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Select Committee on the Constitution

8th Report of Session 2013–14

**Scottish
independence:
constitutional
implications of the
referendum**

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Select Committee on the Constitution

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
Summary		4
Chapter 1: Introduction	1	5
Chapter 2: Principles governing independence	10	7
The UK as the continuator state	10	7
Assets, institutions and liabilities	19	9
Chapter 3: Constitutional implications for the UK state	29	11
Legislation required for negotiations	29	11
Legislation to deliver independence	38	12
The UK Government after a “yes” vote	45	13
Effect on the House of Commons	59	16
Effect on the House of Lords	73	18
Effect on the UK Supreme Court	79	20
Chapter 4: Negotiations	85	22
Pre-negotiation	85	22
Rest of the UK negotiating team	90	23
Involvement of Scottish MPs	99	24
Accountability and ratification	103	25
Timetable for negotiations	110	26
Chapter 5: Summary of conclusions and recommendations	118	29
Appendix 1: List of members and declarations of interests		32
Appendix 2: List of witnesses		33
Appendix 3: Call for evidence		35

Evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (020 7219 5314).

References in the footnotes to the report are as follows:

Q refers to a question in oral evidence.

Witness names without a question reference refer to written evidence.

SUMMARY

On 18 September 2014 Scottish voters will decide whether Scotland should become an independent country. There has been extensive debate about the impact of independence. This report focuses on what the constitutional implications for the rest of the UK would be were a “yes” vote to be returned.

Of prime importance would be whether the rest of the United Kingdom would be the “continuator” state, retaining its current international status and institutions. The evidence we received demonstrated that it would, and that an independent Scotland would be a new “successor” state. This would have significant implications for negotiations about independence following a “yes” vote. It would mean that UK institutions (including Parliament, the BBC and the Bank of England) would remain institutions of the rest of the UK. It would affect how assets and liabilities would be apportioned, with certain assets apportioned in accordance with legal principles and other assets and liabilities subject to political negotiations, based on the principle of equity.

Statements by UK Government ministers suggest that they would cease to represent the interests of Scotland immediately after a “yes” vote. We conclude that this would create constitutional difficulties: while the political dynamic would have changed, the UK Government would continue to have international and domestic responsibilities for Scotland between a “yes” vote and the date of independence. Arrangements would need to be made to ensure that Scotland continued to be represented internationally. On domestic matters reserved to the UK Parliament, the Scottish Government should be consulted during this period on long-term decisions primarily or solely affecting Scotland.

MPs for Scottish constituencies should remain in Parliament until Scotland became independent and leave at that point. Any changes in their status after a “yes” vote being returned, and the timing of their departure from Parliament, would need to be settled quickly. The same issue would not arise for Scottish peers who sit as peers of the United Kingdom; under current law they would, however, need to be taxpayers in the remaining UK to continue to sit.

We recommend that, to avoid any risk of legal challenge, a bill should be introduced soon after a “yes” vote to establish a negotiating team for the rest of the UK and to devolve to the Scottish Parliament power to do the same for Scotland. A small team representing the UK Government should negotiate for the rest of the UK, in consultation with the official opposition and the Welsh and Northern Irish executives. MPs representing Scottish constituencies should not negotiate for the rest of the UK, hold those negotiators to account nor ratify the outcome of the negotiations. There would be no constitutional or legal necessity to adhere to the Scottish Government’s proposed timetable of independence in March 2016.

Following negotiations, UK legislation would be needed to end the UK Parliament’s jurisdiction over Scotland and to enact the results of negotiations.

Scottish independence: constitutional implications of the referendum

CHAPTER 1: INTRODUCTION

1. On 18 September 2014 the people of Scotland will answer the question: “Should Scotland be an independent country?” If there were to be a “yes” vote, the resulting secession would be the biggest change to the constitutional structure of the United Kingdom since the creation of the Irish Free State in 1922.
2. Referendums were held in 1979 and 1997 about devolution to Scotland. In the latter referendum a “yes” vote was returned,¹ and in 1999 the Scottish Parliament was established.² Against expectations, the 2011 election to the Scottish Parliament returned a majority government; it was formed by the Scottish National Party, who had long campaigned for independence for Scotland and whose 2011 manifesto committed them to holding an independence referendum.
3. Although the holding of a referendum on independence was a reserved matter, the UK Government acknowledged the right of the Scottish Government to hold such a referendum and, in the “Edinburgh agreement” of October 2012, agreed to accept as binding the result of a referendum held before the end of 2014.³ The referendum date was set in statute by the Scottish Parliament in the Scottish Independence Referendum Act 2013. The Scottish Government’s November 2013 white paper *Scotland’s Future* sets out their proposed timetable for independence to be granted on 24 March 2016, if there is a “yes” vote in the referendum, as well as the current Scottish Government’s aims in the longer term if returned to power in an independent Scotland.⁴
4. Select committees in both Houses of Parliament have undertaken various inquiries into aspects of independence for Scotland.⁵ The UK Government have published 12 reports in an ongoing series of Scotland analysis papers “on Scotland’s place in the UK and how it contributes to and benefits from being part of the UK”. These have included papers on defence, security,

¹ There was a narrow “yes” vote in 1979, but the threshold of 40% of all Scottish voters voting “yes” was not met.

² The Scotland Act 1998 conferred power on the Scottish Parliament and Executive (now Government) to make decisions on all areas not reserved at Westminster. The Scotland Act 2012 extended the remit of the Scottish Parliament and Government, though important provisions in it have yet to be commenced.

³ Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, October 2012.

⁴ Scottish Government, *Scotland’s Future: Your Guide to an Independent Scotland*, November 2013.

⁵ For example the House of Lords Economic Affairs Committee, and the House of Commons Foreign Affairs and Defence Committees. The Commons Scottish Affairs Committee has produced 11 reports on “the referendum on separation for Scotland”. The House of Lords Committee on Soft Power and the UK’s Influence addressed implications of Scottish independence (*Persuasion and Power in the Modern World*, Report of Session 2013–14, HL Paper 150, paras 294–95).

finance and economics, borders and citizenship, and devolution and the constitution.⁶ Debates have taken place in each House on the impact of independence and on “Scotland’s place in the UK”.⁷

5. This report explores the constitutional implications of a “yes” vote for the rest of the United Kingdom. We have looked into this area in order to enhance public understanding of what would follow a “yes” vote. As this report indicates, a number of important issues would need to be resolved between a “yes” vote in the referendum and Scotland actually becoming independent.
6. Our inquiry focused on the known consequences of a “yes” vote on 18 September: there would be a period of negotiations followed by secession of Scotland from the United Kingdom of Great Britain and Northern Ireland. We explored who might negotiate for the rest of the UK and how they should be held to account, what principles should underpin those negotiations, what legislation would be required to facilitate negotiations and ratify a resulting agreement, and the impact of Scottish secession on the UK’s Parliament, Government and Supreme Court.
7. We found that there were clear answers on many of these issues and that, even where there was uncertainty, there were legal principles and precedents upon which actions should be based.
8. This was a short, focused inquiry, during which we heard from academic experts, the UK Government and commentators on Scottish politics. We also received a wide range of written evidence, including from the Scottish Government. We are grateful to all our witnesses.
9. We hope to secure an early debate in the House on this report. In view of the timing of the referendum it is important that the Government make their written response within two months of publication.

⁶ HM Government, *Scotland analysis* [various dates and titles], available at: <https://www.gov.uk/government/collections/scotland-analysis>.

⁷ HL Deb, 30 January 2014, cols 1361–1450; HC Deb, 6 February 2014, cols 457–506.

CHAPTER 2: PRINCIPLES GOVERNING INDEPENDENCE

The UK as the continuator state

10. A central question about the constitutional position of the rest of the United Kingdom after a “yes” vote is whether it would continue as the same state. In other words, would the United Kingdom retain the statehood of the UK, with Scotland becoming a new breakaway state? If so, the rest of the UK would technically become the “continuator state” and Scotland the “successor state”. Alternatively, would the remaining part of the United Kingdom and Scotland become two new states?
11. A great deal flows from this question. Were the rest of the UK to be the continuator state, it would retain all of the public institutions of the UK.⁸ It would retain the treaty obligations and memberships of international organisations of the existing UK. For example, the rest of the UK would continue as a member of the European Union (with the various opt-outs that the UK now has), the United Nations (including the permanent seat on its Security Council) and NATO. Such memberships would automatically continue; they would not have to be applied for. Were the rest of the UK to be the continuator state it would significantly shape negotiations after a “yes” vote.
12. A comprehensive legal opinion by Professor James Crawford, Whewell Professor of International Law at the University of Cambridge, and Professor Alan Boyle, Professor of Public International Law at the University of Edinburgh, on the status of Scotland and the rest of the UK in international law was annexed to the *Scotland analysis* paper on *Devolution and the implications of Scottish independence*.⁹ We are not aware of any serious objection to their analysis of the principles of public international law that would apply to Scottish independence.
13. The UK Government’s position follows this legal opinion: that the rest of the UK would become the continuator state and that Scotland would become a new, successor state. The Advocate General for Scotland, Lord Wallace of Tankerness QC, set out four main reasons for this:¹⁰
 - First, the majority of international precedents—from Russia being the continuator state on the break-up of the Soviet Union to Sudan continuing after South Sudan became a new state—point to the rest of the UK being the continuator state. The most directly relevant precedent is that Great Britain and Northern Ireland continued as the UK after the secession of the Irish Free State in 1922.
 - Secondly, the rest of the UK would retain the greater share of the population (92%) and territory (68%) of the existing UK. These factors are given weight in public international law.
 - Thirdly, the likelihood is that the majority of other states would recognise the rest of the UK as the continuator state and recognise Scotland as a new state.

