Playing Poohsticks with the British Constitution? The Blair Government's Proposal to Abolish the Lord Chancellor

Susanna Frederick Fischer
The Catholic University, Columbus School of Law

Follow this and additional works at: http://scholarship.law.edu/scholar
Part of the Law Commons

Recommended Citation
Playing Poohsticks with the British Constitution? The Blair Government’s Proposal to Abolish the Lord Chancellor

Susanna Frederick Fischer*

ABSTRACT

This paper critically assesses a recent and significant constitutional change to the British judicial system. The Constitutional Reform Act 2005 swept away more than a thousand years of constitutional tradition by significantly reforming the ancient office of Lord Chancellor, which straddled all three branches of government. A stated goal of this legislation was to create more favorable external perceptions of the British constitutional and justice system. But even though the enacted legislation does substantively promote this goal, both by enhancing the separation of powers and implementing new statutory safeguards for

* Susanna Frederick Fischer is an Assistant Professor at the Columbus School of Law, The Catholic University of America, in Washington D.C. She was called to the Bar of England and Wales in 1988 and practiced as a barrister in London for several years. Questions and comments regarding this article can be sent to her at fischer@law.edu. Thanks are due to John L. Carroll, Brannon P. Denning, and Miriam Cherry for their invitation to present an earlier version of this paper at a faculty colloquium at Cumberland School of Law, Samford University, in Birmingham, Alabama, on October 29, 2004. They and their faculty colleagues provided warm Southern hospitality as well as helpful feedback on a work in progress. The author would also like to thank her husband, Erik Thomas Mueller, for his great support.
judicial independence, the process of constitutional reform did not comport with it. The reform process suffered from undue speed, excessive secrecy, and failure to ensure adequate consultation and debate on the reform proposals. It also created an atmosphere of distrust that not only forced the government's retreat from its initial goal of entirely abolishing the office of Lord Chancellor, but also failed to achieve public confidence that the reforms were needed as a matter of reasoned principle. Like the game of Poohsticks, chance played too great a role in the constitutional reforms. This flawed process is inconsistent with the goal of improving external perceptions of justice, fairness, and judicial independence from political pressure. These recent constitutional reforms in the United Kingdom are worthy of American attention because external perceptions of the justice and fairness of the American constitutional system are growing in importance in an era in which the United States, like the United Kingdom, seeks to export its democratic values across the globe and struggles to ensure the appropriate level of judicial independence. Increasingly, it matters not only that justice be done, but also that it must be seen to be done.

TABLE OF CONTENTS

I. Introduction .................................................................................................. 259
II. The 2003 Proposal to Abolish the Lord Chancellor .................................. 262
III. “He gets extremely little sleep”: The Multifaceted Office of Lord Chancellor .................................................................................................................. 265
   A. The Lord Chancellor’s Executive Functions as a Cabinet Minister and Head of a Government Department ................................................................. 270
   B. The Lord Chancellor’s Judicial Functions as a Judge and Head of the Judiciary .............................................................................................................. 274
   C. The Lord Chancellor’s Legislative Role ....................................................... 278
   D. Miscellaneous Responsibilities of the Lord Chancellor .............................. 281
   E. The Lord Chancellor’s Constitutional Responsibilities to Preserve Judicial Independence .......................................................................................... 281
IV. Previous Reform Efforts Based on “Internal” and “External” Concerns About the Lord Chancellor .................................................................................. 286
V. A Flawed Process of Reform: Lack of Transparency and Adequate Consultation .............................................................................................................. 295
   A. The Government’s Sudden Announcement of Reforms to the Office of Lord Chancellor ................................................................................................. 296
   B. Judicial Concerns Lead to the Negotiation of the Concordat ...................... 306
   C. The Struggle to Enact Constitutional Reform Legislation ............................ 311
VI. Conclusion: Why the British Constitutional Reforms Deserve American Attention ................................................................................................................. 328
I. Introduction

Several American Supreme Court justices, including Justices Sandra Day O’Connor and Anthony Kennedy, have recently argued that American judges should pay greater attention to international law and legal developments. Justice O’Connor has urged American judges to do this not only to better inform their decision making, but also to create a good impression of American justice abroad. “The impressions we create in this world are important, and they can leave their mark,” O’Connor has said. Under this approach, which emphasizes the importance of comporting with shared international human rights norms, justice must not only be done; it must be done visibly.

Similar concerns have recently spurred major and highly controversial constitutional reforms in the United Kingdom. This article focuses on changes to the ancient office of Lord Chancellor, which, prior to the reforms, straddled all three branches of government. The Lord Chancellor was part of the judicial branch of government as a senior

---


2. See Bill Rankin, U.S. Justice is honored; O’Connor says court has its ear to the world, Atlanta Journal-Constitution, Oct. 29, 2003, at 3A (quoting from O’Connor’s speech at a dinner commemorating her as the recipient of the Southern Center for International Studies World Justice Award).

3. Id.

judge and head of the judiciary, part of the executive branch as a senior cabinet minister, and also part of the legislative branch as a member and ex officio speaker of the House of Lords. The Constitutional Reform Act, which was enacted in March 2005 after considerable Parliamentary and public controversy, did not abolish the office of Lord Chancellor but substantially changed it. The Lord Chancellor will no longer automatically serve as speaker of the House of Lords. Nor will he serve as a judge or as head of the judiciary, and his role in relation to the appointment and disciplining of the judiciary is greatly reduced. Additionally, the Constitutional Reform Act imposes a new statutory duty on the Lord Chancellor and other government Ministers to uphold judicial independence.

This article critically assesses how these reforms to the Lord Chancellor’s office became law. It argues that while the Constitutional Reform Act’s changes to the Lord Chancellor’s functions are, viewed substantively, largely positive in outcome, the process by which these reforms were implemented is cause for serious concern. By enhancing the separation of powers, the reforms that were ultimately enacted promote the external perception that the British constitutional and judicial systems are grounded in the rule of law and judicial independence from political pressures. But the speed, secrecy, and lack of adequate consultation that characterized the Blair government’s (hereafter “Government”) constitutional reform process do not promote similarly favorable external perceptions. As one elected Tory peer, the Earl of Onslow, has charged, the Government has been playing Poohsticks with Britain’s constitution and with 800 years of British liberty.

Poohsticks is a game played by Winnie-the-Pooh and his friends. Each player stands on a bridge and, facing upstream, throws a stick into the water at the same time. The players then cross to the downstream side of the bridge and watch as the current carries the sticks under the bridge. The player whose stick floats past the bridge first is the winner.

5. For more information on the Lord Chancellor’s functions, see infra Part III.
6. Constitutional Reform Act, 2005, c. 4 (U.K.) (This legislation was approved by both Houses of Parliament on Mar. 21, 2005 and received Royal Assent on Mar. 24, 2005.).
7. Id. at § 18, Sch. 6.
8. Id. at § 7, 11, Sch. 4.
9. Id. at § 3.
Just as the winner of a Poohsticks competition was completely reliant on random chance, so was the likelihood of the Government's rushed and secret initial constitutional reform proposals ultimately improving the British constitutional system.11 Playing Poohsticks is a dangerous way to conduct constitutional reform, particularly in an era of globalization where the eyes of the world are watching and judging the process. Even if justice is ultimately done, it is crucial for justice to be seen to be done. The global perception that established democratic societies, including the United Kingdom and the United States, comport with their core constitutional values, such as impartial justice and the rule of law, is a pressing concern in an era in which these societies seek to spread democracy across the globe.12

Part II of this article briefly introduces the Government's initial proposal to reform the office of Lord Chancellor, considering how and why it initially sought to abolish the office as well as the widespread opposition it received, especially from the senior judiciary. Part III provides historical background on the role and functions of the Lord Chancellor, from the medieval origins of the office up to the Government's 2003 announcement of its planned abolition. Part IV points out that concern about the Lord Chancellor's multifaceted role is not new by examining several unsuccessful efforts to reform the office over the past two centuries. Part V demonstrates how the process of reform suffered from a lack of transparency, a lack of consultation, and excessive haste that did not inspire public confidence that the reforms were necessary or founded in reasoned principle. As a result, the Government suffered many setbacks in the legislative process. These eventually forced the abandonment of the Government's initial plans to abolish the office of Lord Chancellor, although it did succeed in enacting legislation that profoundly changed the office. Part VI concludes that it is important for Americans to pay attention to this major British constitutional reform because they are facing a similar challenge to promote favorable external perceptions of their system of government, and are also struggling with the problem of ensuring an appropriate level of judicial independence. In an era in which America seeks to export its democratic values, it is of crucial importance to ensure that its system not

12. See, e.g., Jim VandeHei, Bush Calls Democracy Terror's Antidote, WASH. POST, Mar. 9, 2005, at A16 (describing speech by President George W. Bush advocating the global spread of democracy); Raymond Colitt et al., Blair calls for unity in the face of world challenges, FIN. TIMES, Jan. 27, 2005, at 10 (describing speech by Prime Minister Tony Blair that claims that there is a growing global consensus on the need to spread democracy).
only is, but also appears to be, comporting with those values and with fundamental human rights.

II. The 2003 Proposal to Abolish the Lord Chancellor

In June 2003, Prime Minister Tony Blair suddenly announced plans for massive constitutional changes to the British justice system that would sweep away well over a millennium of tradition. These plans were by no means the first major constitutional changes initiated by the Government. Since Blair’s Labour Party came to power in 1997, the Government has fully or partially implemented more than a dozen others. These include the removal of all but ninety-two of the hereditary peers from Parliament’s upper house, the House of Lords, as the first stage of a two-part reform of that body; the enactment of human rights and freedom of information legislation; and the devolution of certain powers previously held by the United Kingdom Parliament to new legislative bodies in Scotland, Wales, and Northern Ireland.

The plan for reform announced in June 2003 included two major reform proposals other than abolishing the office of Lord Chancellor. These were the removal of most judicial functions from Parliament by replacing the current final court of appeal, a House of Lords committee, and...
with a new Supreme Court, and the introduction of a totally new system for judicial appointments.

The Government’s position was that these reforms were necessary not because the British justice system was actually failing to adequately protect democratic values and human rights, but to foster greater transparency, accountability, and increased public confidence in this system, both domestically and internationally. In other words, the primary concern was not so much that justice was not being done, as that it had to be seen to be done. Lord Falconer of Thoroton, who, as the current Lord Chancellor and Secretary of State for Constitutional Affairs, has been in the unenviable situation of attempting to abolish his own position, emphasized this purpose in his introduction to the Government’s September 2003 Consultation Paper on reforming the office of Lord Chancellor. He stated there that “[t]he Office of Lord Chancellor has been the subject of criticism for some time. In particular by combining the three primary roles of Minister, Judge and Speaker of the House of Lords, these distinct functions have become obscured, even confused.”

Lord Falconer made clear that the Government was seeking to increase public confidence in the constitutional system. He said: “[o]ur

the Appellate Committee is no longer the highest court in England, Wales, Northern Ireland, and Scotland (in civil matters) because the Judicial Committee of the Privy Council’s case law on devolution matters is binding on all other courts, including the Appellate Committee. See Scotland Act, 1998, c. 46, § 103(1) (U.K), Northern Ireland Act, 1998, c. 47, § 82(1) (U.K.), Government of Wales Act, 1998, c. 38, sched. 8, ¶32(b) (U.K.).

16. The name of this new court, the “Supreme Court,” suffered from potential confusion with the existing Supreme Court of England and Wales. See Supreme Court Act 1981, c. 54, § 1 (Eng.). The existing Supreme Court was not the final appeals court for those jurisdictions, but included several lower trial and appellate courts: the High Court, Crown Court, and Court of Appeal. The reason that this collection of courts bore the title “Supreme Court” is the result of the legislation creating it, the Judicature Act of 1873, which abolished the House of Lords’ appellate jurisdiction, so that there was no superior appeals court. See SLAPPER & KELLY, supra note 15, at 109-110, 146. However, three years later this situation changed when a new government enacted the Appellate Jurisdiction Act of 1876 reinstating the House of Lords as the highest court of appeal. See id. at 109-110.

17. 429 PARL. DEB., H.C. (6th ser.) (2005), col. 554 (speech of Christopher Leslie, Parliamentary Under-Secretary for Constitutional Affairs) (stating that the “fundamental principles driving the reforms” were “the need to modernize our constitution so that our institutions can serve the public in a clearer, more transparent and more effective manner; so that our courts and justice system can be administered by a full-time Minister clearly accountable to Parliament; and so that the relationship between the three arms of the state—Parliament, the judiciary, and the Executive—is settled, clarified and easier to understand, in turn making each better fitted to carry out its vital roles in a modern democracy”).

18. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at Foreword.
existing arrangements have become increasingly hard to sustain, even as
we seek to persuade developing countries to adopt clearer constitutional
mechanisms and provide for the insulation of the judiciary from political
pressures.\textsuperscript{19}

In a speech delivered in December 2003, Lord Falconer later
reiterated these concerns:

There is, I believe, a dissonance between our values as citizens of a
liberal democracy and some of our constitutional arrangements. We
should not ignore that dissonance. . . . We must ground our changes
in history. We must understand that history shows us we cannot
afford to stand still. . . . Our programme of reform stems logically
from our progressive values and a firm belief that there is a careful
balance to maintain, between preserving the UK’s constitutional
heritage on the one hand, and running the risk of our public
institutions becoming antiquated on the other. A system of
Government cannot remain in thrall to the past; it must be credible
and it must be effective. Sometimes it can achieve this by virtue of
its heritage; sometimes change is required. Our guide is whether
reform augments, first, the credibility and effectiveness of our public
institutions.\textsuperscript{20}

As well as these concerns about external perceptions of the British
constitutional system, the Government also justified its reform proposals
on the basis that the workload of the Lord Chancellor’s office had
increased so much that it was now beyond the ability of any one person
to manage.\textsuperscript{21}

Many critics, including a large number of senior judges, reacted to
the Government’s announcement with shock and outrage.\textsuperscript{22} They
criticized the reform proposals as rushed and also as lacking adequate
consultation. Even more seriously, they charged that the planned
reforms were likely to destroy their stated goal of judicial independence
and threatened the rule of law.

Critics of the proposals used strong language to voice their
disapproval. The former Conservative Foreign Secretary Lord Howe of
Aberavon expressed the view that abolishing the office of the Lord
Chancellor would amount to “constitutional vandalism,”\textsuperscript{23} and also stated

\textsuperscript{19} Id.

\textsuperscript{20} Lord Falconer of Thoroton, Constitutional Reform Speech, University College,

\textsuperscript{21} See HOUSE OF LORDS SELECT COMMITTEE ON CONSTITUTIONAL REFORM BILL,
FIRST REPORT, July 2, 2004, HL 125-1 ¶ 19 [hereafter HOUSE OF LORDS SELECT
COMMITTEE ON CONSTITUTIONAL REFORM FIRST REPORT], available at
http://www.publications.parliament.uk/pa/ld/ldcrefhtm

\textsuperscript{22} See infra, notes 23-27, 253-264 and accompanying text.

\textsuperscript{23} 663 PARL. DEB., H.L. (5th ser.) (2004), col. 1156 (speech of Lord Howe of
that Blair's proposals "could be compared almost to 9/11 in their folly."\textsuperscript{24}

Lord Justice Judge (yes, his real name), the deputy Lord Chief Justice,\textsuperscript{25} warned of the danger that the reforms would open the door to extremist political interference with justice: "We have to remember that Hitler came to power in a democratic country by getting a significant popular vote and then subverting the constitution."\textsuperscript{26} Lord Woolf, who, as Lord Chief Justice was the second-ranking judge in the English legal system, commented that the reforms constituted the greatest threat to judicial independence since the seventeenth century, when "a lot of judges lost their heads."\textsuperscript{27} The historical basis of such criticism reflects the need for a historical perspective on the ancient office of Lord Chancellor. The next section attempts to provide that perspective.

III. "He gets extremely little sleep": The Multifaceted Office of the Lord Chancellor

\begin{quote}
Poor Gentleman—he has to mix
With barristers and lords
He is in charge of lunatics
And coroners and wards;
And what with listening to Earls
And looking after orphan girls,
And imbeciles of every sort,
And judges of the County Court,
And all that kind of thing,
He gets extremely little sleep;
And then of course he has to keep
The conscience of the King:
And sometimes at the close of day
He gives a vicarage away. . . .\textsuperscript{28}
\end{quote}

As the writer A.P. Herbert made clear in his 1923 book of comic poems, \textit{Tinker Tailor: A Child's Guide to the Professions}, by the middle years of the twentieth century the office of Lord Chancellor had evolved into a multifaceted and highly demanding position that was decidedly not

\begin{footnotes}
\item 24. \textit{Id.} at col. 1152.
\item 25. The Lord Chief Justice of England is the President of the Criminal Division of the Court of Appeal and is the most senior judge in the Queen's Bench Division of the High Court. \textit{See Slapper & Kelly, supra} note 15, at 210.
\end{footnotes}
a job for those who valued their sleep. Although the precise origins of the office are lost in the mists of time, there is clear documentary evidence of an Anglo-Saxon royal official with the title of Chancellor dating from 1068. Some commentators have contended that the office is four hundred years older. Whether or not they are correct, the office of Chancellor is certainly ancient, predating Parliament and the Magna Carta, as well as all other offices of state, except the Crown, and including even the Prime Minister. The historical importance of the post is clear from the rule of precedence that the Lord Chancellor is the second subject in the realm, outranked by only the Royal Family and the Archbishop of Canterbury. The long history of the office has also had a significant impact on the functions of the Lord Chancellor. Many of these functions were not acquired as a matter of logical planning, but through historical accident over many centuries.

Chancellors have always served in an executive role as officers of state and Ministers of the Crown. The early Chancellors were all clerics.


30. See, e.g., UNDERHILL, supra note 4, at 1-5. Despite citing the first documentary evidence of the chancellor as dating from 1068, Underhill contends that the first actual holder of the office can be traced to the reign of King Cnut (1016-1035), the first king to use the royal seal that is the hallmark of the office of Chancellor. Id. at 5.

31. Underhill notes that the nineteenth century biographer Lord Campbell stated that the office is four centuries older, but based this statement on what Underhill believes to be questionable sources. Id. at 1-2. The former Lord Chancellor Lord Mackay of Clashfearn (1987-1997) has agreed with Lord Campbell that the office existed since 605 A.D. See Lord Mackay, The Lord Chancellor in the 1990s, 44 CURRENT LEGAL PROBLEMS 241 (1991); see also HEUSTON, LIVES 1885-1940, supra note 29, at xv (arguing that Edward the Confessor (1042-66) was the first English King to have both a great seal and a Chancellor, though admitting the existence of controversy over the age of the office of Chancellor).

32. ELWYN-JONES, supra note 29, at x; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 99 (4th ed. 2002); Richard Ford, Post dating back 1,400 years is consigned to history. THE TIMES, June 13, 2003, at 6 (Home news).

33. See HEUSTON, LIVES 1885-1940, supra note 29, at xvi. The significance of the position is also evident from the fact that assassinating the Lord Chancellor amounts to an act of high treason. See DIANA WOODHOUSE, THE OFFICE OF LORD CHANCELLOR 1 (2001).
who, unlike most of their compatriots, had been educated in reading and writing. They therefore could assist the King not only as royal chaplains, but also as head of the royal secretariat, the Chancery, which took its name from the Latin word for latticed screens, cancelli. Medieval Chancellors prepared and sealed royal documents such as charters and writs, and had the authority to use the King’s seal in preparing and authenticating royal documents.

The Great Seal of the Realm is the enduring symbol of the office of the Lord Chancellor. Even as the Lord Chancellor’s administrative duties have changed over the centuries, he has always remained the keeper of this seal, apart from a five-year period after the Glorious Revolution of 1688, when there was no Lord Chancellor at all, nor was there a Lord Keeper of the Great Seal. Some Lord Chancellors have taken their role as keeper of the seal particularly seriously. In the early nineteenth century, Lord Eldon (1800-27) reportedly slept with the seal under his pillow.

