HOUSE OF LORDS

Constitution Committee

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

Wednesday 7 September 2022

10.10 am

Watch the meeting

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

Evidence Session No. 9 Heard in Public Questions 118 - 129

Witness

I: The Rt Hon Jack Straw, former Lord Chancellor and Secretary of State for Justice (2007-10), Ministry of Justice.

USE OF THE TRANSCRIPT

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

Examination of Witness

Jack Straw.

Q118 **The Chair:** Good morning. This is a meeting of the House of Lords Constitution Committee. This morning we are hearing evidence from Mr Jack Straw, who was Home Secretary, Foreign Secretary and Leader of the Commons under Prime Minister Tony Blair, and Lord Chancellor and Justice Secretary under Prime Minister Gordon Brown. Welcome, Mr Straw, we are very pleased to have you here today. You have very kindly presented us with written evidence. The committee this morning would like to build on that evidence with a series of questions. I can go to the opening question, or would you like to make some comments?

Jack Straw: No, apart from to say that I am sorry I could not make your June meeting on account of being laid up in bed. Aside from that, I set out my thoughts on your first set of questions and I am happy to take any questions that your committee wishes to ask.

The Chair: Great, thank you very much. You have helpfully provided us with a definition of the rule of law in your written submission, but we would be interested in hearing more of your views as to what you see as the role of the Lord Chancellor in protecting the rule of law within government.

Jack Straw: The role of the Lord Chancellor ought to be to educate his or her colleagues about the importance of the rule of law and to explain to them that, although it is really irritating if a decision of yours is overturned by one of the courts—and it can be infuriating—that is not a reason to attack the judges. Since the Bill of Rights in 1688, the courts have held a really important role in holding government to account. That inevitably means that a lot of individual decisions that some Ministers make—not least if you are Home Secretary—will be the subject of judicial review. As I said in my memorandum to you, Baroness Drake, there is an assumption that this all started with the Human Rights Act in 1998. It is absolutely not the case. It really is not.

I see Lord Howard here; he will remember the case of Chahal at the European Court of Human Rights, which dated back to the early 1990s. Chahal was a very unpleasant Sikh terrorist and Lord Howard, as I remember, did something that Mr Chahal did not like.

Lord Howard of Lympne: I tried to extradite him.

Jack Straw: That is right. The European Court of Human Rights, in the end, declared that what Lord Howard was doing was unlawful, and Lord Howard had to bite the bullet and accept that. That was before the Human Rights Act. Judicial review, although it has become more active and prominent as a legal concept, well predates the early 1990s. That is really important.

It is about, as I say, ensuring that your colleagues around the Cabinet table understand the role of the judiciary; it is nothing personal. We are

very lucky to have a judiciary here that is of such high standing, integrity and independence.

On how you do that, there are various questions about whether you change the oaths. You can do that but, frankly, the key thing comes down to character. There are some incumbents of the Lord Chancellor's seat who swore the same oaths as I did, but I cannot say that they necessarily followed them.

The Prime Minister has a really important role to play here. When I was in government, both Tony Blair and Gordon Brown understood instinctively the importance of the independence of the judiciary. They would get annoyed, as I did, about particular decisions, more often when I was Home Secretary than with Mr Brown, but at no stage did this ever lead to either of them saying, "We should have a public spat with the judiciary". Our job is to explain to people that it has one role and we have another, and we must respect it. This is a democracy.

The Chair: In the evidence we have heard, there are those who express the view very forcefully that the Lord Chancellor has an important role in defending the rule of law and should speak up for it in Cabinet and bring it to Ministers' attention. Others say that the Lord Chancellor cannot be expected to protect the rule of law following the Constitutional Reform Act; it has materially changed the position. What do you say to that range of views?

Jack Straw: I do not think it has. There were not that many occasions when I thought it necessary to speak up for it, because it was not a matter of controversy in Cabinet. There was one occasion where I felt a Minister had gone a bit far in criticising probably the Court of Appeal or the Divisional Court for making a decision they did not like. The position, in terms of the constitutional position of the Lord Chancellor, remains as it was. Those of us who have taken on this position have to swear, in my recollection, three oaths, all of which are about the rule of law.

Moreover, the committee will recall that, when the original Constitutional Reform Bill was put forward in 2003, the position of Lord Chancellor was going to be abolished lock, stock and barrel. I have been through the Bill and there was then an extraordinarily tedious schedule that set out all the multifarious functions of the Lord Chancellor and who would have them. The Lord Chief Justice was to have one set; a nominated member of the Chancery Division was to have another set, and so it went on. In the end, the House of Lords decided, very much in its wisdom, to stick to the position of Lord Chancellor. I obviously was not party to those considerations at the time, but there was a reason for doing that, since not least the senior judiciary and retired former members of the judiciary saw the Lord Chancellor as there to protect them and not to make them a political Aunt Sally. That is my answer to that.

Yes, it can be more difficult if you are a Member of the House of Commons. I know Members may have questions about the qualifications for the Lord Chancellor role. People would say it was easier for me

because I knew personally that it was going to be my last job in government; the same was true for Lord Clarke. Whatever your position in the pecking order, if you take on this job you have to understand that part of it is to protect the judiciary from gratuitous partisan attack by your colleagues.

The Chair: May I move on to the issue of international law in relation to the rule of law? I think Lord Howell wanted to come in.

Q119 **Lord Howell of Guildford:** Good morning. You have given us a very robust definition of the rule of law and I want to ask about the international aspect. Lord Reed told us that, in effect, in a Parliament the later statute always prevails. In fact, I quote him: "We would not be able to give effect to the Northern Ireland protocol in breach of a statute that deprived it of effect". We also had Lord Judge rather expanding Lord Bingham's definition of the rule of law in relation to international law. What do you feel about that? It is something rather different, is it not, from the rule of law domestically?

Jack Straw: It is. On the train, I had a shot at drafting something, which needless to say I now cannot find—I apologise. Here it is: I set out, I hope not at too much length, the difficulty that all of us who were Ministers in charge of the prison service faced in respect of the Hirst decision, which the Strasbourg court made in 2005. In the end, thanks not least to David Lidington's skilful footwork, it backed down. The thing that it accepted as a compromise was not a compromise at all: David Lidington announced that prisoners who were in the community but still technically under sentence could then vote, but they always have been able to in practice, which no one spotted.