⁸ The position of UK institutions is discussed further in the next section.

⁹ February 2013, Annex A.

¹⁰ Q 29. These reasons summarise those in the Crawford/Boyle opinion.

- Fourthly, where the alternative of two new states being created has applied—for example, when Czechoslovakia split into the Czech Republic and Slovakia—that has usually been by mutual agreement. The UK Government would not agree to the UK becoming a new state, so this alternative could not apply. It is relevant that the referendum is taking place only in Scotland: it is not a UK-wide referendum on whether the UK should split into two new states.
14. The majority of our witnesses agreed with this analysis.¹¹ Professor Alan Boyle said that it was the “only ... credible view”.¹² Professor Michael Keating, Chair in Scottish Politics at the University of Aberdeen, referred to the “broad acceptance that the UK would be the continuing state.”¹³ Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, agreed,¹⁴ as did commentators David Torrance and Mandy Rhodes.¹⁵ The commentator Alex Massie said that it appeared “to be the common-sense attitude. It will be the view that will be taken by the rest of the world. If you vote to leave a club, the club remains.”¹⁶
 15. In her covering letter to the Scottish Government’s written evidence the Deputy First Minister, Nicola Sturgeon MSP, appeared to question the proposition that the rest of the UK would be the continuator state. She described it as an “assertion made by the UK” and quoted a passage from Professors Crawford and Boyle’s advice in which they refer to the position in international law depending on arrangements made between the two governments and the position of other states. Having said that, the Scottish Government in their written evidence did not argue explicitly against the principle of the UK being the continuator state and we are not aware of them questioning it in other forums. David Torrance said the Scottish Government “have not taken an unequivocal position ... They appear to cast doubt on the rest of the United Kingdom being the [continuator] state, but they have not said what they think would happen.”¹⁷ As so much flows from this it is incumbent on those who question whether the UK would be the continuator state to set out their analysis of what the alternative position would be.
 16. **The overwhelming view in the evidence we received was that after a “yes” vote the rest of the United Kingdom would continue as the same state: it would be the continuator state. Scotland would become a new, successor state.**
 17. **This would be the case because relevant precedents support that position; it would be consistent with the rest of the UK having the majority of the territory and population of the existing UK; and it would reflect the likely opinion of other countries. No realistic alternative case has been made.**

¹¹ We received written evidence to the contrary from the Campaign for an English Parliament, the English Democrats and Ian Campbell, a former diplomat.

¹² Q 19.

¹³ Q 19.

¹⁴ Q 19.

¹⁵ Q 57.

¹⁶ Q 57.

¹⁷ Q 57.

18. **The fact that the rest of the UK would be the continuator state shapes discussion on the implications of independence; this report proceeds on that basis.**

Assets, institutions and liabilities

19. There are clear legal principles governing the position of institutions, and the division of assets and liabilities between an independent Scotland and the rest of the United Kingdom. Where legal principles do not apply, matters are subject to political negotiations. These principles, which we set out in general terms, would have to be applied to specific instances—such as North Sea oil and the Faslane naval base.
20. It is a legal principle that, as the United Kingdom would be the continuator state, institutions of the UK would remain with that state.¹⁸ For example, Parliament, the UK Supreme Court, the Bank of England and the BBC would—as UK institutions—remain institutions of the rest of the UK. If an independent Scotland wished to continue membership of, or form a partnership in, any UK institution, that would be for the rest of the UK to consider as part of negotiations. There is no legal right for a successor state to share the institutions of the state from which it secedes.
21. The key principle governing the apportionment of assets and liabilities would be that they would be shared equitably between the continuator and the successor states. It is a legal principle that fixed or immovable assets (such as government or military buildings)¹⁹ would automatically become assets of the state in which they are located. Other, moveable assets (such as military equipment)²⁰ would be subject to apportionment through negotiations—with the only applicable legal principle being that the apportionment should be equitable. Liabilities would be similarly subject to apportionment through negotiations.
22. The Scottish Government told us that fixed assets in Scotland would become Scottish on independence, whereas all assets in the rest of the UK would be subject to negotiations.²¹ This was not borne out by other evidence we heard. We were told that fixed assets would not be negotiated, but non-fixed assets would, wherever they are situated.²² Similarly, the Scottish Government’s claim to continued use (or the apportionment) of overseas property was questioned.²³ We were told that the overseas property of the United Kingdom would remain the property of the rest of the UK.²⁴ This is also the clear view of the UK Government.²⁵
23. Given the close integration of Scotland and the rest of the United Kingdom, determining exactly what would be an equitable apportionment of assets would not be easy. An indication of the complexity of the matter was given in

¹⁸ This was elaborated on in a recent article by Rod MacLeod of Tods Murray LLP: ‘Whose Central Bank is it Anyway?’, *Edinburgh Law Review*, volume 18, pp 250–54.

¹⁹ Q 14; written evidence from the Law Society of Scotland.

²⁰ Q 14.

²¹ Written evidence from the Scottish Government, paras 11–12.

²² Q 14.

²³ Written evidence from the Scottish Government, para 14.

²⁴ Written evidence from the Law Society of Scotland.

²⁵ *Scotland analysis: EU and international issues*, para 2.16.

the *Scotland analysis* paper on *Defence*, in which it was noted, for example, that “An independent Scottish state could not simply co-opt existing units that are primarily recruited or based in Scotland, as these are an integral part of the UK Armed Forces”; and “While many military personnel and capabilities are located in Scotland, these do not operate in isolation; ... they depend on close integration with other capabilities, services and infrastructure spread across the UK”.²⁶

24. Apportioning liabilities is likely to be equally complex. The UK Government’s first *Scotland analysis* paper found that there was no clear consensus on the allocation of liabilities, but there were some general principles.²⁷ Professor Iain McLean, Professor of Politics at Nuffield College, University of Oxford, described the three options for apportioning liabilities equitably: a “historic share”, gross domestic product (GDP) and population.
25. The “historic share” option would be problematic, as Professor McLean made clear:

“The Scottish Government say that they are willing to accept a historic share of the UK’s liabilities and they choose a start date [of 1980] for that historic share that happens, by strange coincidence, to be favourable to the political position of the current Scottish Government. I think this is a non-runner. The only base year possible for a historic share is 1707. The data are missing for the first 200 or 250 years of that apportionment.”²⁸
26. This leaves the population share or relative GDP as realistic bases for negotiation. Population share would be the easiest to calculate. It would mean that Scotland would take on 8.4% of the United Kingdom’s liabilities and be entitled to the same proportion of non-fixed assets.²⁹ GDP share would be harder to calculate as it would depend on the apportionment of North Sea oil.³⁰ This would need the accurate calculation of the income generated by that resource, forecasts of which were downgraded in early 2014, and apportioning the assets and liabilities associated with it.³¹
27. Plainly the UK and Scottish Governments would need to agree a basis for apportioning assets and liabilities. In order to facilitate fair apportionment of assets, a full inventory would need to be compiled by the UK Government.³²
28. **In the event of Scottish secession, institutions of the UK would become institutions of the rest of the UK, as the continuator state. Fixed assets would belong to the state in which they are located. Other (non-fixed) assets and liabilities would be apportioned equitably. The exact division would be a matter for negotiations, and would be complicated.**

²⁶ *Scotland analysis: Defence*, p 10 and para 1.85.

²⁷ *Scotland analysis: Devolution and the implications of Scottish independence*, p 57.

²⁸ Q 14. 1980 was cited in the Scottish Government’s white paper as a possible base year: *Scotland’s Future: Your Guide to an Independent Scotland*, p 348.

²⁹ Q 20. The Scottish Global Forum advocated using population share in their written evidence.

³⁰ Q 14.

