HOUSE OF COMMONS

Public Administration and Constitutional Affairs Committee

Oral evidence: The Fixed-term Parliaments Act 2011, HC 167

Friday 24 April 2020

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Watch the meeting

Members present: Mr William Wragg (Chair); Ronnie Cowan; Jackie Doyle-Price; Rachel Hopkins; Mr David Jones; David Mundell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson.

Questions 1-67

Witnesses

I: Lord Gus O'Donnell, Cabinet Secretary 2005-11, Chair of Frontier Economics 2013-present, and Sir Stephen Laws, First Parliamentary Counsel 2006-12, Senior Fellow, Policy Exchange 2018-present.

Examination of witnesses

Witnesses: Lord Gus O'Donnell and Sir Stephen Laws.

Q1 **Chair:** Good morning and welcome to the first virtual public meeting of the Public Administration and Constitutional Affairs Committee. Other Committees of the House have already met virtually, but this is our first such meeting.

I am in a Committee Room in Portcullis House with a small number of staff required to facilitate the meeting. Obviously, we are suitably socially distanced from one another. My colleagues and our witnesses are in their homes and offices dispersed across the country. I thank our Broadcasting colleagues, who have worked extremely hard to find solutions for our Committees to meet, while at the same time working on the hybrid Chamber, which met for the first time earlier this week.

The Committee had already planned to consider what should happen to the Fixed-term Parliaments Act, as the Government are required by statute to consider it this year, as well as there being a commitment made in the Conservative party manifesto. We decided to continue with our evidence session as it is time-critical. Also, our witnesses worked in the Cabinet Office during previous crises, so they will be able to give some invaluable insights before the Committee sees the Chancellor of the

Duchy of Lancaster next week to consider the Coronavirus Act and the Government's co-ordinated response to the current crisis.

To start the meeting, may I ask our two witnesses to introduce themselves, starting with Lord O'Donnell?

Lord O'Donnell: Hi. I am Gus O'Donnell. I was Cabinet Secretary from 2005 to 2011.

Sir Stephen Laws: I am Stephen Laws. I was First Parliamentary Counsel from 2006 to 2012. I was the permanent secretary in charge of legislative drafting and the offices of the Government's business managers. I am now a senior research fellow at Policy Exchange.

Q2 **Chair:** Thank you both very much. Members have agreed their questions. I will start, and after I have asked the first questions I will pass to David Jones. I will begin with a straightforward question to Lord O'Donnell. What was the purpose of the Fixed-term Parliaments Act?

Lord O'Donnell: I think that was made clear by the then Deputy Prime Minister, Nick Clegg, to the Commons. Basically, the idea was to remove the Prime Minister's right to dissolve Parliament. They felt that the system was unfair. It was biased towards the incumbent Government, because they could choose, whenever they were ahead, to have a snap election. They thought it was fairer and would provide for better government by having a longer fixed term, namely five years, so that you could do serious planning.

Now, there was obviously also a political element to this. We were talking about putting together the first full coalition Government and, not surprisingly, the Liberal Democrats were worried that, without some kind of commitment, they would go into full coalition, the Conservative party would decide to go for a snap election whenever it happened to be ahead, and that that would be a real problem for them, so they were quite keen politically that this go through.

Q3 **Chair:** What balance do you think there was between those lofty ideals and political expedience?

Lord O'Donnell: I would say that the lofty ideals were fairly clear, because—people forget this—this was something that the Labour party, when it was in government, was considering. Indeed, it was in the Labour party manifesto in 2010 that they would have a fixed-term Parliaments Act. From a constitutional point of view, people could see that this created a fairer system: it removed the bias towards incumbents being able to choose. If you look at our history, you will see that, quite often, we have had very long runs of one Government in power. I think they thought it would be fair. There were also reasons of electoral administration and planning for long-term issues in Government. There was all of that.

Right at the start of the coalition, you have to understand, there probably wasn't that much trust, if I'm perfectly blunt about it, so they wanted an absolutely clear commitment that there would be no snap election, and the way to do that was to legislate for a fixed-term Parliaments Act.

