REFORMATION OF THE UK JUDICIARY AND ITS EFFECT ON PATENT LITIGATION

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I. ABSTRACT

The United Kingdom ("UK") has recently undergone unprecedented constitutional reform. This reform includes significant changes to the relationship between the UK judiciary and legislative branches of government. This paper attempts to shed light on the likely effects of these changes on UK jurisprudence and, more specifically, patent litigation in the UK. Part I frames the question which this work attempts to answer and the motivation behind the question. Part II discusses the structure of the UK legal system before the most recent and significant constitutional reform. Part III outlines the post-reform structure, emphasizing the key post-reform differences in the judiciary. Part IV evaluates trends resulting from and effects of similar constitutional reform in the United States ("US") and discusses the likelihood of similar trends and effects being experienced in the UK. Part V provides conclusory remarks.

II. INTRODUCTION

Over the past decade, the United Kingdom has undergone unprecedented constitutional reform. The most recent reforms have focused on the establishment of judicial independence, and in particular, the independence of the UK Supreme Court from Parliament. At least on a superficial level, similar reforms were undertaken in the United States less than one hundred years ago.

Accordingly, the questions are raised – how will the most recent constitutional reform affect UK jurisprudence? Will jurisprudential trends following similar reform in the US equally apply to UK jurisprudence? And, with an eye towards intellectual property law, how will constitutional reform affect future patent litigation in the UK?

Each of these questions is explored herein. For a complete understanding, we begin with the structure of the UK legal system prior to the implementation of structural judicial independence.

III. THE STRUCTURE OF THE UK LEGAL SYSTEM: PRE-OCTOBER 1, 2009

To understand the structure of the UK legal system it is appropriate to begin with first principles that permeate

throughout the remaining discussion: the multi-faceted UK constitution and the principle of parliamentary supremacy. Subsequently, the discussion continues with the UK legal and political systems, which stand on the pillars of these first principles. Until October of 2009, the body of the legal and political system, that is, the legislative, executive, and judicial functions of government, could be summarized into a single word having omnipotent stature: Parliament.

A. First Principles

1. The Structure of the UK Constitution

The UK constitution is undoubtedly unique. Unlike almost every other developed country in the world, the constitution is not a single, unitary instrument.[1] Rather, the UK constitution comprises a multitude of distinct, independent sources. Such a constitution is often referred to as an "unwritten" constitution.[2]

The sources of the UK's unwritten constitution are numerous: Acts of Parliament, customs of Parliament, judicial decisions, the principle of Common Law, Conventions, and according to one commentary, "*ad hoc* measures and practical arrangements."[3] For example, the rights of UK citizens today can be found in sources such as the Magna Carta, issued in 1215, and the English Bill of Rights, passed in 1689.[4]

Due to its structure, the UK constitution continually evolves. Indeed, since the late 1990's the rate of constitutional change has been unprecedented.[5] For example, in 1998, Parliament enacted the Human Rights Act,[6] which "fundamentally change[d] the way the UK system of justice works" by enabling individuals to bring

[1] ANTHONY KING, THE BRITISH CONSTITUTION 5 (2007). The following countries all have constitutions that are comprised of one document. *See, e.g.*, U.S. CONST.; AUSTRALIAN CONSTITUTION; 1958 CONST. (Fr.); XIANFA [CONSTITUTION] (1982) (China).

[2] ANTHONY KING, THE BRITISH CONSTITUTION 5 (2007). *See, e.g.*, Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 13839 (2009).

[3] LESLIE WOLF-PHILLIPS, CONSTITUTIONS OF MODERN STATES: SELECTED TEXTS AND COMMENTARY 182 (1968); Jane Pek, Note, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979 (2008).

[4] MAGNA CARTA, (1215) (Eng.); ENGLISH BILL OF RIGHTS, (1689) (Eng. & Wales).

[5] Rt. Hon. Lord Goldsmith QC, *Keynote Address*, 59 STAN. L. REV. 1155, 1157 (2007).

[6] Human Rights Act, 1998, c. 42 (Eng.).

in UK courts, instead of the European Court of Human Rights, violations of human rights articulated in the European Convention on Human Rights.[7] In 1999, Parliament enacted the House of Lords Act,[8] which substantially altered the composition of the House of Lords ("HOL") by removing hundreds of hereditary peers.[9] In 2000, Parliament enacted the Freedom of Information Act, which granted individuals broad rights to access information held by public bodies.[10] And, particularly notable for the purposes of this discussion, in 2005 Parliament passed the Constitutional Reform Act which, *inter alia*, transferred the judicial authority of the HOL to a newly formed UK Supreme Court.[11]

2. The Principle of Parliamentary Supremacy

In accordance with the principle of parliamentary supremacy, the UK Parliament is both legally supreme[12] and sovereign[13] with respect to all other branches of government. The essence of this doctrine thus embraces three different yet related principles. One is that Parliament wields "unbounded lawmaking power."[14] That is, Parliament may (theoretically[15]) enact *any* law, even those overturning British judicial decisions.[16] Two is that one Parliament cannot bind a subsequent Parliament.[17] That is, Parliament may not pass a law that cannot subsequently be altered or removed.[18] Three is that courts do not have the power

[7] JUSTICE, A GUIDE TO THE HUMAN RIGHTS ACT 1998: QUESTIONS AND ANSWERS 3, 18 (2000), *available at* http://www.justice.org.uk/images/pdfs/HRAINT.PDF.

[8] House of Lords Act, 1999, c. 34 (Eng.).

[9] *Annual Report 1999-2000*, PARLIAMENT.UK, http://www.publications.parliament.uk/pa/ld199900/ldbrief/10402.htm (last visited Mar. 6, 2011) (noting that the House of Lords Act removed 665 hereditary peers).

[10] Freedom of Information Act, 2000, c. 36, § 1 (Eng.).

[11] Constitutional Reform Act, 2005, c. 4 (Eng.).

[12] DAVID FELDMAN, ENGLISH PUBLIC LAW 142–43 (2004) ("'[S]upremecy' connotes [that it is] a body which is hierarchically above all others or which has an authority greater than that of its rivals.").

[13] *Id.* ("'Sovereignty' . . . suggests omnipotence [or] the ability to do anything.").

[14] Mark Elliott, *Bicameralism, Sovereignty, and the Unwritten Constitution*, 5 INT'L J. CONST. L. 370, 373 (2007); Michael Skold, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?* 39 CONN. L. REV. 2149, 2152 (2007).

[15] In practice, Parliament is likely bound by political realities.

[16] Skold, *supra* note 14, at 2162.

[17] *Id.*

[18] *Id.*

of judicial review over Acts of Parliament.[19] That is, any law passed by Parliament must be followed by the courts.

The doctrine of parliamentary supremacy lies in stark contrast to the constitutional framework of the US. For example, where Parliament has "unbounded lawmaking power," the US Congress may only pass bills in accordance with the powers vested in them by the US Constitution.[20] Similarly, where UK courts do not have the power of judicial review, US courts have certainly claimed[21] and exercised[22] such power.

Throughout English history, various governmental institutions, including the courts, have attempted to deviate from the principle of parliamentary supremacy.[23] However, their attempts have always been in vain.[24] A recent example is found in *Regina (Jackson) v. Attorney General*.[25]

In *Jackson*, the plaintiffs urged the HOL to declare the Parliament Act of 1949 as "not an Act of Parliament and consequently of no legal effect."[26] As a brief background, "[p]rior to 1911 a Bill could become an Act of Parliament only after having been passed by [both the House of Commons ("HOC") and the HOL] and assented to by the Monarch."[27] Section 2 of the Parliament Act of 1911 subsequently diminished the authority of the HOL. In particular, Section 2 laid down circumstances in which the HOL could only delay certain bills for a maximum of two years before enactment.[28] The 1949 Act was enacted via this procedure.[29] However, the 1949 Act functioned to amend Section 2 of the Parliament Act of 1911 so as to *further* diminish the

[19] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (8th ed. 1915).

[20] *See* Elliot, *supra* note 14; U.S. CONST. art. I.

[21] Marbury v. Madison, 5 U.S. 137, 177–78, 180 (1803).

[22] *See, e.g.*, United States. v. Ferreira, 54 U.S. 40, 52–53 (1851); United States v. Klein, 80 U.S. 128, 142, 147 (1871); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 964–67 (1983); Thompson v. W. States Med. Ctr., 535 U.S. 357, 376–77 (2002).

[23] DICEY, *supra* note 19, at 11 ("The King, each House of Parliament, the Constituencies, and the Law Courts, either have at one time claimed, or might appear to claim, independent legislative power.").

[24] *Id.* ("It will be found, however, on examination that the claim can in none of these cases be made good.").

[25] Regina (Jackson) v. Attorney General, [2005] UKHL 56, [2006] 1 A.C. 262 (H.L.) (appeal taken from Eng.).

[26] *Id.*

[27] *Id.*

[28] Parliament Act, 1911, 1 & 2 Geo. 5, c. 13, § 2 (Eng.).

[29] *Regina*, [2005] UKHL 56, [2006] 1 A.C. at 264–65.

authority of the HOL by reducing the delay period from two years to one year.[30] Plaintiffs argued that the 1949 Act was not an Act of Parliament since the provisions of the 1911 Act had been relied on to enact it, whereas the 1911 Act could only be amended with the consent of the HOL.[31] In rejecting this argument and refusing to find the 1949 Act not an Act of Parliament, the HOL held that the 1911 Act did not preclude use of Section 2 of the 1911 Act to amend itself.[32] In other words, the HOL refused to not enforce an Act of Parliament, recognizing that in its sovereignty, Parliament even has the power to "redesign itself."[33]

Arguably, the legislative supremacy of Parliament has recently been eroded.

In 1972, Parliament enacted the European Communities Act of 1972.[34] The European Communities Act, *inter alia*, enables Parliament to enact legislation which implements European law into UK law.[35] Notably, Section 2(4) of the 1972 Act limits the legislative authority of Parliament by requiring any such legislation to be construed and have effect subject to European Law which has direct effect (i.e., law which requires no action by Parliament to have legal effect) in the UK.[36]

The legislative limiting function of the European Communities Act has been confirmed by the HOL and the European Court of Justice ("ECJ"). In *Factortame*, the ECJ held that national courts, such as UK courts, have a duty to set aside national laws which deny the granting of interim relief in order to safeguard Community rights when waiting for a decision by the ECJ.[37] In responding to public criticism and affirming the ECJ's holding, the HOL confirmed the supremacy of European law over UK law and the authority of UK courts to refuse to enforce UK law where superseded by conflicting European law.[38]

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[30] *Id.* at 271–72.

[31] *Id.* at 264–65.

[32] *Id.* at 285–86, 293, 310, 319, 327.

[33] *Id.* at 318 (according to Baroness Hale, "[i]f, as we must . . . start from the proposition that Parliament can do anything, it follows that" "there is no reason why Parliament should not decide to redesign itself").

[34] European Communities Act, 1972, c. 68 (Eng.).

[35] *Id.* § 2(2).

[36] *Id.* § 2(4).

[37] Case C-213/89, The Queen v. Sec'y of State for Transp. *ex parte* Factortame Ltd., 1990 E.C.R. I-2433, [1990] 2 Lloyds Rep 351, 3 C.M.L.R. 1 [23] (1990).

[38] Regina v. Sec'y of State for Transp. *ex parte* Factortame Ltd. (Interim Relief Order), [1990] UKHL 7 (H.L.) (1990), *available at* http://www.ba

Further, in 1998, Parliament enacted the Human Rights Act.[39] The Human Rights Act was enacted "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights" ("Convention").[40] The 1998 Act does this by enabling individuals to sue public bodies that have violated any of the human rights articulated in the Convention in UK courts.[41] Notably, the 1998 Act also gives UK courts the power to issue a "declaration of incompatibility" where a court determines a piece of legislation is incompatible with a Convention right.[42] Although a declaration of incompatibility fails to actually render the legislation invalid,[43] such a finding would likely have a powerful effect on public and political opinion, consequently encouraging Parliament to address the root problem.

The most recent theory on parliamentary sovereignty endorsed by UK courts[44] is that there exists a hierarchy in the Acts of Parliament.[45] In accordance with this concept, some Acts are considered "non-constitutional" while others are "constitutional." Where an Act is considered "non-constitutional," subsequent Acts of Parliament may impliedly repeal these non-constitutional Acts if they are inconsistent with the subsequent Acts.[46] In contrast, where an Act is considered "constitutional," subsequent Acts of Parliament may *not* impliedly repeal inconsistent constitutional Acts.[47] Rather, Parliament must *expressly* repeal the previous Acts if so desired.[48]

Constitutional Acts have been identified as those "which (a) condition[ ] the legal relationship between citizen and state in some general, overarching manner, or (b) enlarge[ ] or diminish[ ] the scope of what we would now regard as fundamental

ilii.org/uk/cases/UKHL/1990/7.html ("Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.").