Over time, the Chancellor also acquired a legislative role. Many Chancellors were extremely powerful politicians. Some, like Cardinal Wolsey (1515-29), Sir Thomas More (1529-33), and Lord Clarendon (1658-67), were effectively prime ministers. Celebrating the political skill of Wolsey and More, Lord Hailsham (1970-74, 1979-87) commented: “They served under a tempestuous, savage, conceited, treacherous, authoritarian sovereign who has always had a better press than he deserved.”

As the office of Chancellor became more politically influential, its
holders got the job of presiding over Parliament in the King’s absence, which eventually crystallized into the *ex officio* position of Speaker of the House of Lords, as enshrined in statute in 1539. In an ironic twist, the end result was the loss of some of the Lord Chancellor’s political significance as the seat of political power shifted from the House of Lords to the House of Commons.

Chancellors also gradually took on judicial functions. Many medieval Chancellors held degrees in civil or canon law, and by the early fifteenth century, they had also assumed the role of “keeper of the King’s conscience.” At this time, many plaintiffs were unable to obtain redress in the King’s common law courts. The common law courts could not help them if their claims did not fall within the limited scope of writs recognized by the common law. Some plaintiffs failed to obtain justice in the common law courts as the result of excessively technical procedure, fraud, corruption, or undue influence. In such cases, the Chancellor began intervening to give relief based on his own conscience, or his personal view of what was just in the circumstances of a particular case, using simpler and less formalistic procedure than that of the common law courts. The Chancellor also employed more flexible rules of evidence (such as permitting evidence to be taken by deposition and from the parties themselves), and developed additional remedies that were unavailable in the King’s courts (including injunctions and specific performance). The Chancellor’s system of justice became known as “equity” by the Tudor period, and crystallized into a kind of law. It did not fuse procedurally with the common law system until the enactment of the nineteenth century Judicature Acts, at which time the Lord Chancellor ceased to function as the “King’s conscience.”

Nevertheless, the Lord Chancellor still retained important judicial functions, including a different sort of conscience function. He continued to serve as a judge by reason of his entitlement, as a peer, to sit in the House of Lords. By the eighteenth century, he was generally considered to be the most respected British judge and head of the legal

42. *See* UNDERHILL, supra note 4, at 102.
43. *See* WOODHOUSE, supra note 33, at 5.
44. BAKER, supra note 32, at 99 n.16, 103 n.29; DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶2; BAILEY, supra note 4, at 4.
45. BAILEY, supra note 4, at 4.
46. BAKER, supra note 32, at 103-104.
47. BAILEY, supra note 4, at 4.
48. BAKER, supra note 32, at 106.
49. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (Eng.); Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c. 77 (Eng.).
50. UNDERHILL, supra note 4, at 167-68.
By this time, the Lord Chancellor had also acquired a significant patronage function in appointing judges, which some Lord Chancellors exercised in an unabashedly partisan fashion. But as head of the legal system, the Lord Chancellor also acquired the important constitutional function of guardian of judicial independence, with the goal of protecting judges from political pressure to ensure their integrity. In this role, he has continued to have a type of conscience function.

The range of judicial and administrative duties of the Chancellor required the assistance of a large number of clerks, even in the middle ages. By the late nineteenth century, the Lord Chancellor had acquired a permanent administrative staff of personal assistants and advisers. After the Second World War, the office of Lord Chancellor grew into a sizeable government department headquartered in the House of Lords and Selborne House in Victoria Street, London. By the early years of the twenty-first century, the Lord Chancellor’s Department employed around 12,000 people, and there were predictions that it would double in size by 2008.

By the time of Blair’s announcement that the office of Lord Chancellor would be abolished, the Lord Chancellor had accumulated a wide range of functions, spanning all three branches of government. In 2003, 347 Acts of Parliament referred to the Lord Chancellor, ranging from the Treason Act of 1351 to the Finance Act of 2003.

---

51. Id. at 169.
52. Id. at 142-43.
53. WOODHOUSE, supra note 33 at 8, 15-16.
54. BAKER, supra note 32, at 100.
55. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶ 4.
56. Id.; BAILEY, supra note 4, at 16.
57. BAILEY, supra note 4, at 16; Frances Gibb, Lord Chancellor’s Role Should End, TIMES, April 2, 2003, at 15.
59. DEP’T FOR CONSTITUTIONAL AFFAIRS CONSULTATION PAPER 13/03, supra note 4, at Annex E.
following subsections describe these functions in some detail.

A. The Lord Chancellor's Executive Functions as a Cabinet Minister and Head of a Government Department

In 2003, the Lord Chancellor was a member of the executive branch, as a Cabinet minister, and head of his own government department, with ministerial responsibility for the administration of justice. Ministerial responsibility means that the Lord Chancellor was responsible to Parliament for his operation of the Lord Chancellor's Department, including for the spending of the financial support granted by Parliament. As a Cabinet Minister, the Lord Chancellor was also bound by the doctrine of collective responsibility, which required Ministers to publicly support government policy even if they did not personally agree with it. However, unlike most Cabinet ministers, Lord Irvine of Lairg, the Lord Chancellor in 2003, was not and had never been an elected Member of Parliament. A gift of the Prime Minister, the office of Lord Chancellor was a political appointment, and, in his executive role, the Lord Chancellor was a government spokesman.

As the Lord Chancellor's Department grew, his executive role expanded significantly, especially over the past thirty-five years. The 1971 Courts Act substantially reorganized the English and Welsh court system on a more formal basis, resulting in a large expansion in the judiciary and a marked shift in control over the administration of justice away from judges to the Lord Chancellor's Department.

By 2003, the Lord Chancellor's responsibilities for judicial administration included the administration of the higher English and Welsh courts (other than the two House of Lords judicial committees, the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council), the oversight of the management of the

60. See WOODHOUSE, supra note 33, at 68-69.
61. An example of the doctrine of collective responsibility in action is the resignations of Cabinet Ministers Robin Cook and Claire Short because they did not wish to publicly support the Government's policy in Iraq. The one exception to the doctrine of collective responsibility, the "agreement to differ" has been used on only three occasions in the last century. See ADAM TOMKINS, PUBLIC LAW 137 (2003).
62. See WOODHOUSE, supra note 33, at 11; see also Her Majesty's Government, 10 Downing Street Website, http://www.number-10.gov.uk/output/Page1371.asp (has a list of current Cabinet ministers showing that the vast majority are MPs) (last visited Mar. 24, 2005).
63. See WOODHOUSE, supra note 33, at 7, 69.
64. Id. at 46-47.
65. See Dep't for Constitutional Affairs Consultation Paper 13/03, supra note 4, at ¶ 19, Annex D; see also supra note 58, infra notes 66-67. In 1972, an executive agency, the Court Service, was created to provide administrative support to all English and Welsh courts except the House of Lords, the magistrates courts, and certain
magistrates courts, and the administration of more than a dozen tribunals, such as the Lands Tribunal, the Office of the Social Security and Child Support Commissioners, and the General Commissioners of Income Tax. The Lord Chancellor was also responsible for the administration of a number of Northern Irish courts. Additionally, he had primary responsibility for promoting English civil law reform, improving civil procedure, expanding alternative dispute resolution, and providing legal aid and other legal assistance. He also had a growing number of family law, constitutional, and human rights responsibilities, including primary ministerial responsibility for human rights, freedom of information, data protection, and fundamental marriage law.

A very important function of the Lord Chancellor affecting justice was his significant patronage role in the making of judicial appointments in England, Wales, and Northern Ireland. He directly appointed many full and part-time judges, including civil District Judges sitting in county courts and Deputy District Judges. He also appointed lay

tribunals. See WOODHOUSE, supra note 33, at 52.

66. Magistrates courts have criminal jurisdiction to hear lesser criminal offences and civil jurisdiction over a wide variety of matters, including adoption and maintenance proceedings and liquor licensing. They use both lay justices with no legal qualifications as well as professional "stipendiary magistrates." See SLAPPER & KELLY, supra note 15, at 104, 128-9. In 1992, the Lord Chancellor's Department acquired oversight responsibility for the magistrates courts. See BAILEY, supra note 4, at 16. Since the Second World War, there has been a significant rise in the number of tribunals established by statute outside the court system. See SLAPPER & KELLY, supra, at 325. The Lord Chancellor's Department had responsibility for administering many of these tribunals. See DEPT FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at Annex D (containing a full list of all tribunals administered by the Lord Chancellor).

67. DEPT FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶ 28 (including the Supreme Court, the county courts, the magistrates' courts, the coroners courts, and the Office of Social Security and Child Support Commissioners).

68. Id. at Annex D. The Lord Chancellor is responsible for the Law Commission, an advisory body that recommends civil law reform to the Government. The Lord Chancellor oversees the Legal Services Commission that provides citizens with legal assistance through its Community Legal Service and Criminal Defense Service. He also authorizes four legal professional bodies to grant their members to conduct litigation or rights of audience in the courts (the Law Society of England and Wales, the General Council of the Bar of England and Wales, the Institute of Legal Executives, and the Chartered Institute of Patent Agents).

69. Id. (noting that in 2001, a variety of constitutional responsibilities were transferred from the Home Secretary to the Lord Chancellor, including administering the Oath of Homage to new bishops and archbishops).

70. DEPT FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, A NEW WAY OF APPOINTING JUDGES [hereinafter DEPT FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03] ¶¶ 3-10, Annex A (July, 2003); DEPT FOR CONSTITUTIONAL AFFAIRS CONSULTATION PAPER 13/03, supra note 4, at ¶¶ 27-31.

71. DEPT FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶ 5. District Judges and Deputy District Judges hear cases in the county courts,
magistrates in England and Wales, as well as Justices of the Peace in Northern Ireland. He recommended candidates for many other judicial positions to the Queen for appointment, including High Court judges, Circuit judges, and Recorders. In practice, this amounted to making these appointments, since the Queen always accepted his recommendations. The most senior judges, including Lords of Appeal in Ordinary, the Heads of Division of the Supreme Court, and Lords Justices of Appeal were technically appointed by the Queen on the Prime Minister’s recommendation, but in practice the Prime Minister always sought the advice of the Lord Chancellor before recommending a candidate. The Lord Chancellor’s Department ran virtually the entire judicial appointments process, including advertising available positions, consulting about candidates, considering applications, interviewing candidates, deciding who to appoint, and providing feedback to unsuccessful candidates. In addition to appointing judges, the Lord Chancellor also bore responsibility for dealing with many matters of judicial discipline and complaints against judges in England, Wales, and Northern Ireland.

which have jurisdiction over smaller and less complex civil cases. See SLAPPER & KELLY, supra note 15, at 104-105, 211. The Lord Chancellor did not directly appoint District Judges in magistrates courts. See DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra, at ¶4-5.

72. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶14.

73. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶4; WOODHOUSE, supra note 33, at 134. The High Court hears larger and more complex civil trials as well as some appeals from magistrates’ courts, tribunals, and the Crown Court, and some actions for judicial review of administrative bodies. Circuit Judges sit in the Crown Court, which hears serious criminal offenses. They also sit in county courts to hear civil cases. Recorders are part-time judges who assist Circuit judges. See SLAPPER & KELLY, supra note 15, at 106-109, 146, 211. Also included in this category of appointments were District Judges in magistrates’ courts, Social Security Commissioners, the Judge Advocate General, and the Judge Advocate of Her Majesty’s Fleet. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶4.

74. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶3; WOODHOUSE, supra note 33, at 134.

75. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶10, 22.

76. Id. at ¶¶ 100-108; DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶28 (September, 2003). The Lord Chancellor only had the statutory power to remove judges of the rank of Circuit Judges or below from office if they misbehaved or became incapable. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 10/03, supra note 70, at ¶100. It was the responsibility of the Lord Chancellor to review complaints about the conduct of judges and to decide whether to warn or reprimand a judge or to remove him or her from office. Id. Judges of the High Court and above could only be removed from office by the Queen if she has received a formal address from both houses of Parliament. Id.
The proposal to abolish the Lord Chancellor did not include abolishing other members of the executive with some responsibilities for legal matters, including the Attorney General, the Solicitor General, and the Home Secretary. Both the Attorney General and Solicitor General, known together as the Law Officers, straddle the legislative branch of government since they are also usually members of the House of Commons, or, more rarely, members of the House of Lords like the current Attorney General, Lord Goldsmith QC.\textsuperscript{77} The Home Secretary is also a member of the House of Commons.

The Attorney General and his deputy, the Solicitor General, are the Government’s primary legal advisers on domestic, international, and European Community law issues.\textsuperscript{78} The Attorney General is also the head of the Bar of England and Wales, and holds ministerial responsibility for supervising the Director of Public Prosecutions as head of the public prosecution service for England and Wales (the Crown Prosecution Service) and the Director of Public Prosecutions in Northern Ireland.\textsuperscript{79} He is also responsible for the Serious Fraud Office, which investigates and prosecutes complex fraud cases in England, Wales, and Northern Ireland, and for the Treasury Solicitor’s Department, which carries out legal work for a variety of government departments.\textsuperscript{80}

The Home Secretary is a Cabinet minister who has responsibility for many areas relating to law and order, including criminal justice, terrorism, police, prison service, probation service, immigration, asylum, and criminal law reform.\textsuperscript{81} At the time of Blair’s announcement in June 2003, the Home Secretary was David Blunkett. Blind since birth, Blunkett attracted widespread admiration for triumphing over disability and adversity. But his tenure was marked by controversy over his tough stance on immigration as well as his efforts to legislate mandatory

\textsuperscript{77} \textsc{Bailey, supra} note 4, at 19. Lord Goldsmith QC’s webpage is at http://www.lslo.gov.uk/goldsmith.htm (last visited Aug. 21, 2005) (stating that Lord Goldsmith was appointed Attorney General on June 11, 2001). The current Solicitor-General, Mike O’Brien QC, MP, appointed on May 9, 2005, is a member of the House of Commons (Member of Parliament for North Warwickshire). He was formerly Minster of State for Energy and E-Commerce at the Department of Trade and Industry. Before his election to Parliament, he practiced as a solicitor. See http://www.lslo.gov.uk/obrien.htm (last visited Aug. 21, 2005). \textit{See also infra} note 218 (for a discussion of the meaning of “QC,” the abbreviation for Queen’s Counsel).

\textsuperscript{78} A.W. \textsc{Bradley} & \textsc{K.D. Ewing, Constitutional and Administrative Law 391 (13th ed. 2003); Bailey, supra} note 4, at 19-23.

\textsuperscript{79} \textsc{Bradley & Ewing, supra} note 78, at 392; \textsc{Bailey, supra} note 4, at 20.

\textsuperscript{80} \textsc{Bailey, supra} note 4, at 20.

\textsuperscript{81} \textsc{Catherine Elliott & Frances Quinn, The English Legal System 451 (4th ed. 2002); Bailey, supra} note 4, at 19; \textit{see also} webpage for Charles Clarke MP, available at: http://www.homeoffice.gov.uk/inside/org/ministers/clarke.html (last visited Sept. 29, 2005).
national identity cards. The controversy ended in scandal in December 2004, when Blunkett resigned after being accused of expediting a visa application for his former lover’s nanny. The current Home Secretary is Blunkett’s successor, Charles Clarke, the former Secretary of State for Education and Skills.

B. The Lord Chancellor's Judicial Functions as a Judge and Head of the Judiciary

At the time of Blair’s announcement, the Lord Chancellor also had a significant judicial role, serving as a senior judge and head of the judiciary in England and Wales, although not in Northern Ireland or Scotland. The Lord Chancellor was President of the Supreme Court of Judicature of England and Wales and President of the Chancery Division. He was also *ex officio* judge on the Court of Appeal but never actually sat as a judge on that court. When he chose, he served as the presiding chairman of the Appellate Committee of the House of Lords, the final appeals court in England, Wales, and Northern Ireland and for Scottish civil matters. The Lord Chancellor also normally

---


83. *See, e.g.*, Webster, *supra* note 82, at 1; Home Secretary Charles Clarke, http://www.homeoffice.gov.uk/about-us/organisation/ministers/charles-clarke/?version=1 (stating that Clarke, Member of Parliament for Norwich South, was appointed Home Secretary in December 2004) (last visited Sept. 29, 2005).


85. Supreme Court Act, 1981, c. 54, §§ 1(2), 5(1)(a) (Eng.). The Supreme Court is made up of the Court of Appeal, the High Court of Justice, and the Crown Court. The Chancery Division is one of the three divisions in the High Court. It deals with, *inter alia*, property, trusts, insolvency, companies, revenue, and many probate cases. The other two divisions are the Queen’s Bench Division, which hears primarily contract and tort claims and also has appellate jurisdiction over lower courts and tribunals, and the Family Division, dealing with, *inter alia*, divorce, adoption or wardship of children, and certain non-contentious probate matters. *See Supreme Court Act, 1981, c. 54, § 5(1) (Eng.).


87. *WOODHOUSE, supra* note 33 at 104. *See also DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 11/03, supra* note 15, at ¶¶ 11, 15-17.
presided over the Judicial Committee of the Privy Council, another House of Lords Committee, with the main functions in 2003 of hearing appeals from a dwindling number of Commonwealth countries and Crown Dependencies such as Jersey and Guernsey; hearing devolution cases referred to it; and determining the legal competence of the devolved administrations in Scotland, Wales, and Northern Ireland.  

Although the Lord Chancellor was a senior judge, there was no specific requirement that he have any prior judicial experience. However, since 1673, all Lord Chancellors have been lawyers. Some had previous experience as judges, while others did not. For example, Lord Irvine of Lairg (1997-2003), the Lord Chancellor at the time of Blair’s announcement, had no previous judicial experience, although he had been a very successful barrister.

Lord Chancellors had discretion as to whether to sit as a judge in particular cases in the House of Lords or Privy Council. Until the Second World War, many Lord Chancellors frequently sat as judges. They were able to do this in conjunction with fulfilling their duties as Speaker of the House of Lords because the legislative sittings of the House of Lords did not start until late afternoon, enabling them to attend judicial hearings scheduled in the morning and early afternoon. This changed when the wartime bombing of London forced the House of Lords to stop sitting in the evenings. It rescheduled its legislative sittings to begin at 2:30 p.m., making it practically impossible for the Lord Chancellor to attend both judicial and legislative sessions. This scheduling change became permanent after the war’s end.

Many postwar Lord Chancellors, such as Lord Gardiner (1964-70), rarely chose to sit as judges in the House of Lords or the Privy Council because of scheduling conflicts with legislative sittings as well as concerns over separation of powers and safeguarding judicial

88. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶ 11; Fischer, supra note 15, at 110-11; BALEY, supra note 4, at 126. The Privy Council also has jurisdiction to hear a number of other appeals from various bodies which, in the case of several governing bodies for healthcare professions, shifted to the High Court and Court of Session in 2003. See DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 11/03, supra note 15, at ¶ 17.

89. See SLAPPER & KELLY, supra note 15, at 199.

90. See WOODHOUSE, supra note 33, at 9.


92. See SLAPPER & KELLY, supra note 15, at 199.

93. See WOODHOUSE, supra note 33, at 116.

94. See id.

95. See HAILSHAM, supra note 29, at 378.
independence. But two long-serving Lord Chancellors at the end of the twentieth century, Lord Hailsham of St. Marylebone (1970-1974, 1979-1987) and Lord Mackay of Clashfern (1987-1997), sat as judges more frequently. Lord Hailsham sat as a judge for twenty-eight days in his first term as Lord Chancellor and for fifty-three days in his second, hearing an average of three to four cases per year. Lord Mackay tried to hear six to eight cases a year. He nearly achieved this goal, averaging almost five cases per year and sitting for a total of sixty days over the course of his term of office as Lord Chancellor. Lord Hailsham defended his choice to sit as a judge on the grounds that it would ensure that "a politically motivated prime minister does not give the office to a no-good lawyer." He also found the judicial role to be personally fulfilling, and described sitting as a judge as "[t]he part of the Lord Chancellor's function I most enjoyed."

