HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: The role of the Lord Chancellor and the law officers

Wednesday 25 May 2022

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 5 | Hybrid Proceeding | Questions 59 - 66

Witnesses

I: Lord Judge, former Lord Chief Justice and Head of the Judiciary of England and Wales (2008-13); Lord Thomas of Cwmgiedd, former Lord Chief Justice and Head of the Judiciary of England and Wales (2013-17).

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Lord Judge and Lord Thomas of Cwmgiedd.

Q59 **The Chair**: Good morning and thank you very much indeed for coming today. The committee is taking evidence from the right honourable Lord Judge, former Lord Chief Justice and Head of the Judiciary of England and Wales, and the right honourable Lord Thomas of Cwmgiedd, former Lord Chief Justice and Head of the Judiciary of England and Wales. Welcome to you both.

As you can probably guess, we have a lot of questions that we would like to put to you. Maybe before plunging in, I can ask whether you would like to make any opening comments at all, or would you prefer to go straight to the questions?

Lord Judge: I would like to make one very brief opening comment, which is that I wish you could persuade the party in power in government that constitutional change is a matter for all the parties.

The Chair: Thank you. Lord Thomas?

Lord Thomas of Cwmgiedd: I think it is very important that you carry out this sort of inquiry from time to time to evaluate things. I am very glad to see that it is, and I hope it remains, a completely cross-party issue. One of the concerns I have had is that some of the changes that have recently been made have not been done on a slow enough basis. Constitutional change needs time for reflection before it is made.

Q60 **The Chair:** I will open up the questions with a rather broad question, but it goes to the heart of our inquiry. How would you define the rule of law, and what do you see as the role of the Lord Chancellor and the law officers in protecting it within government?

Lord Judge: I will kick off. When Lord Burnett was here last week, Lord Hennessy introduced Lord Bingham's definition of the rule of law. I am slightly heretical. I do not think it is complete enough. I think it omits sufficient emphasis on the equal entitlement of every citizen. It omits that the laws have to be made by an assembly elected on the basis of universal suffrage, and it omits the word "independent" before courts. Subject to that, it is a definition, but we need to be very careful not to allow our language to confuse us.

"Rule of law" is not the same as "rule by law". Apartheid South Africa was ruled by law. It was perfectly constitutional and perfectly normal. I do not think any of us would think that that was the rule of law. We need to keep that distinction fairly in mind.

As for the role of the Lord Chancellor and protecting it within government, I always thought that was the main responsibility of the Lord Chancellor, who was, after all, Speaker of the House of Lords as well as Lord Chancellor. I always assumed it was for the Lord Chancellor to say, on any proposal, "This won't do", or, "This is a problem", and that everybody in the Cabinet—some of you have been in the Cabinet and I

have not—would have listened to what the Lord Chancellor had to say. The Lord Chancellor now is a minor Minister and therefore does not carry the weight that a former Lord Chancellor did.

Lord Thomas of Cwmgiedd: I agree. I think it is important to appreciate that across the world there is virtually no state that does not espouse the rule of law. Even the Chinese say they believe in the rule of law, but it is a different concept of the rule of law from our own. Therefore, it is very important that we are clear about what we mean.

I broadly agree with Lord Judge on the definition, but what people forget is that the rule of law and democracy go hand in hand, and fundamental to the rule of law is the complete constitutional independence of the judiciary.

The Chair: An issue that has come up quite often is how that duty or those duties to protect the rule of law extend to international law. How would you respond to that?

Lord Judge: I think that it does, but the Bingham definition, with or without supplements, does not quite cover it. The courts have nothing to do with treaties, in the sense that treaties are not made by courts and courts do not enforce treaties. We work on the basis, do we not, that we have treaty obligations? We work on the basis that in domestic law, if we have a contract, we expect the other party to abide by it. If you decide that you are going to break a treaty obligation, you are, at the very least, breaking a contractual obligation.

You can see how it can go wrong. I did not think that our efforts in relation to the unfortunate woman Nazanin Zaghari-Ratcliffe were very clever. We had an international obligation to abide by the ruling of a court that decided we owed Iran all that money, and we did not pay it. That was a pity. So I think the rule of law should apply. Ultimately, of course it is for the Government to decide whatever they wish in relation to treaty obligations. It is not for the courts.

Lord Thomas of Cwmgiedd: I would qualify that in two ways. First, by international law, we need to be quite clear what we mean. Traditionally, this country has always looked on international law as comprising two basic elements. The law of merchants, or the law that is commonly accepted in commerce, is and has been largely international over the centuries. We have played a leading role in developing that.

As regards international law that applies to public law, it is important to distinguish between customary international law, which is part of our law, and where there is development. One sees this particularly in international humanitarian law.

As regards treaties, I have nothing to add to what Lord Judge has said. It is very important to distinguish in our system the obligations of the state when treaties are made, which are the responsibility of Parliament and the Executive, and the obligations of the courts. When a treaty has been

brought into domestic law, it is their duty wholly to have regard to what Parliament has enacted.

The Chair: Lord Howell, you had a point.

Lord Howell of Guildford: Good morning, my Lords. I am going to press you further on this question of international law because it is so very contested. Lord Reed told this committee that the courts had no remit or right to enforce international law to which Parliament has not given effect in domestic statute. We also had expert advice that the law officers cannot have an overriding duty to obey international law in preference to the law of their own country. I was fascinated, Lord Judge, by your reference to Lord Bingham, who of course was very strong on this international law question.

What is your opinion as to whether these things should always be treated equally, or whether domestic law, as my quotations rather suggest, should always be given a primacy and treated in a different way?

Lord Judge: Ultimately, it is for Parliament, is it not? It is for Parliament to say whether any particular international treaty, or anything that it does that happens in relation to international law, has impact here, and, if so, what the level of impact should be, and how it should be enforced.

I do not agree, if I have understood what Lord Reed said, that the law officers do not have an obligation in the course of their duties to say, if they believe it to be so, "This proposal puts us in breach of that treaty obligation". I simply do not see how that should not be part of their natural obligations as law officers. Somebody has to be able to advise the Prime Minister and the Cabinet that a proposal is unlawful or would put the country in breach. What happens after that, of course, is, ultimately, for Parliament. I do not see that we have to have a chasm between the two sets of law and responsibilities.

Lord Thomas of Cwmgiedd: As a country where the rule of law applies domestically, and where we attach such weight to it as a fundamental part of ensuring that we are a prosperous country, we cannot ignore as a state agreements that we have made. Abiding by those agreements is essential. The law officers are in a different position from the judiciary because they are members of the Government and representatives of the state as regards the outside world. Therefore, they have a duty to advise and uphold agreements that are made, because a state can be in breach of the rule of law in exactly the same way as an individual or company in this country can be in breach of domestic law. It is therefore extremely important that the law officers, when representing the state on an international level, have regard to the rule of law and, in particular, to treaties they have made.

Lord Howell of Guildford: What happens in the case of treaties, particularly those that affect domestic citizens as well as in international situations, when the other partners to the treaties seem to have changed their position? Lord Keen was telling us a few weeks ago in this

committee that the Vienna convention, which says that if other partners change their position the treaty can be reviewed, did not apply to the European Union because it is not a country, and the Vienna convention only applies to countries. Is that the right position?

Lord Thomas of Cwmgiedd: Getting into an argument as to the exact nature of the European Union, and whether it is a state or not a state, can be a distraction. We have to bear in mind our international standing as a nation that believes in the rule of law.

As to the competitive nature of the rule of law—and I referred, for example, to the Chinese conception of the rule of law—we must be very clear that, where we enter into agreements, we abide by them. Obviously, there can be dispute, and dispute resolution mechanisms in international law are less perfect than they are at a domestic level, but, certainly, if another state breaches it, or if there is a problem in relation to a treaty, it is obvious you can have a dispute about it, but saying that we abide by our agreements is a fundamental duty of the Executive and, where Parliament has ratified a treaty, of Parliament.

The Chair: This has triggered some supplementaries. Lord Howarth, I know you have a question but I will just finish on this point first, if I may. Lord Falconer, did you indicate you wanted to come in?

Lord Falconer of Thoroton: You said something very interesting. There are lots of treaties that this country has signed up to that are not given effect to in domestic law. For example, the rights of the child, which we have signed up to under the United Nations convention, are not enforceable as domestic law. You said in your answer, Lord Thomas, that the Attorney-General should have regard to that—not to that particular example but to our international commitments. Could you explain how the law officers should have regard to our international commitments when they are not part of our domestic law?

Lord Thomas of Cwmgiedd: There are two bases. One is that there are so many international agreements these days that states decide or decide not to incorporate into their domestic law. The rights of the child convention is one of them, and there are many other such conventions. It seems to me that as regards domestic law our position is very clear. Where they have not been incorporated into domestic law, as people of the country, corporations or individuals, we are not bound by that, unless it has become customary international law.

On the other hand, where we have made a commitment under an agreement to do certain things, and I do not believe the rights of the child is one of those, and we wish to act contrary to an agreement we have voluntarily made, unless there are circumstances in customary international law or under the Vienna convention—and the two are very similar—it seems to me that the Executive have a duty to comply with the treaty obligations they have undertaken, and it is difficult for us to complain that other people do not abide by their treaties if we do not have the same general attitude.

Lord Howard of Lympne: It is very desirable that the Executive should behave in that way, but as a matter of law Lord Reed was correct, was he not? If Parliament passes laws that are inconsistent with treaties that have not been implemented in domestic law, domestic law prevails. That is the position as a matter of law, is it not?