Q4 **Chair:** Thank you, Lord O'Donnell. Sir Stephen, from your perspective, what were the purposes of the Bill that your office was asked to produce?

Sir Stephen Laws: Gus has already explained the background. There were two main objectives, from our point of view. One was to deal with the political issue of providing a mechanism that reassured the junior partner in the coalition that they were not going to be ambushed with an election, and there was the issue of providing a stable Government for a reasonable period.

What we thought we were doing was changing the default expectation. The default expectation had always been that a Parliament would not run its full course; the Prime Minister would choose a time for an election towards its end—very often in its fourth year. That had a practical effect that, very often, from the end of two and a half years—you would have a long first Session and a year as a second Session—you would start planning the fourth Session, and the fourth Session you would normally plan as a short one, running up to an election. So Government had a very short period to get going.

That was the practical thing, and there was the political side as well. One thing that has to be remembered about 2010—well, it's one of the three most important things, but in this context the thing that has to be remembered—is that there was also a proposal to switch to proportional representation voting, which was subsequently defeated in a referendum. So this was seen as part of a package that would produce a solution for what was thought to be a situation in which you would have hung Parliaments much more often, and that would enable a coalition to be stable for a decent amount of time.

Q5 **Chair:** Sir Stephen, do you think that the Act that was passed fulfilled those purposes that you have outlined?

Sir Stephen Laws: I think it did change the default expectation. Obviously, events have shown that it has not guaranteed five-year Parliaments, but I think it did change the expectation. The thing that we are probably going to come on to is that it did so at a cost, and the cost may have been too much.

It did, I think, secure a coalition that was stable and was going to last. Harold Wilson had a minority Government in 1974; he had another election at the end of 1974. He did a similar thing, with more success, in '64 and '66.

It prevented a short-term period of government, but that, too, has been overtaken by events, because, as a result of how the Liberal Democrats did in the 2015 election, there is likely to be less enthusiasm for coalitions in the future.

Chair: Thank you, Sir Stephen. We are now going to David Jones, who will be followed by Tom Randall.

Q6 **Mr Jones:** Thank you, Chairman. Lord O'Donnell, as you rightly

mentioned, the previous Labour Government, before the coalition Government, had given consideration to moving away from the convention that the Prime Minister could, effectively, choose the date of the new election, and in fact the "Governance of Britain" papers said that the Prime Minister should be "required to seek the approval of the House of Commons before asking the Monarch for a dissolution." Why, in your view, were these changes not implemented by the Gordon Brown Administration?

Lord O'Donnell: I think you are absolutely right to ask that question, and indeed Gordon Brown was very keen on changing the system and had a very large constitutional agenda. I think the most obvious reason was the global financial crisis, which meant that the priorities of Government changed. They had immediate things to deal with and they just didn't get around to it. Constitutional change, when it is done properly, is taken very seriously and slowly. I think what happened was that it was one of those things where they wanted to do it, but they had not quite got around to it. But they committed themselves to it in their manifesto for the 2010 election.

Q7 **Mr Jones:** "The Governance of Britain" seemed to contemplate changing that convention by legislation rather than seeking to replace it with another convention. What was the reason for that?

Lord O'Donnell: That was in the early stages; they were at the consultation stage. They thought about it more, and they decided in the end that it was a more definite approach to go through legislation.

Q8 **Mr Jones:** I would like to ask you both—perhaps Sir Stephen in the first instance—about the issue of conventions. To what extent would you say that conventions are still an important and effective tool in governing the UK's constitutional arrangements?

Sir Stephen Laws: I think they are crucial. They are part of every country's governing system, but they are obviously more significant in ours. I hold a slightly unorthodox view about conventions, because in some ways I think the whole concept of a convention is a concept dreamt up to make lawyers feel comfortable with the idea that what governs most things is politics. Conventions are really just on a spectrum of situations in which politicians comply with the political imperatives that apply to them. You can put them in a hierarchy—you can say there is law, there is conventions, there is normal practice and so on—but what really counts is how difficult it is either to disregard the rule or to change it. It is very difficult politically to disregard the law, but it is quite often easy to change it. I spent my whole career changing the law in order to enable the Government to do what they wanted to do. Conventions are quite difficult to change, but they are flexible enough to be manipulated to suit the situation that you have. As I say, what really counts is the political imperative.