Lord Mackay argued that "[s]itting gives the Lord Chancellor a practical awareness of the development of the common law at the highest level. It enables him to assess the quality of the most senior advocates." Additionally, he suggested that "[i]t is just possible that the Lord Chancellor may himself have a contribution to make." Although Lord Irvine of Lairg (1997-2003), Lord Mackay's successor, sat as a judge less frequently than Lord Mackay and Lord Hailsham, he agreed that Lord Chancellors should sit as judges, once saying: "[b]oth my predecessors... attached real importance to the Lord Chancellor sitting in the Chair [in the House of Lords]. So do I."

Most Lord Chancellors accepted some limitations on their rights to sit as judges based on the need to protect judicial independence and the right to a fair trial, as well as the importance of preserving public confidence in the legal system. Lord Chancellors have usually refrained

96. See BAILEY, supra note 4, at 248; HAILSHAM, supra note 29, at 379; UNDERHILL, supra note 4, at 197.
97. See BAILEY, supra note 4, at 248.
98. Lord Alexander of Weedon QC et al., The Judicial Functions of the House of Lords, Written Evidence to the Royal Commission on Reform of the House of Lords by a Justice Working Party [hereinafter Justice Working Party] 11 n.23 (May 19, 1999), available at http://www.justice.org.uk/images/pdfs/hol.pdf; see also WOODHOUSE, supra note 33, at 117-118 (warning that statistics vary as to the total time spent hearing cases by some of the earlier postwar depending on what sources are consulted. This may lead to misleading conclusions on the relative frequency of sitting by different Lord Chancellors, unless their different political and judicial circumstances are taken into account).
100. HAILSHAM, supra note 29, at 379.
101. Id. at 433.
102. 597 PARL. DEB., H.L. (5th ser.) (1999), col. 736 (speech of Lord Irvine of Lairg).
103. Id.
104. Id.
from hearing cases in which the government has a direct interest. Some commentators have argued that it is also inappropriate for the Lord Chancellor to hear cases in which the government has an indirect interest, such as criminal appeals, but the three most recent Lord Chancellors at the time of Blair’s announcement did not accept any such broad restrictions on their discretion to sit as judges. Both Lord Hailsham and Lord Mackay heard criminal appeals. Lord Irvine stated to the House of Lords that he was “unwilling to lay down any detailed rules” for when the Lord Chancellor should not sit as a judge, other than to pledge that he would not sit on “any appeal where the Government might reasonably appear to have a stake in a particular outcome.”

Lord Irvine favored a case-by-case approach because it is ever a question of judgment combined with a need to ensure that no party to an appeal could reasonably believe or suspect that the Lord Chancellor might, because of his other roles, have an interest in a specific outcome. Examples might be where the lawfulness of a decision or action by any Minister or department might be at issue.

As a result, according to Lord Irvine, “there is no category of cases that could be labeled ‘constitutional’ which should be ‘no-go areas’ for the Lord Chancellor.”

When serving as a judge, the Lord Chancellor was not supposed to act as a member of the Government, despite the fact that he was a Cabinet minister, and, like all English judges, was required to be independent and unbiased in accordance with his judicial oath. But, unlike other senior judges, he did not have security of tenure, since he served at the pleasure of a Prime Minister who could dismiss him at will. As if the task of keeping these judicial and executive roles

---

105. See WOODHOUSE, supra note 33, at 123 (citing, as an example of a case heard by a Lord Chancellor in which the government had a direct interest, Attorney-General v. County Council of the West Riding of Yorkshire [1907] A.C. 29 (leading judgment delivered by the then Lord Chancellor Lord Loreburn (1905-1912) (involving the issue of whether the Education Act 1902 obliged local education authorities to pay teachers for time spent on religious education that was “lawfully given during school hours.”)).

106. Id. at 124.

107. Id.

108. 597 PARL. DEB., H.L. (5th ser.) (1999), col. 736 (speech of Lord Irvine of Lairg).

109. Id.

110. Id.

111. See WOODHOUSE, supra note 33, at 104.

112. See SLAPPER & KELLY, supra note 15, at 198. Senior judges of the High Court and above have greater security of tenure than the Lord Chancellor, holding office "during good behaviour" up to the retirement age of 70 that was instituted by the Judicial Pensions and Retirement Act 1993, effective in April 1995. See Supreme Court Act, 1981, c. 54, §§ 11(2), 11(3) (Eng.) and Appellate Jurisdiction Act, 1876, 39 & 40 Vict, c. 59, § 6 (Eng.), as amended.
separate was not a sufficient challenge for one person, the Lord Chancellor also wore another hat, both literally and figuratively, in his legislative role as member and ex officio speaker of the House of Lords.\footnote{13}

C. The Lord Chancellor's Legislative Role

The Lord Chancellor was under a duty to ordinarily preside over the House of Lords as Speaker unless it was in Committee.\footnote{14} Dressed in a seventeenth-century full-bottomed wig and a black robe with gold lace embroidery, he arrived at sittings of the House of Lords in a formal procession from his official residence in the Palace of Westminster.\footnote{15} The procession also included several other royal officials in ceremonial attire. The Deputy-Serjeant-at-Arms or Principal Doorkeeper, who carried a ceremonial Mace, and the Purse-Bearer, bearing a large embroidered purse, marched ahead of the Lord Chancellor.\footnote{16} The Train-Bearer followed the Lord Chancellor. The Gentleman Usher of the Black Rod joined the end of the procession as it passed through the Prince’s Chamber, a relatively small but sumptuous room, its walls lined with colorful portraits of various Tudor princes and princesses.\footnote{17} After

\footnote{113. See DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶ 16; see also Hilaire Barnett, Constitutional and Administrative Law 103 (5th ed. 2004). Technically, the House of Lords has no speaker, but by tradition, the Lord Chancellor usually presides over debates as the most senior member. His powers are not as broad as the Speaker of the House of Commons in that he does not rule on points of order or discipline; the entire House does that. HEUSTON 1940-1970, supra note 29, at 13; Companion to the Standing Orders of the House of Lords ¶ 4.01 (2003) [hereafter House of Lords Companion], available at http://www.parliament.the-stationery-office.co.uk/pa/ld/ldcomp/compso.htm (last visited Sept. 29, 2005). As a result of this self-regulation of the House of Lords, the Lord Chancellor’s only real power as Speaker was to bring time-limited debates to an end and to announce his opinion of the result of any vote. HOUSE OF LORDS SELECT COMMITTEE ON SPEAKERSHIP OF THE HOUSE OF LORDS, FIRST REPORT, NOV. 18, 2003, 2002-2003 Session, H.L. Paper 199, at ¶ 12.

114. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶ 16; see also House of Lords Standing Order No. 18, Speaker of the House (June 9, 1660), available at http://www.parliament.the-stationery-office.co.uk/pa/ld/ldstords/ldso--d.htm#18. If the Lord Chancellor were absent, this 1660 standing order provides that his place as Speaker should be taken either by a Deputy Speaker, authorized under the Great Seal from the Queen or by a Deputy Chairman, appointed by the House of Lords, or if neither of those two were present, by a person selected by the Lords themselves. See id. at ¶ 18.


116. House of Lords Companion, supra note 113, at footnote 94. A mace is an ancient weapon, basically an improved club consisting of a long rod with a thicker head that was often spiked or flanged to inflict greater damage and pierce armor.

117. Id.; The Palace of Westminster, A Guide for Young People 7 ["hereinafter Palace
the procession entered the House of Lords Chamber, the official carrying the Mace placed it on the Woolsack, a rectangular sack stuffed with wool that had a red cover.118 Only after a Bishop had led the House in prayer, and the Lord Chancellor had taken his seat on the Woolsack, could the business of the House commence.119

The convention of sitting on the Woolsack evokes the historic importance of wool to the British economy, and, perhaps more significantly for the purposes of this article, represents respect for the constitutional doctrine of the separation of powers.120 Unlike the Speaker of the House of Commons, the Lord Chancellor was not expected to remain nonpartisan and, if a peer, could participate in debate as a Government spokesman.121 All modern Lord Chancellors after Sir Thomas More (1529-33) received a peerage if not already the holder of one.122 But if the Lord Chancellor wanted to speak in debate, he had to rise from the Woolsack (which, as a technical matter, is outside the House of Lords), remove his wig and gown, and move to a spot a few paces away that King Henry VIII had selected.123 If the Lord Chancellor failed to rise from the Woolsack, his words were treated only as advisory and would not be formally recorded.124

The Woolsack has the appearance of being an uncomfortable seat. It has no back or sides like a conventional chair, other than a little backrest.125 But the Woolsack caused Lord Irvine no discomfort. In March 1998, he assured the House of Commons Select Committee on Public Administration that “[t]he Woolsack, contrary to what you might think, is quite comfortable and not a bad place for a speaker to sit, in case you have been worrying about me, which I am sure you have not.”126

118. Id. at 9-10 (includes photographs of the Woolsack).
120. See United Kingdom Parliament, An Introduction to Parliament, “Woolsack,” available at http://www.parliament.uk/works/locomp.cfm#woolsack (noting that King Edward III (1327-77) originally introduced the Woolsack, then stuffed with English wool, as a symbol of the source of English prosperity, but that it is now stuffed with wool from every Commonwealth country as a symbol of unity) (last visited Sept. 29, 2005).
121. HEUSTON, LIVES 1940-1970, supra note 29, at 3; WOODHOUSE, supra note 33, at 101.
122. HEUSTON, LIVES 1940-1970, supra note 29 at 13; WOODHOUSE, supra note 33, at 101.
123. See House of Lords Precedence Act, 1539, 31 Hen. 8, c. 10 § 4; see also House of Lords Standing Order 19, The Lord Chancellor (Mar. 27, 1621), available at: http://www.parliament.the-stationery-office.co.uk/pa/id/ldstords/ldso—d.htm#19; WOODHOUSE, supra note 33, at 101.
125. See HEUSTON, LIVES 1885-1940, supra note 29, at xvii.
126. HOUSE OF COMMONS SELECT COMMITTEE ON PUBLIC ADMINISTRATION, MINUTES
Nevertheless, Irvine doggedly sought to reduce the amount of time that he had to spend on the Woolsack. This was because he found wearing the Lord Chancellor’s heavy wig and ceremonial robes to be extremely burdensome as daily working garb.\(^\text{127}\)

In 1998, Lord Irvine proposed that he should be allowed to spend more time off the Woolsack and behind the dispatch box while leading debate on government bills, rather than just during the committee stage.\(^\text{128}\) This procedural change would permit him to spend less time wearing the uncomfortable wig and robes. Lord Irvine also proposed that he be permitted to replace the Lord Chancellor’s traditional breeches, tights, and buckled shoes with ordinary black trousers and black shoes on non-ceremonial occasions. He promised that he would keep the shoes highly polished.\(^\text{129}\) Some Labour politicians agreed that the Lord Chancellor should spend less time in “fancy dress.”\(^\text{130}\) Jeremy Corbyn, the Member of Parliament for Islington North, commented that anyone who went out in public dressed like the Lord Chancellor would risk arrest.\(^\text{131}\) Eventually, the House of Lords, following the recommendation of its Select Committee on Procedure, agreed that Lord Irvine should be allowed to speak as a Government Minister from the Government Front Benches when the House was sitting as a House, not just when it was sat in committee, and permitted him to dispense with the traditional requirement of wearing breeches, tights and silver buckled shoes other than on ceremonial occasions.\(^\text{132}\)

\(^\text{127}\) Id. at 422-424 (Lord Irvine stated that “[t]he wig, however, is uncomfortable...” When his interrogator solicitously enquired: “Could you sit on the wig perhaps?,” Lord Irvine responded: “I do not think I would sit on the wig. It is far too beautiful and historic an object to do it the great damage I would do it if I sat on it!”).


\(^\text{130}\) See, e.g., Off with his tights, THE MIRROR, Nov. 17, 1998, at 4 (quoting Lord Haskell as stating that if reforms were not made to the Lord Chancellor’s dress, “we shall be perceived as part of theme park Britain.”).


\(^\text{132}\) See HOUSE OF LORDS SELECT COMMITTEE ON PROCEDURE FOURTH REPORT, supra note 129; see also 594 PARL. DEB., H.L. (3rd ser.) (1998), cols. 983-1017 (agreeing to Lord Irvine’s proposals by a vote of 145-114 to reject an amendment, proposed by Earl Ferrers, to a motion to agree to the Fourth Report of the Select Committee on Procedure that would have exempted the proposed changes to the Lord Chancellor’s dress).
D. Miscellaneous Responsibilities of the Lord Chancellor

As well as his executive, judicial, and legislative roles, by the twenty-first century the Lord Chancellor had also acquired a large variety of other miscellaneous responsibilities. Among these were various ecclesiastical functions, including the centuries-old patronage function of appointing Anglican priests to a number of parish livings and cathedral canonries,133 exercising visitorial, or supervisory, jurisdiction at dozens of academic and charitable institutions (which required the Lord Chancellor to, among other things, adjudicate certain disputes between students and universities),134 providing advice to the Sovereign on the "Royal Peculiars" (which are places of worship outside normal ecclesiastical jurisdiction that include Westminster Abbey and the Chapels Royal),135 and various other charitable responsibilities, including making appointments to the governing bodies of such venerable public schools as Charterhouse, Harrow, and Rugby, as well as those of other schools and charitable institutions like the London School of Hygiene and Tropical Medicine.136 The Lord Chancellor’s Department also funded and supervised a variety of government bodies, such as the Land Registry, the Law Commission for England and Wales, the Official Solicitor and Public Trustees Office, and the Public Guardianship Office.137 Additionally, the Lord Chancellor still retained his traditional responsibility as Keeper of the Great Seal of the Realm.138

E. The Lord Chancellor’s Constitutional Responsibility to Preserve Judicial Independence.

Lord Hailsham said that of all the responsibilities of the Lord Chancellor, his “most important constitutional function...remains to preserve the integrity and impartiality of the judiciary against all comers.”139 To Americans, it may seem odd for the Lord Chancellor to have a constitutional responsibility because the United Kingdom has no written constitution or bill of rights. Of course, as the scholar Jeremy Waldron has pointed out, the absence of a written constitution does not mean that there is no British constitution.140 The British constitutional

133. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 13/03, supra note 4, at ¶¶ 34-41, 45-49.
134. Id. at ¶¶ 50-58, Annex H.
135. Id. at ¶¶ 65-67.
136. Id. at ¶¶ 69-74.
137. Id. at Annex D (containing a full list of bodies that were supervised or funded through the Lord Chancellor’s Department).
138. Id. at ¶¶ 20-21.
139. HAILSHAM, supra note 29, at 385.
140. JEREMY WALDRON, THE LAW (THEORY AND PRACTICE IN BRITISH POLITICS) 61-2
system is based on unwritten conventions: custom and practice that are tacitly understood to be obligatory.

As a matter of political theory, the fundamental principles of the rule of law and the separation of powers support judicial independence. In the view of the famous nineteenth-century British constitutional theorist A.V. Dicey, the rule of law afforded constitutional protections that he believed to be lacking in continental Europe. To Dicey, the rule of law consisted of three elements: limits on the arbitrary power of the State, equality before the law, and the supremacy of ordinary law. Many other political theorists, such as F.A. von Hayek and Joseph Raz, have offered further refinements on the doctrine of the rule of law, but these theorists have generally agreed that the rule of law helps to minimize the danger of arbitrary governmental power.

The doctrine of the separation of powers has its origins in the writings of seventeenth and eighteenth century English and French writers, including Locke and Montesquieu. Writing at the very end of the seventeenth century, Locke was particularly concerned about judicial independence, which he viewed as fundamental to the social contract that he believed to be the basis of political societies. In his famous Second Essay Concerning Civil Government, Locke wrote:

For he being supposed to have all, both legislative and executive, power in himself alone, there is no judge to be found, no appeal lies open to any one, who may fairly and indifferently and with authority decide, and from whence relief and redress may be expected of any injury or inconveniency that may be suffered from him, or by his order.

Montesquieu's eighteenth century writings exemplify the classic doctrine of separation of powers, which seeks to protect against abuse of governmental power by dividing government both structurally and

---

142. Id. at 120-21.
144. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 83, 87 (2d ed. 1998) (noting that Montesquieu was influenced by the English writers Locke and Bolingbroke).
147. LOCKE, supra note 145, at Ch. VII ¶ 91.
functionally into executive, legislative, and judicial branches. In *The Spirit of the Laws*, Montesquieu wrote:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu’s views on the separation of powers are at least somewhat familiar to most Americans, because his writings had such a profound influence on some of the American Founders. For example, James Madison wrote: “The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” Madison’s interpretation of Montesquieu was that the separation of powers did not require the three branches of government to be completely separate and distinct, but rather that no one branch could exercise total control over another.