39 Human Rights Act, 1998, c. 42 (Eng.).

40 *Id.*

41 *Id.* § 7(a)-(b).

42 *Id.* § 4.

43 *Id.*

44 This theory was established by the High Court of Justice, and not explicitly endorsed by the House of Lords or the European Court of Justice. Thoburn v. Sunderland City Council, [2002] EWHC 195 (Admin), [2003] Q.B. 151 at 186 (Eng.).

45 *Id.* at 186.

46 *Id.*

47 *Id.* at 186–87.

48 *Id.*

constitutional rights."[49] Such Acts include, for example, the Magna Carta, the Bill of Rights of 1689, the Parliament Act of 1972, and the Human Rights Act of 1998.[50] UK courts thus arguably have the authority to refuse to enforce legislation that is inconsistent with these "constitutional" statutes—similar to US courts' authority to refuse to enforce legislation that is inconsistent with the US Constitution.

Notwithstanding these potential detractions from parliamentary supremacy, it is still possible that Parliament can freely amend or repeal the Acts underlying these alleged "erosions" of parliamentary supremacy. That is, Parliament, at least theoretically, may freely amend or repeal the European Communities Act of 1972, the Human Rights Act of 1998, and the like.

A. The UK Parliament

The UK Parliament, or more precisely, the Queen-in-Parliament,[51] comprises three (almost) distinct bodies: the HOL, the HOC, and the Monarch. The HOL and the HOC have legislative roles.[52] Generally, members of Parliament may introduce bills into either the HOC or the HOL,[53] and mutual consent is required before Bills may be passed.[54] The HOL also provides a judicial role—the court of last resort.[55] The Monarch holds various powers over the government and people of the UK, including holding Royal Assent—a final requirement for the enactment of Bills following passage by the Houses.[56] Figure 1 illustrates the composition of the Parliament-in Queen prior to October 1, 2009.

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[49] *Id.* at 186.

[50] *Id.*

[51] S.H. BAILEY & M.J. GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 261 (3rd ed. 1996).

[52] *The Two-House System*, PARLIAMENT.UK, http://www.parliament.uk/about/how/role/system/ (last visited Mar. 6, 2011).

[53] BAILEY & GUNN, *supra* note 51, at 273.

[54] *Passage of a Bill,* PARLIAMENT.UK, http://www.parliament.uk/about/how/laws/passage-bill/ (last visited Mar. 9, 2011).

[55] House of Lords, *The Work of the House of Lords –its Role, Functions and Powers*1 (2003), *available at* http://www.parliament.uk/documents/lords-information-office/hoflbprole.pdf.

[56] *Royal Assent,* PARLIAMENT.UK, http://www.parliament.uk/about/how/laws/passage-bill/commons/coms-royal-assent/ (last visited Mar. 6, 2011).

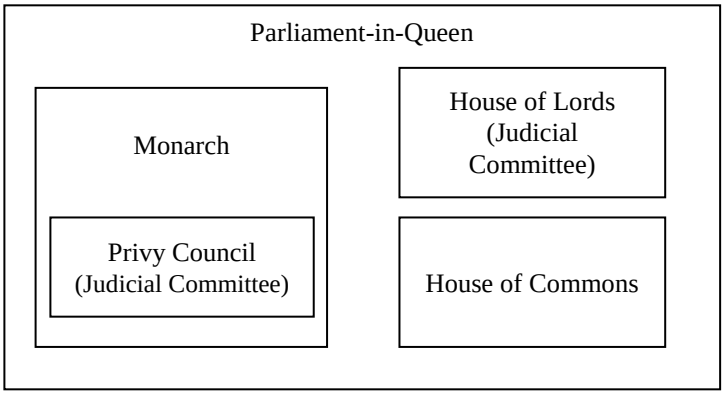

Figure 1.Parliament-in-Queen prior to October 1, 2009.

1. House of Lords

i. Composition

The composition of the HOL is, and always has been, distinctive and fluid.[57] Most recently, the HOL comprises two types of lords, neither of which is elected: Lords Spiritual and Lords Temporal.

Lords Spiritual hold seats by virtue of their religious backgrounds.[58] While other churches, such as the Church of Ireland used to have members that held seats as Lord Spirituals,[59] only members from the Church of England currently hold such seats.[60] There are 26 seats for Lords Spiritual.[61] While once very influential in the HOL, the influence of the Lords Spiritual has declined over the centuries; however, they do still

[57] THOMAS ALFRED SPALDING, THE HOUSE OF LORDS: A RETROSPECT AND A FORECAST 10–11 (1894).

[58] LUCINDA MAER & CHINTAN MAKWANA, RELIGIOUS REPRESENTATION IN THE HOUSE OF LORDS 3 (2009), http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snpc-05172.pdf.

[59] *See* Union with Ireland Act, 1800, 39 & 40 Geo. 3, c. 67 (Scot.) (enabling one archbishop and three bishops from the Church of Ireland to sit as a Lords Spiritual).

[60] *Different Types of Lords,* PARLIAMENT.UK, http://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/ (last visited Mar. 6, 2011).

[61] MAER & MAKWANA, *supra* note 58, at 3.

retain, and sometimes exercise, a right to speak and vote on legislative actions.[62]

Lords Temporal comprise three different classes of Lords. The first class, historically by far the largest having hundreds of members, has seats by virtue of a hereditary right or via letters patent conferring hereditary succession.[63] No formal rules exist for selecting these members, resulting in what has been characterized as an "erratic and unsystematic" selection.[64] According to some commentators, by way of such a selection process, these members often lack meritorious credentials.[65] Due at least in part to the recognition that hereditary rights to sit and vote have little place in a modern democracy, the number of hereditary peers in the HOL has been reduced drastically over the last decade.[66] It is expected that the remaining hereditary peers will lose seats in the near future.[67]

The second, relatively modern class[68] comprises members who hold their seat for life.[69] These members are appointed by the Queen after nomination by the Prime Minister.[70] The number of possible life peerages is not fixed; accordingly, the size of this class has fluctuated from tens to hundreds.[71] As the Prime Minister may nominate individuals to life peerages such that they may function in the HOL, effectively, the provision for such seats increases the ability of a government-in-power to stack the HOL with individuals who support the government's initiatives.[72]

The third and final class comprises members who perform judicial functions; these are identified as Lords of Appeal in

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[62] Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 28–29 (2007).

[63] SPALDING, *supra* note 57, at 10–11.

[64] *Id.* at 11–12.

[65] *Id.* ("Nothing is more remarkable than the mediocrity of the men who have been promoted to the Upper House during recent years.").

[66] *See* House of Lords Act, 1999, c. 34 (Eng.) (removing several hundred hereditary peers); Elliott, *supra* note 14, at 371.

[67] Elliott, *supra* note 14, at 371.

[68] This class was established in 1958. *See infra* note 69.

[69] Life Peerages Act, 1958, 6 & 7 Eliz. 2, c. 21 (Eng.).

[70] Elliott, *supra* note 14, at 372.

[71] *See* David Boothroyd, *Life Peerages: Created Under the Life Peerages Act 1958*, http://www.election.demon.co.uk/lifepeers.html (last visited Mar. 6, 2011) (listing all of the Life Peerages created after the enactment of the Life Peerages Act 1958, along with the birth and death dates of each holder).

[72] Lesley Dingle & Bradley Miller, *A Summary of Recent Constitutional Reform in the United Kingdom*, 33 INT'L J. LEGAL INFO. 71, 77 (2005).

Ordinary.[73] The Lords of Appeal in Ordinary, or "Law Lords," are further described below.

ii. Legislative Authority

The HOL has historically held authority to amend and reject legislation approved by the HOC.[74] However, Parliament (i.e., the HOC and its influence over the HOL) has significantly diminished this authority.

Beginning in the early twentieth century, the Parliament Act of 1911 provided that "Money Bills" could be enacted without the consent of the HOL whatsoever.[75] Similarly, a broader class of Bills, that is "any Public Bill," could become an Act of Parliament without the consent of the HOL, although the HOL could delay the Bill for at most two years.[76] In articulating the extreme impact on the HOL by the Parliament Act of 1911, Baroness Hale confirmed that the objective of this Act was to "'ensure that the elected House could always get its way in the end.'"[77]

Then, in the mid twentieth century, the Parliament Act of 1949 further limited the legislative authority of the HOL by amending the 1911 Act such that the HOL could only delay "any Public Bill" for at most one year.[78] Although this is the last piece of legislation directly influencing the legislative authority of the HOL, the trend toward reducing the legislative authority of the HOL is likely to continue. Indeed, calls have recently been made for further reductions in the Upper House's legislative authority.[79]

iii. Judicial Authority

The judicial authority of the HOL is "as old as Parliament itself."[80] Indeed, such authority originated when medieval kings

[73] Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59, § 6 (Eng.).

[74] VERNON BOGDANOR, THE BRITISH CONSTITUTION 191 (2003); *See* HOUSE OF LORDS, THE HISTORY OF THE HOUSE OF LORDS (2008), *available at* http://www.parliament.uk/documents/lords-information-office/hoflbphistory.pdf (2008).

[75] The Parliament Act, 1911, 1 & 2 Geo 5 Eliz. 2, c. 13, § 1(1) (Eng.).

[76] *Id.* § 2(1).

[77] Elliott, *supra* note 14, at 372.

[78] The Parliament Act, 1949, 12, 13, & 14 Geo 6, c. 103 (Eng.).

[79] *Lords Reform Moves Up the Agenda*, EPOLITIX.COM (Mar. 26, 2006), http://www.epolitix.com/latestnews/article-detail/newsarticle/lords-reform-moves-up-the-agenda/?no_cache=1 (last visited Mar. 6, 2011).

[80] LOUIS BLOOM-COOPER, Q.C., & GAVIN DREWRY, FINAL APPEAL: A STUDY OF

delegated, to an advisory and administrative body identified as the "Great Council," the authority to respond to petitions by subjects of the Monarch.[81] More recently, (i.e., as of October 2009), the HOL was structured in accordance with the Appellate Jurisdiction Act of 1876[82] and its amendments.[83]

The 1876 Act provided for a number of Law Lords within the HOL for performing the judicial functions of the HOL.[84] Although technically lay members of the HOL had a right to vote on judicial matters, the practice of non-Law Lords successfully exercising such a right had been abolished in practice by no later than 1844.[85] As of October 2009, the HOL included eleven Law Lords, even though the 1876 Act and its amendments provided for twelve.[86]

Technically, the Law Lords were appointed to their position by the Queen. However, the appointments made by the Queen were done so on the advice on the Prime Minister. The Prime Minister, in turn, would provide such advice only after consulting with the Lord Chancellor.[87] Accordingly, the Lord Chancellor had the "effective voice" in determining appointments.[88] Once appointed, in addition to having a judicial role, the Law Lords were also entitled to sit and vote in the HOL as a life peer.[89]

THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY 18 (1972).

[81] *Id.*

[82] Lord Justice Leveson, Senior Presiding Judge for Eng. &Wales, *Dicey Revisited: Separation of Powers for the 21st Century*, University of Liverpool Law School (Nov. 28, 2008), *available at* http://www.judiciary.gov.uk/NR/rdonlyres/BCC0868C-779E-4795-A9AA-92B67D2F11B7/0/spjliverpooluni281108.pdf.

[83] Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59 (Eng.). *See also* The Administration of Justice Act, 1969, c. 58 (Eng.) (increasing the jurisdiction of county courts); The Administration of Justice (Appeals) Act, 1934, 24 & 25 Geo. 5, c. 40 (Eng.) (requiring that leave be granted by the House of Lords or the Court of Appeals before an appeal is brought from the Court of Appeal to the House of Lords); The Criminal Appeal Act, 1907, 7 Edw. 7, c. 23 (Eng.) (creating a criminal appellate procedure).

[84] The Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59, § 6 (Eng.).

[85] BAILEY & GUNN, *supra* note 51, at 99.

[86] The Lords included Lord Hope of Craighead, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lady Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Dyson, Lord Phillips of Worth Maltravers, Lord Collins of Mapesbury, and Lord Kerr of Tonaghmore. *Biographies of the Justices*, THE SUPREME COURT, http://www.supremecourt.gov.uk/about/biographies.html (last visited Mar. 6, 2011).

[87] BAILEY & GUNN, *supra* note 51, at 227.

[88] *Id.*

[89] *Id.* at 222.

