



SELECT COMMITTEE ON THE CONSTITUTION

INQUIRY INTO SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS FOR THE REST OF THE UK

Oral and written evidence

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Professor Alan Boyle, University of Edinburgh—Written evidence

SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS FOR THE REST OF THE UK

Submitted by Professor Alan Boyle, University of Edinburgh

I. What legal principles should govern negotiations for Scottish independence in the event of a “yes” vote?

The only legal principle governing the negotiations is that both sides must negotiate in good faith. The Edinburgh Agreement so provides, and insofar as it may be relevant after independence, so does international law. Negotiations must therefore be ‘meaningful’ and each side must be willing to listen and take account of the other’s interests.¹ The object of negotiation is to provide the opportunity for accommodating any conflict of rights and interests which may exist; it does not compel the parties to reach agreement, or to accept the other side’s demands. They must not simply make demands or offer terms on a take-it-or-leave-it basis, but neither are they obliged to compromise vital interests.

The Supreme Court of Canada’s judgment in the *Quebec Secession Case*² addresses some of the issues of constitutional principle. The Court noted that Quebec could not dictate the terms of its secession to other parties and that “No negotiations could be effective if ...secession is cast as an absolute legal entitlement” (p.267). However the Court also held that “The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.” (ibid).

It would seem to follow that there is no legal obligation to respect the timetable for independence laid down unilaterally by the Scottish government. “Good faith” does not require agreement by a specific date nor does the Edinburgh Agreement. The principle of legitimate expectation probably has no relevance in this context, but even if it had the UK government appears to have made no commitment to any particular date and it may be unwise to do so given the complexity of some of the issues at stake.

2. Is the timetable of independence by 24 March 2016 realistic?

It is impossible to say whether this timetable is realistic. The Irish negotiations in 1921 lasted six months. So did the negotiations on the breakup of Czechoslovakia. Many of the issues are the same: division of assets and liabilities, military bases, citizenship, whether to have a common travel area and so on. From that perspective the 18 months envisaged by the Scottish government may appear generous.

But much will depend on what else the parties wish to agree on, and the Anglo-Scottish negotiations are potentially more complex in several respects. What deal will they try to reach on the currency and the banks? How will they handle Faslane and the nuclear

¹ *North Sea Continental Shelf Cases*, ICJ Reports (1969) 46-7, paras 83-5; *Icelandic Fisheries Cases*, ICJ Reports (1974) 32 ff.; *Gabčíkovo-Nagymaros Case*, ICJ Reports (1997) 7, para 141.

² *Reference re Secession of Quebec* [1998] 2 S.C.R 217.

deterrent? Do they want a mutual defence agreement? Or an agreement on maritime boundaries? How will they handle negotiations with the EU? If the United Kingdom has responsibility for negotiating Scottish entry (as Sir David Edward argues) it will first have to reach agreement with the Scottish government on the terms that both parties would seek from the EU. None of these issues are straightforward. Negotiating against a short timetable would give the UK a considerable advantage, but whether the Scottish government would in fact stick to its timetable is unknown.

Even if the UK and the Scottish representatives can reach agreement *inter se*, there remains the problem of negotiating entry into the EU. That might be easy – or it might not. No-one can tell. It took the UK two years to negotiate EEC entry in 1973, but only after two failed attempts dating back to 1963. Turkey applied to join the EEC in 1987 and is still not a member. Scotland is already part of the EU so it is unlike any other applicant state. That should make entry easy, but it is a political process and it is impossible to say how the politicians of 24 other states will respond. Every other EU member has a veto on new members. The signals from Brussels are mixed. No-one can plausibly be certain of the likely timescale for these negotiations.

If EU negotiations are more protracted than the Scottish government's timetable it would then have to choose between independence outside the EU, or a deferment of independence until EU accession is agreed at some point in future.

2A. What impact would the timing of the UK general election in May 2015 have on any independence negotiations?

None, if everything is agreed, at least in principle, by then. But if it is not agreed there might be a new UK negotiating team, and the position taken by the UK in the negotiations might change. If, however, the negotiating team were structured so as to represent all of the main UK parties, and if the UK's negotiating position reflected the agreed position of all those parties, then a change of government in 2015 would have little or no impact on the negotiations.

3. Who would negotiate for the remainder of the UK and to whom should they be accountable?

The government would normally be the body with responsibility for negotiations of this kind. Whether the principal negotiators would be ministers, civil servants, diplomats, or others is essentially a political decision not a matter of constitutional principle. On a matter of such importance to the future of the UK it might be appropriate to include representatives of Her Majesty's Opposition, and of the Northern Irish and Welsh governments, but there is no constitutional requirement to do so. In 1921 the UK team for the Irish negotiations included the Prime Minister (Lloyd George), the Lord Chancellor (Lord Birkenhead), Winston Churchill (Secretary of State for the Colonies), Austen Chamberlain (Lord Privy Seal), Gordon Hewart (Attorney-General) and Hamar Greenwood (Chief Secretary for Ireland). This was a coalition government team. It did not include representatives from the opposition Labour Party or the Asquith Liberals. If that precedent is followed a team of government ministers, civil servants, diplomats and lawyers would negotiate for the UK, as was the case in the more recent Anglo-Irish negotiations that resulted in the Good Friday Agreement on Northern Ireland.

On accountability see Q.5 below.

4. What role if any should Scottish MPs have in negotiations or in holding negotiators to account, and in any vote on a resulting settlement?

It is difficult to see what role Scottish MPs might have in the negotiations if one accepts that the Scottish government would be the body constitutionally empowered to negotiate on behalf of Scotland and that in doing so it would be accountable only to the Scottish Parliament, and not to Scottish MPs at Westminster. The British government would be accountable to the UK Parliament, and in this context it is also difficult to see any role for the Scottish MPs, assuming they still exist at this point. In 1922 nearly all the Southern Irish MPs were boycotting Westminster anyway, so the UK parliament debated and approved the Anglo-Irish Treaty without their participation.

It would seem prudent for the Scottish MPs to absent themselves from any vote on the terms of the Anglo-Scottish negotiations. They could surely not sit in judgment on whether the terms of any agreement are acceptable to the UK, a state from whose parliament they would thereafter be excluded. At best Scottish MPs might try to persuade Parliament to grant terms more favourable to Scotland than those negotiated on their behalf by the Scottish government. At worst they might be accused of undermining a deal negotiated by that government. Certainly it would be strange for the government of the United Kingdom to be held accountable to MPs from a soon-to-be-independent Scotland.

5. Should the negotiating teams be held directly accountable by the public?

The Scottish government has not suggested holding a second referendum on the terms of any agreement. Their view appears to be that the Scottish Parliament will decide on whether to accept the terms negotiated, not the Scottish electorate. While some Scots would prefer to see the terms before deciding whether they are or are not in favour of independence, how Scotland ensures democratic accountability following the negotiations is for it to decide and it would not be prudent for the United Kingdom to enter that debate.

The United Kingdom government is accountable for the outcome of the negotiations to the UK Parliament, but not directly to the public. The United Kingdom has made only limited use of referenda, and it is difficult to see arguments for putting the terms of any UK-Scotland agreement to a popular vote in the rest of the UK. The issue of constitutional principle – that Scotland is entitled to choose independence – was decided long ago. The British electorate could only be asked to vote on the terms agreed, not on the principle of independence, but in practice it might not be easy to maintain that distinction. Parliament would be better placed to hold government to account for the terms negotiated. That is how the negotiations with Ireland were handled in 1922, and indeed all other independence negotiations conducted by British governments since then have followed the same principle of parliamentary accountability.

Once agreement is reached some of the terms will have to be implemented by legislation anyway, while others may be the subject of a potentially binding agreement with Scotland that would enter into force as a treaty between the two states upon independence and after ratification through Parliament in the normal way. The 1922 Anglo-Irish Treaty was debated

and approved by Parliament and by the Dail. Only then were its terms given effect by UK legislation.

6. What would happen if the two negotiating teams could not reach agreement on an issue?

At worst Scotland would not become independent, e.g. if the two sides could not reach agreement on EU membership. But in most instances it seems more likely that Scotland could proceed to independence without agreement on the issues in question, unless the negotiations are treated as a package deal in which nothing is agreed until everything is agreed. But that kind of negotiation can last a very long time, and it would offer little of benefit to the UK to negotiate in that way unless there really are issues of vital importance which could be assured in no other way. Assuming a normally structured negotiating agenda Scotland would simply have to decide how to proceed if it could not get agreement on some key issues, such as the currency. It has far more to lose than the UK from any failure to reach agreement. Scotland has little to give the UK in negotiations while most of what it wants can only be obtained with UK agreement.

7. What would be the status of the 59 MPs for Scottish constituencies in 2015–16? What impact might this have on the 2015–2020 Parliament?

Until the date of independence the United Kingdom would retain its competence to legislate for Scotland on matters which have not been devolved. Laws passed prior to independence would in any event remain in force as the law of Scotland after independence. For all these reasons Scottish MPs could not be excluded from participating in the normal workings of Parliament prior to independence unless matters within the competence of the UK parliament were transferred in whole or part to the Scottish Parliament using s.30 of the Scotland Act or primary legislation. If those powers were transferred in advance of independence it might then be reasonable to exclude Scottish constituencies from participation in the UK general election in 2015.

As regards the parliamentary impact in 2015-20, this is probably not a question for a lawyer to answer, but at the very least there is an obvious risk of a near permanent Conservative majority in the House of Commons once Scottish MPs leave. If Scottish MPs remained in place until 2016 or later there is a risk that removing them would deprive a Labour government elected in 2015 of its majority.

8. What measures would be needed (e.g. legislation) to allow negotiations to take place?

Following a vote for independence, it would seem prudent for the UK government to publish a white paper setting out the terms on which it will seek to reach agreement with Scottish representatives. The Scottish government has already set out its terms in a white paper. The UK could be at a negotiating disadvantage if it does not do the same. Beyond that, however, United Kingdom constitutional law does not require enabling legislation for negotiations to take place. This is a matter for the government, and there is no precedent

for parliament to legislate on negotiations rather than on the outcome of those negotiations. It may be necessary however to empower the Scottish government to negotiate independence. S.30 of the Scotland Act could presumably be used for that purpose.

9. What legislation would be required at Westminster to achieve independence for Scotland?

How the process of becoming an independent state is characterized could have lasting implications for relations between the two countries, and more immediately for the measures necessary to give effect to the referendum vote. The idea that the United Kingdom would legislate to “grant independence” to Scotland seems best avoided, since it carries overtones of decolonization. Manifestly Scotland is not and never has been a colony. Nor is the process comparable to the gradual progression towards statehood of the old dominions, whose independence was never formally granted by the UK, but was merely recognized in the Statute of Westminster 1931. In reality the old dominions had become independent states some time earlier.

Scotland is not seizing independence as Ireland did in 1918, nor is it declaring independence unilaterally like Rhodesia. The process is perhaps best understood as the separation or secession of Scotland, by agreement, from the rest of the UK. On that view Scotland would legislate its own constitution, not the United Kingdom; the UK’s task would be limited to terminating Scotland’s status as part of the United Kingdom. Parliament would thus have to provide (a) for the transfer of necessary powers to the Scottish Parliament and government, if that had not already been done, and (b) that legislation in force for Scotland would cease to have effect in Scotland from the date of independence. Scottish legislation would make provision for the continuation in force of existing UK legislation as part of the law of Scotland.

10. What impact might Scottish independence have on the monarchy? Would an independent Scotland need a governor-general?

It is not obvious that Scottish independence would have any specific impact on the monarchy as such. Her Majesty is already monarch of several states; adding one more changes nothing. Nor is there any constitutional requirement for a Governor-General to be appointed, although in practice all other Commonwealth monarchies currently have a Governor-General. But this seems a matter for negotiation between the two states, taking into account the unique relationship between the monarchy and Scotland. Provision would have to be made to ensure that both countries retained the same rules on matters of succession to the throne and so forth, but this is already true for the other Commonwealth monarchies which have the Queen as Head of State.

11. What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

The relevant law is customary international law; the 1983 Vienna Convention on Succession to State Property, Archives and Debts is not in force and has not been ratified by the United Kingdom. At best it may provide evidence of customary international law, but that cannot be

taken for granted. The primary rule for allocation of debts and assets is that the parties should agree. State practice varies, but in the case of Czechoslovakia, the USSR, and Yugoslavia assets and liabilities were allocated on the basis of an agreed ratio roughly proportionate to population. Only if there is no agreement are other rules applicable. The following is a brief summary of what appear to be the applicable rules.

In principle assets which are already the property of the Scottish government or of Scottish public bodies will remain the property of those bodies. The assets of NHS Scotland, for example, will thus be unaffected. United Kingdom-owned buildings and land-holdings located in Scotland will in principle also pass to the Scottish government. United Kingdom assets located elsewhere in the UK or abroad will not pass to Scotland except by agreement. Scotland will also succeed to movable property that is intended for use by or within Scotland, but it appears doubtful that it would have any right to movable property elsewhere in the UK or abroad unless specifically employed for the activities of the Scottish government.

Military assets are usually the subject of special agreement. One third of the combat aircraft of the Royal Air Force and all of the Royal Navy's submarines are based in Scotland, together with two new aircraft carriers under construction: their function is to defend the UK as a whole, and they are in no sense specifically Scottish assets. They would almost certainly remain United Kingdom assets under existing law. Whether the UK would retain military bases in Scotland, including the submarine base at Faslane, would depend on the agreement of the Scottish government.

It is not clear that there is an accepted rule of international law on the allocation of public debts. Third party creditors have rights, and need to be protected against default, so it is not simply a matter of splitting the debt. There appears to be some authority for the proposition that the continuing state retains liability for its general public debts. In 1947 India retained responsibility for all of British India's debts, while Pakistan gained independence with its share of assets but free of any liabilities. But there are also precedents for a proportionate allocation of public debt by agreement, including the example of Ireland in 1921. One textbook writer concludes that "Much will depend upon the circumstances and it may well be where the seceding territory constituted a substantial or meaningful part of the predecessor State, considerations of equity would suggest some form of apportionment of the national debt" (Shaw, *International Law*, 999). That conclusion would imply a similar allocation of the UK's public debt and it is consistent with Article 40 of the 1983 Vienna Convention. Scotland could not simply repudiate its share of the debt; any disagreement would be subject if necessary to settlement by the International Court of Justice or international arbitration.

12. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK? To whom would services that are currently UK-run be accountable if shared with an independent Scotland?

Much will depend on the service that is shared. Sharing something as fundamental as a central bank would almost certainly have to be agreed in a treaty establishing that bank as an international institution. The ECB would be the obvious example; the other is the Eastern Caribbean Central Bank established by treaty as an institution of the Organisation of Eastern Caribbean States. An internationalised bank would not be accountable to national

parliaments but only to its member states. If Scotland and the UK held equal voting rights in such a bank economic power would in effect be shared and Scotland would have more control over economic policy in both states than it enjoys at present in the United Kingdom. But if, alternatively, the UK held a majority of votes in the bank, it would be able to dictate economic policy to a greater degree than is possible in our present constitutional structure. Scotland would then be politically independent but at the cost of becoming an economic dependency of the United Kingdom.

In other cases shared services could be carried out by agreement and each government would remain accountable to its own parliament for the delivery of that service in its own jurisdiction. At the most mundane level co-operation between the relevant technical bodies would be all that is required: an example is the arrangement governing shared water resources in Northern Ireland and the Irish Republic. Sharing railways or air traffic services can be done under existing international agreements and is not in principle problematic. Sharing of defence installations or of military forces could be arranged under treaty and each government would remain accountable for its own management of that arrangement. There are precedents, some already involving the UK. No constitutional principle requires the United Kingdom or Scotland to share services. Whether to do so is a political question.

4th March 2014

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and Professor Stephen Tierney, Pr
Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh—Oral evidence (QQ16-26)

Evidence Session No. 2

Heard in Public

Questions 16 – 26

WEDNESDAY 5 MARCH 2014

10.35 am

Witnesses: Professor Alan Boyle, Professor Michael Keating and Professor Stephen Tierney

Members present

Baroness Jay of Paddington (Chairman)
Baroness Falkner of Margravine
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Lexden
Baroness Wheatcroft

Examination of Witnesses

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, **Professor Michael Keating**, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and **Professor Stephen Tierney**, Professor of Constitutional Theory, University of Edinburgh

Q16 The Chairman: Good morning. Thank you all very much for being here this morning and for the various written comments that you have made, either directly to us or in general, which we have read with some interest. We are conducting this inquiry, I hope somewhat differently from some of other forums that are engaged in this, purely from the constitutional position, because that is our role—we are the Constitution Committee of the House of Lords, and that is our major interest—so we need to proceed with that in mind, which limits the discussion sometimes but none the less, I think, focuses the discussion usefully.

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and Professor Stephen Tierney, Pr

If I may, I will begin by suggesting to you—this comes from somebody who is not as steeped in all these matters as you are, but it is interesting to us—that there continues to be much uncertainty about the constitutional and legal framework for the discussion of the potential of independence. Professor Boyle, you suggested in your written evidence that you saw the whole of the legal framework, as it were, as open to negotiation. Professor Tierney, in one piece that I read by you, you said that there was a question even about what independence was. At this stage of proceedings, six months from the referendum, it would be very interesting to pursue some of these questions. Perhaps, Professor Boyle, you could begin by giving us, as you see it, the basic constitutional framework and legal principles within which you would expect the negotiations between Scotland, post a positive independence referendum, and the rest of the UK, and say whether you believe that this is simply a matter of political negotiation.

Professor Alan Boyle: Thank you. I think you have come to the heart of the question. There is not a lot of law here. I used to teach constitutional law, and it certainly is not something I have given up, even though I am principally an international lawyer, but you will not find a great deal on these kinds of questions in textbooks on constitutional law. The only directly relevant precedent for us is Irish independence in 1922. That was quite a long time ago and it took place in circumstances that thankfully are remarkably different this time, which needs to be borne in mind when one looks at that as a precedent. The other most obviously relevant precedent with which the United Kingdom is familiar is the decolonisation of our empire, but there are a number of problems there.

The Chairman: And that, presumably, is totally irrelevant in this context.

Professor Alan Boyle: I would not say that it is totally irrelevant; it is almost totally irrelevant. There is a question first of characterisation. The relationship between Scotland, England, and Wales is not one of colonisation. That needs to be emphasised and in that sense it would be inappropriate to look at those as directly relevant precedents. Equally, the history of Canada, Australia and New Zealand as dominions is that they were never given independence anyway; they just emerged eventually as independent states. So it is a different process.

The only area that might be relevant is one to which I am grateful to one of my colleagues for drawing to my attention. He said, “Have a look at India and Pakistan, because Pakistan was in effect a new state separating from India that was nominally an existing state.” I have cited that because it is relevant when it comes to precedents on the allocation of debts, liabilities and assets, but that is the only directly relevant one that I can think of in this context.

The only other thing that is relevant in this area is the question of who negotiates. I have a particular familiarity with our relations with Mauritius, for reasons that one or two of you might be aware of. I have read a lot of the correspondence on that and, rather like negotiation with Ireland, it involved government ministers, civil servants and diplomats, but usually in a slightly different constellation. Again, it very much depends on the circumstances. If you want another example, you could, I suppose, look at the much more recent negotiations over Northern Ireland—the Belfast agreement with the Irish Government and with the Northern Irish political parties. If you are asking who negotiates, that probably provides a reasonably useful template.

You started by asking whether there were any principles of law here, and I think that rather illustrates that there are not. It is fundamentally for the British Government to decide who

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the appropriate people are to negotiate on behalf of the United Kingdom. I suggest that the only important constitutional principle here is that, whatever emerges at the end of the day, the Government are accountable to Parliament. It seems to me that whatever is negotiated, the precedents all point in the same direction: whatever is agreed between the United Kingdom and Scotland will have to go in some form to Parliament for approval. That is what happened in 1922 and it is what has happened in all the other relevant negotiations since, including the Belfast agreement. That could occur in a number of ways. I have suggested that one thing that the Government might like to consider is a white paper in advance of the negotiations, setting out their position. I say that merely because Scotland has done that.

The Chairman: I am sorry for interrupting, but do you think that there should be such a white paper prior to the referendum?

Professor Alan Boyle: No, not prior to the referendum.

The Chairman: Sorry, I misunderstood you.

Professor Alan Boyle: If there were a yes vote in the referendum, it would certainly be something that the Government should consider. The Scottish Government have set out their views in a white paper. It might be appropriate for the British Government to do the same, and perhaps that could be debated in Parliament. The key thing is that Parliament would have to legislate, so to that extent the Government are accountable. The Scottish Government accept that the UK Parliament would have to legislate in an appropriate way. I think there would probably also have to be something in the nature of an international agreement. Scotland is clearly not a state at the moment. At the moment when it was negotiating it would not be a state, but it would be about to become a state. It would be appropriate to put some of the matters into an international agreement, but that rather depends on the subjects on which there was going to be agreement. There are two obvious ones. The first would be defence matters. There is one rather tricky issue on the Clyde. The second is that, if the parties wish to discuss a joint central bank, I cannot see how you could avoid creating an international institution. That would require a treaty, and that in itself poses some interesting questions of accountability. At the end of the day, the only core constitutional principle I can see is accountability to Parliament.

Q17 The Chairman: We will come back to the assets and liabilities question, for example. Professor Keating, may I ask you the same question that I put to Professor Boyle?

Professor Michael Keating: I am not a lawyer but a political scientist, and what I say may be shaped by that. I think in any case that this is primarily a political question and not so much a legal question. There is no precise precedent that I can think of for this debate and, as my colleague has said, very little law, but we do have the Edinburgh agreement, which is critical. I do not know of anything like the Edinburgh agreement in other cases, but it lays down some general principles which both sides have agreed to respect. It does not give us the detail, but it is a huge advance on the discussions that are going on in, say, Spain or Belgium, where they have not even got to that point. So that is critical. It pledges both sides to negotiate in good faith, which is as much as we can expect.

I assume that the two sides would exercise an enlightened self-interest; that is, there is no reason for them to be vindictive and do things that might damage themselves as well as the other party. I do not think that there is great political advantage in England in making life

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difficult for the Scots—if anything, there is a remarkable indifference in England to what is going on in Scotland—so I would expect the Government of the United Kingdom to look after the interests of the rest of the United Kingdom and for Scotland to look after its interests and to reach agreement as quickly as possible, because both sides will lose if this is protracted too long.

Some issues will be extremely difficult: the issue of the pound seems to be very difficult and we have absolutely polarised positions on that. Other things can be compromised on. If it is about money, you can always reach a compromise somehow or other; sometimes, it is a very rough and ready compromise. The Scottish Government have said that you do not need to resolve everything immediately. If the United Kingdom agrees that it would be in the interests of citizens to carry on some joint institutions beyond independence—it is talking about the social security system—that would be possible. That is essentially a political decision; other issues can be resolved relatively quickly. So it depends on good will; it depends on the attitudes of the actors; and it depends on the political climate at the time. That is more important. If those conditions are present, I think that the legal mechanisms can be found, because we have a very flexible constitution.

Q18 The Chairman: We are very aware of that. Professor Tierney, do you want to expand, for example, on your rhetorical question about what independence is?

Professor Stephen Tierney: In terms of the general question of the legal principles that would govern negotiations, it is probably wiser to think about constitutional principles rather than legal principles. I think that there is an important distinction there. In the event of a yes vote, we could enter a situation of constitutional limbo, or at least legal limbo, in relation to Scotland's status within the United Kingdom. In the period prior to independence, there will be a shifting mentality, which is difficult to conceptualise at the moment. I think that we will have to think about an evolving rule of recognition in relation to Scotland and the Scottish political system. That would not affect sovereignty in the external sense—as far as the rest of the world is concerned, Scotland would be part of the United Kingdom until independence—but the internal dimension of sovereignty is already coming under a certain degree of strain. The supremacy of Westminster legislatively has come under at least some tension in light of the legislative reforms since 1998 and through membership of the European Union. I think this would be considerably enhanced by a yes vote in the referendum. If we take parliamentary supremacy primarily as a political fact, that political fact certainly in relation to Scotland would be challenged, if not supplanted, by a yes vote. I think that, on that basis of defined legal principles, Westminster's supremacy would not be a reliable principle simply to fall back on. I am not saying that it would be redundant—it would be absolutely significant for the rest of the UK at least—but we need to think beyond that. The consequences of that are threefold.

First, the negotiations will be primarily political rather than legal. It is a political science contention in any event that constitutional matters are fundamentally political matters shaped by certain institutions, but there is a bigger point. I think that politics, while they may not be quite the only game in town, might be the only game that can be played, given that it would be very difficult to see where one would go for a legal solution were the negotiations to come into difficulty. We already saw that with the debate about whether the Scottish Parliament could hold a referendum—there was legal debate about that. Neither side wanted to go to court over the issue of the Scottish Parliament's authority to hold a consultative referendum. People had different opinions, but it was never fully settled. In this

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situation again, people might be very reluctant to go to court to try to find legal principles to govern negotiations.

A second point is that all we have to go on is the intergovernmental framework set out in the Edinburgh agreement. It has been correctly pointed out that the Edinburgh agreement is primarily about the running of the referendum, not the running of negotiations after it, but it provides that the two governments will work constructively in the best interests of the people of Scotland and the people of the UK if there is a fair and decisive referendum. We can be confident that there will be a fair and democratic referendum. Two bills have passed the Scottish Parliament to regulate the referendum—the Electoral Commission and the Electoral Management Board have significant roles there—so, barring a disaster, we can anticipate a fair and lawful process. On that basis, I think that we can see as a starting point this commitment to work constructively in the best interests of both peoples.

The third consequence of not having a legal framework is that we then need to find constitutional principles. At that point, it would be wise to establish some kind of constitutional platform between the two governments to set out what principles might apply. The search for constitutional principles when the constitution is silent is not unprecedented; it is what the Supreme Court of Canada did with Quebec in 1998. The constitution of Canada was silent on whether Quebec could leave. The Supreme Court, when asked that question, said, “The constitution is silent, but here are some constitutional principles that would apply.” The situation here is different. It is not about whether Scotland can leave but about how negotiations would take place. It would be appropriate to try to define some principles and perhaps for the two sides to lay down what those might be. I do not want to speculate—it is a big question—on what those principles might be, but instances of them could be: good faith, a commitment to respect the outcome of the referendum, transparency in negotiations, accountability, perhaps to both Parliaments, mutual co-operation and respect, reciprocity and, finally, respect for the interests of the peoples of Scotland and the UK. It might be thought that that commitment in the Edinburgh agreement is a commitment that the Scottish side, if you like, would work for the interests of the Scottish people and that the UK side would work for the interests of the UK people—clearly, that would be the intuitive sense—but I think that it would be good to see a commitment on both sides to work for the interests of both peoples. I do not think that is fanciful. If the negotiations are to be constructive and if people are to think that everyone is going to be a close neighbour regardless of the outcome of the negotiations, a commitment by both sides to work constructively in the interests of all the peoples of the United Kingdom as it is today would be a good starting point. That is why I think it is constitutional principles rather than legal principles that should govern the process.

The Chairman: But the constitutional principles will have to be invented.

Professor Stephen Tierney: Invented or found within the constitution. Some of the things that I mentioned could be expanded upon.

The Chairman: I understand. The examples that you have given are very interesting.

Professor Stephen Tierney: In an unwritten constitution, inevitably, we have to find them somewhere.

Q19 Lord Lang of Monkton: Those were three very interesting opening statements. There is clearly a lot that we could discuss about them. The question that was initially asked

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concerned the legal principles that should govern negotiations. I noticed that in your paper, Professor Tierney, you said, “Are we sure there will be negotiations? This is surely the easiest question to answer”, and then you quoted from the Edinburgh agreement. Professor Boyle said that the only legal principle governing the negotiations is that both sides must negotiate in good faith. I think that we all welcome that language and would hope that, if independence were to come about, the Edinburgh agreement would be implemented on a basis of good faith. I think that the following difficulty arises, however—and this is what I would like to hear our witnesses’ views on. The debate between the yes and no campaigns hinges around the word “continuator”. Which is the continuator state? What is a continuator state? It seems to me that when the Chancellor of the Exchequer went to Scotland and made it clear that neither he, the Opposition nor the Permanent Secretary to the Treasury could agree to a currency union, he was stating what he felt entitled to state on the ground that the United Kingdom would be the continuator state. I know that there is more than one view on this, but, Professor Boyle, your paper with Professor Crawford lists the three or possibly four options and comes down pretty firmly in favour of the continuator state. The reaction to the Chancellor’s statement implied that although many people did not like what he said they did not challenge his entitlement to say it. What I am trying to say is that, before the negotiations start, quite a lot of the material that might be thought to be part of the negotiation may be foreclosed on the ground that the United Kingdom is the continuator state and that therefore this issue or that issue is not an issue for negotiation—currency might be one and European Union membership might be another. Have I got it completely wrong and can you clarify the position?

Professor Alan Boyle: No, you have not got it completely wrong. There is one thing that is not open for debate: the United Kingdom will continue as a state unless it chooses otherwise. There is only one credible view on that. The United Kingdom will still be in business the day after Scotland becomes independent (if it becomes independent), as it was in 1922—and as virtually every other example of separation has shown. The exception was Czechoslovakia, but the Czechs and the Slovaks agreed that they would become two new states—that is a special case. The United Kingdom will still be in business, but there is a separate and distinct question of what you do with the assets of the United Kingdom. There is international law on that. I have attempted to summarise it towards the end of my paper. Unfortunately it is not an area where the law is entirely clear. There are two rather different approaches—in our own practice in the United Kingdom, we have adopted both approaches in the past. In the Irish example, we simply allocated the national debt on a basis of proportionality to population. There is practice in the Soviet Union, Yugoslavia and Czechoslovakia which allocates assets and liabilities on a roughly proportionate basis. On the other hand, and this is where one colonial precedent is relevant, in the India–Pakistan partition Pakistan was given its share of the assets, but the government of India retained all the liabilities and all the debts. In so far as we can be clear on the international law, it suggests an equitable apportionment of assets and liabilities. You then start arguing about the assets. It is reasonably easy: things in Scotland by and large we would leave in Scotland and they would be Scottish. But are we going to leave them all our nuclear submarines and two aircraft carriers and a third of the Royal Air Force? Probably not—that would seem a bit unusual, to put it mildly. So there are some assets that clearly we would remove from Scotland. Equally clearly, you might say, “Well, there are other assets worldwide. What about our embassies?” Maybe those should be valued and Scotland should be given some proportionate allocation representing the value of the embassies, for example.

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Q20 Lord Lang of Monkton: Before asking the others whether they would like to comment, perhaps I may say that the starting point for negotiations has to be got right. The thrust of the Scottish Government's white paper is that Scotland is automatically entitled to share ownership of this and share ownership of that. They started saying that they owned the pound as much as England did, to which the answer, I think, is "No, neither England nor Scotland has ownership of the pound; it is an asset of the United Kingdom." Are the two parties in total equality as they approach these negotiations or is there an unseen roadblock, which the nationalists do not seem to have acknowledged in their white paper, of the continuator state starting as owner of a number of things which would be normally subject to negotiation?

The Chairman: I say for the purposes of information that, in the written evidence that the Scottish Government have given us, they specifically make that point in terms of challenging the basis of our call for evidence.

Professor Alan Boyle: Where would you start if you were going into a negotiation? You would make a more extreme case than the one on which you are ultimately going to compromise, so from that point of view I can understand the position that the Scottish Government are taking. On the other hand, if you look at textbooks on international law, the only thing that they are clear about is that, in the absence of agreement, the only rule is that you negotiate. In so far as there are precedents, if there was a constitutional principle here on which you might seek to reach agreement at the outset, it might be on an equitable allocation of assets and liabilities; it would then be for the parties to negotiate that. Interestingly, that is the one area where there are international precedents on dispute settlement—the arbitration on German external debts, for example, and various other arbitrations that an international court or arbitral tribunal has resolved what would amount to an equitable allocation where the parties were unable to agree. A second important constitutional principle that you might want to agree at the outset is that, if the two parties are unable to reach agreement, they should resort to third-party settlement in order to determine the balance of debts and assets. That seems a prudent way to proceed. To say that you must negotiate in good faith is fine, but it does not mean that you are compelled to reach agreement; it does not mean that you have to give in to the other side. There is a risk that each side, acting in full good faith, will simply be unable to compromise with the other fully. That is where some fallback position is always wise. In this context, it would be very prudent. Interestingly, the obvious precedent is the Jay treaty, which the United Kingdom negotiated with the United States. For a century, we resolved a number of quite important disputes with the United States through arbitration, including the famous Alabama claims arbitration for the unfortunate supply of warships to the confederates during the civil war. That worked very successfully to de-escalate what might otherwise have been some difficult and testing moments in Anglo–American relations.

Professor Michael Keating: It seems to me that there is broad acceptance that the UK would be the continuing state. Less clear are the implications of that, which is why the disagreement arises about assets, liabilities and participation in common institutions. The position of the Scottish Government seems to be that they have the right to continue participating in joint institutions, the Bank of England being the most difficult example.

Lord Lang of Monkton: Sorry to interrupt, but do you accept that there is a legal distinction between assets and institutions?

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Professor Michael Keating: I am not a lawyer, but I am going to make that distinction in my own way, as I think that there is something in that. Dividing assets, which I will talk about in a moment, is one thing, but continuing to participate in existing institutions is another matter altogether. If a country has seceded from a state, it is difficult to say, “We want to continue participating in joint institutions as of right”, as opposed to through negotiation. That seems to be a difficult position. If it is in the interests of the United Kingdom to maintain joint institutions, I think they would be maintained; if it is not in the interests of the United Kingdom to maintain joint institutions, I do not think that they would be. I think that it is in the interests of the United Kingdom for Scotland to use the pound, but I do not see that that obliges the UK to allow Scotland to share in the management of the pound, which is a different thing. That is a problematic issue. On EU membership, it also seems to me that the United Kingdom will be the continuator state and will not have to reapply for membership, which some people were suggesting at an earlier point in the debate. Scotland would have to apply for membership, but I think that Scotland has entitlement to membership, because it is a democratic European state meeting all the criteria. That is a different case and needs neither the UK nor any other member state have suggested that they would veto Scottish membership. It would be a matter for negotiation. As far as assets and debts are concerned, there are all kinds of legal principles, but normally this is resolved on the basis of a political compromise. The simplest principle is in proportion to population. It is illogical, but it is easy—you can count it. I would expect some compromise to be reached there. Maybe international arbitration could be used if there is not agreement. If it is a case of assets, a third party could try to broker an agreement or even act as an arbitrator.

Professor Stephen Tierney: I published a paper arguing at length that the United Kingdom would be the continuing state and Scotland would be a new state and would have to apply for recognition on that basis. I agree with my two colleagues on the international law position, but I am not sure how relevant that would be in the longer run. The international law position offers not too much information beyond the equitable distribution point. It is also a default position that states would fall back on in the event of radical disagreement or no negotiations. The intention here would seem to be towards a negotiated deal and I imagine that a lot of these issues would be sorted out, but if they are not I do not disagree with what has been said. I think that the institution/asset distinction is perfectly credible. Assets would fall to be divided. If there are institutions or services of the UK state, they are not something that an independent Scotland could simply assume to sign up for. In the Quebec analogy, going back to the mid-1990s, someone light-heartedly said, “You can’t make a unilateral declaration of partnership.” That, I think, would apply in relation to services that are clearly UK services.

Q21 Lord Goldsmith: Two propositions are being stated. One is that the better view is that the United Kingdom would be the continuator state and then it is all a matter for negotiation. Presumably if the United Kingdom is the continuator state, certain things affect third parties and cannot be a matter for negotiation between the rest of the United Kingdom and Scotland. I wonder whether you could comment on that and identify examples, if you can see any, where that is significant in terms of what then happens in the negotiations.

Professor Alan Boyle: Most obviously, there are debts. Debts are owed to third parties and the third party may not wish the debt to be transferred to another state. That is the

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obvious one. I cannot think of others. By and large, an independent Scotland would succeed to all the

treaties that the United Kingdom is a party to, unless it wished to opt out of them. The only problematic issue is that it would have to join institutions such as the UN and the EU, which is not automatic, but otherwise it would be party to the same treaties. To that extent, in so far as our relationship with third parties is governed by treaties, Scotland would still be in those treaty relationships. Perhaps my colleagues can think of other examples, but those are the only ones that I can think of offhand.

Professor Michael Keating: There is the question of international organisations. There is NATO and the European Union. The difficulty with the European Union is not the principle of Scottish membership but the terms of Scottish membership and whether Scotland would enjoy the same terms as the UK does, which is the Scottish Government's position. That could create all manner of complications as to whether it gets opt-outs. Then there is the interrelationship between using the pound and participating in European institutions. Because the European Union is responsible for so many domestic policies, it would be important to get that right in the negotiations, otherwise Scotland and England could end up damaging each other.

Professor Stephen Tierney: The reason I think so much is an issue of negotiation rather than international law relates to the point that the Lord Chairman made. The United Kingdom is so heavily integrated that, post- independence, in the longer run there would still be considerable sharing. I am not in a position to set out how that would happen, but it seems that the economies of both countries are so heavily integrated, as well as the pensions system and welfare system and so on, that there would be strong efforts on the Scottish side to bring about close sharing. This is also in the context of the European Union, where so many of these services are already heavily integrated. Relations to third parties have to be looked at in the context of the broader European Union. It seems that an independent Scotland would be able to join most international institutions fairly straightforwardly, particularly the United Nations. As Michael suggests, the European Union is a more difficult case—maybe not on membership, although there are clearly issues there, but on the terms. Again, that would implicate relations with the UK.

The Chairman: Perhaps I can turn to a more political question, which has constitutional implications—the Westminster general election next year and the impact on Scottish members of the Westminster Parliament.

Q22 Lord Lexden: There are obvious practical consequences for Scottish MPs elected in 2015. Even on the Scottish Government's optimistic timetable, there is no prospect of independence being achieved by then, but there is every prospect of independence being achieved within the lifetime of the next Parliament. I cannot recall any precedent of MPs ceasing to be members of a Parliament to which they were elected. This did not occur after 1918. Helpfully, from the point of view of ultimate independence, Sinn Féin MPs stayed away from Westminster. University representation ceased at a general election in 1950. There are a host of issues, such as the part that Scottish MPs would or would not play while negotiations took place and the consequent legislation, as well as the position that a Westminster Government would find themselves in if there is doubt about the continuance of Scottish MPs for the rest of the Parliament in which independence is agreed. You are all familiar with these matters and it would be helpful if you could comment on them.

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Professor Alan Boyle: The only thing useful that I can say—and this is perhaps not a question for a professor of public international law—is that, since I come from Belfast, I have a slight interest in the 1922 scenario and I am not sure that you are quite right. It is true that the Sinn Féin members did not take up their seats, but they were still Members of Parliament, in the same way that Gerry Adams used to be. So, presumably, in 1922 they were deprived of their seats. I think that that would be a direct precedent.

Lord Lexden: But in 1922 the Irish Free State was, if not wholly in existence, close to completion.

Professor Alan Boyle: Yes, but I think that the Irish Free State Constitution Act 1922—I assume, although I have not looked at this precise point—must have deprived Irish MPs of their seats at Westminster. Although all the Sinn Féin members, which was the vast majority of Irish members as the nationalist party had been decimated, did not sit, there were, if I recall correctly, six or eight Unionist members from Dublin who held university seats. I imagine that they probably sat. So some members must have been deprived of their seats in 1922. I do not think that is the problem. The real question seems to be the role that Scottish MPs would have between the referendum and independence, not in terms of general legislation, as Scotland would still be part of the United Kingdom and they would still be entitled to participate in law that was going to apply to Scotland—I would not argue with that at all. The key question is, when it comes to the House of Commons and the House of Lords, particularly the House of Commons, having a debate about whatever is agreed between the United Kingdom and Scotland, will the Scottish MPs participate in that debate and in any vote? All I can offer you here is my personal view. I think that it would be strange to have MPs who will be about to disappear and become citizens of another state participating in a debate by the United Kingdom Parliament on whether this was the right deal for the United Kingdom. That seems very peculiar and I think it is where we would have to make up some law. It probably would seem very peculiar to Scottish MPs as well. It would be something, I would have thought, where a deal between the Westminster parties and the Scottish Government in advance of negotiations would be sensible. Presumably, appropriate legislation could then be passed if necessary to bring that about.