Lord Thomas of Cwmgiedd: I agree with you completely on that, and I hope I have not said anything to the contrary. That is our internal domestic position; there is no doubt about that, and that is what Lord Reed was talking about. What I was talking about was something different, and that is our obligations as a state. We have undertaken voluntary obligations. It seems to me that you cannot have a situation where, as a state, you have undertaken to another state—because we claim that the rule of law prevails internationally—that we can be in breach on the international plane but not the national plane. That is the important distinction to make.

Baroness Fookes: On the concept of the rule of law, Lord Judge, you were somewhat critical of the Bingham definition.

Lord Judge: I was not critical. I just amplified it.

Baroness Fookes: If anyone can encapsulate it in a simple and concise way, you can. Could you do that for us now?

Lord Judge: I am really sorry, I cannot. I could give you the Lord Bingham definition with the supplements in it that I have mentioned, but can I do that afterwards rather than rattle it out now? The point is that we do have to be careful. You break the law. The law is made by whomsoever. Some laws are absolutely lousy. I am not of course identifying any in this country, but if you are in breach of them, you have broken the law. That is not the same thing as being governed by the rule of law.

I used the apartheid example, but there are endless ones all over the world. This is all entirely constitutional and entirely acceptable. It was passed in the right way and we now want to implement it. We look at it and think it is horrific, and not the rule of law as we understand it or within any reasonable definition.

I will offer my alternative. I am very anxious that the word "equally" should be in it. Although Lord Bingham used the word "all", I do not think that is enough. It is equality before the law so that every single citizen has exactly the same rights, and an assembly does not pass laws that treat citizens differently. I am sorry, it is rather complex, but I hope I am getting my point across.

Baroness Fookes: We look forward to the result.

Lord Judge: Thank you very much.

The Chair: The point you are making is that a definition of the rule of law is inseparable from democracy and the independence of the judiciary,

and you cannot give a definition outside that context.

Lord Judge: Yes, and to be fair—Lord Hennessy will correct me if I am wrong—I do not think Lord Bingham was picking this out as the final, ultimate definition. He was simply identifying some of the things you should look for when you are looking for the rule of law.

Lord Thomas of Gresford: Suppose this country enters into an agreement with dispute resolution clauses in it, such as the withdrawal agreement, and the Government say, "We are not going to use those dispute resolution procedures. We are going to ignore them by reason of domestic legislation, which we say is superior". What is your view of that?

Lord Judge: Ultimately, I am afraid the sovereignty of Parliament always prevails. We had an example of this with the internal market Bill. Here was a Minister of the Crown saying, "This is unlawful". Nevertheless, it went through to the other place, it came back to us and did not pass. Because of the Brexit timetable, there was no time for it to go back, but if it had gone back to the other place, how many times would we have sent it back to them? The answer is that there is a limit to how many times you can send it back even if something is utterly pernicious. The short answer, I am afraid, Lord Thomas, is that the sovereignty of Parliament prevails.

Lord Thomas of Cwmgiedd: I completely agree with that as regards the domestic plane. There can be no doubt about it. I do not want to go into any specific example, but if the state has made a treaty, and it contains an obligation to submit disputes to an international body, then the state is bound by that treaty on an international plane. It is nothing to do with our domestic courts and nothing essentially to do with the way in which our domestic law operates. The state—the UK as such—as a matter of the international rule of law, is bound by that. For our own security and our reputation in the world, and to encourage others to do the same, unless there is a let-out in customary international law or under the Vienna convention, we ought to abide by our international obligations as fundamental to the rule of law on the international plane. I am sorry to keep on drawing this distinction, but it is very, very important to appreciate the difference between the two.

Lord Thomas of Gresford: In short, you are saying it is a breach of the rule of law not to fulfil your international obligations.

Lord Judge: Yes, I have no doubt about it.

The Chair: Lord Howarth, you have been waiting patiently.

Q61 **Lord Howarth of Newport:** Good morning. With regard to the role of the law officers in upholding the rule of law within government, would you offer us your reflections on what the Attorney-General is reported to have said to the Cabinet yesterday—that there are instances where the advice of the Government Legal Department is too risk averse and perhaps does not reflect the risk appetite that Ministers have?

We understand that the Attorney-General turned for advice outside the department to an American lawyer, to understand the Government's obligations in regard to the Northern Ireland protocol and their treaty obligations.

Should we be concerned about the offshoring of legal advice? Should we be concerned if lawyers are encouraging the Government to sail closer to the wind—perhaps even to be more buccaneering? To what extent should the Government Legal Department feed the risk appetite of Ministers?

Lord Judge: I am very glad I am not still a judge because if I were I would say I really cannot answer that question. It seems to me that the Attorney-General is like any other lawyer, in this sense: he or she can take advice from whomever they think appropriate, provided they realise that the advice they give to the Government is their personal responsibility. I do not know. Some of you here are lawyers; you have looked up different books. Lord Thomas has most certainly looked up all sorts of books on international law. I was inclined less to do so, but that is a different matter.

I do not see any reason why the Attorney-General of the day cannot say, "This is a very unusual problem. I wonder how they dealt with it in Australia". But if it is some sort of excuse, I do not buy it. The only justification for what the Attorney-General advises the Government is his or her personal conviction that that is the right analysis of the legal situation.

I rather wish that we had not even heard that, and I had not heard it, because it opens up the question about the Attorney-General having to justify his or her advice to the Government, and that raises a whole series of difficult issues. Does the Attorney-General say, "This is what I thought on this occasion, but on another occasion I refused to answer the questions"? It is not a good situation to have reached, in my view.

The Chair: The Attorney-General owns the advice they give to the Government. It is their personal decision what advice they give.

Lord Judge: These things are covered by—and it is very old-fashioned—legal professional privilege. The Attorney-General may have said, "On the whole I think the answer is X, although there is a strong argument that it may be Y". I do not think that should be in the public domain, any more than it would be in the context of any other decision.

Judges are in the same situation. "There is a very strong argument here, but there is another argument. The reason I choose this argument is A". The judges give judgment in open court. The parties are all entitled to know what the judge thinks, but the parties are not entitled to know what the other lawyers thought the weaknesses and strengths of the cases were.

The Chair: Lord Howarth, I interrupted you. Do you want to carry on with your question?

Lord Howarth of Newport: Is it appropriate that the culture of the Government Legal Department should be thus publicly questioned by one of the law officers?

Lord Judge: That is a separate question, to which I think the answer is no. You should not be passing any responsibility to anybody else.

Lord Thomas of Cwmgiedd: I would qualify that slightly and say that I think you have to acknowledge in this day and age that in many areas the law has become increasingly specialised. It must be right, therefore, on a difficult question for either the Government Legal Department itself to take outside legal advice, and it very often does, or for the Attorney-General to do it through the Government Legal Department. Taking outside legal advice is not, to my mind, in any way objectionable. I believe Governments have always done this. It is inescapable in the modern age because of the increasing specialisation and complexity of law.

Q62 **Lord Hennessy of Nympsfield:** Lord Judge, could I refer to your fascinating lecture to UCL in December 2013? You have a very powerful second paragraph, if I may say so, which carries an enormous amount of weight. I will read it briefly. It is on the rule of law. You said: "Ultimately, however, it is the judges who are the guardians of the rule of law. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist. Without judicial independence, and without respect for judicial independence, these elementary facets of our civilised community are threatened".

This strikes me, to use a phrase that I have heard you use before, which I rather like, that this is "eternal verities" country. The problem in our system, Lord Judge, is it not, is that in the next paragraph you refer to our half-written constitution? How difficult is it, and, in fact, how can judges fulfil that eternal verities duty that I have just read out from your lecture, in a system where, for example, the Ministerial Code is not on a statutory basis? If it is law, that is fine; we all know where we are with law; but what if it is the codification bit that is the half-written bit of the constitution? Is it not very difficult, for example, for the judges to get drawn into an interpretation of the Ministerial Code?

For example, and this is entirely hypothetical, if you have a Prime Minister whose instinct was to obey those constitutional bits that are in the statute and to cast aside willy-nilly those that exist in the codes or conventions, can you envisage, as your paragraph seems to indicate, the judiciary getting involved in some way or potentially getting involved in some way?

Lord Judge: My answer to that really rather depends on the case. I think it would be unwise to generalise. The Ministerial Code is meant to bind Ministers—and, for that matter, parliamentary codes bind the rest of us—in the way they conduct their responsibility as Ministers. The laws that Parliament produces are subject to judicial scrutiny. I do not see how judges can start interfering with the way the Ministerial Code has or has

not been obeyed. That is essentially for Parliament. I cannot even see what the cause of action would be that anybody would bring to get it before a judge. "The Minister of X failed to comply with code Y or Z". I think most judges would say, "Yes, but that's for Parliament, isn't it?"

What I was trying to get across was the importance of a judicial responsibility for governing the way in which our constitution is implemented, and, beyond that, I do not think I was doing more than asserting the eternal verity of an independent judiciary.

Lord Thomas of Cwmgiedd: I do not want to add anything to that.

The Chair: I think we will move on.

Q63 **Lord Falconer of Thoroton:** The answers you are giving are absolutely at the heart of the problem. You are both here as ex-Lord Chief Justices. Igor, you rightly said that apartheid indicates that you are not necessarily in compliance with the rule of law even though you are complying with the laws. The judges in our system cannot get into that part of the rule of law, can they? Who in our system protects that other bit of the rule of law?

Lord Judge: It was supposed to be the Lord Chancellor, but we have gone over this ground personally, time and time again. I think the constitutional revolution in 2005 was very damaging to that. I have always thought that and I still think it. I think there should have been a serious heavyweight in Cabinet with the job of saying, "This won't do". I was not in Cabinet, but I cannot imagine—I am going to leave Lord Falconer out of it because he is here and it is personal—any Cabinet that had Lord Mackay or Lord Irvine in it not listening to them saying, "This won't do", and for the rest of the Cabinet not to think, "If Lord Mackay or Lord Irvine says it, it probably won't".

