HOUSE OF LORDS

Constitution Committee

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

Wednesday 6 July 2022

10.10 am

Watch the meeting

Members present: Baroness Drake (The Chair); 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; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 8 Heard in Public Questions 102 - 117

Witnesses

I: The Rt Hon the Lord Garnier QC, former Solicitor-General for England and Wales, Attorney-General's Office (2010-12); The Rt Hon Dominic Grieve QC, former Attorney-General for England and Wales, and Advocate-General for Northern Ireland, Attorney-General's Office (2010-14).

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 Garnier and Dominic Grieve.

The Chair: Good morning and welcome to the committee. This morning we are hearing evidence on the subject of our inquiry into the roles of the Lord Chancellor and the law officers from the right honourable Lord Garnier QC, former Solicitor-General for England and Wales, 2010 to 2012, and the right honourable Dominic Grieve QC, former Attorney-General for England and Wales, and Advocate-General for Northern Ireland, 2010 to 2014. Thank you very much for joining us today. We have a series of questions we would like to put to you, as you would expect. Do you have any opening comments or observations before we go into the questions?

Lord Garnier: No.

Dominic Grieve: No, I do not think so. The sooner we get into a conversation, the better.

Q102 **The Chair:** Okay. In some ways, the first question 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 law officers in protecting it within government?

Dominic Grieve: The rule of law is the system of rules that we have in our country to ensure that the decisions we make and the way the Executive and, ultimately, individuals, organisations and institutions behave are subject to the law—both our own domestic law and international law—and that the processes by which the law can be applied work. That is what I have always understood the rule of law to be. We have Lord Bingham's principles, with which I entirely agree, and which have tended to be used as a template.

The role of the law officers has historically been to ensure that the Government get legal advice so that they can pursue their policies lawfully. It has not historically been the role of the law officers to be the guardians of the rule of law within government. The Ministerial Code makes it clear that every Minister is, or should be, a guardian of the rule of law, but I suppose it is right to say that the law officers are intimately involved in the maintenance of aspects of the rule of law, particularly, and often overlooked, because of their role in taking a very large number of decisions quite independently of politics.

Let us bear in mind the three roles of the law officers: they are legal advisers to the Government; they are in charge or have superintendence of the Crown Prosecution Service, the Serious Fraud Office and, ultimately, the prosecutorial functions in England and Wales; and, thirdly, and I think this is overlooked, they have a whole series of duties to be discharged wholly independently of their ministerial colleagues, which are supposed to uphold legal process. Dealing with vexatious litigants, referring unduly lenient sentences to the Court of Appeal or bringing contempt of court proceedings are just three examples; there is a very

long list, including intervening to protect charities or to get the law clarified in respect of charities.

The law officers are intimately associated with the process but, that having been said, they have not historically been supposed to be the people walking around Whitehall saying, "Do remember the rule of law". I note your second question, so I will not pre-empt it, but when we come on to that I will be happy to explain a little more about how I think the role has changed in the last 15 years.

The Chair: We will come on to how the role has changed, but in your general answer how do you distinguish between the Attorney-General and the Lord Chancellor within that?

Dominic Grieve: Nowadays, the Lord Chancellor is a departmental Minister with a major portfolio of maintaining the justice system in England and Wales, and the prison and penal system. In addition, he takes an oath of office, which was insisted on by your Lordships' House, quite correctly, at the time the new office was created, which says that he is there to uphold the rule of law. That gives him a quite distinctive role, as a member of the Cabinet, of seeing the maintenance of the rule of law as of particular importance. Clearly, the law officers speak to the Lord Chancellor frequently, and vice versa, and indeed have a lot to do with each other in my experience, but I would normally have left it to a Lord Chancellor to take the lead if there was a rule of law issue that was causing me anxiety in my ministerial role, rather than doing it myself.

Coming on to your next question, it may be right to say that that responsibility has at times fallen more on law officers, if the Lord Chancellor has been unable or unwilling to understand the issues.

The Chair: Thank you. Lord Garnier?

Lord Garnier: I go back to Lord Bingham's eight principles. I expect you have them, so I will not read them out, but the ones I particularly draw your attention to are numbers 2, 4, 5, 7 and 8. If you want me to recite them I will, but they are there for you to see.

As regards the role of the law officers in protecting the rule of law in government, I go back to what I was told by Peter Rawlinson—Lord Rawlinson—a former law officer under the Governments of both Macmillan and Heath. When he was appointed Solicitor-General after the night of the long knives in 1962, he was given a half-hour seminar by Harold Macmillan about the role and history of the law officers. Macmillan told him that his first priority was to uphold the rule of law, his second was to be responsible and accountable to Parliament, and his third—very much his third—duty and loyalty was to Macmillan's Administration. It takes the law officers out of the general political sphere in which other appointed Ministers operate, and I like to think that I operated under those three principles. It serves a law officer well to do so.

The Chair: Thank you. Lord Howarth, do you want to develop your

question?

Q103 **Lord Howarth of Newport:** Yes, thank you. Good morning to you both. My question is about whether there has been a shift in recent years in the political culture within which the law officers operate. Mr Grieve, when you were defining the rule of law just now, you included a requirement that the processes with which it is applied should actually work. Do you think that in the political culture prior to recent years the large-scale reductions in the resources available for the justice system would have been tolerated? Do you think that, had the role and status of the Lord Chancellor remained as senior as they once were, the Lord Chancellor could have stepped in to prevent the diminution in access to justice? I am thinking in particular of the reductions in legal aid.

Dominic Grieve: It is always difficult, and perhaps a little dangerous, to talk about the past before one was in office oneself, because we do not know very much about it. There may well have been pressures that existed then that are similar to the ones that we encountered, but, as a general principle, the legal system in this country, by which I mean access to justice and the operation of the courts system, has been under greater pressure, in my opinion, in the last 15 to 20 years than at any time previously that I can remember as a professional barrister. It has been systematically starved of money. I realise that it sounds like an easy thing to say, because every government department always feels that it is underfunded, but if one looks at the record of what has happened to the Ministry of Justice and the allocation of funds, relatively speaking, over that time, it immediately becomes apparent that it has been systematically starved of cash.

The consequence is that the system is very close to collapse. In my view, the tipping point between inadequacy and almost complete collapse came at some time around 2015. It was the consequence, I am afraid, of a past Lord Chancellor accepting a cut in the budget of the Ministry of Justice that was absolutely unsustainable. I remember it very well because at the time I succeeded in getting that cut reduced by over half for the Crown Prosecution Service. My view at the time was that the Crown Prosecution Service would go into a state of collapse if the 10% cut that was being suggested to us took place. I negotiated down, I think, to 4.9%. Helped by the fact that Crown Court case load was low at the time, we survived that, but it has been in very serious crisis since then, although it is right to say that the problems go back much further.

Your question as to whether this would have been tolerated in the past is very difficult to answer. What was well understood in 2005, although perhaps ignored by the then Labour Government, is that there is no doubt that the changes to the office of Lord Chancellor and subsequently—the Lord Chancellor first becoming Minister for the Constitution, but then becoming Secretary of State for Justice—impose a budget that is more substantial than it was in the past, but has changed the role radically, and the prioritisation has almost inevitably been on the Prison Service, which is itself underfunded.

The crisis in the funding of legal services, the courts—literally the structures of the courts—and access to justice has been a very serious challenge ever since. Would that have happened in the 1960s, 1970s or 1980s? It is worth bearing in mind that it was in the 1990s, I think, that government first started to get very exercised about the amount of money being spent on legal aid, for example, and that was when some of the cut-backs first kicked in, under the prime ministership of John Major. Of course, one has to control budgetary expenditure in all departments but, giving a personal opinion, I think the maintenance of an adequate justice system has been consistently lowered in priority level over the last 20 years, and we are seeing some of the consequences today.

Lord Garnier: It is easy to get quite prissy and romantic about what happened in the past. Not all the Lord Chancellors of the 20th century were the wonderful people that I would like to think they might be. They were political people, but they were getting towards the end of their political ambitions and therefore had lost political power. They had less clout, I suspect, than a large-spending Minister has now. That said, they had less to do in some senses, in terms of running a department, because the legal system was not required to do as much in those days. Statute since before I came into Parliament, and certainly since I came into Parliament, has hugely increased the ambit of permissible legal disputes that the state has to fund. Therefore, the clash between the economics of running a judicial or a court system and a Treasury has obviously become much starker.

The Lord Chancellor now is in charge of a large spending department. He is not the head of the judiciary. Some perfectly obvious changes have taken place since 2005, one of which is that not every Lord Chancellor since 2005 has been a lawyer. In some respects that does not matter, but, unquestionably, the way in which these things are dealt with has changed, sometimes for the better, sometimes for the worse and, as I indicated a moment ago, the stresses between the Treasury and the Ministry of Justice are very acute. Yes, one answer would be to have more money to maintain the court system, fund the legal aid system and so forth, but political reality tells me that this will be a continuing struggle.

Lord Howarth of Newport: Mr Grieve referred to the erstwhile responsibility of the Lord Chancellor to safeguard the constitution. We now no longer have a Minister of any kind who is designated as having responsibility for the constitution. We have a Lord Chancellor who is a middle-ranking Cabinet Minister, competing for resources for his spending department with all the other spending departments. Do you think anything could be done to reconceive these appointments to ensure that responsibility for the sustaining of the rule of law and the protection of the constitution is more prominent and more respected within government than appears now to be the case?

Lord Garnier: I suppose the current Lord Chancellor would say that he is a very senior Cabinet Minister because he is the Deputy Prime Minister. People may take different views about that.

Unquestionably, I would like to see changes to the role of the Lord Chancellor. We are never going to go back to the Lord Chancellor becoming the head of the judiciary, even though I might prefer it, but I would like, for example, the Lord Chancellor to give up responsibility for the prisons. I would like him to be the Minister for the Constitution, the Minister for the Union of the United Kingdom, and the Minister who has precise responsibility for the protection of the rule of law and of the judiciary in government. I would therefore like his department to be smaller, more agile and more fitted to some of the tasks that that office nominally holds but that tend to get neglected. I would like to see a radical rethink about what the Lord Chancellor is and does, and to free him from the responsibilities for prisons and the big expenditure things that the MoJ has to think about.