Professor Michael Keating: If we are talking about the time between the referendum and independence, Scottish MPs would remain full Members of Parliament, as they are at the moment. We know about the West Lothian question and the difficulties that has created. This would be much more serious because you would be talking about the future of the country. They would have a right to represent Scottish interests. They would have a right to vote on everything, including presumably the independence legislation. I do not think they would be the main channels of negotiation; I think they would be marginalised. It depends on which party they were in, but I think that they would not be a main channel of negotiation, which would be the Scottish Government to the UK Government. It would be important for whatever UK Government were doing the negotiation to have a mandate among non-Scottish MPs as well. It is not a matter of the law, but it seems an important constitutional principle. I think that any Government would do that, whether it was an agreement on the specific issue of independence among the UK parties or whether it was a formal coalition. Then, after independence, Scottish MPs would withdraw. One can imagine that this might precipitate the fall of the UK Government; we know that, occasionally, UK governments

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and Professor Stephen Tierney, Pr have had a mandate that depends on the votes of Scottish MPs. In that case, presumably, we would have a UK election; it would not be a constitutional crisis.

Professor Stephen Tierney: This is where the distinction between a legal principle and a constitutional principle is again relevant. Clearly, Scottish MPs would have the same legal power as other MPs and would take their seats as such, but it might be thought appropriate that constitutional principles should apply. First, should Scottish MPs be involved in negotiating the UK position on independence? There would seem intuitively to be something not correct about that. Secondly, should such MPs vote on matters affecting only the rest of the UK, particularly in anticipation of a separation of the two countries? At that point, constitutional principles might lead to a suggestion of recusal, or a convention emerging where those MPs would recuse themselves from decision-making on those issues. Then, I assume after 2016, in whatever legislation—if legislation is passed—at the moment of independence provision would be made for the termination of those seats.

Q23 The Chairman: None of you has specifically mentioned the UK general election in May 2015, which is in the middle of this process. A proposal made by the Scottish National Party was that that general election should be postponed, thus avoiding all the issues which you have raised. Is there any suggestion that it would be illegitimate for there to be parliamentary elections in Scottish constituencies in 2015 in advance of 2016?

Professor Stephen Tierney: It is a matter for the United Kingdom to determine. I cannot imagine that there is any appetite to postpone a general election.

The Chairman: It does seem, does it not—at least theoretically—somewhat bizarre that you would be electing MPs for a very limited term.

Professor Stephen Tierney: Yes. I think that it could be relevant to the negotiation process. One factor about that election would be that, if negotiations began before it and there was a new government who came into office with a different approach to negotiations, a party may run in that election on the basis of a harder or a softer line on negotiations. One way to avoid some of those difficulties would be—I do not know what the prospects for it would be—a cross-party arrangement among the UK parties on a negotiating position, similar to the position that they currently have in Better Together. The prospect of a pan-UK approach to negotiations, not only among the main parties but maybe bringing in voices from Wales and Northern Ireland to present a UK set of interests, would dilute the 2015 issue.

Professor Alan Boyle: I do not think that it is without precedent. Let us think back to 1922. There was an election in 1922—the government fell and a new one came into office. That election would have included sending MPs from Northern Ireland to Westminster. You have to remember—it may not be obvious unless you are Northern Irish—that the deal done in 1922 was that Northern Ireland would be temporarily excluded from the Irish Free State. It was not thought to be a permanent arrangement. There were to be consultations on the process by which Northern Ireland would be reunited with the Irish Free State; it was fully expected that that would mean that there would be a united Ireland, probably before the next United Kingdom general election. As it happens, those negotiations, as we know, failed; they were torpedoed by intransigence on both sides, but they certainly failed. If you were an MP for Belfast in 1922, you would probably have thought that you had a very

Professor Alan Boyle, Professor of Public International Law, University of Edinburgh, Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, and Professor Stephen Tierney, Pr limited tenure at Westminster. As it happens, that was not the case. I am sure that the negotiations for Scottish independence will succeed, but who knows what might happen?

Lord Lexden: May I comment on that? Northern Ireland had the right to vote itself out of the new arrangements that were established. No unionist thought that it would fail to exercise that right. So unionists returned at the 1922 election had every expectation of remaining for the indefinite future. The area of Northern Ireland was a matter of continuing discussion. The Boundary Commission in the end left Northern Ireland as it is today, but I do not think that there was any expectation on the part of unionist MPs coming to Westminster in October 1922 that their tenure would be brief.

Professor Alan Boyle: I cannot comment on their expectation, but I can point out that the deal that was negotiated in 1922, if it had gone according to the expectations of the British and Irish governments, would have resulted in a very short tenure at Westminster for the Northern Irish MPs.

Lord Lexden: I think it is called constructive ambiguity.

The Chairman: Which seems to colour all this discussion.

Q24 Baroness Falkner of Margravine: If the assumption was that Scottish MPs would be elected to Westminster in 2015, would you see a conflict of interest if the negotiating team comprised Scottish Members of Parliament, bearing in mind that at the moment the Secretary of State for Scotland and the Parliamentary Under-Secretary of State are both Scottish MPs? Could you not imagine raised eyebrows over the fact that you might have MPs whose seats are in Scotland negotiating on behalf of the United Kingdom from the English, Welsh or Northern Irish perspective?

Professor Michael Keating: I can see that that would be politically highly problematic. I suspect that the Secretary of State for Scotland anyway would not be the main actor in this; it would be at a higher level—it would be pretty serious government-to-government. This question was raised in Canada in 1995 when the Prime Minister was a Quebec MP and they had the referendum, but it was never resolved. It was assumed that he would fall as Prime Minister. He could not credibly carry on, nor could his Quebec lieutenants continue to be among the negotiators for Canada. We are in the realms of speculation because there is no precedent. I was trying to remember what happened in Algeria, but I could not. There was a similar question and there was an election; the negotiations went on a very long time and an election intervened. But I cannot remember what happened in that case.

Baroness Falkner of Margravine: What would your views be on the McKay Commission's proposals that, if there was a ratifying vote, the majority of MPs for that vote to pass should not be representatives of Scottish constituencies?

Professor Michael Keating: That is the point that I mentioned earlier. It would be important not just for the final ratifying vote but for the negotiations that the negotiators should be representative of Westminster as a whole even without Scottish MPs. Anything else would not be credible.

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Baroness Falkner of Margravine: A subsequent vote to ratify the agreement in order to pass should comprise a majority of non-Scots MPs.

Professor Michael Keating: Yes. I would expect the UK parties to find a way of making that happen by negotiating among themselves. Of course, they might not, but it seems that the unionist parties at the moment are sufficiently united in the campaign that they would probably be able to get an agreed position.

Baroness Falkner of Margravine: Do you agree?

Professor Stephen Tierney: Yes, I agree. There are two issues: one symbolic and one substantive. Even at the symbolic level, I imagine that eyebrows would be raised at the very least at these MPs taking part in negotiations or in voting. If substantively they were seen to have considerable influence in the negotiations or to have a decisive vote on the outcome, I am sure that the political opposition to that would be very strong.

Professor Alan Boyle: It would surely be disastrous if a government pushed through a deal with Scotland on the basis of the votes of Scottish MPs. It would presumably be equally disastrous if a deal was blocked on the basis of votes by Scottish MPs. I cannot see how they could be given that kind of influence in that kind of question.

Q25 Lord Lang of Monkton: Assuming all the negotiations have been concluded, however satisfactorily or unsatisfactorily, presumably the final act would be legislation in the Westminster Parliament. Can you indicate how far that legislation would go? It would clearly sever if not the umbilical cord then all the remaining wires connecting with the rest of the United Kingdom, except those which by agreement had to be maintained. Can you describe what you expect to see in that legislation if it were to come to pass?

Professor Stephen Tierney: From the perspective of Scotland emerging as independent, there would not necessarily have to be legislation. If there was a clear agreement between the two governments, it would presumably be enough for Scotland to go into the world and seek international recognition, which tends to be forthcoming from other states in situations where a territory leaves with consent. It would make sense for there to be legislation from Westminster, if for no other reason than from the perspective of the rest of the UK, which would say, "We recognise that Scotland is leaving" and to make it clear that United Kingdom laws no longer applied to the territory of Scotland. Everything else in that legislation would depend on what agreement, if any, there is on future shared services and so on.

Professor Michael Keating: I would like the legislation to be a framework and leave the details to negotiation, so laying down general principles, but not all the details, about the shared institutions. I do not think that needs to be in legislation.

Professor Alan Boyle: One question that I have seen reference to—I am no expert on the Scotland Act—is the suggestion that it would be necessary to empower the Scottish Government to negotiate independence.

Lord Lang of Monkton: Under section 30 of the Scotland Act 1998?

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Professor Alan Boyle: Yes. If there is a risk of it being challenged otherwise, then it presumably would be prudent to pass some sort of section 30 deal.

The Chairman: We have been given evidence to that effect.

Q26 Baroness Wheatcroft: Given all the uncertainties that you have discussed this morning—the “unknown unknowns” or the “unknown knowns”, as you have referred to them in one paper—do you have any concerns that, when the Scottish people go the polls to vote in the referendum, they will have any clear idea what it is they are voting for?

Professor Alan Boyle: I am not sure that that is a question for a lawyer. That is a question for an elector and maybe in that capacity—

The Chairman: We have a political scientist and a legal scientist.

Professor Alan Boyle: The problem is obvious. If you talk to any reasonably thoughtful person in Scotland, which is most of the population, they will make the point, “Well, we’re being asked whether we should negotiate independence, but we don’t know what the deal is.” If, as we all expect, the answer is to be no, I think that will probably be one of the key reasons why, because most of the electorate realise that there is immense uncertainty here, particularly about economic matters, which the Scottish Government simply cannot answer. It would be different if there was a second referendum—“Do we want independence in the light of these terms?”—but that is not on offer. I think that is one of the key problems.

Professor Michael Keating: I always thought that the question was very clear as regards the words, but it is not clear as regards the meaning, because we do not really know what independence is in the modern world and the electorate are very confused. We have a big project trying to clarify the issues, but the more information we provide, the more people are confused and even we are confused. This uncertainty tends to play to the advantage of the no side, because people feel that it is a leap in the dark.

Professor Stephen Tierney: I think inevitably things will not be clarified to a great extent. It will come down to voters going in to cast their vote with two rival visions, which they have worked out for themselves as they are best able to do, between two rival futures. Whether those are accurate visions of the future, on either no or yes, we do not know, but I think that is what it will come down to.

Baroness Wheatcroft: Would a second referendum be desirable?

Professor Michael Keating: This was discussed at one point. I warned both sides against it—the yes side because you could win the first one but lose the second one, and the no side because, if you have a second referendum, there is a huge incentive to vote yes in the first one, just as a bargaining position. That is why the people who were canvassing a second referendum from the unionist side abandoned it fairly quickly.

The Chairman: We are very grateful to you. As Lady Wheatcroft said in her last question, which I think rather reflected the tone of the beginning of the discussion, we are obviously dealing with enormous uncertainties at the political, legal and constitutional levels, which we can resolve only by the kind of discussion that we have had this morning, for which we are very grateful to you for taking part in. We thank you for your time.

Dame Rosemary Butler AM - Presiding Officer, National Assembly for Wales—Written evidence

Submission to the House of Lords Constitution Committee on the inquiry into *Scottish independence: constitutional implications for the rest of the UK*

Thank you for the opportunity to provide evidence during your inquiry into ‘*The possible constitutional implications for the rest of the UK in the event of a “yes” vote in the Scottish independence referendum.*’ I am particularly grateful that you have indicated it is possible to provide evidence after the publication of the Silk Commission’s recent report.

On Thursday 18 September 2014, a referendum will be held in Scotland on whether it wants to remain part of the UK or become an independent state. This vote arguably represents the most important political decision that the people of Scotland have made since the existing Acts of Union were passed by the English and Scottish Parliaments in 1707, and its implications will be felt throughout the UK.

An independent Scotland would require a radical reassessment of Wales' constitutional relationships. Such a reassessment is necessitated by the fact that the residual UK would be dominated both territorially and on the basis of population by England. England already constitutes nearly 84 per cent of the existing United Kingdom- an independent Scotland would mean England constituted nearly 92 per cent of the residual state.³

This adjustment in the balance of the residual UK would raise fundamental questions around the equilibrium between the remaining devolved legislatures and England. It would emphasise the need for consideration of how the constitutional needs of the devolved legislatures- and indeed those of England- can most appropriately be secured. For Wales, it would have consequences for:

- the way in which Wales is funded;
- the mechanisms for intergovernmental and inter-parliamentary relations;
- the representation of Wales and Northern Ireland at the residual UK level (for example in relation to the make-up of the House of Commons and the House of Lords); and
- certain practical considerations such as the official name of the new residual state and the design of a new flag.

One of the specific questions raised in the Committee’s consultation is who should negotiate with Scotland, in the event of a ‘yes’ result, and to whom would they be accountable. This is a vital question, because one of the bedrocks of our constitutional framework is accountability. In such a scenario, given the wide ranging implications of Scottish independence, I believe it is appropriate that whosoever conducts such negotiations on behalf of the rest of the UK should take account of, and (among others) be accountable to, the remaining devolved legislatures.

³ Figures calculated using 2011 Census.

However, I do not wish to focus solely on the constitutional implications of a ‘yes’ vote. In the event of a ‘yes’ vote, the focus will inevitably be on Scotland. But it is important to bear in mind that Scotland’s referendum comes at a time of constitutional change throughout the UK. In Wales, the Silk Commission has recently published its second report, a review of the powers of the National Assembly for Wales. For England, the McKay Commission has made recommendations on the issue of ‘English votes for English laws.’ And Northern Ireland is also in constitutional debate on its position within the UK.

I believe the referendum- whatever its final result- highlights the need for mature and mutually respectful co-operation between the devolved legislatures and UK Parliaments. Indeed, Members of both Houses of Parliament play a vital role in promoting the interests of Wales in the United Kingdom. However, the existence of the vote itself highlights the importance of clarifying the constitutional settlements in each of our constituent nations. Clarity is needed on the future of the United Kingdom, which should include:

- what is best for the people of Wales, recognising that it is the settled will of the people of Wales that there should be a devolved legislature;
- a response to the constitutional issues faced by Wales.⁴

I believe that the best way of securing this clarity is to have a Constitutional Convention, with the aim of developing a coherent constitutional framework between the different legislative institutions of the UK. Devolution may be a ‘process rather than an event’, but that does not mean our constitutional development has to be piecemeal and ad hoc. A constitutional framework would provide an underlying, stable structure by which to support the future growth of devolution. Debate on the future constitution of the UK should include representatives of devolved legislatures, recognising the role their Speakers and Presiding Officers have as guardians of the institutions of democracy.

Since the advent of devolution in 1999 there have been mechanisms to facilitate relations between the devolved administrations in Wales, Scotland and Northern Ireland with the UK Government. A Constitutional Convention could review these mechanisms. The Silk Commission’s conclusions could be regarded as the basis for its consideration of Wales within the wider territorial constitution of the United Kingdom. A Constitutional Convention could also consider the merits of:

- rooting the Legislative Consent Motion convention (set out in *Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales*),⁵ in statute,

⁴ For example, a key issue for Wales relates to the Assembly’s legislative competence and the way in which it is defined. The Silk Commission has recently recommended that Wales **existing conferred powers model be replaced by a reserved powers model**. This recommendation is extremely welcome. While no devolution settlement will ever be crystal clear, the Welsh Settlement is currently particularly complex, and especially prone to legal uncertainties around competence. Whereas three Bills of the National Assembly have been referred to the Supreme Court since 2011, there have no such referrals of Bills of the Scottish Parliament or Northern Ireland Assembly by a UK Law officer.

⁵ *Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales*, states that: “the UK Government would not normally bring forward or support proposals to legislate in relation to Wales, on subjects in which the Assembly has legislative competence, or which affect the Assembly’s competence, without the Assembly’s consent. If the UK Government agrees to include provisions which are within the Assembly’s legislative competence (or affect that competence) in a Parliamentary Bill, Welsh Ministers will need to gain the consent of the Assembly via a Legislative Consent Motion. This should be laid in the Assembly as soon as possible after the Bill’s introduction in Parliament.”

rather than an inter-governmental Memorandum of Understanding which has no legal basis;

- establishing a formal inter parliamentary agreement on the EU Protocol on the application of the principles of subsidiarity and proportionality; and
- developing a structured forum for dialogue between the legislatures to enable a wider understanding of good practice and more effective inter-parliamentary relations.

There are also a number of elements in the *Government of Wales Act 2006* which are no longer constitutionally appropriate, and which Scotland's referendum highlights the need for re-evaluation. The evolution of the Assembly's powers and procedures- as set out in UK Acts- has tended to be modelled on Scotland. Recently, for example, despite the Silk Commission recommending that income-tax varying powers in Wales should follow a model which they considered answered the needs of the people of Wales, the UK Government has been cautious to only give Wales parity with the tax-varying model accorded to Scotland. However, the very possibility of Scotland's independence highlights the need for the UK Government to give serious consideration to an appropriate constitutional settlement which best serves the people of Wales, and which does not constantly reference a Scottish settlement.

In particular, changes should be made to reflect Wales' growing institutional maturity, such as our legislature being described as a Parliament rather than an Assembly. The number of Assembly Members should also be increased from 60 to 80, as recommended by the Richard Commission on the Powers and Electoral Arrangements of the National Assembly nearly a decade ago. Since then, the need for robust scrutiny of the Welsh Government, with legislative and financial powers, has only increased. My call for an increase in the number of our Members is about enabling the Assembly to function in the best way possible for the people of Wales, who voted for us to have full law making powers in 2011. It is about enabling Members to build the expertise and knowledge required to robustly challenge Government Ministers on their proposals. I am pleased to note that the Silk Commission has concurred both with the need to increase the number of Members at the Assembly, and the principle that if the Assembly wished to be described as a Parliament, then this should be respected.

I trust that you will find this evidence a useful contribution to your work. I recognise that my comments have not been solely focussed upon the constitutional implications of a 'yes' vote in Scotland's referendum, which is the focal point of your inquiry. This is because the referendum itself highlights an underlying need to address fundamental concerns in our collective constitutional set up. Whether Scotland votes 'yes' or 'no' on 18 September, I believe the time has come to address these issues within a UK-wide conversation.

If you would like any further information on matters covered in this submission, or any other issues of interest to the Committee, we would be very happy to assist.

Dame Rosemary Butler AM
Presiding Officer
National Assembly for Wales

18 March 2014

Campaign for an English Parliament—Written evidence

1. Scottish Independence: Constitutional implications for the rest of the UK

1.1 The House of Lords Select Committee on the Constitution, chaired by Baroness Jay of Paddington has asked for evidence for an enquiry into the constitutional implications for the remainder of the United Kingdom in the event of a ‘Yes’ vote on the 18th September.

2. WRITTEN EVIDENCE SUBMITTED BY THE CAMPAIGN FOR AN ENGLISH PARLIAMENT (CEP)

2.1 SUMMARY

2.1.1 The United Kingdom of Great Britain and Northern Ireland faces the secession of Scotland which agreed to a joint Parliament in 1707. The affairs of both parties were very closely linked until devolution. Since then Scotland, Wales and Northern Ireland have been recognised constitutionally and politically. England has not but has the majority population. The CEP is of the opinion that in the absence of mandated representatives (unlike the rest of the UK that has mandated representatives) to represent England's needs England will not be included in the negotiations of the division of assets and liabilities most of which apply to England. The CEP is also of the opinion that to maintain any form of United Kingdom a new Act of Union in which England is represented as a country and suitable for the 21st Century is necessary.

3. INTRODUCTION

3.1 **The Campaign for an English Parliament (CEP)** was established in 1998 in response to the Devolution Acts of that year, which the CEP believed put England at a serious political and constitutional disadvantage. Scotland and Wales were recognised politically and constitutionally as nations within the United Kingdom (UK) with their own devolved administrations. Northern Ireland was also similarly distinctly recognised. Unlike Scotland and Wales, England was denied national recognition politically and constitutionally being referred to as the regions of Britain and the people of England were denied the right to express their will through their own parliament. The CEP campaigns for an English Parliament that will represent all those for whom England is their chosen or inherited home.

3.2 **The CEP is not linked with any political party but is a cross party organisation that seeks to influence and inform.** An English Parliament cannot come about without the co-operation and agreement of the House of Commons. The CEP's role is to work with academics, business groups, trades unions, think tanks and the media to create the conditions where MPs see that there is no alternative.

3.3 The CEP gave written and oral evidence to the McKay Commission.

4. Campaign for an English Parliament submission

4.1 Background:

4.1.1 The United Kingdom of Great Britain and Northern Ireland is not like the United States of America that has a federal constitution. The United Kingdom is essentially a series of concentric Unions or a “countries of countries”. The union of the Kingdom of England and the Kingdom of Scotland is central to that group of Unions.

4.1.2 In order to understand, we must first examine how the Union came into existence. In 1536 the kingdom of England was extended to completely incorporate Wales into the ‘One Realm’ of England and Wales. It was the ‘Realm’ and Kingdom of England ‘incorporating Wales’ that enacted the Act of Union in 1707, and together with the Kingdom of Scotland formed the so called ‘United Kingdom of Great Britain’ (as these two articles from the Act demonstrate).

4.1.3 ARTICLE I

4.1.3.1 That The Two Kingdoms of England and Scotland shall upon the first Day of May which shall be in the Year one thousand seven hundred and seven, and for ever after, be united into one Kingdom by the name of Great Britain.

4.1.4 ARTICLE III

4.1.4.1 That the United Kingdom of Great Britain be represented by one and the same Parliament, to be stiled, The Parliament of Great Britain".

4.1.5 It was this United Kingdom of Great Britain that passed the 1801 Act which created a union with the Kingdom of Ireland.

4.1.6 Subsequent changes to the Union with Ireland had no effect on the Union of Scotland and England as the entity of Great Britain which is what will be dissolved by Scottish secession. Northern Ireland was in effect a remnant of an earlier Union and could be let go without dissolution of the British union. However if the British Union is dissolved then there would be a ‘knock on’ effect on the other Unions which could have significant consequences. It is essential we recognise the significant impact for all of us if Scotland votes ‘Yes for independence’.

4.1.7 If Scotland does become independent, legal and constitutional logic dictates that unless there is further constitutional legalisation, the break-up of the UK will lead to the re-emergence of the ‘Kingdom of England’ ‘incorporating Wales’. The Act of Union 1707, effectively dead, should be repealed, thus Scottish Independence would lead to a legal dissolution (break-up) of the “United Kingdom of Great Britain”.

4.1.8 The Campaign for an English Parliament believes that the ‘United Kingdom of Great Britain’ will be effectively dissolved if Scotland votes for independence and it is a mistake to believe that the UK will continue.

5. Negotiations:

5.1 Q1. Is the timetable of independence by 24 March 2016 realistic?

5.1.1 Negotiations are liable to be contentious and this may draw them out. It took approximately 6 months to dissolve Czechoslovakia so the timetable is possible although the United Kingdom has been in existence for longer and the integration more extensive.

6. Q2. Who would negotiate for the remainder of the UK? To whom would they be accountable?

6.1 The remainder of the UK are the countries of England and Wales and the province of Northern Ireland. Only representatives from these territories should negotiate with representatives from Scotland. British MPs from Scotland should not take part. Moreover British MPs representing constituencies in England and Wales that have personal or business links with Scotland should be barred. Whilst representatives from the Welsh and Northern Irish Assemblies have a clear mandate to speak on behalf of the citizens of those administrations there is no clear mandate for anyone to speak on behalf of England. It is thus imperative that those negotiating on behalf of England are above suspicion of personal or party bias in favour of any other territory.

6.2 Waiting to see what the outcome of the Scottish referendum will be before establishing a clear mandate for England will be not only foolhardy, but arrogant and dangerous for all the nations of the UK.

7. Q3. What impact would the timing of the UK general election in May 2015 have on negotiations?

7.1 The May 2015 election will have a very adverse effect on negotiations as there would be months spent in campaigning for that election that will distract the ‘negotiators’ particularly on the non-Scottish side. Plus, for several months after the election, there will be a period of ‘bedding-in’ of a raft of new government ministers.

7.2 Clearly a change of government at Westminster would have serious consequences. Even a turnover of MPs would have a destabilising or even destructive influence on ongoing negotiations unless they were out of the hands of British MPs.

7.3 It has to be accepted that there are now clearly defined policy differences between Scotland and England as a result of devolution. English perceptions on their distinctiveness are increasing and there is now a sense of a Scottish lobby running Britain. Westminster political parties appear to be in denial about this perception and they refuse to produce an English manifesto to reassure the English that they will be given a political voice. This is a mistake and English policies need to be recognised before the general election in 2015 as there is a growing disconnect between ordinary people and the governing elite at Westminster.

7.4 Labour however are in the unique position of having substantial representation in Scotland, England and Wales so could win an overall UK majority in 2015 whilst they fail to achieve a majority in England. If Labour were to win with MPs from Scottish constituencies whilst negotiations are being carried out it could create a constitutional crisis. The Conservatives could argue that Labour had no mandate to rule England and therefore no right to speak for it. Such an action could however be interpreted as the Conservatives adopting an anti-Scottish stance thereby making negotiations extremely difficult.

7.5 Perhaps, in the event of a Scottish yes vote, the Fixed Term Parliaments Act would need to be amended, that an earlier general election takes place with Scottish MPs excluded from Westminster so that it could carry out negotiations with the Scottish Parliament.

8. Q4. What happens if the two negotiating teams cannot reach agreement on an issue?

8.1 A clearly independent and unbiased arbitrator would need to be appointed agreeable to all stakeholders. This was done in the case of the Northern Irish Accord.

9. Assets and liabilities, and shared services:

9.1 Q5. What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

9.1.1 As far as we are aware there are no overriding legal principles applying to such negotiations, however moral principles should be applied. The relevant assets and liabilities need to be fully and carefully ascertained, the shared services too. The basis of 'splitting' needs to be fair and equitable.

9.1.2 The division of North Sea oil revenues would clearly depend on an agreed maritime boundary being created between England and Scotland. The present one does not conform to internationally agreed standards and was merely imposed by the then British government due to Devolution. Similar negotiations would need to be undertaken with regard to other maritime boundaries and fishing rights.

9.1.3 Other relevant assets would relate to reserved matters such as defence, taxation, welfare (universal benefits). In addition assets such as the University Loans scheme located in Scotland but serving preponderantly England would need to be repatriated. Universal benefits rely on tax raising powers. Clearly independence means taking on the responsibility of raising taxes.

9.1.4 There are a huge number of jobs in Scotland (e.g. Inland Revenue, Department of National Savings) that exist to service the rest of the UK and some jobs in the rest of the UK (e.g. DVLA, Department for Work & Pensions) that cover Scotland. A specified time needs to be negotiated for these jobs to be repatriated appropriately.

9.1.5 We predicted that the Coalition, if it continued with its rUK stance, would have to accept that the UK Treasury would assume full responsibility for Britain's £1.2tn debt stock in the event of Scottish independence. Danny Alexander, Treasury Chief Secretary, has already needed to allay market jitters ahead of September's referendum. He accepted that gilt investors are now demanding a risk premium on the grounds that some UK debt could be transferred to a newly-independent Scotland with no credit history. This looks like very bad news for the English nation and very good news for Alex Salmond's SNP who are potentially looking at a debt free 'new dawn' for Scotland. He would be in a very strong position and could easily say we want this or else.

9.1.6 By the chancellor George Osborne ignoring the possibility that the United Kingdom of Great Britain would be legally dissolved if Scotland becomes independent and he has failed to accept that the UK government must address the 'English question'. In a blind desire to keep the UK together, the Government is not dictating terms to the SNP before 18th September 2014 and will be in a very weak position at the negotiation table. If the UK government took the initiative and began to create a national federal system before the vote

in September 2014, the debt and assets could then be, theoretically, apportioned accordingly.

10. Q6. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example, the Bank of England and those services listed on page 364 of the Scottish Government's white paper)?

10.1 There must be no obligation on the taxpayers of the rest of the UK to underpin the spending decisions of an independent government. Likewise Scotland's defence commitments must not be a burden on the rest of the UK.

10.2 The purpose of independence is so that a country can take on responsibility for its own affairs therefore allowing Scotland a say in such matters does have profound constitutional implications. Currently there is a growing feeling that the UK is being run by a Scottish lobby that post-independence must not be allowed to continue.

11. Parliament:

11.1 Q7. What would the position of MPs for Scottish constituencies be from May 2015 to March 2016?

11.2 MPs for Scottish constituencies sitting in the House of Commons and voting on English internal matters that do not affect their own constituents are already anomalous and undemocratic. Their retention would be totally untenable in a regime that claims to be a democracy. It would be insulting and insensitive particularly to England, where there are no representatives mandated to represent England's interests, to retain representatives of a foreign country.

12. Q8. What impact would independence have on the House of Commons if the MPs for Scottish constituencies left it in March 2016?

12.1 Clearly the numbers of MPs would be reduced but their main remit to legislate on English internal affairs (and fewer Welsh) would remain the same unless further constitutional change took place. Their reserved functions (England/Wales/NI external affairs) would probably not be reduced in practice.

12.2 It would be unacceptable to have representatives from a foreign country sitting in a residual UK parliament debating and voting on matters that do not affect their country. It is conceivable that after the exit of MPs from Scottish constituencies the House of Commons will be dominated by conservative MPs for the first five year term, possibly for the next as well. This will force both Labour and the Liberal Democrats to appeal to a wider population, to become more sensitive to the needs of England centric in order to win the trust of the English population.

12.3 With Scotland gone, England will become 92% of the UK population. Elections in the UK will either be won or lost in England. The present situation, with England representing 84% of the population but having no national representation compared with the smaller countries, is blatantly unjust. The policy pursued by the three main parties, of denying England the same level of democratic representation as Wales and Northern Ireland, will

become untenable. The policy of breaking England up into regions each with its own assembly will not work as the people of England do not want their country dismembered.

12.4 Some members of the labour party believe that it can create a power base in the north to replace the one it is losing in Scotland. The only solution to England's position is the creation of an English Parliament and the setting up of a proper federal system of government for the UK.

13. Q9. What impact would independence have on the membership of the House of Lords?

13.1 Scottish peers should leave. The current responsibilities of the House of Lords are to review and revise legislation on reserved matters for the UK and domestic legislation but only for England. This would not change greatly.

14. Q10. What legislation (or other measures) would the Westminster Parliament have to pass in order for Scotland to become independent?

14.1 It is clear that the 1707 Act of Union has been in abeyance since 1998. The relevant articles are articles I, II and IV.

14.2 ARTICLE III

14.2.1 That the United Kingdom of Great Britain be represented by one and the same Parliament, to be stiled, The Parliament of Great Britain.”

14.2.2 this article is negated by the fact that the UK has been represented in fishery negotiations with the European Union by a Minister of the Scottish Parliament. A parliament in which citizens of the rest of the UK have no representatives.

14.3 ARTICLE IV

14.3.1 That the subjects of the United Kingdom of Great Britain shall, from and after the union, have full freedom and intercourse of trade and navigation to and from any port or place within the said United Kingdom and the dominions and plantations thereunto belonging; and that there be a communication of all other rights, privileges, and advantages, which do or may belong to the subjects of either kingdom, except where it is otherwise expressly agreed in these articles

14.3.2 It is quite clear that the preferential funding of the country of Scotland (and Wales and Northern Ireland) per head compared with England has enabled the Scottish Parliament to allow Scottish students free tertiary education and all citizens free eye tests, dental examinations and prescriptions and many more advantages. Clearly negating the purpose of the underlined portion of article IV.

14.3.3 The British government should now repeal this Act as no longer fit for purpose. The Campaign for an English Parliament actively seeks a new union suitable for the 21st Century in which all nations of Britain stand in equality with each other and with the central UK government. The CEP has never sought dissolution of the union but has a policy of seeking equality for England vis-à-vis Scotland.

Edward Bone - Campaign Director
Scilla Cullen - Director

Campaign for an English Parliament—Written evidence

Campaign for an English Parliament

27th February 2014

Campaign for an English Parliament—Supplementary written evidence

Written submission by the Campaign for an English Parliament in response to the Scottish Government’s written submission dated the 3rd March 2014

On the 3rd March 2014, Nicola Sturgeon MSP, Deputy First Minister, Deputy Leader of the Scottish National Party (SNP) and Cabinet Secretary for the SNP’s Scottish Government entered her written submission on behalf of the Scottish government to the House of Lords Select Committee on the Constitution. Points 11 – 14 of that submission are of immense significant and importance to the people of England, Wales and Northern Ireland. The Campaign for an English Parliament, being an organisation that represents English concerns, is responding to that written submission solely to highlight the impact of the Scottish government’s assertion that it has a fair and equitable claim on UK public assets located in England. This assertion was made whilst the Scottish government insisted that UK assets in Scotland remain under Scottish control. Here is what Nicola Sturgeon said at Points 11- 14 are below:

Assets and liabilities, and shared services

What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

- 11. Following a vote for independence, the Scottish Government will negotiate with Westminster to agree a sharing of assets and liabilities that is fair, equitable and reflects Scottish needs and those of the rest of the UK. Assets already used to deliver devolved public services in Scotland, such as schools, hospitals and roads, would remain in Scottish hands. Physical assets located in Scotland and needed to deliver currently reserved services, such as defence bases and equipment, and buildings to support administration of welfare, tax and immigration, will transfer to the Scottish Government.*
- 12. Assets located elsewhere in the UK will also have to be included in negotiations, as Scotland has contributed to their value over a long period of time. For physical assets like these, the equitable outcome may be to provide Scotland with an appropriate cash share of their value.*
- 13. UK public services are assets belonging to both Scotland and the rest of the UK. This is because tax payers in both Scotland and the rest of the UK have paid to build and maintain these services.*
- 14. Defence and overseas assets transferred as part of these negotiations will form a basis for Scotland’s defence forces and overseas representation following independence*

It is the opinion of the Campaign for an English Parliament that it would be foolhardy for the committee to dismiss those Scottish Government claims out of hand. We would respectfully suggest that the Scottish Government’s written submission to the committee should be read in conjunction with the speech by Alex Salmond, Scotland’s First Minister, that was hosted by the New Statesman magazine in London on the 4th March 2014. In that speech he stated: “nothing in international law requires Scotland to pay one sterling pound of UK debt if the rest of the UK is deemed the continuator state in this way”. Part of his speech is below:

First Minister's New Statesman speech in London

“The New Statesman this week carries an online article from David Scheffer –professor at Northwestern University in Chicago, who served as a US Ambassador-at-Large during President Clinton’s administration. Professor Scheffer points out that “nothing in international law requires Scotland to pay one sterling pound of UK debt if the rest of the UK is deemed the continuator state in this way”.

Scotland has already indicated that - with agreement - we would service a proportionate share of the debt. Any reasonable approach to negotiation would propose a share of assets and liabilities. That is simply the right thing to do.

For the Chancellor to put the rest of the UK potentially in a position of being landed with all of the UK’s gargantuan national debt is at best reckless and at worst totally irresponsible”.

Currently the UK owes 1.2 trillion which is widely assumed will be equally shared amongst the nations of the UK on a population basis. It is our belief that if the British Government continues with their stance that a rUK will continue if Scotland becomes independent, then Scotland will be enabled to legally negotiate itself out of paying its share of the UK debt. This will mean that the remaining nations of the UK (England, Wales, and Northern Ireland) will be left responsible for all the UK debt.

Attached is a chart that shows how that debt will be shared out amongst the populations of England, Wales and Northern Ireland with a cost per head of population figure if Scottish Government negotiates itself out of its share of the UK debt. Under the present set of circumstances the 1.2 trillion UK debt would be shared equally amongst the UK nations at £18,993 per head of population. If the Scottish government negotiates itself out of the UK debt then England, Wales and Northern Ireland will see their share of the debt increase by £1,737 per head of population to £20,730. This would seriously undermine any attempt at creating a cohesive economic working relationship between the nations of the UK following a ‘yes’ vote in the Scottish independence referendum.

Whilst it was interesting to see in the other submissions that the only two practical lawyers questioned the legal basis of the idea of rUK, it is now easily seen why the Scottish government is happy to play along with the assumption of a rUK as a continuator state because if they are the first to declare independence they would find themselves in the enviable economic position of being the only nation of the old UK without any debt.

The committee needs to respond within its findings to the genuine concerns of the English as the Scottish Government is going to use their share of UK debt and UK assets as part of the independence negotiations. It now seems probable that David Cameron and George Osborne have fallen into the SNP trap by claiming a rUK. The committee should not make the same mistake.

The risk is that if the English are not given their own political voice soon they will not be able to protect their assets and will be forced to take over the UK debt excepting that which would be a Welsh and Northern Irish liability.

The people of England also need to know that the Scottish government wants to keep all the UK assets in Scotland and then they want a share of assets, including the physical assets, located elsewhere in the UK. They are asking for an appropriate cash share of their value that will impact on extra debt for them.

Campaign for an English Parliament—Supplementary written evidence

Eddie Bone, Campaign Director, Campaign for an English Parliament.

17 March 2014

Shared equally amongst the UK nations using the 2011 census population as a guide to dividing up the UK debt.

Nation	Population	% of UK	% of 1.2trillion Allocation of debt for each nation in UK £ (current situation)	Cost of debt per head of population in £	Population rUK Excluding Scotland if they become a new state	% of rUK Ex/S	If Scotland doesn't honour its debt Increase of debt to rUK per nation in £	New allocation of debt for each nation in rUK if Scotland doesn't honour its debt.	Cost of debt Per head of population in £	An increase per head for rUK populations £
England	53,012,456	83.9	1,006,855,967,563	18,993	53,012,456	91.6	92,098,797,148	1,098,954,764,711	20,730	1,737
Scotland	5,295,000	8.4	100,566,975,208	18,993	n/a	n/a	Debt free	Debt Free	Debt Free	Debt free
Wales	3,063,456	4.8	58,183,664,514	18,993	3,063,456	5.3	5,322,156,980	63,513,714,200	20,730	1,737
NI	1,810,863	2.9	34,393,392,715	18,993	1,810,863	3.1	3,146,021,080	37,510,968,946	20,730	1,737
Total	63,181,775	100	1,200,000,000,000		57,886,775	100	100,566,975,208	1,200,000,000,000		

Mr Ian Campbell CMG—Written evidence

Scottish independence: constitutional implications for the rest of the UK

Written evidence submitted by I.B. Campbell CMG

1. **Personal introduction.** I lectured on constitutional and international law at Liverpool before bar and circuit bench and was, 1999-2000, on secondment from the Lord Chancellor's Department through the Council of Europe to the Office of the High Representative (OHR) at Sarajevo. Then until 2003 through the Foreign Office as Deputy High Representative for Legal Affairs and Head of the OHR Legal Affairs Department. This Department amongst other peace implementation activities supported the work of the late Sir A. Watts KCMG QC, who on behalf of the OHR played the key role in achieving the Agreement on succession issues of former Yugoslavia (2001). I was an Honorary Visiting Professor at Liverpool University from 1995-2006, 2009-2012 and awarded an Honorary LL.D. Essay "From the 'Personal Union' between England and Scotland in 1603 to the European Communities Act 1972 and Beyond - Enduring Legal Problems from an Historical Viewpoint" published in the collection *Legal Visions of the New Europe*, (1993).

2. **My reason for submitting evidence** is to seek to assist the Committee on certain legal but not political issues. This paper sets out my personal views. They are not expressed on behalf of, nor do they represent the views of any body or institution. <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72022.aspx> is the location of my response on legal issues to the European Committee of the Scottish Parliament on Independence: European Union Membership Inquiry.

3. **Executive summary:** This paper focuses:
(i) on Question 10. A Union repeal precedent aimed at restoring Kingdoms and Crowns of England and Scotland is analysed; (see paras. 5-14)
(ii) on the Committee's understanding as to the effect of international law on UK institutions. The key position of a shared Monarch is highlighted. (see paras. 15-22)
(iii) It draws attention to the Opinions of the Law Lords, the Rt Hon. the Lord Nicholls of Birkenhead, the late Rt Hon. Lord Slynn of Hadley and the Rt Hon. the Lord Hope of Craighead KT, in regard to Scotland's representation in Parliament. (see paras. 23-28)
(iv) It suggests an answer to Question 7 (see para. 29)

4. **Overview** It is submitted in particular as to point (i) that a 1713 measure introduced in the House of Lords to repeal the Union remains an invaluable precedent today and points the way to deal with point (ii). As to point (ii) it is inferred that the Committee has in mind the Opinion which forms Annex A to HM Government's "Scotland analysis: Devolution and the implications of Scottish independence". The problem is explored that the Annex A position on a 'continuator rUK' and a 'new State' of Scotland does not appear compatible with HM the Queen's contingent right to the ancient titles of Queen of England and Queen of Scotland upon the ending of the Union of Great Britain. Furthermore the UK Parliament's sovereignty was born through the Union of Parliaments of England and Scotland. Parliament in its sovereignty will end the Union and make appropriate provision for its shared institutions ranging from Crown to Bank. International law will not play a key role.

