



## Constitution Committee

### Corrected oral evidence: Executive oversight and responsibility for the constitution

Wednesday 30 October 2024

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Anderson of Ipswich; Lord Beith; Lord Burnett of Maldon; Lord Falconer of Thoroton; Baroness Finn; Lord Foulkes of Cumnock; Baroness Goldie; Lord Keen of Elie; Lord Strathclyde; Lord Thomas of Gresford.

Evidence Session No. 1

Heard in Public

Questions 1 - 31

#### Witness

[I](#): Alex Thomas, Programme Director, Institute for Government.

## Examination of witness

Alex Thomas.

Q1 **The Chair:** Good morning. The Constitution Committee is holding an evidence session with Alex Thomas, programme director of the Institute for Government, as part of our inquiry into the executive oversight and responsibility for the UK constitution. I start by welcoming you, Mr Thomas. We are pleased to see you and always value hearing the views of the Institute for Government. Unless you want to make some opening comments, as we have quite a few questions perhaps we could move straight into questions. What is your preference?

**Alex Thomas:** I have no opening comment, only to say that I will be speaking from the perspective of our research and commentary work at the Institute for Government. Also, I was a civil servant, most pertinently for these purposes, working on and then leading constitutional and electoral policy questions, from 2010 to 2015. Then I was principal private secretary to Jeremy Heywood when he was Cabinet Secretary, from 2016 to 2018. That is the perspective from which I will be coming at these questions.

Q2 **The Chair:** Thank you. That was helpful. I will open with a broad question, from which a few supplementaries will follow, which will perhaps give you more of a free range to start articulating your views. Where does responsibility for safeguarding the constitution lie in the Government? Is this a shared responsibility?

Related to that, how has the arrangement changed over time and what effect, if any, have changes to this arrangement had on constitutional governance? You can talk freely on that question, and then we will follow up with some supplementaries.

**Alex Thomas:** Thank you. That is a really interesting question. As ever, there is a simple answer, then a longer, more complicated answer. The simple answer is yes, there is a single, and it has been continuous, responsibility for safeguarding—we may get into overall strategy questions on the constitution—and that person is the Prime Minister. It is hard to think about these questions without always circling back to the responsibilities of the Prime Minister, as the prime mover in the Government.

Within that, there are various different responsibilities separated across government. I am sure we will come back to this theme, but I think of these questions as there being two quite distinct functions around the constitution. The first is constitutional policy questions, so constitutional reform in actions, policies and legislation that the Government might want to take to change the constitution. The second is oversight advice on “safeguarding the constitution”. Those are often located in slightly different places inside government, from my experience working on and observing it.

To take the first of those, constitutional policy and reform, it would currently sit with Nick Thomas-Symonds as the Minister for the Constitution and other things. He is the person responsible for taking through legislation on constitutional changes and on advising internally on those policies, with civil servants in the Cabinet Office who support him.

The other question is almost the more interesting one and is about safeguarding and advice to the Prime Minister, ultimately, on the constitution. That is more diffuse. The different actors are, of course, the Prime Minister himself, as I have said, and law officers who—I do not need to say this to this committee—are often completely underestimated in their importance to and role on the centrality of constitutional and other questions. This clearly includes the Attorney General. On the officials' side, the Cabinet Secretary has a very important role working with the principal private secretary in No. 10 and with others. Then other Secretaries of State have different constitutional roles: the Lord Chancellor and Secretary of State for Justice clearly has an important constitutional role as regards the judiciary. So there is a diffusion of responsibilities across government.

To come back to a simplistic answer, in their own way, every Secretary of State and Minister has certain constitutional roles and obligations on everything from the rule of law downwards.

How has that changed over time? I am not a historian, so I will not go into the deep history of it, but the fundamental architecture of that has remained fairly similar, although policy responsibility for the constitution has clearly changed. I was working on it in the coalition period, with Nick Clegg as Deputy Prime Minister and a conservative junior Minister. That has previously been with Lord Chancellors in the Department for Constitutional Affairs or successor departments. At times, it has sat in the Home Office. That policy function has moved around government.

One of the positive recent innovations—not innovations; developments—with this new Government, which I am sure we will come on to talk about, is a constitution committee, the Union and Constitution Committee. I think this is a good thing because, precisely on the questions that this committee is looking at, that forum can draw together the strategic questions and interdependencies around the constitution that get overlooked a bit, until you get to the Prime Minister and Cabinet Secretary level in government. I could meander around these questions for longer, but I will stop there.

**The Chair:** That was very helpful for setting out the territory. With reference to the responsibility that the Minister Nick Thomas-Symonds holds, it is not a full Cabinet position, although I think he attends the Cabinet constitution committees. Do you think that is a weakness?

**Lord Strathclyde:** Yes.

**The Chair:** We are just taking evidence.

**Alex Thomas:** It is a weakness, as Lord Strathclyde said, for the particular issues that we are looking at. It is important that someone with a particular constitutional remit is sitting around the Cabinet table although, as you said, Nick Thomas-Symonds is. However, perhaps in a typical, hedging, Civil Service way, I am conscious of just how difficult it is to represent all the different interests in a Cabinet. I have some sympathy for a Prime Minister who is juggling all of those. The formation of a Cabinet is not easy, so I recognise the trade-offs that they are making. In a perfect world, would you have someone who has constitutional questions at the forefront of their mind, as a full member of Cabinet? Yes.

**The Chair:** Baroness Goldie wants to take us on to the basic tenets of the constitution.

Q3 **Baroness Goldie:** In its first report, back in 2001-02, this committee offered a definition of the constitution, which is in no way objectionable, but it also proffered a view about the five basic tenets of the United Kingdom constitution. I am anxious to ascertain that we are still looking at this with firm building blocks.

The five tenets were: the sovereignty of the Crown in Parliament; the rule of law, encompassing the rights of the individual; the union state; representative government; and membership of the Commonwealth and, at the time, of the European Union, which is no longer relevant, as well as of other international organisations. Do you consider these tenets still to be relevant and solid?

**Alex Thomas:** Yes, that sounds fair and right. One of the benefits of this committee and its reports and questions about the constitution is that it does not chop and change the conception of them too lightly or too regularly. That is a good definition. Why not stick with it?

Q4 **Lord Strathclyde:** First, apologies for slightly pre-empting your answer. I did not mean to at all. This whole question of safeguarding the constitution and shared responsibility for it seems fundamental when we discuss the constitution. Over the past 25 years we have seen enormous constitutional change—much more so than in the previous 25 years. So it was a relatively settled constitution, but things were changed: the creation of the devolved Assemblies, the Supreme Court, and the removal of the role of the Lord Chancellor from the House of Lords—indeed, making it plain that he or she did not need to be a lawyer, which surprised some of us. We have also seen Joint Committees and royal commissions on the future of this House. One of the Joint Committees was led by Jack Straw and the other by Nick Clegg, in which I think you were partly involved.

Do you feel that at this stage—in recent times, including now—there is a lack of knowledge about who shares responsibility for the constitution, that there is a shrugging of shoulders by many parliamentarians that they do not really understand, and that people do not know where the safeguards lie or where they should lie? Do you feel that a lot more needs to be done to educate parliamentarians in particular? I have read the

excellent paper published a couple of years ago by the Institute for Government about the guardians of the constitution, where Parliament has an absolutely central role.

What more could be done to encourage knowledge and education about, and understanding of and sympathy for, the way the constitution has changed and, although I know you do not want to go into the history of it, how it has evolved over many centuries?

**Alex Thomas:** Yes, is the simple answer, but I will expand on that a little bit. I would be delighted to go into the history. I am just conscious of my limitations. That is the only point I would make on that.

To your point about Parliament, it is clearly of fundamental importance that Parliament is seized of constitutional questions and able to raise and explore the risks of changes. In my experience and observation, government will always be quite transactional or short-termist in how it makes constitutional changes. Yes, there is a job of work to do to ensure that civil servants give the best possible advice, and that Ministers are seized of deep constitutional underpinnings and are aware, if they are touching a guard-rail or a third rail of the constitution—whichever metaphor you want to use—that they should do so with care, but the pressure on Ministers and Governments will always be to get that policy through, to do it faster, and to do it in a partial way. Much as we might exhort Governments to look at these things deeply and comprehensively, the incentives are always to be quite transactional about it. Precisely to your point, Parliament will always have that essential role to join the dots, calm things down, cool things off and make the case, so it is of fundamental importance that parliamentarians are able to engage with those questions really seriously.

On how to do that, committee members will probably have a better view than me of the things that will most incentivise parliamentarians. I have been fascinated in constitutional and electoral policy and other questions for a long time, but not many people are interested in them for their own sake. The job of education is about how the rules of the game make real-world changes to policies that more MPs and Peers are likely to care about. It is about the translation of constitutional rules and guard-rails into tangible policy and political outcomes—the fact that the rules of the game clearly matter, and that different outcomes would be achieved if we had different rules. Making that alive through the work of this committee and others, the Institute for Government and other parts of civil society, feels an important part of it. Yes, it is about having interesting esoteric constitutional debates that really matter, but it is also about being able to present and translate them to a wider audience and talk about them in terms of power and the exercise of it, as well as the more esoteric side.

**Q5 Lord Strathclyde:** Do you feel that many key constitutional issues can be removed from Parliament and questioned in a referendum, such as on the setting up of the Scottish, Welsh and Northern Irish Parliaments, leaving the EU, and other things, or do you think that removes some responsibility from the guardians of the constitution in Parliament?