It has often been said that Montesquieu based his theory of separation of powers on his observations of the English political system while visiting England in 1729. If that was actually the case, he must have misunderstood the system. Eighteenth-century England was not in fact a paradigm of separation of powers. The fundamental English constitutional doctrine of parliamentary supremacy conflicts with the separation of powers doctrine formulated by Montesquieu and Madison, regardless of whether this requires a pure separation of powers (in that judicial, executive, and legislative functions must be exercised by separate persons or bodies, as in the current French system of government) or only a partial separation of powers (like the system of checks and balances in the current United States system of

---

148. See VILE, supra note 144, at 83 (noting that Montesquieu’s thinking on separation of powers was not completely original, but had great influence).
149. See MONTESQUIEU, supra note 146, at Book XI ¶ 6.
150. THE FEDERALIST No. 47 at 153 (Encyclopedia Britannica 1952) (1787).
151. Id. at 154.
152. TOMKINS, supra note 61, at 37 n.5.
153. For a theory that Montesquieu was basing his theory on an ideal English system rather than the reality, see VILE, supra note 144, at 93.
Dicey defined parliamentary supremacy as giving Parliament "the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." 156

Since the doctrine of separation of powers makes the legislative branch superior to the other branches of government, the extent to which the doctrine of separation of powers actually operated in the United Kingdom at the time of Blair's announcement in 2003 was debatable. There was structural and functional fusion between the branches of government. The Lord Chancellor's participation in all three branches was only one example. Another example was the highest court of appeals, a committee of the upper house of the legislature, the House of Lords, where the judges had the right to participate in and vote on political debates. 157 Aware of the problem that this posed for separation of powers and judicial independence, the Law Lords made a formal statement in 2000 that they would not participate in debates or votes where there was "a strong element of party political controversy; and secondly, . . . bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House." 158 Still another inconsistency with the doctrine of separation of powers was the fact that every Minister in the executive was also a member of one of the Houses of Parliament and, under the doctrine of ministerial responsibility, collectively and individually responsible to Parliament. 159

Notwithstanding these and many other examples of fusion between the branches of government in the British constitutional system, some modern constitutional theorists, including T.R.S. Allen and Eric Barendt, have argued that the idea of the separation of powers is still fundamentally important for the British constitutional system. 160 Barendt

155. Id. at 14-17, 35.
156. DICEY, supra note 141, at 3-4.
157. BAILEY, supra note 4, at 272.
158. 614 PARL. DEB., H.L. (5th ser.) (2000), col. 419 (statement of Lord Bingham, to which all Lords of Appeal in Ordinary agreed, on Recommendation 59 of the Royal Commission on the Reform of the House of Lords).
159. See BARENDT, supra note 154, at 36; see also TOMKINS, supra note 61, at 49-50.
160. See, e.g., BARENDT, supra note 154, at 17, 34-40 (arguing that the separation of powers is such an important safeguard for "guaranteeing limited government" that it should be given priority over the doctrine of parliamentary sovereignty); Eric Barendt, Separation of Powers and Constitutional Government, PUBLIC LAW 599 (1995) (arguing that important constitutional values are promoted by the principle of separation of powers, especially the "partial separation" version of this concept, and consequently it should be better respected in the United Kingdom constitutional system and taken more seriously by British constitutional scholars, commentators, and courts); T.R.S. Allen, Law Liberty and the Separation of Powers, in T.R.S. ALLEN, LAW, LIBERTY, AND JUSTICE: THE
saw the fused functions of the Lord Chancellor as the product of a different concept of separation of powers than the eighteenth century formulations of Montesquieu and Madison. In Barendt’s view, these derived from a seventeenth-century idea of separation of powers between the Crown and Parliament that was designed to render the Crown accountable to Parliament.161

Some of those who agreed with Barendt and Allen that the separation of powers was vitally important to the British system of government viewed the Lord Chancellor as the primary defender of the doctrine, despite the obvious problem that he exercised functions in all three branches of government. For example, Lord Woolf expressed this view in a 1998 speech delivered at All Souls College, Oxford, while he was still Master of the Rolls:162

As a member of the Cabinet, he [the Lord Chancellor] can act as advocate on behalf of the courts and the justice system. He can explain to his colleagues in the Cabinet the proper significance of a decision which they regard as being distasteful in consequence of an application for judicial review. He can, as a member of the Government, ensure that the courts are properly resourced. On the other hand, on behalf of the Government, he can explain to the judiciary the realities of the political situation and the constraints on the resources which they must inevitably accept.163

Admitting that “no one would today give the Lord Chancellor his huge responsibilities,” Lord Woolf added:

As long as the Lord Chancellor is punctillious in keeping his separate roles distinct, the separation of powers is not undermined and the justice system benefits immeasurably. The justice system is better served by having the head of the judiciary at the centre of government than it would be by having its interests represented by a Minister of Justice who would lack these other roles.164

Woolf also stated that “the Lord Chancellor of the day can act as a safety valve avoiding undue tension between the judiciary and the Government

---

161. See TOMKINS, supra note 61, at 46.
162. The Master of the Rolls is the most senior judge on the Court of Appeal. See SLAPPER & KELLY, supra note 15, at 110.
164. Id.
and possibly between the judiciary and Parliament as well.\textsuperscript{165}

Many late twentieth-century Lord Chancellors agreed with Lord Woolf that the Lord Chancellor served as a crucial safeguard of separation of powers. Lord Hailsham believed that the Lord Chancellor better protected the separation of powers than a paper constitution. He described the task of protecting the separation of powers as the "primary constitutional function of the Lord Chancellor, a task he can only fulfill if he sits somewhere near the apex of the constitutional pyramid, armed with a long barge pole to keep off marauding craft from any quarter."\textsuperscript{166} He admitted that this was far from an easy task, noting: "In theory, of course, everyone is in favor of judicial independence in the same way as they are in favour of virtue and against vice. But in practice this is far from the case."\textsuperscript{167} Lord Irvine also shared this view that the Lord Chancellor functioned to protect judicial independence:

The value of a Lord Chancellor is that he upholds judicial independence and can mediate between the executive and judiciary when need be. The judiciary has a representative in the Cabinet, and the Cabinet in the judiciary. The Lord Chancellor can also speak to the public on behalf of the judges, in a way that professional judges themselves cannot. The office of Lord Chancellor is the guarantor of judicial independence in our constitution. It holds the different parts together, and withstands pressure from all sides.\textsuperscript{168}

Similarly, Lord Mackay stated that "the existence of the Lord Chancellor provides a necessary link between Parliament and the executive on the one hand and the judges on the other" and also has said that "the Lord Chancellor is able also to represent the interests and viewpoint of a judge within the executive."\textsuperscript{169}

IV. Previous Reform Efforts Based on "Internal" and "External" Concerns About the Lord Chancellor

The view of the Lord Chancellor as the primary defender of separation of powers has long had many detractors. There has been

\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Lord Hailsham, The Problems of a Lord Chancellor (Holdsworth Lecture 1972), in THE LAWYER AND JUSTICE 234 (Brian W. Harvey ed. 1978).
\item \textsuperscript{167} HAILSHAM, supra note 29, at 385.
\item \textsuperscript{168} LORD IRVINE OF LAIRG, Judicial Independence and the British Constitution, in HUMAN RIGHTS, CONSTITUTIONAL LAW AND THE DEVELOPMENT OF THE ENGLISH LEGAL SYSTEM 206 (2003). Lord Irvine gave two examples to support his belief that the office of Lord Chancellor protected judicial independence: the respected system of judicial appointments and the fact that the Lord Chancellor, as a Minister, was accountable to the public. \textit{Id.} at 206-07.
\item \textsuperscript{169} Mackay, supra note 31, at 250-51.
\end{itemize}
criticism of the multifaceted role of the Lord Chancellor for hundreds of years. As well as “internal” concerns that the office breached separation of powers and failed to protect judicial independence, critics voiced doubts as to whether the Lord Chancellor’s office was “externally” consistent with the appearance of justice. There have also been questions about the ability of any one man, however energetic and talented he may be, to successfully carry out so many functions simultaneously. Many calls for reform have come from the holders of the office themselves.

Faced with a Dickensian backlog of Chancery work, a number of nineteenth-century Lord Chancellors proposed reforms. In the mid-nineteenth century, the radical Lord Brougham (1830-34), who was primarily concerned about overwork, put forward some rather vague suggestions to sever the various roles of the Lord Chancellor and introduce a Ministry of Justice. These suggestions were never implemented, no doubt at least in part due to Brougham’s unstable temperament. The constitutional commentator Walter Bagehot commented of Brougham that “if he were a horse, no-one would buy him.” In 1836, Lord Cottingham (1836-41, 1846-50), sharing Brougham’s concerns about excessive workload, introduced a bill that would have reduced the responsibilities of the Lord Chancellor by transferring his duty to preside over the Court of Chancery to a different judge, but this met with resounding defeat on Second Reading in the House of Lords. Despite the failure of Lord Cottingham’s Bill, its proposals were eventually implemented. The Lord Chancellor ceased to sit as a judge of first instance with the enactment of the Judicature Acts of 1873 and 1875, legislation that was the work of the Lord Chancellors Lord Cairns (1868, 1874-80) and Lord Selborne (1872-74 and 1880-85). Later in the nineteenth century, the idealistic Lord Westbury (1861-65) advocated many radical reforms, including the introduction of a Department of Justice to promote his Justinian-like goal of rationalizing the law by digesting and codifying it. But Westbury never realized his dreams because he was hampered by a lack of talent for diplomacy as well as by a spendthrift son.

In the early twentieth century, Lord Haldane (1912-15, 1924) also pressed for reforms to the office of Lord Chancellor in his role as
chairman of a committee appointed by the then Prime Minister Lloyd George on the Machinery of Government.\textsuperscript{176} This committee was charged with enquiring into the responsibilities of the various departments in the central executive government and advising on how various government offices should better exercise and distribute their functions.\textsuperscript{177} Its 1918 report, the Haldane Report, found that "[s]uccessive holders [of the office of Lord Chancellor] have testified that it is beyond the work of any one man to perform the work that ought to be done," and voiced concern about political pressures on the office.\textsuperscript{178} Despite these concerns, the Haldane Report did not advocate abolishing the office of Lord Chancellor. While disclaiming that this conclusion was motivated by sentiment, the report emphasized the great antiquity and historical significance of the office, which was "deeply rooted in the traditions of the nation."\textsuperscript{179}

The Haldane Report contained a set of proposals that would have drastically reduced the Lord Chancellor's functions. In a section that Lord Haldane himself drafted, it recommended that the Lord Chancellor cease to sit as Speaker in the House of Lords and should no longer sit frequently as a judge in ordinary cases, although he should not be entirely barred from all judicial duties.\textsuperscript{180} Haldane wrote that it was desirable for the Lord Chancellor to provide the benefit of his parliamentary experience by judging occasional cases involving "delicate" constitutional issues in the House of Lords or Privy Council.\textsuperscript{181}

The Haldane Report also proposed a radical shift of many responsibilities for judicial administration away from the Lord Chancellor, although it recommended that he continue to serve as the primary constitutional adviser to the Crown, and also that he "watch and master all questions relating to legislation."\textsuperscript{182} Moreover, the Lord Chancellor should also continue to make judicial appointments, but to keep him free of "any suggestion of political influence," he should first


\textsuperscript{177} HALDANE REPORT, supra note 176, at 4. See also STEVENS, supra note 58, at 25 (describing the Committee as "in some ways, a canard," set up to occupy Lord Haldane after his removal from the War Office as a result of unfair accusations of pro-German sympathies).

\textsuperscript{178} Id. at 73.

\textsuperscript{179} Id. at 72.

\textsuperscript{180} Id. at 73; See HEUSTON, LIVES 1885-1940, supra note 29, at 228.

\textsuperscript{181} HALDANE REPORT, supra note 176, at 73.

\textsuperscript{182} Id. at 74.
be required to consult a judicial appointments committee that would include the Prime Minister and a new Minister of Justice.\textsuperscript{183} Other matters of judicial administration should be shifted to the Minister of Justice, who would take over the Home Secretary’s role as administrator of the criminal justice system and assume various other responsibilities of the Home Secretary.\textsuperscript{184}

The Haldane Report’s proposals for reform to the office of Lord Chancellor met with considerable opposition, including from the English Bar, and were never implemented.\textsuperscript{185} One of the report’s fiercest critics was Lord Haldane’s successor as Lord Chancellor, Lord Birkenhead (1919-1922), who published a powerfully worded attack on the proposals for a Ministry of Justice in a 1922 collection of essays, \textit{Points of View}. While admitting that “[p]robably in an ideal world, no one would have constructed the office of Lord Chancellor exactly as it is,” Lord Birkenhead contended that the office of Lord Chancellor in fact served to strengthen separation of powers. He wrote:

In every democracy there arise from time to time occasions of jealousy and difficulty between the judiciary and the executive. Our present system, under which the head of the judiciary is also a prominent member of the executive Government, has its disadvantages. But it has this great advantage—that it provides a link between the two sets of institutions; if they are totally severed there will disappear with them any controlling or suggestive force exterior to the Judges themselves, and it is difficult to believe that there is no necessity for the existence of such a personality, imbued on the one hand with legal ideas and habits of thought, and aware on the other of the problems which engage the attention of the executive Government. In the absence of such a person the judiciary and the executive are likely to drift asunder to the point of a violent separation, followed by a still more violent and disastrous collision.\textsuperscript{186}

Despite the failure of Lord Haldane’s proposals, the debate about

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{183} \textit{Id.} at 73-74.
\item \textsuperscript{184} \textit{Id.} at 74-78.
\item \textsuperscript{185} \textsc{Bailey}, supra note 4, at 35.
\item \textsuperscript{186} \textsc{Birkenhead}, supra note 172, at 112-13, 127 (1922). This essay, though published under Lord Birkenhead’s name, was probably drafted by Sir Claud Schuster, the Permanent Secretary to the Lord Chancellor and a determined opponent of the Haldane Report’s proposals. \textit{See Drewry, supra} note 176, at 406 (Stillborn); Gavin Drewry, \textit{Ministry of Justice—A Matter of Meaning}, 132 New Law Journal 602 (June 24, 1982). Gavin Drewry has criticized Lord Birkenhead’s essay for attacking positions that the Haldane Report had not taken, such as the abolition of the Lord Chancellor as well as his function in appointing new judges. \textit{Id.} at 603; Drewry, \textit{supra} note 176, at 407 (Stillborn).
\end{itemize}
\end{footnotesize}
whether the Lord Chancellor’s office should be reformed never really ceased, and calls for change continued.\footnote{See e.g., \textit{Justice, Do We Need a Ministry of Justice?} (1970); \textit{Drewry, supra} note 186, at 602 (listing various calls for a Ministry of Justice); \textit{Drewry, supra} note 176 at 502 n. 1 (Joad’s Eye View) (enumerating various proposals for a Ministry of Justice made before the 1987 General Election); \textit{Steyn, supra} note 58 at 89-91 (arguing that it is no longer appropriate for the Lord Chancellor, a Cabinet Minister, to be head of the judiciary and to sit as a judge in the House of Lords and Privy Council); \textit{Woodhouse, supra} note 58 [1998 article in \textit{Public Law}], at 617-632 (criticizing “the pretence that the position of the Lord Chancellor, as currently understood, is fundamental to our constitutional arrangements,” and contending that “[t]he constitutional and political position of the Lord Chancellor is difficult to defend” because “[h]is cross-institutional role neither accords with the separation of powers nor presents a rational protection for judicial independence”; Memorandum from Sarah Spencer, Institute for Public Policy Research, remodeling government, Issue: Future of the Home Office and the Lord Chancellor’s Department 1, 12-17 (April 2, 2001) (on file with author) (expressing concern about (i) overlapping functions between the Home Office and the Lord Chancellor’s Department, (ii) the Lord Chancellor’s lack of accountability, and (iii) the danger that the current functions of the Lord Chancellor fail to adequately protect judicial independence; also advocating the replacement of the Lord Chancellor’s Department with a Department for Justice and Equality, the appointment of a member of the House of Commons as the next Lord Chancellor, and the appointment of an independent Judicial Appointments Commission); \textit{Nony Ardill, From LCD to a Department of Justice?}, \textit{Legal Action} 1-4 (August 2001) (advocating the exploration “as a matter of urgency [of] the creation of a Department of Justice, together with an independent judicial appointments commission”); \textit{Woodhouse, supra} note 33, at 212 (contending that the Lord Chancellor should cease to sit as a judge and his responsibility for the system of judicial appointments should thereupon logically end, and also that the Lord Chancellor’s executive responsibility for the administration of justice should be transferred to a minister of justice, and arguing that the office of Lord Chancellor should either continue as an honorary post with the sole role of Speaker of the House or Lords, or it should be entirely abolished.).} In the 1990s, the introduction of a Ministry of Justice to replace many of the functions of the Lord Chancellor and the Home Office was official party policy of both the Labour and Liberal Democrat parties.\footnote{Spencer, \textit{supra} note 187, at 2. \textit{See also} Drewry, \textit{supra} note 176, at 502 n. 1, 507 (Joad’s Eye View) (noting that the Alliance parties had a detailed proposal for a Department of Justice in their 1987 Election manifesto).} Pressure for reform intensified at the end of the millennium, based primarily on two areas of concern.

This article will refer to the first type of concern as “internal” because it involved a domestic issue, namely whether Lord Chancellor was fulfilling his constitutional duty of preserving judicial independence and respect for separation of powers. In contrast, the second type of concern centered on outside perceptions of the British constitutional system. The focus of this “external” concern was whether the multifaceted role of the Lord Chancellor appeared to promote the goals of judicial independence and separation of powers (whether or not it actually did so in practice). A similar concern over whether justice is publicly observed has been highlighted by the United States Supreme
Court Justice Sandra Day O'Connor when she has urged the American judiciary to pay greater attention to how the U.S. legal system is viewed in other countries.¹⁸⁹

Many observers of the British legal system in the 1990s expressed the internal concern that the British legal system was failing to adequately guarantee impartial justice that was sufficiently independent from politics. For example, Lord Steyn, one of the Lords of Appeal in Ordinary in the House of Lords, charged that "[u]nder governments of all complexions, the Lord Chancellor is always a spokesman for the government in the furtherance of its party political agenda."¹⁹⁰ The activities of Lord Mackay (1987-1997) attracted much criticism. The Times legal correspondent Frances Gibb has written that Lord Mackay, although personally "[c]harming, mild-mannered, and courteous . . . prompted some of the most bitter hostility—and the worst personal abuse—directed at a Lord Chancellor this century."¹⁹¹

When Lord Mackay introduced Green Papers to reform the English legal profession and courts, many senior judges criticized him for allowing his responsibility as a member of the executive to override his duty to protect judicial independence.¹⁹² His efforts to cut costs by, among other things, raising civil court fees and reducing the availability of legal aid, faced substantial opposition from the senior judiciary.¹⁹³ Lord Mackay also received criticism for sitting as a judge in cases in which the government had an interest. Prominent among these was the rearagement of an appeal to the Appellate Committee of the House of Lords in Pepper v. Hart.¹⁹⁴ One issue in this case was whether reference to Hansard, the edited verbatim record of debates in both Houses of Parliament, was a permissible aid for the interpretation of ambiguous

¹⁸⁹. See supra notes 2-3 and accompanying text.
¹⁹⁰. Steyn, supra note 58, at 90-91.
¹⁹¹. Frances Gibb, 'I felt what I was doing was right', THE TIMES, May 2, 1997, at A3.
¹⁹². See, e.g., Alexander, supra note 98, at ¶ 16; RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM 39-40 (2003). The controversial Green Papers introduced by Mackay were: THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION, 1989, Cm. 570; CONTINGENCY FEES, 1989, Cm. 571, and CONVEYANCING BY AUTHORISED PRACTITIONERS, 1989, Cm. 572. Despite the opposition of many judges and barristers, many of the proposal in these Green Papers nevertheless became law in the Courts and Legal Services Act of 1990, c. 41 (U.K.), although some concessions were made to the concerns of the judiciary, including the requirement that senior judges should have the right to approve the granting of rights of audience in the higher courts.
¹⁹³. See WOODHOUSE, supra note 33 at 87-89.
¹⁹⁴. Pepper (Inspector of Taxes) v. Hart [1993] A.C. 593 (involving a tax law issue over how teachers at independent schools should be taxed when their children were educated at reduced fees at the schools where they taught; the outcome depended on the interpretation of the word "cost" in the Finance Act of 1976).
legislation. The government was strongly opposed to changing the previous rule excluding recourse to Hansard as an aid to statutory construction. Lord Mackay was the only Law Lord to disagree with the leading judgment of Lord Browne-Wilkinson that the traditional rule should be relaxed in certain limited circumstances, including where legislation was ambiguous or obscure, or where the literal meaning would give rise to manifestly absurd and unreasonable consequences. Critics considered Lord Mackay's exercise of his discretion to sit as a judge in this case to be a conflict of interest that failed to promote confidence in judicial independence from government pressures. Similar concerns arose from Lord Mackay's failure to withdraw from giving judgment in two Privy Council cases in which the government had an interest when he was appointed Lord Chancellor in 1987.

Lord Irvine also attracted censure for sitting as a judge in particular cases involving constitutional or political issues. One controversial appeal that Lord Irvine chose to hear as Lord Chancellor was *Director of Public Prosecutions v. Jones*, concerning the highly contentious Public Order Act 1986 and its effect on the right to peaceful assembly on a public highway. Many prominent lawyers voiced their concerns about Lord Irvine's decision to hear this case involving the rights of individuals against the State, even though he found for the individuals.

195. *Id.* at 634 (judgment of Lord Browne-Wilkinson, accepting that a "limited modification" should be made to the traditional rule to permit reference to Hansard as an aid to statutory construction of ambiguous or obscure legislation, or where adherence to its literal meaning would have an absurd result"), 614-15 (judgment of Lord Mackay, objecting that these categories were so broad as to permit recourse to Hansard in almost every case involving an issue of statutory construction, which would raise litigation costs, though construing the provision (without reference to Hansard) in the teachers' favor).


197. WOODHOUSE, *supra* note 33, at 124. These two cases were *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473 (P.C.) (involving the issue of whether the Attorney General and Minister of Finance of New Zealand were liable for negligence when deciding on an application for consent to issue shares to a foreign investor) and *Hone v. Maze Prison Board of Visitors* [1988] 1 A.C. 379 (H.L.) (concerning whether a prisoner who appeared before a board of visitors on a disciplinary charge had the right to legal representation at that hearing).

198. See *Director of Public Prosecutions v. Jones* [1999] 2 A.C. 240 (involving a peaceful protest to the perimeter fence excluding the public from the Stonehenge monument in which the defendant protesters stood on the roadside, some holding banners).