5. **(i) Question 10** concerns measures the UK Parliament would have to enact in order for Scotland to become independent. One needs to examine firstly how Great Britain came

into existence in 1707. A useful starting point is the writing of Professor A.V. Dicey (1835-1922). He may be described as the “father” of the theory still widely accepted today of parliamentary sovereignty. His views have not gone unchallenged, particularly in Scotland, but his contribution cannot be ignored.

6. Dicey, apart from his *Law of the Constitution*, was co-author with Professor R.S. Rait of *Thoughts on the Union between England and Scotland* (1920). In that latter work, referring to the enactment of Act(s) of Union by the Parliaments of Scotland and England it is stated (1971 reprint p.v): “*This statute abolished the separate Parliament of England and also the separate Parliament of Scotland, and brought into existence the Parliament of the United Kingdom of Great Britain and, from a legal point of view, the United Kingdom of Great Britain.*” (and p. 244) ... *The Act of Union carried through by legal means an immense revolution; it created a new State namely the United Kingdom of Great Britain.*”

7. It is clear that the new Parliament of Great Britain, incorporating the respective sovereignties of England and of Scotland, and with MP’s representing both England and Scotland and their peoples, had and has the legal power to repeal the Union and restore the separate sovereignties of England and Scotland and of their monarch. Writing in *Law of the Constitution* (8th edn, 1927 reprint, p. 141), Dicey referred to such possibility of repeal. Then in the joint work with Rait it is observed (1971 reprint p.298): “... less than seven years after the passing of the Act of Union there was introduced into the House of Lords a Bill for repealing the Act ...”.

8. According to the National Archives transcript of the proceedings, http://www.nationalarchives.gov.uk/pathways/citizenship/rise_parliament/uniting.htm the issue voted on (67 in favour and 71 against) was: “*That leave be given to bring in a bill for dissolving ye Union for restoreing Each Kingdome to their Rights and Priviledges as atye time of the Union for Effectuall securing of her Ma[jest]y in her Royall Powers and Authority over both Kingdomes & in asserting & confirming all her Royall Prerogatives & Effectually securing the Succession ...*”

9. Dicey did not suggest a different repeal method. It is my submission that if a simple Bill, appropriately updated and amplified were to be enacted by the UK Parliament today, the 1707 Union of England and Scotland would be brought to an end, and the original Kingdoms of England and of Scotland restored under the sovereignty of Her Majesty the Queen.

10. Such process would be founded at one level upon the sovereignty of the UK Parliament. On another level it would be fully compatible with international law. As A.W. Bradley and K.D Ewing, *Constitutional and Administrative Law*, 15th edition, 2011, p.10 state: “*International law ... primarily deals with the external relations of a state with other states; constitutional law concerns the internal structure of the state ... in the dualist tradition, which the United Kingdom has generally observed, national and international law operate at two distinct levels.*”

11. In my submission the correctness of the above analysis is supported by the Balfour Royal Commission on Scottish Affairs Report presented to Parliament in 1954. In Chapter I under the heading ‘Relationship with England’ it is stated (paragraph 13 (ii)): “*When it is advantageous for Scottish business to be dealt with by United Kingdom of Great Britain Ministers, there should be full understanding and recognition by these Ministers and by their officials*

that Scotland is a nation and voluntarily entered into union with England as a partner and not as a dependency.”

12. Support for the above analysis comes from the White Paper ‘Scotland in the Union a Partnership for Good’ presented to Parliament in 1993 by the then Secretary of State for Scotland, now The Rt Hon. the Lord Lang of Monkton DL. In his foreword the then Prime Minister John Major stated: *“That Union is almost 300 years old. As I have said before, no nation could be held irrevocably in a Union against its will ...”* The then Prime Minister thus confirmed Scotland’s continuing nationhood.

13. The White Paper asserts at paragraph 10.3: *“And if the Union is to flourish in the future a more concerted recognition of Scotland’s status as a nation will be necessary. It should be a mark of Scotland’s self-confidence in her own status as a nation that she shares her sovereignty with the other parts of the United Kingdom. But the willingness to share that sovereignty must never be taken for granted.”*

14. In my submission the UK Government was entirely correct in this description of Scotland as a sovereign nation in a continuing Union. Equally the UK Government was not laying any claim in 1993 that it would become the ‘continuator rUK’.

15. **(ii) The Select Committee asks for comment inter alia on its understanding that under international law institutions of the United Kingdom would, in the event of Scottish independence, become institutions of the remainder of the UK.** At this point the Select Committee’s focus moves from pre- to post- independence. I infer as noted above that the Select Committee has in mind here the theory propounded by the eminent Professors J. Crawford SC and A. Boyle in Annex A aforesaid that the ‘rUK’ would be the continuator state of the UK and an independent Scotland a ‘new State’. As the authors state (para. 50 of Annex A): *“This is the position of the UK Government and the position on which we have been particularly asked to advise.”*

16. The first difficulty as to the above is that in my submission the ‘position of the UK Government’ as therein set out is hard to reconcile with its position as set out in the White Paper above referred to. The second difficulty is that the two questions which Professors Crawford and Boyle were asked to deal with in preparing their Annex A Opinion, predicate the existence of a post independence ‘rUK’ and of a ‘new Scotland’, without indicating by what legal process this was to come about.

17. Indeed the Opinion para. 1 reads: *“If Scotland were to become independent after the referendum planned for late 2014, it would be with the UK’s agreement rather than by unilateral secession.”* The problem is that until independence Scotland would remain part of the “agreeing” UK. Independence is not achieved as such by a “yes” vote in the referendum. Again independence ‘with the UK’s agreement’ does not explain the constitutional process contemplated.

18. Viewing the end of the Union through the prism of rules of international law is in my submission pregnant with difficulty. If Parliament in the exercise of its sovereign will were to enact legislation analogous to that put forward in 1713, as would in my submission be entirely compliant with constitutional principle and with international law and respectful of the rights of the Crown, the Opinion contained in Annex A would be substantially irrelevant.

19. The standpoint of the authors of Annex A is essentially that (para. 69) it would be pursuant to international law that 'rUK' would retain "*its principal government institutions, since the UK Parliament, the UK Supreme Court and its government departments are located in London.*" The first problem with this is that it does not deal with the Crown. The second problem is that it attributes to international law a role it does not possess. It will be for the sovereign UK Parliament in the period between a "yes" vote and actual independence to make provision for such matters as are agreed upon. Scotland already has a government, a Parliament and a Court system. It might well be that on issues such as the fixing of boundaries and division of assets reference would be made by negotiators to relevant international law principles, but prior to independence, unless some form of arbitral tribunal empowered to apply rules of international law to the resolution of issues were established, rules of international law would not override domestic law.

20. One needs to exercise caution in regard to the term "state". As Bradley and Ewing, put it (p. 233): "*The fact that central government is carried on in the name of the Crown has left its mark on the law. Our law has never developed the notion of 'the state' ... Instead, the Crown has developed as 'a convenient symbol for the state', although it is unclear whether the two terms can always be used as synonyms.*" It is helpful to read this in conjunction with the 9th edition of *Oppenheim's International Law*, (1992) volume I, paragraphs 445 and 448 where it is stated (pp. 1033 and 1035): "*The highest organ of the state, representing it, within and without its borders, in the totality of its relations, is the Head of State. Such Head is the monarch in a monarchy ... In every monarchy the monarch appears as the representative of the sovereignty of the state, and is therefore a sovereign himself. International law recognises all monarchs as equally sovereign, although their constitutional positions under the constitutional laws of their different states may vary considerably.*"

21. It is revealing to take the position as to a post independence 'rUK' and a 'new Scotland' to its logical conclusion in regard to the Crown. On the basis of this position HM the Queen, who as Queen of Great Britain bears a title derived from the separate sovereignties of England and Scotland, would have to be regarded by virtue of rules of *international law* to have 'lost' her ancient Scottish Crown. According to this theory for example it is 'rUK' which would remain within the EU while Scotland would be 'outside'. Yet it was in the name of HM the Queen of the United Kingdom of Great Britain and Northern Ireland that the UK joined the Lisbon Treaty. In the light of the Crown being the symbol of the State, as noted at para 20 above, it is submitted, taking again the EU as an example, that 'rUK' as well as Scotland would have to present themselves before the EU, in 'new clothes' upon Scotland becoming independent. To ascertain what those 'new clothes' would be one needs to return once again to the 1713 precedent which envisaged the restoration of the Kingdoms of England and Scotland and of royal authority over them. Upon this basis the idea of a 'continuator rUK' and a 'new Scotland' becomes increasingly problematic. On the one hand if the Kingdom of Scotland and HM the Queen's authority over it is restored the Queen as Queen of Scotland would in international law be equal to the Queen as Queen of the UK of England and Northern Ireland. On the other hand if such restoration is not enacted by the UK Parliament upon repealing the Union one may ask rhetorically how the Queen could become Queen of Scotland? The Act of Settlement of 1701 is incorporated in Article II of the Act(s) of Union of 1707.

22. The 'rUK continuator' position necessitates HM the Queen as Head of State of a 'new Scotland' being in effect 'set aside' from the EU to allow her place to be absorbed by HM the Queen of the United Kingdom of England and Northern Ireland. This is scarcely

tenable from a legal standpoint. For statements by EU officials on the topic to carry any weight their full understanding of the constitutional position of the Crown in the UK requires to be demonstrated. In my submission both States headed by HM the Queen post termination of the Union would require to be treated by the EU upon the same legal footing, with whatever consequences to EU membership that might entail, should the present UK Union end pursuant to due constitutional process.

23. *iii) Legal aspects of Scotland's representation in the UK Parliament.* This may assist the Committee as to Questions 7-9. In addition it strengthens in my submission the above analysis generally. In 1999 the House of Lords Bill was introduced by the UK Government. The object was to restrict membership of the House of Lords by virtue of a hereditary peerage. The House of Lords passed a motion referring to the Committee for Privileges the question whether, if enacted, this would “breach the provisions of the Treaty of Union between England and Scotland.” The 2nd Report of the Committee’s proceedings: (<http://www.publications.parliament.uk/pa/ld199899/ldselect/ldprivi/108i/10801.htm>) contains *inter alia* the Opinions of the three Law Lords referred to in para. 1 hereof on the features of the Union relevant to the issue before them. Para. 46 of the Annex A Opinion of Professors Crawford and Boyle refers to the UK Government’s case as to Parliamentary sovereignty made to such Committee but does not set out the legal Opinions of the Law Lords. The latter in my submission require consideration.

24. Thus Lord Nicholls stated: *“In 1706 England and Scotland were two distinct states. England was ruled by Anne as Queen of England, and Scotland was ruled by Anne as Queen of Scotland. Each state had its own Parliament. On 1 May 1707 the two states were united into one state by the name of Great Britain. The new state had a single monarch, in the person of Queen Anne, and a single Parliament.”* He continued as to whether there was or was not a treaty: *“For present purposes it is sufficient to note that, especially in the Scottish Act of Union, the articles of union are referred to as articles of the ‘Treaty of Union.’ ... The inescapable fact, and this is what matters, is that the union took place on the basis of articles thus described.”* Finally as to Scotland’s representation he stated: *“There is room for argument that the treaty of union would be breached if Scotland ceased to have adequate representation in both houses of the United Kingdom Parliament. If that politically unthinkable event should ever happen, there would be scope to contend that this constituted a breach of a condition implicit in the Treaty.”*

25. The late Lord Slynn in turn stated as to the Treaty: *“Whether there was a Treaty is a matter of interesting debate amongst academic lawyers. For my part, I would accept that there was an international treaty between England and Scotland (as it has often been called in the past), but since neither state has existed as such since 1707 there is no party to the treaty which could enforce it.”* He went on to say as to representation: *“... unlike members of the House of Commons, it does not seem to me that the sixteen peers were to represent the people or the nation of Scotland but, if truly representative at all (rather than selected from the peerage of Scotland) they represented that peerage.”*

26. Lord Hope gave examples to show that the phrase “Treaty of Union” is still in common use. He further stated: *“... the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement cannot be dismissed as entirely fanciful.”*

27. He went on to deal with what Lord Slynn had referred to as the representation of the people or nation of Scotland and stated as to the relevant Article XXII: *“Taken as a*

whole, the purpose of the Article appears to have been this: first, to settle the number of peers of Scotland who were to sit with all the Lords of Parliament of England in the House of Lords; secondly, to settle the number of members who were to sit on the part of Scotland with the Commons of the existing Parliament of England in the House of Commons; and, thirdly, to make the necessary arrangements for the first meeting of the new Parliament of Great Britain.

... On the whole it seems to me that the argument that the effect of the Union Agreement was that the peers of Scotland were to represent Scotland in the Parliament of Great Britain is less than convincing ... The better view is that the function of the Scottish representative peers in the House of Lords was to represent the peerage of Scotland in the new Parliament.

... So far as the people of Scotland and their representation in the new Parliament of Great Britain was concerned, therefore, this is to be found in the arrangements that representatives of Scotland were to sit in the House of Commons.”

28. The Opinions of the Law Lords demonstrate in my submission that Scotland and its people were, by virtue of the Union Treaty and Acts, to be represented at least in the House of Commons of the Parliament of Great Britain. Such representation of Scotland and its people, notwithstanding changes, has continued to this day, providing in conjunction with the continuity of the Crown a legal chain of continuity between the Kingdom of Scotland in 1707 and the potentially re-emergent Kingdom of Scotland of today. In principle exactly the same applies to the Kingdom of England.

29. **(iv) As to Question 7** it follows in my submission that MP's for Scottish constituencies should continue to be elected for and sit in the UK Parliament until the date of independence whenever that might be, but not beyond.

16 February 2014

Rt Hon. Alistair Carmichael MP and Rt Hon. Lord Wallace of Tankerness QC—Oral evidence (QQ27-44)

Evidence Session No. 3.

Heard in Public.

Questions 27 – 44

WEDNESDAY 12 MARCH 2014

10.35 am

Witnesses: Rt Hon. Alistair Carmichael MP and Rt Hon. Lord Wallace of Tankerness QC

Members present

Baroness Jay of Paddington (chairman)

Lord Cullen of Whitekirk

Baroness Falkner of Margravine

Lord Goldsmith

Lord Hart of Chilton

Lord Irvine of Lairg

Lord Lang of Monkton

Lord Lester of Herne Hill

Baroness Wheatcroft

Examination of Witnesses

Rt Hon. Alistair Carmichael MP, Secretary of State for Scotland, and **Rt Hon. Lord Wallace of Tankerness QC**, Advocate General for Scotland

Q27 The Chairman: Good morning and thank you both very much for coming. As you know, we are primarily concerned, as the Constitution Committee, with looking at some of the legal and constitutional aspects of the outcome of the referendum. That somewhat constrains our discussion, although, on the basis of the evidence that we have had so far, it still seems to be pretty wide-ranging, as it no doubt will be this morning. I thought that I would mention that at the beginning, because it gives focus to the questions that we want to ask. I understand, Mr Carmichael, that you would like to make an opening statement. That would be very helpful, so maybe you would like to start.

Alistair Carmichael: Thank you, Lord Chairman, for the opportunity to give evidence to the committee. I know that you have already received written and oral evidence from a number of eminent academics and constitutional experts. I have had the opportunity of reviewing some of that evidence with interest. It is fair to say that, inevitably, there will be a difference between the evidence that you have received from witnesses so far and the

evidence that the Advocate General and I can give you today. We are both ministers of the Government of the United Kingdom as well as being Scots.

As Secretary of State for Scotland, I have a duty to make sure that the interests of people in Scotland are at the forefront of the minds of my Cabinet colleagues. That is not just about making the case for why Scotland benefits from being part of the United Kingdom; it is about making sure that, day in, day out, decisions made by the United Kingdom Government are made in the full knowledge and interests of Scotland. Your inquiry explores a hypothetical scenario that conflicts with my primary duty as Secretary of State for Scotland. If there were to be a yes vote in the referendum—a scenario that I hope and believe the people in Scotland will not allow to happen—it would mean that people in Scotland had given a mandate that they no longer wished the United Kingdom Government to act in their interests.

It is worth considering what such a mandate would mean. It would mean that the interests of Scotland on the one hand and the interests of the continuing United Kingdom of England, Wales and Northern Ireland on the other would diverge. It would mean that there would need to be negotiations on the terms of Scottish independence—negotiations in which Scotland on the one hand and the continuing United Kingdom on the other would each seek to achieve the best deal according to their own national interests. It would mean that negotiators representing Scotland and negotiators representing the continuing United Kingdom would need to strive to put the interests of their own side above the interests of the other. That is a scenario that fills me with dread, but it is the reality of independence.

However, unless and until the people of Scotland vote to leave the United Kingdom, there is no such mandate to enter into these negotiations and I have the duty which I have outlined to you. Unless and until the people of Scotland decide otherwise, the United Kingdom must act in the interests of all parts of the United Kingdom, including Scotland. That is why the UK Government are not making plans for the implications of a yes vote. Academics and constitutional experts can speculate about the different ways in which these issues could be resolved, but as a minister in the Government of the whole of the United Kingdom I cannot. Unless and until the people of Scotland vote otherwise, the UK Government will continue to act on their behalf and on behalf of the interests of people across the UK. I hope that, come 19 September, we will continue to do that, with the endorsement of the people of Scotland to remain part of our United Kingdom. Thank you, Lord Chairman.

Q28 The Chairman: Thank you very much, Secretary of State. I think that the whole committee appreciates that the Government are unhappy about discussing hypotheticals, but several people in the Government have spoken about, for example, currency union, the place of the BBC and issues that could broadly be said to be matters that need to be negotiated. Perhaps I might quote the evidence of the Deputy First Minister of Scotland, Nicola Sturgeon, who said to us: “The Scottish Government accepts that detailed negotiations ... cannot begin ahead of the referendum. However, we believe that sensible discussions about the practical consequences of independence should take place to help the people of Scotland to make an informed choice.” Is that not a fair point?

Alistair Carmichael: To a point it is. It was for that reason that it was necessary for the Chancellor quite recently to explain that, on the basis of the advice that he had been given by the Permanent Secretary to the Treasury, he could not countenance entry into a currency union between the remainder of the United Kingdom and Scotland, if Scotland were to be an independent country. I think it is widely accepted that it would have been irresponsible for the Chancellor, having received that advice, not to have made that clear. Having said that, there is always going to be a balance in these matters between those of us

who as politicians are required to engage in the debate and ministers who do the job that we are elected and appointed by the Prime Minister to do.

Q29 The Chairman: We have heard evidence, surprisingly, from academics about how this whole debate is about politics. I think that members of the committee are interested in, for example, the speech that you, Lord Wallace, gave to the 80 Club two weeks ago in which you said that, as you collectively felt, “legal issues matter.” So perhaps you would like to outline those ones that you think are legally and constitutionally significant.

Lord Wallace of Tankerness: Following on from what the Secretary of State said, given that the public have been asking for information, the Scotland Office and, indeed, the whole of the UK Government embarked on a series of Scotland analysis papers to help to inform the debate. A lot of work has gone into them—they are very detailed. The first paper that we produced—“Devolution and the implications of Scottish independence”—set out some of the background to what we believe will be the important legal framework that would attend any yes vote. The first and perhaps most important issue relates to the view that the United Kingdom Government came to on the basis of evidence from Professor James Crawford of the University of Cambridge and Professor Alan Boyle of the University of Edinburgh, from whom you have had written and oral evidence—

The Chairman: Yes, Professor Boyle was here last week.

Lord Wallace of Tankerness: The view is that the rest of the United Kingdom—England, Wales and Northern Ireland—would be a continuator state and that Scotland would be a new state. Some of the principles or guidelines that led us to that conclusion included, first, that there is good precedent, the most recent one being South Sudan and Sudan, where Sudan was the continuing state and South Sudan was the new state. There is also the case of Singapore and Malaysia. Perhaps the example closest to home relates to when the Irish Free State left the United Kingdom in 1922, when Great Britain and Northern Ireland continued as the United Kingdom and the Irish Free State became a new state. Secondly, in public international law, regard is given to relative population and size. I do not think that there is any question but that, in terms of both relative population and relative size, England, Wales and Northern Ireland would be much larger than Scotland. Thirdly and importantly—although they are all important—how would this be seen in the eyes of the rest of the world? I think that this is of considerable importance. Again, given the United Kingdom’s standing in the world—the fact that we are a permanent member of the United Nations Security Council, our membership of NATO and a number of organisations, and the treaties that the United Kingdom has entered into—the continuing United Kingdom would be seen as a continuator state, with the obligations and the rights of that, and Scotland would be identified and seen as a new state. Fourthly, the other alternative would be two new states, which was the position with the formation of the Czech Republic and Slovakia. That proceeds on the basis of mutual agreement—a joint agreement. We do not believe that there is any way in which the Government of the continuing United Kingdom would sign up to the disestablishment or disintegration of the United Kingdom and all that would flow from that. That is perhaps the most important and fundamental legal view.

Other issues that we may wish to explore include those around European Union membership, on which there is a lot of uncertainty and a lot of politics. We believe that the continuing United Kingdom would continue to be a member of the European Union and that Scotland would be a new state having to apply for membership. There can be much debate about how that would proceed and, crucially, about the terms of membership.

The other issue that I addressed in that lecture related to institutions and the sharing of assets and liabilities. You may wish to explore that but, briefly, we believe that the institutions would stay with the continuing state. This Parliament is an institution of the United Kingdom state. You only need to say that, in a sense: a new Scottish state would not want to have part of it; the whole point of independence is not to be a part of it. There is a distinction to be made between institutions such as the Bank of England, which is the central bank of the United Kingdom and an institution of the United Kingdom, and assets, which could include, for example, gold reserves and literal pounds, although the pound as a currency is not an asset. These are the kinds of issues that I highlighted in that lecture.

The Chairman: That is very helpful. We will come back to assets and liabilities, but perhaps we could pursue for a little while questions about the potential arrangements after a yes vote.

Q30 Lord Lester of Herne Hill: I fully understand the Secretary of State's dread, which I share, but, as I am sure you appreciate, we are trying to deal with an important hypothetical to work out some of the implications. As you know, the Scottish Government have suggested that a timetable of independence by 24 March 2016 is realistic. Lord Mackay of Clashfern, among others, has indicated his reasons for thinking that is not realistic. The first thing that I wanted to establish is that negotiations, if they did occur, would have to occur in good faith and in a practical way in an attempt to find a solution that resolved some of the conflicts that the Secretary of State has powerfully indicated. Can we start with that assumption, in spite of the conflicts?

Alistair Carmichael: Certainly. I think that Lord Lester has known me long enough and well enough to know that, at a personal level, my interest is completely engaged and piqued by these issues, but as a government minister I have to take a different approach. I absolutely take the point that these negotiations will have to be conducted in good faith and in a practical way aimed at resolving conflicts, but the other point that will be significant in these negotiations is the sheer enormity of what is being undertaken. You are looking at unpicking what I would regard as the single most successful economic, political and social union, which has now endured for over 300 years and which has produced institutions that are, rightly, the envy of the world. That is going to be no mean feat and it will require an enormous amount of complicated negotiation. Both as a politician and in my previous professional career as a lawyer, I have been involved in sufficient negotiations to know that setting yourself a somewhat arbitrary timescale is not a sensible way of negotiating, because it fundamentally weakens your hand. If you are to keep to that timetable, the party that has invested importance in that timetable will feel under greater pressure to make concessions in order to meet the deadline. That is a fairly well-accepted fact of how negotiations proceed. For that reason, I do not see the 2016 deadline as achievable, especially if on all these issues, where they have walked away from the advantages of the United Kingdom, as they say they wish to do, they then want to negotiate their way back in. I do not regard it as a realistic timetable but, frankly, it was the Scottish Government in their white paper who chose to set that deadline. I suspect that it was set for political reasons rather than as a realistic or considered proposition.

Lord Lester of Herne Hill: Would it not be true that, although that may be unrealistic, the longer such negotiations went on, the longer the period of uncertainty on both sides of the border? Therefore, it would be in the interests of the UK, as the continuing state, and Scotland for those negotiations to be conducted as speedily as possible.

Alistair Carmichael: As speedily as possible, but these are complicated matters and, not quite in the middle of that 18-month period, you will have the United Kingdom general election in May 2015. So you can take from your 18-month period a period of at least a month during which the United Kingdom Parliament will be dissolved and when an election campaign will be going on. These negotiations would be best done and would be required to be done in good faith—I do not think that anybody would doubt that—but good faith will take you only so far when you are dealing with matters of the scale of which we are speaking.

Q31 Lord Lester of Herne Hill: What would happen if the two negotiating teams were unable to reach agreement on core issues?

Alistair Carmichael: That takes you into uncharted waters. I do not think that anybody can reasonably know the answer to that. One thing that I can put to you beyond peradventure is that, if Scotland votes yes on 18 September, Scotland will become an independent nation. There could be no question thereafter of Scotland somehow not becoming an independent nation, even if there were difficulties in the negotiations.

Lord Cullen of Whitekirk: I appreciate what you have said about there being many issues, some of which are very complicated. Might it be possible to divide the issues into those that it was essential should be resolved by so-called independence day and those that could be left to a later occasion? When I say “settled”, I mean settled by some means, possibly including arbitration. If it is possible to reach a division, could you indicate what you would regard as the essential items?

Alistair Carmichael: You tempt me down a road that involves essentially setting the mandate or the parameters for any negotiating team. However much I might find that a tempting prospect at an intellectual level, I am afraid that for the purposes of today’s evidence it would be imprudent for me to do that.

Q32 The Chairman: Can I ask you a practical question, which I hope both of you might look at from the perspective of the two Houses of Parliament in which you sit? Lord Mackay of Clashfern has told us that it would be necessary for the UK Parliament to pass legislation in order to enable the negotiations to start. Is that your perspective?

Alistair Carmichael: It would probably be sensible to do that. The United Kingdom Government negotiate agreements and treaties on behalf of the United Kingdom all the time and do so with the powers that they currently have. This would be a negotiation of a very different stripe and I would have thought it sensible for any government undertaking that enterprise to make sure that they had the widest range of views in Parliament engaged in it, for which it might be that legislation would be sensible. As to whether it is legally necessary, I am not going to get into a tangle on matters of law with Lord Mackay of Clashfern.

Lord Wallace of Tankerness: The other dimension that has come through in some of the evidence given to your Lordships’ committee is the question of the legal competence of the Scottish Government to negotiate. Let us be honest about it: there would be an element of realpolitik. But we all know that people quite readily resort to the courts if they want to throw spanners into works. It may be that something like a section 30 order or some primary legislation was needed—we are in a hypothetical situation—to put beyond doubt the competence of the Scottish Government to negotiate, although the Scottish

Government has said that this may go more widely than members of the Scottish Government. The Scottish Parliament would at least have competence then to enter into negotiations, so that would put it beyond doubt.

Q33 Lord Lang of Monkton: I would like to return to the concept of the continuator state, which seems pivotal to what might happen in the event of a yes vote. The view expressed in your excellent and very lucid lecture, if I may say so, Lord Wallace, is very clear and has not been challenged, as far as I am aware, by anybody. Almost all the evidence that we have had—and I think our perception of it—is in line with that. I would like to find out to what extent that endows the negotiating position with which the United Kingdom Government would enter negotiations. Does it give added weight to the negotiation? It seems to me that the Scottish National Party, in their white paper, base all their estimates of their future prosperity and success in negotiations on the assumption that they enter them on an absolutely equal basis with the UK Government in negotiating assets that lie between the two negotiators. I am assume that part of the basis on which the Chancellor made his speech was the fact that the UK was the continuator state and would be in possession of the currency and he could already see that that would simply not be part of the negotiations. To what extent does that concept of continuator state endow the negotiating position more generally?

Lord Wallace of Tankerness: It is the crucial starting point. On your specific example, it allowed the Chancellor to make that statement. It is my view that the Bank of England as the central bank is an institution of the United Kingdom and would be the institution of the continuing United Kingdom. There has been very little contradiction to the position that we set out. We set it out on the basis of well-informed advice. Crucially, that would be the position in the eyes of the world. If the Scottish Government have aspirations of a March 2016 conclusion, I do not think that it would be worthwhile spending time trying to argue over something that has such widespread support. It sets out what the starting point is. I think that it is the case, as is implicit in the memorandums of understanding since devolution, that both governments should hold each other in mutual respect. But it means that, if you are looking at things such as the currency, there is a starting point and any negotiation would flow from that position. That is the case with other institutions. You can put it in terms of, “Does that give an upper hand or a lower hand?” but I think that it is better putting it in terms of making sure that you are negotiating on the basis of reality and how it will be seen in the eyes of the rest of the world.

Lord Lang of Monkton: Secretary of State, I assume from your opening statement that you might contemplate being a member of the negotiating team on behalf of Scotland rather than the United Kingdom by then. I am not asking you to answer that, but would you like to comment on how you see the negotiations proceeding against the background of the United Kingdom as the continuator state?

Alistair Carmichael: I do not think that there is a great deal that I could really add to Lord Wallace’s analysis beyond the statement of the blindingly obvious that you would not expect somebody from England, Wales or Northern Ireland to negotiate on behalf of Scotland and so you would not expect a Scot to negotiate on behalf of people from England, Wales and Northern Ireland. You start from the presumption that these are countries that are foreign to each other at that point and will each pursue their own national interest. You would expect no less. I would be mildly sceptical about whether my presence would necessarily be wanted by the negotiating team that would be put in place at that time, although, as a Scot,

and a proud Scot, I will always want to pursue Scotland's best interests. I believe that Scotland's best interests remain as being part of the United Kingdom. As a Member of Parliament, my primary duty is to my constituents in Orkney and Shetland.

Q34 Lord Lester of Herne Hill: Many years ago, and I have to declare this, I wrote an article in the *International & Comparative Law Quarterly* called "State succession to treaties in the Commonwealth". In those days, it was the United Kingdom's position, as part of decolonisation, that a new state inherited all the obligations of the United Kingdom so far as treaties were concerned. I argued for the clean slate theory, which I think is the current one; it was the position that the International Law Commission subsequently adopted. So I personally agree entirely with the view that you take as Advocate General and the view of James Crawford and Alan Boyle. But I would like to ask you about that. Does it not follow that, if the UK without Scotland is the continuing state and Scotland is a new state, Scotland has to negotiate for every treaty right and obligation that it seeks on behalf of Scotland? It has to negotiate not only, say, membership of the European Union, but membership of the Council of Europe and the European Convention on Human Rights, as well as all the other trade and other agreements that have to be separately and independently negotiated. Am I right about that?

Lord Wallace of Tankerness: I think that it is a matter of principle. You are right. The practical issue is that some would be easier than others. For example, you could not imagine membership of the United Nations to be particularly problematic. Membership of NATO requires the unanimous agreement of all member states of NATO and so might be more problematic. I think that people would positively encourage membership of various human rights conventions and there is no reason to suggest that that would not happen. I stand to be corrected, not least from such an eminent jurist, but my understanding is, albeit that I have made the caveat before about the break-up of Czechoslovakia, that the two respective countries wrote to our Prime Minister indicating that they wished that the treaties to which the old Czechoslovakia had been party should continue. You cannot make a complete read-across, but there may be some that would be nodded through. Others might be more difficult. Double taxation agreements could be problematic. The basic principle that you assert is one to which I would subscribe, but the devil would be in the detail and the practical realities.

Q35 Lord Cullen of Whitekirk: I want to ask a question about the implications of the general election. If at the time of the general election negotiations are not complete, as seems likely, is it possible that negotiation stances will form part of what political parties put before the electorate?

Alistair Carmichael: That is a matter of politics. I think that it is self-evidently going to be the case. Scotland has had a lengthy debate on this. I joined my political party as a 14 year-old, so I have dealt with this issue for the last 34 years. It has been very much a part of Scottish politics to the extent that, once we get to 19 September, I look forward to dealing with other matters of perhaps greater political significance to the day-to-day lives of my constituents. It is apparent to me now, as a member of the United Kingdom Parliament, that there is growing interest in the rest of the United Kingdom, but, with all due respect, they have a long way to catch up with us. If we were to find ourselves in that position, then, yes, I would expect the terms and conditions of the independence agreement in respect of directions in which the negotiating teams would expect to go to be a significant issue in that

general election. It is by no means impossible that it may change the course of the negotiating stance that would be taken by either party to these negotiations.

Q36 Baroness Wheatcroft: Looking at the state of the UK's continuator Parliament after independence—should we get independence—what would be the status of Scottish MPs and how long could Scottish MPs continue to sit in the UK Parliament? There are very different opinions as to when that would come to an end.

Alistair Carmichael: My assumption would be that for as long as the United Kingdom Parliament has jurisdiction over the people of Scotland—that is, until the day that Scotland formally leaves the United Kingdom—then Scottish Members of Parliament would continue to sit as Members of Parliament. We are in highly unusual territory here; certainly, in the last 300 years of our constitution it is genuinely unprecedented. But I think that it is fair to assume, given the uncertainties that I have outlined about timetables, that membership of the Parliament here would have to continue. It is always, of course, for the members of both Houses to set their own sessional orders and standing orders and to determine the manner in which their own business is conducted. That is an essential consequence of parliamentary sovereignty.

Baroness Wheatcroft: I wonder whether I could ask Lord Wallace if he believes that those Scottish MPs would have to leave immediately after independence, or does he take the view that they would have been elected for a full term?

Lord Wallace of Tankerness: I share the view of the Secretary of State. I cannot see any constitutional basis on which you could sit for a place for which a Parliament no longer has jurisdiction. Up until that point, even on the simple principle of no taxation without representation—as the writ of the UK for taxation matters would cover the whole of Scotland—it would only be right that the people of Scotland had representatives.

Q37 Baroness Wheatcroft: Secretary of State, you were very clear in your opening remarks that a yes vote would mean independence come what may for Scotland, without specifying the scale of that yes vote or of the poll. Yet, as is clear, the Scots are being asked to vote for something that is very vague. Can you imagine that after a yes vote and a period of negotiation, there might be a growing body of opinion saying, “Hang on; we did not think that this was quite what was on offer. We would like a second referendum”?

Alistair Carmichael: I cannot imagine that being the case, not least because this is a decision which, while it is made in Scotland, has implications for the whole of the United Kingdom. I cannot be clearer, and I do not think that anyone on either side of the debate would wish to contest this, that a yes vote on 18 September means that Scotland will become an independent nation. You are quite right that that would bring with it substantial elements of uncertainty—you might even say risk—but that is what the people of Scotland are being invited to vote for, warts and all, if I may say so. I cannot imagine the circumstances where, having voted for independence by however narrow a margin—and as far as I am concerned, that is 50% plus one—we might not then become independent. This is a once-in-a-lifetime decision, from which there will be no resiling.

Baroness Wheatcroft: I understand the political imperative to take that view now, but I just wonder whether you think that that view might change.

Alistair Carmichael: No.

Lord Wallace of Tankerness: It is interesting that, in a long debate which has produced a lot of divided opinion, neither side—neither those advocating independence nor those opposed to it—is advocating a second referendum.

Alistair Carmichael: This is why the conduct of the debate in many respects thus far has been somewhat unsatisfactory. There have been too many unsubstantiated assertions. The Scottish National Party have clearly embarked on a deliberate strategy, which is, as the political campaigners would have it, to de-risk the proposition—that is, to invent various scenarios where, in relation to the currency, for example, they identify an element of what being part of the United Kingdom brings with it that is popular and desirable in the eyes of most Scots and then pretend that it is possible to walk away from the United Kingdom while walking back in or indeed retaining those aspects that are desirable. Currency is one; membership of the European Union is another. That is why people in Scotland—my fellow Scots—must understand that, if they vote yes and walk away from the United Kingdom, that means that you walk away from the bits that you like as well as the bits that you do not like.

Q38 Lord Hart of Chilton: Mr Gordon Brown has entered the fray by making his contribution. I doubt that you are going to tell me whether you think that is going to assist the yes vote or the no vote, but it is clear that, if there is a no vote, that is not the end of the road, is it? There will be a completely new debate opened up following a no vote because the issues raised by Mr Brown are not going to go away. They are going to be very important, I would have thought, for further consideration of the status of the United Kingdom and the way in which it is to continue.

Alistair Carmichael: You are quite right. They are not going to go away and nor should they. It is almost a cliché to say that devolution is a process and not an event, but that is seen increasingly as a truism. From my point of view and that of my party, the devolution of further control to the Scottish Parliament, in particular of its budget-raising powers, is not only desirable but necessary. One reason why I joined my political party as a 14 year-old was my belief that Scotland could be better governed from Scotland, within the United Kingdom. The creation of a Scottish Parliament was an issue that motivated me and continued to motivate me throughout my adult political life. We have seen, though, a somewhat unbalanced politics emerge in Scotland since the creation of the Scottish Parliament where, because the funding for public services still comes directly from the Treasury in a lump sum every year, the debate in Scotland now is merely about how you spend money. We need to anchor that debate in a more balanced way, involving a greater discussion of how we raise money. I think that that will be healthy for the Scottish Parliament and healthy for political debate in Scotland. As a result, ultimately it will be good for the United Kingdom as a whole.

Q39 Baroness Falkner of Margravine: Secretary of State, I want to take you back a little while remembering that you were chief whip for one side of the coalition. I ask you to wear that hat briefly as you reflect on this question on the role of Scottish MPs, were there to be a yes vote, in the period between the general election and the point at which they would cease to be members of the United Kingdom Parliament. My question is this. In that interim period, do you think that they would be entitled or well advised to vote on English matters?

Alistair Carmichael: That would be a question to be resolved on the other side of a general election. It is a hypothetical layered on top of a hypothetical. I confess that when the noble Baroness referred to my history as the chief whip, I was mildly concerned that I might be invited to comment on stuff that would make my answers as Secretary of State look positively expansive. But I think that there would be in that event renewed attention on the issue that you raise. How that would play out ultimately would depend on the views of the returned members after May 2015 and the terms of the debate that had taken them there. It is another level of uncertainty, which of course does not come into play if the people of Scotland remain part of the United Kingdom.

Baroness Falkner of Margravine: Lord Wallace, could I take you to the role of peers who reside in Scotland? I think that some 60 or so give Scotland as their place of residence. You have been clear in your view that, if you do not live in the United Kingdom, you should not be part of its legislature. Is that a correct interpretation?

Lord Wallace of Tankerness: I think that it is slightly more subtle than that. The key thing is the writ of summons. Everyone on the committee here is a peer of the United Kingdom, but that must be read subject to section 41 of the Constitutional Reform and Governance Act 2010, which deems anyone who is a member of the House of Lords to be a taxpayer for the purposes of three taxes: income tax, capital gains tax and inheritance tax. I think that it has to be seen in that light. You will recall that, when that Act was brought in, section 42 gave a transition period if people wished to change their membership.

Baroness Falkner of Margravine: Their status.

Lord Wallace of Tankerness: Yes, their status. That would be another thing that would have to be considered: whether people felt that it was worth paying income tax in two separate countries to continue their membership of the House of Lords.

Baroness Falkner of Margravine: There may be a view that, because they were existing members of the House of Lords, those 62 or so current peers should be allowed to continue as members and new peers from an independent Scotland would perhaps not be appointed. If those 62 remained, would you have a view on whether they, for example, should exercise full rights of scrutiny and voting rights, or would you imagine that that they would have somewhat diminished rights?

Lord Wallace of Tankerness: As the Secretary of State said in an earlier answer, each House has its own standing orders and, in what I sincerely hope is an event that will never arise, I rather suspect that people would want to address the question that the noble Baroness raises. I think that it would be a matter for the House itself to come to a view on; no doubt good sense would prevail. It is a self-governing House.