**Alex Thomas:** Referendums clearly have enormous democratic power. I would not say never use them. We worked together some time ago on the referendum on the voting system—the now forgotten referendum. There could be a place for referendums, but unless you get into complicated questions of exactly how you ask the question, they are clearly binary, and constitutional questions are often not binary.

We should approach referendums with intense trepidation and enter into them either if it is a question that is simple enough to be solved in a binary way or where the two options are clear. For example, one of the benefits of the 2014 referendum on Scottish independence—I think this was accidental rather than intentional—was that the Scottish Government had published quite a detailed set of policy and operational proposals as to how an independent Scotland would function, which, for all the trauma and difficulties around that referendum, allowed for something of an informed debate. I am consciously not holding that up as a paragon of perfect referendums, as it was not in many ways, but if you are going to have a binary question, the responsibility on parliamentarians is to prepare the ground for that question being asked in a way that is resolvable in a binary way. Those were some of the challenges around the Brexit fallout.

**Lord Strathclyde:** I feel that I have taken you far wider than the original question. I did not really want to go down a rabbit hole on referendums, although I did raise them.

Q6 **The Chair:** You made the point that parliamentarians may not be interested in the constitution for its own sake. Do you think that has always been a weakness, or has that become an increasing weakness in attitude to the constitution?

**Alex Thomas:** That is a really interesting question. I do not know, and I would defer to the wisdom of the committee to some extent. The changes that Lord Strathclyde pointed to over the last 25 years—the more turbulent policy grounding for the constitution—have lowered the bar for making those changes. I would not want to say that current parliamentarians or Ministers are less seized of constitutional questions than previous generations, but I wonder whether the mere fact of having made more of these changes over the last quarter of a century has meant that the trepidation with which they might approach such questions is somewhat reduced.

Q7 **Lord Burnett of Maldon:** I was interested in the two strands you started with of policy and safeguarding, and your observation that the question of safeguarding the constitution is rather diffuse. We all know, and it is true of any organisation, that if you have responsibilities that are diffuse—in other words, not clearly established—the likelihood is that everybody thinks that someone else is doing it, and the truth is that no one is doing it.

I just wonder whether there is not an obvious candidate for the safeguarding role who already sits in Cabinet and who, under the

Constitutional Reform Act, has express constitutional responsibility for the rule of law, which has a lot of components. We do not need to go into that, but the Act also imposes on that person—the Lord Chancellor—particular responsibilities regarding the independence of the judiciary and securing funding from the Treasury to enable the courts and tribunals to operate.

One can wind the clock back through history but I think most people would agree that the Lord High Chancellor of Great Britain was pretty well always regarded as having a constitutional responsibility and, in more modern political times—albeit a party politician—was always seen as slightly above the fray. Now, things have changed; in particular, prisons and probation were added to the responsibilities of the Lord Chancellor. This is not the forum to discuss the wisdom of that but, if you are looking for a single Cabinet Minister who already has statutory responsibilities of supreme importance in this sphere, would it not make a lot of sense for the Lord Chancellor to be invested with the safeguarding role as the Minister with overall responsibility?

**Alex Thomas:** I completely see the case for that; you make a strong argument. Personally, I would have no objection to an enhancement of or statement on the Lord Chancellor’s responsibilities around the constitution.

The issue that arises in my mind, though, is that a lot of the operational decisions around the constitution, if I can put it that way, are taken or advised on in the bowels of No. 10. I think of the times when the constitution has been under stress, with serious constitutional questions—for example, around the parliamentary process of Brexit legislation. In practice, some quite profound constitutional decisions were taken in No. 10 itself in advising the Prime Minister. Could you imagine Boris Johnson, in those circumstances, calling for the Lord Chancellor and saying, “We’re getting into choppy constitutional waters here. Send for the Lord Chancellor to give me the best advice on how to navigate this constitutionally”? Maybe, but it is also important that there is authoritative constitutional advice very close to the Prime Minister.

For me—I would say this, given my experience—that is where the role of the Cabinet Secretary comes in. I would not want giving the Lord Chancellor a particular responsibility around the constitution to mean, as classically happens in government, people saying, “All right, someone’s got that responsibility over there, so we don’t have to worry about it here”. It is really important that constitutional authority exists very close to the heart of the most senior level of decision-making around the Prime Minister.

In a way, the idealised view would be where I started: the Prime Minister has the responsibility for safeguarding the constitution, and they should not subcontract that out to the Lord Chancellor. Obviously, that is a crude caricature of what you were saying, but that is the only question your proposal raises with me.

**Lord Burnett of Maldon:** But, at the moment, the subcontracting is to four or five different Ministers for different aspects of it.

**Alex Thomas:** That is correct, although the alternative view would be that they have various aspects and the only place where they come together is in the person of the Prime Minister. As I said at the start, it would be of benefit for the Lord Chancellor to have a specific constitutional role in that way, but the risk is that it would allow the Prime Minister to say, "It's happening over there". At the moment, the fact that various parties have that advice means that it comes together in the advice the Cabinet Secretary gives to the Prime Minister and in the Prime Minister themselves.

I do not want to make too much of that point because, as ever with these kinds of governmental questions, you can organise the structures of government differently but that rarely resolves the underlying question—in this case, about the seriousness with which the Prime Minister takes constitutional questions. An institutional, organisational answer will only ever be one relatively small part of the solution to Governments taking constitutional questions really seriously.

Q8 **Lord Falconer of Thoroton:** I am interested not in the role of the Lord Chancellor but in how the Government deal with constitutional issues. I am interested in the second of your two categories, which is safeguarding, not making policy changes. You have told us that you led constitutional work in the Cabinet Office between 2010 and 2015.

**Alex Thomas:** Yes. I had various jobs, but I was working on that. I was then promoted into other jobs during the coalition period and just after.

**Lord Falconer of Thoroton:** Then you were Jeremy Heywood's principal private secretary from 2015 onwards. Was that when Jeremy was the Cabinet Secretary?

**Alex Thomas:** Yes, between 2016 and 2018.

**Lord Falconer of Thoroton:** When you were doing it, what was the method by which the Government identified genuine constitutional issues? By that, I mean them saying, "There's an issue here around whether this particular act"—I do not mean an Act of Parliament; I mean a step or a Bill—"that we are proposing offends against the constitution".

**Alex Thomas:** It was—and, as far as I know, still is—pretty ad hoc. Questions would be raised; they often come through the law officers and the legal route. In my experience of observing and working closely with the Cabinet Secretary, it was pretty rare that anybody thought, "Oh, this is a constitutional question. This must be handled in a particular, 'constitutional with a capital C' sort of way". It was much more ad hoc than that. This slightly goes to my earlier point in response to Lord Strathclyde. The Government's incentive will always be to get through the business of the day.

**Lord Falconer of Thoroton:** Surely the Cabinet Office and the Cabinet



Secretary would have regarded their role between 2010 and—I do not know when you ceased to be Jeremy’s principal private secretary—

**Alex Thomas:** It was in 2018.

**Lord Falconer of Thoroton:** Would not either the constitutional bit of the Cabinet Office or the Cabinet Secretary have regarded their function as, in part, to safeguard the constitution against breaches of the constitution within the Executive?

**Alex Thomas:** Yes, but the point I was trying to make was that the way in which issues made their way up to the Cabinet Secretary, say, was pretty ad hoc. We in the constitutional team did not see a scouring of government functions to keep a beady eye on constitutional questions. They tended to emerge—this is distinct from questions of constitutional policy, which were handled in the policy team—because a Minister had a concern, the law officers raised a concern, or an issue became politically or publicly contentious. Then, the Cabinet Secretary absolutely would say, “I have a role here to advise the Prime Minister on the constitutionally proper course of action”. You then get into the oddity of the Cabinet Secretary’s position. It is a powerful position but also a weak one in that, ultimately, the Prime Minister takes a view and the Cabinet Secretary is only an adviser.

**Lord Falconer of Thoroton:** So you are saying that, when you were seeing it or watching it, nobody was looking for it. Questions would emerge and, when they did, it was for the Cabinet Secretary to raise them with the Prime Minister.

**Alex Thomas:** In that bit of the universe, yes, although clearly the Prime Minister would also have discussions with whichever Secretary of State, the Attorney-General, the Lord Chancellor or whoever. This goes to the committee’s inquiry, really. The Cabinet Secretary offers quite a narrow set of policy advice around how to handle a particular constitutional issue.

**Lord Falconer of Thoroton:** Has that changed? You are describing a completely random situation in which nobody has responsibility, somebody has to look at it if something emerges—in your language—and the Prime Minister decides.

**Alex Thomas:** That is a fair characterisation of how it worked.

**Lord Falconer of Thoroton:** Has it changed?

**Alex Thomas:** For this Government, it is too early to tell. The Union and Constitution Committee is a good development, as I said earlier—let us see how it emerges—but I would be surprised if it had changed.

Q9 **Lord Falconer of Thoroton:** Finally, can you tell us the difference with issues that the law officer must identify? If something is not constitutional, one might be of the simplistic view that it is not lawful. Why are the law officers not always identifying things that are

unconstitutional in significant Bills? If there is a difference between something that is unconstitutional on the one hand and not unlawful on the other, what is it?

**Alex Thomas:** I was thinking not just about issues around legislation.

**Lord Falconer of Thoroton:** They could be questions into everything. Prorogation is a good example.

**Alex Thomas:** Exactly, so it is a broader question than just what is in legislation. As the committee knows, there is a process through which legislation is prepared, in which constitutionally questionable issues will emerge through the Parliamentary Business and Legislation Committee and the work that the law officers and their advisers do. There is a more systematic process with legislation.