Dominic Grieve: The difficulty with change is that, since the Lord Chancellor lost his old status—in a way it was perhaps a bit of smoke and mirrors, but he was the Speaker of the House of Lords, he was regarded as being at the end of his career, as Lord Garnier said, beyond ambition, and somebody steadying the ship, with a keen understanding of the rule of law—his position in government has been largely dictated by the size of his budget, and the bulk of that budget is prisons, the probation service and rehabilitation.

I agree with Lord Garnier that it would be desirable for the Lord Chancellor to revert in part to the role he took earlier. Combining that with the role about the constitution seems to make eminent sense; it is, after all, what Lord Falconer did in the early stages of being Secretary of State for Constitutional Affairs and Lord Chancellor. The risk is that, unless you have a Prime Minister who appreciates the importance of such a figure—if his role heading prisons, and that aspect of justice was removed from him—he would simply descend even lower in the pecking order of Cabinet hierarchy and become a decorative extra, without much say in policy-making of any kind at all. Bringing about that change, which I would see as desirable in the light of what has happened, is very dependent on having a Prime Minister who can see the value of a Lord Chancellor who is seen to be respected and understood to have a particular role within our unwritten constitutional set-up.

Q104 **Lord Howard of Lympne:** I have the advantage over both of you in terms of remembering the past. When I started at the Bar almost 60 years ago, legal aid was in many respects minimal compared to what it is today. There is a danger, is there not, in looking at the past through rose-tinted spectacles?

Lord Garnier: Yes, I think I indicated that a couple of moments ago. We do not want to be too prissy or to have an excessively romantic view of the past. You are right. As I also indicated a moment ago, statute now permits a whole lot more things to be litigated at the state's expense, so

you are right, but we have to deal with the unsatisfactory position that we are in now. The role of the Lord Chancellor needs to be rethought and the theory of the good chap is one that I adhere to. I see Lord Hennessy on the screen. There is a shortage of good chaps.

The Chair: Lord Hennessy will be returning to that point shortly.

Dominic Grieve: To pick up Lord Howard's question, I agree that one has to be careful, and I made that point earlier. Of course, there is a very big difference between the amount of legal aid that was available in the early 1960s and the amount available when I started at the Bar doing general practice, including a lot of criminal work in the Crown Courts in the 1980s, when it was probably at its peak and was attracting large numbers of practitioners. There was an expanding workload and expanding demand, the very thing that led to pressure on Lord Mackay in the 1990s, under John Major, to say, "This budget is in danger of running out of control". That is when it peaked, but, equally, one only has to look at what is happening now, with barristers going on strike.

I am not here as an advocate for the Bar, but on the subject of earnings for criminal barristers, when I was Attorney-General in 2012 I went back to a court where I had practised in the 1980s, more than 20 years earlier, and was astonished to discover that, essentially, the payments for a day in court were no different from what I had been getting in 1987. One then has to ask oneself how such a system can survive. You are not going to get the quality of entrants capable of doing the work, and those who are there are living a hand-to-mouth existence. I am afraid that is what led to the strike, which I make clear I do not support, because I think if you are a professional and you have agreed to represent somebody in court, you should be in court to do it.

The Chair: The Constitution Committee addressed a lot of those important points in its recent report on the courts' backlog and raised some of those questions.

Q105 **Lord Howell of Guildford:** Good morning. I can do past as well, having sat in the Cabinet that Peter Rawlinson attended, and where Lord Hailsham was of course the Lord Chancellor and raised the issue of the salaries of judges at every Cabinet meeting.

I want to ask about international law and whether it has to be addressed and handled by law officers in a slightly different way from laws affecting the domestic citizen. I am talking about international law that enshrines in statute the provisions of some treaties signed, for instance, which is rather a topical matter.

Mr Grieve, you said earlier that the rule of law affects every individual and Governments and so on, and so it should, but handling the rule of law is a bit different. The individual may have to comply with the international rule of law, but the actual management of the rule of law is different, is it not? At the other end of the wire, there are other partners, or another partner, and therefore political judgments have to be made on

whether the other side of the partnership in a treaty is interpreting it in the right way or whether there have been breaches elsewhere, and so on. It seems to me that, despite Lord Bingham's marvellous overall view, it is a different game, in a way. Would you agree with that?

Dominic Grieve: Not entirely. Let me go back for a moment. I think there is a misunderstanding about international law of quite a fundamental character in some of the discussions that we have on this subject. Most international law is about international treaties that the United Kingdom has signed. We are signatories to about 14,000 extant and operational treaties. That was the last figure I was given by the Foreign Office when I asked them. They got into a bit of anxiety about it, and refused to go back before 1834, although there are quite a few treaties before 1834 that still apply to us.

An international treaty is about the sovereign, represented by her servants—Ministers—going to negotiate with another country or another group of countries and entering into binding undertakings that they will behave in a particular fashion. The duty to observe international law is enshrined in our unwritten constitution because it is Her Majesty's intention that her servants should observe the binding agreements that her previous servants have entered into—unless, of course, you want to resile from an international treaty. It is very specifically a duty on the Executive, as I see it, and the Executive should not undermine the treaties they enter into. One of the key roles of the law officers is undoubtedly to consider difficult issues that arise that might involve breach of international law, and to advise the Government as best they can as to whether what the Government intend to do is compliant with an international legal obligation, and, very occasionally, if it is not, whether it falls within the very narrow category of actions that can be justified within the treaty because, for example, another party is not observing its own side of the treaty obligations.

That is how I have always understood it to be. Yes, you are right, it is correct that it is more difficult to interpret, because in many cases there is no court adjudicating on it; it is simply a matter for the law officers, and central to their role, to try to ensure that the Ministerial Code observes those international legal obligations. The code used to have that specifically but now does not, which, we are told, does not make any difference.

In addition, on occasion there are in the treaties mechanisms for arbitration to be resolved by international tribunals. That is what the European Court of Justice was, and that is what the European Court of Human Rights is. Part of the agreement entered into by the Queen through her servants is that if those international bodies, those courts, rule against the United Kingdom, the United Kingdom will observe the findings and implement them, because it is an arbitration mechanism. There again, the role of the law officers is to ensure that the Government's case in such an arbitration can be properly put, but it is right to say that once the arbitration has ruled against the United

Kingdom, it is the duty of the United Kingdom to implement that, certainly at Executive level.

Then there are treaties that are sometimes incorporated into our own domestic law and, because of that, the law officers may be called on to advise whether something is going to breach or alter our own domestic law in a way that might make it incompatible with the international treaty obligation to which we are subject.

Forgive that peroration at the beginning. To take an example, the suggestion that it is acceptable to breach an international legal obligation because you are going to get the House of Commons, or Parliament, to enact legislation that overrides it is a complete misunderstanding of the principles of international law. The duty is not on what Parliament does; the duty is on the Executive, and if the Executive connive to use Parliament in that way, they are breaching their international treaty obligations from the moment they publish the offensive Bill that is going to do that.

That does not mean to say that Parliament cannot do anything. For example, when we were having the big arguments over prisoner voting—now thankfully resolved—there was a moment in the House of Commons when the Labour Party, I think, tabled a Motion that they wanted debated, which said that the United Kingdom was wholly content with its current arrangements of depriving prisoners of the right to vote. It was in the run-up to a case called Scoppola, on which I was going to represent the UK Government in Strasbourg. I took the view that this was actually rather helpful, because the European Court of Human Rights kept insisting that the UK Parliament had never considered this, and I said, "If we haven't, it's quite a good thing if Parliament wants to pronounce on it".

As we had an outstanding judgment against us from the European court, which we had failed to implement, I made the point to the then Prime Minister that the payroll—the Government—could not be seen to be supporting that Motion, and indeed they abstained on it. It still served its purpose, and it may have contributed to resolving the matter eventually when David Lidington was Lord Chancellor. The point is that this is about the duty on the Executive. Sorry that I have gone on a bit, but it seems to me so fundamental, and often so misunderstood.

Lord Howell of Guildford: That is very clear, thank you. Lord Garnier?

Lord Garnier: Mr Grieve has explained it all very fully and I do not have much to add, save to say that confusing one's international law obligations with political expedience is a mistake that seems increasingly to be made. As Mr Grieve said, just because you can pass an Act of Parliament that appears to override your international treaty obligations, that does not actually mean what it says on the tin. Of course Parliament can pass whatever law it likes, but, in my view, that does not alter the problem you have in breaking an international treaty.

Lord Howell of Guildford: Before this committee, we have had, if I may say, rather more purist views that what Parliament passes as a statute is the law, and therefore law officers—

Lord Garnier: That is right as a matter of domestic law, but it does not, in my view, touch on the Executive's duty to uphold the international treaty that they are engaged with.

Lord Howell of Guildford: I see your different viewpoint, thank you.

The Chair: Lord Howard, do you have an additional point that you want to bring in now?

Lord Howard of Lympne: No, thank you.

Q106 **Lord Hennessy of Nympsfield:** I accept Lord Howard's warning about romanticising the past, even though my professional life has been largely based on it, as a historian, but I must admit that I pine for the days when we had Prime Ministers who could deliver a 30-minute impromptu seminar on the rule of law. Would our two witnesses be interested in adding to the tweaking of Tom Bingham's definition of the rule of law that Lord Judge has done for the committee, both in his oral evidence and subsequent written evidence, or do you just accept Tom Bingham's definition of it as it stands in that wonderful book?

Lord Garnier: Lord Bingham's description of the rule of law in his eight principles is just one version. There are numerous versions and different definitions of the rule of law. I confess I have not read Lord Judge's amendment to the eight principles, but I am sure they are more than worth reading and considering.

Essentially, you can have any number of things written down on a piece of paper, but if the people to whom they are supposed to apply ignore them, either wilfully or just because they cannot be bothered to read them, you are in a difficult place. Then you require an independent law officer and an independent Lord Chancellor to get hold of those Ministers and say, "I'm afraid this is not good enough. Unless you behave, we're off".

Dominic Grieve: I am afraid I have not picked it up, so perhaps somebody would like to enlighten us as to the exact tweak that Lord Judge suggested. I agree with Lord Garnier.

The Chair: Can I interrupt? The essential tweaks were to take Lord Bingham's definition and add, more or less, these phrases; that it was based on laws made by "an assembly elected on the basis of universal suffrage" and administered by independent courts, meaning that the definition of rule of law was inseparable from the principles of democracy and the independence of the judiciary, and those made explicit. That is the issue.