This is what I scribbled down; I am happy to have it typed up. There has to be a distinction within the Ministerial Code between domestic law and international law. Domestic law is very straightforward. Ultimately, it is a matter for enforcement by the courts and, if the courts come to a decision about it, Ministers must follow it. For reasons I set out in my memorandum, the situation is different with regard to international obligations.

I scribbled this: "Ministers are under a duty to comply with the United Kingdom's obligations under treaties and international law more widely. Where a Minister has doubts about this, he or she should consult the law officers and follow their advice. Where a Minister is of the opinion that there are serious practical obstacles to following a specific obligation, her or she should make an immediate statement to Parliament to explain in detail his or her reasons."

Another thing that I think of is that, when we were drafting what became the Human Rights Act 1998, one issue that came on to my desk, because I was the Minister responsible for that Act, was how to ensure that Parliament is properly told whether we think a particular part of legislation is or is not compliant with the convention articles that have been incorporated into British domestic law. I came up with the idea,

which is now incorporated into Section 19 of the Act, that Ministers must provide a certificate on the face of any Bill to say whether, in their opinion, the proposed legislation is compliant with our obligations under the incorporated convention articles.

We were very clear in agreeing that we should not say every piece of legislation has to be complaint in advance. There may be occasions—to my recollection, there has been one since the Act was passed—where a Minister has to provide a certificate saying that they do not think it is compliant. Parliament needs to know the opinion of the sponsoring Minister, and in practice often the Attorney-General.

You could extend that to cover not just the human rights convention articles in the Human Rights Act, but treaty obligations and other obligations under international law. That would concentrate the mind, let me say.

Lord Howell of Guildford: That was a good innovation, but you would not dispute that what Parliament does, Parliament can undo, which is what Lord Reed was saying, in effect. If a treaty or an agreement is embodied in a statute, as long as the statute is there it is the law, but of course it can be changed.

Jack Straw: Yes, of course. Ultimately, within our system, it is decisions of Parliament that trump everything else, whether one likes it or not. The difficulty often arises not over what is in the black letter law of a particular clause in a treaty, but over how that is interpreted by some arbitral mechanism, most obviously by the European Court of Human Rights in Strasbourg.

I have been around the table, as have others here, in treaty negotiations. You will get to late in the evening; you have been negotiating for a long time. Everybody wants to just reach agreement, so you come up with a fudge. It is not quite the same as the parliamentary process for legislating. You agree a fudge and hope you will see another day over it. Even the obligations in black letter law may be very smudged.

Lord Howell of Guildford: Thank you very much. That is very interesting.

Q120 **The Chair:** Staying international but coming now to the Ministerial Code, in your evidence, Mr Straw, you said there should be a separate paragraph in the Ministerial Code covering Ministers' duty to comply with international law and treaties. Can you elaborate a little on how you would frame that?

Jack Straw: I tried to do that a moment ago.

The Chair: I see; you are saying that you would put those words into it.

Jack Straw: Yes. I have no pride of ownership of these words and I am sure they can be improved, but it is at least a first stab at this. I think it was Mr Cameron who dropped the obligation within the previous

Ministerial Code in respect of international law. I am not quite sure why he did that, because he was somebody who followed the rules and understood his obligations, but it may have been because he was concerned about the difficulty of eliding international law obligations with domestic law.

There is one other point I would make to Lord Howell, if I may. Our system of international law—I do not claim expertise; I know a bit about it, but I am happy to be shot down by those who know more—is what is called a dualist system. This means that, if it is a treaty, the treaty will have been approved by Parliament, but in a very light-touch way. Cripes, I got that change into the Constitutional Reform and Governance Act 2010, but it is no more formal a process than a statutory instrument requiring a negative resolution. Quite a lot of treaty obligations and other obligations are not incorporated into domestic law. All the EU ones were, for obvious reasons, but plenty of others are not. That creates the difficulty.

Q121 **Lord Howard of Lympne:** Good morning. You say that the Ministerial Code should be placed on a statutory footing, but would not the difficulty with that be that it would then be subject to judicial review? Anybody who complains about the way that the Ministerial Code has been interpreted or acted upon by the Prime Minister could apply for judicial review of the Prime Minister's decision. That would, some may think, lead to rather unfortunate consequences.

Jack Straw: It could; you are right. I have been thinking about this since this point was made. I am not going to die in a ditch over my statement. However, first, it depends on how the legislation is phrased. Secondly, let us say, for the sake of argument, that interpretation of the Ministerial Code could ultimately be subject to judicial review; would that be such a bad thing? It would certainly concentrate the mind of the Prime Minister.

The rest of us who have laboured away on the scaffolding of the pyramids rather than being in charge have to accept that the things we may do could be overturned. Really important things, as we know, can be overturned by the courts, usually on procedural grounds and not substantive ones.

One striking thing about the way No. 10 operates, in my view—it may have changed; I do not think it has—is how little they are aware day by day of legal obligations. I am not talking about Prime Ministers, necessarily, but the whole building. This is partly to do with the fact that executive decisions, including those of the Home Secretary or Foreign Secretary, are in the hands of Secretaries of State, not of the Prime Minister. This is striking if you look at how our Head of Government operates compared with the United States, with which I have some familiarity. There is endless counsel to the President; they are subject to legal advice being offered all the time, and that is no bad thing.

I am on the cusp regarding the merits of incorporating the Ministerial Code into legislation. If I were a member of this committee, I would want

to reflect on the arguments, but the current situation is not all that satisfactory either.

Q122 **Lord Faulks:** Good morning, Mr Straw. I was the chair of the Independent Review of Administrative Law. You quite rightly said to us just now that judicial review has grown considerably. It grew quite a lot in the time that you had significant office.

I found a quote from you to this particular committee in 2011. You said, "There is plainly a lack of mutual confidence between the senior judiciary and this place"—ie Parliament—"in respect of the role of the senior judiciary and its broadening authority into areas that are inevitably political". Earlier, you rather gave the impression that the Government had to accept the fact that judges came to conclusions that were not necessarily welcomed. Do you think that, when you spoke to this committee in 2011, you were overstating it?