199. See 593 PARL. DEBS., H.L. (5th ser.) (1998), cols. 1971-72 (speech of Lord Lester of Herne Hill, criticizing Lord Irvine's choice to hear this appeal and noting that many other prominent lawyers shared his concerns, including Heather Hallett QC, the chair of the Bar Council of England and Wales; Philip Dry, President of the Law Society of Scotland; Antoinette Curran, President of the Law Society of Northern Ireland; Roy Amlot, QC, recent chairman of the Criminal Bar Association; and Michael Lavery, QC, chairman of the Standing Advisory Commission on Human Rights in Northern Ireland).
Additionally there was widespread condemnation of Lord Irvine over the so-called "cash for wigs affair." This erupted in 2001, after it became public knowledge that Lord Irvine had sent personal requests to lawyers who supported the Labour Party, seeking their donations to the party at a fund-raising dinner at the Atlantic Grill and Restaurant. Critics charged that it was highly improper for the Minister responsible for judicial appointments to solicit money from possible appointees. Lord Irvine did not mollify them when he responded by denying any wrongdoing and refusing to apologize. In a statement to the House of Lords (delivered as a Government spokesman, away from the Woolsack), Lord Irvine described the office of Lord Chancellor as at its essence a political post, and contended that fundraising was as acceptable for the Lord Chancellor as for any other government minister.

As criticism mounted over such internal concerns, it also grew with respect to the external concern that the British constitutional system was not sufficiently transparent to ensure that justice was publicly perceivable in a manner appropriate for a modern democratic society. Such external concern intensified as a result of two significant constitutional developments, the enactment of major human rights legislation and devolution, both of which gave significant new powers to courts.

As of October 2000, the 1998 Human Rights Act made it possible to enforce many rights in the European Convention on Human Rights ("European Convention") in United Kingdom courts. Although the

---


201. See Gibb, supra note 200.

202. Parl. Debs., H.L. (5th ser.) (2001), col. 874 (speech of Lord Irvine of Lairg) (stating "I am simply saying that I do not believe that I have done anything wrong. Nor do I believe that I have broken any current rules. If I did, I would be the first to apologise.").

203. Id. (stating "There is no real difference between party-political campaigning and fundraising because I believe that fundraising is an inherent part of party-political campaigning. We would be unrealistic not to recognise that. A great deal has been said about the office of Lord Chancellor being non-party political. That is simply not true. At the great age of 79, the noble and learned Lord, Lord Hailsham, toured the country in the 1987 general election campaign. Lord Kilmuir was even more frequently on the campaign trail. In 1997, the noble and learned Lord, Lord Mackay of Clashfern, took a high political profile to speak out strongly against Scottish devolution. I take the view that, unless and until the rules are changed, a Lord Chancellor is no different from any other Cabinet Minister").

Human Rights Act does not overrule the doctrine of parliamentary sovereignty, it requires courts to interpret legislation to give effect, as far as possible, to European Convention rights, and empowers courts to issue a declaration of incompatibility if they cannot interpret a legislative provision consistently with the European Convention. Devolution now requires United Kingdom courts to adjudicate disputes between the central Executive and the executive authorities in Scotland, Wales, and Northern Ireland over whether the devolved bodies have acted within the scope and limits of their devolved powers.

For a Lord Chancellor to hear a human rights or devolution case would seem to pose clear conflict of interest difficulties, but Lord Irvine refused to agree to any categorical restrictions on appeals he would hear. Lord Irvine’s insistence on retaining such broad discretion over whether to sit in individual cases fueled the external concern that the British justice system lacked the appearance of fairness, regardless of whether the Lord Chancellor has in fact fairly and reasonably exercised his discretion.

Reflecting this external concern about the need for the appearance of fairness, the European Commission on Human Rights (“Commission”) ruled in 2000 in *McGonnell v. United Kingdom* that the Bailiff of Guernsey, an official who, like the British Lord Chancellor, had functions straddling the legislative, executive and judicial branches of government, had violated the right to a fair trial in Article 6 of the European Convention by serving as sole professional judge on a dispute over planning permission. The Commission accepted that the Bailiff spent the majority of his time in judicial functions and also that his other functions did not interfere with his judicial work. But these findings did not alleviate the Commission’s concern about the appearance of impartiality where the Bailiff was a senior member of all three branches of government. The Commission stated in its decision that “[i]t is incompatible with the requisite appearances of independence and
impartiality for a judge to have legislative and executive functions as substantial as those [carried out by the Bailiff]."\textsuperscript{209} The European Court of Human Rights agreed that the Bailiff did not have "the required ‘appearance’ of independence, or the required ‘objective’ impartiality" to satisfy Article 6(1).\textsuperscript{210}

Neither the Commission nor the European Court of Human Rights specifically mentioned the British Lord Chancellor in \textit{McGonnell}, but their reasoning would seem to apply even more strongly to the Lord Chancellor than to the Bailiff of Guernsey. Adding to the likelihood that the Lord Chancellor would fail to satisfy the "appearance of independence and impartiality" requirement of Article 6 were the facts that, unlike the Bailiff, the Lord Chancellor's functions were not primarily judicial, and the Bailiff enjoyed much greater security of tenure than the Lord Chancellor.\textsuperscript{211}

It is ironic, in light of the implications for his position as Lord Chancellor, that Lord Irvine was an instrumental player in pushing through the human rights reforms.\textsuperscript{212} For that reason, Michael Beloff QC called Article 6 of the European Convention the "Lord Chancellor's suicide note."

It certainly looked like one in June 2003, when the Government suddenly announced its intention to abolish the office of Lord Chancellor.

\section{A Flawed Process of Reform: Lack of Transparency and Adequate Consultation}

From the start, the Government's process of reform was marred by secrecy, a lack of consultation, and excessive haste. Moreover, personal relationships often trumped policy considerations. The result of this flawed process was that the Government eventually had to back down on the abolition of the office of Lord Chancellor, although it did succeed in enacting legislation that profoundly changed it. But the Government's

\begin{itemize}
\item \textsuperscript{209} Id. at 301.
\item \textsuperscript{210} Id. at 307-308.
\item \textsuperscript{211} See \textit{WOODHOUSE}, supra note 33, at 129 (noting that the Bailiff, who is appointed by the Queen and not the Prime Minister, serves at Her Majesty's pleasure until retirement at age 70).
\item \textsuperscript{212} See, e.g., LORD IRVINE OF LAIRG, the \textit{Human \ Rights \ Bill, House of Lords 2\textsuperscript{nd} Reading; The Development of Human Rights in Britain under an Incorporated Convention on Human Rights; Constitutional Change in the United Kingdom: British Solutions to Universal Problems; Britain's Programme of Constitutional Change in Human Rights, Constitutional Law and the Development of the English Legal System, SELECTED ESSAYS 7-56, 87-102 (2003).
\item \textsuperscript{213} Michael Beloff QC, \textit{A legal step that had to be taken}, THE OBSERVER, June 15, 2003, at 15. See infra note 218 (for more information on the meaning of "QC," the abbreviation for Queen's Counsel).
\end{itemize}
reform process was not in keeping with its underlying goal of ensuring that the United Kingdom constitutional system promoted external perceptions of fairness, justice and judicial independence from political pressures. Even if the end result of the reforms ultimately does increase the separation of powers (thus addressing internal concerns about actual fairness, justice, and judicial independence), the means used to achieve this result are very troubling.

Chance played far too great a role in the process of reform. The Government’s initial proposals for reform of the office of Lord Chancellor reform put too much power into the executive branch, and only achieved adequate protection for judicial independence after the judiciary mobilized themselves to hammer out an agreement, the concordat, that ensured such protections. The Government should have provided greater opportunity for pre-legislative and legislative scrutiny of its proposals so that constitutional protection for judicial independence was not left so much up to chance. It should have consulted with the judiciary before announcing such drastic reform proposals. The haste to push through legislation for reasons of political expediency was not calculated to give rise to a better constitutional balance than the existing one. Excessive secrecy and lack of consultation made it very difficult to achieve consensus on the need for the reforms as a matter of well-reasoned constitutional principle. Many important issues were never adequately considered or discussed, such as the messy division of judicial functions between the Lord Chancellor and Home Secretary and the impact of the reforms on the constitutional conventions that underpin the British constitutional system.

A. The Government’s Sudden Announcement of Reforms to the Office of Lord Chancellor

At 5:45 p.m. on June 12, 2003, the Prime Minister’s office suddenly and without prior public warning announced, through a press release, a Cabinet reshuffle that included the abolition of the Lord Chancellor’s Department.214 The press release stated that the Lord Chancellor’s Department would be replaced by a new Department of Constitutional Affairs, which would be headed by a Secretary of State for Constitutional Affairs.215 The Government also announced the retirement of the

215. Id.
incumbent Lord Chancellor, Lord Irvine of Lairg.\footnote{216}

This bombshell announcement that Lord Irvine would step down sent shockwaves through the Government because of his close ties to the Prime Minister. While practicing as a successful barrister,\footnote{217} Lord Irvine was the young Tony Blair's pupilmaster,\footnote{218} and served as an important mentor to Blair throughout the years that followed.\footnote{219} He even introduced Blair to his wife, the former Cherie Booth, thereby earning the nickname “Cupid QC.”\footnote{220} Lord Irvine also loaned the Blairs the money to buy their first home in Sedgefield after Tony Blair was elected Member of Parliament for that constituency.\footnote{221} It has been reported that

216. Id.


218. A pupilmaster is a barrister who supervises the period of apprenticeship required to become a fully qualified barrister. Lord Irvine QC was one of the youngest barristers ever to "take silk," that is appointed a Queen's Counsel ("QC") by the Queen on the advice of the Lord Chancellor (so effectively appointed by the Lord Chancellor). QC is an honorable status awarded to particularly successful senior barristers. See BAILEY, supra note 4, at 174. QCs wear silk, not stuff, gowns like junior barristers, are permitted to sit in the front row of the courtroom, and are typically employed to argue larger or more complex cases, often using a junior barrister or barristers to assist with pleadings and case preparation. See DEP'T FOR CONSTITUTIONAL AFFAIRS, CONSULTATION PAPER 08/03, CONSTITUTIONAL REFORM: THE FUTURE OF QUEEN'S COUNSEL ¶¶ 5, 8, 10 (July, 2003), available at http://www.dca.gov.uk/consult/qcfuture/.

QCs generally charge significantly higher fees than junior barristers. Id. at ¶ 13. Among its many constitutional reforms, the Blair Government initiated reform to the system for appointment of QCs, suspending it in 2002. See generally id. In May 2004, the Government announced that the QC title would be retained for a few years pending a wider review of legal services. The system for appointing QCs was somewhat changed in the interim. Among other things, the Lord Chancellor and Secretary of State would no longer have a role in selecting candidates for QC. See 10 Downing Street Press Release, New QC scheme to put customer first (May 26, 2004), available at http://www.number10.gov.uk/output/Page5864.asp; Lord Falconer of Thoroton, The Future of Queen’s Counsel, Written Ministerial Statement (May, 2004), available at http://www.dca.gov.uk/judicial/judges/qcstatement.htm (last visited Sept. 29, 2005). A new selection process for QCs was agreed between the Bar Council and the Law Society and approved by the Lord Chancellor and Secretary of State for Constitutional Affairs. See Summary of the Process for QC Award England and Wales (Nov. 2004), available at http://www.qcapplications.org.uk/process. The Government set up a new QC selection panel that accepted applications between July and September 2005. See Application and Selection for Queen’s Counsel website, http://www.qcapplications.org.uk/ (last visited Sept. 29, 2005).


220. See Nicholas Watt & Claire Dyer, A law unto himself: Derry Irvine's reluctant refusal of a £22,691 pay rise is just the latest in a series of gaffes that includes his £30,000 splurge on wallpaper. So how much longer will Tony Blair tolerate his accident-prone lord chancellor?, THE GUARDIAN, Feb. 12, 2003, at 2 (Features).

221. Andrew Pierce, Revealed: debt paid to cupid who brought the Blairs together,
Lord Irvine was the only person that Blair would permit to call him "Young Tony." 222

Blair apparently believed that speed and secrecy were required because of the delicacy involved in sacking his great mentor and friend. 223 Baroness Kennedy has commented that "it must have felt like an act of patricide." 224 The Prime Minister limited discussion of his plans to his closest advisers and did not follow the usual procedure of forming a Cabinet sub-committee to scrutinize the proposed constitutional changes. 225 One Blair adviser commented, "How could you discuss it around the Cabinet table when the person whose job you were discussing was sitting right there?" 226

That person, Lord Irvine of Lairg, was in fact highly controversial as Lord Chancellor. He was the subject of widespread criticism by Labour and Tory politicians alike. 227 Many Labour politicians deeply distrusted Lord Irvine, not only because of his close ties to the Prime Minister, but because they believed he did not hold key Labour party values, despite his distinctly humble Glaswegian origins as the son of a roofer and a waitress. 228 Some critics accused him of arrogance after he likened himself to Cardinal Wolsey, one of the most powerful Lord Chancellors and de facto Prime Minister during the reign of Henry VIII. 229 A Sun journalist who authored a tongue-in-cheek comparison of Wolsey and Irvine under the heading Pompous Ass v. Pompous Ass, pointed out a number of similarities between the two Lord Chancellors, including flamboyance, greed, and arrogant behavior (the latter attribute said to consist of Lord Irvine's use of an assistant to peel his oranges and Cardinal Wolsey's clearing of the streets of London to enable him to ride a mule decked out with gold and velvet trappings). 230 In response to the furor over his remarks, Lord Irvine later claimed that he had been joking. 231

Tory politicians charged Lord Irvine with extravagance after he spent over £650,000 of public funds on the interior decoration of the

222. See Ahmed & Hinsliff, supra note 214, at 14.
223. Id.
226. Id.
227. For some of Lord Irvine's actions that sparked criticism, see supra notes 198-203 and accompanying text.
228. See BBC News Profile, Lord Irvine, supra note 217.
229. See David Starkey, A few words of warning to the 'Cardinal': As Lord Irvine likens himself to Thomas Wolsey, DAILY MAIL, Dec. 2, 1997, at 8.
231. Starkey, supra note 229, at 8.
Lord Chancellor’s large rent-free “grace and favour” apartment in the Palace of Westminster, including £59,000 on expensive new wallpaper. Lord Irvine dismissed the storm of criticism over his redecoration as a “storm in a teacup.” But as the political humorist Matthew Parris quipped, “£650,000! Some teacup.” Similar criticism erupted after Lord Irvine received a pay increase of more than £22,000, although part of this was later revoked pending a review of the laws tying the Lord Chancellor’s pay to the senior judiciary and civil servants. And there was a storm of controversy over Lord Irvine’s efforts to modernize the Lord Chancellor’s court dress.

Notwithstanding the public uproar over Lord Irvine’s actions as Lord Chancellor, the Government’s press release announcing his resignation included some warm words of gratitude from Blair:

Derry Irvine has been a very senior member of the Cabinet for six years, a man of great integrity, and a most trusted adviser and friend. Derry’s contribution to the Government’s programme of devolution and constitutional reform has been outstanding. I respect his wish to retire and pay tribute to all he has achieved.

The same press release also announced that the first Secretary of State for Constitutional Affairs (hereafter “Secretary of State”) would be Lord Charles “Charlie” Falconer of Thoroton, and that Lord Falconer would

---

232. See David Wighton, Irvine defends £650,000 decoration bill, FIN. TIMES, Mar. 4, 1998, at 1 (noting that each roll of the handmade wallpaper selected by Lord Irvine cost £300); Ewen Macaskill, Irvine indicates opening hours after £650,000 political refit, THE GUARDIAN, Mar. 5, 1998, at 11. Lord Irvine defended the expense as for a “noble cause,” arguing that the refurbishment would benefit the public and improve the national heritage. See James Landale, Irvine defends his ‘noble cause,’ THE TIMES, Mar. 4, 1998, at 12. Lord Irvine also infuriated the nation’s wallpaper manufacturers, who were angered by his claim that he could not have used cheaper wallpaper because it would “collapse after a year or so.” See Peter Foster, Up Against the Wall: Irvine’s taste put to test, THE TIMES, Mar. 7, 1998, at 3; see also Wallpaper makers hit back at cheap ‘insult,’ THE TIMES, Mar. 4, 1998, at 3.


234. Id.

235. See Rosemary Bennett, Huge pay rise for Blair crony provokes fury, THE TIMES, Feb. 8 2003, at 1 (Home News) (noting that the government sought to defend the pay raise, which would increase Irvine’s pay to a total of £202,736, on the ground that it was required by rules stipulating that the Lord Chancellor’s salary exceed the Lord Chief Justice by £2,500). See also Joshua Rozenberg & Andrew Sparrow, Don’t worry, Lord Irvine, your pension still goes up, THE DAILY TELEGRAPH, Feb. 11, 2003, at 10 (noting that the proposed pay increase was a 12.6 per cent rise on his salary of £180,096). See also Ben Russell, Brown Denies Forcing Irvine to Turn Down Pounds 22,000 Pay Rise, THE INDEPENDENT, Feb. 20, 2003, at 8 (reporting that Irvine eventually agreed to receive only a pay rise of 2.25 percent, the same increase received by other Cabinet ministers, which amounted to slightly over £4,000).

236. See supra notes 128-32.
simultaneously serve as Lord Chancellor until that office was abolished.\textsuperscript{237} Unlike the often socially inept Lord Irvine, who seemed to be the master of the political gaffe, Lord Falconer, dubbed the “cheery chappie” by journalists, was socially charming, so much so that as a young man he successfully enticed away Blair’s sixth-form girlfriend, Amanda Mackenzie Stuart, the first female to attend Fettes College, Blair’s exclusive Edinburgh public school.\textsuperscript{238}

But despite his cheery bonhomie, Falconer’s appointment sparked yet more controversy because of his own close ties to the Prime Minister. Despite their competition over Mackenzie Stuart’s affections, Blair and Falconer became close friends, and shared a house in London as young lawyers in their twenties.\textsuperscript{239} Until the late 1990s, Falconer had successfully practiced as a barrister.\textsuperscript{240} He was appointed Solicitor General in May of 1997, and later served the Blair Government in a variety of ministerial positions, including Minister of State at the Cabinet Office, Minister for Housing, Planning and Regeneration at the Department of Transport, and Minister of State for Criminal Justice, Sentencing and Law Reform at the Home Office.\textsuperscript{241}

Despite Falconer’s prior legal and government experience, there was immediate and widespread criticism of his appointment on the grounds that, like Lord Irvine, he was one of “Tony’s cronies,” whose appointment reeked of shameless patronage.\textsuperscript{242} One Guardian journalist facetiously imagined the following conversation between a young

\begin{itemize}
\item \textsuperscript{237} Press Release, 10 Downing Street, Modernising Government—Lord Falconer appointed Secretary of State for Constitutional Affairs (June 12, 2003) available at http://www.number-10.gov.uk/output/Page3892.asp.
\item \textsuperscript{239} Letts, supra note 238.
\item \textsuperscript{240} John Mortimer, \textit{We have a Cabinet full of lawyers with no idea of justice John Mortimer says his creation Rumpole would be moved to righteous wrath at Labour’s legal reforms}, \textit{The Daily Telegraph}, July 30, 2003, at 20.
\item \textsuperscript{241} See Lord Falconer of Thoroton, Biographical details at http://www.dca.gov.uk/lcframe.htm (last visited Sept. 29, 2005).
\item \textsuperscript{242} See, e.g., Leader, \textit{Cronyism Sours Law Reform}, \textit{The Express}, June 19, 2003, at 12. Falconer himself has accused of cronyism with regard to his appointment of his former pupilmaster and friend Sir Mark Potter, a commercial lawyer with little family law experience, to head one of the most powerful judicial positions, the president of the High Court’s Family Division. See Clare Dyer, \textit{Falconer angers top judges}, \textit{The Guardian}, Jan. 12, 2005, at 1 (Home Section), available at http://politics.guardian.co.uk/lords/story/0,9061,1388436,00.html; Clare Dyer, A family row: Today the government unveils plans to shake up the family justice system, \textit{The Guardian}, Jan. 18, 2005, at G2.
\end{itemize}
Falconer and his housemate Blair:

Wandsworth flat. A grimy kitchen. It is early morning. Two young barristers are preparing breakfast. Falconer, sweating slightly in his dressing gown, has his head inside the fridge. Blair, already up and dressed, scribbles idly on the back of an envelope.

