HOUSE OF LORDS

Constitution Committee

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

Wednesday 4 December 2024

10.20 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; Baroness Goldie; Lord Keen of Elie; Lord Strathclyde; Lord Thomas of Gresford.

Evidence Session No. 4 Heard in Public Questions 89 - 107

Witness

I: Lord Sedwill GCMG, Former Cabinet Secretary and National Security Adviser, UK Government.

Examination of witness

Lord Sedwill.

Q89 **The Chair:** Good morning, everyone. This morning, the Constitution Committee will be taking oral evidence on its inquiry into the executive oversight and responsibility for the UK constitution from Lord Sedwill, former Cabinet Secretary and National Security Adviser. Thank you for agreeing to join us this morning. Hopefully you have had an indication of our area of interest in the questions we want to put.

Lord Sedwill: I am pleased to be with you, and thank you for that.

The Chair: If you are content, unless you would like to make an opening statement, we will move straight into the questions because we have a time constraint. Are you happy to do that?

Lord Sedwill: Of course.

Q90 **The Chair:** Maybe I can open with a more general question. Having regard to the two distinct functions around the constitution, constitutional policy and constitutional stewardship, could you share your views with us as to the role of the Cabinet Secretary and the Civil Service more broadly in both safeguarding that constitution and advising on constitutional reform?

Lord Sedwill: First, thank you for the opportunity to speak to you this morning. This is an important inquiry. I am pleased to be able to contribute to it, and I can do so again if you have any further questions as you have taken further evidence.

On constitutional policy, the short answer is that it is treated like any other area of policy. If a Government have a manifesto or wish to address certain questions with constitutional elements—the two referendums in 2014 and 2016, devolution settlements, all those issues that broadly speaking are part of the constitution and certainly fit within the committee's definition of the constitution—will be advised on, as in any other area. The Civil Service will draw on expertise from elsewhere—internal expertise, legal advice, and so on—in giving Ministers advice, including on what the second-order consequences of any particular reform might be.

I presume that right now—obviously I am no longer directly involved—that will be happening over the proposal to remove the hereditary Peers from the House of Lords. That is clearly a matter on which there is a manifesto commitment, but there are also constitutional questions about what that means for a wholly appointed House, for numbers and that kind of thing. All of that will be in the Civil Service advice to Ministers, and, as you probably heard from Pat McFadden, the Chancellor of the Duchy of Lancaster, they will be taking advice from other sources as well.

The constitutional stewardship is an interesting question and is somewhat different. You had a range of different contributions on that. Certainly the

Cabinet Secretary has a pivotal role in that, particularly in times of pressure. Sometimes there are almost direct responsibilities that one might describe as constitutional. During the 2019 election, for example, I had to rule on a couple of issues—fortunately for me, but coincidentally, one in favour of the Government and one in favour of the Opposition, about the use of information et cetera during an election campaign. In theory, one is exercising that responsibility on behalf of the Prime Minister. He could have overruled me, but in practice the Cabinet Secretary in those circumstances is making the decision.

There are other questions where, in the end, as I think we have heard from others, the Prime Minister, as the First Minister to the sovereign, bears the fundamental responsibility. Certainly during some of the tension points in my time as Cabinet Secretary, which coincided with Brexit and Covid, I talked to the then Attorney-General about this. The shorthand we agreed was that he was essentially responsible for advice on constitutional law or the legal elements relating to the constitution, given that we do not have a constitution, and I was responsible for the constitutional conventions. We had to try to understand both those perspectives and bring that advice together.

Q91 **The Chair:** As you say, we do not have a codified constitution, so there is always a debate about what precisely is covered by the constitution. This committee's working definition of the constitution is that there are five basic tenets of the United Kingdom constitution: 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, EU and other international organisations. Obviously, the EU is not a relevant point. Do you think that is a fair and reasonably accurate capture of the five basic tenets of the United Kingdom constitution, or have we missed something?

Lord Sedwill: No, I think it is fair, and I agree with that definition. Obviously, having left the European Union, the fifth element has a less direct impact, because a very important part of our legal and constitutional system was the application of European Union law, so that is now less significant than it was. Also, one might say that the rule of law point encompasses international law; you have a couple of very distinguished jurists on your committee who will take a view on that.

But, fundamentally, I think you are right. As long as one recognises the subtleties within that, it is the Crown in Parliament. There are some constitutional roles where the role of the sovereign as Head of State has some reserve responsibilities. So it is not just the Crown in the sense of the Government notionally representing the Crown, but there are some subtleties within that. As long as all that is understood, that is a good definition.

Q92 **The Chair:** We will come later to constitutional stewardship during periods of stress and where advice is not taken. On a more general level, do you think there is sufficient expertise within the Civil Service for the safeguarding function to operate effectively?

Lord Sedwill: Yes, but I do not think it is just within the Civil Service. We have a team in the Cabinet Office, usually, that has that responsibility and has the same expertise in that as civil servants in the Department of Health would have on health issues and so on.

Certainly, in terms of my responsibilities, where I was having to think about the relationship between the various constitutional conventions, as well as when I was dealing with some of these tension points, I found it useful, given that we do not have a written codified constitution—well, a lot of it is written; it is written in lots of different places, but not all of it is—to go beyond the Civil Service.