Q9 **Mr Jones:** Is a problem with conventions that the political imperatives underpinning them change far more quickly than the conventions themselves?

Sir Stephen Laws: Yes, but—I think I explained this to previous versions of this Committee, on which you sat—there are four main factors that govern the way politicians regard themselves as constrained by the imperatives. One is parliamentary time. Governments do not want to use parliamentary time. The more controversial something is, the more time you take up. They do not want to expend their political capital. The more arguments they have, the more they appear to be contentious and perhaps inefficient. It is not enough usually for most policy processes just to have a majority. You want to get as many people on board as possible, and you certainly want an overwhelming majority of people to accept the legitimacy of what you are doing, so you stick to the normal way of doing things, because that saves on parliamentary time, saves on political capital and gives you legitimacy. It also avoids what I call the Pandora's box factor, which is the likelihood that you will change all the rules and find that they are used against you when the political cycle turns against you.

Lord O'Donnell: I think conventions have their place, but I remember, when we came to the Cabinet Manual—this is probably the economist in me—asking the question, "What constitutes a convention? What is the definition of it? When does a precedent become a convention?" There are all sorts of issues there. It seems like a convention is regarded as basically one of the agreed rules of the game until someone comes along and changes them. We saw the previous Speaker in the House of Commons taking what one thought were established conventions and changing them.

It is a strange world, but it seems like nearly everywhere has a mix of conventions and formal constitutions. Even in the US, there are some rather strange things—for example, the size of the Supreme Court or voting for the President—that are matters of convention, not constitution. One of the issues, which Stephen is probably better qualified than I am to talk about, is what happens when the Supreme Court puts itself up and looks at conventions, in a sense, as a constitutional court, but without a written constitution. That is quite a difficult area.

Q10 **Mr Jones:** Perhaps, Sir Stephen, we could explore that a bit further, in the light of cases such as the Miller case. To what extent would you say conventions are still an effective way of bringing about constitutional change in this country? Do you think it is necessary for legislation to be effected to obviate the problems that have arisen as a consequence of cases such as Miller?

Sir Stephen Laws: I am not sure that conventions are a way to change—they are not a mechanism for change. Change is something that law can do, but it is much more difficult for conventions to do because, by definition, they are the established way of doing things and you cannot change that except by a run of practice.

That is one reason why I have some doubts about the concept at all. The legislative consent convention was created out of a single statement by a Government Minister in the House of Lords during the passage of the

devolution legislation. That is said to be a convention. The normal, lawyers' definition is that a convention is established by practice which everyone accepts, and it is established by long practice. There is no long practice in relation to Dissolutions of Parliament and votes of confidence. We have only had three since the beginning of the 20th century—cases in which the Government have been defeated on a motion of confidence.

If you are going to change a convention, and not manipulate it to fit your new situation, you have to do it by law. The risk of doing it by law is always that you introduce the courts into a place where I think they should not go, which is the relationship between Government and Parliament. That is not a place for the courts. If you legislate conventions that affect that relationship, you get the courts interfering with it, and that is a bad thing in principle.

Parliament is sovereign, and it can legislate to change a convention and legislate for it not to go before the courts. In the first Miller case, that is what they said about the legislative consent motion convention—that it was a convention; it may have been set out in statute, but it was not the law. That is always the big risk, that you subject yourself to the regulation of the courts.

Mr Jones: Lord O'Donnell, would you like to add to that?

Lord O'Donnell: No. I agree very strongly with what Stephen said. When you are in completely new areas, like devolution, people try to establish conventions, but clearly there is no history, so they cannot be something that is built up over the years. You are in a slightly strange place.