³¹ ‘OPEC says North Sea oil output to hit new lows’, *The Daily Telegraph*, 12 February 2014.

³² Written evidence from Donald Shell, the Campaign for an English Parliament and the Scottish Global Forum.

CHAPTER 3: CONSTITUTIONAL IMPLICATIONS FOR THE UK STATE

Legislation required for negotiations

29. There are two elements to the question of whether legislation would be needed to enable negotiations to begin: whether legislation would be necessary to enable the Scottish negotiating team to be established; and whether it would be necessary for the rest of the UK negotiating team.
30. The Scotland Act 1998 devolved legislative competence to the Scottish Parliament and the Scottish Government. That Parliament and Government are empowered to pass legislation in any area which is not reserved. The Union is amongst the reserved matters.³³ Hence the necessity for a statutory instrument to be passed which conferred on the Scottish Parliament power to legislate for the referendum on independence.³⁴ This was done by way of a “section 30 order”.³⁵ Such orders enable a reserved matter to be devolved; they are made by the UK Government with the approval of both Houses of Parliament and the Scottish Parliament.
31. This raises the question of whether it is within the competence of the Scottish Government to negotiate for independence and the Scottish Parliament to legislate for negotiations.
32. Lord Mackay of Clashfern, a former Lord Chancellor and Lord Advocate, stated that, if there were a vote for independence, he “would expect the UK Parliament to introduce legislation as a preliminary stage to set up the machinery for the negotiation”.³⁶ Lord Hope of Craighead, a former Deputy President of the Supreme Court, thought such legislation would be necessary, though it might be possible to begin negotiations and then legislate later.³⁷
33. Professor Tierney, on the other hand, thought that both governments would consider a “yes” vote a mandate to negotiate and if further authority were needed they could rely on the Edinburgh agreement. That said, he thought it would “make sense for both parliaments to pass paving legislation, appointing negotiating teams, setting the respective remits for negotiations, and setting out principles to guide the negotiators.”³⁸
34. Professor Boyle said that UK “constitutional law does not require enabling legislation for negotiations to take place ... there is no precedent for Parliament to legislate on negotiations rather than the outcome of those negotiations.” However, he thought it “may be necessary” to empower the Scottish Government to negotiate, and that a section 30 order “could presumably be used for that purpose.”³⁹

³³ Paragraph 1(b) of Schedule 5 to the Scotland Act 1998.

³⁴ Scotland Act 1998 (Modification of Schedule 5) Order 2013.

³⁵ So called because they are made under section 30 of the Scotland Act 1998.

³⁶ Written evidence from Lord Mackay of Clashfern.

³⁷ Q 5.

³⁸ Written evidence from Prof Stephen Tierney.

³⁹ Written evidence from Prof Alan Boyle.

35. The Secretary of State for Scotland, Alistair Carmichael MP, thought it would “probably be sensible” for there to be legislation establishing the negotiations; although the UK Government regularly negotiate agreements and treaties with their existing powers, “this would be an agreement of a very different stripe”.⁴⁰ The Advocate General for Scotland referred to the possibility of a legal challenge to the competence of the Scottish Government to negotiate, and thought that a section 30 order or primary legislation may be needed to put the matter beyond doubt.⁴¹
36. The difficulty with devolving legislative competence for establishing negotiations to the Scottish Parliament by way of a section 30 order would be that such an order may itself be subject to legal challenge. As it is secondary legislation made by a minister it could be judicially reviewed, including on the ground of *vires*. It may be that any such review would have little chance of success; but it would create uncertainty and may prevent negotiations from beginning.
37. **It would be important for any independence negotiations to have a clear legal basis. The evidence we received suggested that the UK Government are likely already to possess legal power to negotiate, but the Scottish Government may not. In the event of a “yes” vote, this should be put beyond doubt. In that event, soon after any such vote, a bill should be introduced to the UK Parliament which would establish the negotiating team for the rest of the UK and devolve power to the Scottish Parliament to establish a negotiating team for Scotland.**

Legislation to deliver independence

38. The evidence we received suggests that the legislation needed to deliver independence itself, although important, may not need to be large in scale. Professor Tierney told us:
- “[In] the event of a negotiated agreement [between Scotland and the rest of the United Kingdom] the Westminster Parliament would presumably pass legislation formally recognising that agreement and Scotland’s independent status. This could also serve to acknowledge that Scotland no longer forms part of the United Kingdom.”⁴²
39. Any legislation should deal with the Treaty and Acts of Union that created Great Britain in 1707. The Secretary of State for Scotland told us: “The union was constituted by a treaty followed by two Acts. If it is now to be dissolved, it would presumably need that at the very least.”⁴³ The ratification of an agreement (following negotiations) between Scotland and the rest of the UK followed by legislation in each Parliament would be a symbolic act, echoing the Treaty of Union in 1706 and the 1706–07 Acts of Union.
40. There is an issue of whether further legislation would be required. The process of colonies and dominions becoming independent was obviously very different from the separation of part of the United Kingdom into a new state.⁴⁴ However, it is useful to remember that when certain colonies and

⁴⁰ Q 32.

⁴¹ Q 32.

⁴² Written evidence from Prof Stephen Tierney.

⁴³ Q 41.

⁴⁴ QQ 16 and 41.

dominions were granted “fully responsible status” by the UK Parliament, provisions in the relevant Acts stated that, after independence day, the “Government in the United Kingdom shall have no responsibility for the government of” the country in question, and that “No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to [the country] as part of the law thereof.”⁴⁵ Such recognition of the end of Westminster’s jurisdiction over Scotland would be necessary in the event of Scottish independence.

41. It might be that an Act of the UK Parliament could simply state the cessation of that Parliament’s ability to legislate for Scotland,⁴⁶ make any consequential provision and provide any transfer of powers that was required.⁴⁷ This would fit with the Scottish Government’s position that “the key legislative steps towards independence should be taken by the Scottish Parliament”.⁴⁸
42. Our witnesses agreed with the Scottish Government that UK legislation applying to Scotland at the point it became independent would remain the law of Scotland unless and until repealed or superseded by Acts of the Scottish Parliament.⁴⁹ This is referred to as “continuity of laws”.
43. Beyond delivering independence, legislation is likely to be required to enact the outcome of post-referendum negotiations. There would probably also need to be legislation to ensure that the rest of the UK’s statute book was consistent with the reality of a UK that no longer included Scotland. This could be a substantial task, as was the case with the changes to the role of the Lord Chancellor in 2005, when significant legislative amendments were required.⁵⁰
44. **UK legislation to facilitate Scottish secession from the Union may not need to be extensive. Its primary purpose would be to recognise independence for Scotland and the end of the UK Parliament’s legislative competence over Scotland. However, it is likely that extensive consequential legislation, and legislation to implement any agreement reached between the two governments, would be necessary.**

The UK Government after a “yes” vote

45. A “yes” vote in the referendum in September would put the UK Government in an unusual position. Scotland would still be in the Union until the date of secession, but its people would have stated their desire to be ruled from Holyrood exclusively rather than, as now, Westminster and Holyrood together.
46. The Secretary of State for Scotland, in his opening statement to the committee, described what would happen:

⁴⁵ Section 1(1) and (2) of the Trinidad and Tobago Independence Act 1962. Section 2 of the Canada Act 1982 is similar.

⁴⁶ Q 25.

⁴⁷ Written evidence from Prof Alan Boyle.

⁴⁸ Written evidence from the Scottish Government.

⁴⁹ *Scotland’s Future: Your Guide to an Independent Scotland*, p 558; Q 5; written evidence from Prof Alan Boyle.

⁵⁰ Constitutional Reform Act 2005.

“If there were to be a yes vote in the referendum—a scenario that I hope and believe the people in Scotland will not allow to happen—it would mean that people in Scotland had given a mandate that they no longer wished the United Kingdom Government to act in their interests ... [this] would mean that the interests of Scotland on the one hand and the interests of the continuing United Kingdom of England, Wales and Northern Ireland on the other would diverge.”⁵¹

47. He then set out the implications for the UK Government:

“Unless and until the people of Scotland decide otherwise, the United Kingdom must act in the interests of all parts of the United Kingdom, including Scotland. That is why the UK Government are not making plans for the implications of a yes vote ... Unless and until the people of Scotland vote otherwise, the UK Government will continue to act on their behalf and on behalf of the interests of people across the UK.”⁵²

48. The implication was that, were a “yes” vote to be delivered in the referendum in September 2014, from that date the UK Government would no longer seek to act on behalf of the people of Scotland. This would have implications for international representation and domestic governance.

49. In terms of international representation, David Lidington MP, Minister of State at the Foreign and Commonwealth Office, said during a media briefing in March 2014:

“The key point is this: now, and right up until referendum day, every United Kingdom minister—whatever responsibility they hold—is thinking about and representing the people of Scotland as much as any other part of the UK. If Scotland votes for independence, from that time on ministers in the UK Government will have a responsibility for people of the rest of the United Kingdom.