I had good expertise in the Civil Service, and I am also an amateur constitutional historian. I will give you a concrete example, which we may come to. When, as Prime Minister, Boris Johnson had to go into intensive care and was therefore unable to perform the functions of Prime Minister—we also, of course, had to consider what might happen had the worst happened and he was the first Prime Minister in a very long time to die in office—I talked to various constitutional historians about what had happened under Bonar Law, when Churchill had his stroke, Macmillan's illness in 1963, et cetera. Our constitutional conventions, rather like the common law, are essentially built on precedent, so having external expertise to draw on in an informal way was invaluable to me in testing my own understanding of what those precedents might be.

The Chair: In various questions, as we go through, we will probably interrogate further the importance of the role of the Cabinet Secretary. Baroness Goldie wants to build on my question.

Q93 **Baroness Goldie:** Good morning, Lord Sedwill. Is there sufficient rotation of civil servants across the United Kingdom to enhance understanding of how devolution impacts in the constitution, and is there some career grid to ensure that the structure is in some way formal?

Lord Sedwill: The short answer is no, there is not sufficient rotation. I think there was, but it has eroded. I certainly strongly favour civil servants working outside London in other parts of England—I am thinking, for example, of the move of certain departments to other parts of the UK, for lots of reasons, including economic development ones—but not just that. For constitutional reasons we should have more interchange with the Scottish and the Welsh Governments, the Northern Ireland Executive, et cetera.

That has stalled somewhat, and probably even more as a result of Covid, and I would favour the grid approach and an expectation that rising stars at least in the policy departments, would have some experience elsewhere. Many rising stars have overseas experience as well, which is also invaluable, not just in constitutional matters but in understanding how other jurisdictions handle these issues. Experience of a federal jurisdiction in particular, for example, would also give officials very valuable insight.

Q94 **Lord Burnett of Maldon:** I want to follow up on the safeguarding function. To be in a position to safeguard anything, a person or a group of people need to have some basic understanding of how the thing works. During my time as Lord Chief Justice for over six years, I was often quite surprised at the lack of understanding in the Civil Service—and, if I may say so, among Ministers—of something as basic to the rule of law as the independence of the judiciary.

I could give examples, if necessary, but it came very much to the fore during Covid, where many people were simply viewing the judiciary and other independent parts of the system as just part of the Government that could be directed. We had to be quite firm in reminding people that we could neither give direction to the police and CPS, for example, nor could we take direction from them or the Government. It struck me that this basic lack of understanding was a rather concerning feature, not least because it was apparent, I have to say, in Downing Street but also in the Ministry of Justice itself. Do you recognise what I am describing?

Lord Sedwill: I do. I might put it slightly differently. I am concerned that you think that the civil servants did not understand it. In times of crisis we sometimes see frustration with independent parts of the constitutional settlement coming to the fore: why will they not just understand X? Why will they not just do this? We found during Brexit, probably more so than during Covid, that people forget that, the Civil Service, like the judiciary and almost anybody when you have such a polarised argument, forget that there are parts of our constitutional settlement—notably the judiciary, but also the Civil Service—that are truly impartial and pride themselves on that impartiality. The Civil Service is impartial, not independent—the judiciary is independent—but fundamentally we do not take sides.

For something so polarising—the Brexit debate became this, but one saw this in the Scottish debate as well a couple of years earlier—institutions that do not take sides are presumed by both sides, therefore, somehow or other to be complicit with the other. That sort of virus—sorry, that is an inappropriate word in this context—seeped into the political system as a whole, not just in government but among media commentators and so on. That has still not been extracted from the broader understanding through Covid and beyond.

There is a presumption—one sees this in the United States—that somehow or other the system has its own view, that independent institutions in particular, have their own view, which is generally presumed to be in opposition to whichever view the protagonist is taking. As you will remember, Lord Burnett, one finds oneself in the crosshairs from both sides. The general understanding of those who do not take sides—impartial Civil Service, independent judiciary—has probably been eroded as a result of some of the political experience in the past decade or so. I see that Lord Keen is next to you, and he and I, like you and I, found ourselves in the crosshairs on this in quite acute circumstances.

The Chair: That leads us to drilling down more on the consideration of

constitutional issues during the decision-making process, particularly in moments of stress.

Q95 **Baroness Finn:** As the Chair has pointed out, this constitutional issue is considered during the policy and decision-making process. How are the concerns raised and by whom? When Alex Thomas gave his evidence—you will remember him from his days working for Lord Heywood—he said that the constitutional concerns were raised in a rather ad hoc way to the Cabinet Secretary, who therefore had quite an important role in dealing with them, and talked about how this process changed during the times of stress because you were there for quite a few of the times of stress. Would you agree with that analysis?

Lord Sedwill: Yes, I would. "Ad hoc" sounds quite pejorative. In a sense, it is very circumstance-driven. If there is a policy matter coming to Ministers where there are second-order consequences that might be constitutional, et cetera, every policy that goes forward has to be compliant with the law, and any submission, as you will remember from the various roles you fulfilled in government, will have legal advice on it as well as other perspectives, if it is relevant. That would encompass anything where there was a legal question, but if there were something that was essentially changing a convention, all of that should be built into the policy process. So, in a sense, it is driven by circumstances.

Parliament left some significant gaps in the Fixed-term Parliaments Act, for example, which was brought in during the coalition Government and repealed less than a decade later, particularly around what happens in circumstances of votes of confidence. When in a hung Parliament that became a live issue, we had to ask ourselves what might happen were there a vote of no confidence—in that case, you may recall the two-week period when, without a further vote of confidence, a general election would follow; as a contingency plan, it never came to it—and how that interacted with the Brexit deadline and so on.