The 1876 Act provided the HOL with broad appellate jurisdiction. In particular, it provided the HOL with jurisdiction to hear appeals from (1) the English Court of Appeal, (2) in certain situations, the English High Court, (3) the English Courts-Martial Appeal Court, (4) the Scottish Court of Session (highest civil court), (5) the Court of Appeal in Northern Ireland (highest court), and (6) in certain situations, the High Court of Justice in Northern Ireland (similar to the English High Court).[90] Criminal cases in Scotland could not be appealed to the HOL.[91] In contrast to its appellate jurisdiction, the 1876 Act provided the HOL with relatively narrow original jurisdiction. In particular, the Act only provided the HOL with original jurisdiction to hear peerage claims and conduct impeachment proceedings.[92]

2. House of Commons

i. Composition

The HOC comprises a number of members who, through general elections, are elected to represent the public.[93] The United Kingdom comprises 650 constituencies, where a single member of the HOC represents each constituency and is elected by a majority of the voting population in that constituency.[94] Once elected, members may retain their position until losing a majority vote in a subsequent election, which must occur not more than five years following a previous election, or until voluntarily relinquishing it.[95]

In addition to determining the members of the HOC, each election also functions to determine the membership of the executive branch; that is, following each election, the Monarch asks the leader of the majority party to become the Prime Minister and subsequently select a government.[96] The government then wields a "commanding role" in the HOC to ensure the majority party can press forward with the issues on

[90] *Id.* at 98–99.
[91] *Id.* at 99 n.83.
[92] *Id.* at 101.
[93] *See* Elliott, *supra* note 14, at 371.
[94] HOUSE OF COMMONS INFO. OFFICE, THE HOUSE OF COMMONS AND THE RIGHT TO VOTE 4 (2010), *available at* http://www.parliament.uk/documents/commons-information-office/g01.pdf .
[95] *Id.* at 2, 4.
[96] *Id.* at 2.

which it was elected.[97]

ii. Legislative authority

The authority of Parliament to pass laws for the Monarch dates as far back as the early thirteenth Century, when King Henry III of England established a Parliament that addressed, *inter alia*, the granting of taxes.[98] Evolving from this tool of the Monarch to the predominant force of legislating, the legislative authority of the HOC was effectively established by the fifteenth Century.[99] By that point, it was necessary for the HOC to consent to legislation prior to enactment.[100]

The legislating authority of the HOC has historically been tempered by the amending and veto authority of the HOL.[101] However, as previously discussed, the authority of the HOL to veto legislation passed by the HOC was substantially diminished by the Acts of Parliament of 1911 and 1949. Considering these legislative acts in combination with the principle of mandatory Royal Assent and the doctrine of parliamentary sovereignty, as of October 2009 the HOC may effectively pass any legislation in their interest.

iii. Monarch

The third and final element of the Queen-in-Parliament comprises the Queen. The Queen's powers include prerogative powers which, although no single accepted definition exists,[102] generally comprise a broad range of powers such as the power to appoint and dismiss Ministers, the power to declare war, the power to make treaties, etc.[103]

Among the Queen's prerogative powers includes the power of Royal Assent.[104] For a bill to be enacted, the Queen's Royal

97 *Id.*

98 Gwilym Dodd, *The Birth of Parliament*, BBC, http://www.bbc.co.uk/history/british/middle_ages/birth_of_parliament_01.shtml (last updated Feb. 17, 2011).

99 BAILEY & GUNN, *supra* note 51, at 259.

100 *Id.*

101 *See Id.* at 274, 276.

102 *PASC Publishes Government Defence of its Sweeping Prerogative Powers*, PARLIAMENT.UK,http://www.parliament.uk/business/committees/committees-archive/public-administration-select-committee/pa sc-19/ (last visited Mar. 6, 2011).

103 *Id.*

104 *Id.*

Assent is required.[105] No provisions exist for overriding the Queen's refusal to provide Royal Assent.[106] However, once a Bill has been properly approved by both the HOL and the HOC, the governing constitutional rule is that the Queen shall always provide her consent.[107] Indeed, the Monarch has not refused to provide Royal Assent since 1708, when Queen Anne vetoed a Bill "'for the settling of Militia in Scotland.'"[108] Accordingly, to some degree, the Royal Assent is a mere formality representative of very little *de facto* legislative authority.

In general, the Queen only exercises her powers after having been counseled by appropriate advisors.[109] The advisors to the Queen are known as the Privy Council which, in addition to having an advisory role, also holds a judicial role. Accordingly, a brief description of the Privy Council and its judicial function is appropriate.

iv. Privy Council

The Privy Council dates back to "the earliest days of the monarchy" where it consisted of individuals appointed by the monarchy to advise the monarchy on state issues.[110] In its current form, the Privy Council primarily functions to make government regulations via statutory instruments in accordance with Acts of Parliament.[111] The Privy Council also performs judicial functions via a Judicial Committee.

The Privy Council generally consists of current and previous Cabinet members, but also includes members of the royal family, senior judges, senior members of the Church of England, and the like.[112] Membership is obtained via appointment by the Queen who acts on advice from the Prime Minister, and the appointment lasts for life.[113] While the number of members of

105 *Queen in Parliament*, THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, http://www.royal.gov.uk/MonarchUK/QueenandGovernment/QueeninParliament.aspx (last visited Mar. 9, 2011).

106 Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 FORDHAM L. REV. 1697, 1702–03 (2006).

107 *Id.*

108 *Id.* at 1703 & n.24.

109 *Id.* at 1704.

110 OONAGH GAY & ANWEN REES, THE PRIVY COUNCIL 2 (July 5, 2005), *available at* http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-3708.pdf.

111 *See id.* at 4.

112 *Id.* at 3.

113 *Id.*

the Privy Council is not fixed, as of 2005 the Privy Council comprised 420 members.[114]

v. Judicial Committee of the Privy Council

The majority of the functions undertaken by the Privy Council are performed by committees.[115] One such committee, which performs the judicial functions of the Privy Council, is the Judicial Committee of the Privy Council, which was established in 1833.[116] The Judicial Committee is generally composed of individuals performing a judicial role. For example, Law Lords, the Lord Chancellor, and members of the Privy Council who hold "high judicial office," are included in the committee.[117]

The Judicial Committee originally had broad appellate jurisdiction to hear appeals from Commonwealth countries.[118] Over the past century, however, such jurisdiction has dwindled as Commonwealth countries, in establishing their independence, have removed this avenue of appeal.[119] Simultaneously, the Judicial Committee's appellate jurisdiction to hear appeals for other subject matter has recently broadened. For example, the Judicial Committee now has jurisdiction to hear appeals from various professional bodies.[120] Prior to October 2009, the Judicial

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[114] *Id.*

[115] *Id.* at 5.

[116] Judicial Committee Act, 1833, 3 & 4, Will. 4, c. 41, § 1 (Eng.).

[117] *See* BAILEY & GUNN, *supra* note 51, at 102; *Membership*, PRIVY COUNCIL OFFICE, http://www.privy-council.org.uk/output/Page75.asp (last visited Mar. 6, 2011) (stating that the Law Lords "do most of the judicial work of the Judicial Committee").

[118] *See* GAY & REES, *supra* note 110, at 6; *see, e.g.*, Right Honourable Beverley McLachlin, Chief Justice of Can., *Remarks at the International Summit of High Courts: Appellate Review in Canada* 5 (Nov. 2010), *available at* http://www.summitofhighcourts.com/docs/papers/canada.pdf (stating that the Supreme Court of Canada is the court of last resort since Canada abolished appeals to the Judicial Committee of the Privy in 1949).

[119] Bryan Finlay, Q.C. & Frank E. Walwyn, WEIRFOULDS LLP, Presentation to the Judicial Education Institute of the Eastern Caribbean Supreme Court: *"Such As They Are Our Own": A Talk on Abolishing Canadian Appeals to the Privy Council* 1 (Feb, 8, 2008), *available at* http://www.eccourts.org/jei_doc/2008/book_launch/ATalkonAbolishingCanadianAppealstothePrivyCouncilbyBryanFinlayandFrankWalwyn.pdf (stating that Canada and India abolished appeals to the Judicial Committee in 1949, Malaysia abolished appeals in 1985, and Singapore did so in 1994); *see also Jurisdiction*, PRIVY COUNCIL OFFICE [hereinafter *Privy Council Jurisdiction*] http://www.privy-council.org.uk/output/Page32.asp (last visited Mar. 6, 2011) (stating that New Zealand abolished appeals to the Privy Council in 2003).

[120] ANDREW LE SUEUR, WHAT IS THE FUTURE FOR THE JUDICIAL COMMITTEE OF

Committee also had jurisdiction to hear devolution issues; that is, issues concerning the powers and functions of the legislative and executive authorities established in Scotland by the Scotland Act of 1998, the same in Northern Ireland by the Northern Ireland Act of 1998, and issues concerning the "competence and functions of the Assembly" in Wales as established by the Government of Wales Act 1998.[121]

B. The UK Court System

The English court system comprises a number of courts of first instance, a Court of Appeal for hearing most appeals from the courts of first instance, and the previously described Appellate Committee in the HOL. The particular court of first instance used, and whether a party has standing in the HOL, generally depends on the subject matter of the dispute.[122] The Judicial Committee of the Privy Council, as also already described, hears appeals from Commonwealth countries and devolution issues—subject matter for which the courts of first instance and HOL do not have jurisdiction.[123]

Figure 2 illustrates the English court system prior to October 1, 2009. For simplicity, various courts are not illustrated, such as coroners' courts,[124] courts martial,[125] and ecclesiastical

THE PRIVY COUNCIL? 9 (2001); *see, e.g.*, Dentists Act, 1984, c. 24, § 29(2)-(3) (Eng.) (providing for appeals from the Professional Conduct Committee to the Judicial Committee); Veterinary Surgeons Act, 1966, c. 36, § 17(1) (Eng.) (providing that disciplinary cases are appealable to the Judicial Committee); *see also* GAY & REES, *supra* note 110, at 6 (stating that the Judicial Committee "can hear appeals from the decisions of certain professional disciplinary bodies").

[121] *Privy Council Jurisdiction*, *supra* note 120; *see also* Scotland Act, 1998, c. 46, § 1 (Eng.) (establishing the Scottish Parliament); Northern Ireland Act, 1998, c. 47, § 5 (Eng.) (providing for the legislative powers of Northern Ireland); Government of Wales Act, 1998, c. 38, § 1 (Eng.)
(establishing the National Assembly for Wales).

[122] *See* GLENN DYMOND, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS 19–20 (2009), *available at* http://www.parliament.uk/documents/lords-library/lln2009-010appellate.pdf ("The Jurisdiction of the House [of Lords] extends to claims to Irish peerages, although peers of Ireland do not sit in the House.").

[123] *See Privy Council Jurisdiction*, *supra* note 120 (stating that the Judicial Committee hears devolutions issues through appeals from certain superior courts and through referrals by "certain appellate courts, including the House of Lords").

[124] G.E. Caraker, *The Coroner's Court in England and Wales: An Ancient Office That is Still Vigorous*, 37 A.B.A. J. 361, 361 (1951).

[125] *Q&A: Court Martial,* BBC NEWS (Dec. 1, 2005, 11:30 AM), http://news.bbc.co.uk/2/hi/uk_news/3809395.stm.

courts;[126] however, these are of minor importance to the present discussion. Moreover, the United Kingdom Intellectual Property Office ("UKIPO") is also not illustrated, even though it is authorized to provide opinions on patent infringement and validity.[127]

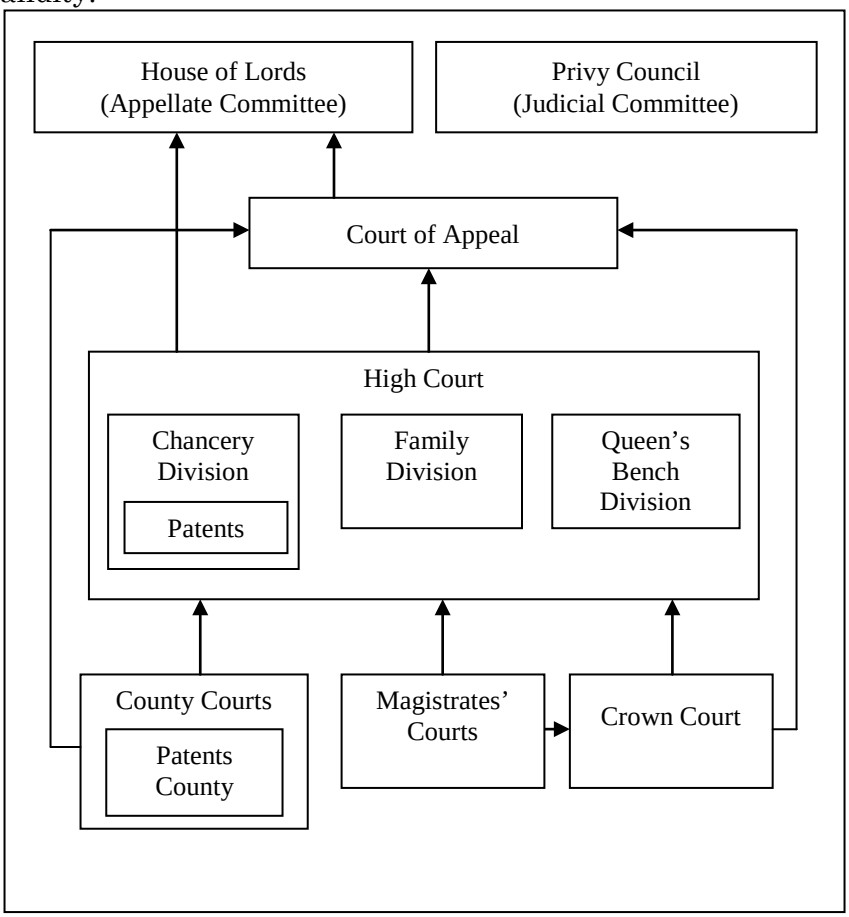

Figure 2. The English court system before October 1, 2009.