Jack Straw: These are the perils of the internet—previous inconsistent statements. The casuist in me would say that the two things I have said are not completely inconsistent. I do not think they are. It is incumbent, in my view, on Lord Chancellors to do their best to protect the judiciary and not to allow or to encourage their Cabinet colleagues, and still less themselves, to denigrate what the judiciary has done either at large or in specific cases. At the same time, it is just a fact of life that, as judicial review has grown, some decisions made by the senior courts have a political effect. There is no way out of that. They always have done, but it is more widespread these days. The senior judiciary is well aware of that; some say, "There you go; that is our role", while others take a more "quietist" view.

To take the most prominent case, which was the Supreme Court decision over Prorogation, it was highly political and subject to the most terrible characterisation, particularly by the *Daily Mail*, on which the then Lord Chancellor did not speak up as, in my view, she should have done. It was political, but the irony was that it was not about the Supreme Court taking powers unto itself; it was saying, "Actually, we think this is a decision for Parliament".

I do not think there is any escape from the fact that, if you have judicial review and it is as extensive as it is today, the decisions that senior courts make, whether or not they are in favour of the government position, have a political consequence. That is just how it is. You could revert to a position pre 1688, or indeed in many ways pre war, as it was unusual then, where what the Executive said was what happened and the courts kept out of it. I do not think that is something the British people, or indeed Parliament, would be comfortable about.

I am still in touch with many members of the senior judiciary, and they understand that. It is about how you give them space and make sure that the judiciary gives the political classes space to carry out their different roles. What is wrong is if politicians, including very senior ones, go around seeking to deny the role of the courts to do this. It is a really

difficult job; the courts know that, but they are damned if they do and damned if they do not. That is just how it is, unless you significantly remove JR.

Lord Faulks: The Lord Chancellor's failure to defend the judiciary does not seem to have held her back.

Jack Straw: No, that is absolutely true. Let us see. If I may say so, it is a matter of record that a majority of Conservative Members of Parliament did not support the new Prime Minister in the ballots here.

The Chair: That is not the subject before us today, although I do want to come to Lord Robertson and the impact of political culture on the Lord Chancellor.

Q123 **Lord Robertson of Port Ellen:** Good morning. In a way, it is following on from what you have just been saying. In your written evidence, you talked about a shift in recent years to a coarsening in the political culture within which the Lord Chancellor operates. First, do you think this is permanent? Secondly, what impact do you think that new political culture has had on the Lord Chancellor's relationship with the Lord Chief Justice and the judiciary in general?

Jack Straw: It need not be permanent, and I hope very much that it is not. It principally comes back to the point I was making earlier about character. When you become Lord Chancellor, you have to dress up in all the kit, go off to the Royal Courts of Justice and swear these oaths. Certainly in my case, because I had not had to swear an oath, apart from a very simple one in front of Her Majesty when appointed to a new post, it brought home to me that this job was different. If someone is appointed who, frankly, is not very interested in the law, and who thinks that this is a rather tedious area, that the quicker they can leave the better and that judges are pompous and keep overturning decent decisions by a Government of which he or she is a member, no amount of oath-swearing will overcome it. That is the difficulty.

This may be a counsel of perfection, but I do think there is a duty on a Prime Minister when they come to select a Lord Chancellor to bear that in mind. Ultimately, if there is an open contest between government and the judiciary, at its crudest, the judiciary is going to win because people trust judges and they do not trust politicians. It is really silly, but it is also very damaging to our constitutional arrangements and people's sense of the rule of law.

I want to avoid being too ad hominem, but I will be. I do not know quite what Mr Cameron was thinking when he decided to appoint Chris Grayling as Lord Chancellor, because he showed very little inclination to appreciate the nature of the responsibilities. The issue of why books should be banned from being sent into prisons is off this committee's terms of reference, but he made a number of slightly aberrant decisions that had people scratching their heads. It then got considerably better and

different incumbents have done the job differently, leaving aside the comments we made about the new Prime Minister.

As I say, it is about character and it is about getting across to the Prime Minister as best one can that, although this job is not one of the great offices of state, it is in its own way a really important constitutional position.

Lord Robertson of Port Ellen: I must say, I took umbrage at all this morning's coverage of the great offices of state, which did not appear to include the Secretary of State for Defence, which used to be traditionally regarded in that way. Lord Judge, a former Lord Chief Justice, gave evidence to our committee and said that, "We've now reduced the Lord Chancellor to be a … sort of second division Minister". Do you think that is accurate, and, if so, what do you do about it?

Jack Straw: Again, it all depends on who has been appointed to the position. Bluntly, it was not the case when I was Lord Chancellor, because, as you know, I was very senior in that Administration by that stage. It was not the case when Lord Clarke was serving there, nor was it the case, I suggest, when, for example, David Lidington was doing the job, or even Robert Buckland, because they had an instinctive sense of what their responsibilities were. It very much comes back to this issue of who they appoint.

It has been patently obvious that the requirements, which I think are in Section 5 of the Act, or maybe Section 2, have not really been followed by No. 10 when it comes to Cabinet appointments. That is one very good reason for there to be a greater understanding in No. 10 about legal duties. If there were counsel to the Prime Minister, just on that discrete point, I think the Prime Minister might have had advice before appointing one or two people I can think of that said, "This is inconsistent with what's in the Act. You can't appoint X or Y because, whether or not you get a JR on its feet, they don't have these qualifications".

Lord Robertson of Port Ellen: That is interesting.

Q124 **Lord Falconer of Thoroton:** Hello, Jack, how lovely to see you. Can I follow up on the question of who should be the Lord Chancellor? I completely agree with you about character. You have referred to the section in the Constitutional Reform Act that says the Prime Minister can appoint only somebody "qualified by experience" to be the Lord Chancellor. The intention of the provision is to say you have to appoint somebody who has the character and the standing to be able to bring what you have described, which is a particular ability and willingness to defend the judiciary and the rule of law within government. Do you think we should change that section? If we change that section to make it beefier, do you think it puts the courts in a terrible position if they have to decide whether the Prime Minister has appointed the wrong person?

Jack Straw: Lord Falconer, good morning. You are obviously much more familiar with the drafting of that clause than I am, because I have an alibi

that I was abroad at the time when all of that was going through. You will remember that I was, as Foreign Secretary, a bit preoccupied with one or two other issues. I was surprised, and you probably were too, by some of the appointments made since Lord Clarke finished his period. They seemed to me to be patently inconsistent with the obligations on the Prime Minister under the Act. I was surprised, in a way, that nobody had sought to JR the Prime Minister's decision even on the basis of the rather loose wording in the Act.