It would be for ministers in Holyrood in those circumstances to make the case for Scotland. In those circumstances, ministers in the UK Government would be working all the time and thinking all the time about the people who elect us in England, Wales and Northern Ireland. If the people in Scotland chose a different way that’s fine, but that changes our outlook.”⁵³

50. In *Scotland’s Future* the Scottish Government set out their view of how a transition in preparation for independence would work:

“Existing constitutional arrangements in Scotland will provide the basis for the transition to independent statehood, with additional powers transferred as soon as possible after the referendum, giving the Scottish Parliament the ability to declare independent statehood for Scotland in the name of the sovereign people of Scotland ...

This early transfer will also enable the Scottish Parliament to extend the devolved competences of the Scottish Parliament and Scottish Government into all policy areas, including those currently reserved to Westminster, for the purpose of making preparations for independence.

⁵¹ Q 27.

⁵² Q 27.

⁵³ ‘Foreign Office hints it would cease to represent Scots’ interests the minute they vote Yes’, *Sunday Herald*, 9 March 2014.

The transitional period will also see the necessary foundations laid for Scotland's engagement with the international community ... It will also enable Scotland to move to a position of full participation in the international community. The arrangements will provide for the continuing application to Scotland of multilateral and bilateral international agreements and treaties with other countries and international organisations and enable Scotland to negotiate membership of international organisations."⁵⁴

51. As a matter of law Scotland will remain part of the United Kingdom unless and until it becomes an independent country. A "yes" vote would not itself alter the legal status of Scotland—this would change only following formal independence or as the consequence of Westminster legislation passed in preparation for formal independence.⁵⁵ As a matter of political reality, however, the UK Government may feel less legitimate in acting on Scotland's behalf were Scotland to have voted to leave the United Kingdom.⁵⁶
52. If the ministers' statements were acted upon, Scotland would be left without international representation in the period between a "yes" vote and Scotland assuming full control over foreign affairs.
53. In domestic affairs, the UK Government would still govern the whole of the UK, including Scotland, until such time as Scotland became independent. However, after a "yes" vote the legitimacy of the UK Government continuing to govern Scotland may be questioned, especially in cases where their policy diverges from that of the Scottish Government.
54. Decisions would have to be taken by the UK Government on reserved matters that affect Scotland, such as on economic and fiscal policy. Given that independence would be on the way, transition arrangements would have to be established. We note that neither the UK nor the Scottish Government have explained in detail what they imagine such arrangements may look like.
55. In domestic affairs it may be appropriate for the UK Government to adopt a practice broadly similar to that in the pre-election "purdah" period. Under the "purdah" convention ministers observe discretion in initiating any new action of a continuing or long-term character (such as announcing major policy decisions or entering into large contracts). If such decisions cannot wait (for example, if delay would waste money), they are taken after consulting the opposition.⁵⁷ Although the parallels are not exact, were an analogous practice to be introduced, decisions by the UK Government on reserved matters with long-term impacts on Scotland could be dealt with in this period after consulting the Scottish Government.
56. **The UK Government's apparent position—that they would cease to represent the interests of Scotland immediately after a "yes" vote was returned—may create a constitutional limbo for Scotland. Scotland would still be part of the United Kingdom, but the UK Government would cease to act in Scotland's interests.**

⁵⁴ *Scotland's Future: Your Guide to an Independent Scotland*, pp 338–40.

⁵⁵ Q 53.

⁵⁶ Q 53.

⁵⁷ The convention is set out in: *Cabinet Manual: A guide to laws, conventions and rules on the operation of government*, Cabinet Office, October 2011, paras 2.27–2.28.

57. **On international representation, we recommend that an agreement be reached between the two governments immediately following a “yes” vote to clarify the basis of such representation for Scotland in the period between that vote and independence day.**
58. **On domestic governance, we recommend that, if Scotland votes for independence, the UK and Scottish Governments should agree how any transfer of powers prior to independence day should take place. In addition, an arrangement should operate between the referendum and independence day whereby the UK Government take long-term decisions on reserved matters relating primarily or solely to Scotland only after consulting the Scottish Government.**

Effect on the House of Commons

59. Fifty-nine MPs represent Scottish constituencies in the House of Commons. A “yes” vote in the referendum would have significant implications for them and for the House of Commons as a whole. There are three aspects to this: the status of Scottish MPs⁵⁸ between the referendum and independence day; the question of when Scottish MPs would leave the House of Commons; and the position of Scottish MPs in negotiations. We address the latter aspect in the next chapter (on negotiations).
60. The clear consensus amongst our witnesses was that, in the event of a “yes” vote, Scottish MPs should remain members of the House for as long as Scotland remains part of the UK.⁵⁹ Professor Boyle said, “Scotland would still be part of the United Kingdom and they would still be entitled to participate in law that was going to apply to Scotland”.⁶⁰ They would leave when Scotland became independent, but not before.⁶¹
61. The presence of MPs representing constituencies that would soon no longer be part of the Union may be controversial. It could become “the West Lothian question on steroids”,⁶² especially if Scottish MPs continued to debate and vote on issues relating solely to the rest of the United Kingdom or on issues affecting the United Kingdom after Scotland seceded from it.
62. It may be that Parliament simply lived with “this greater anomaly—though for a much shorter period of time.”⁶³ Alternatively, the House of Commons could make internal arrangements to address the situation. Professor Tierney told us that “constitutional principles might lead to a suggestion of recusal, or a convention emerging where those [Scottish] MPs would recuse themselves from decision-making on those [non-Scottish] issues.”⁶⁴ The English Lobby called for Scottish MPs to be “debarred by a resolution of the Commons, from speaking and voting on English and Welsh matters and

⁵⁸ In this report we use the phrase “Scottish MPs” as shorthand for MPs representing Scottish constituencies.

⁵⁹ For example, see written evidence from Lord Mackay of Clashfern, Ian Campbell, Donald Shell, the Scottish Government and the Law Society of Scotland; QQ 22 and 36.

⁶⁰ Q 22.

⁶¹ Q 36; written evidence from the Law Society of Scotland.

⁶² Q 62 (Alex Massie).

⁶³ Written evidence from Shell.

⁶⁴ Q 23.

confined to matters affecting Scotland.”⁶⁵ Any such “recusal” may affect the majority of the government on these issues.

63. **In the event of a “yes” vote, the status of MPs for Scottish constituencies in the period between the referendum and independence day should be resolved quickly, and certainly before the 2015 general election.**
64. In the event of Scotland becoming independent, once the UK Parliament ceased to have jurisdiction over Scotland there would be no grounds for retaining MPs representing Scottish constituencies. The only question would be when Scottish MPs should leave the House of Commons.
65. Removing the 59 Scottish MPs may affect the balance of power in the House of Commons, potentially forcing a change of government. Since 1945, there have been two elections in which the largest party in the Commons would have been different were Scottish MPs excluded: 1964 and February 1974.⁶⁶ There were two more elections in which Scottish MPs made the difference between a minority and a majority administration: October 1974 and 2010. A majority administration elected in May 2015 could lose their majority upon the departure of Scottish MPs. Alternatively, the largest party in May 2015 may have a minority of seats, but stand to gain a majority through the departure of Scottish MPs. Both situations would be foreseeable after the election in 2015.
66. Lord Hope of Craighead observed that, under current legislation, all MPs would be elected in 2015 to serve a full term.⁶⁷ Therefore legislation would be needed to remove the right of Scottish MPs to sit mid-Parliament. Previous changes to representation, the franchise or the distribution of seats have come into force at the subsequent general election.⁶⁸
67. The consensus in our evidence was that MPs should leave on independence day.⁶⁹ Professor McLean suggested that Scottish MPs might want to remain beyond the Scottish Government’s proposed independence day of 24 March 2016, if it was possible that the Scottish Government elected in May 2016 would want to reverse the move to independence.⁷⁰ We do not see that this should be kept as an option: the Edinburgh agreement was for a “decisive” referendum whose outcome will be respected on both sides.
68. The Law Society of Scotland recommended that the end of a parliamentary session would be a convenient point at which to make such a change.⁷¹ Prorogation of Parliament could be timed so that independence day for Scotland would fall between two sessions. This would mean that parliamentary business would need to be arranged around the agreed date for Scottish independence. Given the impact of the loss of 59 MPs on the House

⁶⁵ Written evidence from the English Lobby.

⁶⁶ Written evidence from the Scottish Government; written evidence from David Torrance.

⁶⁷ Q 7.