[126] Ecclesiastical Courts Jurisdiction Act, 1860, 23 & 24 Vict., c. 32, § 2 (Eng.)

[127] MEWBURN ELLIS LLP, VALIDITY AND INFRINGEMENT OPINIONS FROM THE UKIPO 1 (2008), *available at* http://www.mewburn.com/downloads/*UK_Patents_-_Validity_and_Infringement_Opinions_from_the_UKIPO.pdf*.

1. Magistrates' Courts

Magistrates' courts are courts of first instance for most "non-serious" criminal matters, where "serious" criminal matters are heard in the Crown Court and may be passed to the Crown Court from a magistrate court.[128] Magistrates' courts also have jurisdiction to hear some civil matters, such as those concerning family law, the recovery of debts, and the granting of business licenses.[129] Disputes in these courts are typically heard by a magistrate judge, who is not legally trained, but who is supported by legally trained law clerks.[130]

Appeals from magistrates' courts may be made to either a Crown Court or the High Court, depending again on the subject matter. For issues concerning a criminal conviction or sentence, appeals must be made to the Crown Court.[131] For issues concerning points of law or procedure, appeals must be made to the High Court (Queen's Bench Division).[132] For issues concerning family matters, appeals must be made to the High Court (Family Division).[133]

2. Crown Court

The Crown Court is the court of first instance for "serious" criminal matters.[134] This court also hears disputes passed to it by, or appealed from, a magistrate court.[135] Disputes in these courts are typically heard by a legally trained judge and a jury,[136] with the level of judge being circumscribed by the seriousness of the alleged crime. Less serious crimes are typically heard by Circuit Judges, whereas more serious crimes are heard by High Judges.[137] Appeals from the Crown Court may be made to the

[128] COUNCIL OF EUROPE PUBLISHING, JUDICIAL ORGANISATION IN EUROPE 99–100 (2000); *see also Legal System – in England*, CITIZENS ADVICE BUREAU, http://www.adviceguide.org.uk/index/your_rights/legal_system/courts_of_law.htm (last visited Mar. 6, 2011) [hereinafter *English Legal System*] (stating that some cases start in the magistrates' court but then go to the Crown Court for trial).

[129] COUNCIL OF EUROPE PUBLISHING, *supra* note 129, at 99.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] COUNCIL OF EUROPE PUBLISHING, *supra* note 129, at 99–100.

[134] Andy Boon & John Flood, *Trials of Strength: The Reconfiguration of Litigation as Contested Terrain*, 33 LAW & SOC'Y REV. 595, 597 (1999).

[135] COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 100.

[136] *See id.*

[137] *Id.*

Court of Appeal.[138]

3. County Courts

County courts are courts of first instance for "less complicated" civil matters.[139] The largest percentage of cases heard by county courts involve debt recovery, but the court also has jurisdiction to hear other civil matters, such as those concerning family law, property law, and bankruptcy law.[140]

Appeals from the County Court may be made to either the Court of Appeal or the High Court, depending on the subject matter. While most appeals must be made to the Court of Appeals, some appeals, such as those concerning bankruptcy law, must be made to the High Court.[141] Like the Crown Court, disputes may be heard by various types of judges, such as Circuit Judges and District Judges, depending on the complexity of the dispute.[142]

A Patents County Court ("PCC"), i.e., a county court having jurisdiction to hear patent disputes, was established in accordance with Section 287(1) of the Copyright, Designs, and Patents Act of 1988.[143] The court was established with the intention of creating a more streamlined and cost-effective mechanism for litigating relatively simple patent disputes.[144] The court has jurisdiction to hear patent disputes to the same extent as the High Court, and also jurisdiction to hear certain copyright, unregistered design, and breach of confidence cases.[145] As of 2009, the only county court having jurisdiction to hear patent disputes is the Central London County Court.[146] Appeals

138 *Id.*

139 *Id.* at 99; *see also* KAREL SCHELLE & ILONA SCHELLEOVÁ, HISTORY AND PRESENT OF JUDICIARY 27 (2009) (stating that the county courts are courts of first instance for civil cases not exceeding a certain value and less complicated divorces).

140 COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 99.

141 *Id.*

142 *Id.* at 99–100.

143 Patents, 1990, S.I. 1990/1496 (U.K.).

144 *See* VIVIEN IRISH, INTELLECTUAL PROPERTY RIGHTS FOR ENGINEERS 179, 183 (2d ed. 2005) (explaining that the County Court, which has all the powers of the High Court, employs a simplified procedure allowing smaller businesses to bring patent claims at a low cost).

145 CATHERINE COLSTON & KIRSTY MIDDLETON, MODERN INTELLECTUAL PROPERTY LAW 671 (2d ed. 2005).

146 JANE LAMBERT, ENFORCING INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE FOR BUSINESSES, INNOVATIVE AND CREATIVE INDIVIDUALS xviii (2009); *see also* Patents County Court (Designation and Jurisdiction) Order, 1994, S.I.

from the Patents County Court must be made to the Court of Appeals.[147] Unfortunately, data concerning the number of cases filed in, and appealed from the PCC could not be obtained.

4. High Court

The High Court is the court of first instance for "more complex" civil cases.[148] This court also has jurisdiction to hear appeals arising from various other courts, tribunals, and bodies or individuals performing public functions.[149] Appeals from the High Court must be made to the Court of Appeal.[150]

The High Court comprises three divisions: the Queen's Bench Division, the Chancery Division, and the Family Division. Each division has jurisdiction to hear appeals based again on subject matter. For example, the Queen's Bench Division, the largest Division, has jurisdiction to hear appeals concerning "a wide range of civil matters," such as those pertaining to contract law, commercial law, and Admiralty law.[151] The Chancery Division has jurisdiction to hear appeals concerning property law.[152] The Family Division has jurisdiction to hear divorce and matrimonial matters, as well as matters concerning children.[153]

Further, the Chancery Division includes a Patents Court. The Chancery Division Patents Court was established in accordance with Section 6(1)(a) of the Supreme Court Act of 1981.[154] The court has jurisdiction to hear patent disputes, as well as jurisdiction to hear disputes concerning "registered designs,

1994/1609 (U.K.) (designating the Central London County Court as a patents county court).

147 Michael Burdon, *UK Patents County Courts – Phoenix Risen?*, PATENT WORLD, July-Aug. 2003, at 2, *available at* http://www.olswang.com/pdfs/phoenix_risen.pdf; *see also* COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 101 (explaining that the Civil Division of the Court of Appeal hears decisions of the county courts).

148 *See* COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 100; *Overview of UK Courts and Tribunals System*, FINDLAW UK, http://www.findlaw.co.uk/law/dispute_resolution/courts_system/court_and_tribunals/500115.html (last visited Mar. 6, 2011) (stating that the High Court is "a court of first instance for cases of particular significance or value").

149 COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 101.

150 *Id.*

151 *Id.* at 100.

152 *See id.*; *English Law Research Guide*, TARLTON LAW LIBRARY,http://tarltonguides.law.utexas.edu/content.php?pid=105066&sid=812660 (last updated Dec. 8, 2010).

153 COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 100.

154 Supreme Court Act, 1981, c.54, § 6(1) (Eng.).

registered trademarks, passing-off, and copyright."[155] The Patents Court generally hears cases that are more complex than those pursued in the PCC.[156] Appeal from the Patents Court lies with the Court of Appeals.[157]

Figure 3 illustrates the number of new patent suits filed as first actions in the Chancery Division Patents Court, as well as the number of patent appeals heard at the Chancery Division Patents Court from the UKIPO, from 1999 to 2008. The number of new patent suits ranges from 54 to 238 per year, with an average of approximately 116 per year.[158] In contrast, the number of appeals from the UKIPO is relatively small. They range from 2 to 10 per year, with an average of approximately 5 per year.[159]

[155] IRISH, *supra* note 144, at 182.

[156] *See id.* at 183 ("Some say that the [PCC] is for simple cases only with no dispute as to facts or need for experts or disclosure of documents.").

[157] *Id.* at 184.

[158] *See Annual Reports*, DEP'T CONSTITUTIONAL AFFAIRS, http://www.dca.gov.uk/dept/depstrat.htm (last visited Mar. 6, 2011) (providing the data for the years 1999 to 2005); MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2006 32–33(2007) [hereinafter JUDICIAL AND COURT STATISTICS 2006], *available at* http://www.justice.gov.uk/publications/docs/judicial-court-stats-2006-tag.pdf;MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2007 34 (2008) [hereinafter JUDICIAL AND COURT STATISTICS 2007], *available at* http://www.justice.gov.uk/publications/docs/judicial-court-stats-2007-full.pdf; MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2008 34 (2009) [hereinafter JUDICIAL AND COURT STATISTICS 2008], *available at* http://www.justice.gov.uk/about/docs/judicial-court-stats-2008-full.pdf.

[159] *See* LAMBERT, *supra* note 146, at xiv; *Annual Reports*, *supra* note 158 (providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 33; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 34; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 34.

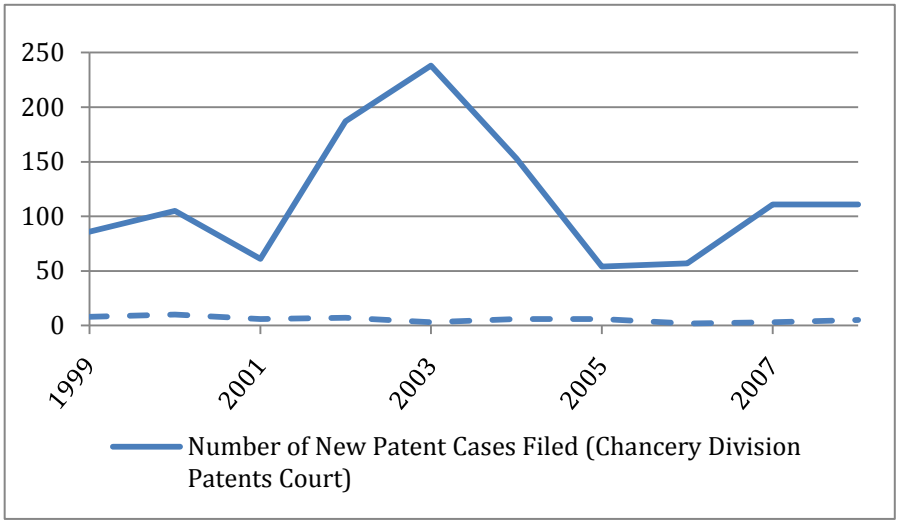

Figure 3. Number of new patent cases filed at the Chancery Division Patents Court, and number of appeals heard at the Chancery Division Patents Court from the UKIPO, since 1999.[160]

Figure 4 illustrates the total number of new patent cases heard at the Chancery Division Patents Court as well as the total number of new patent cases heard in US District Courts between 1999 and 2008. The number of cases heard at the Patents Court includes both first actions in the court as well as appeals from the UKIPO (i.e., the combination of cases illustrated in Figure 3) and ranges from 60 per year to 241 per year, with an average of approximately 122 per year.[161] In contrast, the number of cases filed in US District Courts is relatively large. They range from 2,318 in 1997 to 3,075 in 2004, with an average of approximately 2,652 per year.[162] Indeed, the number of patent cases filed in the US is—on average—two times an order of magnitude larger than

[160] *See Annual Reports*, *supra* note 158 (providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 33; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 34; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 34.

[161] *See Annual Reports*, *supra* note 158 (providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 33; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 34; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 34.