Q40 Lord Lester of Herne Hill: Secretary of State, you stated admirably, if I may say so, the need for a well-informed and rational debate on the pros and cons of Scottish independence. But does experience of referenda—with the Irish in particular, in my case—not teach us that emotion and prejudice also, unfortunately, play a major part? One of the problems that the Government will have to grapple with is that in Scotland it may be that disillusion with the English political system and the parties will encourage people to vote not on the basis of reason but because of their wish for a different kind of political order.

Alistair Carmichael: I take issue with the terminology that you use. I am not sure what the English political system is. I am here as a Scot sitting in the United Kingdom Parliament, as many other Scots have before and, I hope, will continue to do so after my time here. There is certainly a need for political reform of the United Kingdom. I think that there is in fact a need for the different parts of England now to look at their own constitutional position. I have family there—my wife’s family lives in the south-west of England and I believe that they are as badly served by the current constitutional set-up as we in Scotland were in the past, before we had our own Parliament. I very much hope that it may be, albeit as an unintended consequence of this debate, that that debate will now be pursued in the rest of the United Kingdom, in particular in England, with a seriousness and vigour that we have not seen hitherto.

What we know about constitutional reform of this sort is that it happens only if there is a genuine popular will for it to happen and if the people somehow have a say in defining what it is that they want to have. But that is a debate that we could have within the context of the United Kingdom; you do not have to break up the United Kingdom in order to achieve political reform. We have demonstrated that already by the constitutions of the Scottish Parliament, the Welsh Assembly, the London Assembly and the Northern Ireland Assembly. We have twice given devolution to Scotland from this place. It has been three times, and we are possibly into the fourth now, for Wales and twice for Northern Ireland. The people of Scotland wishing to have a different political design can take comfort from the fact that at no time when they have sought constitutional change since we started the devolutionary process has it been denied to them—or to any other part of the United Kingdom. In fact, to take the other side of that coin, when the previous Government offered devolution to the north-east of England and the north-east looked at it and said “No, thank you”, it was not forced on them.

Q41 Lord Goldsmith: I was going to ask you about legislation. I am slightly inhibited, first, by the clarity with which you, Secretary of State, have expressed your view that you are not here to talk about hypotheticals and, secondly, because Lord Wallace has answered part of the question already. Let me propose it and see where we get to. There are two elements to the question of legislation. One is whether there is a need for legislation in relation to negotiations. If I understand correctly what has been said so far, there is no need for legislation for the remaining United Kingdom because the UK Government have the powers already. So far as negotiations for Scotland are concerned, there may be a need to put something through a section 30 Scotland Act order, but realpolitik will otherwise do the trick. Have I understood correctly your view on that aspect?

Lord Wallace of Tankerness: That is a fair assumption.

Lord Goldsmith: So far as the next stage is concerned, if there is a yes vote, we have had varying evidence as to the need for legislation to deal with independence itself. Plainly, the Scottish Government and the new Scottish state, whatever it may be, will need to have legislation that sets their house in order. What will the United Kingdom Government or Parliament need to do in terms of legislation to have at least something that makes it clear that Scotland is now independent and that the United Kingdom Parliament has no further responsibility for it? Do you envisage more?

Alistair Carmichael: The union was constituted by a treaty followed by two Acts. If it is now to be dissolved, it would presumably need that at the very least.

Lord Wallace of Tankerness: The precedents are not very easy. Obviously, Scotland is not a colony and perhaps people look too simply at how independence went to some of the colonies—very often their independence Act enshrined a constitution. I do not think that anyone is suggesting that Westminster should write this constitution but there may be some way just to disapply certain Acts. We would probably have to go through the statute book to find out what would be appropriate. It need not necessarily be a major Act. I rather suspect that there is a working assumption in other places, as I think happened in the case of Ireland, that Acts of the United Kingdom would continue as simple onward traffic in an independent Scotland. Maybe it would be more appropriate for the Scottish Parliament to enact that matter as one of its first pieces of legislation as a new Parliament, should that hypothetical situation arise. I suspect that there would have to be something that broke the link and that its content might depend on parliamentary counsel going through and seeing what bits they needed to do.

Lord Goldsmith: With the possible exception that you have raised today of the tax status of remaining peers with residences in Scotland, you are not sure that it would need much more from the United Kingdom Parliament than that.

Lord Wallace of Tankerness: The reason why I hesitate is that one knows that when one starts going down into the nooks and crannies of legislation that has been passed, other things may emerge. Some of them would possibly be fundamental in the breakage of the link.

The Chairman: One area that is concrete, which the Secretary of State has already mentioned and which I said we would return to, is the question of assets and liabilities, not to mention shared services. I know that Lord Lang wishes to speak about that.

Q42 Lord Lang of Monkton: I had better start by asking you about the context of what legal principles might apply to the negotiations. We touched on the continuator state issue but are there any other legal principles that would form the basis on which negotiations would happen?

Lord Wallace of Tankerness: It is fair to say that the legal principles in public international law that take us to the position of a continuator state are probably far clearer than those on the division of assets and liabilities. There is the 1983 Vienna convention, which has certainly not been ratified—I do not think that the UK even signed it—and is not in force, although it embodied a subject of some controversy among academics and much of what people understood to be the accepted international legal position. The one principle that seems to emerge is of an equitable apportionment, but that sometimes raises as many questions as it answers. There is possibly a principle higher than that, which is giving primacy to an agreement reached between the respective parties. If that can happen, I think that would be recognised in law, but equitable apportionment seems to be a principle that is reasonably accepted. There are views as to whether that would be per capita; indeed, there is some evidence which I think Mr John Swinney, the Cabinet Secretary for Finance, gave to your Lordships' Economic Affairs Committee. There are other points, such as the *capacité contributive*, which is the ability of respective countries to be able to service debt. That clearly would be a matter for negotiation, but a principle of equal apportionment is one that seems to have recognition.

Q43 Lord Lang of Monkton: Thank you. You touched on the European Union earlier. You both mentioned it in passing and we have not responded with questions on it. I am not

sure whether you would view that as an asset, an institution or an institutional asset. In any event, it seems to be pre-empted by the continuator state concept and it remains with the remaining United Kingdom. That seems to be the view also of the President of the Commission and the President of the European Council. In a recent debate to which you responded, Advocate General, Lord Kerr of Kinlochard indicated that a separate Scotland would need to apply for membership of the European Union and would not be able to do so until independence had taken place. That might be 18 months or some years ahead. Is that your view as to the legal position as well?

Lord Wallace of Tankerness: Because this is so unprecedented, I think that we are in uncharted waters. It may be that politics would take over. I think that what Lord Kerr then said, and I hope that I am not misinterpreting him, was that the way round that would be for the United Kingdom to negotiate on Scotland's behalf.

Lord Lang of Monkton: Yes, to which you did not reply.

Lord Wallace of Tankerness: I did not reply. It is an interesting idea. The United Kingdom is the member state. You have to recognise that, on Scotland, the *acquis* applies, so it is not a question like that of Turkey, which has a long way to go to get into that position. I do not think that anyone would guess as to what the procedure would be, but one thing that I would say with some certainty is that the continuing United Kingdom would remain a member of the European Union with the Schengen opt-out, for example. The principles of the rebate would remain in place, but the figures would change, because the GDP of the continuing United Kingdom would be different. There would also possibly have to be some changes in the number of MEPs, but basically the opt-outs from justice and home affairs would continue. Scotland would have to apply for membership. We can debate how that would be done. The Scottish Government say that it would be under article 48, but I think that that is likely to be somewhat fraught, because it could lead to a convention and all sorts of other treaty changes being brought into play. Article 49 is the article that is there for new members. I could not say with certainty what the process would be. The other point is the question of the terms, which might be the most crucial thing, because there is no guarantee that Scotland would accede, certainly not automatically, to the terms that the United Kingdom has negotiated. In terms of the rebate, the irony could be that, because of how it is calculated, Scotland would end up contributing to the United Kingdom's rebate.

Q44 The Chairman: Thank you both very much. I do not know whether you would like to put on the record this morning any other points that you feel we have failed to cover.

Alistair Carmichael: No. I think that this has been an interesting and fairly comprehensive discussion. I have very much enjoyed it. Thank you for the invitation. If you think that I can help you in this way in the future, I will be more than happy to do so.

Lord Wallace of Tankerness: To follow up on the question asked by Lord Hart of Chilton, I would find it politically very satisfying if, in a year's time, we were before your committee dealing with the consequences of a no vote.

The Chairman: I think that the whole committee appreciates the discomfort that you must have about some of the political aspects of this. You both, Secretary of State and Advocate General, mentioned the "uncharted waters". If I can pursue the metaphor without becoming too laboured, I think that the charts became a little clearer this morning,

Rt Hon. Alistair Carmichael MP and Rt Hon. Lord Wallace of Tankerness QC—Oral evidence (QQ27-44)

particularly on some of the legal and constitutional matters, which are our primary interest. Thank you very much indeed for coming.

Alistair Carmichael: As the current MP for Orkney and Shetland and as the previous MP for Orkney and Shetland, we know a bit about waters, chartered or otherwise.

The Chairman: I hoped that you would both appreciate that. Thank you very much indeed.

Mr Stewart Connell—Written evidence

Inquiry into Scottish independence: constitutional implications for the rest of the UK

By Stewart Connell

(Unionist Campaigner and former Scottish Conservative and Unionist Party Parliamentary Candidate.)

Reason for Submission

To present a defence of our British Parliamentary democracy.

Quote

Edmund Burke MP for Bristol 1774 (Dublin, Ireland. January 12, 1729 - Beaconsfield, England, July 9, 1797

“...Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You chose a member indeed; when you have chosen him, he is not a member of Bristol, but he is member of parliament...”

Parliamentary Representation.

Call for Evidence

"The committee would welcome other relevant views which you think the committee should be aware of."

Constitution Committee Questions

The questions asked by the committee are based on the assumption that a referendum "yes" result authorises the 59 MPs from constituencies in Scotland to withdraw their constituencies from the British House of Commons - it does not.

Note

1. In the 2010 British Parliamentary General Election the electorate in 59/59 constituencies in Scotland authorised their MP to go and sit in the British Parliament - to be part of the whole (no abstentionist candidates were elected).
2. In 2014 the authority of the electorate remains in the 59 MP's - only constituency election determines membership of the House of Commons.
3. The referendum cannot contain an authority (secondary or alternative or superior to constituency electoral authority) to authorise the withdrawal of the 59 MP's from Scotland from the House of Commons - withdrawal can only occur through constituency election of a candidate on an abstentionist manifesto.

4. All MP's from constituencies in Scotland have been mandated to sit in Parliament until the next general election or constituency by-election when they will again decide whether to be represented in or abstain from the Parliament of the United Kingdom of Great Britain and Northern Ireland.
5. Scotland Act 1998 (Modification of Schedule 5) Order 2013 does not contain any provisions relating to Scottish constituencies in the UK Parliament.
6. The referendum is anti-parliamentary and unconstitutional.
7. The Scotland Act 1998 (Modification of Schedule 5) Order 2013 must be repealed and the Parliamentary representation of the constituency elector restored.

Dates

1. 2010 British Parliamentary General Election decides the Union as it has done for centuries.
2. 2010 General Election - 59/59 constituency electorates in Scotland authorise their MP to sit in the British Parliament (to be part of the whole).
3. 2010 General Election Conservative and Labour manifesto's contain no mention of a Scottish separation referendum.
4. 2011 (May) Scotland Act 1998 still in force - Schedule 5 declares Union and United Kingdom Parliament are reserved matters - only mandateable by a British general election.
5. 2011 (May) SNP win majority (on devolved matters) in Scottish election.
6. 2011 (Oct) Mr Cameron still makes no mention of a referendum at Conservative Conference.
7. 2012 (Jan) Mr Cameron launches referendum on a BBC TV show.
8. 2013 (15th Jan) Scotland Act 1998 (Modification of Schedule 5) Order 2013 in House of Commons.
(No Green Paper, No White Paper, No Constitutional Bill, No Constitutional Debate and No Act of Parliament).
9. 2013 (15 Jan) Scotland Act 1998 (Modification of Schedule 5) Order 2013 passed in the House of Commons unanimously.
10. 2013 (16 Jan) Scotland Act 1998 (Modification of Schedule 5) Order 2013 passed in the House of Lords unanimously.

Recommendation:

I Her Majesty's Government repeal the Scotland Act 1998 (Modification of Schedule 5) Order 2013.

February 2014

Rt Hon. Lord Hope of Craighead KT and Professor Iain McLean, Professor of Politics at Nuffield College, University of Oxford—Oral evidence (QQ1-15)

**Rt Hon. Lord Hope of Craighead KT and Professor Iain McLean,
Professor of Politics at Nuffield College, University of Oxford—Oral
evidence (QQ1-15)**

Evidence Session No. 1

Heard in Public

Questions 1 - 15

WEDNESDAY 12 FEBRUARY 2014

10.30 am

Witnesses: Rt Hon. Lord Hope of Craighead and Professor Iain McLean

Members present

Baroness Jay of Paddington (Chairman)

Lord Cullen of Whitekirk

Baroness Falkner of Margravine

Lord Goldsmith

Lord Hart of Chilton

Lord Irvine of Lairg

Lord Lang of Monkton

Lord Lester of Herne Hill

Lord Lexden

Lord Powell of Bayswater

Examination of Witnesses

Rt Hon. Lord Hope of Craighead, KT, former Deputy President of the Supreme Court, and **Iain McLean**, Professor of Politics at the University of Oxford

Q1 The Chairman: Good morning and thank you very much for coming. I know that you have both, individually, given a great deal of thought on this subject. Lord Hope, we were interested to read your helpful speech in the debate which Lord Lang of Monkton led in the House of Lords a couple of weeks ago. We have tried to define our interest. Because there are so many different committees, academic bodies and political organisations studying this issue, the limits of our inquiry were in our call for evidence. I hope you will not feel they are too narrow; it does not mean that we are circumscribing the conversation. If you feel there are points which we fail to make in our questions or comments, please add those in. This is a fast-moving situation, with the lead story in the newspapers and on television and radio this morning about the speech which the Chancellor, Mr Osborne, is due to make tomorrow in Edinburgh, suggesting that he will rule out the possibility of a currency union if there is a yes vote, which again circumscribes some of the questions we wanted to ask you on the negotiations et cetera. Perhaps the most sensible thing is if I begin with a very general

question. Lord Hope, what legal principles do you think will govern negotiations for Scottish independence in the event of there being a yes vote in the referendum?

Lord Hope of Craighead: I have not studied this subject in anything like the depth that your legal adviser or my neighbour who will give evidence with me have done. My background is that I dealt with the Scotland Acts 1998 and 2012, and have dealt with Commonwealth cases through the Judicial Committee of the Privy Council. The basic structure, as I see it, is what we find in the Scotland Act 1998, which created a devolved Parliament whose powers do not extend to the constitution. So the question in my mind is what Westminster is going to do about the powers of the Scottish Parliament, which are circumscribed until independence is created. I have in mind also section 33, which allows pre-legislative scrutiny of bills from the Scottish Parliament where it is not within its powers to make laws. I am pretty sure that an attempt to do something that is a reserved matter would be challenged. It would have to come to the Supreme Court, which would deal with it as briskly as it could. But one has to bear in mind that these powers are not without some fence within which it is necessary to stick.

As for the Commonwealth, I have looked at two examples which the committee might find helpful. One is the Solomon Islands Act 1978, and an earlier Act, the Trinidad and Tobago Independence Act 1962. I will not take time in this answer to explain what I found in them, but these are two examples of independence being granted—I am assuming, although I may be wrong, that it would be for Westminster to grant independence to Scotland rather than for Scotland simply to assert it, because there has to be some legal structure within which the thing would take place.

The Chairman: What you have said, Lord Hope, very much coincides with written evidence, which I think you have seen, that we have received from Lord Mackay of Clashfern. Essentially it confirms what you have just said, particularly about the need for preliminary legislation by the UK Parliament, even after a yes vote in a referendum.

Lord Hope of Craighead: I have discussed the matter with Lord Mackay and I entirely agree with him on that.

The Chairman: Professor McLean, do you have a point you wish to add?

Professor Iain McLean: In the presence of the company that I find myself in, chair, no.

Q2 The Chairman: The next question, addressed to you both, is mostly a practical one arising from those different issues which you have addressed and about which we have also had evidence from Lord Mackay of Clashfern. It is about the ambition of the timetable that has been set out by the Scottish Government on their aspirations—let us put them as no more than that—for achieving full independence within a matter of, I think, 18 months. Perhaps you would like to start on that, Professor McLean.

Professor Iain McLean: This is ground I feel more comfortable occupying. I do not think that the Scottish Government's timetable is realistic. One reason it is not realistic is that their principal counterparty will be the rest of the UK, as it will become, and the current Government of the rest of the UK, as we know, runs until May 2015. There will then be another government, whose composition we do not know. The next government may have different policies, priorities and attitudes to such questions as the one you have just mentioned, the currency, as well as to the other enormous questions affecting the

relationship between Scotland and RUK. After the currency, the most enormous question is that of the UK submarine fleet and base. Even supposing discussions with the commissioners or plenipotentiaries—or whatever they are—appointed by the present coalition Government were to get anywhere, I would presume that on the controversial matters they would have to start again after the UK general election. I also look at this from the perspective of a game theorist who says that you think back from the final conclusion. The interest of the current UK Government in the event of a yes vote in Scotland in September is simply to say no to everything.

The Chairman: In spite of the Edinburgh agreement?

Professor Iain McLean: In spite of the Edinburgh agreement. As members will know, the two governments currently have very different interpretations of the Edinburgh agreement. The Scottish Government say in their white paper that the Edinburgh agreement commits RUK in effect to accepting the Scottish Government's position on various matters such as currency and procedures for EU entry. The UK Government say that the Edinburgh agreement says what it means and means what it says, which is that the parties should negotiate "constructively". I think that the UK Government's interpretation of what the Prime Minister signed off is closer to ordinary use of language than the Scottish Government's.

Q3 Lord Cullen of Whitekirk: I declare an interest as the chancellor of a Scottish institution, the University of Abertay Dundee. Is it correct to interpret paragraph 30 as meaning that in the negotiations the Scottish Government will be concerned solely with the best interests of Scotland while the UK will be concerned solely with the interests of the rest of the United Kingdom? In other words, there is a complete split, which is quite different from the existing devolved situation.

Professor Iain McLean: That fact will be governed not so much by the content of the Edinburgh agreement as by the fact that after a yes vote this September the negotiating party will be the Government of the UK, although they will in effect be acting as the Government of the rest of the UK. The position of Scottish MPs will then be an anomaly which we may have to look at in a moment. It is an over-interpretation of section 30, which I do not have in front of me—

Lord Cullen of Whitekirk: Paragraph 30.

Professor Iain McLean: Paragraph 30, thank you, Lord Cullen. It is an over-interpretation of paragraph 30 to say that it commits either side to any substantive position. I think it commits both sides to talking in a spirit of co-operation and to no more than that.

Lord Lang of Monkton: Could I follow up a specific point on the currency, which Professor McLean referred to in the context of the different attitudes on either side? I believe, speaking from memory, that the Scottish Government's white paper says that the pound belongs as much to Scotland as it does to England. My understanding is that it does not belong to Scotland nor to England but to the United Kingdom. That is the legal entity and that would remain the legal entity after Scotland left the United Kingdom. Is that correct?

Professor Iain McLean: That is my understanding, although I defer to the lawyers in the room.

The Chairman: Lord Hope may want to intervene.

Lord Hope of Craighead: I think that is right: it is the currency of the United Kingdom and Scotland would have to find a currency of its own if it cannot agree to share the pound with the United Kingdom. That is how I look at it. As far as the date is concerned, I think that it was chosen for political reasons rather than practical ones. As we know, independence day would be in March 2016 and the next election for the Scottish Parliament will be in May that year. I think the First Minister is keen to be First Minister on independence day, and it is not entirely certain what he will be after the election in 2016.

Q4 Lord Powell of Bayswater: I want to add another aspect of the timing, which is the question of Scotland and the European Union. Am I right that only the UK could negotiate about Scotland, at least until independence was granted, and that Scotland could not negotiate on its own behalf?

Professor Iain McLean: That is my understanding. Again, I would defer to any lawyer who thinks differently, but I have not yet heard a lawyer who thinks differently from that.

Lord Powell of Bayswater: You do not think that a more pragmatic solution might be found? The political reality will be that Scotland has voted yes and therefore Scotland should be allowed to conduct negotiations in Brussels. Perhaps ostensibly that would be under a UK umbrella, but it could nevertheless get on with talking.

Professor Iain McLean: That would depend on whether this was an Article 48 or an Article 49 negotiation. If it was an Article 48 negotiation, I cannot in practice see the UK Government handing that to the Scots, because the UK Government have agendas of their own in relation to the EU. I do not see any possibility of it abnegating that. If the procedure was starting an Article 49 negotiation early, before Scottish independence had been declared, I see that as a more practical route via which Scottish representatives could negotiate directly with the EU. But in that case, the rest of the UK becomes one of the counterparties in the European Council and would express its own views on the matters in dispute in that role.

Lord Powell of Bayswater: There is also the general question of the EU's own timetable, ranging of course from our elections and our presidency of the European Union in 2016 to the elections in France and Germany. All these would combine, surely, to make delay almost inevitable beyond the preferred date for Scotland to have independence.

Professor Iain McLean: I do not know whether “almost inevitable” is too strong, but I would certainly say “very likely”.

Q5 Lord Lexden: Is it possible to distinguish, particularly in legal and constitutional terms, between issues that would have to be settled before an independence day and issues that could be settled later—by analogy with the Irish Free State in 1922, where a large number of issues were settled in the years that followed? A bipartisan approach was established at Westminster to make that possible. We do not know whether that will happen in future but can a distinction be drawn?

Lord Hope of Craighead: One can draw some analogy with the Solomon Islands Act. It may be rather strange to think of that as an analogy, but there are three chapters in the statute that would have to be put in place in the situation that you describe. First, there would have to be something that says that as from the given date—it need not be the independence date, but certainly a specific date—the Westminster Parliament shall have no responsibility for the government of Scotland. At the moment, the position is that it does have that responsibility, and it would simply have to write that out by statute. Secondly, it would have to say that no Act of Parliament after the independence day should extend to Scotland. Thirdly, it would have to do something about the existing laws. In the Trinidad and Tobago example, there is quite a lengthy schedule that preserves existing laws, which is very important for businesses: anybody doing business needs to know what the law is. I would imagine that the agreement would be that existing laws would remain in place unless and until they are altered by the Scottish Parliament. That is the basic structure. One can leave aside all the negotiations in a way, because, strictly speaking, once it has all these powers and Westminster ceases to have powers, you have an independent state. The problem is what sort of state it is and what the state of its currency is.

Lord Lester of Herne Hill: I wonder whether I have got this right—I may not have. Lord Hope, Professor McLean and Lord Mackay of Clashfern all agree that there needs to be paving legislation before negotiations can take place. That is the first point. Secondly, the Scotland Act will remain in force until independence day. Thirdly, if the Scottish Government were to try to proceed without proper paving legislation having been agreed, there would be the probability of a legal challenge because they would be acting beyond the powers conferred by the Scotland Act. Have I got that right?

Lord Hope of Craighead: That is exactly my position, yes.

The Chairman: So in the context of the timetable, we are talking about a great deal of preliminary work involving statutory changes taking place in both Houses of the UK Parliament before negotiation could proceed?

Lord Hope of Craighead: I suppose that one can negotiate and then ratify later. I may be corrected by the academics, but that is one possible scenario. If everybody was of an equal mind and prepared to do this, you could negotiate before any statutes were put forward to ratify what you have decided. That would speed the process up, but I do not see it happening in the present climate until the referendum has been resolved, because the whole effort at the moment is aimed at winning the political battle rather than dealing with the detail.

Lord Lester of Herne Hill: I understand that, but surely anybody with a sufficient interest could meanwhile challenge what was going on, even, on this occasion, up to the Supreme Court?

Lord Hope of Craighead: I do not see a focus for that challenge unless there is something by way of an act of the executive that could be challenged under section 57, or an Act or bill of the Scottish Parliament that could be challenged under section 29. You can do an awful lot without the formality that would give rise to a challenge, if parties are prepared to deal with each other in that way. That is a way of speeding things up, if there is the political will on both sides.

Lord Powell of Bayswater: That last comment is the point I was going to come to. The political reality will look very different, will it not, on the morning after a yes vote? The idea that the Scots cannot even start to appoint their own negotiating team or start negotiating until the UK Parliament has legislated in favour of it will look rather odd and, I would have thought, hard to justify. At the least, there would be pressure for a very quick bill that would go through in a couple of days or something to enable negotiations to start. I find it hard to imagine anything other than that.

Lord Hope of Craighead: I agree with that. I have set out as clearly as I could, in agreeing with Lord Lester, what the legal structure is. However, that does not prevent people from negotiating, provided you know who the negotiators are and provided that you understand that they will report back eventually with a view to a treaty or legislation to give effect to what they have decided.

Q6 Baroness Falkner of Margravine: Lord Hope, you have just said that the big conundrum is the lack of transparency and knowing who the negotiators are. Of course, from the Scottish side, we have *Scotland's Future*, which sets out that negotiations will be led by the First Minister and representatives of the other political parties and from across Scottish public life. The question that arises is who the negotiators would be on the United Kingdom side. We know that Lord Mackay of Clashfern believes that the negotiators on the United Kingdom side should not be Scottish: in other words, not elected representatives in Scotland. There is also speculation as to whether the other assemblies of the United Kingdom, the Welsh Assembly and the Northern Ireland Assembly, should be involved. Do they have a stake in the outcomes? What, in your view, would be the appropriate negotiating team for the United Kingdom successor state?

Lord Hope of Craighead: I think that is a matter for this Parliament. A quick bill, as Lord Powell suggested, would be a way of sorting that out. It has to be clear that they have the authority to negotiate. One has to get over the hoop that an election is coming up, and it would have to be addressed somehow in a way that has cross-party support and that would get over a change of government, if there was one. Then it would be clear that they would report back to this Parliament, with a view to it approving by legislation whatever they recommend. I do not see how the commissioners, given the various interests, could begin unless they were confident that they had the authority of this Parliament to do it.

Professor Iain McLean: I do not consider it at all likely that this Parliament would fetter itself to not include any Scottish representatives in its negotiating team. Scottish MPs are already saying that they, too, are elected by the people of Scotland. Should Parliament and the current Government suggest that, for the sake of argument, the current Chief Secretary should be a member of the UK negotiating team, I think any argument that he should stand down because he represents a Scottish seat would not be well received by him or his party—or, I suspect, by this Parliament.

I do not know whether the Irish analogies that Lord Lexden invited us to consider, but which we have not yet come to, are at all helpful here. I can talk in partial answer to Lord Lexden now or leave it until later.

The Chairman: Please do, I think it is relevant at this point.

Professor Iain McLean: Lord Hope and I briefly discussed both 1921 and 1706 as possible parallels. What happened in those cases was that the two Parliaments appointed

commissioners who were answerable to their Parliament, and only to their own Parliament. In some respects, the relatively optimistic scenario that Lord Lexden mentioned—that you can agree on the principles now, get the legislation ready and continue on the details into the future—is borne out by the 1921–22 process and, to a lesser extent, by the 1706–07 process. One might say that in 1921–22, although there were two countries that had been at war, the agreement that was reached was extremely harmonious. That is the rosy view. The slightly less rosy view is that one of the things that they put off was the delineation of the boundaries of the Irish Free State and Northern Ireland. Having a boundary commission—a subject I have written about and which was fully intended by Lloyd George to mean entirely different things to the Northern Ireland unionists and the Irish Free State—was a precondition of having a treaty. But as everyone in this room knows, it all ended in tears, so much so that when the boundary commission was going to report in 1925, the contents were leaked by its unionist member. The report was then suppressed by both governments and not published until 1969, and we know the border trouble that has existed since then. Luckily, on the precise matter of the border, there is no land analogy and I do not think there will be an out-at-sea sea analogy either. I think the out-at-sea border will be settled quite easily.

There are some matters, including very important ones, that could be delayed. The Scottish Government say in their white paper that they want to negotiate a share of what would be UK institutions: embassies, the BBC, the DVLA and so on. A lot of that, I guess, is sub-statutory and can be sorted out whenever the parties are ready. Even one of the two great matters would not need to be sorted, I think, by independence day—namely the fate of HM Naval Base Clyde. But what would imperatively have to be settled by independence day or before is the currency. We are in a different world in that respect to the world of 1921, as the Irish Free State, and then the Irish Republic, continued to use the pound for a further 50 years. Here, we in the British Academy—I know my colleagues have sent in written evidence—think that the closer analogy is the Czech/Slovak split of 1992–93. The currency union in that case lasted, in effect, three days.

Baroness Falkner of Margravine: I wanted to come back on having commissioners drawn from the UK Parliament and not excluding Scots. Would you hold that position, or would you find it logically consistent with good faith in negotiations and constructive negotiations, if the majority of the Scottish representation was SNP?

Professor Iain McLean: I would say that is a decision for the UK Parliament. I think it is unlikely on principle, as I said a moment ago, that the UK Parliament would agree not to have any Scottish representatives in the discussion. It would be for the UK Parliament to decide which Scottish MPs, or indeed Scottish peers, were among the commissioners.

Lord Hope of Craighead: I think your question is directed to the Scottish end and I would think that is a matter for the Parliament at Holyrood to decide, which of course has an SNP majority. It would ultimately have to pass the bill that gives authority to its commissioners.

Baroness Falkner of Margravine: Actually my question was about who the United Kingdom's, or the successor states, negotiation team would be.

Lord Hope of Craighead: But there has to be an equivalent on the other side.

Q7 Lord Goldsmith: There are two interesting periods: the period between September 2014, assuming that there is a yes vote for independence, and May 2015, when the general

election takes place; and the period between May 2015, when the election takes place, and March 2016, independence day. The question then arises, which many people have commented on, of what the status is of MPs elected for Scottish constituencies during both those periods. There is the additional problem, in the second period, of the possibility that the Government will change. We saw how closely the decision as to who the Government would be depended on the numbers at the previous general election, and one can easily foresee that the numbers would change as a result of Scottish MPs disappearing on independence day. So there are two questions. First, who negotiates for the rest of the United Kingdom and what is the role of those elected for Scottish seats? That could arise in both those periods. Lord Hope, you said that certain things are a matter for the UK Parliament, but that raises the question of who constitutes the UK Parliament for those purposes. Given that paragraph 30 of the Edinburgh agreement includes the need for both sides, as it were, to negotiate in the best interests of both people, do you include people for whom the accountable body is the UK Parliament but whose interests are in Scotland because they are going to be part of Scotland? Secondly, more generally, what would the status of Scottish MPs be in that period between the next general election and independence day in 2016?

Lord Hope of Craighead: I have not thought this through completely but it seems to me that the Scottish MPs would be elected for the Parliament: they would be elected to serve for the entire period of the Parliament in which they would begin to serve. In the initial period between the referendum date and independence day, I imagine they would have the full powers of any member entitled to speak and vote on any issue without being excluded. That is their current position. After that, they are still there. There is a question I am very sensitive to because I live in Scotland and I have to pay my travel, if it is not reimbursed for me, over whether their travel could be reimbursed after independence day, and that might have some sort of practical effect. There might be a question about the expenses of their constituency offices. These sorts of practical things may create a situation of their own. But technically I would have thought that they would be elected to serve for the Parliament until the Parliament is brought to an end by, let us say, a vote in the Commons.

Q8 Lord Goldsmith: Perhaps I might put a question to Professor McLean that might bring a slightly less legal answer. I am the last person to criticise giving a legal answer, but I wonder whether there is a more political answer as well.

Professor Iain McLean: The legal answer being what it is, how would Scottish MPs in the 2015–20 Parliament behave in practice after independence day, or in the run-up to independence day? This question has two parts, one of which Lord Goldsmith has already alluded to. One part is the contingency that the UK government elected in 2015 would lose their majority when the Scottish MPs go. This has obviously occurred to all of you, but if the numbers are such as to produce that result, the implication is that the UK Government have every incentive not to agree in a hasty way to the matters in which the RUK and Scotland are the counterparties. That makes it all the more likely that independence day could not be in March 2016. If it was, there would be a number of unsettled matters. Speaking as a political scientist, I can see that there would be a very powerful incentive for the Scottish MPs elected to the 2015 UK Parliament not to resign at least until after the 2016 Scottish Parliament election, because we do not know what Parliament will be elected in Scotland. Should the Parliament that is elected in Scotland decide that independence was a terrible mistake and wish to abort the negotiations—however small that likelihood is—if Scottish MPs had voluntarily resigned their seats in March they would be looking a little silly in May

or June. I would predict that they would not go voluntarily before May or June 2016 at the earliest.

Lord Goldsmith: Looking at that second period between the 2015 election and independence day, some people suggest that the UK government during that period would be a lame duck because they would be looking at the possibility of disappearance relatively soon. Do you have any comment on that?

Professor Iain McLean: If those are the electoral numbers, those will be the electoral numbers. Of course, there is an interaction with the Fixed-term Parliaments Act 2011. Until we know the constituency numbers, we probably cannot go much further than saying that the procedures laid down under the Fixed-term Parliaments Act would be central to any calculations by the next UK government.

Q9 Lord Lester of Herne Hill: Yesterday, Lord Newby was asked by someone in the House about the implications for the BBC of Scottish independence. It is quite a good example to ask you about because broadcasting does not stop at a land frontier. There are EU free speech rules as well as the European Convention on Human Rights that at the moment govern the BBC and its listeners. In the negotiations on the BBC, am I right in thinking that if Scotland is not in the EU there would be a question about the application of the EU broadcasting rules? Whether it is in or out of the EU, the European Convention would provide at least some common standards, because presumably Scotland and the UK would continue to be bound by it. I hope that is not too technical a question.

Lord Hope of Craighead: I am not sure about that, with respect. The United Kingdom is a signatory to the treaty that created the Council of Europe. Scotland would be a new state and it would have to become a member of the Council of Europe. There is a void there as to whether it would have actually crossed the bridge and whether the people of Scotland would be covered by the European convention until they become signatories to the treaty and assert it as part of their law. I do not know exactly how they propose to treat that, because there is no discussion of it in the white paper which the SNP issued.

Lord Lester of Herne Hill: In trying to work out not only what you call the BBC but, more importantly, how you guarantee freedom of communication in broadcasting after independence—given that it does not stop at the land frontier—how would they negotiate on the European obligations binding the UK but apparently not binding Scotland?

Lord Hope of Craighead: Scotland could have a constitution. It would take a long time to agree it, of course, but it could have a constitution that contained the rights that are set out in the Human Rights Act 1998 and the schedule. That could be done fairly simply. Without that, there is a question mark over exactly what the right to free speech is, except on what the judges divine from the common law, which would be the only anchor they would have.

The Chairman: We will go back to Lord Lang, who I think is the only member of the committee who has been a Scottish MP.

Q10 Lord Lang of Monkton: Yes, I think that is right, Lord Chairman. Happily, I do not plan to revert to that status in any circumstances. I would like to seek clarification of the position of Scottish MPs after independence, who have been elected, as Lord Hope said, for a Parliament. This matter was raised in the House of Lords a week or two ago and the

Advocate General for Scotland, Lord Wallace of Tankerness, said that that would be a matter for negotiation, which elicited a gasp around the chamber. I heard views expressed afterwards that some sort of statute would need to be passed to clear up the position. Surely, if they are no longer citizens of the United Kingdom, as most of them would no longer be, and if they no longer had constituents whose interests they had been elected to represent, that would seriously undermine their status. Is there no statute that clarifies the position they would be in in that situation, and if there is not would we therefore need to form new legislation or, as the Advocate General said, reach a negotiated settlement?

Professor Iain McLean: I query your premise about UK citizenship. The Scottish white paper says that it will offer Scottish citizenship to various classes of persons and it is quite comfortable with them holding UK citizenship, as they all would on independence day. Therefore, I assume by default that Scots, including Scottish MPs in particular, will continue to be UK citizens until some legislative change is made if the UK chooses not to offer UK citizenship to those living in Scotland, but that would be its choice. Beyond that, I cannot go beyond my answer to Lady Falkner and Lord Goldsmith: that this would be highly political and that whatever negotiations Lord Wallace speaks of—and he is speaking for the present Government—might take a different form under the new UK government. I think that the spirit of self-abnegation would not be particularly strong among Scottish MPs, at least not until the result of the 2016 Holyrood election was known.

Lord Hope of Craighead: The Trinidad and Tobago legislation addressed the issue of nationality. That would have to be put into any independence measure. There could be a continuing citizenship until somebody declared themselves a citizen of Scotland. There would be that option, which I suppose could be available under the Scottish legislation. But this would be a matter of detail for the independence measure. As a matter of negotiation, that would be fairly simple to solve. I do not think that is one of the big obstacles to independence.

Q11 Lord Hart of Chilton: Lord Hope, you spoke in the debate about what the impact on the Supreme Court would be in the event of independence. Perhaps you could expand a little on that. Lord Mackay has a paragraph in his note on the same subject. I would like to hear a little more from you on that.

Lord Hope of Craighead: The position at the moment is that under the Constitutional Reform Act 2005, among the 12 Justices there have to be Justices—no numbers are put on it—who have experience of the practice and laws of all parts of the United Kingdom. Maintaining the tradition in the House of Lords has resulted in there being one from Northern Ireland and two from Scotland. Once they join the court, they become members of the court, with all the powers of every other member. They sit as much, indeed much more, on English appeals and Northern Irish appeals as they do on Scottish appeals. There is every reason to maintain the existing Justices in position because they are there as members of the court, having been appointed to serve the court on behalf of the UK jurisdiction. That situation has to end in the event of a new appointment. The Judicial Appointments Commission would not be looking for somebody from a foreign state, so there would be that break in the tradition, which I described in my speech in the debate.

As far as the jurisdiction is concerned, of course Scottish appeals would cease to come south but some provision would have to be made, as you find in Commonwealth legislation, for the continuing appeals. New Zealand, for example, retained the right of appeal to the Privy Council. When that was ended, it was decided that appeals that had already gone

through the Court of Appeal in New Zealand would not be subject to the measure that stopped appeals to the UK Court of Appeal. That has meant that one or two cases have come from New Zealand since the jurisdiction was stopped. So a decision would have to be taken as to whether appeals that had been marked and were pending hearing, or perhaps even being heard, on independence day should continue to be within the jurisdiction of the Supreme Court. But it would be impossible to mark a new appeal after independence day, if that was to happen.

Can I add one footnote? There is an important fact to consider in the maintenance of the present team: Wales. There are a number of cases—I sat on one, and one is being heard next week—under the devolution system for Wales. To be frank, the people who know about devolution—the right language to use and its feeling—are the Scottish justices who have dealt with this for a number of years. There is a strong case, until there is a Welsh member of the court, to maintain the Northern Irish and Scottish representation that we have, because we have that balance, which gives some degree of confidence to the Welsh that their position is being understood.

The Chairman: Do you want to pursue that, Lord Hart?

Lord Hart of Chilton: I do not think so. I was just looking to see whether Lord Mackay said anything that it might be useful to have Lord Hope's comments on. He said, "However, two independent states could agree to have a supreme court in common although if this were to be agreed the constitution of that court would require to be adjusted to take account of the new constitutional position of the two nations". I suppose that one might regard that as fanciful.

Lord Hope of Craighead: I do not think it is entirely fanciful. I think that the identity of the judicial body is important. There is the Judicial Committee of the Privy Council. That is where appeals from New Zealand went to. They are the same judges, to all intents and purposes, but there could be privy counsellors from Scotland who would continue to exist, I suppose. It could be handled through the Privy Council, but I think the atmosphere in Scotland at the moment is very much against that. I do not think they like appeals coming south to any court. Lord Mackay is right: it could be done if they wanted to do it.

Q12 Lord Cullen of Whitekirk: Lord Hope, you mentioned the 2005 Act. Can you remind me of the position of the existing so-called Scottish Justices? Were they appointed specifically to represent Scotland or were they appointed simply to be members of the Supreme Court?

Lord Hope of Craighead: They were appointed to be members of the Supreme Court, and that is how one regards oneself. It is very significant, because of course we have to share the Scottish jurisdiction with the English appointees but they regard themselves as part of the court of the United Kingdom.

Lord Cullen of Whitekirk: So I take it that when an advertisement is put in the papers, it does not say specifically that applications from England will not be entertained?