**Lord Falconer of Thoroton:** The law officers advise on much more than just legislation. When, for example, it is suggested that we prorogue for six weeks, they would presumably advise on whether that is constitutional.

**Alex Thomas:** You would expect that, but your question goes to the point that there has been a fuzzier line around what is constitutional and what is not, and what is lawful and what is not.

**Lord Falconer of Thoroton:** Give us an example of something that might be unconstitutional but would not be picked up by the law officers—an important thing, not a minor thing.

**Alex Thomas:** The example you raised was Prorogation, which clearly did go through the law officers and they decided that it was able to go ahead.

**Lord Falconer of Thoroton:** I assume they said that it was lawful and constitutional. I assume; I do not know.

**Alex Thomas:** I assume so as well. I do not know; I was not involved.

**Lord Falconer of Thoroton:** Do you have an example? If the position is that there is no distinction between something that is unconstitutional and something that is unlawful, why are the law officers not the guardians of the constitution?

**Alex Thomas:** In government, I think you would assume that there is a difference between being unconstitutional and being unlawful.

**Lord Falconer of Thoroton:** Can you think of an example from your experience?

**Alex Thomas:** I am happy to send the committee a note. I will have a think afterwards, but nothing immediately comes to mind. I will reflect on that.

**The Chair:** Staying on that point, there is a difference between capturing

constitutional issues at the point when the legislation is drafted and when policy emerges and is being developed. From listening to what you have said, if one were doing an audit on governance and decision-making on the constitution, policy is being developed to the point that, when the Cabinet Office says, "There is a constitutional implication", there are no controls in place. It is ad hoc.

**Alex Thomas:** Outside of the legislative process, you would clearly expect officials and Ministers within departments to raise questions with the law officers. I keep coming back to them, because they are an important lock on the system. Beyond that, I do not think that the constitutional policy team in the Cabinet Office, advising the Cabinet Secretary and the Prime Minister, would actively look for that or insert themselves as a check on different aspects of policy. However, you would expect the Cabinet Secretary and the Prime Minister's principal private secretary to be alert to constitutional issues that emerge. I keep coming back to the same point: yes, it is pretty ad hoc, other than the individual processes that are in place.

**The Chair:** It is a governance issue in how the process of decision-making emerges, right through to the Prime Minister and the Cabinet Office. Lord Foulkes, some of your question has been anticipated by the previous discussion—I am sorry—but do you want to pick out particular points to develop?

Q10 **Lord Foulkes of Cumnock:** The discussion and responses have been helpful so far. When we started the meeting, I was confused about responsibilities. With no disrespect to Mr Thomas—in fact, with thanks to Mr Thomas—I am even more confused now. He mentioned two responsibilities: he says that safeguarding is rightly the Prime Minister's responsibility and that reform is Nick Thomas-Symonds's. There is also a need to take account of the work of the devolved Government's day to day, week to week, which is a third responsibility.

I want to explore the mechanisms for formal and informal consultation in each of these areas. Can we start with one example? English devolution is the responsibility of the Deputy Prime Minister. How will this be decided and advanced? How will other interests be involved, both formally and informally?

**Alex Thomas:** That is a good question, and it goes to how this Union and Constitution Cabinet Committee, the Council of the Nations and Regions and so on will work operationally. The Government will need to manage the fact that responsibility for English devolution and the management of relationships with the Scottish, Welsh and Northern Ireland Governments are functionally led by different bits of government and by different departments. That is not an insoluble problem, but it does present a risk of divergence.

This Government have taken the first institutional steps to bring that together but, so far, the jury is out on how they will choose to use them and whether they will bring them together. It is interesting that this

Government seem to be looking at those questions as more of a piece. It is hard to say exactly how that will play out, but it is one to watch on the constitutional side, as well as on policies, because some big decisions could be taken over the coming months and years.

Q11 **Lord Foulkes of Cumnock:** We have a Cabinet committee rather than a sub-committee now, which is an improvement, with 11 members—a whole football team of them. How many meetings has it had so far? Do you know?

**Alex Thomas:** I do not know that.

**Lord Foulkes of Cumnock:** Is there any way of finding out whether it is operating and working effectively?

**Alex Thomas:** I am sure that you will be able to ask Government Ministers on that score but, as you know, the Government are always cautious about getting into the details of when Cabinet committees have met and so on. That information is not always available. In fact, it took quite a long time after the election for them to publish the list of committees. But it is a good thing: I have talked to civil servants and others who seem tolerably comfortable with the architecture that is in place, but it is still too early to tell how the actual decisions will lock into the system.

**Lord Foulkes of Cumnock:** English devolution is obviously a major decision. We are going to have a Bill considered in both Houses. What other decisions are imminent and need this kind of informal and formal consultation?

**Alex Thomas:** There are parts of the broader constitutional and electoral questions that were in the Labour Party manifesto, such as House of Lords reform, and the reference to the Sewel convention and how that may or may not be more entrenched. I would expect that committee to consider those sorts of questions, as well as the legislation that you talked about.

On some of my answers to previous questions, the advantage of that committee, which has not always been the case in the past, is that Ministers can have an informed decision about how one bit of the constitutional and devolution landscape affects another. For example, how does votes at 16 interact with removing hereditary Peers, or with the devolution and electoral agenda? Those are the sorts of discussions on which you hope that papers will be prepared and discussions had in that committee.

**Lord Foulkes of Cumnock:** Who is taking the lead from a Civil Service point of view?

**Alex Thomas:** Do you mean on the constitutional questions or the devolution questions?

**Lord Foulkes of Cumnock:** You are separating them. Can you answer

on both?

**Alex Thomas:** On the Civil Service side, it will be the senior officials leading the constitution team in the Cabinet Office, up to the Permanent Secretary, Cat Little, and then the Cabinet Secretary, whoever the next one is. On the English devolution side, it will be officials in—I lose track of the title of the department; is it MHCLG or DCLG?—the communities and local government department up to Sarah Healey, who is the Permanent Secretary there.

**Lord Foulkes of Cumnock:** And the appointment of the new Cabinet Secretary will then, from what you say, be vital in this whole discussion and debate.

**Alex Thomas:** It will be immensely important. In fact, I published a paper yesterday on some of the considerations and challenges that the Cabinet Secretary will need to face early doors. In the Institute for Government and government-watching world, it would be hard to overstate the importance of the appointment of the next Cabinet Secretary. There is an enormous job of work to be done there, on this and other issues.

**Lord Foulkes of Cumnock:** You have convinced me that we had better get our report done quickly and get it out as soon as possible.

**The Chair:** That is precisely what we are trying to do. We will come back to the Council of the Nations and Regions. We will move on, although the next question goes back to constitutional issues playing a part in policy and legislation. Lord Falconer, you have partly anticipated this, but do you want to develop it further?

Q12 **Lord Falconer of Thoroton:** How significant a role does constitutional safeguarding play? We have all struggled to find a difference between a constitutional issue and a law issue. Does that mean that the Government view constitutional issues as a matter of political opinion that can be decided any way they like? I have in mind, for example, the internal market Bill the previous Government proposed, which on one view was unconstitutional. Another example is the safety of Rwanda Bill, where there was a substantial issue about separation of powers. If the law officers do not say it is unlawful then that becomes a political issue, so there are no safeguards beyond the law officers.

**Alex Thomas:** That has been a problem recently and that is an accurate way of describing how things work. There is a perception in conversations like this that the Civil Service, up to the Cabinet Secretary, can do more to safeguard than it actually does. The Civil Service has done less in recent times to see itself as part of a constitutional safeguard. That can be for good or ill, but I would not dissent from your characterisation.

**Lord Falconer of Thoroton:** Can you give us an example, either from your period between 2010 and 2018 or from your external view, of where the Cabinet Secretary or an official has, in fact, stopped something happening in government because it was unconstitutional but not

unlawful?

**Alex Thomas:** I will reflect on that as well, because I am trying to be careful about saying things that I should not say. I will have a think about that. I was party to a conversation with the Cabinet Secretary and a Minister where the Minister suggested something and Jeremy straightaway said, "Couldn't do that; that would be unconstitutional".

**Lord Falconer of Thoroton:** Can you tell us what it was?

**Alex Thomas:** I would prefer not to, if that is all right. Those sorts of conversations did and do happen but, to the theme of our exchanges, they are pretty ad hoc.

**Lord Falconer of Thoroton:** There are lots of big constitutional issues, like the separation of powers in relation to the Rwanda Bill, which got to the Floor of Parliament and passed. It looks like there was pretty ineffective executive oversight. The ideas that Lord Burnett put to you about the role of the Lord Chancellor would have the benefit of somebody being politically responsible if something unconstitutional emerged from what the Government did. Maybe the Lord Chancellor is not the right person, and the Prime Minister is responsible for everything so he is responsible for nothing, so you need some Minister who can be fired or take responsibility if it goes wrong. Is that not a sensible way of strongly strengthening the constitutional safeguard?

**Alex Thomas:** Yes and, as I said to Lord Burnett, I agree that would be a good thing. It is not really a hesitation, but my qualification to that is, given what we have seen over recent years, that I am not sure it would strongly strengthen executive oversight. Whether a Government takes these questions deeply seriously is itself a political question for the Government. You could argue that some of those pieces of legislation, such as the internal market Bill or the Rwanda Bill, could and should have been stopped by the law officers, or they could have raised more questions. Simply saying that the Lord Chancellor has an additional constitutional responsibility would not necessarily fundamentally change the decisions the Government took if the Government were not taking those constitutional questions seriously, if you see what I mean.