I will not try to draft it sitting here just now, but the Act ought to be tightened and redrafted. There is a good case for that. If there is a risk of JR, that is a reason for doing it, in my view. It would then mean that, as for every other senior Minister, there would be legal advice available. I have a high regard for Mr Cameron, and he will have to speak for himself. We all know around this table how Cabinet reshuffles are conducted, often in terrible chaos. It is a jigsaw: "What do you do about X?" If someone is in the room saying, "Yes, Prime Minister, we understand all that but you can't appoint that person. You may have forgotten this"—because Prime Ministers are likely to have forgotten it—"but you have special obligations under the 2005 Act and person X does not meet those criteria", that is a good thing. Somehow or other, you have to ensure that the criteria are enforced.

Lord Falconer of Thoroton: Do you think there needs to be another criterion? I do not want to be remotely ad hominem, but you will notice that the current Prime Minister just appointed Mr Brandon Lewis to be the Lord Chancellor. Mr Brandon Lewis was the person who led for the Government in, as he said, knowingly seeking to break international law in relation to the United Kingdom Internal Market Bill. Should there be a provision in the Constitutional Reform Act that your previous conduct in breaking the law should be take into account in whether you can become the Lord Chancellor? I do not mean whether you have had a traffic offence, but, if you show disregard for the rule of law in some way or another, that is a relevant factor for the Prime Minister to take into account.

Now, I can see people are not keen to tie the Prime Minister's hands, but this is a quite remarkable combination that the Prime Minister, who let the judges twist in the wind after Brexit, has appointed somebody who led for the Government in trying to break the law in relation to the Northern Ireland protocol. Should there be some provision that prevents that happening—not Liz Truss becoming Prime Minister, because that is entirely inappropriate for this committee, but the appointment of somebody like Brandon Lewis? I have nothing personal against him, but there is this issue.

Jack Straw: Yes, indeed. The first thing to say is that Mr Brandon Lewis seems to me to fulfil the criteria laid down under the 2005 Act, leaving aside your point. He is a qualified lawyer and has had quite a lot of experience and so on.

Your second point, which is very interesting, goes to the question I was asked by Lord Howell. On whether or not our obligations under international law have been broken, I am, ultimately, of the view that this Parliament has an absolute right to legislate as it wishes, even if that undoes some existing obligation. It needs to know what the consequences are, but we will never be in a position where the senior courts say to this place, "You cannot legislate in primary legislation in that way". Even within the Human Rights Act, we were very careful to avoid that possibility.

If I may say so, Lord Falconer, yours is an argumentative point. At a political level, I entirely agree with you about the Northern Ireland protocol, but others take a different view. It is also worth noting that, although our former Prime Minister signed up to every last dot and comma of it, even people on the other side of the argument—I know this is the subject of a detailed and extensive inquiry by Lord Jay and his committee—accept that the protocol needs to be changed. It is an argumentative point and I certainly do not think you can get to the position where, if somebody feels that you have, as it were, previous convictions by way of a political position you have taken, you should be disqualified by virtue of that fact. They could have dug out things that I had said when I was president of the National Union of Students, which I am very pleased are not on the internet.

The Chair: Lord Faulks is working on it. We move on to the issue of the Lord Chancellor's role in senior judicial appointments. Lord Hope has a question.

Q125 **Lord Hope of Craighead:** Good morning, Mr Straw, I am very sorry not to be able to be present with you in person this morning. My question is indeed about the Lord Chancellor's role in senior judicial appointments. The question is whether the present system, which involves the nomination of a single individual, is one that you are now prepared to accept. In a foreword to a Policy Exchange document in 2021, you said that the current system was "far too introspective". First, what did you mean by those words? Secondly, is a shortlist system, where a number of names are provided, one that can really be made to work, given the need for independence from political pressures to be maintained throughout the process?

Jack Straw: I stand by the view I expressed in my foreword to the Policy Exchange document. There may be some colleagues in my party who are slightly surprised that I was subscribing to a Policy Exchange document, but the truth is that I read it through very carefully. It was written by some quite distinguished people and I happened to agree with it. To those who throw up their hands in horror about its proposals—I am sure you are not one of them, Lord Hope—it would be good if they read it through.

One really important point made towards the end of the paper is the example of other common law countries that have judiciaries that are, as you know better than I do, just as independent as the British judiciary. In

every case they mentioned—New Zealand, Australia, Canada particularly— the equivalent of the Lord Chancellor, the Justice Minister, has a greater role in senior appointments.

One reason why I come to this view strongly is for reasons I set out in that foreword, which I appended to my evidence here, over the recommendation to appoint Sir Nicholas Wall as head of the Family Division. It is difficult to talk about this, but it is really important because this is where the existing system went wrong. It is terribly interesting because there was an acceptance by many in the senior judiciary that it had gone wrong as well.

The background was that there was a vacancy for head of the Family Division. A special committee of the Judicial Appointments Commission, chaired, I think, by the President of the Supreme Court or by the Lord Chief Justice, came forward with the proposal that Sir Nicholas Wall should be the next head of the division. I had talked to Sir Nicholas on a number of occasions and did not think that he was up to the job. It was absolutely nothing to do with his politics; I knew nothing whatever about his politics and I did not want to.

I was trying to move things on to a greater degree of openness in the family courts, not so that names of parties could be publicised but so that some journalists in certain circumstances could be admitted to witness what was going on. He took a slightly different view from me, but that was not the issue either. I was very conscious of the fact that, if I sought to overturn the recommendation—the only power I actually had, as it turned out, was to delay it and send it back—there would be some criticism, as indeed there was, that I was acting in a partisan way. I could not ever mention this publicly, but I had gone to some trouble to consult very privately with my opposite numbers in the House of Commons, who did not disagree with my view. Had they disagreed, I might have taken a different opinion.

I then asked to see all of the letters recommending Sir Nicholas Wall. As I may have said here, a great fat file came forward after a while. There was some reluctance to let me see it, but I did. He was being damned with faint praise. I also talked to some friends—two in particular—who were very senior in the Court of Appeal and whose letters I saw were notable for what they did not say rather than for what they did. I asked them and they shrugged their shoulders and said, "You are right, Jack, really, but the general view here is that it is his turn".