Lord Hope of Craighead: No, it does not. I sat on the appointments commission and we were very careful in the design of the advertisement for that very reason. We are very anxious not to identify people as representing their individual nations. Part of the strength of the court is the way in which all the jurisdictions come together and pool ideas.

The Chairman: Although, Lord Hope, you indicated in your previous answer that people are identified by nationality even if they are not recruited in that way.

Lord Hope of Craighead: Well, not nationality, Lord Chairman, but by experience. You have to have knowledge of the laws of Scotland in order to be able to guide the court in how it deals with a Scottish appeal. That sort of experience is necessary, just as you need people from England with Chancery experience or commercial experience or whatever it might be.

Q13 Lord Lester of Herne Hill: When the Constitutional Reform Bill was being debated, Lord Cooke of Thorndon attempted to widen the pool for the Supreme Court to include Commonwealth judges. He failed, for various reasons. The Court of Final Appeal in Hong Kong allows a foreign judge to sit on that court in order to broaden its composition and cosmopolitanism. It would be theoretically possible, would it not, to imagine either the Judicial Committee of the Privy Council or a revamped Supreme Court at least allowing for the appointment of Scottish judges after independence to either of those bodies in order to deal with the kind of thing I was talking about before, such as European convention issues and others that are part of the glue that binds Europe's states at the moment.

Lord Hope of Craighead: I see no problem with the Judicial Committee of the Privy Council because anybody who has held high judicial office and is a privy counsellor is competent to sit on the Judicial Committee. That avenue would be open even after independence. There is no reason why, if they thought it was helpful, they should not invite a privy counsellor to sit, as they used to do before Lord Cooke was a member of this House and a number of New Zealanders came, and we had a Caribbean judge as well. That is easy. I think the Supreme Court is quite different. I do not see how that would work because there would be no Scottish appeals coming any more. If not strictly legally, the position is that all parts of the United Kingdom would forget about Scotland. You could not put somebody in there from Scotland under that system.

Lord Goldsmith: Perhaps I can widen this slightly. It is perfectly possible to have two or more sovereign nations agreeing on a common appeal court. There are not many examples, but the Caribbean Court of Justice is one. The Privy Council is somewhat different. My question to Lord Hope is: would there be benefits to the people of the rest of the United Kingdom and, indeed, Scotland by continuing to have a common court able to develop almost a common law? I know that Scots law is different from English law and the English do not always understand that—we just think you have strange concepts that we cannot pronounce properly, but otherwise it is the same—but from your experience, both sitting in Scotland and in the Supreme Court here, do you think it would be advantageous to continue to have a common court to deal with the most difficult issues so that the people of Scotland and England got the same answer?

Lord Hope of Craighead: I do believe that. Part of the background is that a great deal of legislation that affects commercial matters applies throughout the United Kingdom, and much of that would continue after independence. There is great value in having a voice on the court that interprets a provision that has to apply both to Scotland and to the rest of the United Kingdom. The problem is more an emotional one, or you might say a political one. I do not think that the atmosphere in Scotland would go along with the idea of being told what to do by London. That is the reality, and it colours so much of this debate. There is a

great deal of resistance, but in principle what you say is right and I would personally regard it as very desirable.

Q14 Lord Lang of Monkton: I am interested in our witnesses' views on the principles underlying the apportionment of assets and liabilities between an independent Scotland and the remaining continuator United Kingdom. The Scottish Government's white paper seems to assume that Scotland has an automatic entitlement to a share of all assets. It is slightly less clear on liabilities, as one can understand. But the UK Government's view, as expressed in their departmental papers, is that the UK as the continuator state would be the prime inheritor of those assets: fixed assets would remain with the nation where they were located, but moveable assets and liabilities would be a matter for negotiation, with the UK in the position of owner. Is that correct and are there any underlying legal principles or statutes that support that position?

Lord Hope of Craighead: That is exactly as I see it. The fixed assets point is easy. Ownership of things built above ground adheres to the owner of the ground. It is a simple position and the *lex situs* determines who owns property there. Moveable assets, debts and credit balances are different. That is for negotiation. I suppose the banks would maintain that if they had a head office somewhere, the amount of assets they held should be attributed to the place where they had their head office, but that is much more open to question. Ultimately, it comes down to negotiation. Of course, it is a question of negotiating one balance against another and there are interests on both sides to be balanced out.

Professor Iain McLean: I agree with Lord Hope that the assets question is relatively easy, as long as the correct distinction is made between an institution and an asset. Your legal adviser gave a clear answer on this to a committee in another place a couple of weeks ago, and I am sure he can repeat it to you, so I will not attempt to usurp him. On the liabilities side, according to the Scottish Government's white paper and other commentators, there seem to be three possible positions. The Scottish Government say that they are willing to accept a historic share of the UK's liabilities and they choose a start date for that historic share that happens, by strange coincidence, to be favourable to the political position of the current Scottish Government. I think this is a non-runner. The only base year possible for a historic share is 1707. The data are missing for the first 200 or 250 years of that apportionment. That leaves in play population share, which is easy as everybody knows what it is, and share by GDP, which is slightly trickier.

The Scottish Government's white paper insists that, in 2015 at any rate, on what it regards as the proper apportionment of North Sea assets and entitlement to future revenue flows from the North Sea, Scottish GDP per head will be greater than the rest of the UK's GDP per head. The numbers they provide from official statistics support that for independence day, whatever they may say about independence day plus one. But it is an implication of that position that since among the major things to be apportioned is the UK's public debt, creditors would look to relative GDP as one of the criteria of creditworthiness. If the relative GDP per head of Scotland is higher than that of the rest of the UK, that might lead to an argument that Scotland should take not less but more than its population share of debt. I cannot imagine that argument being acceptable to the current Scottish Government. The realistic territory we are in is population share or GDP share of liabilities. I do not think any other apportionment is worth serious discussion.

Rt Hon. Lord Hope of Craighead KT and Professor Iain McLean, Professor of Politics at Nuffield College, University of Oxford—Oral evidence (QQ1-15)

Lord Lang of Monkton: While we are on the subject, can I tempt you on to the area of defence and the location of the assets at Coulport and Faslane? How would you contemplate those being apportioned? Would it be entirely a matter for negotiation?

Professor Iain McLean: Fixed assets have already been covered by Lord Hope's answer, I think.

Lord Lang of Monkton: Is a submarine moored alongside the base a fixed asset? Probably not.

Professor Iain McLean: No, a submarine is not a fixed asset.

Lord Lang of Monkton: It is very mobile.

Professor Iain McLean: Then there are principles of international law and previous independence discussions, and at that point I bow out of the discussion and leave it to the lawyers.

Lord Hope of Craighead: The same would apply to aircraft in an airfield in the north of Scotland. They can fly off the airfield. Moveable things are open to negotiation. I was talking about the buildings, the dockyard and so on, which are fixed.

Q15 Lord Cullen of Whitekirk: The stated intention of the Scottish Government is to maintain shared services in certain respects, for example research councils. It appears to be envisaged that there should be accountability in that respect to the Scottish Government and the Scottish Parliament. Of course, we are talking about organisations that are presently UK-based and serve the whole United Kingdom with assets in different places. Can you see how accountability to the Scottish Government and Scottish Parliament would work alongside that to United Kingdom organisations, particularly where there may be different policies being pursued in Scotland from the rest of the United Kingdom?

Professor Iain McLean: These seem to be contractual matters post-independence—vital to those affected, as are many others, but not central to the independence act. As I envisage it, the Scottish Government would come to the RUK government—and this discussion would start before independence day—saying, “We would like to continue to have access to the UK research councils. Can we talk terms?”, and the RUK government, in the spirit of the Edinburgh agreement, should be willing to talk terms. Whether those terms would include Scottish representation on—well, on what? In the example of the research councils, these are in a structure that ultimately reports to BIS. The rest of the UK negotiators would be saying, “On what body do you wish to see representation?”, and the discussion would go from there. I do not know where it would go, but as it would be discussion between two parties about whether or not to enter a contract, clearly the final contract has to have the approval of both parties.

Lord Cullen of Whitekirk: I was thinking that there might be strain due to the effect of policies in one part of the United Kingdom being different from another and consequently a difficulty in holding the whole thing together.

Professor Iain McLean: That depends on whether you regard a research council as a distributor of money according to certain principles, in which case it is important to know

certain things: where does the money come from and in what proportions, and who sets the principles of distribution? On this one, I am relatively upbeat, if that is the right word. It is a contractual matter and it will be up to the two parties to agree a contract, which the UK Government have said they would do in the spirit of the Edinburgh agreement.

Lord Hope of Craighead: I agree with what has just been said. If one thinks of other shared services, such as the National Health Service and the ability of specialist hospitals to provide assistance across the border, that could be solved by contractual mechanisms. There is also the police service and the cross-border warrants system. There are cases that examined this, first, in relation to the Irish position and then in relation to Scotland. If somebody is wanted in England but happens to be in Ireland, there is a system of the signing of warrants that would enable them to be exchanged relatively easily. This is done within something that is rather like the common travel area. They do not need to go through the European arrest warrant system because in dealing with Ireland we regard ourselves as dealing with a relatively friendly and co-operative nation with a similar system of justice. That kind of thing could be perfectly well shared, provided there is a legal structure put in place to give effect to it.

The Chairman: Thank you both very much. You have been enormously helpful and have helped us to get clarity at the beginning of our evidence on these complicated matters. Are there any points that either of you felt you wanted to be sure that the committee understood, which we have failed to address?

Professor Iain McLean: I would only reiterate that the British Academy and the Royal Society of Edinburgh have supplied background evidence, and we would be happy to supply any further evidence should you wish.

The Chairman: That is very kind. Thank you. Lord Hope?

Lord Hope of Craighead: No, Lord Chairman, I do not have anything to add. The questions have covered the ground very fully, if I may say so.

The Chairman: Thank you very much for your time and your thoughts. It has been very helpful.

Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, Professor Alan Boyle, Professor of Public International Law, University of Edinburgh and Professor Stephen Tierney, Pro
Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change, Professor Alan Boyle, Professor of Public International Law, University of Edinburgh and Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh—Oral evidence (QQ16-26)

[Transcript to be found under Professor Alan Boyle](#)

The Rt Hon. the Lord Mackay of Clashfern KT—Written evidence

Scottish independence: constitutional implications for the rest of the UK inquiry

Submitted by Lord Mackay of Clashfern KT PC

Formerly a Scottish Queen's Counsel, Lord Advocate, Judge of the Supreme Courts of Scotland and Lord Chancellor of Great Britain

In terms of the Scotland Act 1998 the Parliament of the United Kingdom has the sole authority to legislate on the Constitution of the United Kingdom as this is a reserved matter. The referendum would not of itself alter this position, but I would expect this authority to be exercised in the light of the result of the referendum. In the event of that being in favour of Scottish independence I would expect the UK Parliament to introduce legislation as a preliminary stage to set up machinery for the negotiation of the arrangements. I envisage the negotiators for Scotland to be nominated by the Scottish Government with approval by the Scottish Parliament, and those for the remainder of the UK by the Government of the UK with approval by the UK Parliament. But I would expect these arrangements to be on the basis that they should be handled by those who are not Scottish. The negotiators would be accountable to those responsible for their appointment.

I would fervently hope that the negotiators would be able to reach agreement and if so the UK Parliament would legislate to give effect to the agreement. If not, the UK Parliament would need to legislate to resolve the issues on which agreement had not been reached. In my view it would probably be wise to leave the negotiators as free as possible at the outset.

The UK in the past has given independence to colonies such as the Solomon Islands in 1978 and Belize in 1981 (when I was a member of the government). The terms of the relevant Acts are instructive in relation to some matters that have to be dealt with, but the closest in some ways is the legislation that led to the Republic of Ireland starting with the Government of Ireland Act 1920 which created a kind of devolution analogous to that of colonies. This was followed by a treaty and finally by the relevant provisions of the Statute of Westminster. An important aspect of the legislation which is not appropriate for negotiation is what the remaining part of the UK should be called after separation.

How long these negotiations will take I find it difficult to say. I think the result of the UK General election presently scheduled for May 2015 is likely to affect the negotiations, and its imminence may affect getting the negotiations under way.

In the debates in our House on the European Referendum Bill it was suggested the in some situations having a time limit could be detrimental to successful negotiations.

All members of the UK parliament would be unaffected until legislation was passed affecting them. In particular Scottish MPs elected in 2015 would have a place and voice in the UK Parliament unless legislation had been passed before that date to affect their election or after that election to affect their status.

The jurisdiction and membership of the UK Supreme Court after independence would depend on the terms of the legislation effecting independence. I would expect that the UK Supreme Court would become a court only of the rest of the UK and that the present Supreme Courts of Scotland would become truly so. However two independent states could agree to have a Supreme Court in common although if this were to be agreed the constitution of that court would require to be adjusted to take account of the new constitutional position of the two nations.. Unless such an arrangement were agreed I

would expect those whose practical experience was mainly in Scotland no longer to be appointed to the UK Supreme Court. In this event the position of those in that position who are already in that Court would require special consideration. I expect that the existing laws of the United Kingdom affecting Scotland would continue to be the law of Scotland unless and until altered after independence by the Scottish Parliament. This would have benefits for the rest of the UK.

11 February 2014

Mr Alex Massie, journalist, commentator and regular columnist for the *Spectator*, Ms Mandy Rhodes, journalist and editor of *Holyrood* magazine, and Mr David Torrance, journalist, commentator and regular columnist for the *Herald*—Oral evidence (QQ45-65)

Mr Alex Massie, journalist, commentator and regular columnist for the *Spectator*, Ms Mandy Rhodes, journalist and editor of *Holyrood* magazine, and Mr David Torrance, journalist, commentator and regular columnist for the *Herald*—Oral evidence (QQ45-65)

Evidence Session No. 4

Heard in Public

Questions 45 – 65

WEDNESDAY 19 MARCH 2014

10.30 am

Witnesses: Alex Massie, Mandy Rhodes and David Torrance

Members present

Baroness Jay of Paddington (chairman)

Lord Cullen of Whitekirk

Baroness Falkner of Margravine

Lord Hart of Chilton

Lord Lester of Herne Hill

Lord Lexden

Lord Powell of Bayswater

Baroness Wheatcroft

Examination of Witnesses

Alex Massie, journalist, commentator and regular columnist for the *Spectator*, **Mandy Rhodes**, journalist and editor of *Holyrood* magazine, and **David Torrance**, journalist, commentator and regular columnist for the *Herald*

Q45 The Chairman: Good morning, and thank you all for coming to talk to the committee. We are having a reasonably focused look at this issue, which has many different strands, and on which discussion and argument—not to mention the campaigning—are spread far and wide. If we ask you specifically constitutional and legal questions, forgive us if that seems to be rather narrowly focused, but that, of course, is our main responsibility.

We have taken extremely interesting evidence from authoritative, academic sources and from ministers, and so on, over the last few weeks, but it has been what I could broadly describe as cautious. That is perhaps not surprising, given the speculation in terms of responsibilities and so on which may change after the referendum in September. We are inviting you perhaps to go a bit further. We would be grateful for some steers on matters that we have had some slightly dead-bat answers on from other sources.

With that background, perhaps I can start by saying that one of the things that the UK Government and Westminster ministers have said consistently is that they are not prepared

Mr Alex Massie, journalist, commentator and regular columnist for the Spectator, Ms Mandy Rhodes, journalist and editor of Holyrood magazine, and Mr David Torrance, journalist, commentator and regular columnist for the Herald—Oral evidence (QQ45-65)

to talk about the pre-negotiation of any particular terms before the referendum. Yet we have had, for example, written evidence from Nicola Sturgeon that says that in a way makes it difficult for people to have a clear picture of what they are going to be voting for or about. We have also had straws in the wind, if you can call them that, about a currency union, the BBC and various institutions from Westminster ministers that give an indication of specific positions on some matters. We would be interested in your opinion about whether the UK's stated policy of no negotiation before the referendum is realistic.

Alex Massie: It seems to me that the Scottish Government's position on pre-negotiation is curious, even quixotic, in that the Scottish Government appear to believe that the UK Government should help the Scottish Government achieve their objectives. They get terribly upset when the UK Government decline to do that and so assist the SNP. I am not qualified on the legal aspects, but it seems that from a political point of view the UK Government's position is transparent and sensible. Why give the nationalists what they want? The thought of pre-negotiating any aspect before the result is known strikes me—if I could be incautious—as idiotic. There is no upside to the UK Government doing that. Why should they be expected to, simply because the SNP think this will help make up people's minds? The UK Government are not a neutral arbiter in this. They are not drawing up the rules of engagement for the referendum; they are an active participant in it. That seems a perfectly reasonable position for the UK Government to have.

Q46 The Chairman: Do you see any inconsistency in making that broad statement and yet indicating some particular positions? I mentioned the obvious one, which is currency, but there also is the relationship with the European Union et cetera.

Alex Massie: On the currency, it seems to me that the nationalist position is that the nationalists will make a proposal and the UK Government are supposed to accept it. I think that is unrealistic. I am not sure I would term it pre-negotiation. In the aftermath of the vote it is quite possible that things would change. By definition, this is an uncertain process and I do not see how you can realistically expect the UK Government to spell out their negotiating position after a result that they do not want to see happen.

Mandy Rhodes: You ask if it is realistic. I think that not only is it not realistic, but pre-negotiation is happening. It is fair to say that we are having a very different debate in Scotland from the one that is happening in the rest of the UK; you are having to do quite a big catch-up on it.

The Chairman: I am very interested in that and would like you to pursue that.

Mandy Rhodes: The SNP has successfully shifted what we would call the “Overton window” so that what has gone from being quite a ridiculous idea of independence has become credible. The white paper makes a whole load of assertions that I guess you could call part of a pre-negotiation. The UK Government have had to respond quite heavily. The currency assertion rules out a negotiation after a yes vote. Where I disagree absolutely with Alex is that the UK Government are also my Government, as well as the Scottish Government. Therefore, I think the onus is on both governments to try to provide us with information that allows us to make credible decisions at the end of this procedure.

Mr Alex Massie, journalist, commentator and regular columnist for the Spectator, Ms Mandy Rhodes, journalist and editor of Holyrood magazine, and Mr David Torrance, journalist, commentator and regular columnist for the Herald—Oral evidence (QQ45-65)

David Torrance: I agree with Mandy on the white paper point. That is certainly a negotiating document, as well as a manifesto, as well as a vision of independence. It is doing lots of different things at once. I agree with Alex that there ought to be no formal pre-negotiation. That would seem a very curious thing to do in advance of an independence referendum. It presupposes the result. There has been informal pre-negotiation though. You mentioned the currency. That was an unequivocal statement from the Chancellor of what presumably the UK Government's position would be. On a lower level, there was a concession in one of the Scotland Analysis papers produced by the Treasury that appeared to contradict the Home Secretary on the position as to dual citizenship. One of these papers conceded that that was very likely to happen. There is movement in the undergrowth, but it is below-the-radar stuff. It is informal rather than formal. I think that is inevitable—just as, looking ahead to perhaps another referendum on the UK's membership of the EU, there would be similar movement between London and Brussels.

Q47 Lord Powell of Bayswater: Does it not mean that those who are going to vote yes in the referendum will be voting in the dark? They will have no clue what they are voting for other than not being part of the UK. They have the proposals in the Scottish white paper, which, as you said, are largely negotiating ideas, but they will not really have any knowledge of the negatives, the downsides and the possible obstacles. That is a rather unhealthy situation. If there was a real referendum in the Crimea, it would be rather clearer what the downsides might be. For Scotland though, that seems not to be the case.

Mandy Rhodes: The other issue is that people who are voting in the referendum also know that they are not voting for the status quo. There is uncertainty on either side. I think we are all probably agreed that some sort of pre-negotiation, however that is tailored, needs to happen. Instead, it is a battle. One UK minister said to me, "Well, they started it first", in relation to the white paper.

David Torrance: That sounds rather like playground language, but to an extent it is true that the onus is on the Scottish Government. The burden of proof lies with them. I think that is clear. However, as Mandy says, it is clearly in the UK Government's favour to respond and set out a degree of information—although not, from their point of view, to go too far. The burden of proof in terms of supplying information was always with the Scottish Government. To an extent, this is the situation that we find ourselves in in any election, or any referendum. All these things are hypothetical to a degree. Even approaching a general election, the incumbent government can say what they intend to do, but that might or might not happen; likewise with the opposition. The electorate have to reach a decision based on the information put before them. They can have only a general idea of what is likely to happen, rather than what will.

Lord Powell of Bayswater: I suppose that the British Government's view might be that uncertainty about the consequences is a greater deterrent than offering a few clues as to what the results might be.

Mandy Rhodes: Yes, absolutely.

Alex Massie: Absolutely. This makes perfect sense. It is because there is not any grotesque grievance to which Scottish independence is the only possible solution that the SNP and the Scottish Government would have us believe that Scotland's constitutional future should be

Mr Alex Massie, journalist, commentator and regular columnist for the Spectator, Ms Mandy Rhodes, journalist and editor of Holyrood magazine, and Mr David Torrance, journalist, commentator and regular columnist for the Herald—Oral evidence (QQ45-65)

dictated by a cost–benefit analysis. I think you are right, Lord Powell. Fundamentally, this is an issue of principle and, therefore, the uncertainty that inevitably follows a yes vote is the sort of thing that, if you are a true believer, is not going to concern you. However, from the UK Government’s point of view, the imponderables are a useful tool, ploy, or path to take in persuading people that it is more trouble and more complicated than it is worth.

Mandy Rhodes: It is such an adversarial situation, because the stakes are so high. That means that our role as journalists is incredibly difficult, complex and at times quite sensitive. That is one reason why, in my role as editor of *Holyrood*, I went back and have interviewed quite a lot of people from the first time round—a lot of people who now sit in the Lords. That has been quite enlightening, but it leads me to the conclusion that it is very difficult to trust either side.

Q48 Lord Powell of Bayswater: There is one other hole: what are the constitutional processes that are going to be required to deliver it? Perhaps you could tell us what you think the constitutional processes are.

David Torrance: We can only look at historical precedent for that. People often forget that there are several precedents around the world, but also one much closer to home. Perhaps it is understandable that people do not want to talk about the Irish Free State in the early 1920s, but in certain constitutional respects there are parallels. The UK has experienced the loss of some of its territory before—an integral part of the United Kingdom since the union of 1801. If you look back at coverage of those events, some of it is strikingly familiar to what is discussed now.

Then, as now, if there was a yes vote—and, assuming independence was successfully negotiated by March 2016, as the Scottish Government say—there would need to be legislation at Westminster. The Scottish Government acknowledge that, and have issued a paper setting out how they see this proceeding, just as various Acts of this Parliament determined the secession of the Irish Free State in the early 1920s. Indeed, Westminster carried on legislating. The last piece of legislation dealing with Ireland was the Ireland Act 1949, which recognised Ireland as a republic. There is a clear precedent there, not just internationally, but much closer to home. That may change from case to case, but it is a fairly clear process.

Lord Powell of Bayswater: We have, of course, looked at that. Lord Lexden on my left is a walking encyclopaedia on the subject. It is not an exact parallel, but it has some useful pointers.

Mandy Rhodes: In some respects devolution is much more complicated than independence. We have already managed to deliver two packages of devolution quite successfully. We have seen governments work very well together. Even in this process, we have seen the Edinburgh agreement put together and signed by two governments who are essentially fighting over very high spoils.

Q49 Lord Lexden: I am charged by my colleague, Lord Lang of Monkton, to say that he passes on his apologies for the fact that he is unavoidably prevented from being here. Given the uncertainty and huge significance of the discussions and negotiations that will follow a yes vote—and the not insignificant discussions and negotiations that will follow a no vote about

Mr Alex Massie, journalist, commentator and regular columnist for the Spectator, Ms Mandy Rhodes, journalist and editor of Holyrood magazine, and Mr David Torrance, journalist, commentator and regular columnist for the Herald—Oral evidence (QQ45-65)

Scotland's future relationship with the rest of us—do you see the case for a second referendum?

Alex Massie: From a journalistic, self-interested point of view, yes.

Lord Lexden: But from the country's point of view?

Alex Massie: Certainly not. I am not sure that anyone would want to go through all this again. There are obvious practical difficulties. If you get a split decision, if you like, between the two referendums, you then get into very awkward positions. You are correct that the complexities of the situation are considerable, but it would be a question of making the best of them. I do not see politically how you could get away with having a second referendum.

Mandy Rhodes: You could have one at the same time as the EU referendum.

Alex Massie: It might make logical and legal sense, but politics trumps legal and constitutional matters.

David Torrance: There is an academic argument for a second referendum. There was one made by the Constitution Unit in UCL. The 1980 referendum in Quebec was envisaged as the first of two. Had that been a yes vote, it would have been followed by another referendum on the result of the negotiations. There is a case for that, but politically it is a hard sell. A while ago, the then Secretary of State for Scotland, Michael Moore, toyed with the idea, but it was quickly dropped.

Q50 Lord Lester of Herne Hill: I am wondering whether you would agree with me that we should celebrate the fact that the referendum is providing a great deal of information—unlike, for example, my experience of the Irish referenda. As a blow-in of West Cork, I follow closely what happens there. My experience there is that the Irish people are in the dark as to several of the referenda, because it is incomprehensible to understand either the questions or the propaganda. Would you agree that, leaving out this word “negotiation” or “pre-negotiation”, the reality is that everyone concerned is providing a great deal of information and ideas, and that the Scottish people will benefit from that, whatever they decide in the end?

Mandy Rhodes: That is true. There is a lot of information. There are still a lot of people that will say, until 18 September, “We have not had enough information”, but there is a lot of information. What is striking, regardless of the result, is that everybody is talking about it. It has revitalised the idea of public meetings. People are going to events, and they are being informed. That has to be a good thing.

Q51 The Chairman: May I ask Mandy Rhodes something that is relevant to this? When you spoke earlier about the appreciation gap between the Westminster Parliament or the Westminster body politic and everybody north of the border, where do you think the real problems arise?

Mandy Rhodes: We have been talking about it for quite a long time and, for us, with an SNP Government in its second term, people have got used to it. It has become part of our lexicon; it is part of the norm. This always gets me into trouble, but I think that the media

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down south have taken a long time to catch up. They are not there and why should they be? This is our day-to-day bread and butter: we are immersed in it; we all talk about it all the time, so every nuance is picked up on. Yet there are other things going on in the world.

Lord Lester of Herne Hill: I want to go back to Lord Lexden's question about a second referendum. I am sure you are not intending to rule out what would happen if there was a no vote followed by the Lib Dem solution—or, Gordon Brown's Gladstonian solution—of federalism and a written constitution, and so on, when one would need to have a referendum on a completely different constitutional settlement. You are not suggesting that would be wrong, are you?

Alex Massie: No, but presumably, that would have to be a UK-wide referendum, which is a very different affair. It then leads to all sorts of problems. What if England voted no to that, but Scotland voted yes? Politically, I can see why you would not wish to go down that road. It would be quite bold to do so, perhaps.

Q52 Baroness Wheatcroft: May I take you back to this suggestion that there is an awful lot of information around? I am slightly bemused by that. There is a lot of speculation. There are a lot of wish lists, but are you really saying that when people go to the polls they are going to have clear information about what it is they are voting for?

Mandy Rhodes: They have a range of options. You are absolutely right, though. The white paper is essentially an SNP manifesto.

Baroness Wheatcroft: It is a wish list.

Mandy Rhodes: Equally, it is no surprise that none of the UK analysis papers is saying, "independence sounds like a good idea." With respect, I would not call the white paper a wish list. There are things in there that are aspirational for a particular party.

Baroness Wheatcroft: An aspiration is a wish.

Mandy Rhodes: Yes, but there are also facts and figures in there about the wealth of the nation and how things could be shaped in terms of childcare and the economy, and so on. I do not think people would be going into this blind. What you will hear is people saying, "I am not quite sure what independence would look like", but how can they? It depends who is in government. You are never going to have that certainty. That is the bit that we are so much further ahead on in terms of the debate. In Scotland, people accept that, in the main.

Baroness Wheatcroft: The parallel with the manifesto is that people vote on the basis of a manifesto. If they do not like the result five years on, they change it. This is very different. Mr Massie, could you talk about information?

Alex Massie: It is, but in the end it is a simple question. It is a very complicated set of issues in terms of how the practicalities of it work, but the question, "Should Scotland be an independent country?" is simple. It is a question that has been debated for 40 years. Very little that is new has come out in this process. Most of what has been talked about in the media, and in parliaments north and south of the border, seems to be people entrenching positions they have long held: yes voters are even more likely to vote yes; no voters are

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even more likely to vote no. There is plenty of information, if by information one means claim and counter-claim. What independence would actually look like is fundamentally unknowable. However, that does not necessarily have an impact on whether you should answer the question with a yes or a no.

David Torrance: I would defend the Scotland Analysis papers from the Treasury up to a point. It is not my job to say how wonderful they are, but they are fundamentally different sorts of documents from the white paper. I am not sure it is fair to put them in the same category. In fact, they are surprisingly apolitical, if that is the right word. They are not really making a political argument; they are describing the status quo. Sure, they are describing a status quo which, implicitly, they want to preserve. I gave an example earlier of a concession on dual citizenship. That was an example of how non-confrontational some of those papers are. I think there are five more due, and collectively they will be the most comprehensive description of the UK and Scotland's place within it that we have had to date. Going back to your point, that is almost certainly a product of the referendum. Without that we would not have had that process spearheaded by the Treasury. So, for future reference, if not only at the moment, that has been a very useful exercise.

Q53 Lord Hart of Chilton: Last week, the Secretary of State for Scotland gave evidence. He said that, in the event of a yes vote, the UK Government would immediately cease to be required to act in the interests of the people of Scotland. That seemed surprising. What do you think about that?

Mandy Rhodes: I find it surprising. The UK Government remain the UK Government. Nothing has fundamentally changed on the day after a yes vote, other than that we have voted for this. It is not a legally recognised thing at that point. There would need to be legislation that allows that to happen. The UK Government continue as they have and as they do.

David Torrance: Scotland may become a “temporary independent state”⁶. Is that now the terminology?

Mandy Rhodes: The landscape would be different, but I do not think anything would have fundamentally changed that day.

David Torrance: The dynamic would have changed.

Mandy Rhodes: Yes, I am saying that the landscape et cetera changes.

David Torrance: In legal terms, nothing has changed at that point. I think the dynamic has altered considerably. I suppose what the Secretary of State for Scotland was attempting to illustrate was that it would be tricky for a UK Government to defend Scotland's interests, given that they voted yes. It throws up the interesting question of how negotiations are handled and, specifically, who forms part of the UK negotiating team. The line of the Deputy First Minister, Nicola Sturgeon, on that is that “Team Scotland” would convene and try to get the best deal for Scotland. “Team Scotland” would comprise people who, until a few

⁶ Note by witness: This was a reference, perhaps too subtle, to Crimea.

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weeks before, had been campaigning against independence. That is an admirable aim, perhaps a quixotic one, but it would seem likely that the negotiating team would draw from beyond the ranks of the Scottish Government.

Mandy Rhodes: A previous Secretary of State for Scotland told me that on the day after the referendum, should it be a yes vote, he would then start to negotiate to get the best results for Scotland. I think people's positions would change. David is right; it may be untenable for the current Secretary of State for Scotland to be part of the negotiating team for the rest of the UK.

Lord Hart of Chilton: If the view was taken that the UK Government no longer represented the interests of Scotland, who would represent the interests of Scotland internationally?

Alex Massie: I suppose it would be a provisional government of some sort. The Scottish Government would take the lead in that sort of thing. To answer your initial question, the UK Government could act as the Secretary of State for Scotland suggested, but it would be very unwise for them to do so, for no other reason than because very complex negotiations would begin in a needlessly confrontational and antagonistic fashion. It is in everybody's interests for them, as much as possible, to proceed with the minimum of confrontation and antagonism for all parties.

Q54 Lord Cullen of Whitekirk: I have been wondering about those areas of the law and activity that are reserved to the UK Parliament. During this period of 18 months, whom would that Parliament hold responsible for matters that are reserved to that Parliament, such as health and safety? Supposing some very bad accident happened—affecting Scotland—who is going to answer in the UK Parliament for that? Is this matter going to have to be solved in some way by negotiation?

David Torrance: I think it would be tackled on a case-by-case basis. These things have a habit of sorting themselves out. It seems unthinkable that the UK Parliament or UK Government would stand back and say, "This has nothing to do with us. You voted yes; don't expect us to carrying on paying attention." To an extent, things would carry on as before until in legal terms—and you will know much more about this than I do—the real change takes place on independence day, as proposed by the Scottish Government, in March 2016, although the political dynamic may have changed in the intervening period.

Lord Cullen of Whitekirk: The Secretary for Scotland might have to temper his words when he says that, after a vote for yes, his Government would no longer act for the Scottish people. There is awkwardness about this.

Alex Massie: It reminds me a bit of HL Mencken's aphorism: "Democracy is the theory that the common people know what they want, and deserve to get it good and hard." The UK Government could take that approach in the event of a yes vote—"you have spurned us; now live with the consequences"—but I think that would be unwise. For all that you can draw on legal principles and so on, there is a strong case for taking a pragmatic—even if constitutionally questionable—approach to most of these things.

Lord Powell of Bayswater: So we should just make it up as we go along.

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Alex Massie: I believe that is the British way.

The Chairman: That has certainly been the theme that has emerged from the discussions we have had.

Lord Lester of Herne Hill: Leaving aside whether what he said was literally correct, I suppose the message he was trying to get across is that there will come a point at which you cannot have your cake and eat it at the same time. Therefore, if there were a yes vote, there would be at least a permanent or long-term implication against having your cake and eating it at the same time—in other words, not being part of the United Kingdom yet wanting all the benefits as if you were part of the United Kingdom.

Alex Massie: The cake question cuts to the heart of what we might call “Salmondism”. The Scottish Government’s white paper, for instance, is very much pro-cake and pro-eating-cake. It is one of those things that will be put to the test by the realities of independence. The white paper is an aspirational document that is likely to be contradicted by stubborn events.

Mandy Rhodes: If you said, “You have now voted yes; you are going for independence and we no longer represent you”, that gets us into all kinds of issues, such as whether we then continue to pay money into the Treasury. There are so many other issues that come into this that I think pragmatism is the word that probably will continue throughout this.

Q55 Lord Lexden: Could we turn to the vexed and much discussed question of the time that it will take? The SNP says that 18 months will be sufficient. “Not so”, says almost everyone else. All those who have given evidence to us—politicians and academic experts—have placed a severe question mark over that, with one exception. We have that exception with us this morning. Mr Torrance states that 18 months may be more than enough; it could be done easily in that time, at least, he says, I think, as far as headline issues are concerned. Mr Torrance is promptly in the spotlight. Could I ask all three of you to comment on the time and on those issues that you would regard as essential to settle before independence was granted?

David Torrance: That was a point I made in written evidence. Of course, no one can predict this. As with everything we are discussing, it is highly hypothetical. However, I find it difficult to believe that both the Government of the remaining, continuing United Kingdom—whatever it is called—and the provisional Scottish Government are going to occupy themselves for a year-and-a-half in negotiations, rather than actually governing their respective countries. I find that very difficult to grasp. There is a distinction between negotiating “headline issues”, as I put it, and an incredibly large volume of detail. For the headline issues, the dynamic would be such that those could be settled relatively quickly. The general election due in May next year would focus minds in that respect. Indeed, there are issues associated with continuing negotiations across a potential change in government. As Czechoslovakia in the early 1990s demonstrates, the negotiations carry on for several years on finer points of detail. I think the Scottish Government have a case when they say that the headline issues would be negotiated quite quickly. I think 18 months is a conservative estimate on that point. It is in everyone’s interest to get the main issues out of the way as quickly as possible. We have already seen a degree of pre-negotiation that makes that easier. It carries on beyond that, but not to the same extent. Of course, that could be completely

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wrong. I am no great sage in these matters. That is just how I think the constitutional dynamic would play out following a yes vote.

Mandy Rhodes: I agree with David. I prefix that by saying that I am not a constitutional legal expert. There has been a debate among them, including the UK adviser Professor James Crawford, who said 18 months was a reasonable time. It might be interesting to ask him if that is exactly what he meant. I go back to devolution and say that it is quite a complicated thing to do when you are allowing for the flexibility of some things being reserved and some things not. Those agreements were put together quite quickly. The headline issues could be done quite quickly. You would need to legislate very quickly for the powers to be transferred so that Scotland could declare itself independent, but there is then a constitution to draw up. You have to put the people together who would be on that constitutional convention, or committee, or whatever that might be. Any membership of the EU, NATO and the UN would be predicated on us having a defined statehood. It feels like a tall order but I suspect that the headline issues could be agreed, and then there would be a long trail of things that would probably go on for a number of years. There will also be things that do not need to be replicated, such as discussions over things like the War Graves Commission, and whether you need another one of those. There will be things that can be dispensed with reasonably quickly by negotiating teams.

Q56 Lord Powell of Bayswater: In most negotiations, people say that if you put yourself under the gun of a deadline, you put yourself at a disadvantage. Are the supporters of a yes vote putting themselves under a considerable disadvantage by setting a deadline? Are they going to have to make far more concessions than they can possibly admit that they will have to make now?

Alex Massie: I do not think so, but what happens after the yes vote is extremely important. However, from the yes campaign's point of view, at least in the here and now, it is less important than getting to the yes vote in the first place. I agree with David and Mandy that in broad terms most of these things can be done in 18 months. Perhaps if you did not set a deadline you face the prospect of it dragging out for an extremely long time, in ways that would prove unsatisfactory to all parties. Therefore, "If it were done ... 'twere well it were done quickly".

Lord Powell of Bayswater: Yes, but at what cost?

Alex Massie: To whom?

Lord Powell of Bayswater: To the Scottish Government. They have set the deadline. They will be negotiating under that deadline. If they are really serious about the deadline, they may find themselves having to make more concessions than they would have envisaged.

Alex Massie: Yes, but I think they will find themselves having to do that anyway because it strikes me that the Scottish Government's position in any negotiations is necessarily going to be considerably weaker than that of whoever is leading the negotiations for the remainder of the United Kingdom. The Scottish Government's position is, "Everybody will get together, common sense will prevail, and we will work everything out. Our proposals are realistic and everyone else will see how realistic and sensible they are, and agree with us." That strikes me as fairly optimistic. On pensions, on divisions of assets, and so on, the UK Government

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carry a much larger stick than the Scottish Government do. An acceptable outcome for Scotland is vastly more important to Scotland than it is to the United Kingdom, because Scotland has much more to lose from the negotiations than the rest of the UK does. Therefore, it starts in a vastly weaker position.

Q57 Lord Lexden: Could I ask whether you accept the strong legal and constitutional advice that the United Kingdom Government have been given to the effect that what is going to be called the rest of the United Kingdom will be the continuator state in possession of UK assets and institutions? That is the United Kingdom Government's position, and it will go to the negotiating table against that background. The Scottish Government, however, take the view that there is much that is automatically to be shared and that they come more or less on equal terms to discuss the disposal of assets and institutions. Do you agree with the United Kingdom Government or with the Scottish Government?

Alex Massie: I agree with the United Kingdom Government. Without being a constitutional lawyer, their position seems to me, both politically and practically to be the common-sense attitude. It will be the view that will be taken by the rest of the world. If you vote to leave a club, the club remains. It does not cease to exist, simply because you have chosen to withdraw or cancel your membership. I understand why the Scottish Government take the view they do, not least because that is a political thing. However, I think that is wishful thinking.

David Torrance: It is interesting to note that the Scottish Government, to my knowledge, have not taken an unequivocal position on the issue of successor states. They appear to cast doubt on the rest of the United Kingdom being the successor state, but they have not said what they think would happen. It raises an interesting issue. It is an issue on which I think the Scottish Government have a point. That is the issue of debt. There is international evidence that would suggest that successor states generally inherit 100% of that state's debt. That is not the UK Government's position. Their position is that they would become the successor state and they would carve up the debt with Scotland, which would not be a successor state. There is a weakness in that position that they have not addressed. On successor state, I agree with Alex. I think it is overwhelmingly the case that the rest of the UK, which is larger by territorial mass, larger by population, wealthier, and so on, would be the successor state. I do not think there is much doubt about that. The UK, and Scotland and England, is not a formal federation by any stretch, and so it is not analogous with Czechoslovakia in the early 1990s.