**Lord Falconer of Thoroton:** If I were the Lord Chancellor and I knew Prorogation might go wrong for me, or that the Rwanda Bill was regarded by everybody as a breach of the constitution, then I would feel a bit windy if I gave that advice. Basically, the Lord Chancellor could say no to Bills, and if she said no that would generally stop a Bill.

**Alex Thomas:** But so could have the law officers, on the Prorogation question.

**Lord Falconer of Thoroton:** I am interested in this idea of there being something more. If the law officers have a responsibility to say no then they are the main guardian. What is more, the law officers are authoritative in a way that other Ministers are not, because if they say, "This is contrary to law", then you cannot go ahead in government.

**Alex Thomas:** I am not denying that giving the Lord Chancellor that responsibility would be of benefit to these sorts of questions. I am just saying that if Boris Johnson was the Prime Minister, he decided to prorogue Parliament and the Lord Chancellor gave advice that that was okay, I am not sure that Boris Johnson would then have sacked the Lord Chancellor. There is a wider cultural and political question around the Government. Giving that particular responsibility might help but it is not a silver bullet. That is the only point I am making.

Q13 **Lord Falconer of Thoroton:** You have recommended that something called the centre for constitutional expertise should be permanently established in the Cabinet Office. What would that do?

**Alex Thomas:** That would, clearly, be a centre of expertise. Colleagues did that work rather than me personally, but some of the thinking behind it goes to the point Lord Strathclyde talked about earlier on education and having a permanent function inside government where expertise would be built up. It could offer that advice on these safeguarding questions. It would strengthen and make permanent the knowledge and expertise of the Civil Service on constitutional questions, because the constitutional bit of the Cabinet Office is like any other bit of the Civil Service: officials move around and come and go. Actually, there has been quite a lot of stability there recently, but that is not necessarily always the case. It would be to institutionally embed expertise and knowledge in the constitutional function of the Cabinet Office.

**The Chair:** I think you said earlier—these are my words, not yours—given that the primacy of responsibility for the constitution rests with the Prime Minister, that strengthening the role of the Cabinet Secretary as a heavy hitter in giving advice to the Prime Minister is a pretty important part of the control of the government process. If that relationship between the Cabinet Secretary and the Prime Minister is weak then overly relying on allocating it to a Minister—whoever you allocate it to—will be limited in its impact.

**Alex Thomas:** I completely agree. It is important that, as I say, there is somebody in or close to the bunker in No. 10 who can give the Prime Minister authoritative advice, and who would be coming at it not from an oppositional perspective but from a position of working to the Government's agenda and saying, "Actually, I'm here to help you do what you want to do, but this is why this won't work or shouldn't be done".

**The Chair:** I can understand why you were diffident in giving an example of where something may be lawful but not necessarily constitutional, but could you take that away? If the Institute for Government can give examples based on its research or thinking that would be really helpful.

**Alex Thomas:** I will do that, and think about the other points Lord Falconer made. I do not want to make a misstep there, but it is an interesting and important question, so I will think about it.

Q14 **Lord Anderson of Ipswich:** Thank you, and good morning. To start

with the point that the Chair just made, I wondered whether a proposal that might breach a constitutional convention—for example, a proposal to take legislation through in breach of the Sewel convention, which the courts would not touch—might be an example of something that is unconstitutional and not illegal. I do not ask for an answer now; I am just feeding in a thought.

I would like to come back to Lord Falconer's question about the centre for constitutional expertise. I should declare a mild interest because I was on the advisory board of the Institute for Government's review of the UK constitution that recommended having a centre for constitutional expertise, although that was not my idea—I am not clever enough to have thought of it.

I have just a couple of questions. One is about range. We have already established that there are so many aspects of the constitution. Would this centre have expertise on devolution, the separation of powers, access to the courts, parliamentary procedure, parliamentary reform, voting systems and voter ID—the whole range of constitutional issues that we try to cover in this committee—or would you hive off devolution, for example, and say it is a different subject and, in this sense, not part of the centre for constitutional expertise?

The other thing I noticed in the report is that you envisaged this centre working with parliamentary committees, such as this committee and PACAC in the Commons, or, if both committees were to be abolished and replaced by a single joint committee on the constitution, as you proposed, with that committee. It would be interesting to hear any thoughts you have on what that might mean in practice.

**Alex Thomas:** On the first of those questions, it would be hard for a centre of constitutional expertise worthy of the name not to cover most if not all of the areas you raised. It would be difficult to hive off devolution, say, because it is such a fundamental part of the wiring of the state and how the constitution works.

Equally, it would be important that it was not replicating the policy of departments working on those issues. This is a classic organisational design question for civil servants. Take something that is now in the local government department, such as voter ID or the electoral system. There are constitutional aspects to those things, clearly, but you do not want a centre of expertise just replicating the knowledge that exists in a line department. Part of its objective would be, as this committee and others do, to make the links and have sufficient expertise and knowledge about the constitutional aspects of those things so that you can, in effect, join the dots in terms of how government policy is being developed. You could see the advice from that unit being useful in the context of the Union and Constitution Cabinet committee because they are the people who think about how it all joins up, rather than individual policy areas.

On how that would relate to committees, I realised as you said it that the suggestion of abolishing this committee or joining it with a new one would be controversial, but this would, I hope, only strengthen it. Clearly,



the role of civil servants in public fora or parliamentary hearings needs to be managed fairly carefully, but I would not see a problem with there being a relationship between the centre for expertise in the Civil Service, the Cabinet Office or wherever and the clerks of a committee. The head of that unit could have a relationship with them, such as giving evidence alongside a Minister and being able to present in that way. That would be a useful dialogue, if that is what you were getting at with your question.

**Q15 Lord Anderson of Ipswich:** On the question of constitutional conventions, the difficulty is that nobody quite knows when they have stumbled across a constitutional issue. Is there anything to be said for that centre, or this committee, the equivalent committee in the Commons or both, producing a list of constitutional conventions? It would not have any statutory force, of course; none the less, it would be a checklist for people to have in mind when making laws, debating laws or holding the Government to account. In a sense, it might act as a trip-wire and alert people to the fact that dangerous territory is being reached. Do you think there is any benefit in that, or is this area so well understood by everybody that it is not needed?

**Alex Thomas:** It is definitely not well understood by everybody. There would be a benefit to it. The risk is that something gets missed off, or something emerges as a constitutional issue that is not on the list so everyone says, "It's fine because it's not on the august Lords Constitution Committee's list, so let's run amok". Such a list would need to be framed quite carefully. It would be important that it was not highly prescriptive and narrow, but more a case of saying, "These are the sorts of constitutional issues that emerge when these questions of governance are touched on". It would need to be broad enough. Whether you are a Minister, a civil servant or a parliamentarian, I do not think you can absent yourself from the judgment on whether something is a constitutional question; this goes partly to what Lord Falconer asked about. That is a long way of saying yes, I think a list is a good idea, but it could go wrong if it becomes exclusive.

**Lord Anderson of Ipswich:** It would have to be a running list.

**Q16 Baroness Goldie:** Not for the first time, Lord Falconer has stimulated my interest and made me think. At the moment, when Ministers present legislation to Parliament they have to confirm that, to the best of their belief, the legislation is compliant with the European Convention on Human Rights. So there is a continuing potential tension between the legal and the constitutional. Would it not help Parliament if the Government also had to produce some form of commentary on legislation's constitutional implications? It would not necessarily say, "This is constitutionally fine", but it might say, "This legislation raises constitutional issues".

**Alex Thomas:** It certainly would not hurt. This goes partly to the definitional question that Lord Anderson asked a moment ago: by what criteria do the Government decide something is a constitutional issue? I do not think it would hurt at all, as part of the set of material that the

Government prepare for legislation, that they present and reflect on the constitutional issues raised by a piece of legislation.

Thanks to debates like these, you end up preparing all sorts of bits of material in order to be able to introduce a Bill into Parliament. There is a risk that it becomes a tick-box exercise, where people say, "Okay, we need to do the impact assessment here, and we need to do this, that and the other". It can be less illuminating than it might be but, in principle, I do not think there is any harm in that. There could be some benefit.

**Baroness Goldie:** Therefore, would it be possible for the Lord Chancellor to be the gatekeeper who might offer that opinion? Or would things then become fuzzy, to use your word, because it would mix the legal roles with a constitutional comment?

**Alex Thomas:** If you were to have some kind of requirement to present a constitutional assessment of a Bill, say, before putting it in, it would get purchase in the system only if there was a ministerial lock on it in one way or another. It could be through the Parliamentary Business and Legislation Committee, which prepares the Bill, so that it will not sign off on legislation unless it is satisfied that the constitutional questions have been adequately addressed. It could be the chair of that committee, whoever it happens to be—for example the Leader of the House of Commons—or the Lord Chancellor but, for it to bite, you would need some kind of ministerial lock on it.

**The Chair:** That raises an interesting point, though. In a sense, if one was to reflect on legislation coming through the Commons to the Lords and there were references to constitutional implications, I suppose the supreme constitutional implication would be parliamentary sovereignty. If the Government had to say, "This is consistent with whatever", then you would be asking them to mark their own homework when they have decided that this is something they want to do, would you not?