What happened then was that my sending it back was leaked in the *Times*; there was a full page about how I was blocking this on political grounds. I did not want to engage with this publicly, and did not. It was just before an election. In the end I said to Lord Judge, with whom I am pleased to say I had a very good personal relationship, "You go ahead, but, frankly, on your head be it". Subsequently, it turned out that the poor chap could not do the job.

Let us say that there was a requirement for the appropriate appointing commission to put forward two or three names. They would all have to be well above the line. I do not see how that could move the Lord Chancellor into the position of making partisan appointments. There is an interesting parallel here with the previous system, before the reforms that Lord Falconer introduced, which is essentially that the Lord Chancellor made the decision.

You may remember that, back in 1996, when Lord Taylor had to stand down as Lord Chief Justice of England and Wales because he was very ill, there was a terrible rumpus—it did not get into the public print, but it has subsequently been written about—between the senior judiciary and the Lord Chancellor about who should fulfil Lord Taylor's role. There is no need for me to mention him, but there was one senior member of the Court of Appeal who was very well qualified in the criminal law and there was Lord Bingham, who, with great respect to you, most people would regard as one of the finest jurists of his age. There had been a convention, as I understand it—I have done quite a lot of work on this—that there would be a Lord Chief Justice who had had experience of the criminal law as a practitioner or an active High Court judge, and then another who had had experience of the commercial bar or public law and so on, and that they would alternate.

The Lord Chief Justice at the time and 17 senior judges in the English Court of Appeal signed a letter to the Prime Minister saying that they thought the other candidate should get it and not Lord Bingham. They felt so strongly about this that they sent the Lord Chief Justice to see the then Prime Minister, John Major, about this and tried to persuade him and Lord Mackay that Lord Mackay should change his mind. The long and the short of this was that he did not change his mind.

If I had been Lord Chancellor, who would I have chosen? I am not in any doubt that I would have chosen Lord Bingham as president, or, if I had had a role in it, as a member of the Supreme Court and, as it were, senior Law Lord. Would I have chosen him as Lord Chief Justice? I do not know, but I certainly think it was entirely appropriate that the final choice should have been made by the Lord Chancellor. Lord Mackay served as Lord Chancellor for 10 years. He was extremely distinguished. No one ever accused him of being partisan in his decisions. It seemed entirely reasonable of him to come to the view that Lord Bingham should be the person, not the alternative candidate. That is the kind of system I am after.

Lord Hope of Craighead: That is a very interesting history and the case of Sir Nicholas Wall is a tragic one, as you have explained. I wonder whether what you have been saying is in touch with reality today. Lord Reed gave us a description of how matters operate with the ad hoc panel that deals with Supreme Court appointments, and his evidence was that a great deal of discussion goes on behind the scenes with the Lord Chancellor. Before the recommendation is finally made, the basis for it is explained to the Lord Chancellor and there is an opportunity to consult

and so on and so forth. He says that it is not an ivory tower, as your phrase was tending to suggest, and it is handled with great care by that particular commission. That is, as I understand, the present state of affairs.

Would you accept that a great deal depends on the personality of the Lord Chancellor and the opportunity that the Lord Chancellor has to do research? Your case of Sir Nicholas Wall is a very good example of the way in which a diligent Lord Chancellor will operate the system, but one cannot be sure that all of them, particularly those without much legal background, would be as diligent and as careful as you were. That is the problem one has to face in terms of where the balance really lies: it is worth altering the system and taking the risks that are inherent in doing that, or should we should stay with what we have?

Jack Straw: This is not a complaint but, on your first point, I do not recall during the three years that I was Lord Chancellor—I may be wrong about this; it is a while ago—being asked for my opinions privately about alternative candidates for the Supreme Court. I remember there being a lot of chuntering when Lord Sumption's name was mentioned, because there were quite a lot of senior judges who thought it was inappropriate for him to be proposed as a member of the Supreme Court, partly because he never served as a judge in lower courts and for other reasons as well. But I do not remember ever being asked for a view about that.

When I took over from Lord Falconer, the judiciary was very nervous about political interference. I was the first Lord Chancellor sitting in the Commons, as it happens, since Thomas More, I think—in modern times. I wanted to protect them. I cared about the legal system anyway.

I am sure you are right. Who was it you mentioned?

Lord Hope of Craighead: I was saying it depends on the personality of the Lord Chancellor. You have given fascinating examples and I know quite a lot of the background to all of them, including Lord Sumption, and why that created a problem and why Lord Mackay had a problem over the appointment of Lord Bingham. There are various undercurrents here as well, but I am concerned with the present system. I am trying to bring you up to date.

Jack Straw: On the present system, if it is the case, as you say, that these days there is active consultation with the Lord Chancellor, but behind cupped hands, to find out if it will be acceptable if they put forward X, it would be far better to be open about that and to say, "Here are two or three names. They are all highly qualified. They are above the line. Make your choice". That is, in effect, what is being said.

Lord Hope of Craighead: Since time is pressing and there are a lot of other points we should cover, we should leave it there. Your position has been very clearly explained and I am grateful for the way you have done that. Thank you very much.

Lord Howard of Lympne: It is pretty clear, is it not, that under the

present system Lord Bingham would not have been appointed Lord Chief Justice?

Jack Straw: Under the present system, no, he would not have been.

Lord Howard of Lympne: I am very sympathetic to your view. I would like to put to you an extract from the Policy Exchange report to see whether it reflects your views: "A common critique is that the current selection processes are unbalanced: senior judges now exercise excessive influence over individual appointment decisions, especially for senior roles, whilst at the same time the Lord Chancellor's role in making the final decision about whom to select has been wholly eliminated for appointments below the High Court and squeezed to almost vanishing point in selections to the High Court and above. It is only a small exaggeration to say that the judiciary now selects itself". That is pretty much on the button, is it not?

Jack Straw: It is, absolutely. I quoted in the opening sentence of my foreword to the Policy Exchange paper that Baroness Hale—after all, there is no more independent judge than she—said that, in respect of the current system of judicial appointments, "the Lord Chancellor basically is in an almost impossible position". That is true.

