



HOUSE OF LORDS

Revised transcript of evidence taken before
The Select Committee on the Constitution
Inquiry on

THE OFFICE OF LORD CHANCELLOR

Evidence Session No. 6 Heard in Public Questions 86 - 105

WEDNESDAY 29 OCTOBER 2014

10.30 am

Witnesses: Rt Hon Dominic Grieve QC MP and Baroness Scotland of Asthal QC

Rt Hon Jack Straw MP

Members present

Lord Lang of Monkton (Chairman)
 Lord Brennan
 Lord Crickhowell
 Lord Cullen of Whitekirk
 Baroness Falkner of Margravine
 Lord Lester of Herne Hill
 Lord Lexden
 Lord Powell of Bayswater
 Baroness Taylor of Bolton

Examination of Witnesses

Rt Hon Dominic Grieve QC MP, Attorney-General, 2010-14, and **Baroness Scotland of Asthal QC**, Attorney-General, 2007-10

Q86 The Chairman: Welcome, Dominic Grieve QC MP and Lady Scotland. We are most grateful to you for coming. As you know, we are looking into the office of Lord Chancellor. We are not looking into the person of the Lord Chancellor but we are looking into the job and how it has changed. We are most grateful to you for coming because, Lady Scotland, you I think were the first Attorney-General after the changes and, Mr Grieve, you were the second. I do not know if you would like to make an opening statement. If either of you would like to or you are confident that what you may have to say will come out in answer to questions, we can press on into questions.

Mr Grieve: I think I am probably confident that having seen a list of the questions you want to ask that the answers will come out in the questions. I do not know about Baroness Scotland.

Baroness Scotland of Asthal: I would agree.

The Chairman: Thank you very much. I will fire off with the first question, which is: how do law officers ensure that Ministers act lawfully and in accordance with the rule of law? Mr Grieve, would you like to start?

Mr Grieve: There is an important point here that we will come on to in a moment, but the law officers are there to make sure that the ministerial code is observed, which the Prime Minister has set out: the United Kingdom, its Ministers, its civil servants, must obey the law, the rule of law and act in accordance with our international legal obligations. Certainly we are there, I was there, to ensure that all the decisions that we took were in conformity with that.

As you will appreciate there are about 2,000 lawyers embedded in the Government Legal Service and the vast bulk of the advice that is provided to Government comes from them without any intervention from the law officers at all. But on issues that are reputational to Government, the Civil Service has a way of teasing those issues out, so that although it is never really written down as to what should come to the law officers, on the whole, I think, what needs to come to the law officers does come to the law officers, but it does it by a sort of process of emergence. Most of those issues, in my experience, are either constitutional law—particularly law relating to devolution—European law, human rights law, and international law, and in particular international humanitarian law, the law of war and armed conflict.

Those are what I would describe as broadly the principal categories that the law officers had to grapple with during my period in office, although there might be other things.

We then provide the advice, but it is important to understand—and this arises in a question further down—that we are certainly not in a position to be overseers of the rule of law. I do not have spies in government departments telling me when ministerial colleagues might be on the point of going off the rails. The law officers' department has 42 employees; it is down a little bit from the time when Baroness Scotland was in charge of it. There are 17 lawyers and the rest are support staff. There is a small press office and a tiny private office, only about four private secretaries to support two law officers. Ultimately, as any lawyers, we are a referral organisation. If somebody refers something to us we can advise and try to make sure that the right answer is come up with or the right solution is come up with, which is compatible with the rule of law.

Occasionally we might hear of something that was not coming to us and where we might say we think perhaps it might be advisable that it should come to us. That is one of the reasons why it is of great value that the Attorney-General attends Cabinet. There is a specific question about that, so I can come back to it in a moment. Certainly if the Solicitor-General or I picked something up that indicated that a course of action was being adopted that looked to us to be troublesome, we would flag it up and suggest somebody might wish to come and discuss it with us. What we are certainly not doing, and I would like to emphasise this, is we are not in a position to provide a scrutiny service of every aspect of the Government's actions, any more than a lawyer who is retained by a client can be the person responsible for everything the client is trying to do.

Baroness Scotland of Asthal: Not surprisingly I agree with the exposition just given by my brother Attorney-General, but I just want to add a few other points, if I may, in relation to the nature of the rule of the law and the importance of it. As Dominic says, the Attorney-General sits at the apex of about 2,000 Government Legal Service lawyers, and those lawyers are responsible for the day-to-day scrutiny of what the department does. The advice that they give is quite often the real yardstick by which we can judge the efficacy of the legal content of what gets delivered. The important thing I realised when I became Attorney-General, which I frankly say I was not necessarily aware of prior to becoming Attorney-General, was the depth and nature of what the Attorney does. I say that notwithstanding the fact that I had two years in the Foreign Office where I would deal with some of the issues that the Attorney-General dealt with—we had the International Criminal Court during that time—then two years as deputy to the Lord Chancellor, then four years in the Home Office. By the time I arrived as the Attorney-General, I really believed that I fully understood what the office did but when I got the job I realised how wrong I was. It is very difficult to identify when you are sitting outside. So, for example, every lawyer in every department owes two duties. The first, of course, is to the department that he or she serves. The second, however, is to the Attorney-General.

So I was told that sometimes the lawyers in these departments have challenging conversations with the department Ministers. They may not fully understand the import of some of the advice they are given and they may agree or disagree with it, and that is the opportunity for the departmental lawyers to say, "Well, if you do not like the advice I am giving you, if you do not trust the advice I am giving you, then you can always ask the Attorney-General", which I was told had a very sobering impact. Either it caused the Minister to think again, as to whether he or she wished to do that, or the Minister was confident to say, "That is exactly what I will do", confident that the Attorney-General would look at it and would give a definitive view.