What have we done? We have now reduced the Lord Chancellor to a sort of second-division Minister. We have shoved on to them the responsibility for prisons. It should be a job for somebody who has done all the other jobs, as Ken Clarke and Jack Straw had, and for whom this was at the end of a career. Let me put it this way. I do not think that the constitutional centrality of the Lord Chancellor was ever fully appreciated, and it is no longer a star that shines very brightly in the constitutional firmament.

The Chair: In a moment we are coming to some questions on the Lord Chancellor's duties, so I do not want to overanticipate those. Lord Thomas, do you want to add anything?

Lord Thomas of Cwmgiedd: I will wait until those questions come.

Lord Howard of Lympne: Given Lord Judge's last answer, can he help the committee on what we can do to rectify the damage done by the 2005 revolution?

Lord Judge: I am sorry, it is a facetious answer: you need another revolution. The one thing you cannot do, and we cannot do, is to resurrect the old Lord Chancellor in the old role. That will never happen. In practical terms, that is not a runner. I know people say, "Let's go back to the old Lord Chancellor", but the reality is that the Lord Chancellor has been tarnished in the sense of constitutional centrality, and you cannot take the tarnish away.

The Chair: We are coming back with other questions on the Lord Chancellor.

Q64 **Lord Robertson of Port Ellen:** We seem to have covered a lot of the ground already, but it is fascinating to hear the unconstrained views of Lord Judge—

Lord Judge: Less constrained views, Lord Robertson.

Lord Robertson of Port Ellen: —or the less constrained views of former Lord Chief Justices, because you go to the heart of what we are investigating, which is the relationships between the law officers, the Lord Chancellor and the system as a whole.

You have just described the Lord Chancellor as a second-division Minister. I would say, as somebody coming from the other side of the political divide, that at the moment he happens to be Deputy Prime Minister, so it is not really easy to see it as second division, at this point in time, although it keeps changing.

Have you detected a shift in recent years in the political culture within which the law officers and the Lord Chancellor operate, especially as your fascinating speech in 2013, which has already been quoted, referred to the Home Secretary saying at the Conservative Party conference at that time: "Some judges choose to ignore Parliament and go on putting the law on the side of foreign criminals, instead of the public"? The Home Secretary at that time was Theresa May, who went on to become Prime Minister. Do you detect any major changes in the relationships?

Lord Judge: I think the fact that the present Lord Chancellor is the Deputy Prime Minister is itself an indication of the downgrading of the office of Lord Chancellor. The old Lord Chancellor would not have had time to be the Deputy Prime Minister. My view is that a Deputy Prime Minister should not be Lord Chancellor. I do not think being Deputy Prime Minister makes the slightest bit of difference to the functioning of the Lord Chancellor at the lower level. I really do not.

The post of Deputy Prime Minister is very political and, if you add it to what I am saying, it has made it more political, not less. There is less independence. If somebody is a Deputy Prime Minister, he or she must have a deep commitment to whatever the party's policies are, to the unity of the party, and so on and so forth. It is much harder, I think, for him to appreciate that there is a rule of law or breach of treaty issue, or whatever it may be. For me, it is not a strength at all that the Lord

Chancellor currently happens to be Deputy Prime Minister. I just do not see it like that.

Lord Robertson of Port Ellen: Okay, but you did not come out with a remedy for that situation of a heavyweight being in charge of the independence of the judiciary.

Lord Judge: The Lord Chancellor has a series of obligations that are imposed on him by statute. Those have to be fulfilled and, provided they are fulfilled, there is sufficient protection within the Cabinet. The important point in any meeting, as you all know, is that it is not the office somebody holds; it is the weight he or she carries, and, in my view, even if we resurrected the role of Lord Chancellor and gave them exactly the same responsibilities as they had before, they would not hold the office that was once held because it would be a different office.

Lord Thomas of Cwmgiedd: We must not lose sight of the fact that the Lord Chancellor had three jobs: government Minister, Speaker of the House of Lords and head of the judiciary. I do not entirely agree with Lord Judge. I think it is untenable in the modern age to conceive of the Lord Chancellor as head of the judiciary. If you are re-creating the Lord Chancellor, you have to re-create someone who has the impartial role of being Speaker of the House, plus an impartial role of being a judge and a Cabinet Minister.

I am afraid I think that the reform in 2005 was necessary, because that form of person could no longer exist in our modern society. I do not disagree with the reforms that were made. The problem that has arisen is more to do with who you make Lord Chancellor. I completely agree with Lord Judge that it is very difficult to see how a Deputy Prime Minister can have the necessary independence. Nor do I see how you can make someone Lord Chancellor who still has ambitions, because the very essence of the role is to be able to say to the Cabinet, "You can't do that. It's unlawful". One hopes in this day and age—although it is increasingly difficult—that advice can be given in complete confidence. One of the difficulties is perhaps that that is no longer possible.

It is very important that you also recall that no country in the world, with possibly two or three exceptions, likes giving money to a justice system. Rich countries such as Norway are an exception. You need someone who holds the position to be able to ensure that the courts system is properly funded. There is quite a difficult conundrum of how you solve this problem. You can disagree with what happened historically, but both Lord Judge and I are in absolute agreement: you cannot go back; it has gone and we have to look for something new.

The Chair: We will come to what we do about the problem in other questions.

Lord Robertson of Port Ellen: As regards the political atmosphere related to the law officers and the Lord Chancellor, we have a pretty political Attorney-General at the moment, who is given to making

statements about either general or particular political issues. Do you think that is having an effect on the relationships between the Lord Chief Justice, the law officers and the Lord Chancellor?

Lord Judge: I think it diminishes the weight that is attached to the Attorney-General or the Lord Chancellor if he or she is seen to be overpolitical and political statements are made. As I said to Lord Howarth, I regret very much that that statement was made at all. As I say, I have not read it.

I think there has to be a certain level of discretion in the law officers. The more they talk in political terms, the less people will attach weight to what they say, and the less weight they will carry with the judges, among others, but not just among the judges, because I do not think the offices that they hold are offices that should have a political, so to speak, outside. There are obviously political responsibilities, and they have to agree with the Government and so on and so forth, but I do not think it helps at all for any of them to be making public statements about political issues.

Let us take as a "for instance" the really rather complex situation that arose in relation to the internal market Bill. I do not think we should know what the Attorney-General has advised. He or she should be independent, advising, giving the advice that they think is right. The more we treat them as political, the less weight is attached to them in relation to the rule of law because they become, if I may say so to so many of you around the table, mere politicians, and I do not think that is healthy.

Lord Thomas of Cwmgiedd: I would make just one observation, and we are coming back to this. It seems to me that you have your greatest influence as a lawyer when your advice is private.

The Chair: We will move on to the issue of the relationship between the Lord Chief Justice and the Lord Chancellor.

Q65 **Lord Hope of Craighead:** Could you cast your minds back to the time when you were in office as Lord Chief Justice, where, as part of the functions of that office you had to develop a relationship with the Lord Chancellor? I am interested, of course, in the constitutional relationship and not the personal relationship such as it may have been.

Lord Judge, could you tell us how often you met, what kinds of topics you discussed, and, if there were disagreements, what you felt you could do about it? Did you relay your discussions to your colleagues on the Bench when you got back to court?

Lord Judge: I had three Lord Chancellors: Jack Straw, Lord Clarke and Chris Grayling. The first two, if I may say so, had been around. They had done every office there was and this was at the end of their political careers. I used to meet them once a month. There would be occasional delays and so on, but we met almost without fail. We would discuss

anything that occurred to either of us. We would tell each other in advance what was troubling us.

I will give you an example for each of them. For instance, with Jack Straw, we had a long discussion about how the House of Lords had shattered a judgment of mine in which I had said that it was possible for witnesses to give evidence and not be cross-examined. This was in a case where somebody had fired a gun at a party and killed somebody he was aiming at. The bullet had gone through a very thin wall and killed somebody standing behind, so it was rather difficult to get any witnesses to come forward, given the risks.

He told me that he was proposing to introduce a Bill to remedy, as he saw it, the mistake made by the House of Lords and raise up my judgment. We discussed that. We always discussed any cases where there was some suggestion of misconduct or misbehaviour by a judge. To start with, to be fair, we were both getting our feet under the table.

With Ken Clarke, again, it was a monthly meeting. One of the subjects we discussed, for example, was the situation of IPPs. His question to me, and I am paraphrasing a memory that goes back many years now, was, in effect, "Would the judges be bothered if the sentences they had imposed were now varied by Act of Parliament in the particular circumstances?" I said I was sure they would not. The judges hated that particular law; they thought it was unjust. With him, the issue that started to arise was pensions.

One thing I had to do with Mr Grayling, because he did not have the experience of the other two, was discuss why particular forms of misbehaviour really did constitute misbehaviour, and, if so, at what sort of level they would be in the hierarchy of misbehaviours, because we had a joint responsibility for the final decision on what should happen when a judge misbehaved.

With him, of course, the major issue was the pensions, when I argued like fury that the Government were going to be in breach of the contract they had made, particularly to attract young people on to the Bench, and the pension arrangements that were being provided were a total breach of that contractual obligation. It did not matter what was decided for the future, but it should not have applied to any of the judges. It was beyond his pay grade. I know that obviously it was a Cabinet decision and a prime ministerial decision. That was what we talked about, generally speaking.

I found the meetings terribly easy, with them all. I would always ask at the end of the meeting, "Can I tell my colleagues?" This was entirely private. Sometimes they would tell me what had gone on in Cabinet, and that was obviously private, but occasionally I would need to know, and they would always say that was fine, unless they had a particular reason not to. When I went back to the law courts, I would have a meeting with my senior colleagues every week and I would tell them what was going on. I think that covers the ground that you raised, Lord Hope.