All of those conventions get tested when we come up with something that is very new but, on the other hand, one of the problems with legislation is that it tends to be rather fixed. Imagine legislating for the regulation of the internet—the kind of thing that we would have legislated for five years ago even would be wildly inappropriate now.

Sometimes you have to find ways, possibly through regulation, that are better ways to manage situations, rather than necessarily going through legislation. In particular, as Stephen says, it seems odd to me that one can establish a convention overnight.

Mr Jones: Thank you.

Chair: Thank you, David Jones. Before Tom Randall comes in, a brief supplementary question from David Mundell, please.

Q11 **David Mundell:** Thank you, Chair. I was interested, Sir Stephen, in what you were saying about the so-called Sewel convention, which I took through the House of Commons as part of the Scotland Act 2016. Is your view that, in effect, you cannot incorporate a convention in statute, or is your view that it is in statute, but it can change, even though it is in statute?

Sir Stephen Laws: I think once it is in statute, it is very difficult to change except by statute. The Miller case demonstrated that it is possible to legislate convention and not to turn it into a rule of law—in the case of that convention—but it is a very risky thing to do, because once you have started, the courts are very likely to take the view that, because it is in statute, it is law and therefore they should regard it as something that is justiciable. That part of the first Miller case was good, in that it held that the convention was not a matter of law for the courts to determine.

It is quite a challenge to draft something that you can guarantee will not be regarded by the courts as something that is justiciable. That was also an issue with aspects of Gordon Brown's "The Governance of Britain" agenda, the war powers proposals in particular. There was always this issue that you could do your best to make sure that it was not justiciable, but you could not guarantee it once you had put it in a statute.

Chair: Thank you. I call Tom Randall, and then Lloyd Russell- Moyle.

Q12 **Tom Randall:** Thank you, Chair. Lord O'Donnell, the Fixed-term Parliaments Act replaced the previous arrangements for dissolving Parliaments, which were based on Her Majesty's prerogative powers. Can you explain how arrangements for Dissolution worked while you were the Cabinet Secretary and were there any limits on those previous prerogative arrangements?

Lord O'Donnell: They weren't particularly tested, to be honest. All the decisions that were made were pretty straightforward. There was pretty much cross-party agreement on most things, so I do not think there was anything that made me feel that there were problems there.

Q13 **Tom Randall:** Thank you. Sir Stephen, there are seven sections and a schedule in the Fixed-term Parliaments Act. Can you explain what the different sections of the Act do?

Sir Stephen Laws: Section 1 establishes the five-year term. That was previously fixed under the Septennial Act 1715, when the term was seven years, and then reduced to five in the Parliament Act 1911. This set out a clear date and timetable for five-yearly elections. It was a lot clearer than the previous law and beneficial, and it may, for that reason, have contributed to that thing I was talking about, which is changing the default position of expecting Parliament to last its full term. As you were never quite sure when the full term finished, there was a great advantage in getting the Prime Minister to choose to finish it before you reached an uncertain date.

Section 2 is the most crucial one. It is the one that tells you that you can have elections within the five-year cycle—that was essential, because Government might lose the confidence of the House of Commons and you needed to take account of that. It provides two means by which that can be done. The first is by a two-thirds majority on a vote of the House of Commons, and the other is the system of a vote of no-confidence and then a two-week wait and another vote of confidence in whoever was then the Government.

The third dealt with the procedures for the Dissolution of Parliament. The way that the Dissolution of Parliament was worked out previously was that you worked backwards through the election timetable in the Representation of the People Act 1918, and then you worked out when you needed to dissolve Parliament to have the election on the day that you wanted. I always found that very difficult—perhaps I found it difficult because it was so important to get it right. So that provides for the Dissolution of Parliament and therefore says that Parliament can only be dissolved in the circumstances when an election has been designated under previous provisions of the Act.

Sections 4 and 5 were two provisions—one for Scotland and one for Wales—to postpone the Assembly elections so that they would not coincide with the date that is now being fixed for a general election. Section 6 has something on Prorogation, which is what was wanted, and also makes it clear that, before Parliament was dissolved by proclamation and the new Parliament was summoned, although you have replaced the system for Dissolution, you have not replaced the system for summoning the new Parliament. Then there are some amendments, mostly to the election timetable that goes with the Dissolution in the schedule, and the final provisions with the short title and so on. That is what they all do.