The second issue that I came to understand was very important was to have a well qualified law officer. Sometimes different departments will construe bits of legislation in a slightly different way, all of which are within the ambit of reasonable disagreement, so that a lawyer in department A may quite properly come to the view that the construction that can be put on that piece of legislation points in direction A. Another department lawyer, acting entirely properly, would say it points in the direction of B, because departmentally that construction is much more comfortable for what the department would like to do, and then you would have another department C who has another construct within the ambit of reasonable disagreement. Therefore, when there are those perfectly proper but internal conflicts, that is something that the Attorney-General has to define as to what the Government's real analysis on behalf of the Government should be, so that there is an opportunity to say either A, B or C. Sometimes the most challenging is when the Attorney decrees that it is not A, it is not B, it is not C but in fact it is D. I came to realise that that was a very powerful instrument.

Of course, there are a number of prosecutorial authorities both outside of government and within departments, and getting some synergy between those is incredibly important, and during my time I created a board on which all the directors sat to try to deliver a more holistic approach to the way in which we discharged that duty.

The challenge has always been: how do you make sure that you are aware of what is transpiring? That is why I think the domestic affairs committee is very important. As you will know that for any piece of legislation it has to go through DA and at that stage different departments will consider the impact that the new legislation is likely to have and the Attorney acts together with the Parliamentary Counsel, the draftsman, looking at the detail of some of those Bills trying to ensure that it complies with the Human Rights Act and is of good quality.

Those areas are extremely important, but the thing that I became very clearly aware of is that the Attorney-General is in government but is not of government. It has the ability to remain independent and give independent advice that Ministers need to have but may not always want to have. Our job is not to tell people what they want to hear; our job is to tell them what they need to know.

Q87 Lord Lester of Herne Hill: I wonder if I can explore a bit more this business about being in government but not of government, and the relationship with Parliament. As you both know very well, the Attorney-General in Ireland, Cyprus and Israel is a constitutional officer, not in government. It is entirely independent of government, with a different role. As you both know, that has been rejected for good or bad reason here. So the position is that, although you say you are in government but not of government, the reality is that you are in government and however much you try to distance yourself from government in that perfectly proper way there are internal conflicts. I am particularly interested in your role as Attorney-General in relation to Parliament. You have spoken so far entirely within government, but the reality of our situation I think is this: although occasionally an Attorney-General will advise Parliament, in general the only legal advice that Parliament receives on a routine basis comes from a committee such as the Joint Committee on Human Rights with its legal adviser that really is independent and able to make a report. Is that problem about accountability to Parliament not something we need to think about?

Baroness Scotland of Asthal: I understand the concern that is expressed, but there have been a number of occasions when Parliament has asked the Attorney-General for the Attorney's opinion. It has had a degree of force certainly from those who I have spoken to, which has been very helpful to Parliament, because there is a real understanding of how Parliament

works and an opportunity to develop an acuity and skill in that area that I think is very important.

The real strength of having an Attorney who is in government but not of government is that it is much easier to say to someone, “I understand the problems that you have. I also understand why you want to do this and the outcome you seek, so there is no dissonance between us in terms of that direction”. But there are occasions when Attorneys-General—and I am not speaking of any specific occasion—have had to say, “That is an extremely good idea save for one small thing. It is not lawful. Other than that, I absolutely understand it is a consummation devoutly to be wished but not obtainable”. So I do think that the Joint Committee on Human Rights plays a very powerful role. I believe that that is a role that should continue because it is strongly valued by the House, and both Houses, but I do not think that that necessarily expunges the need to have an Attorney represent the views of the law to Parliament in a way that Parliament will feel is covered appropriately. I do not think you have to choose either/or; I think you can have both, which is what, of course, we have now.

The Chairman: Thank you. Do you want to add anything to that?

Mr Grieve: I agree with all that. The Attorneys have a specific role in providing legal advice to the House of Commons, and indeed the House of Lords. I have a personal Writ of Summons to the House of Lords—different from Patricia’s, but as a Member of the House of Commons—or had one, to come along and give counsel if required. I was told at the time that I received it that it was completely archaic; they all said, “It hasn’t happened in the last 100 years”. In fact, I was asked for advice about three weeks later, which was about your powers in respect of disciplining errant Members of the Lords. I think that is the specific purpose; it is to advise the Commons and the Lords about their privileges.

More difficult is the question of providing advice—the advice that we are providing to government. Of course from time to time with the consent of the Prime Minister and colleagues in government I did front up debates in the House of Commons on issues where the Government wanted to explain what it understood the legal position to be, sometimes slightly controversially. Prisoner voting springs to mind as one where we had some debate and where I think I was empowered to make quite clear what the legal framework was under which the Commons had to operate. Of course there have been other examples of the Attorney sitting on the Bench during a major debate and being able to intervene in the debate to clarify legal concerns that might on occasion be raised and we have done that, and my predecessors have done that, particularly when we are in the House of Commons.

I think it is quite clear that the client is the Government. The client is not Parliament. The Government is answerable to Parliament and the Attorney may fulfil that role of answerability to Parliament on the Government’s behalf where it is thought to be right, but that is slightly different from providing specific legal advice to the Joint Committee on Human Rights, for example, which would raise some quite difficult areas of a potential conflict of interest.

The Chairman: Thank you. I think we will move on to question 2, with Lord Crickhowell and Lady Taylor on that. It is on rule of law as well.

Q88 Baroness Taylor of Bolton: It is specifically on what you have just been saying about the role of the Attorney both in specific terms and in general about being in government but not of government. I just wonder whether you see something conceptual about the role of the Lord Chancellor, about him also being in government but not quite of government.

Mr Grieve: The Lord Chancellor—and I know this is a specific interest of this Committee—has a very different role. In his current form he is a departmental Minister with responsibility

for the prison system, penal policy, criminal justice policy, the administration of the courts and ultimately the appointment of judges. Because his role changed so dramatically with the Constitutional Reform Act there was great anxiety, particularly in your House, as to what was going to happen in respect of his previous role as a judicial figure upholding the rule of law within government, which is why his specific oath of office was prescribed. He clearly has, under that oath of office, a duty to uphold the rule of law particularly in respect of the provision of court services and maintaining the independence of the judiciary, but it is a very broad oath.