Lord Hope of Craighead: Did you find these meetings valuable, and if there were points at which you felt you were not getting your point across, was there some other means of obtaining redress against the disagreements that you were meeting?

Lord Judge: The meetings were always useful. Of course, they are three different individuals. Because I thought that the then current arrangements were not adequate, through the then Cabinet Secretary I asked for the opportunity to see the Prime Minister twice a year. There was no difficulty with that; it was agreed, and so I saw the Prime Minister every six months or so.

There had been a separate understanding that, if the Lord Chief Justice had a nuclear option he wanted to blow, he could see the Prime Minister, but this was going to be standard form. I would go to the Prime Minister and make the case out. I regret to say success did not bless all my enterprises, but that was the arrangement.

Then I always had in mind, but I had forgotten until Lord Thomas reminded me, what I thought was a really hopeless nuclear weapon, which is the right of the Lord Chief Justice, which I think is still there, to write a letter to Parliament. Any of us who have done advocacy know that writing a letter to anybody is about the quickest way for it to get buried at the bottom of the pile. I never used that and I would never have contemplated using it. I thought it was a completely ridiculous form of protest.

Lord Hope of Craighead: In the old days you would have been able to speak, but you were not able to speak.

Lord Judge: Exactly, and that was taken away during the constitutional format. Suddenly, the head of the judiciary, who had been able to speak in Parliament, was no longer able to speak there.

Lord Thomas of Cwmgiedd: I agree. It is important to bear in mind that, when the new system was devised, it effectively imposed a partnership between the Lord Chancellor and the Lord Chief Justice in relation to certain things, embodied in the concordat and the framework agreement. For example, discipline was a joint responsibility. Both the Lord Chancellor and the Lord Chief Justice had to agree on the sanction. In relation to certain kinds of leadership appointments, the Lord Chancellor and the Lord Chief Justice had to agree. For example, there had to be discussions on the appointment of the chair of the Judicial Appointments Commission.

Certain areas were laid down in the governing constitutional instruments. When arrangements were made about Her Majesty's Courts Service, and this became a central issue in positive terms when I was Lord Chief Justice, there was a partnership. The framework agreement sets up a working partnership. It is very important to realise that there is a constitutional mechanism in place that compels you to work together.

In support of that working together, it is very important to pay close attention to the importance of the Civil Service. In the usual way, the Private Secretary to the Lord Chief Justice and the Private Secretary to the Lord Chancellor would have a broad discussion on what was to be discussed, so, if there was a tension, you would have some notice of it in advance, in the way all good civil servants do. I think Lord Judge did exactly the same and would regularly meet with the Permanent Secretary.

Lord Hope of Craighead: Was the Permanent Secretary present in your discussions, or was it just one to one?

Lord Thomas of Cwmgiedd: Sometimes yes, sometimes no. It depended. I had one-to-one meetings. I had meetings with more than one person there. For example, the chair of the Judicial Appointments Commission would be at some meetings because one used to chat to them. Similarly, Sir John Brigstocke would be present as the ombudsman.

You constructed meetings, but because of the absolute necessity of working together you had to have one-to-one meetings. Normally, we would meet about once a month, but allowing for the differences in our vacations, there might be a period over the summer where you did not meet. You would sometimes talk on the telephone if there was something very urgent. That was, to my mind, very important.

Going back to what was central when I was Lord Chief Justice, and this was why I laid such emphasis on it earlier, it was trying to reform the justice system. It had been starved of funds for years. Its digitalisation was completely hopeless and so it was necessary to get very significant investment. The person who got us that investment was Michael Gove. He was effective. I went with him to see the Chancellor of the Exchequer and we got an agreement from the Treasury to spend more than had ever been spent on the justice system.

That is why a heavyweight political Minister is critical, quite apart from the importance of defending the rule of law, because if you do not have courts, if you have buildings that leak and you have no legal aid, a justice system does not work for the ordinary person.

We had endless discussions about changing the nature of the court estate. That is not different from what has gone on in most of the rest of the world, as we have moved to the modern age. It was fortunate that we carried out those reforms. The justice system, apart from jury trials, operated effectively during the pandemic and that was because huge investment had been made. That was a joint enterprise and, to my mind, it worked extremely well.

I would say that the meetings are essential. You do not have an option. You have to get on with the Lord Chancellor. I had four Lord Chancellors, but that is a different question. It is not really for me. You really need to work with them.

One final point, and it is a point Lord Reed made yesterday in his talk at the House, is that one must remember that London is still the pre-eminent legal centre in the world, and the role of the Lord Chancellor in promoting this is critical to one aspect of our economy. I found, for example, that all the Lord Chancellors were very keen to help in promoting London as a legal centre.

There are lots of areas where I think you can have a positive and beneficial relationship. You may have slight disagreements. I used to meet the Permanent Secretary of the Cabinet Office, Sir Jeremy Heywood, regularly. I saw him twice a year. That was another conduit to make certain that matters were properly understood at 10 Downing Street, apart from meeting the Prime Minister.

Lord Judge: The other place where the Lord Chief Justice could start issuing concerns, in the very gentlest way, was in the annual report, which was a creation. I did annual reports. They did not necessarily come out every 12 months, but that was a place where you could ventilate. You could tell the Lord Chancellor, "This is going into my report". That was quite a useful mechanism, at least for the interested public, to know what was going on.

Lord Thomas of Cwmgiedd: The presentation of the annual report, coinciding with being able to talk to you as the Constitution Committee, and to the Justice Committee, actually produces quite a healthy court of appeal.

The Chair: We have questions on the annual report, so I do not want to develop this here. Lord Hope, had you finished?

Lord Hope of Craighead: Yes, I had, but I thought Lord Falconer wanted to come in.

The Chair: I am going to call in Lord Howell first.

Lord Howell of Guildford: I am reeling a bit after the "mere politicians" comment, but I will get over it.

Lord Judge: It was not my comment about them. That was a reflection of what I think some members of the public think.

Q66 **Lord Howell of Guildford:** I realise that all too well.

I want to turn to Lord Thomas and the remarks in his superb Michael Ryle Memorial Lecture, which reminds us that the original 2003 White Paper, before the 2005 constitutional changes that led to this second-division Lord Chancellorship, which many of us regard as a disaster, suggested we abolish the thing altogether.

Lord Thomas of Cwmgiedd: Yes.

Lord Howell of Guildford: If we cannot go back, as Lord Judge says, would that be a course this committee should look at? It really is a very disappointing scene, and many of us thought things were going to

happen this way. How do we get back to the idea of a senior figure linking the judiciary and the Executive, without ambitions, when, as Lord Judge says, it is almost impossible to go back?

Lord Thomas of Cwmgiedd: I think it is very difficult. The reason I say that is twofold. One is because of money. It is the root of all evil, but what matters to the ordinary person is having a functioning court system, with things like legal aid, which are all within ministerial responsibility and which call on quite significant resources, so you do need a figure who can produce the money from the Treasury and has influence.

Secondly, I think it is important that the person who occupies the job is prepared, and I hope this is always done in private, to say, "You can't do this". That is what you need. Perhaps I do not have the gifts of a politician, but I do not see how in the modern era it is as easy to find someone who still hopes for a long political career who can do that as it was in the past.

Lord Falconer of Thoroton: I think, Lord Thomas, at the point that I became Lord Chancellor you were the senior presiding judge.

Lord Judge: Yes.

Lord Falconer of Thoroton: You were not the President of the Queen's Bench Division because that role had not been invented, but were you the senior Queen's Bench Division judge at the point I became Lord Chancellor, so pre the changes?

Lord Judge: I cannot remember. It may have been betwixt and between.

Lord Thomas of Cwmgiedd: He was the Deputy Lord Chief Justice. He was my boss.

Lord Falconer of Thoroton: I knew in some way he was your boss, Lord Thomas. The relationship with the Lord Chancellor was transformed by the changes. There was the concordat with Lord Woolf and I think both of you were involved in negotiating it. It became a much more detailed relationship, and as a result the judges had much more influence on the day-to-day running of the courts and policy decisions. In your own words, could each of you describe what the difference was, pre and post, in the relationship between the judges on the one hand and the politicians on the other, because, ultimately, whatever system you have, you have to have that relationship, if for no other reason than that the politicians are producing the money for the justice system?

Lord Judge: I am not sure I can do that without writing an essay. The importance is this. Suddenly, the Lord Chief Justice, who was a judge, with obviously some administrative functions, became head of the judiciary and was responsible for what was going on in Swansea county court, where a poor judge was sitting in a room with two litigants in person, either one of whom might have decided to beat him up. That suddenly became the Lord Chief Justice's responsibility and so the Lord

Chief Justice—with no training—was suddenly asked to head a department. That rather changed everything.

So far as the Lord Chancellor was concerned, suddenly he was not the person to whom you could go to get things sorted out. The Lord Chancellor was the person you would go to. I was part of it when I was senior presiding judge and I used to go and see Lord Irvine and come to see you from time to time, Lord Falconer. This was a problem, and it was the Lord Chancellor's problem. To the extent he could, and so on and so forth, he sorted things out. That was the great change. Suddenly, as I said a moment ago, the Lord Chief Justice became the head of a department of state.

Lord Thomas of Cwmgiedd: May I say two things? First, you had to create a mechanism, and one of the things I was told to do was to get to grips with the detail of the reform, I think it was called in the end, of the Office of Lord Chancellor—because everyone forgot what had accreted to the Lord Chancellor over the centuries. That was a massive job. We overlooked one or two small things, one of which turned out to be important, which was who could appoint the deputy chairman of the Boundaries Commission. That was overlooked, but most things were picked up and it was decided where they fell, and it was dealt with in the legislation.