**Alex Thomas:** That is why, ultimately, it has to be for Parliament to determine whether something is constitutional. On Baroness Goldie's question, I would not expect too much from a government statement on the constitutional issues raised by legislation. It would be useful in determining how the Government themselves saw legislation—it would, therefore, be a starting point for debate—but clearly that is ultimately for Parliament.

**The Chair:** This was precisely the issue we sought to address in our rule of law point—that we could only go so far. We now move on to more strategic thinking issues.

Q17 **Baroness Finn:** Thank you for coming, Mr Thomas. A fair amount of my question has been covered in questions previously raised. We have talked a lot about safeguarding the constitution, but this is more about the policy of the constitution, the strategic thinking that takes place in government and how this can be improved.

In 2016, this committee gave a report in which it identified, in rather

brilliant wording, an “absence of territorial statecraft”. It recommended that a senior Cabinet Minister should undertake such a role. The IfG’s excellent report from its Commission on the Centre of Government identified similar problems yet again. You referred to the merry-go-round of responsibility for policy on the constitution in different government departments and the commission put forward some recommendations to make the centre more strategic. What is your view on where strategic thinking on the constitution should sit within such a space?

**Alex Thomas:** It goes partly to the discussion we were having on the role of the Lord Chancellor on safeguarding, but it is on the policy side. I find it hard to see that sitting anywhere other than close to the centre, whether in the Cabinet Office as currently constituted or in No. 10. I absolutely see that if you moved the constitutional policy team from the Cabinet Office into the Ministry of Justice, say, and gave the Lord Chancellor a particular responsibility, that could work as well. I would not get too hung up on the institutional architecture but, as with so many things in government, there is an absence of strategic thinking about constitutional policy.

It is important that the function exists. Personally, I would keep it quite close to the centre, because constitutional issues are of fundamental import to the way government works, and it is ultimately the Prime Minister who determines ministerial responsibilities. The more important thing is that that function exists somewhere.

**Baroness Finn:** So you would keep it at the centre and create a specific role for it.

**Alex Thomas:** I would, yes.

Q18 **Lord Strathclyde:** We have discussed strategic thinking quite a lot. It has been a very useful and interesting discussion. On ad hoc versus strategic, I think you come down on the side of it being too ad hoc. I was particularly drawn by what Lord Burnett said about having a single Minister, the Lord Chancellor, playing a role. Of course, that was the ancient role of the Lord Chancellor when they were still in the House of Lords. I dare say that, if Lord Falconer became Lord Chancellor, that authority would immediately return to him and he would no doubt do it very well. Moving it to the House of Commons and making the role of Lord Chancellor competitive with other Cabinet Ministers was a mistake. Not requiring them to be legally qualified was also important. That would exclude me, of course, but that would probably be quite a good thing.

I have been wrestling with the very question that Lord Falconer asked about unlawful and unconstitutional. I do not follow the view that the Rwanda Bill was unconstitutional. I think the Prorogation was, ultimately, a terrible mistake, partly by the Supreme Court but certainly by the then Government who made that decision. There were other ways of fixing the problem that should have been done.

But is not the point about the constitution that so much of it is governed

by convention? Convention does not fall under unlawful. I am trying to think of a slightly ludicrous example. Imagine that the sovereign refused to sign a Bill; that would not be unlawful, but it would be wholly unconstitutional. Or a Prime Minister refused to resign after he or she lost a vote of confidence in the House of Commons; that would be deeply unconstitutional, and we recognise that. When you are wrestling with the answers to the Chair, I hope you will think on that.

You argued for a centre of excellence in the Cabinet Office, and I think that is the right place for it. There is a good dotted line to the Prime Minister and key decision-makers, but perhaps responsibility for it on a day-to-day basis should be with the Lord Chancellor. Clearly, a lot of work needs to be done on this, because we seem to have got into a bit of a muddle with piecemeal reform, a sense of uncertainty and a sense that it is all up for grabs—that nothing really matters that cannot be sorted out at a later date. Do you agree with that?

**Alex Thomas:** Yes, I do, and I should probably quit while I am ahead and stop there. That is the theme of this session. Yes, I do agree with that. On your first point, the only problem with Lord Falconer being appointed Lord Chancellor is that he would have to leave this committee, which would be a tragedy for all concerned. Everything is a trade-off.

You are helping me out with your examples. The unlawful and unconstitutional question is clearly interesting, and I and we will reflect more on it. But you prompted a thought, which I can share because it is fairly well-trodden territory, about the result of the 2017 general election when Theresa May lost her majority. I was Jeremy Heywood's PPS at that moment. In thinking about the unlawful and unconstitutional distinction, part of his job that morning was to go up the stairs to the flat in Downing Street to have a discussion with Theresa May over whether she could constitutionally form a government or not. He had that conversation, and she was clearly entitled to form a government and test the confidence of the House of Commons.

That is an example of the active working of the constitution, as nobody else was going to go up those stairs and say, "Yes, you can carry on Prime Minister", or, "You can have a go and try to form a government". That was Jeremy's job. Ultimately, whether she could carry on or not was obviously a political question and a constitutional question in the broadest sense. He embodied that residual authority, which gets to the strangeness of the Cabinet Secretary's job but, ultimately, the context as to whether she could carry on or not was political.

Anyway, I will reflect on these questions and think more on that. But to your fundamental question, yes.

**Baroness Finn:** Your answer just prompted me, because those constitutional questions are also taken in conversation with the palace, presumably. On Lord Strathclyde's point, I believe the sovereign can refuse a request to dissolve Parliament and call a general election. The principles that guided that were probably made up as they went along, at

the time, and are now part of convention in the Lascelles principles. I am wondering where the formulation of that came from. It is important to have that expertise at the centre to know where a convention came from, why it happened at the time and how it can be applied now.

**Alex Thomas:** I think a letter to the *Times* is in order on all these issues. Yes, you are clearly right: this is a mutable thing and a question of judgment. There are often no bright lines on those questions and subject to much debate among academics and others. I will not get into the intricacies of Lascelles, because there has been much debate and discussion about it, which I will inevitably get wrong. The point is that constitutional issues are hard to define, but you will know it when you see it. That is why expertise in this room and in government is important; it is often a question of advice and judgment, not a bright-line issue.

Q19 **Lord Falconer of Thoroton:** This bit of the question is about the lack of strategic focus on the constitution. I understand your answers about somebody having to give the Prime Minister advice when something like the 2017 election occurs.

In the Institute for Government's report of March 2024 on the centre of government, you said, in effect, that there is a lack of strategic thinking. Does that apply to the constitution? What do we mean by "strategic thinking" about the constitution? That is different from there being somebody available to raise very important constitutional issues, such as whether you can form a Government after a general election with the PM. What are you referring to when you refer to a lack of strategic drive in relation to the constitution at the centre of government?

**Alex Thomas:** In that report, we referred more generally to a lack of strategic focus at the centre, and around the Prime Minister in particular, and to the fact that not having a well-defined strategy does not mean that you do not have a strategy but that you chose for it to be ad hoc, to subcontract it to the Treasury or lots of other arguments. It is, as ever, a really interesting question on the constitution. It is hard. You could have a strategic view of constitutional policy changes, as Nick Clegg no doubt would argue he had on coming into government and being responsible for the constitution in 2010. I am not sure that you can have a strategic view of safeguarding the constitutional rules of the game.

That comes back to some of our earlier discussions. It is about the knitting together of constitutional or semi-constitutional changes. To take a specific example, how does the introduction of votes at 16 knit together with voter ID? How do the questions around the advice you give a Prime Minister after a general election fit with a confidence and supply arrangement that gets into constitutional questions about who has access to information in government? It is all that sort of stuff. It is not strategic as in having a long-term plan for the direction of the constitution. I suppose holistic might be a better word, so that you understand the completeness and that if you pull one thing out here then something else will happen over there.

**Q20 The Chair:** I have two points. Taking that strategic thinking point, in our report on the union and devolution we identified, just in that area, what we referred to as an “absence of territorial statecraft”—statecraft is often a substitute for strategic thinking—and suggested more strategic thinking. That will probably come up when we come to the Council of the Nations and Regions, because that is the sort of thing we are thinking about. A lot is happening, but it is difficult to see the subtle strategic context in which the Government are proceeding on this.

To go back to Lord Strathclyde’s point that we do not have a written constitution, to this long list of questions we are asking you to take away and reflect on could I add whether you or the Institute for Government see any value in putting some principles in legislation to guide executive and government decision-making on constitutional issues.

**Alex Thomas:** There is value in that, as long as it is done quite carefully. You are skirting around the edge of written constitutions and things like that. Speaking personally, I will take the opportunity to say that I do not think that a written constitution would be a good idea. It is often a vehicle for people who have views about particular changes that should be made to the constitution, and it would open up all sorts of questions. But that is just a personal view.

One of the lessons we can learn from a period when the constitution has been under some stress over the last let us say 10 years, to pick a date, is that there is value to certain specific underpinnings, sometimes in statute, that give guidance on and set certain requirements around how Governments should act in certain circumstances.

One reason why we have argued for the Civil Service to have more of its functions set out more clearly on a statutory basis is to underpin some of these questions more clearly. I am struck that during the Johnson Government, through 2020 at least—I think it evolved in different iterations—who did not consider themselves bound by constitutional norms or other norms, it was useful in certain circumstances for certain things to be set out in statute.

I have given evidence to this committee before on the appointment and dismissal of Permanent Secretaries and the value of the Civil Service Commission having a statutory underpinning in the Constitutional Reform and Governance Act 2010 through that period. There is value in setting out some of those points in statute in quite a targeted way, not least because then, if a Government want to change them, you can have a full debate around it and process rather than the whim of the Prime Minister or the Prime Minister’s adviser.