Dominic Grieve: I should make it clear that that is a statement that, for me, is not obvious, but I agree entirely with Lord Judge's view that that is

part of the rule of law. As to whether it is insufficiently reflected in Lord Bingham's current eight principles, I can see how it adds something, and I certainly would not have a problem with that. I can see it is aimed at, I suspect, Lord Judge's anxiety about two things: first, the tendency, increasingly, for the Executive to rule by decree through a system of statutory instruments; and, secondly, the tendency to undermine the independence of the courts by criticising the judiciary for its interpretation of the law in manners that, I agree entirely with Lord Judge and others, were totally unjustified.

Lord Garnier: Perhaps I am reading too much into what I have just heard, but it may well also be that he has a scepticism about the value of what some would see as the slavish adherence to foreign courts, be it the European Court of Human Rights or the European Court of Justice. If, in Lord Judge's gloss on Lord Bingham's principles, he is seeking to exclude international law, but I do not think he is, I can see—

Dominic Grieve: I did not read it that way, I must say.

Lord Garnier: Good. I can see that I am being admonished by Lord Hope. On that basis, I am pretty relaxed about what Lord Judge said.

Lord Hennessy of Nympsfield: Is your argument essentially that the rule of law is a state of mind, a mentalité, rather than a thing of black and white on paper?

Lord Garnier: It can be both.

Lord Hennessy of Nympsfield: Unless you are suffused with it as a Minister or as a civil servant or a member of the judiciary, it does not work, because it is a state of mind.

Lord Garnier: There are plenty of things that you and I do not do, not because they are written down in the law or in a book of rules, but because we know they are wrong. It seems to me that it could be a matter of upbringing, it could be a matter of education, or it could just be a matter of one's nature. I do not know. The Russians have a written constitution. Zimbabwe has a written institution. A number of despotic countries have bills of rights, but I do not know that they bind the leaders of those countries to behave by them.

Dominic Grieve: It is a state of mind, and it is also more than that. Bear in mind that the law officers have been involved historically in the process of legislation. The introduction of legislation into Parliament is done by departmental lawyers scrutinising a Bill for unusual uses of power: retrospectivity; the question of the extent to which there are what are described as Henry VIII clauses, which is a bit maligning King Henry VIII, but in fact a process by which you can change primary legislation by statutory instrument; and unusual use of powers. That then gets sent to the law officers to be considered. One of the jobs that we had to look at, and certainly looked at, was highlighting whether we thought that such

unusual use of powers, even though they might be lawful under domestic law once they are enacted, should be done.

There is also a sense—I remember challenging one of my successors about this over Prorogation—that, even if a law officer thinks something may be lawful, the question is whether it is proper within our unwritten constitution, and that can be quite a difficult area. I did it on the Floor of the House of Commons to Sir Geoffrey Cox. It is all on the record. His answer was that had the Prorogation been longer he would have objected to it, but because of the length of time that it actually was he thought it was acceptable. That was a view that did not commend itself to the Supreme Court. That is a propriety issue. It is something quite subtle. I also happen to think that it is part of the rule of law as well.

The Chair: Before we leave this question, to make sure we have done justice to all the elements, and playing back to the state of mind issue and checks on that state of mind, do you think the Ministerial Code should be updated to reflect the law officers' responsibilities more fully? Do you think there is scope for improvement?

Lord Garnier: As I said a moment ago, you can write anything down, but it requires to be considered and followed. The law officers are mentioned eight times in the Ministerial Code. "The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations … By convention, written opinions of the Law Officers". You have seen it. If you are suggesting that it should say, "And the law officers should be consulted when you are worried about whether you are going to break the law or are in breach of the rule of law", I am not sure that would be terribly helpful. You just need people to understand what their duties are and how to perform them. If we are at the stage now where a modern Minister requires a book of rules telling him how to behave, I am afraid we are in a very much worse state than I thought we were.

Dominic Grieve: My memory when I was Attorney-General is that the manuals under which government departments operate make specific reference—I am not sure where—to matters of difficulty being referred upwards as a matter of practice to the law officers. Obviously, lots of legal issues are resolved within government departments. They have their own lawyers and that is what they are there for, otherwise the poor old law officers would be a bit snowed under. I remember seeing something somewhere—maybe in the Civil Service manual—about escalating to the law officers. I remember the issues. They were when there are differences of view between departments, when there are serious reputational issues for the Government, and issues of international law and, in the old days, European law, which were of concern. Forgive me, I cannot remember where it was, but I am pretty sure it is written down somewhere.

The Chair: I have one final point for you in particular, Lord Garnier. You said in your initial responses to questions that there was a sort of hierarchy of responsibilities for the law officers: uphold the rule of law,

responsibility to Parliament and then your own Administration. From time to time, those three will come into tension or possibly conflict. Based on your experience, what are the codes, guides and norms that would help in maintaining that hierarchy of obligations and resolving them if they come under tension or conflict?

Lord Garnier: Perhaps it would be useful if those three priorities were made more widely known. They are in Peter Rawlinson's autobiography, which may not be a widely read book nowadays. Perhaps this committee could, in its report, draw attention to those points. Let us hope that members of the Government read your report. There is only so much that one can do to persuade Ministers who do not want to behave properly, or do not care to, to do so.

We—or certainly I as the second string—had no political power in government at all. That is the whole point, in a sense, of being a law officer. You take a self-denying ordinance. The Secretary of State for Health and Social Care can stand up and say, "Today, I have built 40 hospitals", to pick an example at random. The law officer cannot say, "Today, I have advised the Government about this, that or the other". It is a silent occupation. I used to compare my role to that of a submarine. Everyone knew that, somewhere down there, there was a submarine patrolling Whitehall to make sure that things were going as they should within the rule of law and various other things. If the submarine surfaced, either the Government were in trouble or the law officer was in trouble, and we have seen examples of both over the last 150 years or so.

I know that it is not always fashionable to rely on Lord Hennessy's "good chaps" principles. Call it something else, but it requires leadership and example from the top. The law officers cannot work or advise in isolation. They cannot just talk to themselves. It is essential that they are seen to be part of the government team, albeit a special part of that team or a different part of that team. They should not ignore what their duties are and nor should other members of the Government.

Dominic Grieve: There are a few subtle reminders about the law officers having a slightly curious role, if Ministers care to look at them. We have to ask the Queen's permission to go abroad on holiday or, indeed, to go abroad. I had to write to her private secretary to ask whether she would mind if I took a holiday at my house in France. When the then Prime Minister dispensed with my services in 2014, as I was leaving the room it was pointed out to him that, as he had not decided who was to replace me, I would have to stay in post for the next 24 hours until he did, which had the interesting consequence that about six months later I received one day's extra emolument of office on departure.

As Lord Garnier said, although the law officers are an appointment made by the Prime Minister and within his gift, and they are MPs and they are treated as members of the Government, they have, to an extent, a separate existence; they are to serve the rule of law. Indeed, the way I heard it worded was "to serve the Crown". I am sure Harold Macmillan saw the duty to the Government as last. We have a specific duty to the

House of Commons and the House of Lords. Indeed, I received a Writ of Summons to the House of Lords. On one occasion, I provided advice to the House of Lords. There was a separate Writ of Summons for the Attorney-General. Those signs are there.

As for how Attorney-Generals or law officers generally go about their business, it is a matter for them how politicised they want to be. Let us bear in mind that, when I was appointed, and indeed when Lord Garnier was appointed in 2010, there had been some controversy. There had been a previous report about whether the law officers should continue in their current mode. There was a suggestion that we should adopt the practice now in Scotland, whereby the Lord Advocate is a person brought in from outside to be the legal adviser to the Government. I was very conscious of that and very conscious of the need to try to make sure that the reputation of the law officers was, obviously, supportive of the Government—or I could not be in it—and of their policies, but that we were there to provide a degree of independence. Others take a different view.

For example, Sir Geoffrey Cox was very prominent in pushing something he believed in very much, which was the Brexit debate, and fronting up for the Government by making speeches at Conservative Party conferences, which is something I would not have done, not on the platform anyway; I might have done on the fringe. Another example is that the law officers in our day had no special adviser. It cropped up each time we were appointed: should the law officers have a special adviser? Sir Paul Jenkins, with whom I remember discussing this in 2010, said it is very important that you should not have a special adviser because it suggests that politics might colour your opinions, and I agreed. I understood immediately and said that must be the case. It sometimes caused slight problems, because people would say, "Hasn't your special adviser told you about this?", because there was a whole nexus, and I would say, "I don't have one". You could be a bit out of the loop, but we did not have them.

The current Attorney-General is, I think, the first Attorney-General in history to have a special adviser, a special adviser she initially shared with Lord Frost. I do not know whether she shares him with somebody else now or not. I think that is a strange thing for an Attorney-General to do.

The Chair: Thank you.

Q107 **Lord Thomas of Gresford:** How effective is the ammunition in your submarine? If you said to a department, "You cannot do that", was that inevitably followed?

Lord Garnier: As you know, as a lawyer, it is not very helpful just to say "No". You could say, "I wouldn't do it this way, but have you thought about doing it that way?" A creative approach to how you get round or deal with a problem is very important. If the thing becomes impossible to resolve, the only power that a non-political Minister, of the sort that we

were, has is the power of resignation. It is mutually assured destruction, and it is one that very rarely has to be used. It has historically been used. If you are talking to other sentient beings, you tend to be able to reach some form of way through a problem.

In our lives as advocates, we deal with controversy and invite courts to arbitrate those controversies. We are not always right. We do not win every case, but as long as you can persuade your client—the Government—that you have a respectable and honest argument for the points that you are making, first, your client should take them on board and should not simply expect you to reflect what they want, just to please them, and you can then appear in front of a court and say, "This is the Government's case on the law and on the facts". You then take into account what the other side's facts and arguments might do to weaken your case and address your client on those. You navigate your way to a solution if you possibly can. It is only when you meet an obstacle in the face of an obdurate client who simply will not see where their line of thinking is taking them that you have to say goodbye. I have done that in civilian life as well as in government.

Lord Howarth of Newport: In this extremely valuable discussion, you have both, I think, been deploring a state of affairs in which there has been perhaps a growing ignorance of constitutional propriety or a willingness to disregard constitutional propriety among politicians. What is it about our political culture that has allowed that to happen? Why has it happened?