Secondly, as Lord Judge has said, it was the creation of an organisational structure, and I got landed with that job as well. When recreating the job of the Lord Chancellor, one must remember that the Lord Chancellor used to sit as a judge. As Lord Chief Justice—and it would be invidious for me to speak of my own position but certainly in the case of Lord Judge and before him Lord Phillips and Lord Woolf, and in the case of Lord Burnett—one of the central aspects of the person who is head of the judiciary is that he must be a judge, he must sit on cases and he must decide cases.

One of the burdens of carrying on the job of the Lord Chief Justice is that you have to deal with very important cases, particularly any that involve difficult issues of administrative law, and certainly criminal law. You must, therefore, be a judge, with an organisational structure beneath you, properly organised, where you delegate all the kinds of things you have had to learn—and learn at speed. If you were to recreate the position of Lord Chancellor, he would not possess the authority that the old-fashioned Lord Chancellor had. Lord Irvine used to sit as a judge. The way you gain respect for your central role is sitting as a judge. Certainly, that was central to the position of the Lord Justices I worked with or who succeeded me. They all used to try to sit at least 50% of their time as judges.

The Chair: Lord Sherbourne, I think you are going to take us now to possible challenges to the role of the Lord Chancellor.

Q67 **Lord Sherbourne of Didsbury:** Yes, I want to come back, if I may, to what has been described as the demotion of the position of Lord Chancellor. I will also very briefly quote from Lord Judge's 2013 lecture,

where he said: "The judiciary is no longer represented at the Cabinet table by an individual holding ancient office, whose only personal ministerial responsibility—his specific role and focus—was to represent and protect the independence of the judiciary". Lord Judge said that the role of the Lord Chancellor has now been diminished. So what evidence is there that this demotion of the Lord Chancellor has actually had adverse practical consequences?

Lord Judge: I can think of one, and I am sorry, but it comes immediately to mind. I said at the time, and I am not embarrassed to say it again, that when the newspapers decided that the judges were the enemy of the people, I think an old-fashioned Lord Chancellor would have been on the television news, or certainly in Parliament, asserting what it took a very long time for the new Lord Chancellor to do: namely, saying this was a totally inappropriate observation about the judges who were doing their duties. There was a lack of understanding, and that is a prime example of the way in which the head of the judiciary as Lord Chancellor would have been able to step in, is still able to step in, but failed to step in. As I said about two days later, what emerged eventually was too little and too late.

The Lord Chief Justice and the President of the Supreme Court could not step in because it was their decisions that were being talked about. It was not much use getting up to say, "I'm not an enemy of the people". It would have been absurd. That was a prime example of the difference.

Lord Sherbourne of Didsbury: Are there any other examples?

Lord Judge: Not that come immediately to mind, but that is so striking that I think it speaks for itself.

Lord Sherbourne of Didsbury: Lord Thomas, are there any other examples you could give?

Lord Thomas of Cwmgiedd: I am not going to say anything about the incident to which Lord Judge has referred, although of course I am happy to add my voice to it.

What concerns me more is the extent to which, when rule of law issues come up, the voice of the Lord Chancellor, who is no longer a lawyer, is listened to. Obviously, that means that the position of the Attorney-General becomes much more critical, because, as the Lord Chancellor does not have to be a lawyer, I have no idea about the extent to which they are listened to. I would say that each of the Lord Chancellors understood—and this is what helped: their ability to fund the court system. I am sorry to come back to money, but a court system needs money, and ours was starved of money for a very long period.

Lord Judge: May I return to the question, please? Can we just examine what we have done? We have a Lord Chancellor who is the level of Minister I have described. We then introduced a Minister for the Constitution. It was not a Cabinet post. We now do not even have a Minister for the Constitution. It was thought necessary to have somebody

available as a Minister to discuss the constitution, and to take responsibility for dealing with constitutional questions. We now do not have one at all. It has not reverted to the Lord Chancellor. It has simply dissipated. That is the sort of thing that concerns me.

Lord Sherbourne of Didsbury: I will come back on the question. I understand all your concerns about structural changes, the change in the position of the Lord Chancellor, and the point you have just made about the other changes. I am interested to know more on the question of the Lord Chancellor's primary responsibility to uphold the independence of the judiciary. I take the example you gave about the enemy of the people, but I think it is quite important to know whether there is any evidence of practical consequences that we ought to be concerned about in this committee.

Lord Judge: Not that I can speak of beyond the one I have given, and not during my own time, save and except the pensions issue, and that actually was overwhelming. I pointed out that it would be very difficult to recruit bright young people on to the High Court and circuit Bench, because the whole profession, solicitors and barristers, would have thought that what went on was a betrayal of trust—and indeed, that is what happened. The candidates for appointment for a year or two after that were not so good. We are now recovering.

A former Lord Chancellor might have been in a stronger position to point out that we had just spent a great deal of time trying to recruit and persuade particularly young women on to the Bench, on the basis, among other things, that they would have a very healthy and very pleasant pension arrangement, and it was suddenly taken away. I think a former Lord Chancellor would have carried much more weight.

Q68 **Lord Faulks:** Good morning. Lord Thomas, you spoke about money being very important. I understand that entirely. We are examining the role of the Lord Chancellor and the law officers. The Secretary of State's role involves deciding or contributing to the debate about how much money should be spent on the court system, legal aid, and the like. The Ministry of Justice, we read, is now the recipient of the most applications for judicial review. I think it was the Home Office and now it is the Ministry of Justice, apparently.

I am asking for your views on whether you feel comfortable with a position where the Secretary of State for Justice has a significant role in deciding or contributing to the debate about money, and at the same time as the Lord Chancellor, he or she, has as part of that role the very important role of protecting the administration of justice, which would of course involve making sure there are sufficient funds. Is that a comfortable combination of roles?

Lord Thomas of Cwmgiedd: I do not think you can divorce the two. When justice used to be funded locally, before the good Dr Beeching changed things, it was probably easier to be happy that justice would be

funded. In the period before Dr Beeching, the courts themselves had a much more extensive role in relation to money.

When the legal aid system was created, that was given, ultimately, to the Lord Chancellor. If one looks at the position of the Ministry of Justice, or the Lord Chancellor wearing that hat, the administration of justice is concerned with two things. One is funding litigants so that they can come to court. It is dreadful, for example, that we do not have legal aid for most of the important issues in people's lives—housing and employment. People would say you cannot get justice without that. When one looks at the position in the round, it is inescapable that the person as Lord Chancellor traditionally had the role of securing money.

There is a wonderful document, in what must be the 750th anniversary of Magna Carta, where the Treasury was thinking of putting up fees, and the Lord Chancellor wrote to the Permanent Secretary to the Treasury merely to say he did not think it would be a very good idea to charge for justice when we were celebrating the 750th anniversary of Magna Carta, which said that we do not sell justice.

I do not think you can divorce the role of the Lord Chancellor traditionally as a judge, or the Lord Chancellor traditionally as Speaker of the House, or the responsibility of someone who has that position to get money. It all worked. We have to find a means of getting back to that. That is where I would be coming from.

Lord Faulks: Lord Judge, do you have anything add to that?

Lord Judge: No. Lord Thomas had greater money problems than I had.

Lord Faulks: May I ask one other question? It looks to me from your evidence that we cannot go back to the old Lord Chancellor. Whether we should ever have changed it is contestable.

Given that we are where we are, and taking up the point made by you, Lord Judge, about the apparent vacuum in terms of a responsibility for constitutional affairs, do you think it is a feasible scenario that you could have a Lord Chancellor—whether you call him or her that perhaps does not matter—or an important Cabinet role separate from the spending department with responsibility for prisons, who was perhaps a Lord Chancellor in charge of constitutional affairs, who could advise the Government on legal issues, divorced or substantially divorced from the spending obligations and commitments that a Ministry of State for Justice might have?

Lord Judge: I am making a distinction. I think it would be better if whoever was the Lord Chancellor was not also responsible for prisons and for financing that. I do not think he or she should have to be responsible for funding the prison system. Whether that would increase or reduce the power and weight of the Lord Chancellor in the Cabinet is another question, but I was never enthusiastic about the idea—Lord Falconer will remember—of the prisons being joined to the Lord Chancellor, because

suddenly it is a huge responsibility. I also know that prisons are much more interesting to the public. They demand money almost any time something goes wrong, and things constantly go wrong. If you were resuscitating it—but I am not in favour of trying to resuscitate it—you could create a new job for the Lord Chancellor, but you should, in my view, drop the prisons.

Lord Falconer of Thoroton: Are you thinking in these thoughts of somebody who is not a politician? Without in any way being disrespectful, there is a slight undercurrent there of not holding the politicians as being reliable people when it comes to the rule of law.

Lord Judge: I am so sorry. If there is an undercurrent, that is not what I am driving at. I think whoever takes on this role, whatever it is described as, must be somebody with a deep understanding of the constitution, and not somebody who has been drafted in because it is time for him or her to have another job, or to be transferred to a different job.

Lord Falconer of Thoroton: Do you mean that this job is to be held by an MP generally, or perhaps by a Labour or Conservative supporter, depending on who is the Government, who is an authoritative figure?

Lord Judge: I think he or she has to be answerable to Parliament.

Lord Falconer of Thoroton: So an MP or a Lord.

Lord Judge: I would not mind so much if it was in the House of Lords, but there has to be parliamentary responsibility.

Lord Thomas of Cwmgiedd: I want to say something in answer to Lord Faulks's question. There are many different ways worldwide in which you can structure the way the judiciary operates. It is a problem. If you look at the different models in Europe, or elsewhere in the world, the problems that we are facing are not dissimilar. It is interesting, and this is by way of an aside, when the issues arose in relation to the enemies of the people, that this attracted enormous worldwide interest. I gave several talks trying to explain what judges should do in these circumstances across Europe, and elsewhere.