He is undoubtedly a member of the Government. The question is how he exercises his functions within government in the light of the new duties that devolved on him post-2005. Also I have to accept that I was not around before 2005 to see how the Lord Chancellor operated in Cabinet. You can read about it—I think the Lord Chancellor also still has the title of Keeper of the Queen’s Conscience—and I think that at its best the Lord Chancellor acted as a voice that upheld the rule of law in circumstances in Cabinet where anybody might be suggesting some other route should be followed, and had an understanding of the law and of legal principles. So that is separate from the legal advice being provided by the law officers but nevertheless an important constitutional pillar in upholding the rule of law in our government structures. But he is of government and in that sense it is a slightly different position, and we can come on to look at it.

Q89 Lord Crickhowell: I read with very great interest your 2011 speech in which you set out the role of the Attorneys defending the rule of law. In the course of that speech you do not make a single reference to the Lord Chancellor. You referred, though, to the oath of office and the legislation set up and introduced by Lord Falconer to try to sort out the shambles that was involved in the attempt to abolish the office of Lord Chancellor. He spoke with extreme force at our last meeting about the importance of that oath and the duties of the Lord Chancellor in this respect. Yet you do not refer to the Lord Chancellor in your speech. That is the first point that I want to ask you.

You do make the point, and you have made it during the course of some of your remarks, of your presence on what in my day was called the L Committee—the committee that considers the legislative programme. In my day it was chaired by Willie Whitelaw. I do not expect you to answer because on the whole specifically the principle is that the advice given by Attorneys to the Government is not disclosed except in exceptional circumstances. I imagine you were sitting on that committee when the Criminal Justice and Courts Bill was brought forward, a Bill that was debated in this House on Monday. It seemed to the House, by a very considerable majority, to raise important rule of law issues—judges being told they must do things rather than they might consider things. It does therefore pose the question that if the Attorney is the principal defender, not just on referral matters but on a crucial committee that he has to advise the Government, is there a difficulty in preventing a Bill like this coming forward with rule of law issues clearly exposed? It is a bit unfair because I am asking you in a way to say what your advice to the committee was, and I shall perfectly understand if you refuse to do that, but it does raise the general point about your presence on the committee and how easy it is therefore in practice for you to defend the rule of law in that situation.

Mr Grieve: I will go first, because I think it is probably partly directed at me—

The Chairman: I am sorry to interrupt you, but we are going to be short of time towards the end, so perhaps you could manage to focus narrowly. Thank you.

Mr Grieve: I will try to keep my remarks short. The role of the law officers in terms of the introduction of legislation to Parliament is important. It is certainly one of the critical roles

and I agree entirely with what Patricia said about that. When we are doing it, we will look at issues of whether there is compatibility so you can sign off a Section 19 statement of compatibility with the convention rights. That is obviously a critical part of it.

We look at the department's memorandum claiming compatibility, so we scrutinise it rather than saying ourselves whether it is compatible or not. We do a critique of the reasoning in the departmental memorandum, but we also look at issues of propriety, unusual use of powers—all those things can be spelled out—and if we have concerns then we can raise them and ask for them to be readdressed. If we think something is manifestly unlawful, we can raise that and say that we are very concerned about it. Of course we can do all those things. At the end of the day, with the introduction of legislation, it will remain the Government's collective view as to whether the legislation should be introduced or not. I suppose it is also right to say that if you ever had an Attorney-General who thought the Government was about to do something that he really profoundly disagreed with it would be his duty to resign over it. That is how the system is bound to work, but we have an opportunity to provide our input. This particular piece of legislation is undoubtedly controversial. It is of course primary legislation and, as you will be aware, the Government's view is that it is compatible with our convention obligations. That is not to say that it is not going to be the subject of heated debate both in our place and your place as to whether or not it should be enacted and whether it enhances or diminishes the rule of law, ultimately, and accessibility to justice, which is very much a key issue surrounding the Secretary of State for Justice's responsibilities.

Lord Crickhowell: What about your failure to refer to the Lord Chancellor?

Mr Grieve: I think that you may be attributing too much to that. I did a number of talks in my time as Attorney-General and I do not think that by the failure to mention the Lord Chancellor there was some sort of message being sent out that the Lord Chancellor was irrelevant to the maintenance of the rule of law. His oath makes him really very important in his departmental responsibilities. Prior to the change that has come about since 2005 he had very limited departmental responsibilities but his presence in Cabinet, particularly with his strange mix of judicial office and being a member of the Government, gave the Lord Chancellor a unique position in terms of speaking out within government—a far more senior Minister than the Attorney—if he felt that the Government was about to do something that had impropriety about it, although there are examples of Lord Chancellors who did not speak out on a number of things that they might have done. I think the change is that whereas previously he might have been a second focus within Cabinet for general guidance, now it is much more specific to his own departmental responsibilities but it is going to vary from one Lord Chancellor to another according to their interests and according, probably, to their legal qualifications.

The Chairman: A quick question and answer and then we will move on.

Q90 Lord Powell of Bayswater: The present Lord Chancellor has told us that he does not have a particular responsibility for upholding the rule of law. Should you perhaps have resigned?

Mr Grieve: If he has told you that, he has to reconcile his duties with his oath. His oath is very specific. His oath is merely a reflection, in some ways, of the duty of all government Ministers, but nevertheless it is spelled out explicitly and he has to take an oath of office. It is certainly not my experience in my time as an Attorney-General that either of the two Lord Chancellors with whom I served ignored that issue and were not alive to the fact that it might have a bearing on what they could or could not do. It was probably right to say that it has become increasingly viewed in terms of their own departmental responsibilities.

The Chairman: Thank you. Lady Scotland, are you content for us to move on or do you wish to add anything?