It may be said that hard cases make bad law, but there were not that many senior appointments that came before me. One did, as it happens, and I was in absolutely no doubt that I was on very firm ground in saying, "We are not going to do Sir Nicholas Wall a favour if we appoint him, still less the administration of justice". What is so frustrating about this is that, privately, a number of senior members of the Court of Appeal knew that. Because there is no intermediation on this, you get groupthink. That is a problem.

Going to the appointment of Lord Bingham, it is absolutely clear, without any doubt, that under the current system Lord Bingham would never have been appointed Lord Chief Justice, not in a million years. The other candidate was very well qualified and it depended on who you wanted. The then Lord Chancellor was completely entitled to make his decision and no one then would have said that it was a political decision. It was not; he decided to choose what he regarded as the best person for the job.

The Chair: Just staying with this point for the moment, from the committee's point of view there is the issue of an efficient process around the appointment of judges and the risk of overpoliticising the judicial appointments. That is the tension in this debate, so let us go to that tension. Your example of own position was where you felt thwarted in the position where you were not interested in the politics of the judge; you felt his competence in terms of leadership skills was insufficient. Liz Truss clearly used the existing process to set some quite hard criteria, which illuminated some candidates for judicial appointment.

In the actual document to which you put a foreword, there is this quote

that says, "The strongest argument in favour of reform is the need to enhance the democratic legitimacy and accountability of senior appointments in the face of ascendant judicial power", and, in the same paragraph, "intervene to restore limits on judicial power". That is quite a wide-ranging reason for changing the judicial appointment. Do you agree with that? Do you think the challenge in the face of ascendent judicial power and the need to intervene to restore limits on judicial power is the primary reason for changing the judicial appointments?

Jack Straw: I would not have put it that way.

The Chair: I am just reading from the document.

Jack Straw: I know. That is probably slightly overembroidered, but I support the conclusion. There is a protection for the judiciary too, if we stop the system where it essentially becomes self-appointing. That is the system you have at the moment. Baroness Hale was absolutely right to say, as my example of Sir Nicholas Wall showed, that the Lord Chancellor is basically a cipher when it comes to this. That is just true. The legislation in the 2005 Act just gives the Lord Chancellor two opportunities to send back a name and ask the commission to think again. If it says it is in favour for a second time, that is the end of it; it is unlikely to think again.

It is very unsatisfactory, because the reality is that at the moment it is senior judges making the decisions themselves. You can have that system. If you are going to have that system, say that is what the system is. I do not agree with that. Those who throw up their hands in horror and say it is going to lead to a high level of politicisation should answer two sets of questions. First, post war, under the old system, when there was quite so high a level of politicisation over the appointment of judges, who were the judges who were appointed who were highly political?

Secondly, in the current system of appointing in which the equivalent of the Lord Chancellor has the final decision, in which of these very comparable, common law, Commonwealth countries is the senior judiciary less independent than it is here? It is in none of them; that is the truth of it. There is an interface between senior judiciary and politicians. There has to be. It is unthinkable for there to be no judicial review of ministerial decisions, because we would be back to the divine right of kings. There just is an intersection. It is about how you manage that. It is naive to suggest that you can somehow keep the senior judiciary out of the political system altogether.

You should be protecting them from partisan criticism and respecting their role. That is what I and most of my successors sought to do, although it turns out not all of them. It is actually dangerous for the judiciary to have this degree of power over senior appointments. It would be better for it, as well as for the way our constitutional arrangements work, if these very senior appointments were subject to the kind of process that exists in Australia, New Zealand and Canada, and would exist here under proposals that I have endorsed.

The Chair: Could we move on to the role of the Lord Chancellor and its potential separation from that of Secretary of State for Justice? Lord Howarth had a question.

Q126 **Lord Howarth of Newport:** Good morning; it is very good to see you. In your written submission to us, you opposed the idea that it would be appropriate to separate the role of the Lord Chancellor from that of the Secretary of State for Justice. It is quite a modern conjunction to put the two together. You consider that is the right thing and that to separate them out would be to make the position of Lord Chancellor a shell. Why would that be so?

Jack Straw: It depends on what is behind the question about separating the two. As I say in my evidence, you could transfer back to the Home Office responsibility for prisons and probation. I would never have established the Ministry of Justice in the first place. I made my views clear at the time: it was done for entirely the wrong reasons and is an appalling example of shambolic changes in the machinery of government.

When I found out about this I was Leader of the House. I was the duty Minister, as it were, to do the Sunday morning programmes. I was going on Andrew Marr the next morning. I was phoned by John Reid's political adviser on the Saturday night to say that he thought I ought to be aware that they had given the *Sunday Telegraph*, of all papers—from a Labour Party point of view—a story that there was going to be a Ministry of Justice. I then talked to John Reid and this turned out to be the case. I went on the next morning and I did what you are paid for as a loyal member of the Cabinet: to come out with stuff explaining how this is all part of a seamless system of government and all that stuff. Thankfully, no one spotted my fury about this.

I was not directly affected by it, but it was awful; it was terrible. I am not surprised that it further compounded the senior judiciary's anxiety about the way it was being treated, first of all by the initial decision to abolish the Lord Chancellor, which it found out about at a conference in a hotel in Oxfordshire, just there and then. That was pretty poor because the argument was that it could leak; actually, politicians leak but senior judges do not leak. I never had a senior judge leak on me. Anyway, it was awful and there was no good reason for doing it.

It would be crackers, but you could have a Minister simply responsible for prisons and probation. I do not know what they would call them but they would do that bit. Also you could have one doing constitutional change, which is another part of the Justice Secretary's job, or has been. On the discrete point, Lord Howarth, assuming that the Secretary of State for Justice has responsibility for the judiciary and there is a Lord Chancellor, what on earth does the Lord Chancellor do? No doubt they put the kit on and do the walking backwards in front of Her Majesty the Queen at the opening of Parliament and stuff like that, but there is no function. That is my point. These two jobs are, in effect, the same.

Lord Howarth of Newport: How do you deal with two arguments that

are made? One is that there is an incompatibility in the conflict of interest between responsibilities of Secretary of State for Justice and those of the Lord Chancellor, in that the Secretary of State for Justice may have to, as has been the case, preside over and defend extensive cuts to the budget of his department and the resources available for justice system, whereas the Lord Chancellor swears an oath to uphold the rule of law. There is a very considerable tension there.