⁶⁸ For example, provision was made for the removal of constituencies in what became the Irish Free State in the Irish Free State (Agreement) Act 1922; at the following general election (in October 1922) no MPs were returned for those seats. The abolition of university seats, under the Representation of the People Act 1948, took effect when a new Parliament was elected in 1950.

⁶⁹ For example, written evidence from Ian Campbell; written evidence from the Campaign for an English Parliament; Q 22.

⁷⁰ Q 8.

⁷¹ Written evidence from the Law Society of Scotland.

of Commons, it is likely that the date would be of great significance in Parliament anyway, in which case starting a new session without Scottish MPs may be sensible.

69. It has been suggested that an early general election could be held when Scottish MPs depart. This would remove the problem of changing the composition of the House of Commons mid-Parliament, but it would mean that the Parliament elected in 2015 would be liable to be dominated by negotiations over Scotland. It would also risk alienating the electorate in the remaining UK: “Voters in the [rest of the UK] may well resent being forced to have a second election so soon for no other reason—one foreseeable before the 2015 election—than Scottish independence”.⁷² The decision over whether an early election should be held would be for Parliament to take: the Fixed-term Parliaments Act 2011 allows for an early election if the Government lose a vote of confidence in the House of Commons (and no new government is formed within a fortnight) or if two-thirds of MPs vote to hold an election.⁷³
70. An alternative suggestion has been mooted by a Scottish National Party MP: that the UK general election could be postponed to 2016 and not return MPs for Scottish constituencies.⁷⁴ The extension of a Parliament beyond five years would be an extraordinary step constitutionally; it may risk being seen by voters as self-serving, extending the time in power of the current Government. Professor Tierney told us that he “cannot imagine that there is any appetite to postpone a general election.”⁷⁵ The suspension of the Fixed-term Parliaments Act to delay the first election scheduled under it risks undermining the very certainty over election dates that the Act was supposed to deliver.
71. Given that the impact of the loss of 59 MPs on the balance of power would be known immediately after the 2015 general election, there may be a risk that the government then in power would seek to delay the departure of these members to retain their majority. This should be avoided. The clearest way to avoid a delay would be to set out before the 2015 general election Parliament’s intention to remove Scottish MPs at the point that Scotland became an independent country.
72. **The UK Government should make it clear as soon as possible after a “yes” vote when they propose that Scottish MPs would be removed from the House of Commons. MPs for Scottish constituencies should cease to sit in the House of Commons from the date on which Scotland secedes from the United Kingdom. Legislation to this effect would be necessary. The Government should provide sufficient parliamentary time to enable the matter to be clearly resolved.**

Effect on the House of Lords

73. The impact of Scottish independence on the House of Lords is less immediately obvious than on the House of Commons. Members of the

⁷² Written evidence from Barry Winetrobe.

⁷³ Unless the Act is amended, the requirement for two-thirds of all MPs to vote for dissolution would include the 59 Scottish MPs.

⁷⁴ ‘Call to delay UK election for a year after Yes vote’, *The Scotsman*, 30 November 2013.

⁷⁵ Q 23.

House of Lords sit by virtue of their peerage and do not represent a particular territorial part of the UK. Unlike MPs representing Scottish constituencies, it is not obvious what constitutes a Scottish peer. Since devolution the House of Lords has not been concerned with legislation that is before the Scottish Parliament, and peers have not held UK ministers to account for matters which are devolved to the Scottish Parliament.

74. The vast majority of members hold life peerages of the United Kingdom. If Scotland were to secede, these peers of the United Kingdom would continue to have a right to sit in the United Kingdom Parliament. The fact that a peer was, for example, born in Scotland would not be sufficient to exclude them from the House, any more than it should an MP born in Scotland who represents a constituency in the rest of the UK. Neither should peers' territorial designations be taken as a statement of their affiliation to Scotland rather than the rest of the United Kingdom.
75. All members of the House of Lords are deemed to be resident, ordinarily resident and domiciled in the United Kingdom for the purposes of certain taxes,⁷⁶ under section 41 of the Constitutional Reform and Governance Act 2010. A three-month transitional period was provided after this provision came into force, during which members could decide to leave the House and so not be subject to those tax requirements.⁷⁷ At present, at least 62 members are resident in Scotland.⁷⁸ As the Advocate General for Scotland told us, these peers would need to decide whether they were willing to pay tax in two countries in order to remain members of the House.⁷⁹ In the event of a “yes” vote in September 2014, the period before independence could serve as transitional period, during which peers wishing to pay tax in Scotland and not the rest of the UK could retire from membership of the House under the House of Lords Reform Act 2014.
76. **As the law now stands, if Scotland were to leave the United Kingdom, members of the House of Lords who live in Scotland would have to be resident, ordinarily resident and domiciled in the rest of the UK for the purposes of certain taxes. If they did not want to pay tax in the rest of the UK, they would have to retire from the House.**
77. Among the 92 hereditary members of the House, there are six who sit solely as peers of Scotland, their titles pre-dating the formation of Great Britain in 1707.⁸⁰ Other peers of Scotland also hold peerages of Great Britain (peerages created in 1707–1801) or of the United Kingdom, so would be unaffected. Under the Peerage Act 1963, peers of Scotland sit as though they were peers of the United Kingdom.⁸¹

⁷⁶ Income tax, capital gains tax and inheritance tax.

⁷⁷ See section 42 of that Act.

⁷⁸ 62 of the 601 members whose residence was reported in August 2013 had their main residence in Scotland: see *Regional Representation in the House of Lords*, Lords Library Note LLN 2014/005.

⁷⁹ Q 39. The situation may change were there to be a double-taxation agreement between an independent Scottish Government and the government of the rest of the UK.

⁸⁰ The six peers of Scotland are the Countess of Mar, the Earl of Caithness, the Earl of Erroll, the Earl of Lindsay, Viscount Falkland and Lady Saltoun of Abernethy. They are excepted peers under the House of Lords Act 1999.

⁸¹ Section 4.

78. **In the event of independence it would need to be decided whether peers of Scotland should be entitled to continue to be members of the House of Lords on the basis of a Scottish peerage alone.**

Effect on the UK Supreme Court

79. The United Kingdom's Supreme Court hears cases from the three jurisdictions in the UK: the English and Welsh, Northern Irish and Scottish systems.⁸² All Supreme Court justices are eligible to hear cases from any of those jurisdictions, but to ensure that expertise in all three systems is represented in the court, appointments must be made so that between them the justices "have knowledge of, and experience of practice in, the law of each part of the United Kingdom."⁸³ Although no numbers are set in statute, by convention the court has contained two judges with experience of Scots law and one with experience of Northern Irish law.⁸⁴
80. The Scottish Government's white paper sets out a plan for a supreme court in an independent Scotland: "The Inner House of the Court of Session and the High Court of Judiciary sitting as the Court of Criminal Appeal will collectively be Scotland's Supreme Court."⁸⁵ Lord Hope of Craighead told us that he could see advantages to the remaining UK and an independent Scotland sharing a supreme court: "a great deal of the legislation that affects commercial matters applies throughout the United Kingdom, and much of that would continue after independence." He and Lord Mackay of Clashfern agreed, however, that it was unlikely that an independent Scotland would share a supreme court with the rest of the UK.⁸⁶
81. If an independent Scotland had its own supreme court, there would no longer be a need for justices to be appointed to the UK Supreme Court with experience of Scots law, as Scottish appeal cases would no longer be heard there.
82. In a debate on Scottish independence, Lord Hope commented on the effect on the UK Supreme Court of losing justices from the Scots legal system:
- "The process of cross-fertilisation of ideas across the border will cease. The tendency to prefer principle to precedent, which is one of the characteristics of the Scottish approach, is also at risk of being lost. So, too, will be the breadth of experience which has always marked Scots judges out in comparison with the specialists from England. Of course, the loss of the two Scots justices, if and when this has to happen, can be made good, but the breadth of vision which comes from having what is at present a court for the entire United Kingdom and draws its ideas from a broad canvas, cannot."⁸⁷
83. Whatever their background, justices are appointed to hear cases from across the UK. Therefore, it would not be appropriate to remove the serving justices with experience of Scots law; indeed it would be advantageous, as

⁸² The court hears only civil appeals from Scotland.

⁸³ Section 27 of the Constitutional Reform Act 2005, which established the Supreme Court.

⁸⁴ Q 11. This convention was developed with the Law Lords, and carried over to the Supreme Court when it was created.

⁸⁵ *Scotland's Future: Your Guide to an Independent Scotland*, p 46.

⁸⁶ Q 13; written evidence from Lord Mackay of Clashfern.

⁸⁷ HL Deb, 30 January 2014, cols 1379–80.