Baroness Scotland of Asthal: I just want to make a few points if I may. First, for the first time I slightly disagree with Dominic when it comes to the fact that the Attorney only has one client. I think the Attorney-General has three, but they are in different areas. Of course we have not spoken about the Attorney's advisory role to the Queen, to Parliament and to the Government, and those three duties are discharged in very different ways without there being any inherent conflict. So if we look at the conversation we had a little earlier about the nature of the sort of advice and assistance that the Attorney gives to Parliament, it is very specific and different from that which he or she discharged in relation to the Government.

Secondly, it was absolutely clear when the legislation went through that the Lord Chancellor's duty to uphold the rule of law would not be expunged, but that it would be reinforced and fundamental to the discharge of his duty. It was for that reason and that reason alone that the oath that the Lord Chancellor took made specific reference to that duty, particularly in terms of supporting the judiciary. It was in contemplation that there might at some stage, although many thought it was unlikely ever to happen, be a Lord Chancellor who was not a qualified lawyer, had never sat as a judge and therefore might not be fully conversant with what the day-to-day meaning of the application of the rule of law stood for.

For many it is shocking indeed to hear of a Lord High Chancellor of this country who appears not to understand the nature of that oath, so if—which is not admitted by me because I am afraid I have not had the opportunity, and I do apologise for that, of reading the evidence that is submitted in that regard—as I am gathering, that has been put in question then I think that is a very sad thing indeed. The Government, I believe any Government, needs a strong Lord Chancellor who understands the fundamental importance of the rule of law to our democracy. It is the cornerstone, the foundation stone, on which our democracy stands. If we do not understand the rule of law and if we have a Lord Chancellor who does not understand that then I think our democracy is in a little difficulty.

The Chairman: Thank you very much.

Mr Grieve: Can I just come back?

The Chairman: Do you mind if we move on?

Mr Grieve: I just want to make it clear that I do not disagree at all with Patricia over the three roles in relation to Parliament, which we explained, Government, and the Queen. All the public interest functions carried out by the Attorney-General are our responsibility to the Queen for the upholding of the rule of law and are totally independent of government. That was just the one point I wanted to make.

The Chairman: Thank you. I will bring in Lord Lester and then Lord Cullen and then I hope we can move on to some of the other issues. Thank you.

Q91 Lord Lester of Herne Hill: Because time is short I was going to ask you how you would define the rule of law, but as a shorthand what I have done is to extract from Tom Bingham's book his eight principles. I do not know whether you have a one-page sheet of them in front of you. I asked that that should be done. If our report decides to explain to the public what the rule of law means, one way of doing it would be to endorse something like those eight principles. My question is short and simple: would we broadly be correct in treating those eight principles as a way of describing what we think the rule of law is?

Baroness Scotland of Asthal: Absolutely.

Mr Grieve: Yes.

Lord Lester of Herne Hill: So far as the particular role of the Lord Chancellor is concerned, I think you have already covered that. We will come later to other questions.

Mr Grieve: Yes. Just to make the other point about this, it is quite clear to me that the oath of office taken by the Lord Chancellor is very important. It was not put there for no reason and it should absolutely underpin the way any Lord Chancellor discharges his or her functions.

Q92 Lord Cullen of Whitekirk: This is a very short question. In the Cabinet manual I can see that the role of Attorney-General is mentioned in regard to the rule of law. So far I have not been able to find any reference to the rule of law in relation to the Lord Chancellor. Am I right in that understanding?

Mr Grieve: Within government rules?

Lord Cullen of Whitekirk: Within the Cabinet manual I am talking about.

Mr Grieve: That may well be the case, yes. The Cabinet manual makes clear the crucial role of the law officers and the Attorney-General in advising on legality and the need therefore to involve the law officers in the decision-making process. I have not looked at it recently but I would not be surprised if there is no reference to the Lord Chancellor. You could argue that that is something that should be corrected, but I come back to the point I made originally that the oath is central to what he does. His role has never been defined in Cabinet before, even before the Constitutional Reform Act.

Lord Cullen of Whitekirk: Perhaps it is the time for putting it in the Cabinet manual.

Mr Grieve: It may be.

Lord Cullen of Whitekirk: One other question, if I may. When he was asked about the duty to uphold the rule of law, the present Lord Chancellor referred to the ministerial code, but that simply talks about the overarching duty to comply with the law, including international law, and with treaties. Now, there is nothing therefore in the ministerial code obliging Ministers to act consistently with the rule of law. Do you have any comments on that?

Mr Grieve: If any Lord Chancellor were to ask me whether his oath of office is merely compliance with the ministerial code, I would tell him that I think it goes beyond that.

Lord Lester of Herne Hill: Would you include in that the common law—in other words, that the principles of the common law are themselves vital in being upheld?

Mr Grieve: Yes, the rule of law includes the common law and statutes, so it underpins it.

Baroness Scotland of Asthal: It is important for us to remember that the Human Rights Act is the embodiment of some of the fundamental principles of the common law. I remember when I very first read that document I wondered whether in fact a common law lawyer had simply picked up his or her pen, and written down the fundamental principles of our common law and stuck “Human Rights Act” at the top.

The Chairman: This is an extremely interesting session and clearly we have failed to allow enough time for it. The last thing I want to do is to rush matters and I wonder whether if we do not reach all the questions you would be content if we sent you a letter with unasked questions that we might like to pursue further through a written answer from you. Would that be acceptable?

Mr Grieve: I am perfectly happy to do that, and perfectly happy to come back if you want me to.

The Chairman: That is a kind thought, but difficult to arrange.

Baroness Scotland of Asthal: I just want to say that unfortunately I have been away quite a lot. I did 10 countries in eight weeks and I am just a bit timorous about saying that I will be able to answer further questions in writing within the timescale that you might like.

The Chairman: We are prepared to take that risk, and we will understand if a problem develops, Lady Scotland. I would like not to rush matters but to pursue them more carefully and I would like to bring in Lord Brennan now, with the next question.