Mandy Rhodes: I agree with both David and Alex. I think the UK would be the successor state. The Scottish Government's view of how they would carve up the assets, if you like, is fairly crude at the moment. We need a degree of sophistication on that, but I do not think anybody would argue that Scotland would walk away with nothing.

The Chairman: Lady Wheatcroft, did you want to come back on this assets point?

Q58 Baroness Wheatcroft: You have covered it to a large extent. However, there are so many imponderables here. The successor state seems to be pretty much without doubt the remaining UK. There is some debate over assets outside the UK, though. Which of those might Scotland maintain any interest in post independence? Do you have any views on that?

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David Torrance: The Scottish Government have a rather simplistic view of that. They have spoken in the past about British embassies abroad somehow being sold off and the proceeds divvied up between rUK and an independent Scotland. I think that is a fairly absurd scenario. The precedents for this sort of thing are fairly well established, in that fixed assets are dealt with separately from fluid assets and assets based overseas are dealt with differently. Generally, assets overseas go to the successor state. The Scottish Government, as Mandy implied, take a rather basic view of this at the moment. At one point they even published the last UK asset register and said that Scotland's population share was this, and therefore they would get hundreds of billions of pounds. It is not going to work like that. There is an interesting tension in how the Scottish Government see these things. For example, they are keen on population shares of almost everything except North Sea oil, which very conveniently becomes a geographical share. They have never adequately explained why there is that intellectual leap between the two. The political reasons are obvious.

Alex Massie: I agree with David. The Scottish Government think that some sort of cheque will be written that will offset other things. I simply add that the Scottish Government's definition of "asset" is also extremely broad.

David Torrance: It includes currency.

Alex Massie: It includes the Bank of England, which I think is an institution rather than an asset. The Scottish Government suggest that Scotland is entitled to 8.5% of the Bank of England.

Q59 Baroness Wheatcroft: The UK Government have been very clear about institutions like the Bank of England and the BBC, for instance. Mr Torrance, in your crystal ball-gazing you envisaged a settlement being reached over Trident, for instance, and naval assets. Do you think it will turn out that way, or is this purely imaginative?

David Torrance: I think it is in everyone's interests to deal with those issues pretty quickly. Trident is or would be an extremely difficult area, but it is more difficult for the Scottish Government than the UK Government. Interestingly, over the past few years the Scottish Government have shifted tonally on what might happen. Previously, they gave the impression that Trident would be gliding down the Clyde within moments of the referendum; now they talk very deliberately about a 10-year time scale, if not longer. They realise that in the real world it would take a very long time to sort that out. However, that is distinct from agreement being reached on what should happen. That could occur quite quickly, as I have argued. When it leaves is a slightly different matter.

Mandy Rhodes: I was just thinking that we had not agreed so often, but I agree with that.

The Chairman: I am aware that we are moving rather rapidly through the time. This is interesting, but we need to get not only to the issues to be discussed but to who will actually negotiate them. That is something you have raised before. I know Lord Lester wanted to come in on the previous point but also on that. Is that right, Lord Lester?

Q60 Lord Lester of Herne Hill: Yes. Briefly, on the previous point, you are the eyes and ears of the public; you are the press. I strongly believe in your function in informing the public. As I listen to you, I think you are all accepting that the papers produced by the UK

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Government have attempted to be fairly objective rather than highly politicised, and there are areas like state succession in which the Scottish Government have not yet come clean as to how they respond. Is it not incumbent on you as journalists to probe that and inform the Scottish public so they can make informed choices?

Mandy Rhodes: I suppose “coming clean” is part of the emotive language being used in this debate at the moment. I do not think it is a question of the SNP Government coming clean on some things. There are some things they cannot answer because we are not having pre-negotiation. On the currency, whether you believe Alex Salmond’s view that it is bluff, bluster and bullying is another question, but at the moment we have to say that a shared currency would not happen. On things like Europe, we cannot answer the question; there is no definitive answer at the moment. As journalists, we are trying to navigate our way through the documents that were published. I would not say that the Scottish Government’s white paper is all fantasy and the UK Government’s analysis papers are all fact and wonderful. They come from a particular point. You are trying to get this information out to the public and have as many people informed as possible. The UK Government’s analysis papers have not been widely picked up, so much so that I understand they are collating them and trying to jazz them up a bit to make them a bit more populist. The white paper has been criticised for being too populist, but it has also been widely picked up and, hopefully, read.

Q61 Lord Lester of Herne Hill: The question I am coming to is probably more technical and dull. I want to ask you about the composition of a negotiating team for the rest of the United Kingdom. Do you think the devolved legislatures and executives of Northern Ireland and Wales should be part of that; and to whom would the team be accountable?

Alex Massie: They probably should be. Presumably, we are envisaging a sort of grand constitutional convention that should be cross-party in terms of representing the interests of the rest of the UK—a Welsh and Northern Irish component of that would seem sensible. If the negotiating team is operating in parallel with the UK Government’s position, you can create a mechanism within it whereby, if there is a change of government at the next UK election, it does not necessarily mean you have to start over again; there can be continuity of negotiation. That would be sensible. The Welsh and Northern Irish elements of these things are often overlooked and it seems to me they should be involved.

Lord Lester of Herne Hill: What about Scottish MPs and ministers?

Alex Massie: I assume that most of them would want to be on the other team. It would be very awkward for sitting Members of Parliament representing Scottish constituencies to be on the UK negotiating team. That sort of division is just the way it is going to have to be.

Mandy Rhodes: That opens the interesting question of whether Alistair Darling would sit on the Scottish Government’s negotiating team. For my purposes—we come back to pragmatism—I would hope that, in the event of a yes vote, we create bodies of huge expertise, and we would need to take people who have come from a UK Government point of view. I would hope that people like Douglas Alexander, Jim Murphy, Alistair Darling and Gordon Brown might be taken into the big tent of the Scottish Government. I do not know whether everyone can be that pragmatic, but it would be interesting to see.

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Q62 Baroness Falkner of Margravine: While you expect Scottish MPs to join the big tent and potentially be part of the Scottish team, what would be your view on Scottish Members of Parliament being part of the United Kingdom team, bearing in mind that under the current composition, if this were happening now, the Secretary of State for Scotland and Advocate General for Scotland have Scottish constituencies?

David Torrance: It would come down to them but, as other witnesses touched on, it would seem curious for them to end up on the other side. I am not sure how history would judge such a position. You referred to the Advocate General for Scotland, Lord Wallace of Tankerness. He may or may not choose to be part of the UK negotiating team. It is difficult to foresee. As to the role of Scottish MPs, I suppose it comes down to individual choice. It is very difficult to forecast.

Baroness Falkner of Margravine: Since we are talking about Lord Wallace, he ruled it out. In his evidence he suggested that it would be inappropriate.

Alex Massie: In terms of MPs from Scottish constituencies sitting at Westminster, in the period of the negotiations one can see all sorts of procedural difficulties, particularly if the Government rely upon them for their majority on all manner of bills. For them and their constituents, it would be like the West Lothian question on steroids. There would have to be a self-denying ordinance. They would have to recuse themselves from a lot of the business of Parliament. If that meant that the Government had a majority on some bills but not on others, that would have to be muddled through. In terms of parliamentary management it becomes a nightmare, but if you do not do that you risk a populist backlash in the other parts of the United Kingdom, in the sense that this is not fair. A new era of John Wilkes will arise, if you like.

Mandy Rhodes: It will be interesting to get answers to a series of questions that I put to Nick Clegg about what happens in the event of a yes vote. Will Alistair Carmichael and Danny Alexander be removed from the coalition? It would be interesting to see if I get an answer. I will let you know.

Alex Massie: Like the previous Secretary of State for Scotland, they may be removed anyway.

Baroness Falkner of Margravine: It is interesting, Mr Massie, that you think they would voluntarily recuse themselves, particularly if the composition of the Government was such that their majority depended on Scottish MPs voting. If that happened, would you agree that, as Lord Mackay of Clashfern suggested to us, a final ratifying vote on the agreement must necessarily have the majority of the votes of non-Scots MPs for it to be deemed legitimate and credible for the remainder of the United Kingdom?

Alex Massie: That is probably true. In the way these things are perceived, that would be the case. I do not know that Scottish MPs would necessarily recuse themselves from all these things; I merely suggest that might be the sensible, or even honourable, thing to do—but that may be the greatest piece of wishful thinking this committee has heard for a long time.

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David Torrance: It also seems highly likely that it would enjoy a majority of non-Scots. After all, non-Scottish MPs are the overwhelming majority, and I suspect that where it seemed in doubt that a deal had majority support in the rest of the UK it would not be much of a deal.

Q63 Lord Lexden: If there were large teams in big tents on both sides, could it not cause the discussions to become more protracted? The more people who are involved, one would expect the harder it is on the two sides to reach agreement. Things moved rapidly at the end of 1921 in what was to become the Irish Free State because the teams were very small: the leaders of Sinn Fein on the one hand and the most prominent members of the British Cabinet on the other. What took everybody by surprise was that they found they liked one another. In particular, on the British side they became enraptured with one particular person, Michael Collins, who, sadly, was to be killed in the Irish civil war. Large teams can delay.

Mandy Rhodes: There might be a lot of people within a big tent, but a few political actors would be the principal or head team, if you like.

David Torrance: Small negotiating teams are best. The Social Democrats and the Liberals discovered that in the late 1980s when they were overburdened by very large negotiating teams. In Ireland there were very small teams, and the UK team was a sub-committee of the UK Cabinet, but the circumstances are rather different. Irish sovereignty was ceded extremely reluctantly and in very violent circumstances. Mercifully, that is not the case this time. I think the negotiations would be much more public with larger teams, but not that much larger, and a lengthier process, although I am optimistic about how long that would take, but the Irish negotiations proceeded very swiftly at that point.

Lord Lester of Herne Hill: I think it would be unwise to read much into the Irish story, given that Michael Collins paid for his negotiating position with his life and there was a civil war. Irish politics is still haunted by what happened in those negotiations.

Alex Massie: In some ways the Irish situation was simpler than the one we face now, not least because the nature of the modern state is different from that pertaining in the 1920s. This touches on one of the earlier questions you asked, Lord Lester. In general, given the way this referendum is being held and its process, it has been a surprisingly civilised and mature argument thus far. In many respects—this committee's hearings are part of that process—it offers quite a useful model for subsequent referenda, discussions or arguments of this sort in other countries. I think in that sense it is exemplary.

Q64 Lord Powell of Bayswater: It has been suggested to us in evidence that the rest of the UK negotiating team should be all-party and formed ahead of the general election. The period before a general election is not normally a time when you expect parties to be trying to co-operate with each other. Do you think that suggestion is at all practical?

Mandy Rhodes: They have managed to co-operate and come together on an agreement about shared currency, but I think it is completely impractical that they would come together. Labour in Scotland has already discovered the dangers of sharing a platform with the other parties in Better Together. You raise an important point that we are going to have

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this referendum and then there is a general election. We will already be in that campaign as we go into the referendum.

The Chairman: I think it has been suggested, but by only one person, that the general election should be postponed.

Mandy Rhodes: There would need to be legislation to do that, would there not?

Q65 The Chairman: I thank all three of you very much. It has been extremely interesting. I do not know whether you feel there are matters that you were hoping to deal with that we have ignored, or points which you think we may have got slightly wrong in terms of our questions. Do speak now.

Mandy Rhodes: I have a cheeky line, I suppose. I wondered what your own position would be if it was a yes vote. What do you do about residency of Scottish Lords?

The Chairman: That is an interesting question, which we have put to people. We got some answers, which are in the transcripts of previous evidence. I do not know whether that would be accepted by the House of Lords, which as you know is a self-governing institution which, particularly about matters related to its own membership, can be extremely detailed and prolonged in its discussions. I do not think that is something to which there is any one-sentence answer, any more than there is to many of the questions that we have asked you today. Is there anything about the matters that we have talked about today that you think is important and we have not dealt with?

David Torrance: I covered slightly more in my written evidence.

The Chairman: Thank you very much. It was very helpful.

Mandy Rhodes: One question we did not discuss was whether, in the event of a yes vote, Scottish members should be expelled from the UK Parliament. My answer is simply no.

David Torrance: Not until the actual point of independence.

Mandy Rhodes: Not until independence day.

The Chairman: One interesting fact to emerge from these hearings, which I had not realised before, is that there have been only two Westminster elections since the war where Scottish MPs would have made a difference to the majority in the Commons. I was surprised by that.

Mandy Rhodes: It has become conventional wisdom that it is otherwise.

The Chairman: It has become conventional wisdom, yes. Thank you so much. It was very interesting. We will try to be engaged with it in the properly active way that you have encouraged us to take. I do not think that will be difficult in the next few months.

Mandy Rhodes: Subscribe to *Holyrood* magazine.

The Chairman: Indeed. Thank you very much for coming.

Professor Iain McLean, Professor of Politics at Nuffield College, University of Oxford and Rt Hon. Lord Hope of Craighead KT—Oral evidence (QQI-15)

**Professor Iain McLean, Professor of Politics at Nuffield College,
University of Oxford and Rt Hon. Lord Hope of Craighead KT—Oral
evidence (QQI-15)**

[Transcript to be found under Rt Hon. Lord Hope of Craighead KT](#)

Ms Mandy Rhodes, journalist and editor of Holyrood magazine, Mr Alex Massie, journalist, commentator and regular columnist for the Spectator and Mr David Torrance, journalist, commentator and regular columnist for the Herald—Oral evidence (QQ45-65)

Ms Mandy Rhodes, journalist and editor of *Holyrood* magazine, Mr Alex Massie, journalist, commentator and regular columnist for the *Spectator* and Mr David Torrance, journalist, commentator and regular columnist for the *Herald*—Oral evidence (QQ45-65)

[.Transcript to be found under Mr Alex Massie.](#)

Scottish Global Forum—Written evidence

Negotiating the apportionment of UK military assets in the event of a vote for Scottish independence: What should Scotland look to inherit?

A submission to the House of Lords Select Committee on the Constitution

Author: Dr John MacDonald

Director, Scottish Global Forum

Introduction

The speed with which a newly independent Scotland would be able to muster its full defence posture would be influenced significantly by the nature of post-referendum negotiations between Edinburgh and London. What should Scotland reasonably seek to secure as part of its share of ‘inherited UK assets’? What factors should be borne in mind as negotiators representing Edinburgh and London collaborate in trying to agree on this issue?

The subject of ‘Scotland’s defence’ is currently saturated by pre-referendum politicking but it is important to note that in the event of a vote for independence, Scotland and the UK would have everything to gain from cementing agreement on military asset apportionment in as swift and cordial a manner as possible. Ensuring that a newly independent Scotland was able to muster its defence swiftly would be in London’s interests as much as Edinburgh’s.

A key theme of this submission is that whilst the legal principles applied to the post-referendum transition period would be of great importance, of equal importance would be that maturity and recognition of shared interests and values should characterise the approach of, and interactions between, Scottish and UK negotiators. Those characteristics – perhaps more than any ‘legal principles’ – would have the greatest bearing on how mutually satisfactory the asset apportionment process was.

The Scottish Global Forum welcomes the fact that House of Lords Select Committee on the Constitution has made the following public declaration:

‘...in the event of the Scottish independence...the UK’s assets and liabilities would fall to be apportioned equitably between Scotland and the remainder of the UK, subject to negotiations. An exception to the latter point is that Government assets fixed in Scotland would become assets of the new Scottish state.’

This acknowledgement paves the way for a constructive discussion about asset apportionment in the event of a Yes vote. This submission attempts to highlight some issues of importance and to draw attention to how both sides can benefit from a levelheaded and realistic negotiation. This is, admittedly, an analysis which examines things principally – though not exclusively – from a Scottish perspective.

This submission is not driven by any partisan stance on Scottish independence. It is borne instead of a rational appreciation of the fact that Scotland may vote for independence this coming September and that if it does, it would be remiss of the UK’s political community not

to have given serious thought to what should follow. Planning for possible outcomes is an essential element of judicious politics. Not supporting those outcomes is no excuse for neglecting to contemplate and prepare for their happening.

Facilitating the quickest possible transition period for an independent Scotland's military forces would be in London's interests as much as Edinburgh's. Acknowledging this axiom, and letting it infuse the way in which the UK government might negotiate with a newly independent Scotland, would be just as important as the legalistic prisms through which negotiations are conducted.

Asset apportionment – key issues

1. Calculating asset apportionment between Scotland and rUK.

The least controversial method of calculating 'equitable' asset apportionment between Scotland and rUK would be to designate Scotland's 'asset inheritance' by means of percentage population share. In utilizing this method, we can assume that in the aftermath of a 'Yes' vote, London and Edinburgh would enter asset apportionment negotiations under the assumption that Scotland should inherit an 8.4% population share of UK defence assets. For clarity, a notional cash value should be attached to this 'population share'.

2. What would Scotland inherit?

The Ministry of Defence's *Annual Report and Accounts for 2012-13* lists the UK's total asset value at **£92.28 billion**.⁷ Based upon its population share, we can thus assert that a newly independent Scotland should expect to inherit a notional sum of **£7.75 billion** from UK defence assets. What this means is that in looking to build its own defence posture, Scotland should approach negotiations with the UK government looking to transfer military equipment and infrastructure and – where appropriate, cash – to the value of £7.75 billion. If Scotland could not secure the satisfactory transfer of what it felt was required for the Scottish Defence Force (SFD), it could reasonably expect cash value in lieu of equipment so that desired equipment could be procured elsewhere.

3. What would Scotland look to secure in asset apportionment negotiations?

When contemplating Scotland's notional £7.75 billion 'defence inheritance' from the UK, it is entirely possible that after the first – and all-important – round of discussions, Scotland may still be holding around £4.7 billion 'credit' from its original £7.75 billion. If the UK government would not agree to transfer from the UK inventory equipment requested by the Scottish government, the Scottish government could expect to receive some – or all – of that remaining sum in 'cash value' so that it can procure desired equipment elsewhere. Further details are given below.

The House of Lords Select Committee on the Constitution acknowledges that in the aftermath of a Yes vote, '*assets fixed in Scotland would become assets of the new Scottish state.*' If this acknowledgement is to stand, it is reasonable to assume that MoD facilities in Scotland – including the Faslane Naval base, RAF Lossiemouth; Leuchars in Fife; Craigiehall, Redford and Dreghorn barracks in Edinburgh and Glencorse in Midlothian – would all 'become assets

⁷ 'Annual Reports and Accounts 2012-2013'. Ministry of Defence, 2013, p. 26 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/222874/MOD_AR13_clean.pdf

of the new Scottish state'. Precisely what else would fall under this designation would need to be clarified.⁸ In budgeting to meet the costs of those 'fixed assets', Scottish planners would have to ascertain their monetary value; however, this may prove to be a challenge. The UK government has neglected to update the national asset register; nor does the MoD demonstrate any willingness to divulge its own 'regional' spending statistics. Based upon the most recent analysis (2006-7), MoD facilities, dwellings and property in Scotland – including Faslane RAF Lossiemouth; Leuchars; Craigiehall, Redford and Dregghorn barracks in Edinburgh and Glencorse in Midlothian – were valued at roughly £1.43 billion.⁹ Whilst this figure is almost certainly obsolete – indeed, it may be considerably lower now, given the stark nature of the contemporary economic landscape – if we continue to use it as a guide we can see that the Scottish government's purchase of those assets would make little dent in Scotland's £7.75 billion defence 'inheritance'. Paying to transfer these 'fixed assets' from UK to Scottish ownership would reduce it to a still-significant £6.32 billion.

Aside from paying to maintain – for future use – those 'fixed assets in Scotland', the Scottish government would also look to prioritise the transfer of military aircraft and ships from the current UK inventory. It has in fact earmarked several assets which it would seek to negotiate for Scotland in the event of independence. Those assets include two Type 23 frigates (£149.6 million); four Sandown minesweepers (£133.7m); one Bay landing ship dock (£128.7m); two offshore patrol vessels (£26.6m); six patrol boats (£1.2m); 16 Typhoon fighter jets (£976.5m); six Hercules planes (£129.4m); and six Lynx helicopters (£75m). The combined monetary values attached to these items – factoring in value depreciation – amounts to around £1.62 billion.¹⁰

It is interesting to note that combining the £1.62 billion for the transfer purchase of aircraft and ships with the £1.43 billion, cited earlier for the purchase of the 'existing fixed assets in Scotland', brings a figure of £3.05 billion. What is clear is that Scotland would still be sitting on a remaining £4.70 billion (from the initial £7.75 billion 'defence inheritance'). In describing the implications of this, *The Scotsman* has described how 'the rest of the UK would owe an independent Scotland almost £5 billion in defence assets or cash'.¹¹ This observation – whilst somewhat crass – represents an accurate portrayal of the situation which may follow the initial apportionment negotiations over 'fixed MoD assets in Scotland', and those UK boats and aircraft earmarked by the Scottish government. This remaining £4.70 billion of 'credit' would form the basis for Scottish negotiators to negotiate the transfer of other equipment from UK service to Scottish. It would also provide the affordability for Scotland to look elsewhere to procure preferred equipment, if agreement could not be reached with the MoD.

4. Scotland's military priorities should be acknowledged in asset negotiations.

An independent Scotland's security and defence priorities would be very different from those of the UK. It would make no sense for Scotland to try to recreate what the UK currently has and does. This should be recognized in the event that military asset

⁸ We can also assume that the Cape Wrath Training Area, and the RAF facility on Benbecula would also constitute 'assets fixed in Scotland' which 'would become assets of the new Scottish state.' A newly independent Scottish government may well wish to negotiate with the MoD over continued use of those facilities.

⁹ David Maddox, 'Scottish independence: "£5 billion defence assets" claim'. *The Scotsman*, 9th February 2014 at: <http://www.scotsman.com/news/politics/top-stories/scottish-independence-5bn-defence-assets-claim-1-3299615>

¹⁰ *Scotland's Future. Your Guide to an Independent Scotland*. Scottish Government, 2013, pp. 239-242. See also Maddox, 'Scottish independence: "£5 billion defence assets" claim'.

¹¹ *Ibid.*

apportionment is negotiated between Edinburgh and London. Previous Westminster committees have acknowledged that a newly independent Scotland would be offered a ‘proportional share’ of military equipment as part of its share of UK inherited assets (UKIA): assets such as Typhoon jets have been mentioned in such observances.¹² However, whilst Scottish negotiators should negotiate reasonably, it would not be unreasonable for them to refuse equipment that is not deemed appropriate for, or superfluous to, Scotland’s defence requirements. Scottish negotiators should be firm in looking to procure only what is deemed to be required for Scotland’s needs. A newly independent Scotland should not be pushed towards ‘military solutions’ which are not in Scotland’s best interests.

5. Asset value calculations must be realistic.

In any future negotiations, the cash value set against equipment being considered for transfer from UK to Scotland must be calculated carefully. All equipment must be valued at its current, depreciated cost and not original ‘shelf’ cost. This is most important: depreciation – of original cost as well as of original technological novelty and utility – must be acknowledged and incorporated into all valuations.

6. Where appropriate, Scotland could look to transfer value rather than equipment.

In cases where equipment is not deemed to be necessary or effective, Scottish negotiators should seek to transfer value (i.e. cash equivalent) rather than equipment. This option might be especially relevant when it comes to some of the ‘big ticket’ items in the MoD inventory which Scotland would have no interest in – nuclear weapons, aircraft carriers and submarines are ready examples. However, it should be borne in mind that whilst a newly independent Scottish government would have no interest in such military assets, Scottish taxpayers have nonetheless made sizable contributions towards the research, development and construction of those assets. So, in lieu of allocation of those assets to Scotland, their value should be traded off against those which Scotland would need.

Likewise, whilst it has been widely acknowledged that a newly independent Scotland would be offered a ‘proportional share’ of UK military assets, there has been no shortage of commentary suggesting that strict apportionment may see Scotland ‘inheriting one-third of a frigate’. Such flippancy is unhelpful and it significantly belittles the significance of the negotiations, should they take place. In circumstances where the MoD might dispute the transference of particular assets to Scotland, then the ‘shelf’ cash value of the equipment under dispute should be allocated to Scotland, thus – hopefully – meeting the desires of both parties.

7. It makes economic sense to ensure a consensual approach

The UK is the largest defence spender in the EU but it is being forced to reduce its spending. This downsizing is a considerable challenge; indeed, Peter Quentin of the *Royal United Services Institute* has described the provision of affordable defence as ‘one of the UK’s thorniest issues’.¹³

¹² See for example *The Defence Implications of Possible Scottish Independence*. House of Commons Defence Committee, 6th Report of session 2013-2014, p. 25.

¹³ Peter Quentin, ‘The British Army Reserves Judgement’. RUSI Newsbrief, 13th March, 2013 at: http://www.rusi.org/publications/newsbrief/ref:A514077C33D4E6/#.UJ_jgFCkpsU

This uncomfortable truth should be acknowledged by UK negotiators ahead of any possible asset apportionment negotiations with Scotland. It should be remembered that Scotland is a sizeable military spender within the UK; its 2011-12 contribution to UK defence spending was around £3.3 billion, an outlay which exceeds the annual military expenditures of both Denmark and Finland.¹⁴ If Scotland becomes independent, then this sizeable annual contribution will be lost to the UK. What this means is that the UK could not maintain what it currently has without somehow matching the current Scottish contribution. This does not seem likely. It would thus make perfect economic sense to use asset apportionment negotiations to reduce the UK military in ways which benefit the UK as well as Scotland and prudent negotiations might lead to efficiencies which could be mutually beneficial. Agreeing to a variety of shared arrangements – for example, joint fast jet maintenance and various types of training – would make economic sense. It would also, importantly, reflect and enhance the relationship between Scotland and the UK.

8. It makes military sense to ensure a consensual approach

Certain commentators seem intent on asserting that the closeness and shared interests of Scotland and the other component parts of the UK will suddenly diverge if Scots vote for independence. However, this is a wildly inaccurate projection, one willingly fomented by pro-union activists, intent upon darkening Scots' views of the post-Yes landscape. It is worth emphasising that London would have nothing to gain from seeing a newly independent Scotland – its closest neighbour and second-largest trading partner – somehow idling in the aftermath of a 'Yes' vote. London's political, economic and security interests would be best served by seeing Scotland 'up and running' as quickly as possible, and this includes helping to ensure that a Scotland-sized security gap does not open up to the north of the English border. Security interests in Edinburgh and London would not suddenly somehow diverge just because Scotland voted democratically for independence. Ensuring that a newly independent Scotland were able to muster its defence as quickly and seamlessly as possible would be in London's interests as much as Edinburgh's. Seeing this happen would depend greatly upon both sides working hard to reach and swift and mutually satisfying conclusion when negotiating the allocation of UK military assets.

9. The UK government should work to show a fuller asset breakdown

It makes perfect sense for the UK government to be more compliant in allowing the Scottish government to make contingency plans for Scottish independence. This needn't be done in the public sphere, so that the UK government 'loses face'; it can be conducted behind closed doors, secluded from the heated partisanship which is coming to the fore ahead of September's referendum.

As things stand, things are not being conducted at the governmental level with the maturity suggested by the signing of the Edinburgh Agreement. A judicious political approach would

¹⁴ See 'Government Expenditure & Revenue Scotland 2011-2012'. The Scottish Government, March 2013 at: <http://www.scotland.gov.uk/Resource/0041/00415871.pdf> Section 2, Table 2.5.

See also Crawford & March (2012). For Scandinavian spending patterns, see Gerard O'Dwyer, 'Norway Bucks Trend as Neighbors Curb Spending'. *Defence News*, 24th October 2012 at: <http://www.defensenews.com/article/20121024/DEFREG01/310240001/Norway-Bucks-Trend-Neighbors-Curb-Spending> Gerard O'Dwyer, 'Strong Norway Economy Allows \$100m Defense Budget Boost'. *Defence News*, 16th October 2012 at: <http://www.defensenews.com/article/20121016/DEFREG01/310160007/Strong-Norway-Economy-Allows-100M-Defense-Budget-Boost>

see the UK government acknowledging that whilst it does not support Scottish independence, it would be foolish in the extreme not to prepare for it. It is worth repeating that facilitating the quickest possible transition for an independent Scotland's military forces would be in London's interests as much as Edinburgh's. At this point, however, the Scottish government is greatly hindered in its attempts to conceptualize what a Scottish Defence Force might look like due to the fact that the UK government has neglected to update the national asset register and because the MoD remains intransigent on divulging its own 'regional' spending statistics. This is not helpful.

28th February 2014

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3. David Maddox, 'Scottish independence: "£5 billion defence assets" claim'. *The Scotsman*, 9th February 2014 at: <http://www.scotsman.com/news/politics/top-stories/scottish-independence-5bn-defence-assets-claim-1-3299615>
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7. Peter Quentin, 'The British Army Reserves Judgement'. RUSI Newsbrief, 13th March, 2013 at: http://www.rusi.org/publications/newsbrief/ref:A514077C33D4E6/#.UL_jgFCkpsU
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Scottish Government—Written evidence

Written Evidence on behalf of the Scottish Government

The House of Lords Select Committee on the Constitution has invited written evidence as part of their inquiry into the constitutional implications for the rest of the UK of Scottish independence. The following paragraphs set out the Scottish Government's views on the questions asked:

Negotiations

Is the timetable of independence by 24 March 2016 realistic?

1. Independence on 24 March 2016 would mean the transition process would be complete before the May 2016 Holyrood elections. This allows those elections to focus on the future and the newly elected Government and Parliament of an independent Scotland to immediately start delivering the priorities of the people of Scotland.
2. Eighteen months is a realistic timetable for the necessary preparations. International examples show that countries can make significant constitutional changes happen quickly once a democratic decision is taken. Eighteen months is comparable to the time taken by other countries making the transition to independence.
3. Scotland already complies with EU laws, people in Scotland are already EU citizens and Scotland is already a member of the EU. The proposed transition period between the referendum and becoming independent in March 2016 is enough time for Scotland to become a recognised independent member state of the European Union.

Who would negotiate for the remainder of the UK? To whom would they be accountable?

4. The Scottish Government will lead the independence negotiations for Scotland. We will invite representatives from other parties in the Scottish Parliament, prominent Scottish Westminster politicians and representatives of Scottish civic society, to join the Government in negotiating the independence settlement and in ensuring the continuity of those public services currently managed at UK level.
5. It will be for Westminster to decide who negotiates on behalf of the rest of the UK.

What impact would the timing of the UK General elections in May 2015 have on negotiations?

6. There is no reason that the UK General Election in May 2015 should prolong the timetable for negotiations. It will be in the interests of both countries to conclude the process in good time.

What happens if the two negotiating teams cannot reach agreement on an issue?

7. After a democratic vote for independence, it will be in the interests of both Scotland and the rest of the UK to come to a swift and co-operative settlement. In the Edinburgh

Agreement, the UK and Scottish Governments agreed that they will continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.

8. Key to the negotiations will be issues about dividing assets and liabilities, on which the Scottish Government is committed to achieving a fair settlement.
9. The Scottish Government accepts that detailed negotiations on the independence settlement cannot begin ahead of the referendum. However, we believe that sensible discussions about the practical consequences of independence should take place to help the people of Scotland to make an informed choice and prepare the way for detailed negotiation following a vote for independence.
10. At the beginning of the process of negotiation, it will make sense to agree a process for resolving any disputes in a way that both governments see as fair and equitable. Some matters will also continue to be discussed following independence, as was the case in the dissolution of Czechoslovakia in 1992.

Assets and liabilities, and shared services

What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

11. Following a vote for independence, the Scottish Government will negotiate with Westminster to agree a sharing of assets and liabilities that is fair, equitable and reflects Scottish needs and those of the rest of the UK. Assets already used to deliver devolved public services in Scotland, such as schools, hospitals and roads, would remain in Scottish hands. Physical assets located in Scotland and needed to deliver currently reserved services, such as defence bases and equipment, and buildings to support administration of welfare, tax and immigration, will transfer to the Scottish Government.
12. Assets located elsewhere in the UK will also have to be included in negotiations, as Scotland has contributed to their value over a long period of time. For physical assets like these, the equitable outcome may be to provide Scotland with an appropriate cash share of their value.
13. UK public services are assets belonging to both Scotland and the rest of the UK. This is because tax payers in both Scotland and the rest of the UK have paid to build and maintain these services.
14. Defence and overseas assets transferred as part of these negotiations will form a basis for Scotland's defence forces and overseas representation following independence.
15. The negotiations will also agree how best to share assets such as bespoke IT software used to deliver reserved services. Scotland has shared the costs of the development of these systems and so it would be reasonable to expect that access to these systems would be available as needed.

16. Assets that are not related directly to particular services, such as the UK's public shareholdings in banks, will also be part of negotiations. Scotland would expect to receive a population share of these assets, or their value in cash.
17. In some cases, the transfer of reserved assets to Scotland might take place over a period of time – for example, where it is agreed that services would be shared for a transitional period – or the value of the asset might be offset against the share of the inherited UK national debt that Scotland agrees to finance.
18. Negotiations would also agree how to apportion liabilities. Again, equity would be a guiding principle in the negotiations. The biggest UK public liabilities include pensions for public sector employees, the costs of nuclear decommissioning, and the national debt.

What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example, the Bank of England and those services listed on page 364 of the Scottish Government's white paper?)

19. The Scottish Government plans to maintain shared services in areas where it makes sense to do so, and where it is in the interests of both Scotland and the rest of the UK.
20. Where functions continue on a shared services basis, there will need to be adjustments to the governance of these bodies to ensure there is appropriate accountability to the Scottish Government and Scottish Parliament. These can build on arrangements already in place for cross-border bodies dealing with devolved matters.
21. The Scottish Government's priority will be the seamless delivery of public services on independence to citizens of both countries. This applies both to those services currently delivered to Scotland from locations elsewhere in the UK and to those services currently delivered from Scotland to people elsewhere in the UK.
22. Important services such as tax credits and the welfare system, HM Revenue & Customs, and the Department of Work & Pensions all have assets or networks in Scotland. Other Westminster Government Departments have systems and capabilities largely outwith Scotland and the future of these will be considered in negotiations between the governments.
23. It is possible to 'share' public services, in fact Scotland and the UK already share public bodies in devolved areas now. Under the Scotland Act 1998, these bodies are known as 'cross-border public authorities'. The UK and Ireland also share several public bodies on an all-Ireland basis (e.g. InterTradeIreland and Waterways Ireland).
24. Agreements to share services would be formalised by either a change in the law in Scotland and the rest of the UK, or a contract or treaty between Scotland and the rest of the UK. It is possible for two governments to have a contract for services. Indeed, the Scottish Government has several contracts now with the Westminster Government.
25. Many sharing arrangements will be in place for a transitional period while systems specific to Scotland are set up. An example of this approach is the administration of state

benefits which we would intend to operate on a shared basis until 2018, though Scotland would take full control of policy decisions on benefits at the point of independence.

26. We also propose that there will be some institutions we will share with the rest of the UK on a long-term basis. An example would be the Bank of England.
27. Where there is an agreement to share a public service after independence, the Scottish Government will be able to have different policies from the rest of the UK. This already happens now in some instances where devolved Scotland and the rest of the UK share services. For example, the university admissions body UCAS operates across the UK but has a distinct admissions process for Scotland.
28. The rules for changing shared services in Scotland only or in the rest of the UK only will be part of the post-referendum negotiations between Scotland and the rest of the UK.

Parliament

What would be the position of MPs for Scottish constituencies be from May 2015 to March 2016?

29. Sovereignty will be fully exercised by the people of Scotland from the point Scotland becomes independent on 24 March 2016. Until that point, the people of Scotland must be represented politically at the UK level. Scotland should therefore elect MPs to Westminster to represent Scotland up until the date of independence.

What impact would independence have on the House of Commons if the MPs for Scottish constituencies left it in March 2016?

30. In only two of the 18 UK general elections since 1945 (October 1964 and February 1974) would the largest party at Westminster have been different if Scotland had been independent and not returned MPs to Westminster. The two governments which were elected lasted for less than 26 months in total. This means that Scottish votes play a limited role in the results of, and the overall power balance following, UK General Elections.

What impact would independence have on the membership of the House of Lords?

31. Arrangements for the House of Lords will be for the rest of the UK to decide but the House of Lords will no longer be involved in legislating for Scotland.

What legislation (or other measures) would the Westminster Parliament have to pass in order for Scotland to become independent?

32. We propose that the key legislative steps towards independence should be taken by the Scottish Parliament, following an initial transfer of powers from Westminster after the referendum. Westminster will have a role in passing legislation concerning independence.

Scottish Government—Written evidence

Nicola Sturgeon MSP, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities

3 March 2014

Mr Donald Shell—Written evidence

Negotiating an Independent Scotland:

Evidence presented to the House of Lords Select Committee on the Constitution inquiry entitled “Scottish Independence: Constitutional Implications for the rest of the UK”.

Submitted by: Donald Shell, former SL in politics, University of Bristol, now retired living in Oban, Scotland

Before addressing the specific questions posed in the invitation to give evidence, I think it helpful to make some broader preliminary points.

- This inquiry is predicated on the assumption that the referendum result is in support of independence. It is quite likely if that is the case that the result will be fairly close, and that the closing stages of the campaign will have been very hard fought. Within Scotland there will be a potentially dangerous mixture of triumphant celebrations and bitter recriminations, while within the rest of the UK there will be a degree of shock and some anger. This will be the context in which negotiations are launched. The manner in which they are conducted will be important in helping to re-build good relations both within the two countries involved and between them. This will be the moment of truth when campaign rhetoric has to give way to the reality of sorting out practical arrangements for Scotland to become a separate independent state. While both sides will have interests which they will feel have to be strongly defended and fought for, both sides will also realise the importance of trying to generate a degree of good will without which the negotiations could become very difficult and protracted. It would be helpful to emphasise the importance of this in advance; hopefully both sides will remember and act by the commitment given in the Edinburgh Agreement, “to work constructivelyin the best interests of the people of Scotland and the rest of the United Kingdom”. A constructive approach could be reinforced by the desire of both parties to reach an agreed settlement as quickly as possible. Scotland will not wish to prolong uncertainty and rUK will probably consider it desirable to mitigate perceived loss of status internationally caused by Scotland’s secession; handling the negotiations in a purposeful and dignified manner, appropriate to a country which aspires to project itself as capable of handling difficulties with skilled diplomacy may well be part of this process.
- The readiness to accord a referendum, agreed by the prime minister and first minister to be politically binding on both sides, on the creation of a new state, and the commitment to negotiate the detail of this in a constructive manner for all concerned, is virtually without precedent. This is therefore a unique moment in the constitutional and political history of the UK. Change within the UK constitutional and political system has accelerated in recent years, but one might reasonably expect the decision by Scotland to leave the UK to cause a further acceleration of that process. In some respects the rest of the UK will have even more uncertainty to face up to than Scotland. The whole process will call into question many of the norms of behaviour which have hitherto shaped

political practice within the UK. For example there is likely to be pressure to move from the Westminster dominated sharply adversarial politics to a more consensual politics with more input from the different constituent parts of the UK and regions within England.

- Crucial aspects of the negotiations will be with international bodies, especially the European Union. The UK Government will be a significant participant in these negotiations, and indeed could have a pivotal role to play. Sequencing the negotiations between the rUK and the Scottish Government with the negotiations necessarily involving third parties will be complex and will to some degree dictate the timetable at which the former can take place.

Answers to Questions posed by the Committee

1. *Is the timetable of independence by 24 March 2016 realistic?*

The timetable is very tight, given the complexity of the relationships between these two countries, and the general lack of pre-negotiation. Indeed in some areas, notably the future of the Faslane base, public statements would suggest there has been a deliberate policy of not undertaking any preliminary work to explore alternative arrangements. Furthermore, the distraction caused by the General Election of May 2015 will be unhelpful.

On the other hand I think this is the right timetable because prolonging uncertainty on such matters as currency arrangements, debt management and regulatory frameworks has the potential to be very damaging. And difficult decisions rarely become easier through the passage of time; indeed the reverse is probably more likely; if there is not momentum towards reaching a settlement there is likely to be deepening entrenchment on both sides.

2. *Who would negotiate for the remainder of the UK? To whom would they be accountable?*

It is essential that those negotiating on behalf of rUK are seen to be representative of all major political parties and of Wales and Northern Ireland, ie all constituent parts of the rUK. It is strongly desirable that all parties feel a sense of ownership of the process and thereby of the outcome of these negotiations.