Lord Hope explained, for them to continue.⁸⁸ The retention of serving Scottish justices would also be helpful in retaining their experience of devolution matters that would still arise from Welsh cases.⁸⁹

84. **If an independent Scotland were to have its own supreme court, justices with experience of Scots law would no longer be appointed to the UK Supreme Court. However, given their UK-wide remit, serving justices with this experience should continue to sit on the Supreme Court until their scheduled date of retirement.**

⁸⁸ Q 12.

⁸⁹ Q 11.

CHAPTER 4: NEGOTIATIONS

Pre-negotiation

85. The UK Government's position is that they will not negotiate the terms of independence before the referendum: they will not "pre-negotiate". The first *Scotland analysis* paper elaborated that, "This is because of a profoundly important principle arising from the fact that the UK Government is one of Scotland's two governments. UK Government ministers represent the whole of the UK, including Scotland, and serve the interests of all its citizens. As such the UK Government has direct responsibility for many of the key areas likely to feature heavily in post-referendum negotiations".⁹⁰ Moreover, unless and until a "yes" vote is delivered, neither the UK nor the Scottish government have any mandate to negotiate independence.
86. The Scottish Government's written evidence stated:
- "The Scottish Government accepts that detailed negotiations on the independence settlement cannot begin ahead of the referendum. However, we believe that sensible discussions about the practical consequences of independence should take place to help the people of Scotland to make an informed choice and prepare the way for detailed negotiation following a vote for independence."⁹¹
87. Alex Massie was firm in saying that the UK Government should not pre-negotiate:
- "from a political point of view the UK Government's position is transparent and sensible ... The thought of pre-negotiating any aspect before the result is known strikes me ... as idiotic. There is no upside to the UK Government doing that ... The UK Government are not a neutral arbiter in this. They are not drawing up the rules of engagement for the referendum; they are an active participant in it."⁹²
88. It has been argued that, in spite of their formal stance of "no pre-negotiation", the UK Government have in effect engaged in negotiations by publishing their *Scotland analysis* papers and setting out their position on matters such as a currency union.⁹³ This suggestion merits close examination.
89. The *Scotland analysis* papers are intended to provide a "comprehensive and detailed analysis of Scotland's place in the UK."⁹⁴ They thoroughly set out the facts of the debate and address all sides of the argument. David Torrance described them as "surprisingly apolitical ... they are not really making a political argument; they are describing the status quo."⁹⁵ Providing such information is essential to ensuring there is an informed debate, in the same way as the Scottish Government's white paper seeks to inform voters of what a "yes" vote would mean. While we heard that *Scotland's Future* also sets out

⁹⁰ *Scotland analysis: Devolution and the implications of Scottish independence*, para 2.45.

⁹¹ Written evidence from the Scottish Government, para 9.

⁹² Q 45.

⁹³ Q 46.

⁹⁴ *Scotland analysis: Devolution and the implications of Scottish independence*, executive summary, para vi.

⁹⁵ Q 52.

the Scottish Government's key negotiating positions and the Scottish National Party's longer-term vision,⁹⁶ the *Scotland analysis* papers cannot be regarded as an exercise in pre-negotiation.

Rest of the UK negotiating team

90. Two options have been put to us as to who should be on the negotiating team for the rest of the UK: representatives of the UK Government alone, or a cross-party group of negotiators.
91. In 1921 the creation of the Irish Free State was negotiated by UK ministers alone (representing a coalition government).⁹⁷ The 2012 Edinburgh agreement was negotiated by the UK Government. Lord Mackay of Clashfern and Professor Boyle both envisaged the negotiating team for the remainder of the UK being the UK Government alone.⁹⁸
92. There would be advantages to having a team comprised solely of the UK Government (though during a coalition such a team might be expected to contain ministers from more than one party). It is likely to be smaller than a cross-party team, which militates against negotiations becoming unwieldy. There would be an established process for a UK Government team reaching agreement amongst its members on negotiating positions (i.e. the Cabinet and cabinet committees), with a single figure (the Prime Minister) as the final arbiter. The principle of collective responsibility should mean that the team is disciplined and collectively defends its positions. There are established means of holding the negotiators to account.
93. There are, however, risks to having a team comprised solely of the UK Government. The biggest risk is of a change of government at the general election in 2015 (or conceivably at some other point). In advance of the election, the Government might be reluctant to enter into binding commitments lest they be overturned by another government. Alternatively, a new government after 2015 might seek to reopen issues that both sides had thought were settled before the election. If negotiators for a new UK government wish to reopen issues then the Scottish negotiators might want to reopen other issues. Different parties' negotiating positions might become an issue at the general election. Sensitivities around a new UK government which relied for its majority on Scottish MPs (as discussed in the previous chapter) may also have a bearing.
94. An alternative would be to have a cross-party group of negotiators. David Torrance favoured this as it would mean that a change of government would cause "minimum disruption". He stated, "the three "Unionist" parties have already worked together under the "Better Together" banner and hold broadly the same position in relation to a currency union, defence, and so on."⁹⁹
95. If there were a cross-party team, it would need to be decided which parties should be included. The three main Westminster parties would be obvious, but it might be that other parties represented in Parliament would want to be included. Representatives of the Northern Ireland Executive and the Welsh

⁹⁶ Q 46.

⁹⁷ Written evidence from Prof Alan Boyle.

⁹⁸ Written evidence from Lord Mackay of Clashfern; written evidence from Prof Alan Boyle.

⁹⁹ Written evidence from David Torrance.

Assembly Government could be included,¹⁰⁰ though there would be sensitivities particularly about which Northern Irish parties to include. One idea is for a convention to be convened, mirroring the broad range of negotiators on the Scottish side that the Scottish Government's white paper envisages.¹⁰¹

96. Some witnesses stressed the advantages of other parties and other devolved executives being involved in the process, but without necessarily being part of the negotiating team. Donald Shell, a former senior lecturer in politics at the University of Bristol, thought it important that the negotiators were “seen as representative of all major political parties and of Wales and Northern Ireland ... it is strongly desirable that all parties feel a sense of ownership of the process and thereby the outcome”.¹⁰² Dame Rosemary Butler AM, the Presiding Officer of the National Assembly for Wales, referred to the negotiators taking account of the views of the remaining devolved jurisdictions.¹⁰³
97. **The best approach would be for the negotiating team to be composed solely of representatives of the UK Government. The team should be small and able to act quickly and with authority. It would also be important for it to be held fully to account by Parliament through established means.**
98. **It would be desirable for there to be broad agreement on the scope and aims of the negotiations, and for any change of government in 2015 to cause as little disruption as possible. It would be important for the official opposition at Westminster to be fully consulted during negotiations. Similarly, given the interests of the devolved executives in Northern Ireland and Wales, it would be important to keep them closely involved.**

Involvement of Scottish MPs

99. A related issue is whether MPs representing Scottish constituencies should be included in the negotiating team for the rest of the UK.
100. If, as discussed in the previous chapter, Scottish MPs remain members of the House of Commons until independence day, then it may be thought that they should not be prevented from negotiating on behalf of the rest of the UK. Professor McLean said, “I do not consider it at all likely that this [UK] Parliament would fetter itself not to include any Scottish representatives in its negotiating team.”¹⁰⁴
101. On the other hand, Lord Mackay of Clashfern said he expected the rest of the UK negotiators not to include those who are Scottish.¹⁰⁵ The Secretary of State for Scotland thought it a “statement of the blindingly obvious that you would not expect somebody from England, Wales or Northern Ireland to negotiate on behalf of Scotland and so you would not expect a Scot to

¹⁰⁰ This was suggested by Alex Massie: Q 61.

¹⁰¹ *Scotland's Future: Your Guide to an Independent Scotland*, p 552. This was proposed for the rest of the UK by the Law Society of Scotland.

¹⁰² Written evidence from Shell.

¹⁰³ Written evidence from Dame Rosemary Butler.

¹⁰⁴ Q 6.