[162] RODNEY J. BOSCO, WALT BRATIC & H. JONATHAN REDWAY, PATENT DAMAGES 1 (2008).

those filed in the UK.[163]

A complete comparison between patent actions in courts of first instance for the UK and the US would include the number of suits filed in the PCC and with the Comptroller of Patents. As previously mentioned, however, data compiling the number of cases filed in the PCC could not be obtained. Notably, any modification to the illustrated comparison with regard to those cases brought before the Comptroller of Patents would likely be insubstantial since "this route is rarely used."[164]

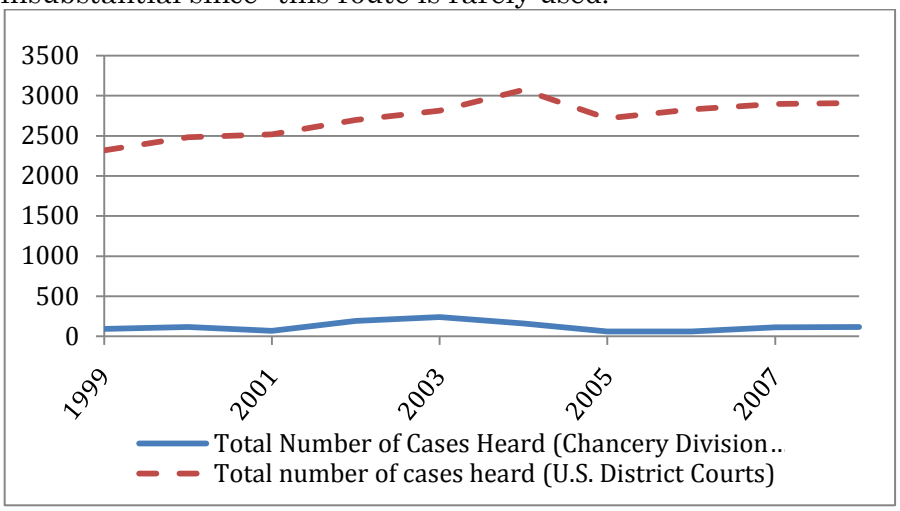

Figure 4.Total number of new patent cases heard at the Chancery Division Patents Court and at US District Court's since 1999.[165]

5. Court of Appeal

The Court of Appeal has jurisdiction to hear appeals from a number of courts, such as County Courts, the High Court, and the Crown Court. The Court of Appeal comprises two divisions: a civil division, which hears appeals mainly against decisions of the High Court and County Courts; and a criminal division,

[163] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 808 (1977) (defining an "order of magnitude" as "a range of magnitude extending from some value to ten times that value").

[164] *See* IRISH, *supra* note 144, at 182.

[165] *See* BOSCO, *supra* note 162, at 1; *Annual Reports*, *supra* note 158 (providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 33; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 34; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 34.

which hears appeals against conviction and sentence from the Crown court.[166]

Figure 5 illustrates the number of new patent appeals heard at the Court of Appeal from the Chancery Division Patents Court and the number of patent appeals heard at the US Court of Appeal for the Federal Circuit ("CAFC"). Appeals to the CAFC include appeals from the US District Courts as well as from the US International Trade Commission.[167] Appeals from the PCC to the Chancery Division are excluded since this data could not be obtained. However, as previously mentioned, the PCC is rarely used and thus the number of appeals from the court would likely be insignificant.

The number of appeals heard at the Chancery Division Patents Court ranges from 6 to 26 per year, with an average of 20 per year.[168] The number of appeals filed in the CAFC, on the other hand, is substantially larger. Between 2001 and 2010, they ranged from338 to 453 per year, with an average of approximately 411 per year.[169] Again, approximately two times an order of magnitude than the UK counte.

[166] COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 101.

[167] *Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited Mar. 6, 2011).

[168] *See Annual Reports*, *supra* note 158(providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 23; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 24; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 24.

[169] *Statistics*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, http://www.cafc.uscourts.gov/the-court/statistics.html (last visited Mar. 6, 2011).

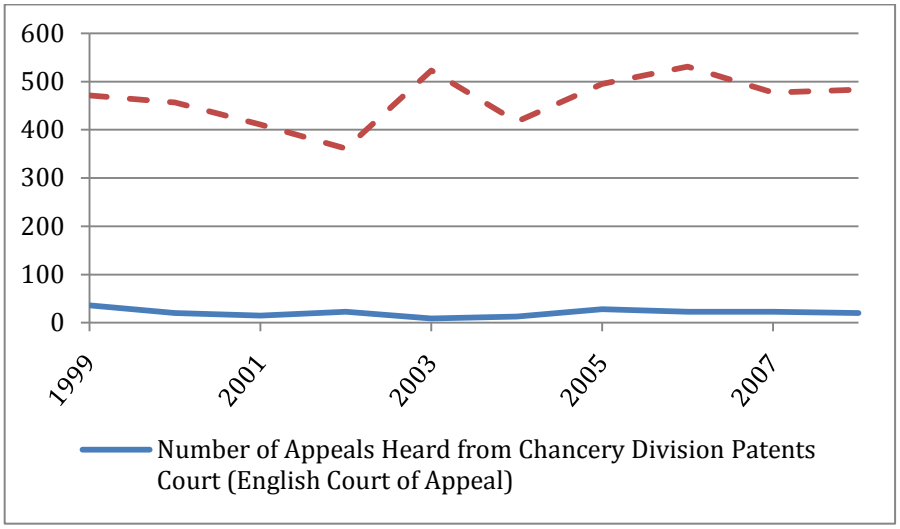

Figure 5.Number of new patent appeals heard at the English Court of Appeals from the Chancery Division Patents Court, and at the Federal Circuit Court of Appeals, since 1999.[170]

6. House of Lords (Appellate Committee)

The court of last resort as previously discussed, is the HOL.[171] The HOL hears appeals from the Court of Appeal and the High Court. For a case to be heard by the HOL, leave to appeal the HOL must be granted by the Court of Appeals or High Court or if such leave is denied, by the Appeal Committee of the HOL.[172] The Appeal Committee of the HOL comprises three Law Lords,[173] and leave to appeal is generally granted only where the case raises a point of law of general public importance.[174]

Figure 6 illustrates the number of patent cases heard by each of the HOL and the US Supreme Court from 1989 to 2009. As can be easily deduced, the number of patent cases heard is

[170] *See Annual Reports*, *supra* note 158 (providing the data for the years 1999 to 2005); JUDICIAL AND COURT STATISTICS 2006, *supra* note 158, at 23; JUDICIAL AND COURT STATISTICS 2007, *supra* note 158, at 24; JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 24; *Statistics*, *supra* note 169.

[171] COUNCIL OF EUROPE PUBLISHING, *supra* note 128, at 101.

[172] JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at11–12.

[173] SMITH & BAILEY, *supra* note 51,at 82; *see also* JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 10, 12 ("Petitions for leave for appeal . . . are referred to an Appeal Committee of three Lords of Appeal in Ordinary.").

[174] JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 12.

extremely small in both cases, and ranges from 0 to 3 cases per year. On average, the HOL hears 1.05 cases per year,[175]whereas the US Supreme Court hears 1.8 per year.[176]Interestingly, the number of cases heard by the courts of last resort in the UK and in the US is similar, notwithstanding the significant difference in the number of cases heard by the respective courts of appeal.

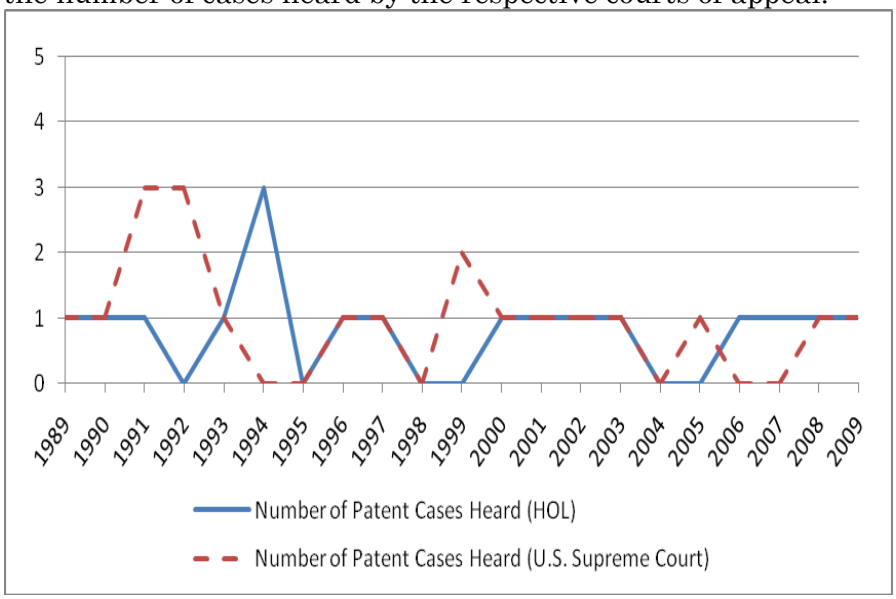

Figure 6.Number of patent appeals heard by the HOL since 1989.[177]

7. Privy Council

As previously discussed, the Privy Council includes a judicial committee which has exclusive jurisdiction over various subject matter such as: appeals from Commonwealth countries, appeals from various professional bodies, and devolution issues. The

[175] The number of HOL patent cases was calculated by performing a search in Westlaw for HOL decisions using the key words "patent infringement" and subsequently confirming the dispute concerning patent infringement proceedings.

[176] The number of US Supreme Court cases was determined using a method similar to that described in footnote 175.

[177] The number of HOL patent cases was calculated by performing a search in Westlaw for HOL decisions using the key words "patent infringement" and subsequently confirming the dispute concerning patent infringement proceedings. The number of US Supreme Court cases was determined using a similar method.

Privy Council does not have jurisdiction to hear domestic patent disputes.[178]

8. United Kingdom intellectual Property Office

In addition to the aforementioned courts, the UKIPO has also recently begun playing a judicial role. On October 1, 2005, the UKIPO was provided with the authority to issue opinions concerning patent infringement and invalidity.[179] The new procedural mechanism was intended to provide a cheap and fast (yet non-binding) alternative to pursuing legal action in either the PCC or the Chancery Division Patents Court.[180] This mechanism has proven to be not unpopular, as the UKIPO published about forty opinions within the first few years of establishing the system.[181]

Appeals from UKIPO opinions concerning patent infringement and validity must be made to Chancery Division Patents Court.[182] The appeal procedure has not frequently been used; to date, only two Chancery Division Patents Court decisions concerning UKIPO patent infringement and validity opinions have been published.[183] Both decisions affirmed the UKIPO opinions.[184]

[178] *See* JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 9; *see also Privy Council Overview*, PRIVY COUNCIL OFFICE, http://www.privy-council.org.uk/output/page2.asp (last visited Mar.. 6, 2011) (describing the Privy Council's jurisdiction with no mention of domestic patent law).

[179] The Patents (Amendment) Rules, 2005, S.I. 2005/2496 (U.K.) (exercising the powers granted under the Patents Act of 1977).

[180] *See* HECTOR MACQUEEN, CHARLOTTE WAELDE, & GRAEME LAURIE, CONTEMPORARY INTELLECTUAL PROPERTY: LAW AND POLICY 391–92 (2008).

[181] *See* CHRIS DENT, INTELLECTUAL PROP. RESEARCH INST. OF AUSTL., POST-GRANT PATENT ENFORCEMENT STRATEGIES 6 (2009), *available at* http://www.ipria.org/publications/submissions/Post-Grant%20Patent%20Enforcement%20Strategies%2009.pdf.

[182] *See* Civil Procedure (Amendment) Rules, 2009, S.I. 2009/2092, ¶ 63.16(U.K.).

[183] *See* Re DLP Ltd's Patent, [2007] EWHC 2669(Pat), [1]–[2], [17], [39] (appeal taken from Eng.) (stating that the instant case is one of two patent cases that have been appealed); Cunningham v. Nokia Corp., [2008] EWHC 1174 (Ch), [10], [33]–[36].

[184] *Re DLP Ltd's Patent*, [2007] EWHC at [1]–[2], [39]; *Nokia Corp.*, [2008] EWHC at[10] [33]-[36].

IV. THE STRUCTURE OF THE UK LEGAL SYSTEM: POST-OCTOBER 1, 2009

As of October 1, 2009, the Constitutional Reform Act of 2005[185] dramatically altered the structure of the UK legal system. The judicial function of the House of Lords has been removed;[186] the Law Lords no longer exist. In place of the Law Lords now stands Justices of a new UK Supreme Court—structurally and functionally independent of Parliament.[187] Before delving into the details of the new structure, we begin with the motivations for change.

A. Motivations for Constitutional Reform

1. Judicial Independence

One of the primary motivations for constitutional reform was to clearly establish judicial independence.[188] Judicial independence comprises three essential elements: (1) a clear separation from the legislative and executive branches, (2) judges who may better reflect society, and (3) judicial appointments which are transparent and based on merit.[189] The need for an independent judiciary has been recognized in the UK since at least the late 19th Century,[190] and clearly articulating the responsibilities of the branches of government has been recognized as "a requirement of the modern democracy."[191] By way of establishing judicial independence, increased public

185 Constitutional Reform Act (Consequential Amendments) Order, 2009, S.I. 2009/2468, (U.K.); *see* MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2009 6 (2010), *available at* http://www.justice.gov.uk/publications/docs/judicial-court-statistics-2009.pdf.

186 JUDICIAL AND COURT STATISTICS 2008, *supra* note 158, at 11.

187 *See* Maria Dakolias, *Are We There Yet?: Measuring Success of Constitutional Reform*, 39 VAND. J. TRANSNAT'L L. 1117, 1181–84, 1189 (2006).