Q93 Lord Brennan: Assuming the Attorney should attend all Cabinet meetings, why not give the Attorney the Lord Chancellor's rule of law duties? If you do not think that is a wise step, if you were at a Cabinet meeting with a Lord Chancellor who is weak, incompetent or very diffident about challenging his colleagues on matters of propriety, especially if he is not a lawyer, is there then a positive duty on the Attorney to speak up in Cabinet and rectify the position?

Baroness Scotland of Asthal: First, I do not think there should be a diminution or a dilution of the duty that currently exists for both to discharge that duty in relation to the rule of law. The rule of law is particularly important for the departmental responsibilities that any Lord Chancellor will seek to discharge, because the Lord Chancellor of the day will be the officer or the departmental Secretary of State responsible for civil justice, for making a large contribution to development of criminal justice, the opportunity to influence the administration of justice through the courts, and indeed the way in which our liberty if we transgress is constrained. All those duties, I believe, cannot be discharged honourably without taking into account the rule of law. To have a Lord Chancellor around the Cabinet table who does not see it as an intimate part of the discharge of those functions that are all departmental functions puts us in a very difficult position. I would not like to support any suggestion that the Lord Chancellor of the day, whoever he or she may be, would be able to avoid that oath and avoid discharging that duty. There is a real issue as to whether it should not go into the Cabinet documents, but I think that the oath itself is so powerful that I would not wish to see it shared or simply discharged by the Attorney. I think it is important that the rule of law is there at the heart of what the justice system does and is not just something pushed to the sideline that could be construed as the preserve of simply the lawyers. It belongs to all of us.

Mr Grieve: The Lord Chancellor's departmental responsibilities go to the heart of the maintenance of the rule of law because of his role in the appointment of the judiciary, protecting their independence and the operation of the court system. The Attorney-General cannot substitute himself or herself for that in government, and that is why I made the point that the Lord Chancellor in a sense has two roles. One is his major departmental responsibilities and the second is the extent to which he also wishes to push that envelope further in influencing the entirety of the way in which government is conducted, which I believe in the past is what often happened. Certainly the Attorney cannot be a substitute for that. You asked a question about the Attorney's attendance at Cabinet. The Attorney is of course not a member of the Cabinet. Attendance is by invitation. I do not know how it was in Patricia's day. It is right to say that when I was appointed in 2010 there was a short period where there seemed to be some uncertainty as to whether the Attorney should attend every Cabinet meeting or not. But the habit that grew up reasonably quickly was that in reality I attended every Cabinet meeting.

The Chairman: Did you feel as free to speak out at Cabinet because you were in attendance as you would have felt had you been sitting at the Cabinet table as a Member?

Mr Grieve: Yes. I do not think it affected me by virtue of my role as Attorney. Of course, there is a bit of a self-denying ordinance as Attorney-General. I certainly think that precisely because one is there to provide legal advice one should not necessarily be steaming in to comment on every article of policy unless one thinks it is either particularly serious or important in policy terms or one thinks that there is a distinct legal angle to it, because otherwise one's presence might start to become irksome to one's colleagues. One has to be a little bit restrained because one has a very specific role to perform and one must not let anything start to detract from one's ability to do one's core task. But, no, I never felt that and, indeed, I also attended National Security Council, a very important body in terms of legality, and I never at any stage felt that my role in that was in any way marginal.

The Chairman: Thank you. I think we just have time to squeeze in question 6, because it is a very short one and you might manage an answer in one sentence each. I will bring in Lord Lester and then, if there is time, Lady Falkner.

Q94 Lord Lester of Herne Hill: It has been suggested that the Lord Chancellor needs to be someone old—all passion spent—and a lawyer. My personal experience of the Wilson Government serving Roy Jenkins was that Roy Jenkins, not a lawyer and not all passion spent, was a much more effective upholder of the rule of law than Elwyn Jones on issues like the Shrewsbury Two, Clay Cross and so on. Even though I am a lawyer I am sceptical about the idea of our being very prescriptive. Do you think that the Lord Chancellor must be a lawyer and must be someone with all passion spent? I am not sure Lord Mackay of Clashfern qualifies on that basis or not, because my own view is that what matters much more is the DNA of the individual than whether he or she is a lawyer or has no further ambition.

Mr Grieve: It helps to be a lawyer. I think there are advantages of having a Lord Chancellor who is a lawyer. One of his jobs is to act as a link between the judiciary and government, a very proper constitutional link that needs to be maintained while also ensuring the distance between the judiciary and government. I think it is probably easier to do that if one has a history of involvement in the legal profession. It seems to me that that is quite apparent but it is not essential. Somebody can overcome that if they choose to do so or want to do so. I certainly would not want to suggest that legal knowledge is essential. An understanding of legal principles is essential. An understanding of the oath of office is essential. As for whether it should be somebody who is ambitious and hoping for other things or somebody at the end of their career, again I think it is entirely a question of how people view the office. It is a slightly different office in government, even today, from that of other departmental Ministers. If somebody understands that, it does not matter whether they may have other ambitions because they will be able to successfully discharge their functions and their oath of office.

Baroness Scotland of Asthal: I think it is incredibly important for the Lord Chancellor's role to remain one of the most senior in government because of the duties the Lord Chancellor discharges and the importance of the departmental issues the Lord Chancellor deals with. As I said earlier, I believe they are fundamental to our justice system. Therefore, I think the Minister who holds that office should be a very senior Minister who has demonstrated their acuity and sagacity over a period of time, so you could be confident they have the ability to discharge the onerous burden placed on the Lord Chancellor. I think that is easier if the person has had the experience of being a senior lawyer and discharging that responsibility or has had responsibility of a quality in nature that demonstrates their fitness to discharge such a senior role. The person has to have demonstrated a real understanding of what the rule of law means. The Bingham principles of the rule of law can, I believe, be understood by anyone, but there should be a clear responsibility on any Government in choosing the person to discharge that onerous, senior duty to ensure that the Minister chosen holds the confidence of the other

ministerial colleagues and the ability and strength to be listened to in government to uphold the rule of law. I would certainly invite the Bingham book to be given to every Minister who comes into government.