¹⁰⁵ Written evidence from Lord Mackay of Clashfern.

negotiate on behalf of people from England, Wales and Northern Ireland. You start from the presumption that these are countries that are foreign to each other at that point and will each pursue their own national interest.”¹⁰⁶

102. **We recommend that MPs representing Scottish constituencies should not be on the negotiating team for the rest of the UK. Their duty as representatives of their constituents in Scotland would conflict with the objective of that negotiating team: to secure the best outcome for England, Northern Ireland and Wales.**

Accountability and ratification

103. The consensus amongst our witnesses was that the appropriate body for holding the rest of the UK negotiators to account would be the UK Parliament.¹⁰⁷ That would make particular sense if, as we recommend, the negotiating team would be composed solely of representatives of the UK Government: the Government are already wholly accountable to Parliament.
104. An issue would arise over the position of Scottish MPs in holding the rest of the UK negotiators to account and in ratifying any agreement or legislation which resulted from the negotiations. Related to that would be the possibility that some Scottish MPs (or peers) could become negotiators for Scotland¹⁰⁸—there should be no risk of them being in a position to hold the rest of the UK’s negotiators to account.
105. It has been a feature of our constitutional arrangements that all MPs are entitled to participate in all matters that are before the chamber of the House of Commons on an equal basis, regardless of which constituency they represent. Until now, there has been no law, convention or practice that can prevent, for example, an MP representing a Scottish constituency from voting on a bill which extends to England and Wales only.
106. However, were the people of Scotland to vote in favour of independence, then the ability of Scottish MPs to hold the rest of the UK negotiators to account would be questioned. Professor Boyle said that it was “difficult to see any role for the Scottish MPs” in this process. He argued that they:
- “could surely not sit in judgment on whether the terms of any agreement are acceptable to the UK, a state from whose parliament they would thereafter be excluded. At best Scottish MPs might try to persuade Parliament to grant terms more favourable to Scotland than those negotiated on their behalf by the Scottish government. At worst they might be accused of undermining a deal negotiated by that government.”¹⁰⁹
107. If it was accepted that Scottish MPs should not participate in holding the rest of the UK negotiators to account, nor in any ratifying vote, the question would be how to achieve this. One option would be legislation; another would be for the Commons to pass a standing order or a resolution

¹⁰⁶ Q 33. Professor Tierney (in written evidence) and Mandy Rhodes (Q53) made similar points.

¹⁰⁷ See, for example, the written evidence of Professor Boyle, David Torrance and the Law Society of Scotland.

¹⁰⁸ The Scottish Government’s written evidence stated that they would invite “prominent Scottish Westminster politicians” to join the Scottish side in negotiating independence.

¹⁰⁹ Written evidence from Prof Alan Boyle.

preventing their participation; a third would be an informal arrangement whereby MPs absent themselves.

108. Professor Tierney¹¹⁰ and Alex Massie¹¹¹ thought that Scottish MPs informally absenting themselves would be appropriate. The Secretary of State for Scotland was reluctant to comment as the matter was hypothetical,¹¹² but referred to the ability “of both Houses to set their own sessional orders and standing orders and to determine the manner in which their own business is conducted.”¹¹³ Professor Boyle thought that it would be “very peculiar” to have Scottish MPs participating, and that “appropriate legislation” could be passed if necessary.¹¹⁴
109. **We conclude that MPs for Scottish constituencies should not be involved in holding the negotiators for the rest of the UK to account, nor in voting on any measure which ratifies the outcome of the negotiations. In the event of a “yes” vote, we recommend that the Government put before Parliament a proposal that would put this matter beyond doubt before the 2015 general election.**

Timetable for negotiations

110. The Scottish Government have set out their proposed timetable for independence: “After a vote for independence, the Scottish Government will reach agreement with the Westminster Government and the EU on arrangements for the transition to independence, based on our proposed date of 24 March 2016.”¹¹⁵ The elections due in May 2016 would then be the first for a newly independent Scottish Parliament.¹¹⁶ There are mixed views on how realistic this timetable would be.
111. The Scottish Government told us that it would be realistic, as “international examples show that countries can make significant constitutional changes happen quickly once a democratic decision is taken.”¹¹⁷
112. The Edinburgh agreement does not mention a date for independence. It requires the UK and Scottish governments “to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.”¹¹⁸ Professor Boyle said that negotiations must be “‘meaningful’ and each side must be willing to listen and take account of the other’s interests.”¹¹⁹ However, he observed that there was no legal obligation on the UK Government to respect the Scottish Government’s proposed timetable, and that the requirement to negotiate in good faith did not mean agreement by a specific date.¹²⁰

¹¹⁰ Written evidence from Prof Stephen Tierney.

¹¹¹ Q 62.

¹¹² Q 39.

¹¹³ Q 36.

¹¹⁴ Q 22.

¹¹⁵ *Scotland’s Future: Your Guide to an Independent Scotland*, p 30

¹¹⁶ *Scotland’s Future: Your Guide to an Independent Scotland*, p 51.

¹¹⁷ Written evidence from the Scottish Government, para 2.

¹¹⁸ Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, October 2012, para 30.

¹¹⁹ Written evidence from Prof Alan Boyle.

¹²⁰ Written evidence from Prof Alan Boyle.

113. David Torrance thought that, although it was impossible to be certain, the Scottish Government's timetable was "not only realistic, but [the negotiations] could be settled in a shorter time-frame, or at least the headline issues could be."¹²¹ He referred to the fact that negotiations over the detail of other secessions—for example Czechoslovakia—have continued after independence day.¹²² If it were possible for independence to take place without all issues being resolved, then there would need to be agreement on what could be left to negotiations post-independence. Mr Torrance thought that "long drawn-out negotiations would be in neither side's interests",¹²³ both sides would be concerned with "actually governing their respective countries."¹²⁴
114. Other witnesses pointed to the scale and complexity of the negotiations to suggest there was little chance of them being completed to the Scottish Government's timetable. The Secretary of State for Scotland said:
- "You are looking at unpicking ... the single most successful economic, political and social union, which has now endured for over 300 years and which has produced institutions that are, rightly, the envy of the world. That ... will require an enormous amount of complicated negotiation."¹²⁵
115. Two factors may extend the time required for negotiations. The first is the process of setting up the negotiating teams: this would involve both sides selecting their members, determining the mandate and putting in place measures for holding them to account. The time taken would, of course, depend on the size and composition of the teams.¹²⁶ This process may be further delayed if (as discussed in chapter 3) the teams were not on an appropriate legal footing.
116. The second potential cause of delay would be the UK general election due in May 2015. In the months up to the election the UK Government would be likely to be preoccupied with preparing for it, and so may not make the negotiations their priority. Before the election there will be more than a month of "purdah", during which the UK Government could not ordinarily enter into commitments which would bind their successors. If, after the election, there was a hung parliament it may take time for a new government to be formed. If a new government were formed, they would have to set up a new negotiating team. It is conceivable that that team would want to re-examine issues already negotiated. Professor Tierney speculated that there may be a government after the election that depended for its majority on Scottish MPs, and so might want to draw out negotiations.¹²⁷

¹²¹ Written evidence from David Torrance. Mandy Rhodes also thought that "headline issues" could be agreed within the Scottish Government's proposed timetable (Q 55).

¹²² The Scottish Government also cited the example of Czechoslovakia: *Scotland's Future: Your Guide to an Independent Scotland*, p 342.

¹²³ Written evidence from David Torrance.

¹²⁴ Q 55.

¹²⁵ Q 30.

¹²⁶ The First Minister of Scotland has stated his intention to have the Scottish negotiating team ready to start within 12 days of the referendum: 'SNP conference: Alex Salmond tells party 'Team Scotland' negotiations would start days after a 'Yes' vote on independence', *The Independent*, 12 April 2014.

¹²⁷ Written evidence from Prof Stephen Tierney.

117. The Scottish Government have proposed a timetable of completing negotiations on independence by March 2016. There is no constitutional principle by which that timetable would bind the rest of the UK. The UK Government should not put the interests of the rest of the UK at risk by attempting to stick to that timetable. Any negotiations should take as long as necessary; they should not be foreshortened in order to meet a deadline set by one party to the negotiations.

CHAPTER 5: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Principles governing independence

118. The overwhelming view in the evidence we received was that after a “yes” vote the rest of the United Kingdom would continue as the same state: it would be the continuator state. Scotland would become a new, successor state. (Paragraph 16)
119. This would be the case because relevant precedents support that position; it would be consistent with the rest of the UK having the majority of the territory and population of the existing UK; and it would reflect the likely opinion of other countries. No realistic alternative case has been made. (Paragraph 17)
120. The fact that the rest of the UK would be the continuator state shapes discussion on the implications of independence; this report proceeds on that basis. (Paragraph 18)
121. In the event of Scottish secession, institutions of the UK would become institutions of the rest of the UK, as the continuator state. Fixed assets would belong to the state in which they are located. Other (non-fixed) assets and liabilities would be apportioned equitably. The exact division would be a matter for negotiations, and would be complicated. (Paragraph 28)