188 *See* DEP'T OF CONSTITUTIONAL AFFAIRS, REGULATORY IMPACT ASSESSMENT: CONSTITUTIONAL REFORM BILL ¶ 2 (2004),*available at* http://www.dca.gov.uk/risk/constrefria.htm.

189 Dakolias, *supra* note 187, at 1180–81.

190 *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 366–67 (1999) ("A High Court judge is . . . removable by the Crown but . . . only under the procedures laid down in the Act of Settlement (1701) as restated by the Appellate Jurisdiction Act 1875 and the Supreme Court Act 1981.").

191 JUDGES' COUNCIL, RESPONSE TO THE CONSULTATION PAPERS ON CONSTITUTIONAL REFORM 14–15 (2003), *available at* http://www.dca.gov.uk/judicial/pdfs/jcresp.pdf.

confidence and faith—as well as reduced confusion—in the legal system should be attained.

Although numerous techniques for ensuring an independent judiciary exist, relatively few existed in the UK prior to enactment of the Constitutional Reform Act.[192] For example, UK judges have historically never had two particularly important (at least in appearance) characteristics of independence: functional and structural separation. Concerning functional separation, as previously discussed, the members of the court of last resort held both legislative and judicial roles. One should not be mistaken—the Law Lords did not hesitate to exercise this dual role, as evidenced by their willingness to speak in legislative debates on sensitive topics such as the death penalty and the provisions of government legal aid.[193] Concerning structural separation, all of the judicial functions of the Law Lords have been performed on the same premises of the HOL. Indeed, the Law Lords heard cases in a Committee Room of the Palace of Westminster since 1948.[194]

2. European Convention on Human Rights and the Human Rights Act of 1998

Another motivation for constitutional reform was to ensure the UK satisfied its obligations under the European Convention on

[192] *See* Appellate Jurisdiction Act, 1876, 39 & 40Vict., ch. 59, § 6 (Eng.) (providing that judges are appointed rather than elected); Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L.J. 387, 387–88 (2007); *The Act of Settlement, 1701*,GUARDIAN.CO.UK (Dec. 6, 2000), http://www.guardian.co.uk/uk/2000/dec/06/monarchy (last visited Mar. 6, 2011) (providing judges with life tenure for good behavior); *Quamdiu Se Bene Gesserint*, LAW.JRANK.ORG, http://law.jrank.org/pages/17034/quamdiu-se-bene-gesserint.html (last visited Mar. 6, 2011) (defining *quamdiu se bene gesserint* as Latin for "as long as he shall behave himself well"); *Independence of the Judiciary*, CONSTITUTIONAL RIGHTS FOUND., http://www.crf-usa.org/bill-of-rights-in-action/bria-14-2-c.html (last visited Mar. 6, 2011) (describing how the United States maintains an independent judiciary under Article III of the Constitution).

[193] Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and the United Kingdom*, 13 VA. J. SOC. POL'Y & L. 239, 276 (2006); *see also* Lord Steyn, *2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom*, 2005 EUR. HUM. RTS. L. REV. 349, 362("Since the announcement on June 1, 2003 by the Government of its intention to create a Supreme Court, seven serving Law Lords have spoken in the chamber on diverse subjects, most of them twice or three times, and some of them have voted in divisions.").

[194] David Hope, *A Phoenix from the Ashes?: Accommodating a New Supreme Court*, 121 LAW Q.REV. 253, 255–56 (2005).

Human Rights[195] and, subsequently, the Human Rights Act of 1998.[196] The European Convention on Human Rights is a treaty for protecting human rights and freedoms.[197] It enables individuals in signatory states to file suit against the state at the European Court of Human Rights for state violations of articulated human rights.[198] According to the Convention, "everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal*."[199] Arguably, an independent and impartial tribunal requires members of the judiciary to not exercise legislative or executive powers.[200] Accordingly, since the Law Lords are not independent of the HOL, an individual could appeal a ruling by the Law Lords to the European Court of Human Rights on the basis that the Law Lords failed to provide a "fair and public hearing."

As previously alluded to, by way of the Human Rights Act of 1998, individuals were enabled to bring—in UK courts rather than the European Court of Human Rights—violations of the rights articulated in the Convention. As the Human Rights Act incorporates, *inter alia*, the rights articulated in Articles 2 to 12 of the Convention,[201] and Article 6 of the Convention articulates the right to a fair and public hearing by an independent and impartial tribunal, this right has been directly introduced into UK law. Notably, the argument that UK courts must provide an independent and impartial tribunal is now even stronger.

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[195] *See The European Convention on Human Rights*,UK LAW ONLINE,http://www.leeds.ac.uk/law/hamlyn/echr.htm (last updated Oct. 1998). The UK ratified the Convention on March 8, 1951, which subsequently came into force on September 3, 1953.*Seeid.*; *United Kingdom of Great Britain and Northern Ireland,* PRIVACY INT'L (Dec. 18, 2007), https://www.privacyinternational.org/article/phr2006-united-kingdom-great-britain-and-northern-ireland.

[196] *SeeGovernment Judiciary Constitution*, LAW TEACHER, http://www.lawteacher.net/criminal-law/essays/government-judiciary-constitution.php(last visited Mar. 6, 2011).

[197] Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, E.T.S. No. 005,[hereinafter Convention], *available at*http://conventions.coe.int/treaty/en/treaties/html/005.htm; *Summary of the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm (last visited Mar. 6, 2011).

[198] *See* Convention, *supra* note 197,art. 19, 34.

[199] *Id.* art. 6 (emphasis added).

[200] *See* Wolcher, *supra* note 193, at 276–77.

[201] Human Rights Act, 1998, c. 42, § 1(1)(a) (Eng.).

3. Other Factors Motivating Constitutional Reform

Numerous other concerns also motivated constitutional reform. For example, a single Member of Parliament has historically played a role in substantially impeding judicial independence: the Lord Chancellor. Prior to the Constitutional Reform Act of 2005, the Lord Chancellor, *inter alia*, was the speaker of the HOL *and* the head of the judiciary in England and Wales.[202] That is, like Law Lords, the Lord Chancellor performed both legislative and judicial functions. However, the Lord Chancellor's impetus to judicial independence was even more egregious than that of the Law Lords, as the Lord Chancellor served as the senior authoritative figure in both instances.

Further, prior to the Constitutional Reform Act of 2005, most of the procedures for appointing the Lord Chancellor (as well as the Law Lords) substantially lacked transparency.[203] That is, there have been no independent selection bodies. Rather, individuals were selected for such positions by ministerial appointment based on political interests.[204]

B. The UK Parliament

The Constitutional Reform Act of 2005 effectively transferred the judicial function of the Law Lords from the House of Lords to a new UK Supreme Court. The UK Supreme Court is structurally and (theoretically) functionally independent of the Parliament-in-Queen. Figure 7 illustrates the legislative and judicial structure of the UK government as of October 1, 2009.

[202] Dakolias, *supra* note 187, at 1119, 1130–31, 1165, 1182.

[203] *See id.* at 1119, 1166–67, 1185–87.

[204] *See id.* at1185–87 ("The judges will be selected and appointed on the basis of merit and regardless of gender, ethnic origin, maritalstatus, sexual orientation, political affiliation, religion, or disability."); *see also* K.E. Malleson, *Modernising the Constitution: Completing the Unfinished Business*, 24 LEGAL STUD. 119, 120 (2004) (stating that the first serious proposal for creating an independent judicial appointments body was made in 1972).

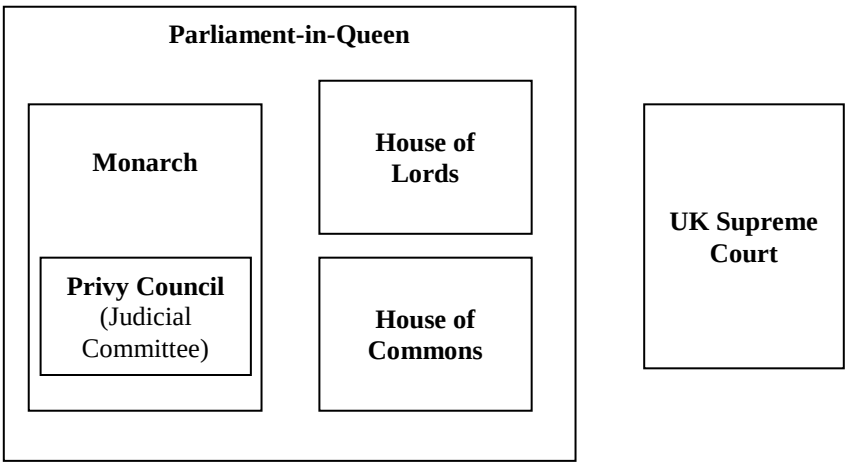

Figure 7.Legislative and judicial structure of the UK as of October 1, 2009.

1. House of Lords

The Constitutional Reform Act of 2005 abolished the judicial jurisdiction of the HOL.[205] Accordingly, the position of Law Lords within the HOL now ceases to exist. In its place, a new UK Supreme Court was born.[206] The Constitutional Reform Act provided for the current Law Lords to become the first Justices of the UK Supreme Court.[207] The new Justices were entitled to maintain their status as Members of the HOL, although subsequent Justices will be forbidden to carry such status.[208] Notably, although the new Justices have retained their status as Members of the HOL, they have lost their right to sit and vote in

[205] Constitutional Reform Act, 2005, c.4 (Eng.) (stating one of the purposes of the Act as "abolish[ing] the appellate jurisdiction of the House of Lords").

[206] *See id.* § 35(3) (substituting "Judge of the Supreme Court" for "Lord of Appeal in Ordinary").

[207] *Id.* § 24.

[208] *See Appellate Committee of the House of Lords*, THE SUPREME COURT, http://www.supremecourt.gov.uk/about/appellate-committee.html (last visited Mar. 6, 2010).

the House.[209]

2. House of Commons and Monarch

The HOC was not affected by the Constitutional Reform Act of 2005. However, the Privy Council within the Monarch was affected. The Constitutional Reform Act transferred the Judicial Committee's jurisdiction to hear devolution issues to the newly formed UK Supreme Court.[210]

3. The Lord Chancellor

The Constitutional Reform Act of 2005 also substantially changed the role of the Lord Chancellor. For example, it transferred the Lord Chancellor's role as the presiding officer of the HOL to the Lord Speaker,[211] and it transferred the Lord Chancellor's role as the head of the judiciary in England and Wales to the Lord Chief Justice.[212] That said, "the Lord Chancellor remains responsible for the administration of the courts and is accountable to Parliament for the efficiency and effectiveness of the court system,"[213] although, in so doing, emphasis is placed on the Lord Chancellor's requirement to "uphold the continued independence of the judiciary."[214]

C. The UK Court System

The English Court system as of October 1, 2009 effectively replaced the Appellate Committee of the HOL with the UK Supreme court. Figure 8 illustrates the resulting (simplified) court system.

[209] *Id.*
[210] Constitutional Reform Act 2005, c. 4, § 4(4)(b) (Eng.).
[211] *See id.* § 4(6).
[212] *Id.* §§ 7(1), (5).
[213] Dakolias, *supra* note 187, at 1181.
[214] Constitutional Reform Act, 2005, c. 4, § 3(1) (Eng.).

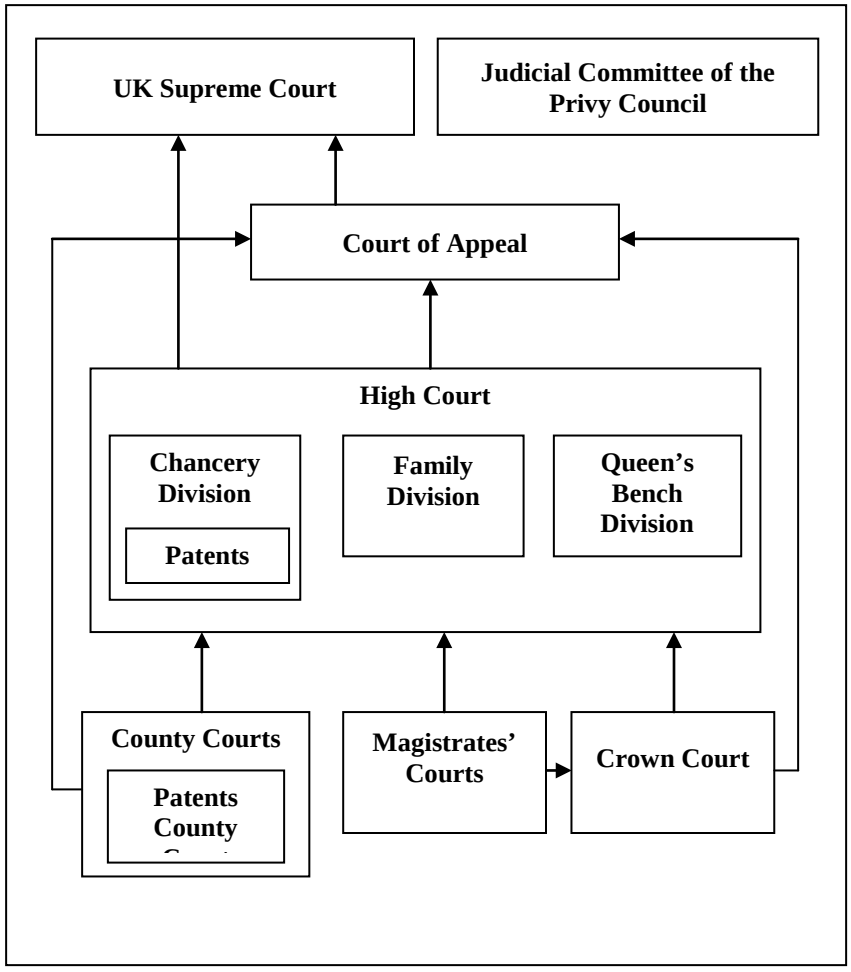

Figure 8. The English court system as of October 1, 2009.