Dominic Grieve: It has happened because Governments, feeling themselves under pressure politically, and perhaps sometimes from public opinion, have looked for shortcuts rather than following usual processes or accepting limitations on the way government exercises power. If you exceed those limitations in an unwritten constitution, you can start very quickly creating instability. I recognise that my colleagues in government when I was in government had many such pressures. Indeed, one of our tasks, as Lord Garnier said, was to try to find a way through their difficulties that was viable, would work for them and would also respect the unwritten constitutional norms.

We live in an era, particularly with mass media and all sorts of things, where the pressures are much greater. Because we have an unwritten constitution, ultimately, if you want to depart from the conventional way in which it is operated, it is very easy to do, but you then have to live with the consequences.

Lord Howard of Lympne: You have both read Lord Bingham's wonderful book, and you will both recall the way in which he recounts the attitudes and actions of the then law officers at the time of Suez, so it is frankly absurd, is it not, to suggest that this is something new?

Dominic Grieve: I was not suggesting it was something new, and the law officers at the time of Suez came in for very considerable criticism. Suez was 1956, and I am actually talking about how government is

conducted in the period when I was in it in 2010, in the same way that I would not seek to be comparing what happens today, or even in 2010, with what happened in 1740. I have to accept and I do accept—indeed, it is one thing at which I rejoice in many ways—that because we have an unwritten constitution, it is capable of evolving without having to change a written constitutional framework to respond to different periods.

We have, in a sense, been highlighting some concerns over what we see as some slippage in observing unwritten constitutional norms, because I think that is the thrust of what we are saying. The fact that in 1956 people may have misbehaved does not mean that it simply indicates that there has not been a change, say, compared to what I would have expected talking to previous law officers such as Lord Mayhew, to whom I had an opportunity to talk when I first took office.

The Chair: I think you are saying the sins of the past do not justify the conduct of the future.

Dominic Grieve: No.

Lord Howard of Lympne: Nor am I suggesting they do.

Q108 **Lord Hope of Craighead:** I think you anticipated my question, Mr Grieve. Under what circumstances, if any, is it permissible for the Government—the Executive—to invite Parliament to legislate in breach of international law? I think I have understood your responses so far to lead to the answer no to that question. In other words, if it is in breach of international law, the Executive are bound by the obligation under international law, and they should not invite Parliament to legislate contrary to what the international law is.

There is a question behind those words. What is international law? It comes down to the meaning of words, I think. You gave a very clear-cut example where, under the European convention, the European Court of Human Rights has ruled against the United Kingdom on a particular issue, and the treaty binds the Executive to respect the ruling of the court, but there are other treaties that are nothing like that at all.

One example that Lord Mackay of Clashfern referred to in his evidence is the Warsaw convention, which provides a remedy to passengers if they sustain bodily injury. There has been a huge debate across the world in various courts as to what amounts to a bodily injury if somebody has suffered mental distress. The Appellate Committee of the House of Lords had to rule on that. That is miles away, of course, from the kinds of problems that cross the desk of the Attorney-General.

There is no arbitration procedure in the refugee convention of 1951. What the words mean is open to discussion, and we have had a big debate about that in the Nationality and Borders Act, particularly in Section 12 where there is a distinction between one class of refugee and another, which is not mentioned in the convention. That begs the question as to how you deal with questions of opinion as to the meaning of words. Could you perhaps elaborate a little on that?

Dominic Grieve: Yes, I am happy to. The point you are making is entirely valid. In many cases with international law, there is no tribunal to interpret it, and it is an area, therefore, where law and, to an extent, politics mix because it is the bench of international public opinion and that of your peers with whom you have signed the treaty who are likely to be the people who will complain if you are doing something that is outside it. There is nobody else who will do it.

What is the law officer's duty? It is to look carefully at what the international treaty says, to look at how it has been interpreted by other countries over time, to ascertain whether there is, to use the word we use, a respectable argument that what the Government are seeking to do is within the treaty. If they think that there is a respectable argument, the law officers may sanction it, but they may give a caution. In fact, ultimately, they do not sanction it because they do not have a veto, but they point out how others may see the action that is going to take place.

There are, as I mentioned, some other specific things that can be invoked. One is whether there is a necessity for breaking the international treaty because it is being wrongly interpreted by the other parties and, occasionally with international treaties, whether they are obsolete. We have quite a few treaties lurking around, and nobody is quite sure if anybody is paying attention to them anymore. I certainly remember one example that came across my desk when I was Attorney-General. We concluded that, as nobody seemed to be really interested in the treaty even though it had not been formally struck off, for the United Kingdom to act in a way that might be seen to be contrary to it was unlikely to cause a ripple across the international stage, and, indeed, I do not think anybody noticed. These are quite difficult issues. That is the area in the role of the law officers where I have to accept that law and politics mix. We may come on to that.

It comes back to the propriety point. Are the Government, in the way they operate and act, coming across internationally and domestically as operating with propriety? Sometimes, it may be that they will be seen to be doing something with propriety even if they do something that a tiny number of people might say is a breach of international law. I have to accept there are some grey areas—that is why the law officers exist—but the basic rule is quite clear. Governments should not be legislating in breach of international obligations. When the international obligations are recent and current, all the more reason that they should have an extraordinary explanation to put forward, a justification, if they are to do it.

Lord Hope of Craighead: You used the phrase "respectable argument", which is a relatively low threshold. If you are being asked to give advice in the light of a very strong political impetus to take a particular course of action, you are testing the argument against the imperative of trying to pursue the policy objective of the Government. How do you reach your view on respectable argument, or do you confine your attention purely to the meaning of the words as set out in the convention?

Dominic Grieve: First, I would confine my interpretation to the meaning of the words. I would then go on to consider—often in matters of this kind one would also be getting some outside assistance from experts in international law—whether a respectable or credible argument could be made that what the Government were seeking to do could be said to be compatible with the international legal obligation. In doing that, I would like to emphasise that certainly for myself—it may well be the same for Lord Garnier if he was called on to do this—the question of wishing to support the Government's policies if possible and finding a way through to enable them to be pursued is a different thing from allowing what I would call rather shallow political considerations to impinge on the law officers' interpretation. Yes, the word respectable may appear to be quite a low threshold, but I do not think that is how I viewed it when I was being called on to provide that advice.

Lord Hope of Craighead: Lord Garnier, can I extend the discussion a little by referring to a paper that you gave when you were in office as Solicitor-General? This is your speech to the Constitutional and Administrative Law Bar Association in 2010, of which we have a copy. I think I am right in saying that you referred to the submarine analogy.

Lord Garnier: Yes, I am afraid I do rather bore on about that.

Lord Hope of Craighead: One of the things that caught my attention was a passage where you described the relationship between the law officers and the Government Legal Service. We know that is a very substantial body with a lot of very skilled advisers. The impression I got from your analysis was that a lot of these problems are dealt with by the Government Legal Service and solved by them because they consult widely and look at all the authorities and so on, and the law officer does not really come into it.

I think you put it in this way: the law officers do not become directly involved unless invited to do so. I think you were talking primarily about the obligation under the Human Rights Act to give a view as to whether legislation is compatible or not. If you look more broadly, for example, at the way in which the refugee convention has been interpreted, would that simply be left to the Government Legal Service? What do you mean by being invited to do so? Would you simply stand back and take no initiative until invited, or can you take an initiative?

Lord Garnier: I do not have that particular passage in my head right now, but if you would like me to, I will look at it and write to you. The reason I said "invited to", I suspect, is that there are, as Dominic said a moment ago, so many things going on in government that require legal attention—in the Department for Transport or in the Department for Environment, Food and Rural Affairs or whatever it may be—that the law officers cannot be expected to get into the granular detail of all the issues that each Whitehall department is concerning itself with, as well as all the government agencies and so forth outside Whitehall.

A matter such as the asylum convention, a matter of acute political controversy, is the sort of thing that the Home Office lawyers or the Foreign Office lawyers would want to discuss with the law officers, with a view to explaining what their view of the words in the convention was and whether that was something that the Attorney-General or the Solicitor-General agreed with or had other views on, or whatever it may be. On a thing like that, one would probably not rely only on one's own ability to construe a document and read judgments and so forth, but would bring in Treasury counsel as well.

The law officers are not the only people giving legal advice, although most legal advice to the Cabinet is given via the law officers. Sir James Eadie QC was the leading Treasury counsel in civil matters when we were in office, and I am happy to say it still is Sir James Eadie. There is plenty of discussion, refining and working out what a particular document, a particular treaty or a particular piece of legislation might mean, and how that can be interpreted in a way that is amenable to the Government's aims.

If there is a court or a system of arbitration, you have to work out what that court will accept and what that arbitrating body will accept, and, when there is no arbitrating body, what the other international parties will accept and where we will find a meeting of minds. Inevitably, it is not always helpful to have a fight. You want to allow the convention, on whatever it might be, to work to the advantage of all parties signed up to it. You would receive advice from the Foreign Office that countries A, B, C and D would, according to our embassies in those countries, react in this way if we took that line. It may not be an impermissible or an unarguable line to take, but it is not one they will accept.

Do we just push ahead and have a fight, or do we adjust our views so that we can reach some sort of compromise? It is not magic. It is just called negotiating. It seems to me that our job as law officers was to help the Government negotiate within the law to reach a happy and satisfactory conclusion. It might not be a perfect solution, but it might be one that was the best in all the circumstances.

Lord Hope of Craighead: It is an intriguing scene—lawyers from various departments all contributing, with the Government Legal Service, probably your primary source of advice in your position, and you trying to make the best you can of possibly conflicting views to decide where the respectable argument is.

Lord Garnier: The Department for Transport lawyers would be the source of expertise on the Warsaw convention, for example.

Lord Hope of Craighead: Yes.

Lord Garnier: If it were me, I would listen very carefully to what their lawyers were telling me about how they thought a particular paragraph or clause of the convention should be interpreted. I could take a different

view, but I would need to be very well persuaded that my view was right before I disagreed with somebody who knew a lot more about it.

Lord Hope of Craighead: Does that fit with your experience, Mr Grieve?

Dominic Grieve: Yes, it does. These are difficult areas, I do not deny it. Another example is Syria, and taking military action against Syria, which did not happen because the House of Commons did not approve it. There was no UN Security Council resolution, and there is undoubtedly a strand of international law thinking that, without a UN Security Council resolution, unless you are acting in self-defence, which we were not doing, you could not take military action against another state. The United Kingdom has long adhered to the view that, in addition to the United Nations charter, customary international law remains and the doctrine of humanitarian intervention can be invoked for taking military action against a state that is about to commit grievous humanitarian crimes against its own citizens, which is what was argued was happening, or is happening, with Syria and its use of chemical and biological weapons.

