart of Chilton: That is the pity of it.

Lord McNally: On the pool, again we should be willing to look far wider than we have at present. ILEX has shown that it has a source there. Experience as a tribunal judge should be seen as a career progression. I am interested in the appointment of Deputy High Court Judges, which seems to be one of the last bits that still exist on the old tap-on-the-shoulder basis. I have my suspicions that some of the old ways produce old results. Interestingly, I had a vigorous debate with Baroness Neuberger about looking among lawyers working in public service. She was very hostile to that because she said that if government lawyers became judges, that would again blur the separation of powers. I disagree because it is a pool of talent that should be utilised.

What I can do is give an assurance to Lord Hart and the Committee, and perhaps even persuade Lord Powell to have a quiet drink with me and unburden himself. I am sure that some of these ideas have been tried before and have run into the same problems that he set

out, but it is nevertheless worth trying them again. One of those is engaging the Magic Circle and perhaps to keep up the pressure there. What encourages me is that I saw one of those notes which from my past experience I know produces results. It was scribbled in the margin: "The Prime Minister is taking a personal interest in these matters." That can be a great help in making sure that these things do not run into the sand.

The Chairman: Thank you, Lord McNally. This has been an extremely useful session. I am most grateful to you for the time that you have given to the Committee.