One of the interesting things is how you deal with the money to run the court system. In the States they have a wonderful system. The judges get it direct from Congress.

One of the issues I would ask you to consider, which I have already mentioned, is that your committee and the Justice Committee play a central role in the operation of the constitution, and Parliament should play a central role. It would be impossible to conceive that the Treasury would ever allow the legal system to be funded in discussions with Parliament, and I am not suggesting that. That is out of the question. However, it seems to me that your committees, representing Parliament, have a central role in protecting the independence of the judiciary. You all know each other, you meet together, and perhaps this is a solution we should examine as well.

I think there are tremendous difficulties in reconciling all the different needs of the person who holds the office of Lord Chancellor, and it may be that in the way our constitution has evolved in the last 20 years that is impracticable. But, certainly, my own view is that Parliament needs to strengthen its position, not only in matters about which Lord Judge is much more expert than I—for example, subordinate legislation and our control over that—but, actually, the responsibility of Parliament in protecting the independence of the judiciary. I think your committee has a very important role in this respect.

Q59 **Lord Howard of Lympne:** I would like to ask about judicial appointments. No less an authority than Baroness Hale, with whom I do not always agree, has said that the current arrangements place the Lord Chancellor in an almost impossible position. At least one former Lord Chancellor has written about the extreme difficulties he faced in relation to a particular appointment. Do you agree that there is a strong case for looking again at the appointments arrangements, including the proposal that a panel should draw up a shortlist from which the Lord Chancellor could make the final selection?

Lord Judge: No, I think that would be a great mistake. If there was one feature that was very attractive about the new arrangements in 2003 to 2005, it was that the Lord Chancellor should cease to be ultimately and solely responsible for judicial appointments. Look at how the water has gone through the mill since then. I think we have a much less politically independent Lord Chancellor. The appointment, as I said earlier, is a second-division job. It does not even have to be somebody who understands how the law works and what the requirements are of a judge. I suggest that makes it even less likely that the Lord Chancellor should have a role to play. However, we have a Judicial Appointments Commission. I think that was, as I say, the best reform of all.

Whether Baroness Hale dealt with all this I do not know, but the Lord Chancellor is entitled to, and certainly should, write to the Judicial Appointments Commission on the top appointments saying, "My anxieties for the justice system are these. Whoever you appoint really must be somebody who you think is up to addressing that"—or whatever it may be. Those are taken into account by the Judicial Appointments Commission. It makes a recommendation. It is open to the Lord Chancellor to refuse to accept the recommendation. When Jack Straw was Lord Chancellor he was very concerned about an appointment, and he made it known informally, but it was up to him, if that was not accepted, to then write formally, giving his reasons why he was not happy.

That is the ultimate power the Lord Chancellor has, and that seems to me to be a pretty fair balance. It avoids any interference with the independence of the Commission, it keeps out the political, but it enables the Lord Chancellor to have a final veto, provided he gives reasons. If the Lord Chancellor is simply given a shortlist, he will know very little about the system; he will have no knowledge of the candidates, or will only have the briefing from his department, and perhaps a briefing from one

or two of his ministerial colleagues. I do not think that is a sensible way to preserve the independence, and the perception of independence, of the appointments system.

Lord Howard of Lympne: But surely it would introduce an element of accountability, which is sadly lacking. The current arrangements, in effect, constitute a self-perpetuating judicial oligarchy.

Lord Judge: If I may say so, Lord Howard, I think that needs to be rethought. The appointments are not made by the judges. You may shake your head, but the appointments are not made on that basis. I as Lord Chief Justice had nothing whatever to do with my successor. I was not involved in any way in the process. The accountability for judges in the end turns on the judges doing the job properly. They are accountable to the public.

Lord Howard of Lympne: You may not have been involved in the appointment of your successor but other senior judges were. Although we know there is a lay majority on the Judicial Appointments Commission, the senior judges there inevitably carry great sway.

Lord Judge: Of course, because people listen to people who understand the system. I am not denying that. But take the appointment of the President of the Supreme Court. The majority there are members of the Judicial Appointments Commission, the senior ones for England, Northern Ireland and Scotland, with two judges on it. There are two judges on the appointment for the Lord Chief Justice and three members of the Judicial Appointments Commission. In any event, to restore to the Lord Chancellor the power to, in effect, choose between three simply reintroduces a strong political element and the perception of a strong political element in the appointments system, which, as I have said, I am very glad we got rid of in 2005.

Lord Thomas of Cwmgiedd: I completely agree. I think one ought to bear in mind two circumstances. First, there is not a lack of accountability. The duty to appoint or make the decision that the Lord Chancellor originally had of appointing judges beneath the High Court was transferred to me. Therefore, I had to read all the appointment papers. I used to go back and say, "Are you sure that you're satisfied this person, because of his or her experience, can do the job?" Then one would get an answer. I would hope that what happens from time to time is that Lord Chancellors do raise these questions, and to my mind it is perfectly legitimate to ask people, rather like this House does, to think again.

As long as you have that area of accountability, it is critical that we do not get anywhere near what has happened in the United States. Any US person with a close connection to the way in which the appointments system works will tell you that you have no prospect of promotion to federal judge or in the federal system in the way it has developed there in the last 20 or so years, unless you have a strong party-political affiliation. To my mind, the great virtue of our system and systems in

many countries is that we have got away from judges having a political connection. This has become particularly important when legislators have entrusted to the judiciary through things like Bills of Rights many more decisions that are perceived as political.

Lord Howard of Lympne: But, as Lord Burnett agreed when he came before us, under the old system, the pre-2005 system, since—I think he said—the 18th century, there had never been any suggestion when the responsibility was the sole responsibility of the Lord Chancellor that these appointments were made on political grounds.

Lord Judge: With great respect, that is completely wrong. Lord Halsbury appointed Conservative Members of Parliament. When they were no longer wanted in the House for whatever reason, they were appointed to the High Court. The history is absolutely plain as a pikestaff. It was a shocking period of appointments. Lord Halsbury was completely shameless about his appointments and political careers. I think Lord Burnett's memory must have failed him.

Lord Thomas of Cwmgiedd: Of course, that was true under the old system, where the Lord Chancellor had this triple role: Speaker of the House, head of the judiciary and a sitting judge, and the person responsible for the administration of justice. That is not the position of the current Lord Chancellor and, therefore, analogies with the past are not helpful. Lord Judge is right that, politically, terrible things happened, certainly at some periods, and one does not know what actually happened because the public records in respect of judges are kept closed for a very substantial period. I do not think it matters what happened in the past. What has happened is that the position of the Lord Chancellor has changed, and the world has changed as well. It is accountability. That is why, if I may respectfully say so, Lord Howard, you ignore the power of questioning what the appointments commission is doing. Asking it to think again, properly exercised, and by a Lord Chancellor who has the time and interest to do it, is a very great power.

Lord Faulks: I have one very short point. Do you think there is a danger that you go to the other extreme and somebody who has any political reputation or experience might almost be disqualified from appointment to the judiciary? Is there a danger that we have swung too far the other way?

Lord Judge: No, because if they are interested in the appointment they do not go and have a word behind the scenes with the Lord Chancellor or let it be known. They make an application and then it is viewed like any other application.

Lord Thomas of Cwmgiedd: I agree.

Lord Howarth of Newport: I would like, Lord Thomas, if I may, to probe your pessimism on a matter that has been raised repeatedly this morning. I understand you think it would be impossible now to resurrect the historic role in Cabinet of the Lord Chancellor. I want to ask you why

you take that view. What has changed in our politics and in our national life to make it so? Is it unimaginable that someone with the authority and impartiality traditionally associated with the role of the Lord Chancellor could be found, or is it that such a paragon whose views and advice would rise above political expediency would not fit into a modern Cabinet?

Lord Thomas of Cwmgiedd: One must remember what the old Lord Chancellor was. Many of the great cases have judgments from the Lord Chancellor. Being a judge sitting there reinforces and strengthens your independence, and you have a special role. If you were to say we can go back to a situation where someone sits in the Cabinet and is Speaker of the House of Lords and a judge—I think being a judge is the critical thing—then perhaps it would be open, but I cannot see that being practicable in the modern world. I say it is extremely difficult to find someone to do a third of the job of the Lord Chancellor. One forgets what the Lord Chancellor was. Lord Irvine sat on cases, and it became increasingly difficult for him to do so, for obvious reasons.

Lord Judge: May I add a short supplement to that? I think, if I may say so, there are some Prime Ministers who prefer to have people at the Cabinet table who tend to agree with them. It all turns on the personality and the wishes of the Prime Minister.

Lord Falconer of Thoroton: What do you think the attitude of—

The Chair: Lord Falconer, I have to move on to the other questions.

Q60 **Baroness Suttie:** I will go back to the questions in front of you. You have said that Parliament should strengthen its position. Do you think the Lord Chancellor should be obliged to produce an annual report that is debated in Parliament, and, if you think there should be such a report, what should it cover?

Lord Judge: I think it would be a very good idea. The Lord Chief Justice's report is a significant improvement, and it should cover the way in which his department is run. I cannot comment on the prisons issue, although the public might be very interested to know what the Lord Chancellor, who is head of prisons, thought of the Prison Service, and what he was doing, but it should cover, among other things, where he disagreed with the Lord Chief Justice. If the Lord Chief Justice has said such-and-such in his report and that there was no funding for this, he could say, "I disagree. We fund it in this way". I personally think it would be a very good idea. Actually, although it is not part of the remit here, I think it would be a very good idea to know what he or she was doing with prisons, too.