Falconer (indistinctly): Blair, you bastard, you’ve nicked my bread again, haven’t you?

Blair: I didn’t, honest.

Falconer (extracts head and carefully inspects Blair’s chin): Blair, I can see a crumb.

Blair (flourishing his envelope): Look, when I’m prime minister I’ll make you a lord, OK?

Falconer: Bollocks. I’m hungry.

Blair: Look, I can put you in the cabinet! You won’t even have to get elected.

Falconer (grudgingly): What as?

Blair: Anything you like. Defence, Home Office –

Falconer (interrupting): Lord Chancellor, or you find another flat.

Blair: Look (laughs nervously), the thing is, I’ve already put Derry down.

Falconer: I want my toast.

Blair: OK Charlie, promise, after Derry. I’ll think of something. Promise. 243

Another commonly voiced criticism of Blair’s appointment of Falconer was that it was profoundly undemocratic because Falconer had not been elected and was therefore not sufficiently politically accountable. 244

---

244. *Id.*
Undeterred by such criticism, the Government announced that the new Department of Constitutional Affairs would take on most of the responsibilities of the former Lord Chancellor’s Department, including the historic role of Keeper of the Great Seal, as well as responsibility for the administration of justice of English and Welsh courts and tribunals, legal aid, legal services, civil and family law reform, and constitutional matters. But the Lord Chancellor would no longer sit as a judge. Once the planned new Judicial Appointments Commission was finalized, the Lord Chancellor would also no longer be responsible for judicial selection. Nor would the Lord Chancellor continue to serve as Speaker of the House of Lords. However, the Secretary of State would retain the Lord Chancellor’s responsibility to safeguard judicial independence. The new Secretary of State would have some new responsibilities, including the supervision of the Scotland and Wales Offices, which would cease to be independent Ministries and would move to the new Department for Constitutional Affairs.

The announcement did not propose a European-style Ministry of Justice that would also take over the criminal justice responsibilities of the Home Office. This was the result of the determined opposition of the then Home Secretary, David Blunkett. The Blair Government had plans to reform the criminal justice system and apparently feared that a shake-up of the Home Office would jeopardize these plans. But leaving judicial responsibilities spread across ministries made the reform proposal far messier and less logical than it needed to be.

After the announcement, the Prime Minister received widespread criticism for initiating such sweeping constitutional change too quickly and without an appropriate consultation process. The Prime Minister’s
failure to immediately explain the changes to the House of Commons angered many Members of Parliament. For example, on June 17, Eric Forth, the Member of Parliament for Bromley and Chislehurst, called the announcement “a half-baked afterthought to the most botched and shambolic reshuffle in living memory,” and speculated that the Prime Minister “cannot explain because he does not know what it means, and he will not explain because I doubt whether he cares very much, either.”

The Prime Minister did not defend his proposals in the House of Commons until June 18, 2003, when he described them as “essential acts of constitutional modernization.” But he could not justify the haste and secrecy with which the Government had initiated reform other than to say that there would be future consultation and debate over the proposals in the future.

Senior judges were also deeply troubled that they were not consulted about the proposals. The Lord Chief Justice Lord Woolf only learned of the changes minutes before they were announced. The Scottish Law Lord Lord Hope recalled “I saw it on the news at Heathrow on my way home to Edinburgh one evening. Certainly I was not consulted, none of us [Lords of Appeal] was.” Many senior judges did not view this lack of consultation as justified. Lord Woolf described the way in which the proposals were announced as “extremely unfortunate” and warned that: “[t]he flexibility of our constitutional arrangements is undeniably desirable, but they should not be so malleable that they can be changed by Prime Ministerial announcement in the course of a Government reshuffle.”

Lord Woolf also commented that “it must be a cause for concern that a decision to abolish such a historic office—with its pivotal role in the administration of justice as head of the judiciary—can be taken without any consultation with the judiciary.” The former Lord Chancellor Lord Mackay echoed Lord Woolf’s concern that there

---

254. Id. at col. 358 (speech of Tony Blair).
255. Id. at col. 362 (speech of Tony Blair).
256. Clare Dyer, Judges line up for battle over reforms: Six of proposed supreme courts 12 members denounce harmful and costly plan as judiciary airs fears of threat to independence, THE GUARDIAN, Nov 8 2003, at 10.
259. This statement is quoted in Joshua Rozenberg, Lord Woolf discards the sheep’s clothing, Lord Chief Justice launches Mansion House attack over judges being kept in the dark on abolition of Lord Chancellor, THE DAILY TELEGRAPH, July 10 2003, at 19.
had not been sufficient scrutiny of the reforms, calling them “even less than half-baked.”

To many other observers, the Government’s proposals were not only rushed through with inadequate consultation, but also sloppy and confused. The Government’s announcement of the changes to the Lord Chancellor’s office had to be redrafted at the eleventh hour, because of the initial failure to realize that the office could not be unilaterally abolished without legislation. One Whitehall official told journalists: “[i]t was all so rushed and chaotic.” Even as redrafted, the Government’s announcement confused many about exactly what constitutional role Lord Falconer would play as Secretary of State for Constitutional Affairs. Even some members of Blair’s own party denounced the proposed reforms. One Labour Member of Parliament, Bob Marshall-Andrews, commented acerbically: “Parliament decides the way we are governed, not the Prime Minister on the back of an envelope. What we have here is a botch. It totally lacks coherence and clarity.”

The Government made embarrassing mistakes. It made a premature announcement that the Lord Chancellor would no longer serve as Speaker of the House of Lords while the House of Lords determined who should take on the role. The Government had failed to realize that a standing order dating from 1660 meant that the House of Lords could not sit unless the Lord Chancellor participated in the procession and sat on the Woolsack. Lord Chancellors traditionally seek the leave of the House to be absent from the Woolsack for more than a day, but many peers were so enraged by the Government’s announcement that they refused Lord Falconer leave of absence by proxy. Lord Falconer had to hastily and shamefacedly put on the traditional wig and gown and join the Lord Chancellor’s procession, attired in the Lord Chancellor’s traditional “fancy dress,” although, following the lead of Lord Irvine, Falconer eschewed the silk stockings and knee breeches.

262. Id.
265. See House of Lords Standing Order No. 18, Speaker of the House (June 9, 1660), available at http://www.parliament.the-stationery-office.co.uk/pa/ld/ldstords/ldso-18; Joshua Rozenberg & George Jones, Reform Blocked by 1,400 years of tradition, DAILY TELEGRAPH, June 14, 2003, at 8. See also supra notes 115-119 and accompanying text (for a description of the procession).
266. Id.
267. Id.
Apparently undeterred by the outpouring of critical reactions to its proposals, the Government announced in a September 2003 consultation paper that there would be a shorter than usual consultation period for the implementation of its proposal to abolish the Lord Chancellor.\footnote{See Dep't for Constitutional Affairs, Consultation Paper 13/03, supra note 4, at Introduction.} It gave four primary reasons for this decision. First, consultation was not sought on the "broad principles of the change" but only on "some relatively narrow issues" relating to certain miscellaneous functions of the Lord Chancellor, including his ecclesiastical patronage functions and visitorial jurisdiction.\footnote{Id. See also supra notes 133-34 and accompanying text.} Second, there would be separate consultation with certain affected groups.\footnote{See Dep't for Constitutional Affairs, Consultation Paper 13/03, supra note 4, at Introduction.} Third, the consultation papers for the Government's proposals for a judicial appointments commission and a new Supreme Court had already been issued with a response date set, and the Government viewed it as desirable to use the same date since the abolition of the Lord Chancellor was part of the same broad program of constitutional reform.\footnote{Id.} Finally, the Government sought to complete the abolition of the Lord Chancellor's office within eighteen months (probably due to plans for a general election, although this reason was not given in its September 2003 consultation paper), and it contended that a shorter consultation period was necessary to achieve this timing goal.\footnote{Id.}

The litany of problems with the Government's announcement of the proposed abolition of the Lord Chancellor led the journalist and cross-bencher\footnote{A cross-bencher is a member of the House of Lords who is not aligned with any party. They do not sit on either the government or the opposition benches, but on benches perpendicular to both that face the throne.} William Rees-Mogg, a life peer, to publicly conclude that the Prime Minister was a disastrous constitutional reformer:

The Prime Minister is trying to build his historic reputation as a constitutional reformer, as the great Burke of his generation. It is a pity he has chosen this area to demonstrate his expertise since neither he nor his Lord Chancellor seem able to tell the difference between the British constitution and a turniphead with a candle inside it.\footnote{William Rees-Mogg, Blair is trying, and failing, to be a bit of a Burke, The Times, Dec. 8, 2003, at 18.}

In February 2004, a cross-party House of Commons committee on constitutional affairs agreed with critics of the reforms that the reforms had been rushed, that the timetable for the constitutional reform
legislation was too short, and that there had not been a sufficient consultation period. It concluded that the reason for the haste had been political expediency and advised that there should be a revised timetable to ensure that the proposed constitutional reform legislation could be properly scrutinized.

B. Judicial Concerns Lead to the Negotiation of the Concordat

Excessive speed and secrecy were not the only concerns about the proposed reforms. The judiciary was extremely worried about the impact of the abolition of the Lord Chancellor on judicial independence. Representing judges at all levels and acting as the collective voice of the judiciary as a whole, the Judges' Council submitted a response to the Government's consultation papers in November 2003. This document warned that replacing the Lord Chancellor with a "primarily political" Secretary of State seriously threatened judicial independence because the Secretary of State would "no longer be constrained by judicial responsibilities and constitutional conventions." The Judges' Council recommended greater public discussion of the reform proposals, and also urged the Secretary of State to enter into some formal understanding with the judiciary to protect judicial independence. The Council listed four steps as essential for preserving judicial independence: (1) that there be legislation providing that the Lord Chief Justice take on the role as head of the judiciary, since a Secretary of State cannot have that role; (2) that the judiciary should have control over arrangements for deploying judges and hearing cases; (3) that sufficient funding should be provided for the effective functioning of the judiciary and the courts; and (4) the judiciary should continue to have responsibility for training judges and should thus continue to run the Judicial Studies Board, a body set up in 1979 for the training of judges by judges. Additionally, the Judges' Council


276. HOUSE OF COMMONS CONSTITUTIONAL AFFAIRS COMMITTEE FIRST REPORT, supra note 257, at ¶ 193.


278. Id. at ¶ 5-6, 27-36.

279. Id. at ¶ 7.

280. Id. at ¶ 8, 49-63. See also Judicial Studies Board ("JSB") website, About Us, Introduction, http://www.jsboard.co.uk/aboutus/introduction.htm (stating that "An essential element of the philosophy of the JSB is that the training of judges and magistrates is under judicial control and directions. The Judicial Studies Board was set up in 1979, following the Bridge Report which identified the most important objective of
expressed the view that any new arrangements for judicial appointments should "reflect the need to preserve judicial independence and calibre, and to uphold dignity." It also recommended limits on the executive's role in judicial discipline.

In an effort to achieve these recommendations, Lord Woolf, representing the judiciary with the authority of the Judges' Council, worked with the Lord Chancellor to draft a written agreement on judicial independence. In January 2004, they were able to reach agreement on a document, dubbed the "concordat," and place it before Parliament. This was because, as Lord Falconer noted when announcing this agreement on January 26, 2004, final implementation of the concordat's proposals required Parliamentary approval.

Lord Woolf postponed his retirement to negotiate the concordat, but he clearly viewed this sacrifice as worthwhile. He largely succeeded in obtaining the protections for judicial independence in the concordat that had been sought by the Judges' Council. The concordat provides, *inter alia*, for the imposition of a general statutory duty to respect judicial independence on the government and those involved in the administration of justice and judicial appointments, as well as for a specific statutory duty on the Secretary of State to "defend and uphold the continuing independence of the judiciary." It also expressly states that the Secretary of State will not sit as a judge, nor will have any role in judicial decision-making in particular cases. The concordat seeks to promote transparency through statutory recognition for the role of the Lord Chief Justice as head of the judiciary, as well as for the duties

judicial training as being "To convey in a condensed form the lessons, which experienced judges, have acquired from their experience. . . ." This remains the essence of the JSB's role." (last visited Sept. 29, 2005).

281. *Id.* at ¶ 9.
282. *Id.* at ¶ 13.
287. Concordat, *supra* note 284, at ¶ 6-7. The concordat includes the principle that "the new arrangements should reinforce the independence of the judiciary." *Id.* at ¶ 5.
288. *Id.* at ¶ 4(b), 8.
289. Under the concordat, the Lord Chief Justice has the responsibility to promote the well-being of the judiciary by ensuring that there is appropriate training and guidance for
and responsibilities of the Secretary of State and senior judiciary after implementation of the constitutional reforms.290

Under the concordat, responsibility for judicial administration, appointments, and discipline is divided between the executive and the judiciary in an effort to ensure appropriate executive involvement while simultaneously ensuring judicial independence.291 As the Judges’ Council had wanted, the concordat makes clear that the deployment of individual judges is the responsibility of the Lord Chief Justice (although subject to a requirement of consultation with the Secretary of State), and the allocation of individual cases to particular courts and judges is also within the control of the judiciary.292 Also in keeping with the wishes of the Judges’ Council, the judiciary is to be in control of judicial training, subject to the requirement that this be done within the resources allocated by the Secretary of State.293 The Secretary of State has the duty “to ensure that there is an efficient and effective system to support the carrying on of the business of the courts in England and Wales” and “that appropriate services are provided for those courts.”294 Additionally, the
Secretary of State is charged with providing and allocating financial, material and human resources to achieve this goal, and is accountable to Parliament for decisions relating to the provision and allocation of these resources. The concordat provides for a new Unified Courts Agency in the Department of Constitutional Affairs. The judiciary is to have a significant role in strategic and resource planning for this new agency, which, in part, will be achieved through the requirement that a senior judge sit on the agency’s Board as a non-executive member. The concordat provides for many other aspects of judicial administration to be in the control of the executive, subject to a responsibility to consult with the Lord Chief Justice. These include the total number of judges and the jurisdiction of particular courts. The allowance, disallowance, and changing of court procedural rules are the responsibility of the Secretary of State, but the actual rulemaking is the responsibility of “rule-making” committees, if such exist, and where they do not, of the Lord Chief Justice. The concordat imposes responsibility on the Secretary of State to support the judiciary in the fulfillment of judicial functions. It makes judicial discipline subject to a joint protocol to be worked out between the Secretary of State and Lord Chief Justice and laid before establishing a framework for the organization of the court system, including the determination of jurisdictional boundaries, the total number of judges at each level of courts, the geographical location of courts, the administrative staffing of courts, the distribution of court business between different levels of courts (e.g. High Court and County Court), and the sitting times for courts, but do not extend to the deployment of individual judges or the distribution of business within the same level of courts, which are the responsibility of the Lord Chief Justice. Id. at ¶¶ 26-27, 29-33. These duties of the Secretary of State duties are generally subject to a duty to consult the Lord Chief Justice, and vice versa. Id at ¶¶ 26, 28, 29-33.

295. Id. at ¶ 4, 19. These resources include judicial pay and pensions, conditions of employment, necessary staff and resources for the Lord Chief Justice. Id. at ¶¶ 21-22.
296. Id. at ¶ 20.
297. Id. at ¶¶ 20, 24-25.
298. See id. at ¶¶ 29 et seq., 32 et seq.
299. Id. at ¶¶ 50, 51-52 53, 56. The Secretary of State must provide written reasons for the decision to disallow rules. Id. at ¶ 52. Before rules for tribunals are considered in a White Paper, the Secretary of State has responsibility for rule-making for those tribunals where the Lord Chancellor previously had this responsibility. Id. at ¶ 57. There is shared responsibility for the appointment of members of rule-making committees: the Secretary of State has the power to appoint non-judicial members, in consultation with the Lord Chief Justice, while the Lord Chief Justice has the power to appoint judicial members, in consultation with the Secretary of State. Id. at 58. The Lord Chief Justice has the power to make Practice Directions for criminal, civil, and family courts, with the concurrence of the Secretary of State. Id. at 63. No such concurrence is required for practice directions concerning guidance on the law and the making of judicial decisions. Id. at ¶ 65.
300. Id. at ¶ 4(a).
Parliament. It also provides for most judicial appointments to be handled by an independent Judicial Appointments Commission with a substantial proportion of lay members and a chairman that will recommend appointments to the Secretary of State. Appointments to the senior judiciary (Court of Appeal judges and Heads of Division) will be handled by a special senior appointments panel of the Judicial Appointments Commission, which must have a substantial proportion of lay members. The concordat gives the executive a limited role in judicial appointments: the Secretary of State can ask that a recommendation be reconsidered, ask for another nomination, or require the competition to be rerun, subject to a duty to give reasons for a rejection or a request for reconsideration. It requires the Judicial Appointments Committee to consult the Lord Chief Justice before

301. *Id.* at ¶¶ 73, 78. The Secretary of State will bear the responsibility of providing resources for an “effective and efficient” complaints secretariat to initially handle complaints about judges, though investigations of substantiated or doubtful complaints will be referred to a judge for advice and the final decision to take disciplinary action will must be made jointly by the Secretary of State and Lord Chief Justice, who can also decide that there should be a judicial investigation. *Id.* at ¶ 79, 88-89, 91. The finding of the Investigating Judge can be accepted by the Lord Chief Justice and the Secretary of State, or the complaint may be forwarded to a Review Body, normally consisting of two judges and two lay members appointed by the Lord Chief Justice and the Secretary of State, for reconsideration. *Id.* at ¶ 93, 99. Judges of the High Court and higher courts cannot be removed except by the Queen and an address of both Houses of Parliament. *Id.* at ¶ 74. Removal of other judges, as well as suspension from sitting pending an investigation’s outcome will require agreement by both the Lord Chief Justice and Secretary of State. *Id.* at ¶¶ 75, 76. The Lord Chief Justice will be responsible for administering other sanctions, such as reprimands, subject to the agreement of the Secretary of State and consultation with the relevant Head of Division. *Id.* at ¶ 76, 81-82, 89-90. The power to suspend, reprimand, warn or advise magistrates or tribunal members can be delegated to other judges or Tribunal presidents. *Id.* at ¶ 77. Complaints about magistrates will be investigated by local Advisory Committees but can be referred to the complaints secretariat. *Id.* at ¶¶ 103-104. Either the Lord Chief Justice or the Secretary of State can decide, provided each consults the other, that there is a need for a judicial investigation of a complaint about a magistrate, and the magistrate can ask for the case to be considered by a Review Body. *Id.* at ¶¶ 105-106. Complaints about how complaints about the judiciary or magistrates have been handled can be made to an ombudsman. *Id.* at ¶¶ 100-102, 107. These disciplinary procedures are not applicable where a judge has been convicted of certain serious criminal offenses. *Id.* at ¶ 109.

302. *Id.* at ¶¶ 44, 114-131 (proposals covering appointment of (1) lay magistrates and General Commissioners of Income Tax (after an interim period to be determined by the Judicial Appointments Commission); (2) other judges up to and including the seniority of High Court judges; (3) Court of Appeal judges; (4) Heads of Division). Filling certain judicial leadership posts, such as Presiding Judges, is the responsibility of the Lord Chief Justice, with a requirement either of consultation with or the concurrence of the Secretary of State. *Id.* at ¶ 43-45. The Secretary of State is responsible for setting out the level and type of judges required for bodies like committees and boards, while the Lord Chief Justice has responsibility for appointing individual judges to such bodies. *Id.* at ¶¶ 46-49.