The doctrine of humanitarian necessity was invoked in our intervention in Kosovo. Some countries do not even seek to do that; the United States simply decides it is going to exercise power, and it has never sought to rationalise it on a legal basis. That presents law officers with a classic dilemma. How will they take advice? They get external legal advice. They get advice from the legal advisers to the Foreign Office, who produce precedents for where it has been invoked on previous occasions. They go out to independent legal advice from experts in international law. They have to come to a conclusion, and they have to provide that advice to the Government.

I accept that these are challenging areas. One hopes that because of the fact that there is a system in place, and that the law officers have an understanding of the legal and ethical issues involved, particularly with international treaties that are not subject to any form of arbitration, we can come up with what I hope are, to use that possibly maligned word, respectable decisions. It is easier where there is a domestic court that will ultimately arbitrate on it because, if the law officers have got it wrong, they may end up with egg on their face, but it will be put right.

Q109 **Lord Robertson of Port Ellen:** I am sinking in this sea of legal concepts as a mere ordinary politician and not a lawyer. I am trying to see my way through it in terms of what the committee might recommend. You make a solid case of the fact that in our unwritten constitution there are norms, but we are living through a period at the moment when a lot of those norms are being challenged. Lord Garnier, in a letter to the *Times* in September 2020, you said: "And if a law officer resigns, the Government is probably in trouble". The Solicitor-General last night resigned from the Government, and there are other indications apart from that to suggest the Government are in trouble.

I would like to see coming out of this committee some sort of structural

recommendations that might give protection to the rule of law in a way that the unwritten constitution and the "good chaps" theory do not, especially when we are under siege at the moment. On what you have just said, Mr Grieve, about Kosovo—I was Secretary of State for Defence at the time—the decision was taken that international law existed before the United Nations Security Council, and therefore even without a resolution we were able to do it.

The question then is whether there are some unincorporated international conventions, such as the convention on torture, that should be obligatory. We have been through this already, with the chairman of the Supreme Court saying that unless something is incorporated into domestic law the Supreme Court cannot make a judgment. Our questions about ministerial codes and these things may well be nominal, but they are reminders to people that there is an international code of law that needs to be respected. Do you think that some of them should be obligatory?

Dominic Grieve: We are in a difficult area. I seem to remember it was Lord Kerr, who in an obiter in a judgment, the title of which, I am afraid, is so complicated that I cannot remember it, asked why, if the UK signed up to the UN Convention on the Rights of the Child, it should not be enforced by the Supreme Court, but we have a dualist system and we have parliamentary sovereignty, which are very important principles. Unless we have chosen to incorporate, we may breach an international legal obligation, and it may be argued that we are doing so, but our own domestic courts cannot adjudicate on it. The only way you can bring about that change would be to have a written constitution where, ultimately, the Supreme Court was the ultimate arbiter of the constitution. Some countries have gone down that road. I have never seen signs of it commending itself here, and it has its own problems and difficulties.

The difficulty is that you can enact any rules and any codes you like, but you can see for yourself what has happened in the recent past. If a Prime Minister decides to ignore his own Ministerial Code, even if he has an independent adviser on the code and the independent adviser is ultimately the person who advises the Prime Minister, you may end up with the independent adviser resigning but the Prime Minister can and does ignore the code.

We can do as many codes as we like, and I think codes can be useful. I am not suggesting that we should not have them. I am simply making the point that, if they are ignored, while they may be a useful benchmark to look at and then be raised in Parliament, unless Parliament decides to do something about it, nothing is going to happen. The electorate could decide to do it at an election, but elections are every five years, and an awful lot can happen in the meantime.

Lord Robertson of Port Ellen: Going back to the specifics about unincorporated treaties, last year the Government brought in the overseas operations Bill, which had it been enacted would have been in

breach of a whole series of conventions, on torture, humanitarian law, et cetera. Apart from resignation, how do you think that particular piece of legislation managed to get through all the processes, until it hit the House of Lords and hit the buffers?

Dominic Grieve: I have no idea. Let us put it this way: given that I commented on it extensively, wrote articles about it and drafted some amendments to it, which were in your Lordship's House, I would not have remained as a law officer in office if that had been presented to me and the Government were going ahead regardless. I simply would not, because it was, in my view, a flagrant breach of our international legal obligations. At the end of the day, you have to ask, or you will not be in a position to answer, why people are prepared to see international legal obligations breached and sign it off. Somebody signed it off. The law officers must have signed it off. They must have signed it off at the Bill Committee, which takes place in that room under the Chamber of the House of Commons, the lower ministerial corridor. In that rather sultry atmosphere, either the Solicitor-General or the Attorney-General must have been present and said that they regarded it as fit to be presented to Parliament.

Lord Robertson of Port Ellen: There is nothing you can suggest to us between general elections and a written constitution that would protect the public from breaches of the "good chaps" theory of government.

Lord Garnier: We are a bicameral Parliament.

Dominic Grieve: You did it.

Lord Garnier: That Bill got adjusted, shall we say, in the House of Lords, and the House of Commons was politically sensible enough to realise that it was going to get stuck it if it tried it again and again, despite possibly resorting to the Parliament Act. To use the Parliament Act to be seen to be supporting torture was not what you might call a good look. In some cases the courts will be the check on misconduct, but in other cases it will be raw politics, and that is what this place is all about.

Q110 **Baroness Fookes:** Lord Garnier, earlier this morning you referred to the fact that the Advocate-General for Scotland is drawn not from within Parliament but from outside. Here in England, law officers are drawn from one of the two Houses. Can you suggest to us what the advantages and disadvantages are of these concepts and how they might be improved?

Lord Garnier: I think Dominic Grieve was referring to the Lord Advocate.

Baroness Fookes: Yes, my apologies.

Lord Garnier: I jotted this down when I was thinking about what would be sensible. Can I read it out? Being Members of the Commons in particular means that the law officers are visible, available and seen as internal government and parliamentary advisers who can speak on equal terms with other Ministers, and, although appointed by the Prime Minister, they have little political power or power at all save, as I

mentioned before, the nuclear option of resignation. An outsider, a civil servant, would not have the clout that a law officer in Parliament should have, as there would always be the appearance of a Minister and civil servant relationship. No matter how senior, how good and bright or independent a civil servant is, the relationship is never one of equals.

To use a very old-fashioned word, propinquity is quite important. I know the law officers are hidden away in a dark corridor, although it is actually above the Sports and Social Club, so it is not actually a quiet place. I think when this building was designed in the 1840s and 1850s they were deliberately given rooms away from the political Cabinet, which is behind the Speaker's chair, but accessible up the staircase to the Judicial Committee, where they would appear. There is clearly some sort of separation.

I would not suggest we were quite like monks. We were not as visible in the Chamber or in other parts of the building as political Ministers. Dominic and I made a particular effort, if I may say so, to make sure that we were visible. We were in the tea room, the dining room and the Chamber, even on days when our particular business was not being discussed, so that Members of Parliament from both sides of the House could approach us and say, "What's happening about this?", or, "Can you help me about that?", or even, "What on earth do you do? What is the job of a law officer?"

We had groups of Members of Parliament in Dominic's room downstairs where we would have discussions and teaching seminars about the role of the law officers. If we had just stayed in our rooms and done papers, we would have been forgotten very soon and become an irrelevance to the process of legislation, the process of government and the processes of Parliament. Being here and being on equal terms with our colleagues in one House or the other is very important.

Baroness Fookes: What about the House of Lords? You would not have quite that propinquity, as you put it, if it was someone drawn from the House of Lords. Would you see that as a disadvantage?

Lord Garnier: It is preferable if you can get the two English law officers in the House of Commons. If there is no one available or no one willing to do the job, being a Member of the House of Lords is a second best. Lord Williams was a fine Attorney-General, if I may say so. He came into Parliament with a stellar reputation as a lawyer. If he had been in the House of Commons, he would, I am sure, have made an excellent Member of Parliament and a very good Attorney-General. His being in the House of Lords kept him away a bit from the hurly-burly of the House of Commons, but everyone knew who he was. He was not somebody nobody had ever heard of who was suddenly plonked into the job. He was a man of stature, a man of high reputation and integrity. The fact that he was in the House of Lords was not that important. It is when people are plucked from nowhere and given a job that is of some importance, and they are not seen and they do not explain themselves, that it allows problems to build up.

Baroness Fookes: Is there a problem these days with fewer first-class lawyers going into Parliament as MPs?

Lord Garnier: When I first came into the House of Commons, a very helpful Whip asked whether I was going to continue with my practice at the Bar, and I said, "Yes, I am". He said, "Well, you have to choose. You can't have two passports. Either you must be a Member of Parliament and a politician or you must be a barrister. You can't be both", and I said, "Well, actually, I think I can". It was interesting that that very Whip only a few years later cornered me in the Members' Lobby to ask for my legal advice about some matter that was causing him concern. It is important that we encourage members of the Bar or members of the solicitors' profession and lawyers not only from this jurisdiction but from Scotland and Northern Ireland to come into Parliament.

One of the things I have worried about over the last several years is that the fellowship of lawyers and Members of Parliament, between the judiciary and government, and between the judiciary and Parliament, has gone. We no longer speak the same language. When I took a Lord Chancellor to dinner in my Inn, that person felt that they were going into a foreign country, whereas not so very long ago the Lord Chancellor would not only have known most of the people there but would have appointed many of the judges in that room. There was a shared constitutional understanding about their separate roles, about the role of Parliament, the role of the Executive and the role of lawyers and the judiciary. That has gone. It is a great pity, and it discourages members of the Bar and solicitors. By that, I mean not just those who have law degrees or those who are called to the Bar or admitted as solicitors or as advocates in Scotland. It discourages them from coming in. Why give up a good practice? Why swap all that for the likely inability to continue your practice and, associated with that, the public obloquy that goes with being a Member of Parliament in an era of social media? I know plenty of people younger than me who would make excellent Members of Parliament, excellent Ministers and excellent law officers, but they will not come anywhere near this place because, to them, it is poison.