We were in new territory. There was no precedent for that. So we had to think through what the constitutional conventions told us, what the role of the sovereign as Head of State might be in those circumstances, were there precedents, and so on. So, in a sense, it is driven by circumstances. As I said, if it is a government policy, the constitutional issue should just be addressed as with all the other second-order consequences or consequentials in the normal way. It is when you are dealing with a matter and something comes up, an issue that has significant potential constitutional implications, that in the end the Cabinet Secretary is one of the crucial voices in working through how to deal with it.

Q96 **Baroness Finn:** You mentioned the time when Prime Minister Boris Johnson was taken into intensive care and you had to confront the worst-case scenario, and the historical precedent. When Michael Gove gave evidence last week, he said that it was often more helpful finding out from historians such as Lord Hennessy and royal biographers like William Shawcross the founding principles, the Lascelles principles, and so on. What were the sources of information that you had available to you to

understand those precedents?

Lord Sedwill: The Civil Service machine produced for me the Lascelles letter and Robert Armstrong's clarifying letter of several years later about some of that. But, yes, exactly as you heard, I found being an amateur historian and an amateur constitutional historian was most valuable to me, because it enabled me to ask the right questions. In that case, the last Prime Minister to die as Prime Minister was Spencer Percival. One or two others came very close, but Spencer Percival was the one who actually died in office. I think he was assassinated.

Of course, that was before the nuclear revolution. One issue that is different from anything essentially pre-Second World War is the need for continuity in the nuclear weapons command structure. We have mechanisms for that, but all that authority proceeds from the sitting Prime Minister. Therefore that created a time pressure on resolving any gap in governance just because of the way government now operates. That would not have been true in an earlier era when a more considerate approach might have been possible. One has to think of all those historical precedents but also recognise that they have to be applied in a modern and somewhat different context.

Q97 **Lord Beith:** You gave a very interesting answer earlier in which you said that you had had a discussion with the Attorney-General basically about a division of labour in which the Attorney-General would deal with the legally based constitution issues, which came up during the Covid crisis, and you would be dealing with the more conventional-related issues. It did not really work, did it, because, if you look on the legal side, every fine that was levied that went to court was overturned. On the conventional side, Ministers were on television night after night blurring the distinction between the law and what they thought people should do.

Lord Sedwill: The conversation I had with the Attorney-General was earlier. It was pre Covid. It was in the context of Brexit. As we were dealing with some of the acute constitutional issues around that time, and as we went into discussions with the Prime Minister and his team, it was essentially a shorthand for the distinctive but complementary roles the two of us had to play in bringing those issues to the table—the shorthand being constitutional law him, and constitutional conventions me. But you are right; it is more complex than that, of course.

In the end, Governments still have to make decisions that, as long as something is not actually unlawful, and in the end the Attorney-General takes a view on that, which becomes the basis on which government proceeds until and unless the courts rule otherwise—there is obviously a very famous case relating to Prorogation, and another question that Lord Keen and I were involved in, a Brexit-related issue that was on the table—in the end, government, as long as it is operating within a legal boundary, can choose to disregard, amend or override the constitutional conventions if it considers that the issue at hand is so important that it merits that.

That is one of the weaknesses of conventions, in that there is no enforcement mechanism, but they are nevertheless an important part of our constitutional settlement. There is a moral pressure in order to observe, the neutrality of the sovereign being a very prominent one. But these things have changed over the years.

Lord Beith: Is that really what happened in the pandemic case, or was the situation that the things that were going wrong were further down the system than you would normally have on your desk? There were decisions taken by police forces that did not even have a printed version of the law they were supposed to be applying. There was a whole series of things like that, which were quite well down within the system, and they got public notice in the press quite extensively. Were you giving advice about the constitutional propriety of things like that?

Lord Sedwill: I agree. I do not think that at the time I put it in constitutional terms. I do not think I used that word. But when I was Cabinet Secretary during the first wave of Covid, not during the subsequent waves, I was concerned at some of the overzealous application by some police forces of the public health rules, and I tried to take action and say, "Right, we need to get out some central guidance. They need to understand".

To be fair to the police, they did not have precedents to go on either. To take the pure constitutional point, you could say that they went too far, and some of the fines were then overturned in the court. That is the check and balance working. There is obviously the question as to whether they had the right legal advice in the first place that could have prevented them from going too far and not having those fines subsequently overturned by the courts. But the courts had the power to do so, and that is the check and balance that the independent judiciary applied.

So, mistakes were undoubtedly made, and the inquiry will doubtless highlight others, but in that case I think the issue was that there was probably not a sophisticated enough understanding at that operational level of the legal parameters. That is why, for example, I got in touch with the Home Office during that period and said, "Look, we really need to get some guidance out to forces about where we think the boundaries are here, because it feels like it's going too far".

Lord Beith: It could not really continue as a division of labour in the sense that you had to get involved because the Home Office had to be told that the police needed better guidance than they had.

Lord Sedwill: Yes, but that is guidance. Again, if one is thinking purely through the constitutional lens, it is still for the independent judgment of a police force as to how to enforce the law, who to enforce it on, and so on. That is not something that the Government can or should ever be involved in. But what we can do is provide some guidance and say, "This is what was intended when these regulations were passed, here is where we think the boundaries are", and indicating to police forces that some of

them, not all of them, were being too zealous in their interpretation of that and were going beyond what we had expected.

That is part of the role of the Cabinet Secretary, or the Permanent Secretary of the Home Office for that matter, a job I had done in the past so I was familiar with it. You could describe it as a constitutional role, but I think it is just part of the job. A policy has been agreed by government, authorised by Parliament, it is being implemented in a way that probably goes beyond what was intended. Part of the job of officials or Ministers is to say, "This wasn't what we had in mind. Let's see if we can course correct".