1. Supreme Court of the United Kingdom

i. Composition

The Constitutional Reform Act provides for twelve Justices of the Supreme Court.[215] This includes a President and a Deputy President.[216] The President is the head of the Supreme Court.[217] The first President of the Supreme Court was the senior Lord of Appeal in Ordinary,[218] while the first Deputy President was the second senior Lord of Appeal in Ordinary.[219] In contrast to the other ten Justices, the President (and accordingly the Deputy President) primarily performs additional administrative work.[220]

ii. Appointment

In contrast to the appointments to the Law Lords, which were "informal, unstructured and lacking in transparency,"[221] the process of appointing Justices of the Supreme Court in accordance with the Constitutional Reform Act has "a greater formality and professionalism."[222] For example, the Act specifically requires appointees to have held a "high judicial office" for at least two years or to have "been a qualifying practitioner for . . . at least [fifteen] years."[223] The Act also specifically requires the formation of a "selection commission" for selecting persons to be recommended for appointment by the Queen via the Prime Minister.[224] The selection commission comprises the President and Deputy President of the Supreme Court, as well as a member from each of the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission.[225]

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[215] *Id.* § 23(2).
[216] *Id.* § 23(5).
[217] *See id.* §§ 23(4)–(5).
[218] *Id.* § 24(b).
[219] *Id.* § 24(c).
[220] JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 310 (2006)("[The President] ensure[s] appropriate arrangements for the welfare, training, guidance and deployment of judges He will also be responsible for appointing judges to various committees . . . . He will be the person through whom discussions with ministries on public expenditure will take place.").
[221] *See id.* at 312.
[222] *See id.*at31011.
[223] Constitutional Reform Act, 2005, c.4, § 25(1) (Eng.).
[224] *See id.* §§ 23(2), 26(2), 26(5).
[225] *Id.* § 1, sch. 8.

The Lord Chancellor still maintains a role in the appointment process, albeit formalized. For example, the Act provides for the selection commission to submit a report to the Lord Chancellor disclosing various information such as who is selected for appointment to the selection committee.[226] The Lord Chancellor, after similarly consulting with various people,[227] subsequently has an opportunity to endorse or refuse to endorse the selected individual.[228]

iii. Jurisdiction

The Supreme Court acquired all of the jurisdiction that the Appellate Committee of the HOL used to retain.[229] This includes, for example, jurisdiction to hear appeals from the Court of Appeal in England and Wales, jurisdiction to hear civil cases from the Scottish Court of Session, and jurisdiction to hear civil and criminal cases from the High Court of Justice in Northern Ireland. Further, the Constitutional Reform Act transferred jurisdiction to hear devolution issues from the Judicial Committee of the Privy Council to the Supreme Court.[230] Like its predecessor, the Supreme Court is expected to focus mostly on issues of national importance that have far-reaching implications.[231]

iv. Location

In accordance with the prerogative for the UK judicial function to be structurally independent of its legislative function, the Constitutional Reform Act provides for a new building for the UK Supreme Court—one that is separate from the Houses of Parliament.[232] As of October of 2009, the Justices of the Supreme Court sit in a building physically separate from that which comprises Parliament.[233]

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[226] *Id.* §§ 28(1)–(2).

[227] *Id.* § 28(5) (identifying the same people consulted in accordance with §27(2)).

[228] *Id.* § 29.

[229] *See id*. § 40. *See generally id.*sch. 9.

[230] *Id.* § 40(4)(b).

[231] *See* Dominic Casciani, *Q&A: UK Supreme Court*, BBC NEWS (Sept. 30, 2009, 11:09 PM), http://news.bbc.co.uk/2/hi/uk_news/8283967.stm.

[232] *See* Constitutional Reform Act, 2005, Eliz. 2, c.4, § 148(4)–(5).

[233] *See Supreme Court,*MINISTRY OF JUSTICE, http://www.justice.gov.uk/about/supremecourt.htm (last visited Mar.6, 2011).

V. JURISPRUDENTIAL EFFECTS RESULTING FROM CHANGE

In determining the likely effects on UK jurisprudence resulting from enactment of the Constitutional Reform Act, it is prudent to look to the effect of similar constitutional reforms in other countries. In the following discussion, the effects of the US Supreme Court's 1935 transition from a house shared with the legislative branch of government to one independent of other branches of government are considered. Subsequently, the extent to which these effects may apply to the UK, including their potential effects on patent litigation, is discussed.

A. Effects of Similar Constitutional Reform in the US

A fact often forgotten is that the US Supreme Court, like the Appellate Committee of the HOL, used to not be structurally independent of the legislature. That is, the Justices of the US Supreme Court used to sit in a small basement room in the US Capitol.[234] It was not until 1935—the 146th year of existence of the US Supreme Court—that the court moved into the US Supreme Court Building, apart from the US Capitol.[235]

Notably, prior to physical separation from the legislature, the US Supreme Court had already established, at least to some degree, functional separation, as well. Indeed, in the landmark 1803 decision *Marbury v. Madison*,[236] the court articulated its power of judicial review over Acts of Congress.[237]

Arguably, this physical separation has had three effects on the judiciary: (1) an increased tendency of the US Supreme Court to find legislation unconstitutional; (2) a change in the way judicial opinions are delivered; and (3) the establishment of a clerk network.

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[234] WILLIAM H. REHNQUIST, THE SUPREME COURT 47 (First Vintage Books 2002) (1987).

[235] *See* Joseph Zengerle, *Changing of the Chiefs*, 9 GREEN BAG 175, 178 (2006); *The Court Building*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/courtbuilding.aspx (last visited Mar. 6, 2011).

[236] Marbury v. Madison,5 U.S (1 Cranch) 137,138(1803) (holding Section 13 of the Judiciary Act of 1789 to be unconstitutional to the extent it enlarges the original jurisdiction of the Supreme Court beyond that provided by the Constitution).

[237] *See id.*at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

1. Increased Tendency to Find Legislation Unconstitutional

Separation of the US Supreme Court from the US Capitol may have influenced the likelihood of the Justices finding Acts of Congress to be unconstitutional. Figure 9 illustrates the number of Acts of Congress held unconstitutional by the US Supreme Court from 1803 to 2003. A trend line[238] is also illustrated. As is evident from the figure, the trend of the Court in finding Acts of Congress unconstitutional between approximately 1923 and 1945 did not change. However, since 1945, the number of Acts of Congress found unconstitutional has tended to increase.

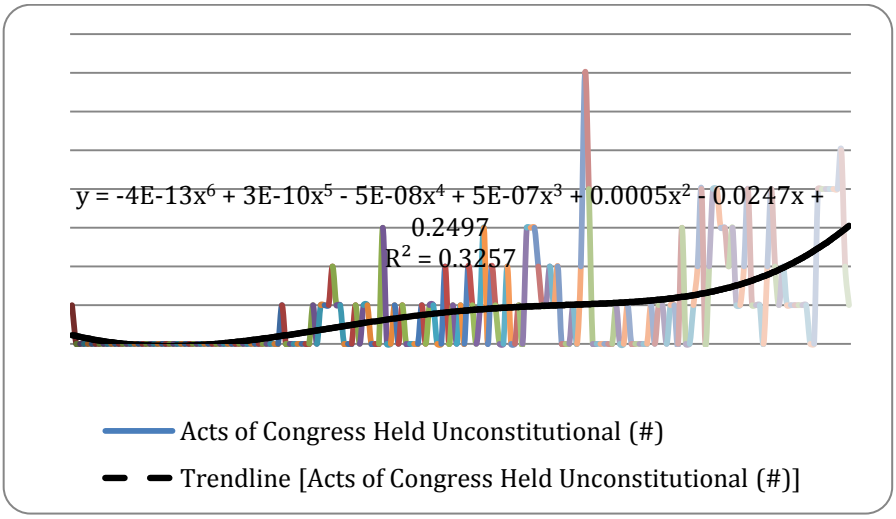

Figure 9. Number of Acts of Congress held unconstitutional from 1803 to 2003.[239]

Critics may argue that this trend results from the well-known increase in number of cases petitioned to the US Supreme Court.[240] However, this argument lacks merit. Figure 10 illustrates the total number of cases on the docket of the US Supreme Court from 1926 to 2000. As is evident from the figure,

[238] *See infra* Figure 9. Figure 9 applies a 6th order polynomial trendline.

[239] *See Acts of Congress Held Unconstitutional In Whole or In Part by the Supreme Court of the United States*, JUSTIA.COM, http://supreme.justia.com/constitution/046-acts-of-congress-held-unconstitutional.html (last visited Mar. 6, 2011).

[240] *See* Kenneth W. Starr, *The Supreme Court and its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006).

the total number of cases on the court's docket has substantially increased. Indeed, the number of cases has increased from 1,183 in 1926 to 8,965 in 2000.[241] This trend appears to continue to this day, as the Supreme Court reports "a current total of more than 10,000 cases on the docket per Term."[242]

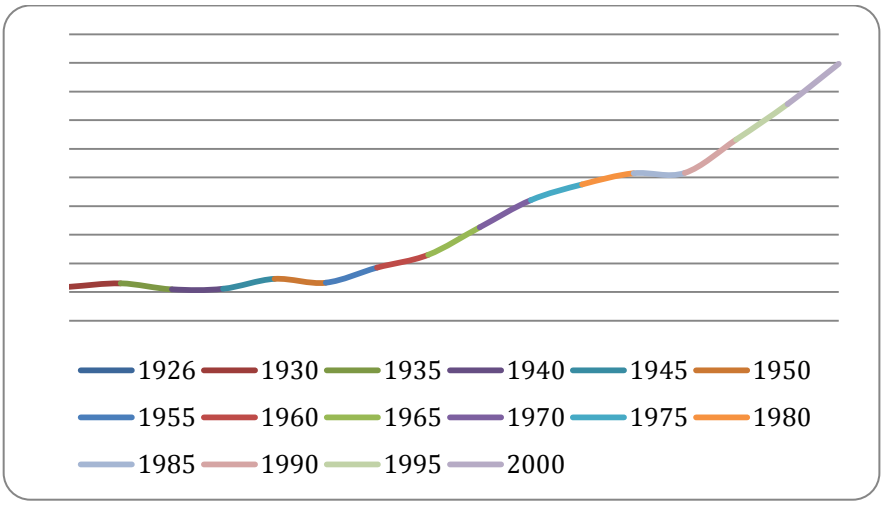

Figure 10.Total number of cases on the docket of the US Supreme Court from 1926 to 2000.[243]

Notably, however, the number of cases actually heard and disposed of on the merits by the court is substantially less than those on its docket. Figure 11 illustrates the number of cases disposed by signed opinion from 1926 to 2000. Figure 12 goes one step further and illustrates the percentage of cases disposed of by signed opinion. As is evident from these figures, both the total number and percentage of cases actually heard and disposed of on the merits has decreased. Indeed, the percentage of cases disposed of by signed opinion has drastically diminished from over 18% in 1926 to under 1% in 2000.[244]

[241] *Id.*
[242] *The Justices' Caseload*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/justicecaseload.aspx (last visited Mar. 6, 2011).
[243] *See* Starr, *supra* note 240, at 1368.
[244] *Id.*