Dominic Grieve: I agree with everything that Edward has just said. It is a problem. There is no shortage of people who have legal qualifications in the House of Commons and who have actually practised, but what is true is that, increasingly, they are people who ceased practice some time ago, embarked on political careers, and are not very active in it. We must be careful to not get carried away on that point. If somebody has been well grounded in law, and they are appointed to be a law officer, they will be capable of doing the job, particularly because of the way the system works in the law officers' department.

In the old days, law officers went into court a great deal. Indeed, the office of the law officers was in the Royal Courts of Justice. If you go back 60, 70 or 80 years, the law officers spent a significant part of their week in court. They would then come out of court, come down to the House of Commons to vote with the Government where necessary, and stay up for

incredibly long hours in the night working on the advice that they had to provide to the Government on a particular topic, helped by a minute staff. The big change is that the opportunity for law officers to go into court is now very limited. It is there if you want to do it, and both Edward and I did it. If we thought a case was of importance, and it was within our competence, we went and did the advocacy, but you can be a law officer and never go into court at all. That can all be done by Treasury counsel.

The truth is that with the administrative workload, superintendence of the Crown Prosecution Service, reading, signing off and making decisions, and, in the case of the Attorney-General, providing advice, going to Cabinet, attending the National Security Council and other work, there is so much to fill up your time that the time to go into court and prepare a brief properly and do it properly is very circumscribed. On the occasions when I did it and I went into the Supreme Court, which I did on two occasions, you really had to clear the space and stay up till three o'clock in the morning to do your prep. That is a change in the nature of the role of the law officers.

The other point is this. Perhaps we are going to come to it, so I do not wish to labour it now, but it came from your original question about the Lord Advocate. There have been a number of jurisdictions that have effectively said, "We're going to have a professional lawyer. That lawyer attends our Cabinet, provides legal advice to Ministers and performs those roles". Usually in those jurisdictions, not in Scotland, but in Ireland, the role of superintendence of the Crown Prosecution Service, or its prosecution service, has been completely removed, so that the DPP in Ireland is a wholly independent player answerable in some vague way, I think, to its Minister of Justice.

In the United Kingdom, with our international obligations and all the other things that go with them, I do not think that that is an arrangement that would work very well. First, as Lord Garnier said, the civil servant attorney can resign if his advice is not being followed, but he has no political traction to stand up and make a speech in the House of Commons and explain without betraying legal professional privilege why he has gone. That aspect of his own protection and of his colleagues is not there. The second thing is that, bluntly speaking, from time to time, law officers have to make decisions that have really extraordinary potential consequences.

For example, one of our predecessors in office had to decide whether to release a terrorist who had been arrested and was being held at Heathrow police station in order to secure the release of several hundred people who had been taken on hijacked planes to an airfield in Jordan. It was the Attorney-General's decision, and the Attorney-General's decision alone, where the balance of the public interest rested. Doubtless, he consulted his ministerial colleagues, and I am sure they told him at the time what they thought—it was when Ted Heath was Prime Minister—but it was his decision. I do not see how you can have a system where such a

decision, the ability to effectively enter a nolle prosequi in a matter where there is a very complex balance of the public interest and with a country with the international links of the United Kingdom, can be done by a civil servant.

Baroness Fookes: They are not answerable in the same way for the results of their decision.

Dominic Grieve: No.

Lord Thomas of Gresford: I recall seeing Lord Elwyn-Jones, as he became, as Attorney-General prosecuting in the Moors murders, and appearing for Brady was Emlyn Hooson QC MP. At that time, the law officers prosecuted from time to time in major cases. I am very glad you referred to Gareth Williams, an old oppo of mine, not least in the murder of a taxi driver in the miners' strike; you may remember that case. He was a brilliant lawyer and chairman of the Bar, and was appointed Attorney-General in this House, followed by Lord Goldsmith and Patricia Scotland. Each of them fulfilled their role very well in this House. It may be that the Labour Party found it difficult to find people with the relevant experience to be Attorney-General in the lower House. Surely, there are advantages of having a larger pool to look at for the law officers outside those who have become Members of Parliament.

Lord Garnier: It is just a question of numbers. I do not want to personalise this, but Lord Howard was a Silk at the top of the Planning Bar before he became a Member of Parliament. He decided that he would rather be a political Minister than a law officer.

Lord Howard of Lympne: He was never given the opportunity.

Lord Garnier: You could say that. I could not. There are not enough, if I may say so, Lord Howards in their early to mid-40s with a big practice, having taken Silk, willing to come into the House of Commons, with all the other obligations that that creates. In order to fill those posts, you will at some stage, or some stages, have to appoint them from the House of Lords. There is nothing wrong with that at all. I just think that, if you can, the law officers are better placed in the House of Commons.

Having said that, we do not always have a legal Lord Chancellor and we do not have a Lord Chancellor in the House of Lords. We rely now on the Advocate-General, who is the UK law officer with responsibility for Scottish legal questions, or, until recently, the Lords Minister in the MoJ, Lord Wolfson, who, sadly, has resigned from this Government. We wait to see whether his replacement, Lord Bellamy, who was a fine lawyer, will be willing to fulfil the Lord Chancellor's role as the legal member of the Government in our House. I am sure there are plenty of people in the House of Lords or plenty of people who might be willing to come into the House of Lords, but there are not, I fear, enough people of standing willing to go into the House of Commons.

Lord Thomas of Gresford: You could not conceivably run a stellar

practice at the Bar and be an MP these days, could you?

Lord Garnier: Oh, I don't know!

Dominic Grieve: It is a matter of balance. The only person I can think of who prioritised his law work consistently over his work in Parliament was Sir Geoffrey Cox, and he eventually became Attorney-General, but I do not suppose you will mind my saying that he was warned repeatedly that his political career was going nowhere because his attendance in the House of Commons was not regarded as satisfactory. There are some difficult issues.

The old days of being able to be in court until four o'clock in the afternoon and then, as somebody described it, sauntering down to Parliament for the evening sittings are long gone. The demands in the House of Commons of constituents, the time the House sits, committees and everything else have really changed that. There are occasionally exceptions to the rule. I sought to maintain some practice, as did Lord Garnier, but I have to accept that it played second fiddle to what I was doing in politics, and, indeed, when I became shadow Home Secretary, I had to stop taking any work. That was the end of it. Then there was a two-year interval before I became Attorney-General. That pattern is likely to be repeated. As I said earlier, I do not think that makes it impossible to find law officers in the House of Commons, if they have had a firm grounding in practice previously.

Q111 **Lord Robertson of Port Ellen:** Lord Garnier, in your letter to the *Times* that I quoted before, you say, "Like submarines, the law officers are most effective when unseen, unheard and operate quietly". Do you think that describes the present Attorney-General, and, if not, what are the implications?

Lord Garnier: I have not been down to the shipyard for quite some while, so I do not know that it would be helpful. Your view on this matter is just as good as mine.

Lord Robertson of Port Ellen: She is very muscular, politically.

Lord Garnier: I am not going to pass comment on the present law officers. Well, there is only one law officer at the minute because the Solicitor-General resigned last night. That is one submarine that has surfaced. You will have a political view. You will have a view as a member of this committee and this House on the merits or demerits of any particular Minister in government. If I may, I will leave that to you.

Lord Robertson of Port Ellen: I was not inviting you to talk about the role of the law officer in being very publicly involved in party politics and going on BBC "Question Time"—

Lord Garnier: As we both indicated earlier, I do not think either of us would have made a political speech touching on our work as law officers. Apart from my speech to the Constitutional and Administrative Law Bar Association in Cambridge or other legal audiences, we very rarely made

party political pronouncements because it could fetter our independence for giving independent, dispassionate legal advice. The current Attorney-General takes a different view. That is a matter for her.

Dominic Grieve: That was the point I was making earlier. My successor, Jeremy Wright, followed exactly the same pattern of approach in putting the work first and, therefore, keeping a lower profile on other matters. As I explained, when I came into office with Edward in 2010, I was very conscious that the role of the Attorney-General had been called into question, and, as a result of a whole number of things, including the Iraq war and Lord Goldsmith's advice, there was a need to try to put the Attorney-General back at the centre of the core role.

To give another example, the Attorney-General in the period under Labour had acquired a policy-making role. There was a little policy-making unit in the Attorney-General's department that was engaged with the Justice ministry and the Home Office and was a policy-making department. We reviewed that when we came into office, and we concluded that it was not contributing anything useful. Of course, there is engagement. There is a tripartite agreement between the Attorney-General and the Home Secretary, whom he meets from time to time on policy matters, and the Lord Chancellor and Secretary of State for Justice, whom he frequently meets. I used to see Lord Clarke quite often, and there were lots of things to discuss. The idea that we should be throwing our weight around within government as policymakers struck me, after discussing it with my civil servants, as not very useful.

Quite apart from anything else, we were minnows in a pond with some very big fish, and it was not clear to me how that extra group of civil servants was making a significant difference to how policy was made. It was a novelty and we decided to drop it. It was a self-denying ordinance. I made political speeches in my constituency and I did fringe meetings at the party conference, but I would never have accepted doing a speech at a party conference on the platform. Others take a different view. Sir Geoffrey Cox fronted up the speech made by then Prime Minister Theresa May at one of the party conferences in 2017 or 2018 as a sort of warm-up act, because he had great advocacy skills and a booming voice, so he introduced her and made a polemical speech. He was much more heavily involved in politics. Perhaps that was inevitable over Brexit because of his views. The present Attorney-General clearly wishes to publicise her very strong views on a large number of subjects.

Lord Garnier: We had one bit of policy. It led to one clause of two lines in the Crime and Courts Act 2013. I was permitted by my boss to work up deferred prosecution agreements, which I brought across from the United States and are now part of the criminal law system, but that was it. It was so deeply technical and uncontroversial that it was passed without a murmur.

Dominic Grieve: It was, I hope, very valuable and did not require a staff of civil servants in a policy unit to do it, because Lord Garnier did it himself with a little bit of help.

Q112 **Lord Hope of Craighead:** This is perhaps the obverse of what we have been discussing. What qualifications do you think are necessary—I stress the word "necessary"—to carry out the duties of a law officer, and would written criteria similar to those in Section 5 of the Constitutional Reform Act 2005 be desirable? Two words: necessary and desirable.

Dominic Grieve: Clearly, they have to be legally qualified. That is obvious, although, oddly enough, I do not actually think there is any constitutional requirement for it whatever. Bizarrely, it is not written down anywhere that the Attorney-General or Solicitor-General have to be lawyers either in the role of solicitors or practising members of the Bar.