Furthermore it would be desirable to make the negotiating team a multi-party team partly because of the possibility of the 2015 election resulting in a different government.

The position of ministers and MPs who have Scottish seats at Westminster needs careful consideration. On balance I think the conflicts of interest involved should preclude their direct participation in these negotiations.

While responsibility for the negotiations must ultimately be carried by the politicians involved, there will clearly be a network of officials at work on both sides. I think it would be desirable to publish advice tendered by official committees on both sides, so that as far as possible areas of agreement and disagreement on technical questions can be placed in the public domain.

The precedent set in February when the Chancellor announced that if Scotland became independent it could not be part of a sterling area is worth noting in that other major

parties at Westminster publicly endorsed this decision, and the advice tendered by the permanent secretary at the Treasury was also simultaneously published. Accountability in all these negotiations should be to the respective parliaments and assemblies within the UK. I think there should be regular take note debates, possibly monthly, in all these bodies.

- 3. *What impact would the timing of the UK general election in May 2015 have on negotiations?*** The timing of the election will be an inconvenience to the negotiations; it will be important if possible to try to keep it as an inconvenience rather than a major difficulty. No doubt in Scotland the outcome of the referendum and the determination of future relations with rUK will be a prominent if not dominating theme. This emphasises further the need to ensure that responsibility for the negotiations on the part of rUK is shared among all parties. It will also be important to emphasise that the outcome of the referendum is final (something already agreed at the Edinburgh Agreement) and that the negotiations are ongoing; some candidates will probably pledge themselves to reverse the referendum result in the light of the negotiations that have by then taken place. It will be up to major party leaders to disown this in order to keep negotiations on track.
- 4. *What happens if the two negotiating teams cannot reach agreement on an issue?*** I find it hard to believe that there will not be areas where reaching agreement will prove extremely difficult. There will have to be trade-offs across different areas of the negotiations. It may be desirable to create some body to which appeals can be made, and which would be capable of imposing a form of arbitration. This could be chaired by two senior legal figures, one from Scotland and one from the remainder of the UK, with the presiding officers of the Parliaments and Assemblies of the four territories involved, and also attended by the UK prime minister and the first minister of Scotland. It will be important to keep in mind that ultimately the outcome of the negotiations will have to be approved by both parliaments. It may be considered helpful at some point to create a joint body between the two parliaments to try to break deadlock.
- 5. *What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?*** Assets and liabilities will have to be defined and an agreed inventory established. The starting point should be a pro rata division of all assets and liabilities based on population. This can then be a subject of negotiation with assets being traded and in some cases financial adjustments being made in lieu of asset division. Some adjustment towards sharing on the basis of GDP per capita could be made as part of the negotiating process.
- 6. *What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example the Bank of England and those services listed on page 364 of the Scottish Government's white paper)?*** Some form of international agreement should be made immediately following independence to define the way such services are to be financed and managed, perhaps in

some cases for a specified transition period. A Joint committee of the two parliaments could be considered as a means to hold service providers to account in areas where joint responsibility is created; this could include members of the House of Lords and should be large enough to operate through various sub-committees. Conceivably some MPs made redundant on the date of independence (see below) could be appointed to such a body.

7. *What would the position of MPs elected for Scottish constituencies be from May 2015 to March 2016?*

The sequence of elections and the referendum is far from ideal. But that sequence is now fixed and the awkwardness it creates must now be accommodated as best it can be. MPs elected for Scottish constituencies would continue as MPs until the date of independence; they will still have constituency duties to perform just as the Westminster government will retain all of its current responsibilities for Scotland until independence is attained. They can be expected to play a normal role in parliamentary debate, including debate on the progress of negotiations on independence. Westminster has lived with the anomaly of the West Lothian Question and will have to live with this greater anomaly - though for a much shorter period of time.

8. *What impact would independence have on the House of Commons if the MPs for Scottish constituencies left it in March 2016?*

The MPs for Scottish constituencies would have to leave the Commons at the date of independence. Their continued membership would be totally anomalous after that date; they would be representing constituencies that had become part of a different state. Fudging this issue in some way will not assist the adjustments that the whole body politic has to make to the new situation caused by Scotland becoming a separate independent state, pursuing different policies internationally as well as domestically. Clearly this could have a significant impact on the House of Commons and indeed on the majority for the government formed after the 2015 election. If for example a Labour Government were elected which then lost its majority when MPs for Scottish constituencies left the House, it may choose to continue as a minority government or it may seek to negotiate some support from other parties or a full coalition arrangement. Unlike the position immediately following an election a government in that position would have had lengthy warning of the circumstances it would face and would therefore have had time to negotiate with other parties before it lost its majority; indeed that whole situation could be anticipated in the formation of the government immediately following the 2015 election. If the Government lost a vote of confidence the provisions of the Fixed Term Parliament Act would give it a further 14 days in which to negotiate before either having to win a further vote of confidence or seek the dissolution of parliament and an early general election. On balance I think the exit of MPs for Scottish constituencies would be unlikely to precipitate an early election.

9. What impact would independence have on the membership of the House of Lords?

At present peers must be resident in the UK for tax purposes. Given the re-definition of the UK that would follow Scottish independence, I would expect some peers to cease to qualify under this criteria. They would therefore leave the House.

I don't see why there should be any other impact on membership of the House of Lords. It may be that some peers who consider themselves Scottish would wish to retire from the House, notwithstanding the fact that they were still rUK tax-payers. But given the fundamentally different position of peers from MPs (chiefly the absence of any direct constituency responsibilities) there should be no pressure put on such peers to resign.

10. What legislation (or other measures) would the Westminster Parliament have to pass in order for Scotland to become independent?

I think it would be desirable immediately following a referendum outcome in favour of independence to introduce a paving Bill naming the target date for independence and declaring that the provisions of the Act of Union of 1707 would be repealed from the date. This could also provide for an agreed procedure by which a new Scottish constitution could be formulated and agreed, though this process could hardly be completed by the target date for independence, given that the Scottish Government's White Paper specifies that the constitution should be prepared through "an open, participative and inclusive constitutional convention" (Page 351). It may therefore be necessary to provide for an interim constitution.

An Independence Act should embody the agreed outcome to negotiations. I think these should be wrapped up into a single Bill rather than being scattered through various items of legislation. As indicated above it may be necessary also to include an interim constitution for Scotland; it would be irresponsible to launch the new state into a constitutional vacuum.

Though it would not be legally necessary I think it would be desirable for the Welsh and Northern Ireland Assemblies to pass resolutions approving the basis of Scottish independence.

22 February 2014

The English Democrats—Written evidence

Scottish Independence: Constitutional implications for the rest of the UK

The House of Lords Select Committee on the Constitution, chaired by Baroness Jay of Paddington has, I understand, called for evidence for an enquiry into the constitutional implications for the remainder of the United Kingdom in the event of a ‘Yes’ vote on the 18th September.

I am the Chairman of the English Democrats, which is the only English party that is interested in such constitutional implications. We are of course interested in the constitutional implications for England. As English nationalists we call for English Independence.

The first point to make crystal clear in the event that Scotland goes independent, and I make this point, not only as the Chairman of the English Democrats, but also as a lawyer and practicing solicitor, that there is no automatically persisting entity known as “the rest of the UK”. This point rests on basic constitutional legal principles and derives from the nature and wording of the Act of Union in 1707. The relevant articles of which are stated as follows:-

"ARTICLE I

THAT THE TWO Kingdoms of England and Scotland shall upon the first Day of May which shall be in the Year one thousand seven hundred and seven, and for ever after, be united into one Kingdom by the name of Great Britain;

ARTICLE III

That the United Kingdom of Great Britain be represented by one and the same Parliament, to be stiled, The Parliament of Great Britain.”

It therefore follows, as a matter of trite law, that in the event of Scotland becoming independent this must involve the repeal of the Act of Union 1707. This automatically means that the then new constitutional entity that was created by the Act of Union, namely the “United Kingdom of Great Britain”, will be dissolved. This leads to the automatic dissolution of the Union with Northern Ireland.

The Union with Northern Ireland is the residue deriving from early 20th Century Southern Irish independence of a Union which was created by the Act of Union of 1801 between the Kingdom of Ireland and the United Kingdom of Great Britain.

Obviously therefore the Union so far as Northern Ireland is concerned, is with the United Kingdom of Great “Britain”. With the dissolution of the “United Kingdom of Great Britain” there will be no automatically persisting Union with any then existing constitutional entity.

The position of Wales is different because Wales was fully incorporated into the “Kingdom of England” by the 1536 union legislation. That is why of course the Act of Union 1707 does not mention Wales because Wales is then encompassed within the term the “Kingdom of England”.

It follows that without new constitutional legislation the independence of Scotland leads to the dissolution of the “United Kingdom of Great Britain” and of Great Britain’s union with Northern Ireland. It will thus give rise to the re-emergent “Kingdom of Scotland”, the re-emergent “Kingdom of England” and the “Province of Northern Ireland” with no current Union between England or Scotland (or the Republic of Ireland).

It is worth considering the above points carefully because the consequence of Scotland becoming independent isn’t just that Scotland technically would be classified as a new state, under the emerging body of what, for want of a better term, is called “international law”, but also that the Kingdom of England and the Province of Northern Ireland will also all be now States.

The Committee has asked for answers to specific questions.

1. Negotiations – Is the timetable of independence by March 2016 realistic?

Yes, I would have thought it was. It will impose an obligation on negotiators to get on with it promptly.

2. Who will negotiate for the remainder of the UK? To whom would they be accountable?

You will appreciate from my introductory points above, about the nature of the constitutional implications of Scottish independence, that there would not automatically be a single entity which is the remainder of the UK.

It is certainly not appropriate for anyone to purport to negotiate on behalf of England if not expressly and avowedly and legitimately mandated to do so. This will particularly apply to those British politicians who have expressly stated either their hostility to the English nation and/or their Scottish origins, such as David Cameron or William Hague, let alone anyone who is actually of Scottish origin, such as Gordon Brown or Alastair Darling.

The English negotiators should be accountable to the English Nation. It is essential that an English parliament and government be reconstructed quickly in the event of Scotland voting for independence so that there are proper lines of democratic accountability and legitimacy within England.

3. What impact would the timing of the UK general election in May 2015 have on negotiation?

It will clearly have a destabilising effect on the negotiations as it may well result in the replacement of the original team with a different team of negotiators and with a different government involved in the negotiations.

4. What happens if the two negotiating teams cannot reach agreement on an issue?

The answer to this question will, of course will depend on the issue. For instance if the issue was where the boundary between English North Sea oil and Scottish North Sea oil lies, then that could be adjudicated upon by the International Court at the Hague. If it was something that was within the giving of one of the parties but requested by the other, such as a role in the formulation of policy at the Bank of England that will not be capable of adjudication. Clearly the English team could simply refuse and the other team would not be able to insist upon it. If in fact on that item there is such a refusal then I suspect the Scottish negotiators will take the advice of the highly respected international law authority, Professor David Scheffer of the Centre for International Human Rights in Chicago and decline to accept any share of the UK's debts.

5. Assets and liabilities and shared services. What legal principles should apply to negotiations on the apportion of assets and liabilities that are currently UK-wide?

Since all the participants in negotiations will be acting on behalf of potentially “new States” the negotiations are inevitably going to be without hard and fast rules and will be based on give and take. In principle all parties could walk away from the liabilities of the “UK”. So far as assets are concerned, that will either rest on satisfactory negotiations between the parties or will be based on who has physical possession.

6. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example, the Bank of England and those services listed on page 364 of the Scottish Governments' White Paper)?

Answer 5 above answers this question.

7. Parliament. What would the position of MPs for Scottish constituencies be from May 2015 to March 2016?

Until the dissolution of the “United Kingdom of Great Britain” and Northern Ireland they would of course be members of the Union Parliament. Upon dissolution the Union Parliament itself will have to be reconfigured in accordance with the new constitutional situation. The same will apply to peers of the Union Parliament.

8. What impact would independence have on the House of Commons if MPs for Scottish constituencies left it in March 2016?

Clearly the balance of the parties would be shifted, but the point remains that the House of Commons constitutional position will be altered as Parliament will no longer be the Parliament of the “United Kingdom of Great Britain” but rather only of the Kingdom of England which will also exclude Northern Irish MPs.

9. What impact would independence have on the House of Lords?

The House of Lords is of course currently one of the two Chambers of the Parliament of the “United Kingdom of Great Britain” and Northern Ireland. With the dissolution of the United Kingdom of Great Britain the membership of the House of Lords will be dramatically affected as it will only be appropriate for English peers to sit in the English Upper Chamber. The English Democrats position is that all members of the English Upper Chamber should be democratically elected by the people of England.

10. What legislation (or other measures) would the Westminster have to pass in order for Scotland to become independent?

The Act of Union of 1707 would have to be repealed.

Robin Tilbrook
Chairman,
The English Democrats

12 February 2014

The English Lobby—Written evidence

Scottish Independence: Constitutional implications for the rest of the UK

Submitted by Alan England, Director-The English Lobby

I am a director of the English Lobby, a non-profit making organisation dedicated to preserving and promoting England and English identity.

We also support the establishment of a separate parliament for England with its own executive and separate bill drafting facilities. To the extent that it is necessary to secure an English Parliament, which is long overdue, we are amenable to England becoming independent to further that objective.

Our submission is as follows:

Scottish Independence: Constitutional implications for the rest of the UK CALL FOR EVIDENCE

1. Implementation of a “yes” vote will render the Act of Union 1707 (together with succeeding extant acts and treaties of which it is elemental) redundant. In consequence, new constitutional arrangements will be needed for England & Wales and Northern Ireland.
2. Dissolution of the United Kingdom will necessitate repealing or amending legislation in respect of citizenship and nationality. For example, the extent of the British Nationality Act 1981 will need to be modified. Indeed, the term ‘British Nationality’ may be regarded as inappropriate and this will give rise to a number of other considerations. Unlike Scotland, which has provision for Scottish ethnic identity (at least in the White category) to be recorded and monitored, the monitoring of ethnic identity in England and Wales makes no specific provision for either English or Welsh ethnic identity to be recorded. The basis for this anomaly lies in the different bases for the 2001 and 2011 Censuses between Scotland on the one hand, and England & Wales on the other.
3. In summary, a “yes” vote will afford opportunity to re-examine these matters with a view to promoting more social cohesion. Moreover, in addition to recognising English ethnic identity, there will be every reason for extending ‘English’ identity to other categories to replace ‘British’ in the other census categories. For example, **C Asian/Asian British** would no longer be appropriate and in England should become **C Asian/Asian English** and so on.
4. The treatment of Northern Ireland is even less clear-cut and will very much depend upon the outcome of negotiations. ‘Constitutional Issues’ Clause 1(vi) of the 1998 Anglo-Irish Agreement records: recognises **“the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.”**
5. The matter of the British-Irish Council, where there has never been any representation specifically of English interests, will require to be considered. It need hardly be said that,

without 'Britain' remaining in constitutional existence, the Council as presently named is more of an anomaly.

6. In short, the effect of new constitutional arrangements on the various questions posed by the Committee will depend upon how and when new arrangements are devised. Responding directly to the Committee's questions as posed, I tender the following thoughts:

Negotiations

Question 1. Is the timetable of independence by 24 March 2016 realistic?

I am sceptical that it will prove to be realistic unless preparatory work has been carried out and depends upon the extent of such work. However, mindful of Parkinson's Law that work expands to fill the time available, it may be unwise to publicly extend the timetable.

Question 2. Who will negotiate for the remainder of the UK? To whom would they be accountable?

Perforce it will fall to Parliament as presently constituted to negotiate for England & Wales plus Northern Ireland. In due course, they will be accountable respectively to the electors in each of those communities.

However, it is not only inappropriate but undesirable for anyone to negotiate on behalf of England and her people who is not clearly loyal to her and has an explicit mandate to do so. The second element of public service is especially applicable here: that of being SEEN to do the proper thing. Regrettably, there are many prominent politicians in the present Parliament who are either hostile to the English nation or by reason of their Scottish ancestry fall short of the previously mentioned second element of public service or both. Therefore, it is imperative that formal arrangements are made rapidly for the proper representation of English interests as soon as it is known that a "yes" vote has occurred. It is to be hoped that the subsequent 2015 General Election may result in true English representatives being elected with a proper mandate.

Question 3. What impact would the timing of the UK general election in May 2015 have on negotiation?

By introducing the variable of a general election at any time prior to 24 March 2016 (or whenever negotiations are completed), any uncertainty will also be increased. Consequently, there is a case for holding a general election earlier than May 2015 to establish a longer period of stability prior to March 2016. Section 2(2) of the Fixed-term Parliaments Act 2011 provides for such a variation.

Question 4. What happens if the two negotiating teams cannot reach agreement on an issue?

In this event, the teams representing each nation will need to agree to forms of international arbitration in appropriate spheres eg the European Court of Justice (whilst EU Membership is still in force) or the International Court at The Hague depending upon the relevant issues. Facilitating agreement, both sides will have external imperatives to consider. Abandoning the UK's liabilities would not only lower the re-emergent defaulting country in the esteem of

other governments, but also lower the confidence of international markets' in the 'team' which did so.

Assets and liabilities and shared services.

Question 5. What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

If clear, the origins of assets and liabilities will need to be taken into account, not merely current possession. For example, significant liabilities were incurred by Scottish banks consciously based in Edinburgh, such as RBS and HBOS prior to 2008 although the British Government subsequently supplied much needed capital. Otherwise, shared services may largely be determined by the size of the particular population being served. It can scarcely be overlooked that the population of Scotland represents less than 9% of the UK's population.

Question 6. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example, the Bank of England and those services listed on page 364 of the Scottish Governments' White Paper)?

On the basis that Scotland would want to administer benefits and the present State Pension for Scottish citizens, England would want a reciprocal arrangement for her people where administration is presently located in Scotland. This principle would apply in other matters eg transfer to England of posts for Armed Services Pensions &c and HMRC functions relating to individuals in England. A National Bank of Scotland could be established for Scotland to administer a new Scottish pound, whilst the Bank of England would continue to serve the much greater number of customers in England (& Wales, if necessary)

The desirability (if not the need) to share England NHS Blood & Transport Services, Research Councils, Air & Maritime Accident Investigations, a Green Investment bank, and the Hydrographic Office would need to be established given the much greater population in England.

It would be neither desirable nor necessary to share the Royal Mint, although it could be used by an independent Scotland for the supply of coins and notes under contract on a commercial basis.

Parliament.

Question 7. What would the position of MPs for Scottish constituencies be from May 2015 to March 2016?

They should be debarred by a resolution of the Commons, from speaking and voting on English & Welsh matters and confined to matters affecting Scotland.

Question 8. What impact would independence have on the House of Commons if MPs for Scottish constituencies left it in March 2016?

In that event, the focus of the Commons on England's interests will be increased. The composition of the Commons may well have been changed by the results of the 2015 General Election having being affected by a "yes" vote.

Question 9. What impact would independence have on the House of Lords?

Reverting to the terms of the Act of Union 1707 [**Article XXII** now repealed] whereby “. . . **by virtue of this Treaty, of the Peers of Scotland, at the Time of the Union, sixteen shall be the Number to sit and vote in the House of Lords**”, all the peers of Scotland should have their right to sit in the Lords revoked with the repeal of the Act of Union 1707.

A “yes” result would provide another opportunity to reform the House of Lords. On this occasion, a more rational start could be made by seeking to establish and describe, if not to define, its role. The next step would be to decide its composition and the option of election could be re-examined.

It has often been asserted in opposition to an elective second chamber, that legislative ‘gridlock’ could arise when two elective chambers disagreed which would not be easily resolved within the terms of the Parliament Acts of 1911 and 1949. However, the resolution could lie in the convening of a joint assembly of both chambers as in the present state opening of Parliament in which the Commons are summoned to the Lords by means of a separate procedure. The joint Commons/Lords assembly could debate the subject of the ‘gridlock’, after which a ‘joint’ vote could be taken by a procedure to be determined.

Question 10. What legislation (or other measures) would the Westminster have to pass in order for Scotland to become independent?

The Act of Union 1707 (as amended) would need to be repealed. Legislation would need to be enacted recording particulars of the border between England and Scotland both on land and sea.

26th February 2014

The Law Society of Scotland—Written evidence

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee ('the committee'). The committee is comprised of senior and specialist lawyers (both in-house and private practice)

The committee welcomes the opportunity to consider and respond to the call for written evidence on the House of Lords Select Committee on the Constitution – Scottish independence: constitutional implications for the rest of the UK and has the following comments to make.

General Comments

Negotiations

Questions:

1. *Is the timetable of independence by 24 March 2016 realistic?*

A number of commentators have written on this issue, some supporting the Scottish Government's position and some not. Comment has focussed on whether the 18 month period between the Referendum and the date identified as independence day is sufficient to achieve all the required negotiations with the UK Government regarding Scotland's independence from the UK as well as the negotiations to establish Scotland as a member state of the EU.

The Society cannot take a view on whether 18 months is enough time to complete all the negotiations, individual members reflect a range of views. However, speculation about whether 18 months is or is not sufficient to complete these negotiations is, in one sense, immaterial because, (and there are a number of views on this point) if there is a "yes" vote in the referendum, statehood will require UK legislation (which could have some of the components of the Statute of Westminster 1931) to create the basis referred to in *Scotland's Future: your guide to an independent Scotland* "for the transition to independent statehood". To an extent, the answer to the question depends upon whether such a UK statute can be enacted by that date. Independence and statehood in law would be a precondition of membership of the EU.

What is essential is that planning has been made within both Scottish and UK Governments to conduct the negotiations and what contingencies are in place to deal with the political issues which both sets of negotiations will uncover.

Notwithstanding that the Scottish Government believes that EU membership would be settled within 18 months, both the UK and Scottish Governments need to detail what would be proposed in the event that negotiations for admission were not concluded in the 18 month window between a ‘yes’ vote and “Independence Day”. Would Independence Day be moved back to allow for conclusion to negotiations or would “Independence Day” be a fixed date requiring Scotland to leave the EU and re-join when the negotiations were concluded?

In any event, it would be highly detrimental; both for the citizens of an independent Scotland and for the rest of the EU, for there to be any period where it could be argued that, as regards Scotland, existing rights and obligations under EU law evaporate on Scotland leaving the rest of the UK, in the absence of further provision. Legal certainty on such matters will be essential.

Other important negotiations would also be needed during this period including negotiations with international institutions such as NATO and the UN.

2. *Who would negotiate for the remainder of the UK? To whom would they be accountable?*

In the event of a vote for Scottish independence there would be two significant sets of negotiations (see *Scotland’s Future: your guide to an independent Scotland: Part 4 Transition*).

The first would be the negotiations between the UK and Scottish Governments to effect the independence of Scotland from the UK. This would be a complex negotiation which would engage the Scottish Government and many Whitehall departments in time consuming and exacting discussions dealing with all aspects of the reserved areas of law under the Scotland Act 1998 and the relative policy considerations.

Although the current UK Government is likely to be in place at the time of the referendum in September 2014 it may not be in place after the UK parliamentary elections in May 2015. The implications of this include the difficulty of making any firm decisions prior to the May election. Accordingly the UK Government may wish to consider forming an all-party Commission drawn from nominees of the parties in the UK Parliament for negotiation with the Scottish negotiators. This would:-

- (a) provide continuity; and
- (b) help in ensuring commitment whichever party is in government after the election.

Similarly, although the Scottish Government will be in place at the referendum and also (subject to the 18 month deadline being met) at independence day, the Scottish Government may wish to consider the appointment of an all-party Commission, drawn from nominees of the parties in the Scottish Parliament.

The Scottish Government have said that they will adopt an inclusive approach. A cross-party approach is appropriate because it will:-

- (1) ensure commitment to the results of the negotiation, irrespective of a potential change of Government after independence day; and
- (2) ensure broad legitimacy, given that many of the decisions made during the negotiation period will be foundational for the new state, and are likely to condition, e.g., post-independence constitution-making.

Such commissions could be established by law and made accountable to the UK and Scottish Parliaments respectively.

The second set of negotiations would be between Scotland and the EU. As Scotland is not a member state but wishes to negotiate membership from within the EU there would need to be an agreement between the UK, as member state, which would conduct the negotiations, the EU and Scotland on the way in which these negotiations would take place.

3. *What impact would the timing of the UK general election in May 2015 have on negotiations?*

The impact as indicated above is that the UK Government could change and that could affect the tone of negotiations from the UK side. Consequently efforts would need to be taken to ensure by creating a joint negotiating commission with representatives of the main UK Parliamentary parties.

4. *What happens if the two negotiating teams cannot reach agreement on an issue? Assets and liabilities, and shared services*

This question is difficult to answer as there is no forum for determination of a dispute between the parties. Perhaps the issue where no agreement could be reached could be assigned to arbitration.

5. *What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?*

The division of assets and liabilities will be determined on a fair and proportionate basis by negotiation between the Governments.

There are few examples which provide some precedent for the issues raised in this question. Although the circumstances are significantly different, the British/Irish arrangements in the 1920s could be considered a precedent.

Article 5 of The Anglo-Irish Treaty of 6 December 1921 stipulated that “*the Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set-off or counter-claim*”.

There was considerable negotiation on both sides. The UK Treasury estimated a £50 million liability. Irish negotiators said that the UK should take into account certain specific problems e.g. the effect of taxation on Irish industry.

It was agreed that money would be paid to the Free State largely on the basis of a political view that it would be against the United Kingdom's interests to impoverish an already poor country and potentially increase migration.

The Irish Free State had to pay £5 million per year, although it was slightly offset, from an overall budget which was at that time £24 million. For reasons connected with the Anglo-Irish relationship during the 1920s including the Boundary Agreement of 1925, the Ireland (Confirmation of Agreement) Act 1925 released the Irish Free State from the obligation under Article 5.

General principles of public international law including for example the Vienna Convention of Succession of States in State Property, Archives and Debts, suggest that:-

1. Immovable property for public purposes located in the successor state transfers without compensation to that state; and
2. division of assets has to be negotiated.

Many commentators take the view, with the UK Government, that rUK will retain the UK's international personality. As confirmed by HM Treasury on 13 January 2014 in the paper *UK debt and the Scotland Independence Referendum*, the continuing UK Government would "in all circumstances honour the contracted terms of the debt issued by the UK Government". It becomes a residual guarantor for the UK's public debt and it continues to hold the external property of the state.

The paper goes on to state that an independent Scottish state would become responsible for a fair and proportionate share of the UK's current liabilities but a share of the outstanding stock of debt instruments that have been issued by the UK would not be transferred to Scotland. The Scottish Government in the White Paper state "On independence Scotland will accept a fair share of existing UK debt. The amount of debt that we will accept will be subject to negotiations. We will also be entitled to a fair share of UK assets (page 55)."

An entirely new agreement between the continuing UK Government and Scotland would be needed and the full spectrum of liabilities, past, future and contingent would need to be considered in negotiations.

6. *What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK (for example, the Bank of England and those services listed on page 364 of the Scottish Government's white paper)?*

Subject to agreement between the rUK and Scotland as to which cross-border or shared services would apply there are some constitutional principles which can be identified. These include:-

- i) Any arrangements or agreement should be clearly set out between the states e.g. the agreement between the UK Government and the Irish Government which resulted in the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999 (1999/859).

- ii) The agreement should be approved by both Parliaments and set out in the context of law which should be subject to Parliamentary scrutiny in both Parliaments.
- iii) The agreement and the activity flowing from the agreement should be accountable to both Parliaments.
- iv) All joint bodies should publish annual reports and their operation should be transparent.

Parliament

7. *What would the position of MPs for Scottish constituencies be from May 2015 to March 2016?*

As a matter of law, Scottish MPs should continue to sit until independence day. Before independence day, the UK Government would require to bring budgets to Parliament and enact relative finance bills and other necessary domestic UK law.

The Government might also need to take international action such as sanctions or humanitarian intervention on behalf of the whole UK including Scotland.

In the Irish example MPs elected for Irish constituencies in the 1918 general election left the House of Commons at the dissolution of Parliament in 1922.

If Scotland becomes independent from March 2016 Scottish constituencies will no longer be part of the United Kingdom.

In the absence of an agreement which would require Scottish MPs to leave the House of Commons at independence day, it is possible that MPs elected in May 2015 could represent their constituencies in the UK Parliament until the end of the session of Parliament terminating after March 2016.

The next dissolution after the election in May 2015 will be that before the election in May 2020.

It is too long from March 2016 to May 2020 for MPs to continue to attend the House of Commons for these constituencies. The issue here is really one of legitimacy, rather than legality. After independence day, there ceases to be any legitimate reason for Scottish MPs to stay, but their departure needs to be handled in an orderly manner, so as not to unduly disrupt the business of the House. Therefore the end of that session would, subject to contrary negotiation be the most appropriate exit point.

8. *What impact would independence have on the House of Commons if the MPs for Scottish constituencies left it in March 2016?*

There would be practical consequences if MPs for Scottish Constituencies left the House of Commons.

Firstly, it could have an impact on the capacity of the governing party to continue in that role. A reduction in the number of MPs could affect the majority upon which the Government of the day relied and make that Government vulnerable to a vote of no confidence.

Secondly, the number of MPs would reduce and this would impact on the political composition of the House of Commons.

On the basis of the current composition of the House of Commons:-

- a) the number of MPs in total would fall from 650 to 591
- b) the number of Labour MPs would drop from 257 to 218
- c) the number of Liberal Democrat MPs would drop from 56 to 45
- d) the number of Conservative MPs would drop from 303 to 302
- e) the number of Scottish National Party MPs would drop from 6 to 0

This could have implications for:-

- a) the breadth of expertise in the House
- b) staffing committees
- c) the overall resources available to the House. Fewer MPs would mean fewer salaries, lower global expenses and more available accommodation on the Parliamentary estate.

9. *What impact would independence have on the membership of the House of Lords?*

In law very little, The Peerage Act 1963 repealed Article XXII of the Treaty of Union which provided for representative Scottish Peers. That Act also confirmed the right of the holder of a peerage in the Peerage of Scotland to receive writs of summons to attend the House of Lords and to sit and vote.

The 1963 Act has been amended by the House of Lords Act 1999 concerning the election of hereditary peers. None of this legislation need be directly affected by Scottish independence. Peers hold their peerages either as elected hereditary members or as life peers.

The position of peers from Scotland has been considered relatively recently by the Committee of Privileges in *Lord Gray's Motion 2000 SLT 1337*.

Lord Gray's motion centred on Article XXII of the Acts of Union, which made provision that "Of the Peers of Scotland" 16 were to sit and vote in the House of Lords at the time of Union. It also provided for 45 to be "the number of Representatives of Scotland in the House of Commons". The House of Lords Bill, as drafted at that time, provided that "No-one shall be a member of the House of Lords by virtue of a hereditary peerage". Lord Gray's argument ran that such provision would be in breach of Article XXII.

Article XXII had in fact been repealed in 1963. Their Lordships found that such repeal had been within the power of Parliament, following the doctrine of parliamentary sovereignty and, in any event, Article XXII did not appear to have been intended to be "fundamental law" unalterable by Parliament. In brief, it was

concluded that there would be no breach of the Treaty of Union if the House of Lords Bill were to be enacted.

Importantly, their Lordships were able to recognise that Article XXII had never been intended to fix the composition of the House of Lords, for instance given that Article XXIII envisaged the position of peers of Great Britain created after the Union. Since the Union there had been numerous amendments to the law regarding the composition of both Houses of Parliament. Moreover, it was concluded that the better view was that the 16 Peers of Scotland originally were there simply to represent the peerage of Scotland in the new Parliament and were not there to represent the people of Scotland as a whole in the House of Lords.

Lord Hope of Craighead observed that Article XXII from the outset made no residence or other requirement to ensure that the representative peers had a continuing connection with Scotland. He considered that it must have been anticipated that, in the new Union with its freedoms, even members of the peerage of Scotland might move to England and establish themselves there, with no links to Scotland. Yet such peers would remain eligible to be elected by the peerage of Scotland to be within the 16 peers envisaged by Article XXII.

Moreover, in the modern era, where Article XXII does not apply, and there is a range of different categories of peer in the House of Lords, including hereditary peers (whether of Scotland, England or Great Britain), as well as life peers, a peer is not there to represent a particular part of the United Kingdom. It may be that certain peers have connections with Scotland, of one kind or another, and thus are able to speak with authority on matters within their knowledge regarding Scotland. As Lord Hope points out (see the penultimate paragraph of his speech), such peers may in a practical sense represent the interests of Scotland, from their interest in Scottish affairs. But that does not make them "Scottish" peers who are there solely by reason of some Scottish connection or purpose.

By way of contrast, their Lordships identified the House of Commons, through its universal democratic mandate, as being the representative House of Parliament - through MP's being elected to particular constituencies.

10. *What legislation (or other measures) would the Westminster Parliament have to pass in order for Scotland to become independent?*

The debate over Scottish independence has turned recently to discussion of the post-referendum landscape. What legislation would be necessary and what it would contain would reflect the agreement between the UK and Scottish Government.

In the White Paper at page 338 a two-stage process is proposed to follow upon a majority 'yes' vote. Powers would be transferred from the UK Government and Parliament to the Scottish Government and Parliament which would give the Scottish Parliament the power to declare independent statehood. There would then follow legislation in both the UK and Scottish Parliaments to finalise the transition. There are differing views on the legislation required in the UK but to ensure a smooth transition and international recognition, legislation would be necessary.

From 19 September 2014 until March 2016, there would be constitutional negotiations with the UK Government culminating in the formal agreement with the UK Government and then a legislative and constitution framing process internal to Scotland would take place.

The paper *Scotland's Future* identifies that “one of the first and most fundamental tasks will be to establish the process for preparing Scotland’s first written constitution. It then goes on to identify some of the potential content of a new Scottish constitution, including that the constitution should be a written constitution, that the monarchy will continue and that there will be a Supreme Court of Scotland. Scotland’s membership of the European Union and protection of ECHR rights will also be subject to constitutional provision. Creating a constitution for an independent Scotland would be a multi-faceted project.

There are certain principles to guide the creation of responsible government.

1. The government should be by the consent of the people.
2. The constitution should respect the principle of the separation of powers and create a stable state.
3. A new constitution should be written and formulated by a thorough process of consultation.

Transitional and interim provisions

In the event of a ‘yes’ vote, transitional and interim provisions concerning Scottish and UK citizenship, the apparatus of the state including the head of state, executive, judicial and parliamentary competence, foreign affairs, defence and financial and fiscal arrangements will all be necessary. Clarity on these issues is needed in order to inform the electorate.

There are a number of remaining questions to be answered:

a) by the UK Government

What principles will govern its approach to negotiations for full legal independence in the event of a ‘yes’ vote?

b) by the Scottish Government

How will the Scottish Government avoid locking Scotland into de facto unchangeable constitutional arrangements in pre-independence negotiations, e.g. over cross-border arrangements?

Will the Scottish Government consult on the constitutional platform referred to on page 340 of the paper *Scotland's Future* and, if so, how?

How will the Scottish Government ensure consistency between the constitutional platform (or interim constitution) referred to in paragraph 338 of *Scotland's Future* and the creation of a constitution through a constitutional convention consisting of a participative process that

The Law Society of Scotland—Written evidence

gives the people of Scotland a direct role in shaping the constitution? To what extent will provisions of the constitutional platform be subject to change by the constitutional convention?

Michael P Clancy OBE
Director of Law Reform

7 March 2014

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Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh, Professor Alan Boyle, Professor of Public International Law, University of Edinburgh and Professor Michael Keating, Chair in Scottish Politics, University of Aberdeen, and Director of Scottish Centre on Constitutional Change—Oral evidence (QQ16-26)

[Transcript to be found under Professor Alan Boyle](#)

Professor Stephen Tierney—Supplementary written evidence

SCOTTISH INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS FOR THE REST OF THE UK

Professor Stephen Tierney, Director, Edinburgh Centre for Constitutional Law

Background

This paper is based upon oral evidence provided to the Committee by me on Wednesday 5 March 2014. In what follows I address each of the questions put to me in a call for evidence by the Committee.

Negotiations

I. What legal principles should govern negotiations for Scottish independence in the event of a “yes” vote?

It is more helpful in my view to think about *constitutional* principles rather than *legal* principles governing the negotiation process in the event of a Yes vote. This is because the legal authority of the UK constitution will, in relation to Scotland, have entered a state of limbo. The authority of its key doctrines, in particular Westminster sovereignty, will be widely considered within the Scottish body politic to be, if not in abeyance, then in a deeply unsettled state during this transitional period, and any attempt to assert legislative supremacy unilaterally from London, without the consent of the Scottish Parliament, could result in a constitutional crisis.

In other words, this question can only be answered meaningfully if we take full account of the changing constitutional landscape of the United Kingdom and Scotland in the event of a Yes vote. Such an outcome will require a radical readjustment of how we think about the application of the United Kingdom constitution to Scotland as it prepares to form a new state. Scotland will still be part of the United Kingdom, but the rule of recognition (i.e. the locus of constitutional sovereignty within Scotland) will be adjusting towards interim constitutional arrangements which will themselves anticipate a new Scottish state. The legitimacy of these interim arrangements will be underpinned not only by the process through which they are put in place – e.g. legislation of both the UK and Scottish Parliaments – but also, and arguably more saliently, by the referendum result expressing the sovereign will of the Scottish people and by the Edinburgh Agreement through which this result was accepted in advance by the UK Government. This situation is certainly complex but we cannot hope to short-circuit this complexity by turning mechanically to out-dated constitutional certainties. Parliamentary supremacy as the core constitutional doctrine of the United Kingdom will, insofar as it remains the rule of recognition of the state, still apply throughout the remainder of the United Kingdom (rUK). But at the same time, it is highly likely that a transitional constitutional platform will begin to pave the way to Scottish independence, and in this period the relationship between the institutions of Scottish government and Westminster will be uncertain, unsettled and evolving.

State sovereignty has both an external and an internal dimension. The former dimension will not see any change in Scotland’s status during the transitional period, but the same cannot

easily be said of the latter. External sovereignty concerns a state's distinctive international personality. Scotland would only acquire this upon becoming a state and being recognised as such by other states, and in joining international organisations, succeeding to international obligations etc. So for all intents and purposes, so far as other states are concerned, Scotland will be part of a sovereign UK until some declarative act is made by Scotland, the United Kingdom or both through which Scotland is announced to be independent and in search of recognition. The referendum result in itself will not change this status.

Internal sovereignty is, however, a grey area. While Scotland will remain part of the United Kingdom pending independence, the United Kingdom constitution will have undergone a considerable jolt; in effect the people of a constituent part will have rejected the sovereignty of that constitution. As I suggest, the doctrine which will come under most obvious scrutiny is that of Parliament's legislative supremacy. This claim bears a more detailed consideration. The parliamentary sovereignty doctrine already sits uncomfortably with a number of constitutional changes which have occurred since the United Kingdom's accession to the European Communities: for example, the Human Rights Act 1998 and the various pieces of legislation passed in the same year establishing devolution. Tensions between the doctrine of parliamentary supremacy and the reality of a heavily devolved state have also been recognised in the obiter comments of the UK's senior judiciary.¹⁵ The constitution has also had to adjust to a situation in which a doctrine built upon a unitary conception of the state no longer reflects the reality of dispersed law-making powers throughout the state. For example, the Sewel convention now regulates how the Westminster Parliament legislates for Scotland in areas which relate to reserved matters, and this convention has been fully respected (and in turn it would seem, solidified) by the lengthy and politically contentious process by which the Scotland Act 2012 was passed.

Therefore, when thinking about the post Yes vote environment it is essential to take full account of the already significant existential challenges to Westminster sovereignty which devolution has brought about. In effect there will be two constitutional stories being played out at the same time. Adopting only one of these stories, some will seek to rely upon the orthodox account of Westminster sovereignty as an on-going legal fact. In relation to rUK this story is not without force. But an attempt to apply only this story to the status of Scotland following a Yes vote would be misconceived. By this account the legal backdrop to negotiations following a Yes vote will be one in which the two principal institutions of devolved Scotland – the Scottish Government and Scottish Parliament - as creatures of the Scotland Act 1998, will continue to be regulated by this Act and by the Scotland Act 2012. These statutes are creatures of the Westminster Parliament and so the authority of the institutions of Scottish government is entirely circumscribed within the framework of Westminster sovereignty and will continue to be beholden to this principle until the day of independence.