Lord Thomas of Cwmgiedd: The whole point of a report is for accountability purposes. That is why, when Lord Judge was Lord Chief Justice, we set about creating an annual report. It was pretty regular but it is now annual. Like many things, it had stops and starts, but it is now on the road. It gives a form of accountability and enables the Lord Chief

Justice to make his or her position clear. I think the same should be true of the Lord Chancellor. And it should not be a report written like most government reports, which are, frankly, quite useless because they say nothing. One of the most important things I did was to go through it and make it in language that was short and understandable. It only had tables in it where they were of some value, and not like most government department reports—and I hope I am not being too contentious in saying this—which really do not get to the nitty-gritty. If you had the Lord Chancellor here and you asked, "Is this a report you personally have looked at and signed that gives a proper account?", I think it would help a great deal.

Q61 **Baroness Fookes:** We have had a pretty comprehensive look at all the disadvantages. May we turn now and look for some solutions? For example, would it be helpful if the Lord Chancellor as currently constituted had to have a legal or constitutional background that you could incorporate in a new Act of Parliament? Would it be helpful if one added the role of Secretary of State for Constitutional Affairs to it?

Lord Judge: As to the second, if you dropped the prisons, there would be something to be said for that. As to the first, it would be helpful, but it is not an absolute necessity. There have been such people in the House of Commons. I can remember discussing this with Lord Falconer all those years ago. Roy Jenkins would have been an admirable Lord Chancellor. He understood the legal and constitutional system. I am not talking about his capacity as Lord Chancellor, but his record, his knowledge and his experience would have been sufficient. He did not have a legal background as such.

The problem with a constitutional background is how to define it. The constitutional background that the current situation covers is membership of Parliament. We have had different Lord Chancellors: I cannot remember how many since I had three. Some have had it; some have not. I think it is helpful that those who have had it have had a legal background. Michael Gove had no legal background, and you have heard Lord Thomas. He was not one of my Lord Chancellors.

I do not think it is necessary for us to have somebody with a legal constitutional background, provided he or she understands when they take up the appointment that it is a constitutional appointment, with constitutional obligations.

I can think of three people in this House who would have made admirable Lord Chancellors, but in the other place I am not so sure. The world of a Member of Parliament has changed so dramatically, even in my short time here. How many of them are in fact lawyers who have ever practised? There are fewer of them. That may be to the public advantage, but there are fewer of them, so the fewer would be fewer for the Prime Minister to look at and select from.

Baroness Fookes: There would be no objection to having somebody from the House of Lords.

Lord Judge: I would have none, because if you just made it the constitutional issues then somebody from this place could argue the point just as well as—indeed, perhaps better than—somebody who was hoping to move up.

Lord Thomas of Cwmgiedd: I agree.

Q62 **Lord Hope of Craighead:** A change of topic: chapter 2, law officers: I have two questions, which I will put together to save time and ask you to answer them both. I come to Lord Thomas first. What qualifications do you think are necessary for somebody to be appointed as a law officer, and do you think it would be helpful for those qualifications to be set out in statute, as we find in Section 5 of the 2005 Act?

Lord Thomas of Cwmgiedd: Yes. As long as the qualifications are what I would regard as formal rather than descriptive of the kind of person you want, that is obviously right. Once you start to say they have to be a qualified lawyer and then "and also have the following further characteristics", that would become more difficult. Ultimately, you have to rely on the judgment of the person who appoints the person, and in this case it obviously has to be the Prime Minister, in the selection of the person.

Lord Hope of Craighead: What should the Prime Minister be looking for? What would you regard as an essential qualification?

Lord Thomas of Cwmgiedd: Ideally, someone with the independence to say, "Thank you very much. You don't like my advice. You want to do something different. This is so important that I'm leaving". My view as a lawyer throughout is that, if you have told a client they ought to do something and they say, "We have listened to you, but we're going to do something you say I shouldn't do", I would say, "Thank you very much. I can no longer act for you". That is not to say that it should govern the advice. If you say, "Look, Prime Minister, you ought to do this", there is a balance. However, once you have told the Prime Minister, "You can't do something that is unlawful", you should appoint someone who has the independence of another job, another career or something to be able to say, "Thank you very much, I'm resigning". Appointing someone who is in a position to resign where your client does something you think is unlawful is an absolute prerequisite to the appointment.

Lord Hope of Craighead: I wonder whether the discussion may be a little more subtle. We heard from Lord Keen, for example, that in his case he might reach the position where he would say, "I know what you want to do. There is a respectable argument in favour of what you want to do, but I can't be sure that you will succeed if it is challenged in a court of law". That kind of discussion could take place without resignation, could it not?

Lord Thomas of Cwmgiedd: Yes, but where it is clear. I gave the example earlier of acting in clear contravention of a treaty. Suppose the Prime Minister said, "Attorney-General, I have heard your advice on this.

You think this is a clear breach of the treaty". Then you ought to be able to say as Attorney-General, "Fine, thank you very much, but I'm going". The power of resignation and the ability to be able to resign is central to the position.

Lord Judge: I wonder whether the fact that I am being asked this question may not reveal concerns about the way Attorneys-General and Solicitors-General are conducting their responsibilities. I thought the function of the Attorney-General or the law officers was always very clear. People do not go for training when they are appointed. Lord Falconer was a Solicitor-General, and I do not suppose he went for training. He knew perfectly well what he was responsible for. I am right in thinking you were Solicitor-General at one time, am I not?

Lord Falconer of Thoroton: I did not have training and I did know what my responsibilities were. I agree with everything you say.

Lord Judge: I do not think that Section 5 of the Constitutional Reform Act does any good. You have good Lord Chancellors and bad Lord Chancellors, and some in between. They have responsibilities. Some are better at it; some are less good at it. All I would say is, please, if you think that, do not let the definition start with the word "normally".

Lord Hope of Craighead: You would not have to follow the precise formula of Section 5. It is a question of whether it is helpful to have something written down for a Prime Minister as a point of reference to go to in deciding whether somebody should be appointed.

Lord Judge: The Attorneys-General and Solicitors-General I had to deal with—Baroness Scotland and then Dominic Grieve—needed no definition of their roles.

Lord Thomas of Cwmgiedd: I would add the same in respect of the Solicitor-General and Attorney-General I dealt with. They were in exactly the same position. I had no doubt whatever in respect of any of them that they knew exactly what they were entitled to do, what they were entitled to discuss with you, and what they would do if things were being done improperly.

Q63 **Lord Faulks:** There has been a suggestion that it is not very desirable for the law officers to be very political. One possible solution would be that the Attorney-General and possibly the Solicitor-General were not a Member of either House, and having, say, a fixed term to advise the Government and not being political at all. What do you think the advantages and disadvantages of having law officers who are Members of either House are?

Lord Judge: There will be times when the advice given, or the action taken on the basis of advice given, will need somebody to stand up in the House. That is the great advantage of them being Members of the House. In a way, I cannot think that taking that advantage away can possibly be to the overall advantage of the system. I think there should be parliamentary accountability.

Lord Thomas of Cwmgiedd: I agree. There is a halfway house of having one—the Attorney-General, for example—who is a Member of a House, and a Solicitor-General who is not. I think that it is imperative for two reasons: first, accountability, and, secondly, by being here, to have a broad understanding of the way in which the politics of an issue is moving.

Q64 **Lord Thomas of Gresford:** Just over a week ago there were stories in the press that disclosed, apparently, the Attorney-General's advice, and in the *Financial Times* there was a reference to the matter to which Lord Howard referred—to who gave that advice. Do you think there is any merit in codifying and publishing the circumstances under which the law officers' legal advice will be disclosed?

Lord Judge: If you can think of a codification that did not interfere with the privilege of the Prime Minister to keep to himself the advice he was given, that would be admirable, but I do not think you can. I speak as someone who would love to know the actual advice given and the whole basis of the advice given in relation to the Nationality Bill and the way the Refugee Convention apparently is complied with by the current Act. I would love to know that, because you may remember I was saying, let us build into the Act itself that the convention has to be abided by.

In the end, the Prime Minister is a client and must be assured that when he sits down with the Attorney-General, that is a private conversation. I think it is very difficult to envisage isolated particular circumstances in which that should not be the principle. I would love to know, but I think that is true.

The other feature is that you do have to be careful. The Attorney-General's advice, like any lawyer's advice, as I said earlier, would be, "On the whole, yes, but this is arguable the other way". We then have a great dispute among the lawyers about whether the Attorney-General's advice was right or wrong, and whether the balance taken by the Prime Minister was right or wrong in law. I think we have to work out for ourselves whether we think the decisions of the Prime Minister were right or wrong in law. I would love to have a code, but I think it would interfere with the principle of legal privilege.

Lord Thomas of Cwmgiedd: I think one underestimates the difficulties of disclosing legal advice. First, it is essential, going back to a treaty example, that you remember the other party; they would love to know what advice is being given to the Prime Minister. One therefore needs to be extraordinarily cautious about asking for legal advice.

The second problem arises where you are asked to publish an opinion. I did a case once where there was a published opinion from a lawyer, but he had written a side letter to the chief executive of the company saying, "These are the following matters that are not pertinent for inclusion in the advice", which showed that the public document was completely misleading. If you were to ask, for example, as suggested, "Should the Attorney-General advise on the legality of a war?", you then run into the

immediate problem of what you are entitled to see. Is it everything, a polished product, including the caveats that are given? Looking at it from the nation's point of view, the critical factor is the integrity and standing of the Attorney-General. You do not want to know what the advice is because you trust that person. Making it available, the problems of waiver, and having seen this on a number of occasions in practice and as a judge, show how very difficult it is to disclose legal advice on any part of a problem.

Lord Thomas of Gresford: If you take the Iraq war and the disclosure of the Attorney-General's advice, it gives rise to this question: is the Prime Minister the client, or are the public the ultimate client? The advice that would send the soldiers of this country into action affects them deeply and surely the ultimate client to whom a duty is owed in such extreme circumstances is the people.