Lord Hope of Craighead: Would it be better if it was written down?

Dominic Grieve: It could be usefully written down, yes. When I was Attorney-General, there was an occasion when it was suggested to me that a Solicitor-General whom the Prime Minister wanted to appoint did in fact have a legal qualification, but the reality was that they had never used it and it had never been exercised in a court, or only in a very minor matter in their career many years before. I expressed the view to the then Prime Minister that I thought this was not going to work and I was troubled by it. In fairness, he listened to me, and another person was appointed. I was troubled by it. It was not that I had anything against the individual concerned, who had an interesting and distinguished career in many ways, but when I thought of the nature of the work we were having to do, it did not seem to me that it chimed.

As to how you go beyond saying they have to be a barrister or solicitor, I suppose you could insist, if you wanted to, that they have to be of a certain number of years' standing, as are some appointments to other things, but that is just about the limit of where you can go. I am not sure what else you can do. Ultimately, if the Prime Minister ends up appointing somebody who is manifestly unsuitable, it will become apparent.

Lord Hope of Craighead: Has it become a question of personality, which cannot be defined in any kind of statute?

Dominic Grieve: I think that is right. As I was trying to say earlier, one has to be a bit careful. It is nice to think that law officers are very distinguished lawyers at the top of their profession, but I am not sure that has necessarily been the case. Somebody who has that position may do it brilliantly, but it can be done by others as well.

There are certain things that are absolutely essential, which takes us back to the start of this discussion: an understanding of the law and how it works and an understanding of the rule of law. You should understand those two things and you should have the necessary respect within the legal profession, which is quite important as well. The Attorney-General is the leader of the Bar. I know that is a title, but we attended Bar Council meetings, and at times we were a reference point if people wanted to bring to our attention things that they were concerned about. We made a

point, either Edward or I, and, indeed, his successors, of ensuring that one of us attended Bar Council meetings monthly on a Saturday.

Lord Garnier: I think Lord Falconer of Thoroton is a member of this committee. I remember him speaking in the Chamber and pointing at me and saying, "There's another member of the best club in the world, the ex-Solicitor-Generals club". He was not referring to me when he then went on to say that what a law officer needs is not the intellect of a Supreme Court justice, not the experience of a man or woman who has been in Silk for 40 years, but bottom. It is a very English term, I am sure, but it is one that many of us would understand.

When you are giving unpalatable advice to any client—it does not matter whether it is the Government or a client in one's private practice—you have to have the heft or the ability to give unpalatable news or express a view that your client may not like. That does not mean, as I said earlier, that you say, "This case is going nowhere," but "We may be able to deal with it in some other way that will perhaps achieve the end to which you aspire". You have to have someone who is able to face up to senior, ambitious and very hurried Ministers, and gently advise them that this will work this way but it will not work that way. It is partly character, partly experience and partly professional reputation, and a number of other things that are not so easy to write down but are perhaps apparent in some people and not in others.

Lord Hope of Craighead: What about written criteria? Could one put into statute that they should at least be a qualified lawyer, or is that not really addressing the point you are making?

Lord Garnier: Certainly, in my lifetime, I cannot think of a law officer who has not been a qualified lawyer. They may not have been a practising lawyer at the moment of their appointment. For example, I do not think Harriet Harman was a practising solicitor at the time she became Solicitor-General. She had practised, but at the time she was appointed she did not have a practising certificate. That would have shut her out. Whether that would have been a good thing or a bad thing, I have no idea. I am not sure that writing that sort of thing down is strictly necessary when it seems to be self-evident that if you are going to be a law officer of the Crown you need to be a lawyer.

Lord Hope of Craighead: Merely to say "qualified" is not raising the Bar high enough.

Lord Garnier: No.

Lord Hope of Craighead: As soon as you get into areas of practice, it becomes very difficult to define how far you have to go. Perhaps it is best left to judgment based on the criteria that Mr Grieve was suggesting—an understanding of the rule of law and how the law works.

Lord Garnier: My practice before I came into government was entirely media law. I used to appear in front of about five or six judges who dealt

with libel actions. My entire 40-year practice before 2010—I was called in 1976; you can do the maths—was entirely devoted to dealing with media law cases, acting for and against newspapers, broadcasters, publishers and so on. I sat as a Crown Court recorder, so I became exposed to the criminal law by force of circumstance. I knew nothing about commercial law or international law or the law of war or terrorism, but I soon picked it up as best I could when I was in office.

Saying that in order to become a law officer I needed to have had X number of years' practice in the following areas of law—you can adjust the list of qualifications—would not necessarily have helped. I am talking about myself, so you can discount this, but I like to think I made a pretty good fist of being a law officer even though my pre-government practice had been quite narrow.

Q113 **Lord Hennessy of Nympsfield:** As an outsider to the legal profession, I am fascinated by the anthropology of it. It came up a little when we had Lord Reed before us. We were talking about the intellectual formation. You can start off much the same, with recent graduates going to law school and so on, but the path you take can very much shape the way you analyse and the way you think, and it makes considerable differences. I was struck by Lord Garnier's very eloquent elegy to the idea of a lost fellowship, that you can be a stranger to other parts of your profession to quite a high degree by the time you reach your professional maturity.

Following on from that, it seems to me, in human terms, a very big ask of the law officers to be able to switch from being a political animal to being a detached legal animal several times in the course of a day's work. I am fascinated by the discussion you have been having with Lord Hope, because it seems to me that what makes it work is that it comes down to intangibles that are beyond the reach of precise definition. I would argue as an outsider looking in that it is one of the biggest asks of any set of Ministers we have in the British Government that you should be able to do this.

Lord Garnier: If you think about the appointment of High Court judges, a High Court judge might have had a practice entirely devoted to shipping law, but he is appointed to the Queen's Bench as a High Court judge. He may have to deal with shipping cases if he is ticketed to do that, but he might have to deal with a murder or a huge personal injury case. I guess your legal training, no matter what your specialism may have been, should enable you to assess evidence, to apply law and to make decisions.

Although I would never say that as Solicitor-General for two and a half years I was ever in quite the league of our High Court and superior judges, essentially, what I was doing was using my experience to reach decisions based on what was in front of me, what I was advised and what I knew. It is being able to make decisions and to do it dispassionately, and to shut out irrelevancies or biases or prejudices, which is one of the things that judges have to do, and law officers have to do it too.

Lord Hennessy of Nympsfield: But the difference between a High Court judge and a politician is that a politician uses evidence in a different way. I am not a politician, but politicians tend to weaponise evidence, do they not? In David Marquand's phrase, the successful mobilisation of prejudice is what determines political success and failure.

Dominic Grieve: That is a point. I hope I have not interrupted, Edward. You are right that some people do not want to become law officers because they come into politics to do politics. Indeed, I have to say that when I came into the House of Commons in 1997 it was not my intention to pursue what I would call a political legal career. It is quite ironic that what tends to happen is that you get subtly niched perhaps if you already have this predisposition, so you end up as the criminal justice spokesman and then you become the shadow Attorney-General. You stay within the orbit. I became shadow Home Secretary for a time and shadow Justice Secretary, all of which have connections to the law, rather than branching out and doing something completely different.

There is no doubt, and I certainly experienced it personally, that when you become Attorney-General, because of the way the office works, your location, admittedly very close to Westminster—it used to be in Victoria Street and is now in the MoJ building, which is now a complex with different departments in it—your pattern of work and the location of your office here, that niche tends to increase, and you probably start thinking a little bit differently as time goes by; and that may sometimes be the undoing of an Attorney-General. They become disconnected from the political discourse around them.

Lord Garnier and I tried very hard to make sure we kept our links. I used to have breakfast in the tea room before I went down to my office. I made that an absolute practice so that I could talk to my colleagues. We tried to make sure that we were connected.

There is a point when, if you are to do this job properly, you start thinking perhaps more as a lawyer and less as a politician. You still have to balance the two skills, which is why I made the point to Baroness Fookes that I am not sure it is something that can be readily handed over to a civil servant, a complete outsider. You have to balance those things. I acknowledge that in my time as Attorney-General I watched the change take place in myself as to how I viewed what was going on around me, and I rather suspect that most Attorneys-General and Solicitors-General have had the same experience, because I have talked to my predecessors about it and I think they went through the same thing.

Q114 **Lord Thomas of Gresford:** On the subject of the law officers' legal advice, is there any merit in codifying and publishing the circumstances under which law officers' legal advice will be disclosed? Is there a special case for disclosure of advice relating to armed conflict?

Dominic Grieve: I am not in favour of a codification because it will cause great difficulties. Ultimately, it is a fact that the law officers are bound by legal professional privilege. I provide an advice to the Government; it is

usually in the form of a letter rather than an advice. If the Prime Minister chooses to publish that letter, it is a matter for him, but the general principle has been that any Prime Minister should be careful about doing it because, if they do, it will put pressure for all letters of advice to be published. That said, there have been instances in which the law officers' advice has been published, or, if not the entire advice, redacted advice or a document setting out the Government's position, which is, in fact, really drafted by the law officers. I can see the merit of that, but how do you codify it? How do you lay down the rules under which it should be done? I emphasise that I am open-minded about it. Somebody might persuade my successors, or persuade me, that it can be done, but I do not readily see it. My concern is that, if we get to that point, law officers are going to start producing two pieces of advice—the private advice for the Prime Minister and the Cabinet, and the wider advice.

There is a dangerous tendency that collective Cabinet decision-making is disappearing in this country, and that extends to the law officers' advice. I have always been bemused by suggestions that the law officer provides advice to government that is only seen by the Prime Minister, the Foreign Secretary and somebody else, and is not shared with the Cabinet, yet there seems to be quite a lot of evidence that that has been happening. If the Cabinet is to have collective responsibility for decision-making, including decisions of great importance, it is beyond my comprehension that it should not all be seeing the advice.

Lord Thomas of Gresford: We very recently had the experience of the current Attorney-General saying, "I have been advised"—she did not say precisely who by; the *Financial Times* said it was an American lawyer—"that I can effectively break the protocol".

Dominic Grieve: That worries me very much for two reasons. I sometimes listened to colleagues after I left office and I have heard it suggested that the Attorney-General is the person who commissions advice for the Government. The Attorney-General is not the person who commissions advice for the Government; the Attorney-General, or the Solicitor-General, is the person who advises the Government. It suggests that somehow this is just a commissioning department. Of course, any sensible law officer will go off and, particularly in an area of difficulty, seek expert advice from outside, but at the end of the day the letter is his or hers.