303. *Id.* at ¶¶ 121(b)-(c), 122-123.

304. *Id.* at ¶¶ 116, 120-121.
recommending a particular candidate for a judicial appointment up to and including the High Court to the Secretary of State.\textsuperscript{305}

The concordat was a major milestone for the proposed reform of the Lord Chancellor’s office because it defused much of the judiciary’s opposition based on concerns that judicial independence would be threatened. But controversy remained over whether there should still be a Minister with the title of Lord Chancellor, and if so, whether he should still be a member and Speaker of the House of Lords, as well as whether he should be required to be a senior lawyer.\textsuperscript{306}

C. The Struggle to Enact Constitutional Reform Legislation

Even after the negotiation of the concordat, the Government’s efforts to enact constitutional reform legislation faced strong opposition throughout the legislative process. Much of this opposition was based on concerns that the reform process was overly rushed and insufficiently transparent. Although, to the surprise of many observers, this sustained opposition to the legislation did not kill it, it did force the Government to back down on its initial proposal to abolish the office of Lord Chancellor.

On February 24, 2004, the Government introduced a Constitutional Reform Bill into the House of Lords that included the Government’s proposal to abolish the office of Lord Chancellor, as well as the proposals to establish a new Supreme Court in place of the House of Lords and to set up a new Judicial Appointments Commission.\textsuperscript{307} By introducing this legislation, the Government ignored calls for additional pre-legislative scrutiny. On February 10, the House of Commons Constitutional Affairs Committee had issued a report opining that the Constitutional Reform Bill was “a clear candidate for examination in draft.”\textsuperscript{308} Two days later, many members of the House of Lords

\textsuperscript{305} Id. at ¶ 119(g).

\textsuperscript{306} There was also still considerable controversy over the proposed Supreme Court, but this article does not focus on that proposed reform.


\textsuperscript{308} See House of Commons Constitutional Affairs Committee First Report, supra note 257, at ¶ 188 (also recommending that the abolition of the office of Lord Chancellor should be postponed until the other reforms (establishment of the Judicial
expressed similar views in debate. For example, Lord Alexander of Weedon stated that "there ought to be pre-legislative scrutiny of any draft Bill." In the same debate, the Earl of Onslow railed against the manner in which the government had initiated the reforms.

My Lords... I remember getting angry when it was suddenly announced on television that the Lord Chancellorship was going to be abolished. I moved the adjournment of the House because I thought it was the most ill-mannered, cack-handed way to behave. I do not resile for one tiny moment from that opinion.

There is a song by Rolf Harris about two little boys, who had two little toys. I imagine the two little boys, the noble and learned Lord the Lord Chancellor and the Prime Minister, jumping about in their flat thinking, "Yippee! What shall we do? Shall we ruin the constitution? Oh yes, let's abolish ourselves." What an incredibly irresponsible method of looking at constitutional affairs. So, they came down to this House, under pressure, and made a Statement, having already made up their minds without having put any thought into it. It was admitted that nobody was consulted. It was admitted it was done off the back of an envelope. The Prime Minister admitted it was done incompetently. So why should we not say that this is an incredibly bad idea and please think again?

1. The Constitutional Reform Bill

As introduced, the Constitutional Reform Bill did not just replace the Lord Chancellor with a Secretary of Statute for Constitutional Affairs. It also transferred away many of the Lord Chancellor's traditional functions, although some did remain with the Secretary of State, including functions relating to custody of the Great Seal. The bill also provided that the statutory powers exercisable by the Lord Chancellor in his capacity as Speaker of the House of Lords were to be amended to refer to the Speaker without reference to the Lord Chancellor, thus leaving it to the House of Lords to work out its own

---

310. Id. at col. 1231 (speech of Lord Alexander of Weedon).
311. Id. at col. 1257 (speech of Lord Onslow).
312. Constitutional Reform Bill (H.L.), supra note 307, at cl. 9, 10, sched. 5 (also providing that these responsibilities cannot be transferred to any other office of state without primary legislation, thus negating the power to transfer by secondary legislation).
arrangements for the Speaker.\textsuperscript{313} Under the bill, some of the Lord Chancellor’s existing statutory functions relating to the judiciary were transferred to the Lord Chief Justice or other senior judges, although some of these functions were to be carried out by the Secretary of State.\textsuperscript{314}

The division of these judicial functions reflected the sharing of functions between the Secretary of State and the Lord Chief Justice set out in the concordat. Those functions that related to the organization of the court system, including determining geographical and jurisdictional boundaries, the provision of financial, material, and human resources for judicial administration, judicial pay and pensions, the provision of staff and resources for judicial training, and the total number of judges and the distribution of business between different levels of courts, were to be transferred to the Secretary of State for Constitutional Affairs.\textsuperscript{315} Functions relating to the deployment of individual judges, including making rules relating to the deployment of magistrates, the distribution of business within the same level of the court system (such as between divisions of the High Court), the posting and roles of individual judges within the framework of the court system, and filling judicial leadership posts and nominating judges to deal with specific areas of business, would be transferred to the Lord Chief Justice.\textsuperscript{316} As provided by the concordat, the Secretary of State would take over the Lord Chancellor’s existing statutory functions that gave him the power to determine the framework for appointing judges to bodies such as committees and boards, while the Lord Chief Justice would take over those statutory functions that had previously given the Lord Chancellor the power to appoint individual judges to such bodies.\textsuperscript{317} Judicial oaths would no

\textsuperscript{313} Id. at cl. 11, sched. 6.
\textsuperscript{314} Id. at cl. 3, sched.1 (transferring various judiciary-related functions that were set out in primary legislation). In certain cases, the bill required the Secretary of State for Constitutional Affairs to consult the Lord Chief Justice, or vice versa, before exercising a transferred function. The bill also created new statutory posts of the Head of Criminal Justice and Head of Family Justice, as set out in the concordat, and also provided that the Lord Chief Justice could appoint a Deputy Head of Criminal Justice and a Deputy Head of Family Justice. See id. at cl. 4-5. These posts were created as the counterparts of the fairly new positions of Head and Deputy Head of Civil Justice, which had been created by the Courts Act 2003. See Explanatory Notes, supra note 307. Statutes referring to the Vice-Chancellor would be amended to reflect the new title of the “Chancellor of the High Court.” Constitutional Reform Bill, supra note 307, at sched. 1. The bill also provided for statutory amendments to provide that the Master of the Rolls would be the \textit{ex officio} Head of Civil Justice and for the creation of a new position, President of the Queen’s Bench Division. Id.
\textsuperscript{315} Constitutional Reform Bill (H.L.), supra note 307, at sched. 1, supra notes 292-97 and accompanying text.
\textsuperscript{316} Id. at sched. 1, supra notes 296, 298 and accompanying text.
\textsuperscript{317} Id. at sched. 1, supra note 302.
longer be taken before the Lord Chancellor, but instead before the Lord
Chief Justice.\textsuperscript{318}

The Constitutional Reform Bill also provided for significant
changes to the judicial appointments process. While providing that the
Lord Chancellor’s judicial appointments functions would be transferred
to the Queen or to the Secretary of State for Constitutional Affairs, it also
required that certain judicial appointments had to be made based on
selection by a Judicial Appointments Commission with a substantial
proportion of lay members.\textsuperscript{319} The bill gave the executive only a limited
role in judicial appointments: the Secretary of State could ask that a
recommendation be reconsidered, ask for another nomination, or require
the competition to be re-run, subject to a duty to give reasons for a
rejection or a request for reconsideration.\textsuperscript{320}

The bill also made changes to the system of judicial discipline, by
providing for the responsibilities of the Lord Chancellor to be shared
between the Lord Chief Justice and the Secretary of State for
Constitutional Affairs, subject to regulations setting out “prescribed
procedures” to be made by the Lord Chief Justice with the agreement of
the Secretary of State.\textsuperscript{321} The Lord Chief Justice was given the power to
advise, warn, and formally reprimand judges, subject to the prescribed
procedures and the agreement of the Secretary of State.\textsuperscript{322}

The Constitutional Reform Bill also provided for a new statutory
title, “President of the Courts of England and Wales,” to be conferred on
the Lord Chief Justice.\textsuperscript{323} In this role, the Lord Chief Justice had
responsibility for representing the views of the judiciary to Parliament
and government ministers, as well as for providing for judicial
deployment and training (within the resources provided by the Secretary
of State).\textsuperscript{324}

The bill also made provision for the shared exercise of the power to
make rules and practice directions in a similar manner to the concordat.
It provided that procedural rules would continue to be made by existing
rule-making committees, and that the Secretary of State would have the

\textsuperscript{318} Id. at sched. 1. The Lord Chief Justice would take his oath before the Master of
the Rolls. Id.

\textsuperscript{319} Id. at cl. 8, sched. 4 (amending various statutes to provide that the Queen was to
appoint district judges, High Court masters and registrars, senior district judges (chief
magistrates) and that the Secretary of State for Constitutional Affairs was to appoint
certain offices, including various tribunal members, arbitrators, commissioners, circuit
judges, and recorders), cl. 49-72, sched. 10.

\textsuperscript{320} Id. at cl. 57, 63, 69.

\textsuperscript{321} Id. at cl. 83.

\textsuperscript{322} Id. at cl. 83-86.

\textsuperscript{323} Id. at cl. 2.

\textsuperscript{324} Id. at cl. 2(2), Explanatory Notes, supra note 307, at ¶ 18.
power to allow rules, to require rules to be changed, and to disallow
rules, so long as he gave written reasons.325 Where such committees did
not exist, the Lord Chief Justice was to exercise rule-making power,
subject to the agreement of the Secretary of State, who was required to
give written reasons for his decision to disallow a rule.326 The bill’s
procedure for appointing members to rule-making committees reflected
the Concordat’s division of functions between the Lord Chief Justice and
Secretary of State: the Lord Chief Justice was to appoint judicial
members of rule-making committees, and the Secretary of State was to
appoint non-judicial members of such committees.327 The Lord Chief
Justice was to make practice directions for criminal, civil, and family
courts with the agreement of the Secretary of State.328

The bill incorporated the new legislative safeguards for judicial
independence set out in the concordat. It imposed a general statutory
duty on ministers and all others involved in the administration of justice
to uphold the “continued independence of the judiciary.”329 It also
provided for two particular statutory duties that slightly expanded and
clarified the provisions of the concordat.330 First, ministers of the crown
were required to refrain from trying to influence judicial decisions
through special access to the judiciary.331 Second, the Secretary of State
must have regard for the need to defend the continued independence of
the judiciary, the need for the judiciary to have proper support to enable
them to exercise their functions, and the need for the public interest in
“matters relating to the judiciary or otherwise to the administration of
justice to be properly represented in decisions affecting those matters.”332

2. Setbacks for the Government in the Legislative Process

The Constitutional Reform Bill faced sustained opposition
throughout the legislative process, much of it founded on concerns about
haste and lack of consultation in the reform process. Faced with such
sustained opposition to its plans to abolish the Lord Chancellors Office,

325. Constitutional Reform Bill (H.L.), supra note 307, at sched. 1; see also
Explanatory Notes, supra note 307, at ¶ 20.
327. Id. at sched. 1.
328. Id. at sched. 3, pt. 1, cl. 2. According to the Explanatory Notes, “the expectation
is that the power would usually be delegated to the Heads of Criminal, Civil, and Family
Justice.” Explanatory Notes, supra note 307, at ¶ 26. The Secretary of State’s agreement
was not required for practice directions relating to guidance on the law or the making of
judicial decisions. Id.
330. Id. at pt. 1, cl. 1(2)-(4); Explanatory Notes, supra note 307, at ¶ 17.
331. Constitutional Reform Bill, supra note 307, at cl. 1, subsec. 3.
332. Id. at pt. 1, cl. 1 subsec. 4.
the Government was forced to compromise.

a. The First Setback: The Bill is sent to a House of Lords Select Committee that fails to reach agreement on many key aspects of its proposals

The Government suffered its first significant setback to its legislative efforts on March 8, 2004, when the House of Lords voted to delay the Constitutional Reform Bill by sending it to the Constitutional Reform Select Committee ("Select Committee") for review and a determination on whether the legislation should proceed with or without amendments. The Select Committee could not reach agreement on many key aspects of the proposals to abolish the office of Lord Chancellor, including whether wholesale abolition was necessary, as well as whether the Lord Chancellor/Secretary of State for Constitutional Affairs should continue to be a senior lawyer and member of the House of Lords.

Referring a Government bill to a Select Committee is a very unusual procedure for Government bills, although it is not as rare for controversial private members' bills, like the Hare Coursing Bill. Normally, Government bills are committed to a Committee of the Whole House. When bills are referred to a Select Committee, they usually suffer a fate similar to that of the Hare Coursing Bill, which was killed in Select Committee in 1975. The last time a Select Committee had referred a bill to the whole House with amendments was in 1917.

After taking oral and written evidence, and meeting twice weekly over a three month period between March and June of 2004, the Select Committee submitted its required Final Report to the House of Lords on June 24, 2004. Surprising many, in light of the fate of most bills in Select Committees, the Final Report's conclusion was that the Bill could proceed to a Committee of the Whole House for further passage through

333. See House of Lords Select Committee on Constitutional Reform Bill First Report, supra note 257, at ¶ 5.
334. Id. at ¶ 4.
335. Id. at ¶ 4 n. 3.
337. House of Lords Select Committee on Constitutional Reform Bill First Report supra note 257, at ¶ 6, Appendix 4 (list of witnesses); see also 663 Parl. Deb., H.L. (5th ser.) (July 13, 2004), col. 1138) (speech of Lord Richard, noting that "we met in public to take oral evidence from more than 32 witnesses. We received over 80 written submissions. We considered the views of 14 serving judges, seven retired judges, 14 academics, the lawyers' professional bodies in England and Wales, Scotland and Northern Ireland, as well as campaign groups, individual lawyers and law firms, and members of the public. The evidence is published in Volume 2 of the report.")
Parliament. But the Final Report required over 400 amendments to be made to the bill. Many of these were made so that the bill would better comport with the concordat, which the Select Committee agreed should be enacted into legislation. But the Select Committee could not reach agreement on the merits of some key aspects of the Government’s constitutional reform proposals. Although the Select Committee was able to agree that it endorsed the concordat, that the constitutional reform legislation should fulfill the terms of the concordat (though declining to give that document “quasi-statutory” status), that the Lord Chancellor would no longer sit as a judge and serve as head of the judiciary, and that the bill should contain reference to the duty on Ministers to uphold the rule of law, it could not reach agreement on two major issues: (i) whether there should still be a minister with the title of Lord Chancellor, and (ii) whether there should be a Supreme Court.

338. Id. at ¶ 7.
339. Id. at ¶¶ 6, 9.
340. Id. at ¶ 9. Some Select Committee witnesses criticized the introduced legislation for not fully implementing the concordat. For example, a working party of the Judges’ Council, led by Lady Justice Arden, listed a number of subtle ways in which the wording and contents of the bill was not consistent with the concordat, including several matters of judicial deployment, judicial appointments, and judicial discipline. Id. at vol. II, Oral Evidence, Memorandum by the Judges Working Party on the Bill, Appendix (April, 2004). Lord Woolf also criticized the bill for failing to accurately reflect the concordat. According to him, even though the bill correctly recognized that judicial deployment was the responsibility of the judiciary, not the executive, it failed to specify that judicial deployment also included the appointment of judges to boards, committees and other similar bodies Id. at vol. II Annex B, Supplementary memorandum of Lord Woolf (June 7, 2004). The Government accepted that the bill failed to fully implement the concordat in some respects, and proposed a number of amendments to ensure that it did. See id. at vol. II, Memorandum by the Lord Chancellor, sec. II, Concordat Amendments (May, 2004).
341. Id. at ¶ 84. Both proponents and opponents of abolition of the office of Lord Chancellor supported legislating the principles of the Concordat. Id. at ¶ 31.
342. Id. at ¶ 85.
343. These were uncontested by both proponents and opponents of abolition. Id. at ¶¶ 29-34.
344. Id. at ¶ 73. The Committee could not agree on the form of words such a clause should take. Id. at ¶ 75.
345. Id. at ¶ 44. The Select Committee was “more or less evenly divided" on this issue. Id. at ¶ 7.
346. Id. at ¶ 132. The Select Committee was able to agree on many secondary issues relating to the Supreme Court, including the court’s name, the number of justices and their qualifications for appointment, the composition of the Selection Commission, the role of the Prime Minister in the appointment of Supreme Court justices, provisions for acting justices, that the Supreme Court should continue to be designated a superior court of record, that the bill’s provisions regarding Scottish civil and criminal appeals should not be changed; that devolution jurisdiction should be transferred from the Privy Council to the Supreme Court; that the Supreme Court should make its own rules; that the Supreme Court should be established along the lines of a non-ministerial department, and
The Select Committee's Final Report attempted to summarize the arguments for and against retention of the office of Lord Chancellor, even though the Select Committee was unable to agree on which of these arguments should succeed. The Final Report noted the Government's arguments for abolition based on separation of powers, greater freedom of choice for the Prime Minister in selecting a minister responsible for the administration of justice from a wider pool of candidates than senior lawyers, and excessive workload.\textsuperscript{347} It also described the counterarguments that abolition would deprive the government of the advice of a senior lawyer on constitutional questions; risked less effective protection for important constitutional values; posed the danger that the minister responsible for judicial affairs might be "over[ly] influenced by party political considerations" and also might not have enough seniority to effectively protect the judicial system; would not serve to reduce the fundamental tension between the functions of protecting law and order and justice; and would place an unmanageable workload on the Lord Chief Justice.\textsuperscript{348}

The Final Report also proposed several primary options for reform, all of which accepted the need for change in accordance with the Concordat, but could not agree as to which option was best. The options were: (1) retaining the title of Lord Chancellor for the judicial function of overseeing judicial administration as well as the political function of serving as the "constitutional conscience" of Government, and also retaining the traditional requirements that the Lord Chancellor be a senior lawyer and member of the House of Lords; (2) retaining the title of Lord Chancellor as well as the traditional requirements that he be a senior lawyer and member of the House of Lords, but narrowing the responsibilities of the Lord Chancellor to the judicial function of "running the courts"; (3) using the title "Lord Chancellor" for the newly created ministerial position called "Secretary of State for Constitutional Affairs" in the Constitutional Reform Bill; (4) ceasing to use the title Lord Chancellor for the minister responsible for judiciary-related matters, who might be called the Secretary of State for Constitutional Affairs or the Minister of Justice.\textsuperscript{349} The Select Committee was only able to agree that the second proposal was not acceptable.\textsuperscript{350} The Final Report stated:

---

\textsuperscript{347} Id. at \S\S 15, 18-20.
\textsuperscript{348} Id. at \S\S 22-28.
\textsuperscript{349} Id. at \S\S 35-42.
\textsuperscript{350} Id. at \S 45.
There was a clear division of opinion within the Committee between those members who considered that the office-holder should be called Lord Chancellor, be a senior lawyer, and sit in the House of Lords on the one hand; and those members who considered that the name of Lord Chancellor should not be continued (since its retention would be confusing), and that there was no necessity for the office-holder to hold a legal qualification or sit in the House of Lords on the other hand (that is, the policy of the bill). Accordingly we make no recommendation to the House.\footnote{351}

The Select Committee also could not reach agreement as to whether the Minister responsible for the administration of justice should be a lawyer, nor whether he should be a member of the House of Lords. The Final Report enumerated various arguments for and against both requirements.\footnote{352} It noted that those in favor of requiring the Lord Chancellor to be a senior lawyer contended that this would ensure seniority and stability and better equip the minister to defend judicial independence and the rule of law than other ministers.\footnote{353} But the Government and several witnesses who gave evidence to the Select Committee held the view that being a lawyer was not a necessary prerequisite for ensuring that a minister would uphold judicial independence and the rule of law, and also feared that such a limit would overly restrict the pool of candidates for the position.\footnote{354} The Final Report also noted that those who supported retaining the Lord Chancellor’s membership in the House of Lords wanted to ensure the political influence of the House in the Cabinet by maintaining at least two Cabinet ministers in the House of Lords (the other would be the Leader of the Lords).\footnote{355} But the Government’s position was that it needed a freer hand in appointing ministers and also that it was more appropriate for the head of a major spending department to be accountable to the House of Commons.\footnote{356} The Select Committee was unable to voice a recommendation on the merits of these arguments. The Final Report stated that “[t]here was a clear division of opinion between

\footnotesize
\begin{itemize}
\item \footnote{351}{Id. at ¶ 44.}
\item \footnote{352}{Id. at ¶¶ 60, 66. The Select Committee also could not agree as to whether the statutory duty of judicial independence should be strengthened to prevent implied repeal. Id. at ¶ 79. It agreed that it should not extend to Scotland. Id. at ¶ 93. It also agreed that the bill should be amended to include a duty placed on the Minister to uphold the rule of law, but could not agree on the precise form this new clause should take. Id. at ¶¶ 73-75.}
\item \footnote{353}{Id. at ¶¶ 36 (noting the argument that some policy responsibilities recently given to the Lord Chancellor’s Department and/or the Department for Constitutional Affairs should be shifted), 50, 54.}
\item \footnote{354}{Id. at ¶¶ 52-53.}
\item \footnote{355}{Id. at ¶ 65.}
\item \footnote{356}{Id. at ¶ 63.}
\end{itemize}
those members who thought that the Minister had to be a senior lawyer and those who considered that there was no need for the office-holder to hold a legal qualification.\textsuperscript{357}

Another area of disagreement involved the type of oath to be taken by the Lord Chancellor/Secretary of State for Constitutional Affairs on taking office. The Select Committee agreed that the Minister responsible for the administration of justice should not have to swear a judicial oath, but could not agree as to whether he or she should be required to swear some other type of oath.\textsuperscript{358}

The Final Report stated that “the question of the future of the Speakership of the House of Lords is not a statutory matter and so we make no comment on the policy whereby the Lord Chancellor would cease to sit as Speaker.”\textsuperscript{359} In the Select Committee’s view, alternative arrangements were a matter for the House of Lords itself.