**The Chair:** I am reflecting back on when we looked at the law officers. We were able to list their responsibilities and a hierarchy, and state that their first duty was to the rule of law and courts and their second was to the Cabinet. Those sort of things are quite important.

**Q21 Lord Falconer of Thoroton:** You just said that, up to 2020, the Government did not regard themselves as governed by constitutional

norms. That was a period when you were in government.

**Alex Thomas:** I left at the end of 2019.

**Lord Falconer of Thoroton:** What is the basis of your saying that the Government did not regard themselves as governed by constitutional norms?

**Alex Thomas:** For understandable reasons in one sense, as they thought their first duty was to implement the result of the EU referendum and to push that through Parliament, I do not think the Johnson Government, Dominic Cummings and others considered their first duty to be to follow constitutional norms.

**Lord Falconer of Thoroton:** Give us some evidence of this. Did they feel able to govern without complying with the constitution?

**Alex Thomas:** It came back to bite them in some respects. We talked about Prorogation and some of the statements they made about whether to request an extension to the UK's membership of the European Union, even though the legislation had passed. In the context of a Government working to that end and acting in that way, having certain constitutional underpinnings in statute is of benefit.

Q22 **Lord Beith:** Is the case for some further mechanisms, whether setting things in statute or other methods, strengthened by what happens in a crisis? You could say that Brexit was itself a crisis, but Covid was another. Let us take two examples. The Government made constitutional decisions with constitutional implications that might have extended beyond the Covid period itself. For example, they brought devolved Government Ministers into COBRA and then took them out again. Those are two constitutional decisions, which you could argue the merits of either way, but they were clearly constitutional in directly involving devolved Government Ministers in the processes of UK Government.

Then, of course, there was the practice of using secondary legislation in ways that had barely been contemplated before. On that basis, orders were sometimes already obsolete by the time they reached Parliament or even by the time they were printed. The institute did some work on this, which was helpful. Does that all mean that we have to find some other mechanisms?

**Alex Thomas:** The constitution needs to be able to operate in a crisis, and doing something properly constitutionally should not always mean slowly or entirely reactively. The constitution needs to be resilient enough to deal with that. I am not sure that inviting devolved Administration Ministers to COBRA was a constitutional question. That happens quite a lot, depending on the nature of the issue: if you have flooding in Scotland that crosses the border into England you might invite the relevant Minister from the Scottish Government. That was quite a practical question rather than a constitutional one. The wisdom of then disinviting them could be debated.

Your legislative point is obviously very important. It was notable during Covid that the Government did not use the Civil Contingencies Act but used pre-existing health legislation and new regulations, and took some very wide powers, lots of which were never exercised.

The fact that in a crisis like that the Government did not reach for the Civil Contingencies Act—I have some sympathy with that; I understand that to some extent the Civil Contingencies Act is “break glass only in a real, real emergency, and if there is no alternative”—but it suggests that there is something not fit for purpose in the underpinning legislative structures that allow the Government to take necessary but overwhelming executive action at times without a check. We got ourselves into a bit of a tangle on the legislation on Covid. That suggests that the statute book is not right at the moment for giving the Government the power they need to act but also parliamentary scrutiny to keep a check on it.

**Lord Beith:** What seems to have survived from that period, primarily because it is a kind of exculpation, is the belief that you cannot really do these constitutional things in a crisis; you just have to take shortcuts and ignore normal procedure. Can we do anything to reassert the principles and the fact they should be upheld even in a crisis because they can be upheld speedily?

**Alex Thomas:** Yes. Demonstrating that that is possible is right, as well as a reflection on what worked and what did not. Aside from the principle, there is a real utility for Governments to act constitutionally, particularly when under stress and in that crisis, because it is the means by which their actions are legitimate. Governments should not want to give ammunition to their critics by acting in ways that are out with the normal processes. One of the advantages of our constitution is that it is pretty flexible, but equally, to go back to where we started, that imposes a responsibility on Ministers to understand it and act in a way that is defensible in this place and elsewhere.

**The Chair:** On that particular point, our report on Covid and rule of law issues picked up the fact that the moment we went to the Public Health Act meant it would trigger all sorts of issues. The other big issue was the rule of law, because there was confusion between guidance and requirements. Quite a few people were prosecuted through magistrates’ courts using guidance, which had to be unravelled. All our evidence on this is on record. There was a serious issue of ordinary citizens being pursued for something that was guidance and not a requirement.

**Alex Thomas:** It goes back to the relevance to people’s lives of the decisions that Governments take: the fact that what appears arcane one day is highly, tangibly relevant to people’s lives the next.

**The Chair:** Yes. It would have been quite worrying at the time.

**Lord Anderson of Ipswich:** On the face of it, a pandemic is a civil contingency within the meaning of the Act. Might one reason why the Act



was not used during Covid have been connected with the fact that, in exchange for the very broad powers it gave the Government to govern by statutory instrument, it also gave Parliament the power to amend those statutory instruments—a power that, of course, it did not have under the Public Health Act?

**Alex Thomas:** Yes, it might. That is a very good point. Certainly when I was in government it was emphasised and re-emphasised that the CCA is there but not to touch it and that it is not to be used. In the conversations I had around the time, the primary motivation early doors was that we have public health legislation so we would not touch the CCA. We had pandemic flu regulations on the shelf that we could relatively straightforwardly adapt. The perceived benefits for the Government of parliamentary oversight not being as strong emerged over time. I might be wrong about that, but I certainly think that a failure in the legislative structure was that the means by which the Government enacted those decisions did not have sufficient oversight or check from Parliament because of the way they did it, and the expansion of the secondary legislation part of the statute book that it helped to accelerate.

Q23 **Lord Keen of Elie:** Good morning, Mr Thomas. You have already discussed at some length the case for strengthening the role of a Minister for the Constitution and the need for strategic oversight of constitutional matters in government. Would you agree that we require not only oversight but control in that context?

**Alex Thomas:** Yes, I think that is fair.

**Lord Keen of Elie:** Coming back to your original categorisation, you referred, first, to policy reform and change and, secondly, to safeguarding. Ultimately, as you pointed out, safeguarding of the constitution rests with the Prime Minister, but that same Prime Minister may be politically inspired to carry out reform and change, with the result that, to take Baroness Drake's observation, he ends up marking his own homework. That is because we are perhaps very far from Montesquieu's model so far as the separation of powers is concerned. Would you agree that there is perhaps a need for some further constitutional check so that this confusion or merging of roles can be the subject of proper scrutiny?

**Alex Thomas:** In the British system, the Prime Minister does an awful lot of marking their own homework for precisely the reasons you say, so I do not think it is particularly unusual, although clearly the elevated status of constitutional questions means that there is a particular potency to the Prime Minister doing that. The other area where, in recent years, we have talked a lot about the Prime Minister marking their own homework is ethics violations or other questions that might impinge on a Prime Minister's personal interest. That is clearly a question there.

In the same way, to extend the ethics comparison, over time we have developed, and the Prime Minister has, an independent adviser on ethical questions. There is a value to something similar existing for constitutional questions. You could not set it up in quite the same way, and clearly how

the Prime Minister took those decisions would ultimately be a question for them in running their Government, but it goes to what we were saying about a centre of expertise or a Cabinet committee. To have a way that, in particular, scrutiny by Parliament could dock into the system to question the Prime Minister or other Ministers on what sort of conversations they had around precisely these sorts of constitutional questions would be of value, yes.

**Lord Keen of Elie:** The difficulty with it being a matter of scrutiny by Parliament is perhaps the control that the Executive, in the form of the Prime Minister, is able to exercise over the legislature, particularly in circumstances where he may have a very large majority in the House of Commons. Would you agree?

**Alex Thomas:** Yes. Of course, that is a much bigger question.

**Lord Keen of Elie:** Of course. But if we take what you referred to as the elevated issues of the constitution, we have a situation in which, for example, a Prime Minister might decide to remove 100 Members of the legislature, in the form of the House of Lords, and simply replace them with 100 persons of his own choosing. At the moment, that falls within what might be regarded as our constitutional norms.

**Alex Thomas:** Yes.

**Lord Keen of Elie:** Is there not a case, however, for introducing some sort of apolitical filter to try to control as well as scrutinise these constitutional matters? For example, would it make sense, where the Executive propose a major constitutional change, that that matter should go to a royal commission so that you have some sort of apolitical filter before that matter is taken through the legislature itself?

**Alex Thomas:** I get a bit twitchy when people talk about apolitical filters or oversights on these sorts of questions, because they are so fundamentally political. There is often a strong case for a forum, whether parliamentary or otherwise, for reflection, for cooling, and for consideration of issues, whether it is pre-legislative scrutiny, some kind of commission, or whatever.

I do not think you can take the political out of most of these questions. There is a risk of partisan debate around constitutional questions being transacted by other means depending on the members of a royal commission or whatever. While the gaps in Parliament's ability to govern its own time and scrutinise the Executive are entirely well made, and I agree with them, I am not sure that the solution is to take it out of the political or parliamentary process in the way that you suggest.

Q24 **Lord Keen of Elie:** In the event that you want to introduce legislation that will impact on our constitutional position, would it at least make sense to introduce it initially by way of a Green Paper or a White Paper so that it can be the subject of wider discussion and debate?