Lord Thomas of Cwmgiedd: Then you have to face up to the problem of saying, "This is how I moved to this position", and set out all the caveats. It has to be a complete picture. The dangers of this are much more difficult when you see it in practice, I think, than may be appreciated.

Lord Judge: The Attorney-General has an obligation to the rule of law and to give direct and clear advice to the Prime Minister, but, ultimately, it is the Prime Minister who is answerable to John Citizen and Jane Citizen for the fact that casualties have happened. It must be a very heavy burden, but I do not think the Attorney-General's advice either way would help, because if you got the whole of the advice you would say, "I don't want to go and fight. The Attorney-General after all takes the view that it is possibly unlawful". The answer, and it must be on every Prime Minister's conscience when somebody goes to war, is that it is his decision. I do not think the Attorney-General should be involved in that

Lord Thomas of Gresford: Ultimately, in the Iraq war the advice was disclosed in 2005 in full, and it was apparent then that the Attorney-General's original advice was that the war was illegal, but after a visit to the United States his views had been changed.

Lord Falconer of Thoroton: His views changed—not "had been changed".

Lord Judge: Forgive me, it is a hypothetical now, but did that all help? I really seriously do not know. If our son had been a casualty in that war, would it have helped to know that the advice had changed? The Prime Minister is responsible. The Prime Minister makes the decision. The Prime Minister is answerable to those who have lost their family. Anyway, I think I have said enough. It is very difficult to imagine why we need to have the advice of the Attorney-General. Why not have the advice around the Cabinet table? Three members of the Cabinet thought this was a rotten idea. Should we not know that? Ultimately, it is Cabinet responsibility: the Attorney-General's advice is in the same situation as Cabinet responsibility. You may resign, but you all agree on the course

that is proposed. I would love to agree with you, Lord Thomas, I really would, but I do not think I can.

The Chair: That seems a good point to go on to the next question.

Q65 **Lord Falconer of Thoroton:** Do you think that the Attorney-General's oath needs to be updated? His or her current oath is incomprehensible. Basically, she promises to be as cunning as she possibly can be and it broadly bears no relation to what you both have been describing as the central function of the Attorney-General and the Solicitor-General, which is to give advice on an independent basis, confidentially, and to stand by that advice, honestly giving what the Attorney-General and the Solicitor-General believe to be the best legal advice available to the Prime Minister.

Lord Judge: I have heard Attorneys-General make their oath and I have wondered whether everybody in my court has thought, "Now that tells us everything we need to know"—and it does not.

Lord Thomas of Cwmgiedd: If an oath is to be meaningful, it has to be in language that the ordinary person understands as relevant to the 21st century. The use of the words "all my cunning" suggests something that is far from what you would expect of an Attorney-General.

Lord Falconer of Thoroton: I think "cunning" does not mean what we think it means.

Lord Thomas of Cwmgiedd: No, not what we understand it today to mean.

Lord Falconer of Thoroton: The language has moved.

Lord Thomas of Cwmgiedd: No doubt when sworn by Sir Francis Bacon or whoever, it meant something very different, but we ought to modernise it.

Lord Falconer of Thoroton: If we are going to modernise the oath, would it not be sensible as well to have a parallel requirement on the part of the Prime Minister to appoint somebody who does what the Attorney-General promises to do? You have both identified rightly that it depends on who the Prime Minister appoints. Some Prime Ministers, I imagine, would want the dream Attorney-General who never advises that anything is unlawful, and some would like the dream Attorney-General who gives fearless, accurate, appropriate, well-expressed advice. Surely it would be sensible, would it not, to have a statute that says, "Go for the latter and not the former, if you are the Prime Minister, and that is your legal obligation"?

Lord Judge: That would be a bitty reform of the constitutional issue, which I really would not be in favour of.

Lord Falconer of Thoroton: It might be bittiness, but what is wrong with that if we make an improvement somewhere?

Lord Judge: An obligation is going to be imposed on the Prime Minister to make sure that he or she chooses an individual who will comply with his or her Attorney-General's/Solicitor-General's oath. I think that is an obligation too far. It ought to be understood that that is what he or she is looking for and who he or she is choosing.

Lord Thomas of Cwmgiedd: I agree.

Q66 **The Chair:** That gives us a few minutes to deal with the last question. Do you think public perception of government adherence to the rule of law would be improved by Prime Ministers swearing an oath?

Lord Judge: No, I do not think so. Public perception is a very broad question and a very broad concept. I think there is a very serious problem at the moment with the public perception about Parliament, about the way the country is run, about the way the political parties do their business. There is no point in identifying individual issues, but I think there is a problem. One of the reasons why I go on and on and on, as I do, about giving powers to Governments, to the Executive, is that we could end up with people so dissatisfied with the current two-party system that they vote democratically to choose somebody with rather dangerous ideas, whether of the left or the right.

I am not happy that the public perception out there, and I include myself in the public, is that there is a huge issue about whether we can be sure that all Governments will always tell the truth, adhere to the rule of law and so on and so forth. I am not making a party-political point. I think there is a problem. I do not think that having an individual Prime Minister, an individual officer, swearing an oath to abide by the rule of law would mean very much to most John and Jane Citizens. I hate to say this, but I think they would think, "Well, yes, but if it doesn't suit them, they won't".

Lord Thomas of Cwmgiedd: I agree. I think that you are judged by your deeds rather than by your words. It is a well-established principle. The most important thing is to ensure that, in our educational system, and in what we do, people understand the importance of what is meant—as we began—by the rule of law, and why it matters to everyone that we are a society governed by the rule of law and a democracy. I think that is for the educationalists and would be much better left there than with an oath.

Lord Hennessy of Nympsfield: Given what you have just said about not thinking it is a particularly good idea, do you not think that having a Prime Minister who, on first becoming a Prime Minister, swore a solemn oath before the House of Commons to uphold not just the rule of law but the range of codes that we are talking about that are part of the Prime Minister's guardianship and stewardship of the proper conduct of central government, might just increase the chances of good behaviour at the top? Given that you are both very skilled at drafting, can you have a go at drafting such a Prime Minister's oath for us?

Lord Judge: I must say, Lord Hennessy, I have not said I am in favour yet. The question I was first asked was about public perception. I think the idea that making such an oath would keep the Prime Minister of the day up to the mark is open to very serious question. I am not actually unsympathetic. On occasions Prime Ministers have the most dreadful decisions to make, and on occasions they may have to make a decision that says, "This might not be the right side of the rule of law, but in my judgment, and in the judgment of my Cabinet colleagues, it has to be made". I do not think it will lead to a significant improvement in prime ministerial behaviour. I think that is within the character and personality of each Prime Minister.

As to the oath, do tell me what it is supposed to include. "I will abide by the rule of law". Somebody will say, is that Lord Bingham's definition, or Lord Judge's supplemental, or are both ridiculous?

Lord Falconer of Thoroton: But have you not found that everybody who gets a job, whether it be a juror, the Lord Chief Justice, the Chancellor, or the Solicitor-General, takes their oath seriously, and it really matters? I have not met anybody in the law who, when they have a job like that, does not take the oath very seriously.

Lord Thomas of Cwmgiedd: I agree with you. One of the wonderful things to see in operation is our jury system. There is no doubt that jurors take their oaths very seriously. All the research, in so far as it has been permitted, shows that this is right, and when people break their oaths and tell you something about what has happened, it generally affirms that view. Certainly, in respect of all the law officers and Lord Chancellors who take an oath, it seems to me that they take that seriously. What I question is the effect on public perception. It may affect the man or the woman, but look at what happens on Capitol Hill. It is a very solemn ceremony. Has it made a difference? I do not know.

Lord Falconer of Thoroton: But it has for a large number of Presidents. Politicians are like everybody else; they take oaths seriously as well.

Lord Thomas of Cwmgiedd: Perhaps, but what I do not feel I am expert or qualified in any way to speak about is whether it would improve the public perception.

Lord Judge: I have expressed my view on public perception. On whether or not an individual would suddenly think, "Hang on, I took an oath about this three years ago"—well, if he did not think it, the Opposition would remind him. I would love to know, Lord Falconer. I do not know the answer to your question, although I entirely agree with you about jurors.

Lord Thomas of Gresford: Has the royal oath not been taken very seriously?

Lord Judge: Well, if the Monarch takes the oath, why not every member of the Cabinet? Why not? I wish I had something useful I could say on that.

The Chair: Baroness Fookes, a final comment.

Baroness Fookes: We are not bound to consider public perception. Let me put the question another way. Would it be a good idea in itself if the Prime Minister took an oath of some kind, if you like, to say that he will do his best, or some formula such as that?

Lord Judge: I wish I had a strong view about it. I can see that it would look good. I could see that for some people it would make a difference at some stages in the course of the awful job they have to do. But just imagine what the public would think as the individual stood up to take the oath. Would it be, "Oh good, that's going to be all right then"? I would like to think they would think that, but I would like them to think that whether an oath was taken or not. I am sceptical.

Baroness Fookes: Forget the public and just think whether it would be good for the Prime Minister.

Lord Judge: Gosh, I do not know, Lady Fookes. After all, I have never been in that responsible position.

Baroness Fookes: No, neither have I.

Lord Judge: I would like to think that all the things we are talking about would do good to whoever holds the office. But if you recommend it, we will make it work.

Baroness Fookes: Perhaps we are back to Lord Hennessy's "good chaps" theory.

Lord Judge: Yes, perhaps.

The Chair: We have come to an end now. I am conscious that we have to do some time-limited business before we lose members of our committee. Thank you so much for coming today. As expected, you have posed a whole series of views and issues very clearly and very sharply, and added to the way in which we can think about the issues that we are looking at, which is much appreciated. Thank you very much indeed.