Despite its inability to agree on so many key issues of the Constitutional Reform Bill, the Select Committee sent it back to the Committee of the Whole House. But the proposed legislation ran into more difficulties there.

b. A Second Setback: The House of Lords votes to amend the bill to retain the office of Lord Chancellor

Another setback for the Government occurred on July 13, 2004. After almost four hours of debate, the Committee of the Whole House of Lords voted to approve an amendment proposed by the Conservative spokesman Lord Kingsland to retain an office with the title of Lord Chancellor.\textsuperscript{360} The vote was fairly close: 240 to 208, with Conservative peers joining cross-benchers to oppose ending centuries of history and tradition.\textsuperscript{361} During the debate, a former Law Lord, Lord Lloyd of Berwick, warned that the Lord Chancellor served as an important check and balance in the Cabinet, and “we get rid of it at our peril.”\textsuperscript{362} But the Liberal Democrat peer Lord Goodhart countered: “We do not think the retention of an outdated title will assist the protection of judicial

\textsuperscript{357} Id at ¶ 60.
\textsuperscript{358} Id. at ¶¶ 61-62.
\textsuperscript{359} Id. at ¶ 95.
\textsuperscript{361} 663 PARM. DEB., H.L. (5th ser.) (2004), cols. 1191-1193; see also Hardie, supra note 360.
\textsuperscript{362} 663 PARM. DEB., H.L. (5th ser.) (2004), col. 1149 (speech of Lord Lloyd of Berwick).
independence and the rule of law.” Many of those who voted with the majority still had concerns about the reduction in Cabinet status of the Lord Chancellor since the Secretary of Constitutional Affairs was created as a much more junior Cabinet position.

After the vote, the perennially cheery Lord Falconer commented that, in his opinion, the situation was really quite favorable for the Government’s proposal to reform the office of Lord Chancellor. Falconer pointed out that there was widespread agreement that many aspects of the proposed reforms should be implemented. “One of the striking things about the debate this evening was there didn’t seem to be much disagreement about what the role of the Lord Chancellor should be,” he said, adding: “It was agreed that he shouldn’t be a judge any more. It was agreed he shouldn’t be head of the judiciary any more. It was agreed a Judicial Appointments Commission should appoint the judges. . . . The issue was about what he should be called. . . . It’s about a name.”

By the autumn of 2004, it appeared that the Government was backing down on this name issue. In a speech delivered at Exeter University on October 13, 2004 the Lord Chief Justice indicated that it was likely that the government would agree to retain the title of Lord Chancellor, though couching his remarks as speculation. But according to Lord Woolf, even if the office of Lord Chancellor was not abolished, it would be profoundly changed. The Lord Chancellor would no longer be a judge, or head of the judiciary, would no longer appoint judges, and would be bound by the concordat. To Lord Woolf, this was progress. He praised it in his Exeter University speech as “a huge advance.”

The Government promised to amend the bill to reflect the vote to retain an office with the title of Lord Chancellor. For example, provisions that would have abolished the Great Seal Act of 1688 were withdrawn since there was no reason for custody of the Great Seal to be transferred away from the Lord Chancellor in light of the continued existence of the office. But Lord Falconer noted:

363. Id. at col. 1152 (speech of Lord Goodhart).
366. Lord Woolf, supra note 258 (speech at Exeter University).
367. Id.
368. Id
369. 665 PARL. DEB., H.L. (5th ser.) (2004), col. 23 (speech of Baroness Ashton of Upholland). The functions relating to the Great Seal would have been transferred to the Secretary of State. See supra note 312 and accompanying text.
But, of course, that does not preclude the Government from seeking to restore the position of the Secretary of State for Constitutional Affairs in another place. In any event, the decision made on 13 July does not extend to whether the Bill should prescribe that the Lord Chancellor should be a Peer or a lawyer, nor does it extend to the kind of oath that the Lord Chancellor should take. These issues are still open for debate.\footnote{370}

c. A Third Setback: The House of Lords votes to require the Lord Chancellor to be a member of the House of Lords and a senior lawyer

However, in December 2004 the Government suffered a setback on those issues as well. At the report stage, on December 7, 2004, Lord Lloyd of Berwick moved an amendment to the bill that would require the Lord Chancellor be a member of the House of Lords.\footnote{371} Despite the Government’s opposition, this amendment was carried by a vote of 229 to 206.\footnote{372} During the same debate, Lord Kingsland moved another amendment to require the Lord Chancellor to be a senior lawyer, with at least twelve years of practice experience as a qualifying practitioner as well as at least two years of judicial experience in a high judicial office.\footnote{373} The Government also opposed this amendment, on the basis that it would unduly restrict the pool from which a minister could be selected and that a lawyer would not necessarily advance judicial independence more than a non-lawyer.\footnote{374} But this amendment was also carried, by a vote of 215 to 175.\footnote{375}

Despite these three big setbacks to the Government’s proposals to reform the office of Lord Chancellor, the reforms were not dead. The Government successfully moved a number of amendments in December of 2004. These included an amendment designed to combat the fear that reform of the office of the Lord Chancellor would weaken the protection of the rule of law by adding a new provision that “This Act does not adversely affect (a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”\footnote{376} Lord Falconer also successfully moved an amendment that provided that the bill should state explicitly that the Lord Chief Justice would be the head of the judiciary in England and
Wales and would have the title of the President of the Courts of England and Wales. At the report stage on December 7, 2004, the Government also introduced a new Schedule 4 of miscellaneous statutory amendments, including removal of the statutory basis for the Lord Chancellor to sit as a judge. The Constitutional Reform Bill was transferred to the House of Commons on December 21, 2004.

d. Additional Setbacks in the House of Commons

As the bill proceeded through three readings in the House of Commons by the first of March, 2005, it continued to meet considerable opposition. Much of the opposition was, as before, founded on procedural concerns that the reforms were overly rushed and initiated with inadequate consultation. As a result of these procedural flaws, it was harder for the Government build a consensus on the necessity of its plans to abolish the Lord Chancellor’s office.

In debate in the House of Commons, many members voiced concern about the haste with which the Government had initiated its proposed reforms. The Conservative Member of Parliament Dominic Grieve called it a “back-of-the-envelope job.”

David Heathcoat-Amory, also a Conservative Member of Parliament, called the effort to abolish the Lord Chancellor as part of a Cabinet reshuffle without consultation with the Queen, the senior judiciary, the Cabinet, or the House of Commons “outrageous.” Heathcoat-Amory likened the Government’s attempts at constitutional reform to “a blind monkey trying to do a jigsaw puzzle.” He accused them of “lurch[ing] from one-ill thought-out proposal to another without any real understanding or analysis of the underlying principles and accumulated wisdom that is personified in that collection of statutes and conventions that we call the British Constitution.”

Others voiced even stronger criticism of the Government. Edward Garnier, the Conservative Member of Parliament for Harborough, admitted that some valuable political documents like the Gettysburg Address had been written on the back of an envelope, but contended:

377. Id. at col. 795-796 (speech of Lord Falconer). Lord Falconer stated that it was his intention to table another amendment to provide that the Lord Chief Justice of Northern Ireland was the head of the judiciary there and noted that “As justice is a devolved matter in Scotland, we have left the position in that jurisdiction to be dealt with by the Scottish Parliament.” Id. at col. 795.

378. Id. at cols. 822-881.

379. See Explanatory Notes, supra note 307, at ¶ 1.

380. 429 PARL. DEB., H.C. (6th ser.) (2005), col. 573 (speech of Dominic Grieve, MP for Beaconsfield (Cons.).

381. Id. at col. 638 (speech of David Heathcoat-Amory, MP for Wells (Cons.).

382. Id.
We are not here presented with some Leonardo-style doodle by a perceptive intellect on the constitution; we are hearing about what is effectively a mediaeval assassination note written by a contemporary Henry II to rid himself of a turbulent Lord Chancellor, Lord Irvine of Lairg. To do that, the Prime Minister had to invent a system that required abolition of the office, without thinking of the consequences.\textsuperscript{383}

The former Conservative Minister of Agriculture John Gummer complained that "[the] Bill exists not because of a concerted and sensible approach to the constitution, but because the Prime Minister made a bodge-up." He continued:

To try to overcome that, it was thought better to try to produce something that might at least stand up, by which time he was in no position to gain a commonality of view. A considered response is crucial on constitutional matters. It would not matter if we were discussing a less important subject, but it matters not to have got a considered consensual response on a question that lies at the heart of the relationship between the powers of Government, the House of Commons, the House of Lords and the judiciary.\textsuperscript{384}

Similar concerns were voiced even by some who supported the need for reform of the office of Lord Chancellor. For example, the Liberal Democrat Member of Parliament for Berwick-upon-Tweed, A J Beith, called the Government's efforts "a hopeless way to embark on constitutional reform. . . . They managed to convey the impression that the proposals were designed to weaken and politicise the judiciary, which is precisely the reverse of the intention and, I hope, of the effect."\textsuperscript{385} According to Beith, process mattered a great deal. He stated, "The way that the matter was introduced made it much more difficult to argue for the reforms in principle and then get the detail right."\textsuperscript{386}

Procedural concerns were not limited to the way in which the Government had originally announced their proposal. They also concerned the amount of parliamentary scrutiny devoted to the bill. The Government used a "programme motion," a procedure for timetabling the future stages of a bill that is moved directly after second reading of a bill, in order to forestall Opposition delaying tactics by limiting the amount of time that the bill would be debated on the floor of the House of Commons.\textsuperscript{387} Since 2000, programme motions have been commonly

\begin{flushleft}
\textsuperscript{383} \textit{Id.} at col. 645 (speech of Edward Garnier).
\textsuperscript{384} \textit{Id.} at col. 609 (speech of John Gummer (Suffolk, Coastal (Cons))).
\textsuperscript{385} \textit{Id.} at col. 627 (speech of A J Beith (Berwick-upon-Tweed, Lib. Dem)).
\textsuperscript{386} \textit{Id.}
\textsuperscript{387} \textit{Id.} at col. 568.
\end{flushleft}
used for government bills. Under the programme motion for the Constitutional Reform Bill moved after its second reading on January 17, 2005, most of it would be discussed by a standing Committee, including such controversial issues as whether the Lord Chancellor should be a peer and/or a lawyer. Programme motions are not generally debatable. Still, a number of MPs expressed the view that the programme motion did not permit sufficient scrutiny by the whole House of Commons. For example, John Gummer urged that the whole Constitutional Reform Bill should be debated on the floor of the House of Lords. Dominic Grieve agreed, contending that that was the established convention for constitutional reform bills. Gummer also argued that the programme motion was directly contrary to the bill’s purpose of improving public perceptions of the constitutional system. Gummer stated:

He [Christopher Leslie, the Parliamentary Under-Secretary of State for Constitutional Affairs representing the Government in debate in the House of Commons] has told us that the Bill’s purpose is primarily to address the fact that people outside do not understand the complications and what appear to be the contradictions in our present system. Does he not understand that the same is true of what he has just said? People outside will not understand why there is no procedure whereby we will be able to discuss, on the Floor of the House, a major constitutional change. Nevertheless the programme motion carried, by a vote of 297-161. One reason for the Government’s attempts to push the legislation through Parliament with such great speed was clearly political expediency since a general election was widely expected to be held in May or June of 2005. This was an accurate prediction. A general election was held on May 5, 2005. Blair’s Labour Party achieved a historic third term in power, although their Parliamentary majority fell from 167 in 2001 to 66.

Later in January, the Government backed down slightly on the time limits for debate in its programme motion, and moved to amend it to

389. Id. at 3.
391. Id. at col. 578 (speech of Dominic Grieve).
392. Id.
393. See id. at cols. 656-660.
have the entire bill debated on the floor of the House of Commons (by the Committee of the Whole House). But the Government was still under the significant time pressure posed by the forthcoming general election and the amended programme motion allocated only three days for debate on the bill. As many Members of Parliament complained at the time, this was a ridiculously short time for debate on constitutional issues of such magnitude. Nevertheless, the amendment was agreed.

The Government also capitulated on the name issue. At the second reading of the bill, the Government formally announced that the title of Lord Chancellor would be retained. It claimed that it viewed the title as largely symbolic, and as not affecting the substance of the reforms. The Government’s U-turn on whether the office of Lord Chancellor would in fact be abolished was not the first time it had backed down on constitutional reform after pressure from the House of Lords. This happened to Lord Falconer’s plans to move ahead with abolishing the ninety-two hereditary peers that remained in the House of Lords after the Government’s first stage of House of Lords reform.

Despite its capitulation on the name issue, the Government was prepared to give way on whether the Lord Chancellor should be required to be a peer and senior lawyer. There was considerable debate on both of those issues. On third reading, the House of Commons voted in favor of amendments that would overturn the House of Lords’ requirement that the Lord Chancellor be a peer and senior lawyer.

In the middle of March, 2005 the amendments made in the
Commons were brought to the House of Lords for consideration. The House of Lords sent a message to the House of Commons that they did not agree to the amendments that would allow the Lord Chancellor to be a Member of the House of Commons and removed the requirement that the Lord Chancellor be a senior lawyer with twelve years experience or a senior judge of at least two year seniority. But the House of Commons nevertheless voted in favor of these amendments on March 16. The long standoff between the two Houses of Parliament finally ended on March 21, when the Lords held two second votes on these issues. They voted by 203 to 191 to allow the post of Lord Chancellor to be held by either a Member of Parliament or a peer, and by 201 to 189 to accept the Government’s position that the Lord Chancellor did not have to be a senior lawyer or judge. Shortly afterward, on March 24, 2005, the Constitutional Reform Bill received Royal Assent.

Although the Government did not succeed in abolishing the office of Lord Chancellor as it had originally proposed, it did succeed in legislating many of the reforms to the Lord Chancellor’s functions that it had sought. The result is profound change to the office. The Lord Chancellor will no longer automatically serve as speaker of the House of Lords. Nor will he serve as a judge or as head of the judiciary, and his role in relation to the appointment and disciplining of the judiciary is greatly reduced. Additionally, the Constitutional Reform Act imposes a new statutory duty on the Lord Chancellor and other government Ministers to uphold judicial independence. Cumulatively, these reforms increase the separation of powers. As an end result, they thus advance the Government’s goal of improved external perceptions of fairness and judicial independence from political pressure in the British constitutional system.

But the hasty, ill-considered, and secret process used to initiate and implement the reforms does not comport with this goal and has not inspired public confidence. The Government’s failure to achieve a considered consensus for its reforms is a dangerous way to embark on

406. 432 PARL. DEB., H.C. (6th ser.) (2005), col. 358. For the votes in the House of Lords, see 670 PARL. DEB., H.L. (5th ser.) (2005), cols. 1215, 1241-1243 (the vote was 215-199 in favor of an amendment overturning the Government’s amendment that the Lord Chancellor need not be a peer), 1244-1246 (the vote was 209-195 in favor of an amendment overturning the Government’s amendment that the Lord Chancellor need not be a senior lawyer or judge).
408. 671 PARL. DEB., H.L. (5th ser.) (2005), cols. 39-44.
410. Id. at § 18, sched. 6.
411. Id. at § 7, 11, sched. 4.
412. Id. at § 3.
constitutional reform. That is so even if, under a system lacking a written constitution, the reforms could be changed through statute and do not require the kind of Parliamentary super-majority that would be required to amend a written constitution. The haste and chaos of the initial announcements of the reform proposals did not make it appear that the reforms were based on reasoned principles, were really necessary, or were adequately worked out in their details. Additionally, as Dawn Oliver has pointed out, the "atmosphere of distrust" engendered by the flawed reform process has raised questions about the ability of other constitutional conventions underlying the British constitutional system to continue to work.\textsuperscript{413}

VI. Conclusion: Why the British Constitutional Reforms Deserve American Attention

Why should Americans pay attention to proposed reforms to the British Lord Chancellor since an equivalent office does not exist in the United States and it forms part of a constitutional system that is significantly different to the American system in many ways, including the lack of a written constitution and a different approach to separation of powers? The primary reason is the kind of "external" concern that, as noted at the outset of this article, has preoccupied both Justice Sandra Day O'Connor and Tony Blair's Government.\textsuperscript{414}

As in Britain, judicial independence is a fundamental political and constitutional value in the American system. Chief Justice Rehnquist called judicial independence "one of the crown jewels of our system of government today."\textsuperscript{415} But while in Britain most voices are clamoring for greater judicial independence, many Americans on both sides of the political spectrum have recently complained that there is excessive judicial independence in the United States and therefore advocate some reduction in the power of the judiciary. Critics of judicial independence on the political right include Robert Bork and Senator Orrin Hatch.\textsuperscript{416} Many other commentators who lean politically more to the left, including Alan Dershowitz and Margaret-Jane Radin, have also expressed deep...
concern about excessive judicial independence as a result of the Supreme Court's decision in *Bush v. Gore*.  

An additional point of contrast is that, as Britain moves toward most other modern democracies toward enshrining the fundamental constitutional value of judicial independence in written documents like the concordat, questions are being raised in America about whether its written Constitution needs to be amended to protect against excessive judicial activism.  

As Americans struggle with the question of how much judicial independence there should be in the United States legal system, they should look outside their system to see how other democracies are dealing with the same issue. In an era where America is seeking to export its democratic system abroad, it is important to ensure that the American justice system is itself safeguarding fundamental human values. Justice must not only be done, but must be seen to be done.

---