Q98 **Lord Falconer of Thoroton:** Just on the facts, you were the Cabinet Secretary from April 2018 to September 2020.

Lord Sedwill: That is right. I was acting Cabinet Secretary for the first few months while Jeremy Heywood's health deteriorated, and then formally Cabinet Secretary once he formally stepped down in October 2018. But in effect, yes, I was Cabinet Secretary from late spring of 2018 through until September 2020.

Lord Falconer of Thoroton: You were the Cabinet Secretary during all the tempest around how we left the European Union, including all the various occasions when Parliament passed Acts of Parliament demanding the Government send various notices to extend the time.

Lord Sedwill: Yes.

Lord Falconer of Thoroton: You were the Cabinet Secretary during the Prorogation dispute.

Lord Sedwill: Yes.

Lord Falconer of Thoroton: You were the Cabinet Secretary at the point when the pandemic struck in February/March 2020.

Lord Sedwill: Yes.

Lord Falconer of Thoroton: And you were the Cabinet Secretary when the Internal Market Bill was introduced in 2020.

Lord Sedwill: Indeed.

Lord Falconer of Thoroton: You have described constitutional issues as "like any other area of policy". In terms of formal process, who is responsible at a Civil Service level for the constitution in the Government?

Lord Sedwill: There is not one person, because, as I said, there will be policies that government is pursuing that have constitutional implications. Virtually all legislation that has significant constitutional implications does not have the word "constitution" in it—there is CRAG, which has the word in the title—so it does not sit in one place, in that legislation and policy could have constitutional implications from a variety of different areas.

When I was making that point, I was saying that, like other policy areas—for example, the current legislation about withdrawing the hereditary Peers—that will be vested in a department such as the Cabinet Office or local government, or the Foreign Office in some cases, and the constitutional questions, the constitutional implications of that, are part of the policy discussion, as they would be in other areas. So, in that sense, constitutional policy is dealt with by the Civil Service in the same way as other policy areas responding to the agenda.

Lord Falconer of Thoroton: Does have the Cabinet Secretary have a special responsibility in relation to constitutional implications?

Lord Sedwill: Yes. Even a piece of policy in the manifesto that has significant constitutional implications, as one of the roles of the Cabinet Secretary is as the chief policy adviser to the Prime Minister and Cabinet, I would have expected to have been involved and consulted as that submission was coming forward, certainly by the time it reached Cabinet, to have the chance to make sure that the constitutional consequences of a policy were properly ventilated in the policy process.

Lord Falconer of Thoroton: Who is giving you advice? We have just gone through all the big constitutional things that you would have had to deal with—Brexit, the pandemic, Prorogation. Your background is that you were in the Foreign Office for years, then you were in the Home Office, then you were the National Security Adviser. Without being too insulting, what do you know about the constitution? Therefore, who is giving you advice on the constitution when these great constitutional issues arise?

Lord Sedwill: There is a team in the Cabinet Office, and I think they appeared in an earlier evidence session. As I said in answer to an earlier question, I recognised that I also needed advice from experts outwith government and so would talk, particularly during some of the tension points that you have described, to constitutional historians, other experts from outwith government, in order to make sure that I was not missing anything and that I had a proper understanding of it, testing against my own knowledge as an official.

Actually, the Foreign Office is quite a good place to learn this, because you see a lot of it elsewhere as well, so one looks at one's own constitution sometimes through the lens of seeing it from overseas. You accumulate a lot of knowledge and understanding through the kind of career that I have had. But there is a team, and I took external advice as well.

Lord Falconer of Thoroton: The process of getting constitutional advice presumably changes or is different during periods of stress. The occasions that we have just gone through were presumably periods of extreme stress on the constitution. I have in mind particularly the effect of Brexit and the pandemic. Did the system by which you got constitutional advice or on whom you were relying change because of the stress?

Lord Sedwill: No, it is the same system. It is really important that the system has the resilience within it to be able to support the senior officials and Ministers in a time of stress. It was at those times of stress when I would also reach outside or in contingency preparations against a possible point of stress, some of which arose, some which did not.

Lord Falconer of Thoroton: We received evidence earlier from what was described as the proprietary and constitutional part of the Cabinet Office, which is presided over currently by Mr Darren Tierney; I do not know whether it was Darren at the time you were the Cabinet Secretary. Is that the group from which you would have received advice on the constitutional issues?

Lord Sedwill: Yes. They would not necessarily have been the source of it. They would have drawn on other expertise as well, including legal advisers and so on, but that was in a sense the gearbox through which I would receive formal advice on it.

Lord Falconer of Thoroton: Describe this group to us. What is its expertise?

Lord Sedwill: It is a Civil Service team within the Cabinet Office, like any other. Some of them would have been in that area of work for several years. Some will have turned over. If what you are reaching for is whether there is a group of constitutional cognoscenti who sit in that team for many years, the answer is no. As in other areas of government, there is a body of knowledge on which civil servants draw, there are legal advisers who are experts in different areas who do that very well, and there is external advice, including some of the clerks and others in both Houses of Parliament. There is a range of sources of advice. Those teams, which relatively small, are essentially a gearbox in order to channel that advice into the Cabinet Secretary. They are not always the source of that advice itself.