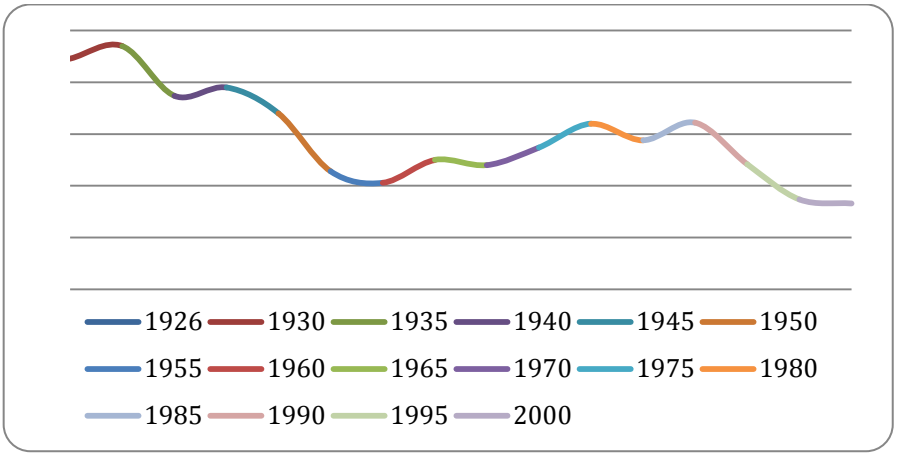

Figure 11. Number of cases disposed of by signed opinion of the U.S Supreme Court from 1926 to 2000.[245]

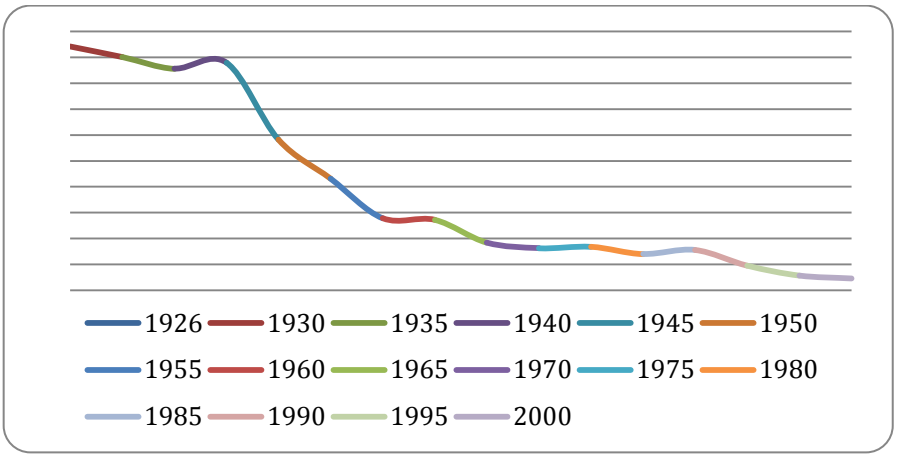

Figure 12. Percentage of cases disposed of by signed opinion of the U.S Supreme Court from 1926 to 2000.[246]

Accordingly, the increasing number of cases on the US Supreme Court's docket has not likely caused the increase in the number of Acts of Congress the court has held unconstitutional since although the number of cases on the docket has increased, the number of cases disposed of by signed opinion has actually

[245] *See id.*
[246] *See id.*

decreased. In contrast, these trends suggest that the court has more actively questioned the constitutionality of legislative Acts since the number of Acts of Congress held unconstitutional has consistently increased in spite of the decreasing percentage of cases disposed of by signed opinion.

2. Changing Form of Delivered Opinions

In the early years of the US Supreme Court, the Justices each wrote a single, individual opinion.[247] During his term beginning in 1801, however, Chief Justice Marshall dropped this practice in favor of the court providing a single, unanimous opinion.[248] The provision of a single, institutional opinion with very few dissents was perceived as necessary to demonstrate "judicial infallability."[249] After passage of the 1925 Judiciary Act, the form of court opinions began to transform once again. To some degree returning to the pre-Marshall form of individualized opinions, the trend since the Judiciary Act has been an increase in the number and substance of dissenting opinions.[250]

The changes in form of delivered opinions can be correlated with times of constitutional reform at the US Supreme Court. Marshall's practice of providing a single, unanimous opinion as a sign of strength around the time of *Marbury v. Madison* appears necessary for the court at the time to establish functional separation (e.g., judicial review) from Congress. In contrast, by the time the court had obtained structural independence in 1935, its independence from Congress had all but been established. Accordingly, the need for unanimity was gone and other factors could play a larger role in encouraging dissent.[251]

3. Establishment of a Clerk Network

It has long been the practice of Justices of the US Supreme Court to employ clerks to assist the Justices in performing their

247 *See* Lani Guinier, *Foreward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 19 (2008).

248 *Id.*

249 *See* Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 928 (1962).

250 *See* Guinier, *supra* note 247, at 19–20.

251 *See id.* at 20–21 (discussing how both the enactment of the 1925 Judiciary Act as well as changes to the Court's personnel played a role in increasing the likelihood of dissenting opinions).

judicial functions.[252] Prior to separation of the US Supreme Court, the Justices heard arguments in the US Capitol, and did most of their work either in the Capitol or at home.[253] Due to the constrained space in the Capitol, the Justices' clerks also did most of their work, and sometimes resided, at the homes of the Justices.[254] The move to the Supreme Court building established what has been referred to as the "clerk network"—a means for the Justices to informally gather information about each other's thinking.[255]

B. Possible Effects from 2009 Creation of UK Supreme Court

A significant question at issue and concern of Parliament is whether the transfer of judicial functions from the HOL to the UK Supreme Court will alter the jurisprudence of the court. According to the Consultation Papers that preceded and informed the adoption of the Constitutional Reform Act, the Act "does nothing to change the traditional principle of parliamentary sovereignty."[256] Some commentators agree with this view expressed in the Consultation Papers.[257] However, others disagree.[258]

1. Effect on Exercise of Judicial Independence

The UK legal and political structure in place at the time of creation of the UK Supreme Court is, without a doubt, substantially different from that which existed in the US when the US Supreme Court established physical independence. For example, before the US Supreme Court moved into its own

[252] *See* Carolyn Shapiro, *The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court*, 37 FLA. ST. U. L. REV. 101, 103–05 (2009).

[253] *Id.* at 110.

[254] *Id.*

[255] *Id.* at 110–11.

[256] Wolcher, *supra* note 193, at 277.

[257] *See, e.g.*, Stephen Howard, *Supreme Court Move Separates Parliament From Judiciary*, INDEP. (Oct. 1, 2009), http://www.independent.co.uk/news/uk/home-news/supreme-court-move-separates-parliament-from-judiciary-1795847.html (quoting Paul Stone, senior partner at DLA Piper, as saying the move "will not change much apart from where [the Justices] sit").

[258] *See, e.g.*, Lord Woolf, *The Rule of Law and a Change in the Constitution*, 63 CAMBRIDGE L.J. 317, 326 (2004); Joshua Rozenberg, *Fear Over UK Supreme Court Impact*, BBC NEWS (Sept. 8, 2009), http://news.bbc.co.uk/2/hi/uk_news/8237855.stm (quoting Lord Neuberger as saying that there is a real risk of "judges arrogating to themselves greater power than they have at the moment").

building, the court had already established the power of judicial review over Acts of Congress. In contrast, at the time of the UK Supreme Court establishing an independent facility, the judiciary had not successfully established the power of judicial review over Acts of Parliament. However, considering the broader picture, the evolution of the US Supreme Court may still, at least to some degree, provide valuable information as to the effect of functional and physical separation on UK jurisprudence.

Considering the trend of the US Supreme Court to deem legislation unconstitutional, there is no doubt that the court has exercised its judicial independence to a greater degree since 1935—that is, since it moved into its own building. Whether this increased exercise of judicial independence is *caused* by the move, or whether other things have played a role, cannot be determined for certain. However, to the extent the increased exercise of judicial independence is *caused* by the move, one may similarly speculate that the UK Supreme Court's move will similarly cause an increased exercise of judicial independence. Of course, such an exercise of judicial independence would not be an increase in the number of Acts of Parliament deemed unconstitutional, since the UK Supreme Court has not successfully established such authority before. However, such an exercise of judicial independence may result in steps toward the successful establishment of such authority.

Other recent changes in the political landscape tend to support this trend toward true judicial independence (i.e., power of judicial review over Acts of Parliament). One such example is the court's ability to issue declarations of incompatibility in accordance with the Human Rights Act of 1998. Other examples include: the recognition of a hierarchy in Acts of Parliament, whereby Acts at the top of the hierarchy may provide a powerful source of authority for exercising judicial review similar to the single US constitution. And, the recognition of the supremacy of European law, whereby UK courts may refuse to enforce Acts which conflict with European law.

The substantial increase in interest and participation in the UK legal system over the last forty years may also support the trend toward increased judicial independence. Table 1 illustrates the number of participants in the UK legal system as well as the size of the UK population. As should be evident from the table, the number of participants in the UK legal system has grown at a rate substantially greater than the rate of population growth.

In particular, where the number of participants has increased by over 460% between 1970 and 2005,[259]the size of the UK population has increased by just over 8% during the same period.[260]

	1970	**1993**	**2005**
Judiciary			
House of Lords	10	10	12
Court of Appeal and Heads of Division	17	29	42
High Court	73	93	108
Circuit Judges	103	490	636
District Judges and Registrars	108	269	430
Total number of full-time judicial posts	356	970	1356
Non-Judiciary			
Solicitors	24407	61329	96757
Barristers	2584	7271	14364
Undergrad law students	6934	34500	44435
Total participants in the UK legal system	34724	107002	160554

[259] *See* BELL, *supra* note 220, at300–01 (calculating the increase by (160554/34724)*100%=462%).

[260] *See UK Population Growth*, OPTIMUM POPULATION TRUST, http://www.optimumpopulation.org/opt.more.ukpoptable.html (last updated Oct. 21, 2009) (calculating the 8% change by (60.2M - 55.6M)/60.2M = .08)).

UK Population	55.6	57.7	60.2

Table 1.The number of participants in the UK legal system and the size of the UK population.[261]

The UK Supreme Court continues the HOL practice of preparing opinions, where each Justice writes a single, individual opinion.[262] Although there has yet to be a move toward a single, unanimous opinion, such a transformation may not be far off. Indeed, like Chief Justice Marshall's efforts to increase the power and authority of the US Supreme Court prior to establishing judicial review, it may be in the interests of the UK Supreme Court Justices to pursue a similar strategy if similar authority is desired.

Finally, it should be noted that use of judicial assistants is a relatively new practice in the UK, first by the House of Lords in 2000,[263] and now by the UK Supreme Court.[264] In contrast to the work conditions of the law clerks for the US Supreme Court Justices prior to the establishment of the US Supreme Court, the judicial assistants, while operating with the House of Lords, were provided with work conditions much more conducive to networking. That is, the judicial assistants, along with their Law Lords, were provided with rooms in the Palace of Westminster.[265] Accordingly, movement to the new UK Supreme Court is unlikely to create a "clerk network" above and beyond any networks already created.

2. Effect on Patent Litigation

Establishment of the new UK Supreme Court is not likely to have any effect on patent litigation. The jurisdiction of the UK Supreme Court is broader than that which the HOL had; thus, any patent dispute that would rise to the HOL may now rise to the UK Supreme Court.[266]

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[261] *See id.*; BELL, *supra* note 220, at 300–01.

[262] *See* Bruce Dickson, *The Processing of Appeals in the House of Lords*, 123 L.Q. REV. 571, 594–95 (2007).

[263] *Id.* at 577 & n.40.

[264] *See* Jenny Rowe, *At the Heart of Justice: The Library at the New Supreme Court of the United Kingdom*, 9 LEGAL INFO. MGMT., no. 4, 2007 at 257, 260.

[265] Hope, *supra* note 194, at 260–61.

[266] *See* Constitutional Reform Act, 2005, c. 4, § 40 (Eng.); *See generally id.* at sch. 9.

To the extent establishment of the new UK Supreme Court results in an increased tendency for the court to exert judicial independence, patent law is unlikely to be affected. As previously discussed, establishment of the new UK Supreme Court may result in judicial review of Acts of Parliament. However, patent law is, on the whole, a relatively non-contentious area of law.[267] Accordingly, the likelihood of the constitutionality of a patent law being in question is very slim. Indeed, in the US, no patent laws have ever been held unconstitutional.[268]

Unfortunately, reliable statistics illustrating the number of patent cases heard by the US Supreme Court soon before and after physical separation of the court from Congress could not be found. However, it is doubtful that even if such data could be identified it would illustrate a notable change in the number of patent cases heard around the time the US Supreme Court entered into its own building.

VI. CONCLUSIONS

The long-term effect of the UK's recent constitutional reform is uncertain. If we consider the effects of similar reform in the US, at the very least an increased exercise of judicial independence by the UK Supreme Court should be expected. Exactly how that independence materializes is also uncertain, but the general trend is for an increased amount of judicial scrutiny over Acts of Parliament.

The effect of the constitutional reform on patent litigation is a matter of form over substance. Instead of final appeals being made to the House of Lords, they must now be made to the UK Supreme Court. Other than this change in letterhead, the procedure, strategy, and legal foundation of patent litigation is unlikely to be affected by the constitutional reform to any notable degree.

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[267] *See* McClurg v. Kingsland, 42 U.S. 202, 206 (1843) (mentioning that Congress has almost unlimited constitutional authority to legislate patent law).

[268] Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH 309, 311 (2004).