**Alex Thomas:** That is always good. Thinking back to my time from 2010 to 2015, there were pieces of legislation that, because of a perception of timing imperatives, went into Parliament very quickly. There were others that had Green Papers and more pre-legislative scrutiny, and the legislation that came out at the other end tended to be better and longer lasting. That should happen wherever possible, although I think Governments will always want to retain the ability to act and legislate immediately.

**Lord Keen of Elie:** But in the area of constitutional change, presumably you would agree that we should seek legislation that is better and long lasting.

**Alex Thomas:** Yes, I certainly agree with that.

Q25 **Lord Falconer of Thoroton:** We have been blithely saying that the Prime Minister is responsible for the constitution, and in one sense he is because he is the head of the Government. I am looking at the government website. It says that "The Prime Minister is the leader of His Majesty's Government and is ultimately responsible for the policy and decisions" of the United Kingdom Government. It does not refer to the constitution at all in any of its descriptions. Why are we all saying he is responsible for the constitution, beyond him being the leader of the Government?

**Alex Thomas:** Because I think he is. I am sure it does not say it on the government website. In fact, I am sure it says that Nick Thomas-Symonds is the Minister for the Constitution and responsible for advising on the constitution. I am sure there are other references to that in other Ministers' jobs. Nevertheless, I think it is the Prime Minister who is responsible.

**Lord Falconer of Thoroton:** More than he is responsible for the health or defence of the nation?

**Alex Thomas:** There is always a risk, for the person who is interested in the constitution, that everything looks like a constitutional question, but there is a particular responsibility on the Prime Minister for the rules of the game. I think that is an elevated responsibility, but I say that with humility to those who care a lot about the health service, the education service or whatever.

**The Chair:** Lord Keen's question reminded me—again, it is on record—of the occasion when we heard from the President of the Supreme Court, who referenced the MP who said that a decision of the Supreme Court against the Government is a decision against Parliament. As the President said, the role of the Supreme Court is to protect parliamentary sovereignty. It is quite an interesting illustration of the point that was being made.

Sorry, I distracted myself with my own comment. We move on to the executive oversight arrangements for the emerging Council of the Nations and Regions.

**Q26 Lord Thomas of Gresford:** Gordon Brown, when he produced his report, suggested a council of the nations and regions “to promote co-operation and facilitate joint working between different levels of government in the UK as a whole and within England”. We have a council that is very disparate in its organisation. It does not cover the whole of England. It has mayors from England but not from Scotland or Wales, all with different powers and different responsibilities. Can you tell us how you see this fitting within the constitutional arrangements of the country?

**Alex Thomas:** It will be interesting to see how it develops. Having that disparate set of characters, responsibilities and powers simply reflects the reality as it exists in our current devolution settlement, so I have some sympathy with the constitution of that council. The basic answer is that it still seems too early to tell exactly how this Government will use it: will it be a talking shop, or will it have purchase on decisions that are made?

One of the things that will be particularly interesting, although it is not my particular area of expertise, is the extent to which it is used as a vehicle for comparison and alignment between the very different devolution settlements in Scotland, Wales and Northern Ireland and devolution settlements in England. Will it be a driver of coherence or a co-ordination mechanism? A lot of that will depend on what the Labour Government intend to do with further devolution in England. It is one to watch, but the way of these things is that three times out of five, or seven times out of 10, they are useful co-ordination mechanisms that have a life for a period and then fade into the background, but it is at least possible that this could become a core part of the co-ordination and governance arrangements for the UK.

**Lord Thomas of Gresford:** So how would you see it helping the Government to achieve their strategic aims?

**Alex Thomas:** There are at least two aspects to it. One is by being the means by which the Government can co-ordinate and test out their policies on devolution and others, so it is a means of consulting on and then transacting activities the Government want to undertake, and the other—I say this with caution—is by acting as a means for greater coherence, particularly across England. I do not yet have a clear sense of exactly where the Government want to go on that, although there seems to be something of a drive towards more coherence.

**Q27 Lord Thomas of Gresford:** Until recently we had a position where the Parliaments in Wales, Scotland and England all had different political parties in charge, and a certain amount of publicity was given to the failures in one particular area, one particular devolved Government, and not in another, and so on. Do you think it would help to resolve that sort of problem?

**Alex Thomas:** It is interesting that Ben Houchen, as a Conservative mayor, has been participating in some of these conversations. If the Government are approaching it in that bipartisan way, it will be a useful bridge across them, although history would suggest that politics often

trumps some of the best intentions of those things. It will depend how it evolves. It could become fractured and fragmented, but for as long as it is seen as in the interests of all those different actors to participate, it is a good thing.

**Lord Thomas of Gresford:** The first meeting, so we gather from the minutes, was really about using the recent conference involving overseas investment in this country. How could it possibly help in that regard?

**Alex Thomas:** As a means of helping to consult on and then to determine how government policies might be directed. It can help to inform government policy. What we have not yet seen is whether it is an active group that is able to take and agree decisions that bind. My suspicion is that that would be quite difficult, and that it will be more of a filter and consultative forum for government policies.

That is useful, and no small thing in and of itself. We will see. Greater political coherence probably helps the ability to reach decisions, but equally, as politicians strive to get elected or re-elected, and at times when it helps to differentiate yourself from what might be going on at the national level, I suspect we will see that council come under more strain.

**Lord Thomas of Gresford:** Are you optimistic?

**Alex Thomas:** I am always optimistic. I think it is a good start, but all these things always take sustained political capital and attention to work. There is always a risk, as the weight of government activity stacks up or as personalities or Ministers change, that something that is launched with high hopes fades into the background. I hope that does not happen, but we will see. It will require sustained political energy for it to work.

Q28 **Lord Beith:** I want to ask you about the interests of England. There are different interests in different parts of England and different structures of government, but there are some circumstances in these processes where the interests of England need to be represented in some way. It may be that a particular policy pursued in the Scottish health service has big implications for the English health service, for example. In your experience and your assessment of the system, do United Kingdom Ministers understand that some of the time they are resolving United Kingdom matters and what is in the interest of the UK as a whole, and some of the time they are supposed to advance English interests in competition, perhaps, or in discussion with how Scotland, Wales and Northern Ireland see and represent their interests in these processes?

**Alex Thomas:** I think that generally they do, but it goes to the oddities and ambiguities of our constitutional settlement and the fact that it is a highly mixed economy in terms of government decision-making. Inside the system, Ministers do get that. Sometimes, as always happens with fallible humans, the right language is not used or the right phrase does not come out of a Minister's or an official's mouth, but I think it is fairly well understood, which does not make it any less complicated, difficult or

confused when it comes to the substance of the questions that Ministers grapple with.

**Lord Beith:** Does the new machinery need any refinement to cover this point, or are you hopeful, as you were a moment ago, that it too can be accommodated?

**Alex Thomas:** I am hopeful. One of the useful things in recent years has been the focus and attention given to intergovernmental relations, as the jargon has it. Its strength and effectiveness have waxed and waned over the last, say, 10 years, but I think we are in a moment where it is being taken quite seriously. It moved to the local government department under Michael Gove and has now moved back to the Cabinet Office. This possibly reflects my centralising instincts, which I was talking about with Baroness Finn, but I think that is the right place for it to be: near the centre of government, so that it can have a locus across all of the rest of government rather than being in one department. It was fine for it to move with Michael Gove because it was a particular interest of his, but it now makes sense for it to be back in the centre.

However, as with my answer to Lord Thomas, it requires sustained political engagement. I have certainly been in my share of discussions where a phantom meeting continues long after political engagement has passed on. There is a performative element to it. It requires senior-level ministerial engagement to actually make these structures work.

**Lord Beith:** Phantom meetings persist long after ministerial engagement ceases: is that what you said?

**Alex Thomas:** Something like that.

Q29 **Lord Foulkes of Cumnock:** You have been very kind and generous to the Government in what you have said about the Council of the Nations and Regions. I put it to you that there are four major problems with it. The first is the one Lord Beith has just been dealing with: the interests of England as a whole are not taken account of. Secondly, and separate to that, there are regions of England that are not represented in any way at all. Thirdly, John Swinney rather arrogantly said that Scotland is a country, not a county. We know that, but you understand what he was getting at there. Fourthly, Glasgow said that other cities are being represented but it is not.

The problem is we do not have a coherent structure. Surely the first priority is to get a coherent structure of devolution within England so that the whole of England—all the English regions—are represented, and then we can bring that together with Scotland, Wales and Northern Ireland into some kind of council. At the moment, it is neither one thing nor the other; it is a mixture.

**Alex Thomas:** I agree that that is a very good first priority, but if that is your first priority you will be waiting quite a long time for the first meeting. All four of your points are entirely correct and true. I agree with a lot of them, but my kindness to the Council of the Nations and Regions

is that it reflects the constitutional reality as it exists today. There is a value to that meeting and discussion happening, despite the gaps and flaws in the underlying settlement. I entirely recognise that that leaves lots of ambiguities and lacunae, people left unrepresented, and a false equivalence between Scotland and a city or a region of the UK, but I have sympathy with a Government who are trying to find some kind of mechanism to make things work as they are while pursuing their policy agenda on devolution. I do not think the best should be the enemy of the good in these kinds of situations.

**Lord Foulkes of Cumnock:** I understand that, and I have sympathy as well, because they have inherited a mess of devolution within England from the previous Government. That is one of the many bad inheritances. How will it relate to the existing Prime Minister and Heads of Devolved Governments Council, for example?