Lord Falconer of Thoroton: The point I am getting at, and you have absolutely seen it, is that that group is an absolutely admirable group, but one feels there is no constitutional expertise or continuity in the centre of government, the Cabinet Office, because the Cabinet Secretary is essentially—this is not intended to be rude—a constitutional amateur advised by civil servants who are a gearbox rather than expertise.

Lord Sedwill: They build expertise, as civil servants do in other areas of policy. Some people might have done several jobs there, but I think what we are both saying is that this area of policy is considered like other areas of policy, and there will be some people who are experts in it and build it up over years because they are interested in it and do several jobs in that area. We have had quite a lot of continuity in the heads of that unit over periods; they tend to do longer in that job than many others at their grade do.

One could say the same about expertise in health, in defence or elsewhere. It is no different from the wider Civil Service system. It is why

it is important to be able to draw upon external expertise when one is considering any of these more acute questions. By the way, I would not want us to be in a position where the expectation was that one would not pick up the phone to Peter Hennessy or one of these other deep constitutional historical experts, particularly as the guardian in some ways of the conventions, which is essentially about precedence and so on. I would not want us to think that we have such deep expertise internally that that was not a necessary part of testing one's thinking.

Q99 **Lord Falconer of Thoroton:** Were there any occasions when you were the Cabinet Secretary in which a policy or a decision was pursued despite you, another senior civil servant, the Attorney-General or the law officers giving advice that it could have substantial constitutional implications?

Lord Sedwill: I would not necessarily just use that word ,but there are a couple of examples that members of the committee are very familiar with. There is obviously the whole question of Prorogation. I was not directly involved. I was away and was not informed of the decision until it was already in train. That has been well covered in evidence on that Brexit period. But the Attorney-General was consulted on that, and he has, I think, given evidence in other fora to say that he believed it was lawful. When I was consulted, I considered that it was not unconstitutional, not a breach of the conventions, but a double negative was quite important there. The Attorney-General warned that it would be challenged and the courts might take a different view. It went through several cases, one of which Lord Burnett was directly involved.

Perhaps for the purpose of this, because that is such a big question and it has been so well ventilated, is a question on which Lord Keen and I were both directly involved, which is the UK Internal Markets Bill, where there was this question about compliance with international law. It was quite clear that there were constitutional implications to that, because the Government were pursuing a course, which, as was described on the floor of the House of Commons, was acknowledged to be a limited and specific—I think those are the right terms—breach. That was considered in advance.

The Attorney-General, as the senior law officer, ruled that it was lawful under British law to proceed. The Treasury Solicitor—I will allow Lord Keen to speak for himself, but Lord Keen was the Advocate-General at the time and took a different view—did not believe it was lawful and took the honourable course of action. As Cabinet Secretary—that was almost my last act as Cabinet Secretary—I was then faced with the question of: could the Civil Service work on something that many considered to be unlawful? The Civil Service Code does not permit that; the Ministerial Code does not permit it.

I recorded this in a letter, which I believe has now been made public.[1] I said that, if the Attorney-General has ruled that something is lawful, until

[1] Following the evidence session, Lord Sedwill wrote to the committee confirming that the letter referred to in his evidence is not in the public domain and providing further

the courts take a different view, the Attorney-General in essence shoulders that responsibility for the Government—most acutely in the cases of military action, which is where I was drawing the precedent. Given that, it was appropriate for the Civil Service to work on this, even though whether it was lawful was highly controversial, until and unless the courts take a different view.

There you have an acute example around the Internal Market Bill where your second pillar of the constitution, the rule of law, was at issue. There was a question as to whether the Government action was lawful; the Attorney-General ruled that it was and we went through all the constitutional questions that arose from that.

Q100 **Baroness Goldie:** Lord Sedwill, you have been describing a challenging situation. How is a Cabinet Secretary supported within the Civil Service when a difficult decision or piece of advice has to be given to Ministers? Is there some informal forum, a panel of elders, if you like, such as former Cabinet Secretaries, or is there some advisory group comprising the Cabinet Secretary and civil servants from across departments who have constitutional responsibilities within these departments?

Lord Sedwill: There is not one group that one draws on. As with other issues—almost every issue that crosses the Cabinet Secretary's desk is challenging because, if it is not, someone else has dealt with it—one brings together, usually informally, the group of people who seem appropriate to provide advice at the time.

On the example that I have just discussed, the Treasury Solicitor was absolutely crucial, and we spent a lot of time together working through that. Obviously I drew heavily on the team that Lord Falconer was just asking about, led at the time by my deputy as Cabinet Secretary, Helen MacNamara, who oversaw that area of the Cabinet Office. We also had other legal advisers, including people from the Foreign Office and so on, because it was obviously relating to European law.

One draws those people together. Then, as I said, depending on the circumstances, I may also reach outside. I would talk to former Cabinet Secretaries, constitutional historians, and former Ministers and Prime Ministers sometimes, to try to test my own thinking and gain their expertise. I do not think one can have a group—capital G—that is always there. One has to draw upon expertise according to the question that is at issue.

Q101 **Lord Falconer of Thoroton:** The role of the Cabinet Secretary and the Deputy Cabinet Secretary is important, on the basis of what you are saying, in holding politicians to the constitution. For example, you describe that you gave "rulings" on the constitution during the 2019 election, which you say the Prime Minister "could have overruled", which presumably he could. Is the ability of the Cabinet Secretary weakened by the fact that it now appears, or it appeared during that period, that the

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detail of its contents. Please see written evidence EOS0007 on the committee's website.

Prime Minister felt able to get rid of the Cabinet Secretary without cause?