Mr Grieve: I would just add this. Much will also depend on the Prime Minister's understanding of what the Lord Chancellor is supposed to deliver. The Prime Minister has to appreciate that the Lord Chancellor has a particular role within government and give it the respect it needs. This has traditionally happened. Certainly pre-2005, the Lord Chancellor had a very high status. He had the highest salary, quite apart from anything else, of any Minister in government and a very specific role within the constitution that, of course, still exists. But it is very much an issue for a Prime Minister to determine how they wish to enhance the role of the Lord Chancellor within their own Government.

The Chairman: Thank you very much. There we must draw stumps. We are most grateful to you. You have been extremely informative and helpful to us and I would like to follow up one or two of the questions that time did not allow us to ask you in the hope that you manage to reply to them. Lady Scotland, we understand you have a very busy travelling timetable. Thank you very much for coming today.

Examination of Witness

Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 2007-10

Q95 The Chairman: Unfortunately the last two speakers could not see you sitting behind them, Mr Straw, although they realised that they were talking beyond their time limit. We understand that you have to leave by 11.45 am and we will keep to that. I urge my colleagues to keep their questions brief and to the point. We are very grateful to you for coming. You were the first modern Lord Chancellor in the House of Commons. You must have had some fascinating experiences and you must have observed the development of the role with possibly mixed feelings. We shall hear about that. It is the office of Lord Chancellor we are concerned about, not the individual, and I look forward to hearing your answers. Perhaps I may head off straightaway with the first question I wanted to ask you, which is: what makes a good Lord Chancellor?

Mr Straw: I think an understanding that your position of Lord Chancellor—leave aside some of the other Justice Secretary responsibilities, such as for the prisons and probation service and constitutional matters—on the interface between the executive branch of government and the judiciary is a different one from the relationships you have in almost any other ministerial post. If you are going to do the job properly you have to have very clear sensibilities about the dividing lines between what is proper for the Executive to get involved in and what is proper for the judiciary, and crucially to do everything you can to protect the judiciary from both political interference but also political attack. They have a job to do and that necessarily involves them from time to time in making decisions that the Government does not like or making decisions on behalf of individuals who are unpleasant, unmeritorious individuals but whose rights none the less need to be respected.

The Chairman: The CRA sets certain criteria of the qualities that are needed in a Lord Chancellor. Do you think those adequately enhance the issue?

Mr Straw: It is for others to judge. Some may take the view that because I qualified it shows they are highly defective, but that is for you to judge. If you read the section it is pretty general and it provides guidance to a Prime Minister but I query whether they have that in front of them every time they make a decision.

The Chairman: Thank you. We will move on to the next question. Lord Cullen, I think you wanted to come in.

Q96 Lord Cullen of Whitekirk: Getting on to the role of the Lord Chancellor, do you think more needs to be done to promote an understanding of his role in relation to the rule of law?

Mr Straw: Yes, almost certainly, because this goes generally to this issue of the rule of law in a democracy. You can never do too much on that. I subscribe to Tom Bingham's principles. The way I summarise the rule of law—and I was talking about this yesterday in a lecture when I, among other things, talked about countries in the Middle East—is that one of the fundamentals in a democracy is that you honour the rights of people who disagree with you. If a democracy is going to operate you have to concede all sorts of rights and privileges to people who have not voted for you. That is the first point.

Secondly, you have to ensure that serious criminals, people who have broken the law or are alleged to have broken the law in a terrible way, who have done very bad things, are accorded rights that they have not themselves accorded to other people. That then can lead to, as I just said a moment ago, the courts making decisions that are uncomfortable for Government, and

it happened loads of times with me, or releasing prisoners or giving someone asylum who appears to be completely unmeritorious. It is important that we do not then get into a situation where the judiciary, as has happened under both parties, are under attack for making decisions that they may themselves feel uncomfortable about personally but are made on the basis of the law that rules at the time.

Lord Cullen of Whitekirk: My question was focused on communicating an understanding of the role of the Lord Chancellor in relation to the rule of law. There seems to be surprisingly little in, for example, the ministerial code or the Cabinet manual that fleshes out what he is there for.

Mr Straw: I accept that. I think that is because the Cabinet manual and the code have not caught up with the change from a Lord Chancellor who was at this end bound to be both legally qualified and legally experienced to the new situation where it is a commoner and the Lord Chancellor may or may not be a lawyer, either of great or limited experience or at all.

Lord Cullen of Whitekirk: As for the understanding of the rule of law, would you, like our previous witness, suggest that the Bingham book should be issued to all Ministers?

Mr Straw: Yes, because it is a good read.

Q97 The Chairman: You were proactive, allegedly, in pursuit of heading off criticism of judicial decisions that might have been adverse and harmful and by warning Ministers in advance of an upcoming decision. Is that something you think all Lord Chancellors should do, because I do not think others have done that?

Mr Straw: Yes, I do. I have to say that I was backed in that by Gordon Brown, the Prime Minister, who was also clear that collectively Ministers should not get into the position of taking shots at the judiciary for decisions they had made, even if those Ministers were being enticed or encouraged to do so by some of the newspapers. I think this runs into the issue of seniority. There is a sense that you should have people in the job who have no further ambition. I continue to have ambition but it was none the less my last job. I was one of the older members of the Cabinet but also I was senior, so I could pick up the phone and say or see somebody in the Lobby and say, "Just do not do this, please". But that may not apply to somebody who is more junior in the Cabinet.