**Alex Thomas:** We will see. I do not know the answer to these institutional relations questions. One of the things that will determine the success of this council is whether it finds its place in that governance architecture. It could just be a talking shop, as we said earlier, or it could be a very useful way of circulating, consulting and informing decisions, but it needs to dock into the existing intergovernmental relationships. The Government are thinking about it at different tiers: the Prime Minister level, the departmental level, and then—. I will try to remember the different levels. I will check my notes in a moment. The Government seem to be developing a sense of where these different things dock in, but I am entirely unclear so far as to whether that will work.

**Lord Foulkes of Cumnock:** Do you think the first meeting was successful?

**Alex Thomas:** I think it was successful on the Government's own terms. I would have thought they would be tolerably pleased with how it was perceived. I am not sure we have got to the questions of substance yet. The test will be in subsequent discussions and what actually comes out of out of them.

**Lord Foulkes of Cumnock:** If there is to be this council of governing bodies—the UK Government, devolved Governments and councils—what about Parliaments? Should there be a meeting of Parliaments' representatives?

**Alex Thomas:** I think it would be very interesting, and presumably for the Parliaments to organise. I do not think that would be a bad thing at all.

**Lord Foulkes of Cumnock:** And this could be co-ordinated by, let us say, a Senedd constitution committee bringing together representatives of the House of Commons PACAC and the devolved Parliaments' committees. Would that be a sensible start?

**Alex Thomas:** I think so. I will reflect on it and pass on any further thoughts, particularly from colleagues at the IfG who are close to some of these things.

**Lord Foulkes of Cumnock:** It would be really good if you could let us have some thoughts on it.

**Alex Thomas:** On the three tiers of engagement, to your question about the Prime Minister, there is Prime Minister level engagement, then interministerial cross-cutting engagement, and then groups within departments at those levels. I think the Government are conceiving of it as those three levels, so there is a Prime Minister/First Minister level, cross-ministerial engagement, and then engagement within departments on particular policy and other questions.

**Lord Foulkes of Cumnock:** Thank you. That has been very helpful.

Q30 **Lord Falconer of Thoroton:** Following up on what Lord Foulkes was saying, the striking thing is that there is no structure in the way that there was a structure at executive, ministerial and parliamentary level in relation to the perpetual engagement that we had in the European Union. The consequence of there being no structure is that there is often no contact on a whole range of issues. Is there anything we can learn from the structures we set up to recognise that we were constantly dealing with the European Union in a variety of ways?

**Alex Thomas:** It is an interesting thought. I think the Government would say that there were structures and there is contact. As I said, intergovernmental relations have been taken more seriously over the last few years. To your point: why did we take the structures of engagement with the European Union so seriously? It was because it mattered and there was a locus: the decisions that came out were binding and would affect us. Again, it is a slightly unfair caricature but the difference between a talking shop and an actual executive meeting that makes decisions is the power and authority that those decisions have. If the Government—or Governments and others across the UK—wanted to bind themselves into meetings that would have decisions that were binding on them, the arrangements would be taken more seriously. One of the challenges that Ministers and officials have had in setting up intergovernmental structures that really take hold is that no one wants to make them decision-making meetings.

**Lord Falconer of Thoroton:** They do not have an effect in terms of Scotland, Northern Ireland and Wales on the UK, save possibly in relation to common frameworks, but they do have an effect going out from the UK Government and the UK Parliament in many respects. Presumably the devolved Administrations would be keen on such structuralised arrangements, but the UK Government are not that interested.

**Alex Thomas:** Do you mean UK foreign policy?

**Lord Falconer of Thoroton:** No. If the UK Parliament or the UK Executive want to do something, it will tend to have an effect on Scotland



and Wales more often than anything that Edinburgh, Belfast or Cardiff does has any effect on England, so the people who would be most interested in this structure would be the devolved Administrations.

**Alex Thomas:** If it is going in that direction. Governments at all levels have quite jealously guarded their powers and space on that, so they have not wanted, whether at the UK level or at the level of Scotland or Wales, to give up their space on that.

**Lord Falconer of Thoroton:** These arrangements do not need to be binding. We had a quite complicated structure in government whereby we were constantly talking to Europe about what was coming down the pipe. There were decision-making structures, but we knew internally within government what we had to clear, and we had structures whereby if we wanted to make points in European councils we had to make them. If a department wanted to be effective in making changes that were delivered by European legislation, it had to have structures that allowed it to lobby people within Europe, et cetera. There were a lot of pretty well-established structures whereby the Government recognised that they were constantly engaged all the time, and there just are not those mechanisms here.

**Alex Thomas:** I see that, and I agree that more entrenched and thicker contact on intergovernmental relations is an unambiguously good thing. That would be good. While progress has been made, there is more to do. The observation I made was that the seriousness with which these kinds of fora are taken is ultimately based on the consequences of the discussions that happen there.

**Lord Falconer of Thoroton:** It would vary from department to department. For example, the Ministry of Justice has dealings with what goes on in Wales but not in Scotland, while other departments have very intense conversations. Who would drive it if there were to be thicker arrangements, as you put it?

**Alex Thomas:** To your point, I spent a decent chunk of time working in Defra. There were a lot of discussions on agricultural and environmental questions across the border. If it was on animal health we talked to our counterparts and colleagues in Scotland and Wales in particular, because it was a single contiguous animal health area. It is driven by the reality of the policy on the ground. Who would drive it and be a thicker contact? That is one reason why it is a good thing that the intergovernmental relations went back into the Cabinet Office, because it comes from the centre. Ultimately, I suppose, it is for Pat McFadden, as the senior Minister in the Cabinet Office, to set out to his colleagues why this is so important and to develop and build the architecture that already exists.

Q31 **The Chair:** Thank you. Let us go back to Lord Foulkes' questions, because I know this is an issue of concern, particularly for colleagues who have experience of Scotland, Wales and Northern Ireland. This council has two aims. One is growth and economic regeneration, which is urgent, and the Government want to get ahead with doing it across the UK. The

other is renewing our democracy.

So you are doing two things, one of which is policy and pragmatic—"let's go for growth; let's regenerate the economy"—and the other is adding to that the opportunity to renew our democracy. Looking at renewing our democracy, what the issues are and where the tensions are for intergovernmental relations between national and devolved government is well documented—we have just produced a report with some more recommendations, whether it is Sewel, common frameworks, consent, quality of dialogue, cultural attitudes or whatever—but in a sense the map is not written in England, so how will the Government move on devolving it?

I do not want to get into a discussion on what the Government should or should not do, but given that this is the route they have chosen, what constitutional challenges may emerge quite quickly from what you have seen so far? Also, from what we know of the existing governance around this, where we have three Ministers—Ms Rayner, Mr Thomas-Symons and Mr McFadden—and four if you count the Prime Minister, what can you say about the effectiveness of that for dealing with the renewing democracy challenge? That is rather than inviting you to say what you think about the policy itself.

**Alex Thomas:** Those are big questions, and I feel I am skirting at the edges of my knowledge.

**The Chair:** You can take them away and think about them.

**Alex Thomas:** I will, as with other questions. Clearly, as with so much else in government—and I make the point on Budget Day—money will be a huge part of that. There are well-established means of distributing money to Scotland and Wales, but the question is the extent to which those discussions will be able to influence the Treasury and decisions about the allocation of money, seed-corn funding or whatever on the investment side. The Treasury will want that to be completely separate from these conversations but, partly to Lord Falconer's point, if they are to be meaningful they need to be able to at least influence the decisions that are made in government on money.

The other constitutional questions coming down the road are the ones that Lord Foulkes and others raised on completing the map and how the Government want to proceed on that. I touched on this a bit earlier: there is a really interesting question about how far they see convergence between the powers and responsibilities of different areas of England, and how that links to the settlements in Scotland and Wales in particular. Is this a vehicle for convergence or for co-ordination? Those are some of the points that I touched on in reply to Lord Thomas. As with all Governments, but it may be particularly acute in this one, there is a top-down/bottom-up question: if you are serious about devolution but you also have a programme of change and policies that you want to pursue across the country, how will this Government settle on, and what is their view on, the balance between setting direction from central government in its broadest sense and giving up powers?

On your question on ministerial responsibilities, it is often messy in government. I do not think there is anything intrinsically wrong with saying that questions of English devolution are being dealt with by Angela Rayner in her department and that questions of constitution and democracy are managed in the Cabinet Office. The question will be the extent to which the Cabinet committee—the Union and Constitution Committee—can cohere and, to go back to the strategic word again, set a clear strategy for what the Government want to do overall. That is why this inquiry is well timed: it feels too early to know the success of that, but it is the right time to make recommendations about its importance.

**Lord Thomas of Gresford:** If the council were to be a forum for discussing how money is to be shared out, it would become very much more central and everybody would take an interest. There is always talk of reforming the Barnett formula, for example. If discussions for whether HS2 money should go to Wales became an issue in the council then everybody would focus on it and that would be a way of giving it status and importance, would it not?

**Alex Thomas:** I can hear the wails from the Treasury coming across the park. Yes, it would. One of the tests of the seriousness with which the Government will take these bits of the architecture is the extent to which they can influence that. It comes right back to the point that people will take it seriously if there are serious decisions to be made.

**The Chair:** That is over two hours of solid questions and we have not given you thinking time either, so well done.

**Alex Thomas:** What a workout. Thank you.

**The Chair:** Go and have your favourite coffee and chill out somewhere. The value of your contribution, as ever, is to help us structure our thinking, even to the point of inviting excitable acclamations on this occasion. We have various questions that we want to follow up with you so Rachel, as clerk to the committee, will follow up on that. As ever, thank you very much indeed.