The second argument would be that there is a need within government that has not been met in recent years. Under the previous Prime Minister, we did not even have a Minister responsible for the constitution. I do not know what the position is as this morning, but the constitution has experienced a lot of stresses in recent years. Perhaps the traditional responsibility of the Lord Chancellor, not just to uphold the rule of law but to be the constitutional conscience of the Cabinet, needs to be revived. On both these grounds, would there not be a case for separation?

Jack Straw: You could have a separate individual just doing the traditional pre-2005 role of the Lord Chancellor. If you had that, it would then be possible to have them as a Member of the House of Lords rather than the House of Commons. If they have any major spending department responsibilities as well, they have to be in the House of Commons, but I disagree with you on both points that you make, which is about protecting the budgets of the courts and the Lord Chancellor being the constitutional conscience of the Government.

Let me just say that the court system had a reasonable settlement in public spending from me and it did, I know, when Lord Falconer was there. Of course, you always get complaints—you do with any area of spending—but it was reasonable and we faced no strikes by the Bar and certainly, which is even worse, no Treasury-led cuts in the number of sitting hours of courts. That is one of the reasons why you have these preposterous delays in court hearings and why we are moving to a situation where many repeat criminals know they can get away with things for really quite a long time. They are never going to end up in court and they have to be bailed after a while, unless they are accused of doing something really serious.

These cuts go back, ironically, to when there was somebody who was fully qualified under the 2005 Act, Lord Clarke. He decided, because although he was a social liberal, he was deeply on the right of the Conservative Party when it came to public spending, to offer very substantial cuts in his budget. My understanding is he went further than he needed to from the Treasury. That is where all this comes from. His successors, to a greater or lesser extent, have been trying to fill the gap. That led to a third of prison officers being fired, but also to this really serious problem of funding the courts, notwithstanding that the total cost of the courts is probably a small fraction—the back end—of a frigate. That goes to who you have in the Treasury, who is the First Lord of the Treasury and what the broad policy is that is being followed by the Government of the day.

The other thing is on the Lord Chancellor being the constitutional conscience of the Government. I would say that just up to a point. I apologise for sounding like an anorak, but I was reading an account of a saga over the development of legal advice on the legality or otherwise of the action against the Egyptians at Suez. The long and short of this was that the Attorney-General, Solicitor-General and legal advice of the Foreign Office all took the view that what was being proposed was unlawful in international law, whichever way you looked at it. I am in no doubt that that was the case.

The person who gave the then Prime Minister a fig leaf to say it was legal was the Lord Chancellor. It was an extraordinary idea, and the Attorney-General and Solicitor-General were kept out the discussions. Again, this comes to character, to the character of the Prime Minister and what kind of lead they give you.

Q127 **Lord Thomas of Gresford:** You have indeed set out the two crises currently: the crisis in the courts, the criminal justice system in particular, and a crisis in the prisons. We are trying to explore whether a Minister responsible for the prisons and a Minister responsible for courts would work rather better in our constitution. The case for keeping the Lord Chancellor in charge of both these crises, these systems, has been made to us, as they have more clout with the Treasury. For example, if you were to remove prisons from the Lord Chancellor's demesne, there would be less clout in getting money for the courts. What do you think of that particular argument?

Jack Straw: I do not think a lot of it, with respect. Essentially, what you are arguing, Lord Thomas—

Lord Thomas of Gresford: I am not arguing it.

Jack Straw: What is being suggested here is that you go back to the previous discrete responsibilities of the Lord Chancellor. There is a case for that. If you were to do that, whether they got the money out of the Treasury would depend on who they were and how skilful their department was at arguing its corner. It is fair to say that the old Lord Chancellor's department did not lack skill in this respect. This cuts both ways: if you are a relatively small department and you were to develop a reputation with the Treasury for being fairly efficient, you are under the radar.

I had a fair amount of clout by the time I became Secretary of State for Justice and protected the budget, but it depends on who you are. I did not have any delegation from the senior judiciary coming to me, screaming that it did not have enough money, because it did. I explained the background to what then happened in 2010. These were terrible decisions, from which we are suffering today: a combination of George Osborne and Lord Clarke. I know why George Osborne made them. I have a very high regard and affection for Lord Clarke, but I just say parenthetically that he had always taken the view there were too many prisoners in prison. It was not my view; I am neutral about that. That is a

matter for the courts. One way to cut the prison numbers was to cut the prison budget, but of course life is not like that. That produced the crisis.

The irony of this is that, by having a senior Minister running a relatively large government department with clout, because he had a particular view about the degree to which you could safely cut the prisons, he ended up having to raid the judiciary budget as well.

Lord Thomas of Gresford: I understood Lord Clarke to tell us and to confess that, having been Chancellor of the Exchequer, he was rather on the Treasury's side and was quick to produce possible cuts to the justice system, which have not turned out well.

Jack Straw: He was.

Lord Thomas of Gresford: You do not agree, do I understand, that the addition of the prison systems gives the Lord Chancellor more clout in getting money from the Treasury? It depends upon the individual.

Jack Straw: No, if that had made a difference, there would not be a crisis in the funding of the courts today.

The Chair: Lord Sherbourne had a question on the legal background of the Lord Chancellor.

Lord Sherbourne of Didsbury: I want to come back to the point that we talked about—the qualifications and character of the Lord Chancellor. We all know that in any Cabinet it is not a requirement that a Minister who takes charge of a department, whether it is Health, Education or Transport, is necessarily an expert in that area at all. It may not be something they have even had many dealings with. You are looking for a competent Minister who can pick up the brief, understand the issues and know how to run the department. I am wondering why you are so clear that, although character is very important, the Lord Chancellor needs to have a legal background. There are lots of Members of Parliament who have no legal background, who would be and have been highly competent Ministers who completely understand the importance of the rule of law. There may well be certain people with a legal background who perhaps are not quite so clear about the rule of law. I wonder why you think a legal background is absolutely requisite.

Jack Straw: With apologies, I do not think that. In my written memorandum in respect of your question 5, I said that it helps to have a legal background but I can think of at least one non-lawyer who carried out his responsibilities at least as well as those who had been legally qualified. I basically agree with you.