Q98 Lord Lester of Herne Hill: I should begin by declaring an interest as I was your independent adviser on some aspects of human rights and the constitution, but only some. You already endorsed the Bingham principles. I was one of those who supported the changes made in 2005. Do you think, on reflection, that the scheme that people like me approved at the time needs now to be reconsidered because it has not worked very well in all respects?

Mr Straw: It is hard for me to say without making some gratuitous ad hominem comments. I think it is a matter for you to conclude after you have run this inquiry. If you are going to have an elected politician being Lord Chancellor, whoever that is, the relationship between the Lord Chancellor and the senior judiciary and the judiciary as a whole is going to be different. It is in any event different because of the 2005 Act, but I suggest that if the Lord Chancellor, notwithstanding the 2005 Act, is at this end and is an experienced lawyer, that changes the dynamic. If they are down the other end, they are an elected politician; they have constituents at them and then the relationship is going to be different. I do not, for example, think it is improper for the current Lord Chancellor to come forward with a view about the role of a judicial review. I may or may not agree with him but it seems to me that that is an entirely proper thing for the Lord Chancellor to make an argument about. Because the Ministry of Justice budget is under huge pressure—not I ought to say because of any decisions by the

current incumbent but ones that go back three or four years—there is going to be a tussle with all branches of the Ministry of Justice over budgets and therefore over a role. Those things are inevitable and I think they have become more difficult. Whether there is a case for strengthening Section 2 and saying that, for example, somebody can only do this job if they qualified as a lawyer and at some stage practised, I would want to see the evidence of it before I came to a conclusion.

Q99 Baroness Falkner of Margravine: Mr Straw, I want to take you back to what you were saying a minute ago before this intervention on the rule of law and the ability to challenge Cabinet colleagues. I wonder whether you might do a thought experiment and put yourself into your role as Foreign Secretary when you were in Cabinet over very contentious legal decisions that were taken in 2002-03, where you were constantly arguing, I suspect, wearing a lawyer's hat as a Foreign Secretary. Do you believe that the authority of the Lord Chancellor derives from the oath of office, which we have heard a lot about this morning, or the ability to be a senior member in any event, knowing their brief, being able to talk to their brief and challenge people on that? I ask you that because a previous witness said he thought the capacity to stand up to colleagues and the Prime Minister, and to stand against the collective view of Cabinet if necessary, was the key rather than the other stuff that we have been talking about.

Mr Straw: I do not think these are alternatives. The oath of office helps and it particularly helps where you have a Lord Chancellor who has not previously been involved in the legal system, because nobody else takes an oath of office as far as I know. The Attorney may, I am not sure, but anyway nobody else who is a member of the Cabinet apart from that takes an oath of office. It is a very formal occasion and you have to understand what you are saying. Especially to those who have not had particular experience in the legal system it is important, but it was important to me, too.

To go back to what I was saying earlier, the degree of authority—with a small “a”—and influence you are able to exercise with Cabinet colleagues critically depends on who you are and what your experience is. Although I only practised at the Bar for a very brief time I have always taken an interest in legal issues and, of course, as Home Secretary I was responsible for a vast range of constitutional legislation, including the Human Rights Act. It is a subject I have thought about a great deal as well as, as Home Secretary, being on the wrong end of endless legal actions and adverse judgments of the courts, and—fewer in number but even higher profile—as Foreign Secretary you have to think about these things.

Baroness Falkner of Margravine: In your many years of experience in all these different roles, do you recall that Lord Chancellors challenged you in your decisions in a different way because you were a lawyer from the way they would have challenged others?

Mr Straw: I do not remember. There were only two Lord Chancellors when I was doing these other jobs. I do not remember either Lord Irvine or Lord Falconer challenging me. Baroness Taylor may be able to remember, but I do not recall a challenge. We used to have discussions about things, but I do not recall a challenge.

Baroness Falkner of Margravine: I think there is a difference between challenging and perhaps the Lord Chancellor taking a step back and an overview. If you go back to the devolution days and those Cabinet committees where the Lord Chancellor was chairing it, his authority there to take an overview of constitutional change was absolutely important.

Mr Straw: Of course, yes. It was and later on in the Gordon Brown Government I chaired the relevant Cabinet committee on constitutional change as well as being directly responsible for a lot of it.

Q100 Lord Crickhowell: I have two questions. We have heard a great deal of the detailed responsibilities of the Attorney upholding the law, some by referral, some from membership of specific committees—the legislative committee, for example—but we have also heard of the still central importance of the role of the Lord Chancellor in the rule of law arising from the oath and all that. Do you therefore agree with the conclusion that seems to have been emerging this morning that there are two individuals who have special responsibilities that go way beyond the general responsibility of all Ministers to uphold the rule of law? My second question is: now that the responsibility for constitutional affairs has gone for the moment to the Deputy Prime Minister and the Cabinet Office, do you think the Lord Chancellor still has a role to defend the constitution resulting from his oath of office?

Mr Straw: On the first, I think those two posts are different in character from other posts. I also just add parenthetically that the more acute responsibilities arise on the shoulders of the Attorney-General because the Attorney does in particular cases have to say to Ministers, “What you are doing is not lawful”, or, “You cannot do it”. To give the answer that is not sought can be uncomfortable, whereas my role was more general and after the event of an adverse judicial decision. On this issue of distribution of government business, personally I think it would be better if these issues were back within the Ministry of Justice, although having said that it is also the case that when I was Leader of the House I had responsibility for two areas of constitutional law: elections and the whole electoral system, and the House of Lords reform. That is going to be a matter for a Prime Minister to decide who they think within their Cabinet can take on these roles. But certainly I think the Lord Chancellor should have a continuum of responsibility.

Q101 Lord Lexden: Could we go back to the question of seniority that you have touched on briefly? Do you think that invariably the office should be held by a senior figure and, if not one lacking any further ambition, an individual with distinctly limited ambition for further advancement?