Chair: Thank you. Lloyd and then David Mundell.

Q14 **Lloyd Russell-Moyle:** My first question is for Lord O'Donnell and then Sir Stephen. In your view, was it the intention of the Government at the time that section 6 of the Act would abolish the royal prerogative power of Dissolution completely?

Lord O'Donnell: The simple answer to that is yes.

Q15 **Lloyd Russell-Moyle:** Why, therefore, did the Government not set out its intention more explicitly in the Bill and explanatory notes? I can see that there were a number of comments about that in the debate, but is it clear in the Act itself?

Lord O'Donnell: Should I let Stephen answer that?

Lloyd Russell-Moyle: Yes.

Sir Stephen Laws: Section 3(2) says: "Parliament cannot otherwise be dissolved". That comes as close as I can see to abolishing it, but I think in some ways the issue of abolition is a red herring. There is a lot of academic debate about whether once you have abolished it you can revive it and so on. I don't think that is relevant. Parliament is sovereign. If Parliament wants to say the law from 2020 is to be the same as it was before 2011, as if we had never had the Fixed-term Parliaments Act, that is within the power of Parliament to say. Whether that revised something that has been abolished or starts it up again is more or less irrelevant, because the practical effect is that you have got to where we were before. There is a reason for not going where we were before, which is the second Miller case, but that is possible. The whole issue of abolition is not, I think, very important.

As for the explanatory notes, it is not the function of explanatory notes to say more than is in the Bill. To legislate by explanatory note is something that I am certainly against and I think lots of people would be. I think there is an issue about the explanatory notes to the Bill, which is one of the other three things I think it is important to remember about 2010. This Bill, particularly section 2, was radically rewritten in the House of Lords, so it said something different. When you look at the explanatory notes for the Act, you see explanatory notes that were written for the previous Bill and only changed so far as it was thought necessary to take account of the amendments, and not to explain them in detail.

Q16 **Lloyd Russell-Moyle:** If I summarise right, it is a bit of an academic nonsense whether you would create a new, or restore from abeyance, royal prerogative or not. What matters is the effect of it, if you would relegislate for that to happen.

Sir Stephen Laws: I think that is right. There is the debate about repealing the Bill. Can you repeal the Fixed-term Parliaments Act and get back to where you were? Well, the common law was that if you repealed an Act the law went back to what it was before, as if the Act that you repealed had never existed, but that was changed in the 19th century. The Interpretation Act says you cannot revive anything just by repealing it. So whatever happens, what comes next—that is to say, what the new law will be—even if it does that by saying it is the same as it was before 2011.

Q17 **Lloyd Russell-Moyle:** So it would have to have a bit more than just repeal on the face of the Bill. You mentioned the Miller-Cherry case and the danger of judicial oversight of some of these things. Maybe I'm a bit dim, but what is the actual problem with judicial oversight over certain things where the public might think that the Government have overstepped the mark compared with where Parliament wanted them to be?

Sir Stephen Laws: I think there are two things. The first is protecting the fact that I think the relationship between Government and Parliament should be a matter between Government and Parliament, and that if you introduced the courts into that you actually put the courts over both Government and Parliament. If they are defining what each can and are allowed to do, they then become supreme rather than Parliament. Parliament can always dismiss the Government in our system—well, the House of Commons can—if it wants to.

Q18 **Lloyd Russell-Moyle:** Not if it's prorogued, it can't. The case there was that Parliament had to re-sit. Of course, Parliament could then continue to allow the Government to govern and even to re-prorogue it, which it did do. Maybe this is going slightly off tangent, but I just wonder if sometimes there is a case for the courts to back up Parliament when Government might overstretch.