Lord Sedwill: I would not necessarily agree with exactly that description of my departure. Do not worry, I am not thin-skinned about it at all. As you know better than I, one develops quite a lot of scar tissue.

You are absolutely right that, if you can get rid of a Cabinet Secretary or if you can sack the Permanent Secretary to the Treasury or the National Security Adviser on day one, there is obviously a risk of compromising the integrity and independence of the Civil Service. That is self-evident. Therefore, the continuity in those positions, which is true across the Government as a whole—sacking Permanent Secretaries and so on—is important because it maintains that resilient impartiality and the willingness to speak truth to power. Wise Ministers and Prime Ministers, as you know as well as I, encourage that.

Lord Falconer of Thoroton: If the position—it was more your deputy than you, with her advice that the Government had to comply with the Benn-Burt Act, which Parliament had passed—had been rejected, what would have been the position of the Cabinet Secretary?

Lord Sedwill: I remember that. You are not in every single meeting and I know that there has been some reporting on a particular meeting. I was quite clear there. There was a question, "What happens; will you resign?" said to me. I said to them, "No, if you don't comply with the law, I will not be the one who's resigning".

Lord Falconer of Thoroton: How would you get rid of the Prime Minister in those circumstances?

Lord Sedwill: This takes us into very delicate territory. One needs to be very careful, even in this area, but there are some residual functions that are possessed by the sovereign as Head of State. In the end the Prime Minister is appointed by the Head of State, according to whether they are the person who can command the confidence of the House of Commons; one can imagine circumstances in which that reserve power may have to be exercised.

The Chair: That was an interesting point; we will look at that further.

Lord Sedwill: This goes to a very important point on which, frankly, we could talk for much longer. At several points in my time as Cabinet Secretary, preserving the neutrality of the sovereign was uppermost in my mind. This is where the interplay of our conventions applies, in that you never want to put the sovereign in the position of becoming involved in politics in that way. To avoid that, therefore, our constitution relies upon people making the right decision. It is the insurance policy of the reserve powers of the sovereign, then the interplay between that and the deep principle of the neutrality of the sovereign, who should not be drawn into politics. It is the interplay of those two things that causes one to talk in the language that I used in that circumstance.

Q102 **Lord Anderson of Ipswich:** Mr Gove told us last week that an incoming

Prime Minister would be within his rights to abolish the Independent Adviser on Ministers' Interests, the Advisory Committee on Business Appointments, the Commissioner for Public Appointments and the House of Lords Appointments Commission. He did not welcome that prospect but he said that it was within the Prime Minister's powers.

Is there anything to be said for giving statutory force to any of those constitutional watchdogs just to introduce some friction into the system and require Parliament to be fully involved, in case such a change was contemplated? Do you think there is a case to put any other aspect of our constitutional settlement into statute? I am thinking, for example, of the Institute for Government's recommendation in 2022 that there should be a statute governing the Civil Service.

Lord Sedwill: There is clearly a case for that. I am always very conscious that hard cases make bad law, and we went through some very hard cases in my time as Cabinet Secretary. I would hope that, having moved beyond some of the acute polarisation of that period, particularly because of the 2014 and 2016 referendums, what Peter Hennessy calls the "good chaps theory" would reapply. Therefore, a general respect for the constitutional conventions, which would avoid a Prime Minister doing any of the things that you have suggested, Lord Anderson—in essence, the political and public pressure to observe the conventions—would be enough of a sanction to avoid a Prime Minister taking that action.

However, if it became apparent—as we are seeing in the United States, for example—that a particular Government or party that is elected thinks of dismantling some of those checks and balances, of course there is a case for Parliament to put them in place on a statutory basis. We have to understand that even in a highly legislated constitutional system with an elaborate legal framework, like the United States—with a written constitution, very powerful courts, checks and balances and separation of powers built in from the start, and so on—as we are seeing right now, it is possible for an incoming President to set aside some of those conventions and put more partisan figures into jobs that have traditionally been done by people who are not, with constitutional consequences to follow. Even if there is a legislated outcome, conventions still have to apply. One is always making a judgment about exactly where that boundary should be.

Q103 **Lord Thomas of Gresford:** I am concerned by the issue of legal risk. We were told by Michael Gove last week that Ministers are risk averse and afraid of judicial review. Consequently, they do not necessarily push through policies that they may consider to be desirable. But the bar is very low. While it is not necessarily the view of the Attorney-General, his own opinion or a wider view, is the respectable argument bar very low? Michael Gove was completely happy with that. What do you have to say about legal risk, from your experience?

Lord Sedwill: A lot of this depends on the experience of the department in dealing with judicial reviews and, in many cases, the self-confidence of both the department and the Minister. Michael Gove, a very experienced

and effective Minister, would have been confident enough to feel that he could navigate those risks.

The Home Office, which I ran for four and a half years, is the most JR-ed department in Government. I remember when Jack Straw moved from being Home Secretary to Foreign Secretary and I met him as Foreign Secretary. I had not been at the Home Office at that time. Someone put to him as Foreign Secretary, "If you do this there's a risk of JR", and his answer was, "Well, yes, but are we going to win it or lose it?" Because as Home Secretary he was so used to being judicially reviewed that he had a robust view of the risk of the process itself, whereas the tradition in the Foreign Office, which had very few judicial reviews, was that you should act to avoid the risk of even the process proceeding. That gives you an example.

There is a question as to whether judicial review is used too much, particularly in casework. A huge volume of judicial reviews snarl up the courts on immigration casework and other administrative cases of that kind. It seems to me that there should be a more streamlined and effective approach to that.