Mr Straw: I do not think you can be prescriptive about this. I think it is better if it is held by a senior figure although I can certainly think of people who could do it as their first appointment to a Cabinet and do it perfectly well. On this issue of ambition, we are talking about age rather than ambition. Should the proverbial bus have hit the incumbent of Downing Street at the right time and had the stars been in the right place, I still had my Field Marshal’s baton in my Private’s knapsack. As I walked into the Ministry of Justice I did not abandon all ambition, but if you are at the top end of the age range of the Cabinet and you have been in the Cabinet as I was at the time—I had been appointed for 10 years already—you are less likely to be gagging for further high office than if you have only just arrived.

The Chairman: Thank you. We might get through all our questions. Lord Lester.

Q102 Lord Lester of Herne Hill: It is related to that in a way. It is about whether the Lord Chancellor needs to be a lawyer. Can I take you back to the time, and I am sure you remember as well as I do, when you were a special adviser and I was a special adviser in the Wilson Government? My experience in the Home Office was that Roy Jenkins, who was not a lawyer but had plenty of ambition within him, was a much better defender of the rule of law than Elwyn Jones, who was a lawyer. I am thinking about issues like the Shrewsbury Two, Clay Cross and all of that. My bias, my experience, is we should not be prescriptive in relation to being a lawyer. It is an advantage provided that the rule of law is in your DNA but the rule of law can be in your DNA otherwise. Would you agree or not?

Mr Straw: I would agree, of course. There is not an exclusive sect of defenders of the rule of law who are only lawyers. I agree with you, yes.

Q103 Lord Powell of Bayswater: Looking back on your own time and also looking at the current practice, what about the conflict of interest between being Secretary of State for Justice and Lord Chancellor? I know in earlier evidence you said you were comfortable with exercising both roles but since then there seems to be more of a conflict, over accessibility to justice, legal aid and so on. Do you think this is a serious problem, the conflict of interest in holding both roles?

Mr Straw: Excuse me asking this, Lord Powell, but are you saying that the conflict arises not in respect of the Ministry of Justice's other responsibilities like prisons and probation but in respect of the role of the Lord Chancellor to hold the purse strings of legal aid and things like that?

Lord Powell of Bayswater: Yes.

Mr Straw: If I had the choice I would not have split the Home Office in the way it was split. There are a lot of advantages in having the Home Office responsible both for the running of the criminal justice system in its widest sense, from policing through to sentence and disposal, and for constitutional affairs, because that gave a balance between liberty and order inside the department. The Home Office had become too much institutionally of a Ministry of the Interior in the old continental system. Anyway, that change happened. If you have a Lord Chancellor, he or she has to be responsible for, and was in the old system, relations with the judiciary and the things that go with access to the courts, which crucially is legal aid. Whether you call it a conflict or not, and there are plenty of conflicts anyway as you know very well within a particular portfolio, that is a key responsibility. I think it would be quite improper to give it to the Home Secretary. There is a major problem now because while, in my view, some cuts were inevitable, they have gone too far in legal aid and they have hit the wrong people. But that is principally a matter of a consequence of overall government policy.

Q104 Lord Powell of Bayswater: Can I just add one unrelated question? Do you see any prospect of going back to the system of an independent Lord Chancellor who did not share a portfolio?

Mr Straw: No, I do not. It is like so many other aspects of the British constitution, the old position of Lord Chancellor did not bear examination against any set of principles, Montesquieu's separation of powers and anything subsequent to that, but it worked. But the moment you started to shine a spotlight on it and then to change it, you could not go back. What is the argument you are going to suddenly come up with for having a Lord Chancellor who is also a senior member of the Executive and chairing the House of Lords? It is a bit tricky.

Baroness Taylor of Bolton: Does it have to be part of the Ministry of Justice? Could it be combined with something else, such as a Department for Constitutional Affairs?

Mr Straw: It could be, in which case if it was my decision I would put prisons, probation, and sentencing back into the Home Office, because they fit much more sensibly. You could do, yes, there is no reason why not.

Baroness Falkner of Margravine: If the Deputy Prime Minister has responsibility for constitutional affairs the role could go to the DPM?

Mr Straw: It could, but the crucial thing about the Deputy Prime Minister is that their responsibilities are entirely ad hominem. Baroness Taylor and I saw this with the same person. Lord Prescott at one period of his incumbency as Deputy Prime Minister had wide executive responsibilities running a government department and subsequently, as far as I know, he had no departmental responsibilities at all but he was still the same person.

Lord Powell of Bayswater: I wonder if the Lord Chancellor should not go back to be someone who had no departmental responsibilities but this general overseeing role of responsibility for the rule of law. I was not suggesting he would go back to the House of Lords and chair.

Mr Straw: Lord Powell, it is different with the Deputy Prime Minister, who by his or her nature is going to be either a leader of a minority coalition party or is going to very senior in the majority party of government. You talk about going back to the system, but it is worth bearing in mind that under the old system the Lord Chancellor did have responsibility for legal aid and the whole issue of access to justice as well as big issues, not often ones that get much publicity, of the administration of civil justice and family justice, which are important.

Q105 Lord Lexden: Could I ask the obvious last question? Is this a post that we need or is it a relic from the past on which the door could be closed?

Mr Straw: I personally think that the Lords came to the right decision in that argument about the future of the post in 2002-03 by insisting that the post should remain because it is about protecting the judiciary. You could argue this both ways but, if it is just another Secretary of State job, you could not then have these oaths and so on. I know people can be cynical about tradition and so on, but there is a reason why this post has survived for such a long time, albeit through various transformations, which is to have a bulwark within the Executive against interference in the judiciary. I think that is a very important feature of a democracy to defend.

The Chairman: That is a very good final note. Is there anything you have left unsaid that you would like to say before we finish?

Mr Straw: I do not think so, Lord Chairman.

The Chairman: We are most grateful to you. It has been extremely helpful in illuminating a lot of points for us and we thank you very much. We release you two minutes ahead of the deadline.

Mr Straw: I am very grateful. Thank you very much.