Sir Stephen Laws: As you say, we are probably going beyond it if we start arguing the rights and wrongs of the Miller No. 2 case. What I would say is that the Government did not prorogue in order to stop itself being defeated in a vote of confidence. I think our system would work to make

sure it did not and that instead it had a calibrated Prorogation that enabled Parliament—the House of Commons—to vote no confidence in the Government if it wanted to. That was a result of the political imperatives I was talking about that govern our constitution. If the Court was to decide whether we could have an election, it would draw the courts into politics in a way that would not be good for them either.

What the Fixed-term Parliaments Act does—what any rule about the Dissolution of Parliament does—is set out the situation where the electorate will not have a say when it otherwise would. That is what the Fixed-term Parliaments Act does. I am not sure there is a great case to be made for saying it is an important part of the system.

Lloyd Russell-Moyle: Okay.

Chair: Thank you Lloyd. I call David Mundell now, followed by John Stevenson.

Q19 **David Mundell:** Perhaps Sir Stephen can start, but Lord O'Donnell, you can come in if you have something to add. I am interested to know what thought and consideration was given in the drafting of the Act to its interaction, when implemented, with the fixed-term arrangements for the devolved institutions. As a direct result of the Act, the timings of, for example, the Scottish Parliament elections were changed, effectively on an ad hoc basis, and that ad hoc nature still goes on, because the fixed term of the Scottish Parliament—four years—has not formally been changed.

Sir Stephen Laws: It certainly was thought about very carefully—that is why the two devolved elections were postponed—but what was not resolved was the fact that the devolved Parliaments had four-year terms and the Westminster Parliament was to have a five-year term. That meant eventually we were always going to come back to a situation where they were happening at the same time. The initial solution was an ad hoc one because that could not be resolved—if you cannot decide it now, you have to decide it later.

Q20 **David Mundell:** So it's a bit like the Barnett formula—although there might be issues with it, people cannot think up a better resolution?

Sir Stephen Laws: Yes.

Chair: We are at risk of straying. We will go to John Stevenson and then Ronnie Cowan.

Q21 **John Stevenson:** I will turn to Sir Stephen first. The Fixed-term Parliaments Act made provision for an election being called with a super-majority of two-thirds of all seats in the Commons, but this was circumvented by the Early Parliamentary General Election Act 2019. In your view, what effect has this had on the Fixed-term Parliaments Act and the feasibility of the super-majority?

Sir Stephen Laws: We always realised that that was an option. We had lots of discussions about whether the Government could vote no confidence in itself, and the view was that the political imperative would

be that it would not want to vote no confidence in itself. So what was the alternative? It was to put the Bill through both Houses.

This fits in with what I was explaining: we thought we were just changing the default assumption. Yes, you could put Bills through both Houses and produce an election. That was going to be more difficult in many circumstances than getting a two-thirds majority in the House of Commons. If you did that, you would have to take whatever political heat came from the fact that you were circumventing the procedures in the legislation. We got to the position last year where it was clear that the Government could make a good political case that Parliament was paralysed and that it needed to pass a Bill through both House to get the election that was the only way out of the problem. As I say, it is all about the weight of the political imperatives. The Act shifted them a bit, but they could give way, as the default imperatives always can, to a political case for changing the law.

John Stevenson: Lord O'Donnell, do you have anything to add?

Lord O'Donnell: Certainly. I think Stephen's phrase about changing the default is a good one. The presumption was, "Let's try and do five years if at all possible," but clearly you don't want to override the sovereignty of Parliament. The possibility of then legislating as Stephen said, and it was actually done, was clearly there, and it was always going to be there. So that is one of those safeguards. What we were primarily thinking about when we put the Bill together was a situation where there might be more and more types of hung Parliaments and if some of the smaller parties fell out with the bigger party, you would need to think about how you might reformulate a Government—hence the 14-day period one. And of course, there might be a period when Parliament itself thought, "This is not working. Let's just have a general election to solve this", so you would have the two-thirds majority one.

I think we stalled during that period when we had minority Government. On some of the problems of minority Government, when we look back on this and compare full coalition with that minority, I think it will be fairly clear to the historians which one was a more stable Government.