However, it is important to note that Westminster's sovereignty is at its root a political and not a legal fact, and the legal principles which subordinate the institutions of Scottish government stem from this political fact. The difficulty is that it is precisely this political fact which will be fundamentally challenged by, and subject to change in consequence of, a Yes vote. People will have voted in a referendum, a referendum consented to by the UK Government and Parliament (through the section 30 Order that followed the Edinburgh Agreement), to supersede that political fact and to move to a new political fact of

¹⁵ R (Jackson) v Attorney General [2005] UKHL 56.

sovereignty – the sovereignty of an independent Scotland. Of course that latter political fact will itself be inchoate, not itself have reached its full reality simply by virtue of a Yes vote. The result then will be, as I say, something of a legal limbo between the date of a Yes vote and the date of independence. So far as the United Kingdom state will be concerned, and so far as the legal system of England and Wales will be concerned, the supremacy of Westminster will continue. In Scotland the situation will be more complex. Certainly the only guiding framework which will exist for the institutions of Scottish government and the Scottish courts after a Yes vote, at least prior to any constitutional platform that begins to transfer further powers to the Scottish institutions, will be the two Scotland Acts. No doubt these will continue to be respected and applied by political actors, including the courts. But arguably what will have changed, even before any constitutional platform is established, is the political fact of sovereignty which underpins the authority and legitimacy of these statutes. In other words Scotland will continue to be governed by the Scotland Acts, what will change is *why*. At the moment a strong case can be made that the ‘why’ question is answered thus: because they were created by Westminster and Westminster is sovereign over Scotland and its system of government. But following a Yes vote the answer may well be more contingent: because they are the only system in place until a constitutional platform paving the way to independence is established, but although they continue to form the framework for government, their authority is now contingent upon the evolving constitutional situation, and subordinate to any constitutional platform which now emerges by agreement of the two parliaments of the UK and Scotland.

It is against this backdrop that the Scottish Government would seek a constitutional platform to move further law-making powers to the Scottish Parliament and to give the Scottish institutions the power to start to build towards full statehood. And it is in this context very difficult to address which, if any, ‘legal’ principles will govern negotiations for Scottish independence in the event of a Yes vote.

This leads to several consequences for the constitutional landscape within which negotiations will take place.

i. The first is that negotiations towards independence will be mainly a political rather than a legal issue. For political scientists of course this is a given. For them constitutional politics is always primarily about political power played out in institutional settings which act to constrain political power to greater or lesser extents. But there is also a constitutional law dimension to the primacy of politics in certain situations. In the context of legal limbo, politics will be, if not the only game in town, then perhaps the only one that can be played. We saw in relation to the Scottish Parliament’s powers to hold a referendum that no-one wanted to go to court to test the boundaries of Scotland Act 1998 s29(3) and related provisions, because no one was clear about the legal answer to a question which posed fundamental questions concerning the nature and locus of supreme power within the United Kingdom constitution. The post-referendum period will be even more unsettled and will be one in which a resort to courts to determine the ground rules for negotiations will be a parlous venture for any side, particularly for the UK state which has most to lose if the verdict of judges is anything short of a ringing endorsement of constitutional orthodoxy.¹⁶

¹⁶ The federal government in Canada had its fingers burned in this way in the Secession Reference (discussed below).

ii. The second is that in the absence of a clear legal framework, there is at least an intergovernmental agreement (the Edinburgh Agreement¹⁷ concluded on 15 October 2013) which provides an agreed starting point. This agreement came in the context of uncertainty and disagreement over the power of the Scottish Parliament to hold a referendum on independence per s29 of the Scotland Act 1998. Partly at least to avoid the risks entailed in a court action the two sides reached this political solution. In the Edinburgh Agreement the UK Government agreed that a section 30 Order would be created to ensure, for the avoidance of doubt, that the Scottish Parliament would have the legal power to hold a referendum on independence under certain conditions, as regulated by the Agreement and the Order.

The Edinburgh Agreement is primarily concerned with the holding of the referendum and not with post-referendum negotiations. However, it does offer some guidance as to how negotiations ought to proceed. Paragraph 30 of the Agreement¹⁸ commits both governments to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom in light of a legal and fair referendum producing a decisive and respected outcome. It seems we can certainly expect a legal and fair referendum. Since the Edinburgh Agreement was concluded the Scottish Parliament has passed two acts: the Scottish Independence (Franchise) Act 2013 and the Scottish Independence Referendum Act 2013, establishing a legal framework for the process of the referendum. These acts set detailed conditions for the referendum, and provide important roles for the Electoral Commission and the Electoral Management Board to ensure this legislation is properly implemented.¹⁹

It is also surely the case that, aside from the legislative requirements, there is also an ethical duty on both of the main campaign designated organisations and others involved in campaigning and reporting to abide fully by the spirit and letter of these rules. Such an undertaking was given by both Yes Scotland and Better Together in oral evidence to the Scottish Parliament Referendum Bill Committee.

Therefore, since the grounds are laid for a legal and fair referendum, we can reasonably expect both governments to respect the outcome as undertaken in the Edinburgh Agreement. The United Kingdom Government's intention to negotiate independence has recently been restated by a UK Government minister.²⁰ It can also reasonably be assumed that despite the rhetoric of the referendum campaign it will be in the interests of the UK to build a constructive relationship with its near neighbour. But what does it mean that they

¹⁷ *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

¹⁸ 'The UK and Scottish Governments are committed, through the Memorandum of Understanding between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is *legal and fair* producing a *decisive and respected outcome*. The two governments are committed to continue to *work together constructively* in the light of the outcome, whatever it is, in *the best interests of the people of Scotland and of the rest of the United Kingdom*.' [emphasis added]

¹⁹ Stephen Tierney, 'Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox', (2013) *Election Law Journal* 1-17.

²⁰ <http://www.scotsman.com/news/politics/top-stories/scottish-independence-uk-will-respect-yes-vote-1-3306378>

will ‘work constructively in the best interests of the people of Scotland and of the rest of the United Kingdom towards a negotiated agreement’?

iii. In light of what I have said a more helpful conceptualisation is to think about *constitutional* rather than *legal* principles as a framework applying to any negotiations.

In the context we are addressing this is a significant distinction. The Scottish institutions after independence may no longer accept the legal authority of the Westminster Parliament to legislate for Scotland on any issue without the consent of the Scottish Parliament. However, it is also clear that Scotland will still be part of the United Kingdom, functioning within one constitutional framework, albeit a deeply unsettled one.

To develop a set of constitutional principles would require two further steps. First, to establish a platform by which a set of principles might be agreed, and secondly to define these principles. Since the negotiation process will be a political one, I do not anticipate that these principles would be legally enforceable. They would rather act as a guide to encourage the negotiations to proceed along an agreed framework.

The search for constitutional principles to guide a process where the constitution is otherwise silent is not without precedent. An analogous – although certainly not identical – situation arose in Canada following Quebec’s referendum on sovereignty in 1995. The Supreme Court of Canada was asked by the Canadian government to address several questions including whether Quebec had the right under the constitution of Canada to secede from Canada. The Court found that Quebec had no right to secede unilaterally but also concluded that in light of a clear vote on a clear question in favour of such an outcome by the people of Quebec voting in a referendum, then Quebec’s partners in confederation (the federal government and the other provinces) would have a duty to negotiate secession in good faith. Such a right to negotiate secession is of course not to be found in the written constitution of Canada. Instead the Court fell back on unwritten principles which it identified from the Canadian constitutional tradition – federalism, democracy, the rule of law and constitutionalism, and minority rights. It stated that these must be considered together and that no one principle was more important than any other.

It is certainly important to note the differences between this process and the issue in the UK following a Yes vote. In the Canadian scenario these were principles which led the Court to conclude that Quebec could secede under certain circumstances, they were not primarily principles which would govern the negotiations to that end. However, it is clear that the Court intended that they would also be applicable to that purpose, for example in issues over Quebec’s borders, the status of indigenous peoples etc.²¹

This is of course a judicial articulation and there is no obvious reason why the courts of England or Scotland would be involved in setting any principles for the UK/Scotland process. But, as I suggest, the two governments together with the negotiating teams could themselves identify principles that would help inform deliberations.

What then might these principles be? This is of course a subject that would need much more detailed consideration, but we can distinguish between substantive starting points or preconditions on the one hand and procedural principles on the other. In general I would

²¹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

consider the former to be unhelpful and perhaps not realistic. I do, however, think that a set of procedural guiding principles could be very useful. These could reasonably include:

- good faith,
- respect for the outcome of the referendum,
- an inclusive approach to participation, embracing the interests of all nations and territories of the United Kingdom,
- transparency,
- accountability (to the two parliaments respectively),
- mutual cooperation,
- full respect for, and consideration of, the position of all parties to negotiation,
- reciprocity,
- respect for the interests of the peoples of Scotland and the UK.

As this last point suggests, it could also be explicitly agreed that both sides will, so far as possible, work together constructively to help secure the best interests of the peoples of *both* Scotland and of the rest of the United Kingdom. In other words, although each side is principally acting for the peoples of rUK and Scotland respectively, they ought to try to deliver an agreement in the best interests of both given that so many mutual interests are at stake.

It is clearly in the best interests of the future relations of the two states that the birth of an independent Scotland, if it is to occur, does so without rancour and against a backdrop of harmonious relations between the two states. The fraught process that led to Ireland's independence should be a warning to both sides to work in a spirit of cooperation and mutual good will. The Edinburgh Agreement has gone a considerable way to achieving this. A fair and democratic referendum should also help secure this outcome. It seems reasonable and preferable that the negotiations be conducted in the same spirit.

2. Is the timetable of independence by 24 March 2016 realistic?

What impact would the timing of the UK general election in May 2015 have on any independence negotiations?

I am not in a position to assess definitively whether negotiations with the rest of the UK could be completed by March 2016. I would, however, refer to a number of contingencies which will make this more or less likely.

The first is the possibility of laying the groundwork in advance. The obvious solution to a lot of uncertainty would be agreement between the two governments on a range of issues ahead of the referendum. The Electoral Commission recommended 'that both Governments should agree a joint position, if possible, so that voters have access to agreed information about what would follow the referendum. The alternative - two different explanations - could cause confusion for voters rather than make things clearer.'²² But it would seem that this is not going to happen for political reasons.²³

²² Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', op. cit., paras 5.41-5.44

²³ S. Tierney, 'Why is Scottish Independence Unclear?' U.K. Const. L. Blog (25th February 2014) (available at: <http://ukconstitutionallaw.org/>).

A second factor is the nature of the negotiations. In light of the undertaking by both governments to work constructively in the negotiation process then I certainly would not say that it could not be done. I also note that Professor James Crawford, has, based upon his experience of the moves to independence of other territories, said the timetable 'seems realistic'.²⁴ Others have taken a different view. But it is important that we distinguish the reality of negotiations following the *fait accompli* of a Yes vote from what is now being presented as either best or worst case scenarios; that we distinguish the attitude of the different sides in the heat of a referendum campaign from the cold reality of independence negotiations. Of course it could be that the UK side will decide to say no to all or most of the Scottish government's proposals. On the other hand, it may be that the goal becomes one of achieving good relations and the most integrated relationship possible following independence; we simply don't know and it does not serve the voter well to pretend that we do. The feasibility of the timetable is dependent therefore upon how willing each side is to reach agreement and to work cooperatively to do so.

A third issue is whether some questions could still remain unsettled until after independence. This is not uncommon in independence negotiations as we saw over the border issue in Ireland in the 1921-22 process. But this begs the question: which issues would have to be settled by independence day and which could be delivered on later?

A fourth factor is the 2015 election. I note the Committee has already taken evidence in relation to this. There are a number of factors here. The first is the possibility of a change of government which assumes office with a different negotiating position and strategy. Another possible contingency would be a Labour Government dependent for its majority upon Scottish MPs: would it be keen to draw out negotiations? I can't speculate further, but can only state these as possible scenarios.

But there is also the possibility that from the beginning, at UK level, there will be cross-party consensus on the issues at stake as there is at the moment in the alliance of the three main UK parties in Better Together. This could lead to a negotiating team encompassing members of different parties and also members from Wales and Northern Ireland, leading to a pan-rUK negotiating position. I return to this at Question 3 below.

A fifth issue is that there will no doubt be an attempt on the part of the Scottish Government and the Scottish negotiating team to synchronise the emergence of Scottish independence with Scottish membership of the European Union. If so, then much will depend upon how negotiations on the latter front proceed. It is of course possible that the international dimension could also be worked through later – membership of international organisations, succession to treaties etc.

3. Who would negotiate for the remainder of the UK and to whom should they be accountable?

This would be a matter for the United Kingdom Government to determine in a way overseen presumably by the Westminster Parliament. There are different scenarios as to the personnel who would negotiate. One possibility is that only the two governments would

²⁴ <http://www.theguardian.com/politics/scottish-independence-blog/2013/feb/11/nicolasturgeon-scotland-treaties-legal>

negotiate with each other and would be accountable to their respective Parliaments for the outcome.

This seems unlikely from the Scottish side. In the White Paper (para 2.7) the Scottish Government announced that it ‘will invite representatives from the other parties in the Scottish Parliament, together with representatives of Scottish civic society, to join the Government in negotiating the independence settlement.’

Related to this, Andrew Wilson a former SNP MSP, has suggested the involvement of former first ministers of Scotland and former Secretaries of State from the Conservative, Labour and Liberal Democrat parties could be included in the negotiating team.²⁵

In the same way, as noted above, a cross-party approach at UK level could also be adopted, perhaps involving the appointment of high level officials to conduct the negotiations together with senior figures from the three main parties represented in Parliament, plus representation from Wales and Northern Ireland.

I should state that I am not recommending such options, merely noting that alternatives to a government-government process do exist.

4. What role if any should Scottish MPs have in negotiations or in holding negotiators to account, and in any vote on a resulting settlement?

This is a matter for the Westminster Parliament to determine. Clearly the *legal* status of such MPs would not change in light of a Yes vote, they would still be members of Parliament on the same terms as any others. The issue is whether there will be a widespread assumption that their *constitutional* status has changed, which should result in a new delineation of their role.

There would seem to be a strong argument that Scottish MPs, facing an agreement in which they would no longer play any role in the UK Parliament, should not take part in negotiations on behalf of the UK which will set the framework for the ongoing constitutional arrangements for the UK. Some measure of informal recusal from any negotiating role and from voting on any settlement could be worked out. Whether such MPs might play a role in the Scottish negotiating team is another matter.

5. Should the negotiating teams be held directly accountable by the public?

The Edinburgh Agreement makes no reference to any process other than an intergovernmental negotiation between the two governments. It is very rare in this type of situation for the seceding territory to hold a second referendum on the outcome of negotiations, or for the continuing state to hold a referendum on the issue.

The Scottish Government has not announced any plan to hold a second referendum in Scotland. Although rare, the idea of such a second referendum is not entirely without precedent. The 1980 referendum question on sovereignty in Quebec involved an undertaking to hold a second referendum on the outcome of negotiations.

²⁵ <http://www.snp.org/media-centre/news/2013/oct/andrew-wilson-donaldson-lecture>

There is also no proposal to hold a referendum in rUK on the outcome of negotiations. Voters at UK level will, however, have the opportunity to speak indirectly about the negotiating process in the 2015 election.

Although further referendums are unusual, it could also be argued that the appropriateness of further direct engagement by the peoples of rUK and Scotland might depend upon the eventual outcome of negotiations. In the event that an agreement is reached which involves significant areas of shared services or elements of union which require shared institutions etc. - in other words a situation that will involve extensive constitutional changes at rUK level and which results in a model of independence significantly different from that envisaged in the Scottish Government's White Paper - then it might well be argued that further referendums in rUK and Scotland would be appropriate to approve such changes.

6. What would happen if the two negotiating teams could not reach agreement on an issue?

This is an unlikely scenario, I expect both sides will negotiate until they reach agreement. It may also be that some matters which are either contested or complex will be left open to further negotiation after the date of Scottish independence.

In the unlikely event of a collapse in the negotiators then there is the possibility of a unilateral declaration of independence by Scotland. This possibility has rarely been considered within the independence debate and is clearly not envisaged in the White Paper. As suggested in answer to question 5 it would seem that in the absence of speedy agreement that negotiations will continue until a conclusion satisfactory to both sides is reached.

Were a UDI it to come about it would raise a new set of issues regarding both the process and the terms of separation between Scotland and the UK, at which point international law would provide some guidance as to the default position, and for Scotland's status internationally.²⁶ This would leave a significant number of undecided issues and would not, it seems, be in the interests of Scotland or rUK.

The UK Parliament

7. What would be the status of the 59 MPs for Scottish constituencies in 2015–16?

What impact might this have on the 2015–2020 Parliament?

As discussed above, under current arrangements the legal status of the MPs from Scotland would not change. But there would no doubt be discussion concerning their appropriate constitutional role following the 2015 general election, particularly in relation to legislation applying only to rUK. This would intensify the West Lothian question. There would be pressure for these MPs not to participate in the passage of such legislation. There are

²⁶ S. Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', (2013) *European Constitutional Law Review* 359-390.

potentially tricky political dimensions here, for example if a majority Labour government after 2015 was dependent upon these seats for its majority.

There would also need to be consideration given to terminating the office of these MPs upon the assumption of independence by Scotland if this happens in 2016. Again clearly if such MPs are elected and are then removed from Parliament in 2016 this would, for example, have serious implications for any UK government dependent upon these MPs for a majority.

These issues would no doubt be addressed by the UK government and Parliament concurrently with negotiations towards interim constitutional arrangements for Scotland.

Legislation

8. What measures would be needed (e.g. legislation) to allow negotiations to take place?

The Scottish Government would no doubt consider a Yes vote as a mandate to negotiate, as presumably would the UK Government. In addition, if further authority were needed, each side could rely upon the Edinburgh Agreement as a mandate to commence negotiations.

It does not seem that legislation would be needed to facilitate such a process per se, although it would make sense for both parliaments to pass paving legislation, appointing negotiating teams, setting the respective remits for such negotiations, and setting out principles to guide the negotiators. An agreement to pass parallel legislation through the two parliaments providing an agreed framework for negotiations, would also make sense. In this way the paving legislation would ensure that each side to the negotiations would proceed with a direct mandate from its respective parliament.

9. What legislation would be required at Westminster to achieve independence for Scotland?

The Scottish Government envisages that on independence day the Scottish Parliament will assume the role of parliament for an independent Scotland. Legislation by Westminster would not be formally necessary. If there is a negotiated agreement on the terms of independence the Scottish Government could seek international recognition on this basis. However, in the event of a negotiated agreement the Westminster Parliament would presumably pass legislation formally recognising that agreement and Scotland's independent status. This could also serve to acknowledge that Scotland no longer forms part of the United Kingdom.

Monarchy

10. What impact might Scottish independence have on the monarchy? Would an independent Scotland need a governor-general?

The Scottish Government White Paper intends that the Queen will remain head of state of an independence Scotland. It seems that this would certainly be the case at least until a new constitution was promulgated for Scotland.

The White Paper provides that, following the elections of May 2016, a constitutional convention will be established to 'prepare the written constitution'. The Scottish Government's intention is that this body would have real determining power. That the Scottish Government can only 'propose [certain matters] for consideration' by the constitutional convention suggests that the convention will have control over the inclusion or exclusion of all of the Government's constitutional goals set out in the White Paper, including the personality of the head of state.

If an independent Scotland is to be a constitutional monarchy then, depending upon what if any constitutional roles the monarch would agree to perform, it would seem prudent for some office to be located in Scotland. Such an office would not require to carry the title 'governor-general'.

Assets and liabilities, and shared services

11. What legal principles should apply to negotiations on the apportionment of assets and liabilities that are currently UK-wide?

Please see comments in answer to Question 1 above.

12. What are the constitutional implications of maintaining services shared between Scotland and the rest of the UK?

To whom would services that are currently UK-run be accountable if shared with an independent Scotland?

Clearly we could be entering new constitutional terrain if there is to be agreement on the sharing of services and assets etc. This question therefore raises a larger issue, namely the heavily integrated nature of the modern nation-state and the web of international relations which bind states within Europe. As the details of the Scottish Government's proposed model of independence emerge, for example in relation to the currency and certain social services, what is envisaged is in fact the continuation of important relationships with the UK as well as new and close relations with international partners.

The reality today is that any new state emerging from within the EU and intending to remain within the EU will, by definition, take on a novel form of statehood which delivers independence but not separation. This unique state of affairs in the birth of new states is the factor which poses the deepest analytical challenges to political actors, to constitutional theorists and practitioners, and to voters.

If rUK were to agree to the sharing of services with an independent Scotland, then each Government would be responsible to their respective Parliaments in respect of such services. But there would also be needed for joint or share institutions to manage these.

12 March 2014

Mr David Torrance—Written evidence

Scottish independence: constitutional implications for the rest of the UK

Submitted by David Torrance

1. Is the timetable of independence by 24 March 2016 realistic?

In truth, at this stage it's impossible to say, but I increasingly believe it is not only realistic, but could actually be settled in a shorter time-frame, or at least the head-line issues could be. In most other cases where one part of a state has seceded from the other – for instance in Czechoslovakia – detailed negotiations have continued long after the agreed “independence” date. Given the complex connections between Scotland and the rest of the UK that would undoubtedly be the case post-24 March 2016 too. In essence, I think long-drawn out negotiations would be in neither side's interests and thus the political dynamic after 18 September 2014 (assuming a “yes” vote) would enable the main points of negotiation – currency, defence, division of assets & liabilities, etc – to be settled relatively quickly.

2. Who would negotiate for the remainder of the UK? To whom would they be accountable?

Given that there is a general election due in May 2015 and given the likelihood negotiations would take more than eight months (if not as many as 18), then it would make sense for rUK's negotiations to be led by a cross-party team for the political aspects with officials providing the necessary administrative support. That way, if there is a change of government during the negotiations then there would be minimum disruption. This would be made easier by the fact that the three “Unionist” parties have already worked together under the “Better Together” banner and hold broadly the same position in relation to a currency union, defence, and so on. Perhaps the person leading the rUK negotiating team might change if there was a change of government, but the fundamental basis of negotiations would not. Sensibly, the rUK team would be accountable to the UK Parliament, just as the Scottish team would be answerable to Holyrood.

3. What impact would the timing of the UK general election in May 2015 have on negotiations?

As explored above, the timing would have an impact, though not necessarily a disruptive one. Those negotiating on behalf of the rUK government would probably have to be non-frontline figures, given the necessity of campaigning in April 2015. Angus Robertson, the SNP's Westminster leader, has suggested that the 2015 general election could be delayed, but given the fixed-term nature of the Westminster Parliament and the possible public response, this does not strike me as realistic. The desirability of resolving all the major issues before campaigning starts in April 2015 might also act to speed up the initial, and most important, negotiating period.

4. What happens if the two negotiating teams cannot reach agreement on an issue?

This seems unlikely, and indeed I cannot think of a single precedent for independence negotiations failing to reach an agreement; the political dynamic is such that a conclusion is always reached (eventually). Recently a “senior” UK Government source suggested that if this did occur then the constitutional status of Scotland would revert to the “status quo”, but again that does not strike me as a realistic scenario, and certainly not a politically desirable one.

Parliament

7. What would the position of MPs for Scottish constituencies be from May 2015 to March 2016?

This would be a potentially difficult area. If negotiations are still ongoing then it would seem unreasonable to expect Scotland’s 59 MPs to step down for they would still have constituency business (among other responsibilities) to attend to until agreement was reached, and indeed until March 2016. In Ireland the situation was tidier. The last election contested by the whole of Ireland had been in 1918 (when 47 Sinn Feiners were elected from prison), and by the time of the next poll in 1922 the Irish Free State had been formed and thus only candidates standing in the six counties of Ulster stood for the House of Commons. There is another consideration: public opinion – voters in rUK might not tolerate the election of 59 Scottish Members, who could potentially hold the balance of power in a hung Parliament, when independence appears imminent.

8. What impact would independence have on the House of Commons if the MPs for Scottish constituencies left it in March 2016?

The main impact would be the loss of almost a tenth of the Lower House’s membership, just as the formation of the Irish Free State in 1922 removed dozens of MPs from the House of Commons. Beyond that there’s no reason why the Chamber would not adapt quickly, indeed it’s likely there would be immediate jostling for prime (vacated) office space among the remaining Members. In terms of the balance of power (and despite the above conclusion to 7.) Scottish MPs have rarely made a difference to the overall balance of power. On current numbers the Conservatives would lose just one MP while Labour would lose a considerable chunk of its tally; the Liberal Democrats would also lose a disproportionate portions of its Parliamentary group.

9. What impact would independence have on the membership of the House of Lords?

This is much trickier territory given the non-territorial aspect of peerages. Again the Irish precedent is instructive (up to a point). Curiously, neither the Anglo-Irish Treaty of 6 December 1921 nor the Irish Free State (Agreement) Act (1921) contained any provision for the Irish peers, 28 of whom had been “elected” by the whole Irish peerage since the 1801 Act of Union with Great Britain. After 1922, therefore, the Irish representative peers continued to sit in the House of Lords, although any who passed away were not replaced. Thus the last survivor, the Earl of Kilmorey, died nearly 40 years later in 1961. The Peerage Act of 1963 finally excluded the Irish peers from the House of Lords entirely, while giving all Scottish peers – who, like the Irish, had hitherto been “electing” representatives – a seat in the House of Lords as of right (as new “UK peers”).²⁷ This would create problems in the

²⁷ For a full account of the Irish peers, see: <http://www.burkespeerage.com/articles/ireland/page93.aspx>

event of independence for there are no longer specifically “Scottish” peers, as there were Irish in 1922. Most of the hereditary peers were expelled in 1999, although 92 – including a few Scots – remain in the Upper House. Life peers, meanwhile, are all United Kingdom creations, and thus identifying, and presumably expelling, those who are Scottish would be an inexact (as well as a divisive) science. Many Scots, for example, were given a peerage in recognition of careers spent predominantly in England or overseas, so excluding them in the event of independence would appear churlish. It seems likely, therefore, the Irish precedent would be followed: existing “Scottish” peers would remain, but no more would be created. Perhaps it might even act as a spur to further reform.

10. What legislation (or other measures) would the Westminster Parliament have to pass in order for Scotland to become independent?

Just as the Act of Union that made Scotland part of “Great Britain” in 1707 required legislative ratification (by both the English and Scottish Parliaments), so too would an Act making Scotland independent from the UK in 2016. More recently, the creation of the Irish Free State required legislative recognition in 1921 (in fact, Westminster only completely relinquished constitutional links with “Eire” following the 1949 Ireland Act), while even in the early 1980s the House of Commons debated and “repatriated” the Canadian constitution. The Scottish Government recognises this requirement and in recent publications has pointed to the Malta Independence Act of 1964 and the 1931 Statute of Westminster as precedents.

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28th February 2014

Mr David Torrance, journalist, commentator and regular columnist for the Herald, Mr Alex Massie, journalist, commentator and regular columnist for the Spectator and Ms Mandy Rhodes, journalist and editor of Holyrood magazine—Oral evidence (QQ45-65)

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[.Transcript to be found under Mr Alex Massie.](#)

Rt Hon. Lord Wallace of Tankerness QC and Rt Hon. Alistair Carmichael MP—Oral evidence (QQ27-44)

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[Transcript to be found under Rt Hon. Alistair Carmichael MP.](#)

Mr Barry Winetrobe—Written evidence

Scottish independence: constitutional implications for the rest of the UK

Submission by Barry K Winetrobe

Introduction

This is an important and timely inquiry, on a matter of central constitutional importance to everyone in all parts of the UK.

Democratic deficits in the referendum/independence processes

Until relatively recently, the approach of the 'UK Centre' to Scottish independence, and its effect on the UK, was a mix of 'hands-off reticence' and what may be described as a 'coastal erosion' theory of changes to the UK, that small peripheral bits may fall off (eg Southern Ireland in the 1920s) without actually threatening the main body of the Union. This fostered a dearth of informed public or political discussion, especially outside Scotland, on the actual process for achieving Scottish independence, and, in particular, the role, if any, of the remainder of the UK ('rUK') polity and public before and after any referendum.²⁸ This was encouraged by the Scottish Government's 'reassurance' approach, aimed at both Scottish voters and people in the rUK, and rosy interpretations of the 2012 Edinburgh Agreement suggesting that post-devolution negotiations would be smooth and straightforward.

Debate has only gradually built up in the rUK. Recent discussions on the currency, debt and Europe, and speeches by senior UK ministers and others, have now placed Scottish independence firmly on the UK political agenda. Belatedly, rUK politicians and people are realising that this issue affects them all directly and significantly.

This highlights a growing awareness of the asymmetry of democratic engagement in this process between Scotland and the rUK. Those in the rUK, with what David Cameron described as a 'voteless voice'²⁹, comprise not just many thousands of Scots by birth, descent or otherwise, but also many millions who may well support or oppose Scottish independence, for a variety of reasons. And their voice seems only to be wanted prior to the referendum, not to any post-'Yes' negotiation process that affects the foundations of the state in which they live.

Realpolitik apparently dictated that the referendum had to be a Scotland-only exercise; that it would be 'binding' (at least politically, in terms of 'everyone respecting' the result), and that the UK would remain as a continuing state without Scotland, one of its two co-founders. Now the consequences are coming home to roost. The more UK politicians argue about the impact of Scottish independence, not just on Scotland, but on the rUK, the more democratically untenable becomes the rUK's 'voteless voice' approach.

Why do the arguments, which are passionately put by some for membership of, or fundamental changes in, the EU to be subject to a UK referendum, not also apply, and with

²⁸ In 2012 I wrote some blogposts on various aspects: <http://constitution-unit.com/2012/01/11/but-what-union/>; <http://constitution-unit.com/2012/01/26/thinking-about-a-post-scotland-union/>; <http://constitution-unit.com/2012/10/24/scots-degrees-of-separation/>

²⁹ "So to everyone in England, Wales and Northern Ireland ...I want to say this: you don't have a vote, but you do have a voice." - David Cameron, 7.2.14: <https://www.gov.uk/government/speeches/the-importance-of-scotland-to-the-uk-david-camersons-speech>

even with greater force, to fundamental changes in a far more constitutionally significant Union, that of the UK state itself?

While it is not realistic, at this late stage, to expect the 2014 referendum to include the people of the rUK, there is time to consider constitutionally appropriate and effective means of public engagement, both in Scotland and in the rUK, in the various stages of any post-‘Yes’ period.

This inquiry by a Committee of the UK Parliament should not ignore the post-‘Yes’ period *within* Scotland, especially with its likely impact on the rUK. Much of the rUK’s involvement in, and perception of, the Scottish independence debate has been muddied by a near-total acceptance that the SNP/Scottish Government’s particular view of Scottish independence, including the process for its achievement, is the only relevant one. But a ‘Yes’ vote is a ‘Yes’ to the question asked, ‘*Should Scotland be an independent country?*’, not a ‘Yes’ to the Scottish Government’s particular vision and policy. Unlike the 1975 Europe referendum, it would not be consent to a published set of terms and conditions, as these are to be the subject of post-referendum negotiations. There appear to be no plans to put any outcome of these negotiations *directly* to anyone in Scotland, or in the rUK. The Scottish Government proposes that such ‘ratification’ in Scotland is for the Scottish Parliament.

A fundamental constitutional change in the very basis of the state should only take place with the *informed consent* of **all** the people affected. The outcome of any negotiations should be subject to a second Scottish referendum, so that the people of Scotland, having already expressed their desire in principle for independence, can give their informed view on the detailed terms by which their wish is to be made a reality. Having the May 2015 Westminster general election act as a snapshot surrogate referendum on independence is unsatisfactory, as negotiations would be ongoing, and it would skew the wider purpose of that election.

A more imaginative approach, more in keeping with recent Scottish constitutional practice, is for the outcome of any negotiations to be put to some form of Scottish constitutional convention³⁰ or ‘Constituent Assembly’. It could be elected by a one-off Scottish-wide election, separate from both the 2015 and 2016 elections, and would make either a binding (on Holyrood at least) decision, or a formal recommendation which can only be rejected by some special majority at Holyrood.

Providing the people of the rUK with a means of direct democratic engagement is more difficult. Any UK-wide referendum faces the problem of the overwhelming population imbalance between Scotland and the rUK (primarily England), which would be hard to overcome by weighted voting or the like. An rUK-only referendum or similar device faces the same problem, if its outcome were to be a veto on Scottish independence, despite the expressed wish of the Scottish people, and even it were not a veto but a trigger for further negotiations, it would risk the nightmare of a stalemate or endless referendums. Similar objections apply to any form of representative engagement via the UK Parliament – other than by dealing with any necessary legislation – with its inbuilt anti-independence majority able to be deployed in any relevant business.

³⁰ Such a mechanism is proposed by the Scottish Government to prepare a written constitution in a newly independent Scotland.

A more practical approach would be a dedicated independently-run mass consultation exercise throughout the rUK, *and* within each of its constituent nations and each English region, to gauge opinion on any agreed deal, to be reported to the UK Parliament and Government.³¹ This would have the benefit of disaggregating rUK opinion on Scottish independence, and its implications for the UK, in the different nations and regions, something which has been sadly lacking thus far in the crude ‘Scotland v UK’ (or even ‘Scotland v England’) debate.

After a ‘Yes’ vote

I wish to focus on your Questions 1-4 and 7-10 collectively. The crucial point, insufficiently addressed thus far, is that the post-‘Yes’ period is fundamentally different from the period up to the referendum. After a ‘Yes’ vote is declared, any ‘No’ arguments, from the UK Government, political parties and others, made with the intention of convincing Scottish voters of their case, need not become the negotiating position of what would be in effect the ‘rUK Government’ for these purposes. Its obligation would become the promotion of what the Edinburgh Agreement describes as “the best interests of the people of ... the rest of the United Kingdom.”

This does not mean some crude zero-sum approach of not having the “best interests of the people of Scotland” also in mind, but it does mean that current arguments over issues like the currency, debt and Europe may well shift, with the rUK looking at the external as well as internal impact of Scottish independence. The feasibility of the SNP’s proposed timetable may not depend on these issues, which may become more resolvable rather than less, but all the others which cumulatively may lead to a prolonged negotiation period, *even if all parties act in good faith and with a desire to reach agreement leading to independence.*

The timetable

When would substantive negotiations begin? After an inevitable period for reflection, especially in the rUK, and decisions on the practicalities of venues etc., an initial issue would be the make-up of the various negotiating teams, as implied in your Q2 and as stated in the Scottish Government’s White Paper. What about representation, formally or otherwise, (a) in the Scottish (and/or UK?) team of the views of any local government area which voted ‘No’ (and wished to remain in the rUK), and (b) in the UK team, of the views of the three nations, and the regions of England, of what an rUK state would be like? The people of the rUK are entitled to expect this latter point to be addressed *during* the negotiation period, as part of that process or in parallel with it, and not as an afterthought, if at all, once Scottish independence is concluded.

This suggests that little substantive may be achievable before 2015, other than say some grand ‘opening ceremony’ just before or after the holiday period. This leaves around 2-3 months before the 2015 election period arrives, with all its limitations on substantive decision-making on issues of this magnitude. Even the passage of any relevant legislation, especially at Westminster (eg to deal with Scottish MPs in the 2015 Parliament, or to establish any novel negotiating framework) may be difficult to achieve between September 2014 and dissolution. The real work may therefore only begin in earnest after the formation of a UK Government in May/June 2015.

³¹ Ideally, this comprehensive consultation should also take place both (a) before the Scottish referendum, so that Scottish voters are informed of the views of their fellow, but voteless, citizens, and (b) after a ‘Yes’ vote, to inform all those participating in the negotiations.

The impact of intervening elections

The referendum question's unfortunate phrasing and the absence of any further direct recourse to the people in Scotland or, at any point, in the rUK specifically on Scottish independence and the future of the UK, means that there is no necessary guarantee that a 'Yes' vote will inevitably lead to Scottish independence within a relatively short period of time or at all. Despite the two Governments' Edinburgh Agreement statement that "everyone will respect" the result, it is unrealistic to expect that all anti-independence forces will cease to work for the maintenance of the Union from 19 September 2014 onwards, especially if there were to be a 'close result', in terms of the size of the 'Yes' majority or the level of turnout³², and/or if post-referendum polling suggested any significant drop in support for independence. All the necessary processes – from the various negotiations themselves to any parliamentary legislative procedures – provide opportunities for pro-Union forces to pursue their opposition, overtly or otherwise, to Scottish independence.

This makes it probable that any major election, such as those in 2015 and (if the process is not completed by then) in 2016,³³ becomes a surrogate for such a direct say. These election campaigns will be an obvious further opportunity for anti-Independence forces to persuade Scotland to 'change its mind'. The 2015 Westminster election would pose dilemmas for Scottish voters participating in an election for a Parliament that may only be relevant to them for a matter of months, with candidates of the UK-wide parties presumably having to run on very different (and far more temporary) manifestos and election addresses in Scotland than in the rest of the UK, well beyond the familiar 'tartanised' editions of previous elections.³⁴

MPs from Scottish constituencies in the 2015 Parliament, especially if they remain after independence, would become a focus for controversy at a constitutionally sensitive time, creating a situation potentially much more toxic than the 'West Lothian Question'. The standard response - that all MPs are of the same status and that there are no 'second class MPs' - would become harder to maintain as independence approached. Scottish MPs (many likely to be anti-independence) could participate in all 'independence-related business' (and even, especially if also Ministers, in the negotiations themselves), and in all other business.

In the absence of any applicable legislation, their position in the 2015 Parliament after independence would presumably be an issue of parliamentary law and practice.³⁵ This would be unsatisfactory. If they were able to remain until dissolution, there would not only be issues of democratic legitimacy – representatives of a 'foreign' state and citizens participating in UK debates and votes – but also damaging media and public arguments about finances (pay, expenses etc) and the like. Some may choose to stay away completely or for some business, or to deal only with constituency work. Others may 'resign', which would presumably lead to even more constitutionally awkward by-elections.

³² Note the 'wobble room' in the wording of para 30 of the Edinburgh Agreement: "They look forward to a referendum that is legal and fair producing a **decisive and respected** outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland **and of the rest of the United Kingdom.**" [emphasis added]

³³ In addition, there will be local government elections in different parts of the UK, and, if the process is protracted, European Parliament elections and possibly EU referendums.

³⁴ Would some pro-independence parties decide not even to contest the 2015 Westminster elections on the basis that it was in effect an 'rUK Parliament', in terms of dealing with independence negotiations and legislation, much like the SNP 'self-denying ordinance' over non-Scottish business?

³⁵ The position on Irish representation at Westminster in 1920-22 is not a suitable analogy or precedent, given enhanced democratic expectations now and the uniquely convoluted situation then.

Any parliamentary decision that those elected for Scottish constituencies had no right of membership after independence may lead to legal challenges (privilege and exclusive cognisance notwithstanding) or attempts by those affected to remain and participate. None of this would reflect well on Westminster.

To provide clarity for all concerned, after any 'Yes' vote and in good time before the run-up to the 2015 election, Westminster should enact legislation to clarify the position of Scottish representation in the Commons (the existence of constituencies, tenure of Members returned, filling of any vacancies, financial issues etc), and, if desired, any issues relating to 'Scottish' (however defined) peers. This may minimise any political resort to ad hoc 'solutions' to accommodate existing Scottish MPs post-independence, such as elevation to the House of Lords; formation of a special 'transitional committee' of Scottish MPs for the remaining period of the 2015 Parliament to scrutinise the path to, and initial period of, independence, or even the creation of a post-independence 'Council of the Isles' (including the Irish Republic?), built on existing devolution/NI peace process mechanisms or otherwise.

If, after independence, the departure of all Scottish MPs removed the existing Government's majority, the recent fixed-term parliaments legislation may lead to the formation of a new Government (or arrangements to support the existing one), or to a dissolution and further general election. Voters in the rUK may well resent being forced to have a second election so soon for no other reason - one foreseeable before the 2015 election - than Scottish independence, and could argue with some justification that it would be more sensible if they had their opportunity for input earlier in the process. Government reformation may be less traumatic, but any Government formed in 2015 depending on Scottish MPs for its majority would be a 'lame duck' or 'caretaker' Government, with attendant risks to political and economic stability and confidence and so on. Some form of coalition or pact could be arranged in 2015, even if there was a majority single party Government available (as was floated in 1997), rather than wait for the inevitable a year later, but the public might find this hard to accept.

23 February 2014