When I took over as Lord Chancellor, it made my life easier because I understood the system. I had qualified at the Bar. I went into practice but, as life turned out, I was in practice for less than two years, even though I carried on a connection with the Bar; the Inner Temple was kind enough to make me a bencher later on when I became Home Secretary. It helped, but plenty of other people have held the role.

Essentially, we do not have a system of employing technocrats into positions here, because the fundamental thing you are paid for if you are a senior Cabinet Minister is to make political judgments on the issues that are presented to you. Certainly, one of the people who was Lord Chancellor subsequently did the job extremely well, notwithstanding that he was not legally qualified.

If I may say so, a bigger risk, which is a problem cross-government, is the churn in Ministers. That has got much worse in recent years. It was bad enough when Lord Robertson and I were in Cabinet. I was one of the lucky ones, because essentially over 13 years I did two jobs. I did foreign affairs for five years and, with different hats, I did home and constitutional affairs for the other eight. There were some people in Mr Blair's Cabinet who seemed to move every six months.

Lord Hague made the point the other day in a column in the *Times* that there had been six Foreign Secretaries in 24 years, and there have been four Foreign Secretaries in the last six years; it is now five. It is ridiculous. Sometimes you get a political crisis and a change in the leadership—that is one reason—but also there is a capricious exercise of power for power's sake in appointments in No. 10, particularly if things are going badly. That is the most serious problem. Let me say that these reshuffles that are made in a panic never work.

Lord Sherbourne of Didsbury: Is the Lord Chancellor having a legal background important in helping the perception of him or her by the legal community, by the judiciary? Is that an important factor?

Jack Straw: I am sorry; I am not being impertinent but you would have to ask them. I think so. It just makes things easier. I have thought quite a lot about this. Of course it is the case that there is no suggestion in any legislation or our practice that you have to have been a teacher before you become Education Secretary or you have to have been a medical practitioner of some kind before you become Health Secretary.

There is this difference, which is that everyone has had experience of the education service, the health service or the transport system, in one form or another. Most people, including most politicians, have not had an experience of the court system. They simply have not, unless they have been involved in a legal action in one way or another, but it is very unusual. That is why, if you appoint someone who does not have a legal background, the learning curve is steeper. It does not necessarily rule out appointing somebody who does not have a legal background.

The Chair: We have time for only one more question and we have not touched much on the role of the Attorney-General. Lord Faulks, do you want to put your question?

Q128 **Lord Faulks:** Yes. We are also considering the role of the Attorney-General. You have some views about this. For example, is there any value in codifying the law officers' duties? Would updating the oath be helpful? Also there is the question of how detached the Attorney-General

is from politics, in that the Attorney-General historically would only attend Cabinet by invitation. Nowadays, recent Attorneys-General have been attending Cabinet automatically and expressing political views in a way that perhaps their predecessors might not have. Do you have any comments about this?

Jack Straw: I am very grateful for some notice about this question, because I had forgotten I had views about it. I refreshed my memory on, crucially, what I had said back in 2008 or 2009 in response to the consultation over the governance of Britain.

First of all, on the issue of attendance at Cabinet, it is a good idea if the Attorney-General attends all cabinet meetings. They should be told by the Prime Minister that they are there to observe except when it is their brief, because their role is different. If I think of the Attorneys-General who attended the Cabinets of which I was a member, some offered a view on anything and others stuck to their last. The latter group were more influential.

One of the reasons why it is really important that Attorneys-General should attend is so they understand the context, and also so they are not taken by complete surprise. One of the absolutely scandalous things about the development of legal advice in respect of the Suez adventure was that, once it became clear to the Prime Minister of the day that the Attorney-General and Solicitor-General had a different view, they were taken out of the loop. They did not attend Cabinet meetings at all in those days.

One of the points we made in the response to the consultation we had in the *Governance of Britain* paper, about the Attorney-General's role as legal adviser, was that it was really important that you had a lawyer at the heart of government who understood the overall context in which they were working. The period leading up to the Iraq war was really hard. It was a cause of huge controversy outside, but in government it was really difficult. It was particularly nerve-wracking for Lord Goldsmith, who was then the Attorney-General, but at least he was there, he was in Cabinet and in many private meetings as well, so he knew the context. I hope that answers your first question.

You could modernise the oath. By the way, it turns out that I informed a breathless public back in 2008 or something that you do not need to change the law to do that. It could just be done if the Government decided.

Lord Faulks: The other thing that the committee would quite like to hear your views on is the question of the politicisation of the Attorney-General. There has been quite a lot of criticism of the current—or until yesterday—holder of the post, in that she entered into political areas that traditionally Attorneys-General have been more reluctant to enter on the basis that they are somewhat more detached.

Jack Straw: Frankly, I favour the Attorney-General being somewhat more detached. Anybody who is in politics likes the sound of their own voice—fair enough—but I do not see the advantage of having an Attorney-General who is expatiating about issues beyond their brief. There are lots of disadvantages, for the reasons you say, because you have a really important quasi-judicial role in the system. You are not there as another partisan.

Q129 **Baroness Fookes:** Mr Straw, concern has been expressed to us that fewer and fewer highly qualified lawyers are coming into the House of Commons as MPs, therefore restricting the choice of such people for the role of Attorney-General or Solicitor-General. Is that an anxiety you share? Could it be dealt with by appointing people from the House of Lords?

Jack Straw: It is not an anxiety. It is a matter of fact—this is my observation; I do not have the numbers—that there are far fewer Members of the Commons who are practising as solicitors or at the Bar while they are also Members of the House. That is a big distinction from when I entered the House or when Lord Howard entered. My head of chambers was also a Conservative MP and he did both very well. That has changed. There still are, from my observation, a lot of Members on both sides who are legally qualified. You may want to ask your policy assistant or adviser for some information about that; I just do not know the degree to which those numbers have changed.

Most Attorneys-General under the Blair and Brown Governments sat in the Lords. I am just trying to run through the list in my head but almost all of them did.

Lord Falconer of Thoroton: John Morris at the beginning was in the Commons.

Jack Straw: Yes, I did say most. Thank you very much for that.

The Chair: That is the end of the session. Thank you very much indeed for coming. That was very helpful and very thoughtful. We are appreciative of you giving us quite a lot of time and a lot of written submissions. We certainly will reflect on them.

Jack Straw: Thank you very much indeed.