Constitutional implications for the UK state

122. It would be important for any independence negotiations to have a clear legal basis. The evidence we received suggested that the UK Government are likely already to possess legal power to negotiate, but the Scottish Government may not. In the event of a “yes” vote, this should be put beyond doubt. In that event, soon after any such vote, a bill should be introduced to the UK Parliament which would establish the negotiating team for the rest of the UK and devolve power to the Scottish Parliament to establish a negotiating team for Scotland. (Paragraph 37)
123. UK legislation to facilitate Scottish secession from the Union may not need to be extensive. Its primary purpose would be to recognise independence for Scotland and the end of the UK Parliament’s legislative competence over Scotland. However, it is likely that extensive consequential legislation, and legislation to implement any agreement reached between the two governments, would be necessary. (Paragraph 44)
124. The UK Government’s apparent position—that they would cease to represent the interests of Scotland immediately after a “yes” vote was returned—may create a constitutional limbo for Scotland. Scotland would still be part of the United Kingdom, but the UK Government would cease to act in Scotland’s interests. (Paragraph 56)
125. On international representation, we recommend that an agreement be reached between the two governments immediately following a “yes” vote to clarify the basis of such representation for Scotland in the period between that vote and independence day. (Paragraph 57)

126. On domestic governance, we recommend that, if Scotland votes for independence, the UK and Scottish Governments should agree how any transfer of powers prior to independence day should take place. In addition, an arrangement should operate between the referendum and independence day whereby the UK Government take long-term decisions on reserved matters relating primarily or solely to Scotland only after consulting the Scottish Government. (Paragraph 58)
127. In the event of a “yes” vote, the status of MPs for Scottish constituencies in the period between the referendum and independence day should be resolved quickly, and certainly before the 2015 general election. (Paragraph 63)
128. The UK Government should make it clear as soon as possible after a “yes” vote when they propose that Scottish MPs would be removed from the House of Commons. MPs for Scottish constituencies should cease to sit in the House of Commons from the date on which Scotland secedes from the United Kingdom. Legislation to this effect would be necessary. The Government should provide sufficient parliamentary time to enable the matter to be clearly resolved. (Paragraph 72)
129. As the law now stands, if Scotland were to leave the United Kingdom, members of the House of Lords who live in Scotland would have to be resident, ordinarily resident and domiciled in the rest of the UK for the purposes of certain taxes. If they did not want to pay tax in the rest of the UK, they would have to retire from the House. (Paragraph 76)
130. In the event of independence it would need to be decided whether peers of Scotland should be entitled to continue to be members of the House of Lords on the basis of a Scottish peerage alone. (Paragraph 78)
131. If an independent Scotland were to have its own supreme court, justices with experience of Scots law would no longer be appointed to the UK Supreme Court. However, given their UK-wide remit, serving justices with this experience should continue to sit on the Supreme Court until their scheduled date of retirement. (Paragraph 84)

Negotiations

132. The best approach would be for the negotiating team to be composed solely of representatives of the UK Government. The team should be small and able to act quickly and with authority. It would also be important for it to be held fully to account by Parliament through established means. (Paragraph 97)
133. It would be desirable for there to be broad agreement on the scope and aims of the negotiations, and for any change of government in 2015 to cause as little disruption as possible. It would be important for the official opposition at Westminster to be fully consulted during negotiations. Similarly, given the interests of the devolved executives in Northern Ireland and Wales, it would be important to keep them closely involved. (Paragraph 98)
134. We recommend that MPs representing Scottish constituencies should not be on the negotiating team for the rest of the UK. Their duty as representatives of their constituents in Scotland would conflict with the objective of that negotiating team: to secure the best arrangements for England, Northern Ireland and Wales. (Paragraph 102)

135. We conclude that MPs for Scottish constituencies should not be involved in holding the negotiators for the rest of the UK to account, nor in voting on any measure which ratifies the outcome of the negotiations. In the event of a “yes” vote, we recommend that the Government put before Parliament a proposal that would put this matter beyond doubt before the 2015 election. (Paragraph 109)
136. The Scottish Government have proposed a timetable of completing negotiations on independence by March 2016. There is no constitutional principle by which that timetable would bind the rest of the UK. The UK Government should not put the interests of the rest of the UK at risk by attempting to stick to that timetable. Any negotiations should take as long as necessary; they should not be foreshortened in order to meet a deadline set by one party to the negotiations. (Paragraph 117)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTERESTS

The members of the committee that conducted the inquiry were:

Lord Crickhowell
 Lord Cullen of Whitekirk
 Baroness Falkner of Margravine
 Lord Goldsmith
 Lord Hart of Chilton
 Lord Irvine of Lairg
 Baroness Jay of Paddington (chairman)
 Lord Lang of Monkton
 Lord Lester of Herne Hill
 Lord Lexden
 Lord Powell of Bayswater
 Baroness Wheatcroft

Declarations of interests

The following interests were declared:

Lord Crickhowell
No relevant interests

Lord Cullen of Whitekirk
Member of the Faculty of Advocates (non-practising)
Chairman of Board of the Signet Accreditation Limited
Chancellor of University of Abertay, Dundee
Trustee of Bute House Trust
President of Sacro

Baroness Falkner of Margravine
No relevant interests

Lord Goldsmith
No relevant interests

Lord Hart of Chilton
No relevant interests

Lord Irvine of Lairg
No relevant interests

Baroness Jay of Paddington
No relevant interests

Lord Lang of Monkton
No relevant interests

Lord Lester of Herne Hill
No relevant interests

Lord Lexden
No relevant interests

Lord Powell of Bayswater
Adviser of BAE Systems

Baroness Wheatcroft
Non-executive director of St James's Place plc (financial services company which does business in Scotland)

Deputy Chairman of the British Museum

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at www.parliament.uk/hlconstitution and available for inspection at the Parliamentary Archives (020 7219 5341).

Evidence received by the committee is listed below in order of receipt and in alphabetical order. Those witnesses with * gave both oral and written evidence. Those with ** gave oral evidence and did not submit written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

**	QQ 1–15	Rt Hon. Lord Hope of Craighead KT
**		Professor Iain McLean
*	QQ 16–26	Professor Alan Boyle
**		Professor Michael Keating
*		Professor Stephen Tierney
**	QQ 27–44	Rt Hon. Alistair Carmichael MP
**		Rt Hon. Lord Wallace of Tankerness QC
**	QQ 45–65	Mr Alex Massie
**		Ms Mandy Rhodes
*		Mr David Torrance

Alphabetical list of all witnesses

*	Professor Alan Boyle
	Dame Rosemary Butler AM
	Campaign for an English Parliament
	Mr Ian Campbell CMG
**	Rt Hon. Alistair Carmichael MP
	Mr Stewart Connell
**	Rt Hon. Lord Hope of Craighead KT
**	Professor Michael Keating
	Rt Hon. Lord Mackay of Clashfern KT
**	Mr Alex Massie
**	Professor Iain McLean
**	Ms Mandy Rhodes
	Scottish Global Forum
	Scottish Government
	Mr Donald Shell
	The English Democrats
	The English Lobby

The Law Society of Scotland

- * Professor Stephen Tierney
 - * Mr David Torrance
 - ** Rt Hon. Lord Wallace of Tankerness QC
- Mr Barry Winetrobe

APPENDIX 3: CALL FOR EVIDENCE

The House of Lords Select Committee on the Constitution, chaired by Baroness Jay of Paddington, is beginning an inquiry into the constitutional implications for the remainder of the United Kingdom of the transition to independence for Scotland in the event of a “yes” vote in the referendum on 18 September 2014. The committee invites interested organisations and individuals to submit written evidence as part of the inquiry.

In November 2013 the Scottish Government published their white paper *Scotland’s Future: Your Guide to an Independent Scotland*. This sets out a timetable, if there is a “yes” vote on 18 September 2014, for full independence for Scotland from 24 March 2016, ahead of the scheduled Scottish Parliament election in May 2016.

Independence for Scotland would have a significant constitutional impact on the remainder of the UK. The committee will be seeking to inform debate on these matters through its inquiry and report.

The committee is seeking written submissions on the following questions, which are predicated on there being a “yes” vote:

Negotiations

Is the timetable of independence by 24 March 2016 realistic?

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

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

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

Assets and liabilities, and shared services

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

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

Parliament

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

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

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

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

The committee’s inquiry is focused. It will not cover the issue of an independent Scotland’s membership of the European Union nor other aspects of its

international relations. Nor will the committee examine the internal constitutional arrangements of an independent Scotland or the constitutional implications of a “no” vote (for example on devolution). The committee may turn to these or other related matters in due course.

The committee understands that under public international law institutions of the United Kingdom would, in the event of Scottish independence, become institutions of the remainder of the UK. The UK’s assets and liabilities would fall to be apportioned equitably between Scotland and the remainder of the UK, subject to negotiations. An exception to the latter point is that Government assets fixed in Scotland would become assets of the new Scottish state. The committee invites those giving written evidence to comment on the above.

Written evidence is sought by 28 February 2014. Public hearings are expected to be held in March 2014. The committee aims to report to the House, with recommendations, around Easter 2014. The report will receive a response from the Government and is expected to be debated in the House of Lords.

You need not address all the questions. The committee would welcome other relevant views which you think the committee should be aware of.

You may follow the progress of the inquiry at:

<http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/>