But fundamentally, the doctrine that in this country Ministers are held to that discipline is a good one. It also goes to a point that came up earlier in the hearing; I think Lord Falconer touched upon it. It goes to the ability of the Civil Service to speak truth to power and offer advice because it can say, "Look, you understand this is what we believe the law says. If you seek to go beyond that you will be JR-ed". In my view, the second half of that sentence should always be, "and we think we'll lose".

Lord Thomas of Gresford: Do you think it is satisfactory that it requires an individual or perhaps an organisation to have the desire to use blood and treasure to bring a judicial review? It depends upon an individual having the bravery to take the matter forward. Do you think that that is a good way of governing?

Lord Sedwill: If it were the only mechanism, the answer would obviously be no, but it is an important check and balance. Institutions or organisations can bring judicial reviews. Even if a judicial review is brought in an individual's name, they are often supported by an institution of some kind. That was certainly the case with some of the judicial reviews that we dealt with during the Brexit period. The answer is, in essence, the same: if judicial reviews becomes the first line of defence in terms of checks and balances, that is clearly not satisfactory, but one should see it in the context of the other checks and balances.

Q104 **Lord Keen of Elie:** You mentioned the Civil Service Code, and I want to come back to that for a moment in the context of a remark you made about the Prime Minister, ultimately as First Minister, being able to overrule a decision of the Cabinet Secretary. If the Prime Minister proposed a policy that you regarded as clearly unconstitutional, would you, as head of the Civil Service, be in a position to tell him that the Civil Service would not implement that policy? If so, could he overrule you?

Lord Sedwill: The answer is that, if it breached constitutional convention, I could advise that it should not proceed because it breached the convention. If it was sufficiently important, obviously one then has to consider one's own position, as you and I have discussed in other circumstances.

The only way you can say that this may not happen—"The Civil Service will not work on this"—is if it is unlawful. There is quite a subtle distinction but the two are not the same. If it is unlawful, Ministers cannot work on it either because the rule of law is the rule of law. If it is breaching a convention, it is inadvisable but the Prime Minister might, in the end, decide that the issue at hand is so important that he is willing to breach that convention—either change the convention or just set it aside temporarily. In terms of strict powers, the Prime Minister has the authority to do that unless challenged in the courts. We found, for example during Prorogation, the Supreme Court concluded that something that he had considered to be a matter of convention to be a matter of law. That, in the end, is for the independent judiciary to judge.

Lord Keen of Elie: On a related point, in the past it was often regarded as the position that the Lord Chancellor is the constitutional conscience of the Cabinet. Those days have passed. Do you consider that we should have a single senior Minister in Cabinet who assumes that role and is perceived publicly to exercise that role, in advising the Government and making clear what advice he has given to the Prime Minister on such issues?

Lord Sedwill: That would work only if one restored the position that the Lord Chancellor traditionally held, with a very limited set of normal responsibilities. It would invariably be someone probably in their last political job, after a long career. If you think back to Lord Chancellors of the past, there is a natural authority that comes from that. It is not necessarily the position itself; it is the natural authority of someone of that ilk in Government who can also be a mentor to the Prime Minister because of their experience. One can think of lots of examples of that.

As I described earlier, and as you know, the Attorney-General plays a very important role in this now, because in the end they are the source of judging whether Government action on anything—from the acute case of military action through to questions of policy—is lawful, at least until the courts take a view.

As we have described, the Cabinet Secretary is naturally the person who is responsible for interpreting and advising on constitutional conventions. I do not think a Minister could quite fulfil that role, not least because the Cabinet Secretary of the day would always take a view on it and rightly so. But if it were to be a Minister, one would almost have to restore the grandeur, independence and rather unique status that the Lord Chancellor traditionally had, and the profile of the person in it, for them to assume that guardianship role.

Q105 **Lord Beith:** This arose from something you said earlier, Lord Sedwill.

You said that it is quite important to maintain the limited functions that the sovereign has in relation to the constitution. I wanted to remind you of one word that was much discussed in this committee and in the Joint Committee on the Bill that repealed the Fixed-term Parliaments Act, and that was the question of whether the Prime Minister can advise or can only request Dissolution. Does that not fall into that category? The advice would be mandatory on the sovereign and the request would not; does that not fall into the category that you were referring to?

Lord Sedwill: It does, exactly.

Q106 **Lord Strathclyde:** Lord Sedwill, thank you very much indeed for the thorough way you have been dealing with these questions and for your answers, which have been excellent.

I rather like what you said about there being some informal grouping to which the Cabinet Secretary could go to discuss constitutional matters—the idea of the gearbox. I am a great believer that constitution is more an organism than a simple set of rules, and it mutates and evolves, sometimes over a long period.

But you said something very important in your opening remarks. You said that the constitution was treated like any other area of policy. Does that allow for the kind of long-term strategic thinking that is usually required on constitutional matters? Does that happen at all within the Civil Service and, and if so, where does it live?

I was particularly impressed by what Lord Keen said and your answer to Lord Keen about the role of the Lord Chancellor. I too very much regret the passing of the old-style Lord Chancellor, because he did give that authority. But, if there were to be a single Minister for the focus of this, where should those constitutional matters sit? Would it be in the Cabinet Office?

Lord Sedwill: In the absence of the re-creation of that role, Lord Strathclyde, yes, it would.