Lord Thomas of Gresford: It seemed to me to be contrary to practice for the Attorney-General to say, "I have had advice", whatever it may be, as opposed to saying, "I have given advice", which he ought to say. Would you agree with that?

Dominic Grieve: Yes, I would entirely. It is your advice. That is what is done. It may just have been somebody not expressing themselves properly, but it seemed to me to indicate a subtle shift in where the law officers' responsibilities lie. As long as they can find somebody to justify something, they can chuck it in and say, "Well, I've done it".

Lord Thomas of Gresford: That is the impression. Lord Garnier, do you have a comment on the disclosure by the *Financial Times* that it was an American lawyer, a member of Mr Trump's Administration, who gave the advice?

Lord Garnier: Let me start at the beginning. Regarding the publication of an Attorney-General's or Solicitor-General's advice, it is the Government's property, so they can, like any client, publish it if they think it appropriate to do so. What we need to be careful of, and perhaps this has been happening a bit, is that political Ministers will say, "The Attorney-General has advised that this is entirely proper and lawful. Therefore, the policy is a good idea". The policy is the political Government's. The policy is the Prime Minister's. Whether it is within or without the law is a separate case.

You must not delegate your political responsibility as the head of Government to your lawyer. Your lawyer tells you whether it is within or without the law, but the decision about whether or not it is a good idea politically must be one for the political Government. Occasionally, I see those two things being elided and that, because the Attorney-General says it is lawful to do what we did in the UK internal market Bill or the Northern Ireland protocol, it is therefore a good thing and a defensible policy. There is a confusion. I am not sure that we are going to see much change for a day or two.

The Chair: We will end that question if we may, because we have run out of time. I want quickly to put the last two questions because the intent behind them is very clear, and I invite you to make a very precise response to them. Baroness Suttie, would you like to put your question?

Q115 **Baroness Suttie:** It is a very direct question. Do you think the Attorney-General's oath should be updated, and should it include specific reference to the rule of law, as the Lord Chancellor's oath currently does?

Dominic Grieve: I am rather fond of the Attorney-General's oath, which, although it is 16th century, is actually highly relevant, when you look at it properly, to what the Attorney-General has to do. The first part of it says that the Attorney-General has to serve the Queen's interests in her court, which is his duty, and represent those interests, which is the job. It uses the word "cunning" in the 16th century sense, rather than the "Blackadder" sense, which is your wisdom on the Queen's behalf.

There is a very interesting second bit, which I keep telling Lord Sumption is a sign that Magna Carta had not disappeared in the 16th century, because curiously you are then told to swear that you will not abuse your power to deny or delay justice to any person, including any person who might have a case against the Crown. As this supposedly dates from a time when Lord Sumption keeps insisting that Magna Carta had been completely forgotten about, I have often said to him that it strikes me that it actually suggests that in the middle of the 16th century the echo was still there, before it revived in the 17th century, so I rather like it. That said, of course, you can update it if you want to.

As to whether a specific reference to the rule of law, which, of course, is a modern buzzword, is necessary, if there is an Attorney-General who is not upholding the rule of law, we are in very serious trouble, because they are supposed to be part of the rule of law. I simply leave it as an open question. On a personal level, I would be slightly sad. I thought it was a fascinating oath, and, when I had actually got my head round it and read it three times, I thought it extremely interesting that this was what was required of my predecessors at some time in the middle of the 16th century.

Baroness Suttie: I have the same question for Lord Garnier.

Lord Garnier: I have here the wording of the oath that I took. I think it is the same one. "I do declare that well and truly I will serve the Queen as her Solicitor-General in all her courts of record within Great Britain and truly counsel the Queen in her matters when I shall be called and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. For any matter against the Queen where the Queen is a party, I will take no wages or fee of any man"—that is, I will not allow myself to be bribed—"I will duly in convenient time speed such matters as any person shall have to do in the law against the Queen, as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to the Queen's matters when I shall be called thereto".

It is charming Tudor language, I assume, or maybe Jacobean language. I think the broad point is that just as a judge takes an oath, just as a law officer takes an oath, and just as the Lord Chancellor takes an oath, you could adjust the wording to whizz it up, rather like moving the King James Bible into the new, whatever-it-is-called version, but there is something quite affecting about the language. The solemnity of the occasion when you take the oath in the Lord Chief Justice's court and the antiquity of the language probably brings home to you that this is quite a serious task that you are taking on, and you are not just filling some political slot at the behest of a Prime Minister in a hurry to make appointments.

Baroness Suttie: Do you have a view on a specific reference to the rule of law?

Lord Garnier: I think it is implied. Accepting the job to me meant that one would ensure that we advised the Government to behave and to adhere to the rule of law. As Dominic said a moment ago, the world will not collapse if a different form of words, including the words "rule of law", is introduced into a law officer's oath. At the time I took that oath in 2010, I was rather delighted that my great-grandfather, probably by 10 generations, who was a law officer from about 1760 to about 1778 under several Prime Ministers, all of different political persuasions, would have taken that very same oath every time he was reappointed either as Solicitor-General or Attorney-General.

Lord Thomas of Gresford: You felt that the—

Lord Garnier: The hand of history was there.

Lord Thomas of Gresford: Exactly.

Dominic Grieve: I was very proud to take the oath, and, I have to say, taking it in front of the judiciary assembled in the Lord Chief Justice's court brings home to you what you are supposed to be doing.

The Chair: This is an issue that has come up. Would it help to give a wider understanding of the role of law officers if it was written in 21st century language?

Dominic Grieve: I wonder who is really going to pay a great deal of attention to it.

Q116 **Baroness Fookes:** I am almost tempted not to ask this question. Is there any merit in the Prime Minister being required to take an oath upholding the rule of law or anything else?

Dominic Grieve: The Prime Minister goes and kisses the Queen's hand on appointment, by which he undertakes to be her Prime Minister and her servant in upholding the rule of law. Would a specific oath make any difference? I hazard the suggestion that I am not sure it would make any difference to the current Prime Minister. Unless it is justiciable in some way, I think I would steer clear of it because I do not think it would have an impact. I hope that Prime Ministers do uphold the rule of law.

There was a good reason for doing it in the context of the Lord Chancellor because the anxiety in 2005 was that the change in the role of the Lord Chancellor meant that they were losing a significant representative for the judiciary within government, and therefore, because of his role, it made sense to put it in: the protector of the rule of law and of the independence of the judiciary. If you start to widen it out, every Minister, on that basis, would have to take an oath to uphold the rule of law, and they do not have to. I will put it this way. I would have no objection to it, but I am not sure it is going to have any significant advantage.

Baroness Fookes: Is that a view you share, Lord Garnier?

Lord Garnier: It is. I go back to my point about the Russian constitution and the Zimbabwe constitution. Certainly, President Mugabe took an oath to uphold the constitution of Zimbabwe. I am not sure that made much difference to his daily conduct of government business. President Trump, as I recall, took an oath to uphold the United States constitution. It is a matter of controversy whether he managed to do that. I am not sure that we would be greatly assisted by a British Prime Minister taking an oath.

The Chair: Lord Hennessy, we have a tradition of very often giving you the last word. Do you want to ask a question?

Q117 **Lord Hennessy of Nympsfield:** That is very kind, Chair. I wonder if we are not at a low point of cynicism and pessimism in our post-war history

in the way we regard the premiership. There are certainly those who think that what we are witnessing is a Prime Minister who gleefully prances around a roaring bonfire of the conventions. The more the conventions roar, the more he seems to be exhilarated by it as he moves into the territory of being a rogue Prime Minister. There are many people who think that. Therefore, they argue, as I think Dominic just did a moment ago, that a prime ministerial oath would not be a restraint on this Prime Minister, but, surely, that does not mean to say it is not worth doing.

If you get to the point where you say the central weakness of our system of government is that, if the number one guarantor of the decency and probity of public life, the keeper of the Ministerial Code and so many other things, is a wrong 'un, there is nothing you can do about it, it is a terribly grim and pessimistic reflection on our country and the great people who have gone before and on whose shoulders we are standing. I do not share that pessimism, but I accept and understand the argument that it would not make the slightest difference to this Prime Minister when he was prancing around a bonfire of the decencies.

Lord Garnier: I am going to throw in yet one more self-regarding story about myself. I appeared for one former Prime Minister in the Supreme Court on the Prorogation case, and there I was an independent barrister, but I was a Peer who took the Conservative Whip. I do not know that there are many people like me who have ever had the chance to describe the sitting Prime Minister in court as the defendant. I do not want to have to do that again.

Dominic Grieve: I simply say this. First, I did not wish to convey total pessimism. One has to accept that we are in a tumultuous period of our politics, partly because of decisions that were taken over the last five years that, because they have a revolutionary component to the country's future, have caused ripples of disturbance right through the system. There is no reason to suppose that that will not settle down. I think it may. It may not. The United Kingdom may break up. You can think of all sorts of things that may flow from it. It has been a disturbed period, and I have experienced it at first hand in politics. That is not to say that there will not be a settlement back when people start behaving and respecting the conventions and realising their advantages.

That said, symbolism can matter, just as I said that going into the Lord Chief Justice's court to take the oath mattered to me and certainly brought home to me the importance of the role I had to carry out and the standards I should seek to meet. I accept that sometimes symbolism, including oath-taking, is the usual way we do it in this country, and we could require someone who now has a very well-established constitutional position, even though it has emerged in an undefined way, namely the Prime Minister, to make a public statement on taking office of a kind that involves the taking of an oath in front of an appropriate audience, which would probably be Parliament. One cannot think where else it would be.

If that has a reinforcement of standards, it may serve a useful purpose, and I do not think we should, therefore, ignore the possibility that it could be beneficial. I entirely accept that, otherwise why do any oath-taking of any kind at all, and yet we do? It is the way, in fact, this country is run—from army officers and police officers to judges and MPs—and it is highly symbolic. Most people, when it is their turn to do it, feel that it is quite a serious issue, so you may be right.

The Chair: Great. Thank you both for your very informed and valuable observations, which we will certainly reflect on, and for sharing your experiences with us. It is always very helpful when people have experience they can delve into when addressing our questions. Thank you very much. It is most appreciated. We now turn to a private session.