By the way, just to be really clear—I apologise if my language was imprecise in my first answer—the point I was trying to make is that policy on the constitution, constitutional matters or matters that have constitutional implications, is, in mechanistic terms, handled like policy on other matters in the Civil Service. I was trying to make the distinction between that and constitutional stewardship. I am not saying that the constitution is just another policy issue. It is not, but policy on constitutional matters, if I can put it that way, is mechanistically run in the same way.

In the end, all policy is under some Minister's authority. The natural place for it would be in the Cabinet Office, in the current structure, but one could imagine it having a senior Minister. Just to give you a "for instance", let us say the territorial departments—the Scotland Office, Wales Office and Northern Ireland Office—came under a single Secretary of State as part of the devolved statement, instead of three separate Secretaries of State; one could imagine that job also being the Minister

for the Union, the Minister for the Constitution et cetera. I do not think one should assume that it has to sit in one place, but one would expect it to sit somewhere detached from the immediate other policy issues or at least in a place that is close to the Prime Minister, where constitutional matters can be considered in their own right.

Lord Strathclyde: Thank you for the clarification on the first point. Does that still allow for some form of long-term strategic thinking within the Civil Service, whether or not the Government are actually pursuing a programme of constitutional change? Is that expertise there or do you then have to rely on your gearbox analogy?

Lord Sedwill: I personally favour establishing more capability to do long-term thinking and, by the way, not just on constitutional matters. One of the responsibilities of the Civil Service—and it is uneven, to be candid—is to think beyond the immediate and to be ready to say to Ministers, "You don't have to decide this right now and it isn't in your manifesto, but this issue is probably going to come down the track at you at some point". One can think of lots of issues, climate change being an obvious one in other policy areas, where having that ability to look ahead and look beyond the immediate priorities is important.

Now, one has to balance that because in the end we serve the Government of the day, but I favour there being policy and strategy units across the Civil Service able to ask themselves, "What is going to be important in the future? What are the strategic issues?" in order to inform Ministers of all responsibilities. One can make that case in almost any area of policy, I would suggest.

Q107 **The Chair:** We have come to the end of our formal questioning, but I would like to reflect on one point that you made relating to the internal market Act issue, where you had to ponder whether the Civil Service was being asked to participate in a matter illegally or that lacked legitimacy. Your answer was that you looked to the Attorney-General and, if they said that it was lawful or that there was a respectable legal argument, the Civil Service could carry on working on the matter.

I was just reflecting on when we did our report on the rule of law, which was a year in the making, both by evidence and consideration. One of the things that we highlighted was that, for the Attorney-General's role to be discharged effectively, first, they had to understand that in their hierarchy of responsibilities primacy was given to the rule of law; secondly, when they were presenting or accepting a respectable legal argument, the bar could not be set so low that that respectable legal argument concept began to lack integrity.

What would you do if you believed the Attorney-General was not meeting the standards of primacy of the rule of law and integrity of a respectable legal argument? How would you address that? That was a concern at a key point.

Lord Sedwill: It was. In a sense, it is not for the Cabinet Secretary to address that. There might be consequences for a Cabinet Secretary if one

felt—as we might, for example, see in the United States—that an Attorney-General was pursuing actions that are in breach of the law.

I would rely primarily on the checks and balances elsewhere. There would almost certainly be a judicial review if it were a matter of any significance, and the courts would then have to make a judgment. I would hope the courts would make the judgment in a timely enough fashion to be effective if an Attorney-General concluded that the respectable legal argument bar was so low, as you suggest, that almost anything could hurdle over it.

In the case that Lord Keen and I were involved in, the Attorney-General was clear that it was not unlawful in British law. She set that out in writing. Therefore, it would have been wrong constitutionally for me as the Cabinet Secretary to say, "I don't agree with the Attorney-General. I have other legal advice that disagrees with the Attorney-General. I don't agree with the Attorney-General; therefore, I am taking the following action".

Constitutionally, as the Cabinet Secretary, I also have to operate within the law and if the Attorney-General, as the senior law officer, rules that something is lawful, however controversial—in that case causing resignations among some of her colleagues—until and unless the court has ruled otherwise, I had to proceed on that basis. Government can only proceed on the basis that, if the Attorney-General says that something is lawful, it is lawful until the courts judge otherwise. It would not be right for me to say that; they are the senior law officer, so I, as an unelected official, would be putting myself above them.

It was a dilemma. It was not how I had hoped to spend my last couple of days as Cabinet Secretary, I must admit. I felt I really had to think that through. There is a letter from me to the Treasury Solicitor, which I think is now public, which sets out exactly my thinking on that in more detail and might help illuminate it.[2] Fundamentally, the check on the Attorney-General's ruling is for the courts. That is the key check in my view, as we found on the Prorogation question.

Baroness Goldie: Chair, can we get a copy of the letter?

The Chair: As we go along, we are noting things that we need to follow up. We will follow up all of them.

Lord Sedwill: If your clerks cannot find it, I can share a copy. It is public. I think it may even have been shared with the Covid inquiry, for various reasons. Anyway, it is now on the record, so it can be shared with you if they cannot find it.

The Chair: You have made two or three helpful references, which we will follow up. It is for me to thank you very much for finding time to come

[2] Following the evidence session, Lord Sedwill wrote to the committee confirming that the letter referred to in his evidence is not in the public domain and providing further detail of its contents. Please see written evidence EOS0007 on the committee's website.

and see us. I echo what Lord Strathclyde said: thank you for engaging with all the questions, the rigour with which you answered the issues that we posed to you and for bringing to bear on our thoughts your experience. It is much appreciated.