I think it is the case that what the Fixed-term Parliaments Act ended up doing was facing Parliament with the choice of, "We can't make up our minds about what the right way forward is", and in the end they voted for a general election and that allowed us to get out. I think sometimes people underestimate the strength of the system that we've got with the Fixed-term Parliaments Act. It actually did find a way through.

Q22 **John Stevenson:** But given what's happened, particularly with the 2019 Act, do you think that supermajorities are a real constitutional check, or are they just there for particular circumstances and can be overridden very easily?

Lord O'Donnell: Well, as Stephen pointed out, if you can get agreement from both Houses to pass it through, which is very much a political view,

then you can override these things, so there is an issue. Stephen will be much better placed to answer the question, "How can you embed a supermajority in our system?"

Q23 **John Stevenson:** On that very point, Sir Stephen, do you think that supermajorities can be of any value as a constitutional check, or is that something that is anathema to our parliamentary sovereignty system?

Sir Stephen Laws: My view on this has always been that entrenchment—supermajorities or whatever it is—of constitutional rules is fine if, first of all, you can get everybody in advance to agree to the entrenchment, and secondly, if you can identify those things in advance that you know you're not going to want to change later on except in exceptional circumstances. You can't get much agreement on either of those things in advance, and maybe it's not a good idea to get agreement in advance about the things you don't want to do in future. Sometimes the best time to decide whether you should do something is when a case for doing it has actually arisen and you can decide whether you want to go into that case or whether you want to go with what people decided, as in the Americans' case, over 200 years ago. I think I'm against entrenchment of any sort, on the basis that it predicts a future that is inherently unpredictable.

John Stevenson: Thank you.

Chair: Ronnie Cowan, followed by Rachel Hopkins.

Q24 **Ronnie Cowan:** I just want to correct what Mr Mundell said earlier about nobody having a better idea than Parliament. I have—it's called independence. His mic is muted, so he can't come back at me.

Sir Stephen and Lord O'Donnell, take us back to before this Act. If a Government lost a confidence vote, it would by convention—there's that word again—either resign or call a general election. The Fixed-term Parliaments Act makes provisions for an early election after a simple majority vote of no confidence. Does this section provide clarity to guide the Government, Members of Parliament and the public as to how confidence votes now operate?

Lord O'Donnell: Certainly I felt that at the time we were putting it through. Through the whole period that I was there as Cabinet Secretary in the early stages of the coalition, I felt that everyone knew what the new rules of the game were. I'll let Stephen talk about the legal aspects.

Sir Stephen Laws: It makes it clear what the legal pre-conditions are for having an election. It doesn't make clear how the different political actors should behave in the event of a loss of confidence. It doesn't do that because there was no political consensus in Parliament, or indeed in Government, as to how that should be.

Q25 **Ronnie Cowan:** Is that because we are mixing statute and convention?

Sir Stephen Laws: Partly, yes, but the law only deals with what the law deals with, and the rest you have to work out for yourself. That was conscious and in my view right. I think that one of the problems we had

last year was that lots of people were taking statements of convention and setting them out in words, saying, "If the Government is defeated on a vote of confidence, it must resign or submit itself to an election," and then trying to construe those words as if they were set out in a statute and it was law. You can think of all sorts of situations where a Government might be defeated and does not need to immediately resign.

Just looking at the precedents, the only precedent we have since universal suffrage was extended to women of 21 is the 1979 vote of no confidence. Nobody thought in those circumstances that Mr Callaghan should resign when he lost the vote and let Mrs Thatcher become the Prime Minister until the election took place.

What did the Fixed-term Parliaments Act do to change that? I don't think it did anything. It did create a situation in which there was time for it to become politically apparent that another coalition could perhaps run a stable Government. This is the first thing I want to say about 2010, which is that one has to remember that the numbers in the 2010 Parliament did not actually allow the Liberal Democrats and the Labour party to get together and run a stable Government—without except, I think, by bringing everybody on board, and even then I think it was one or two that they had, and you don't count the Sinn Fein people, who aren't in there. So there was always that possibility of another Government.

Q26 **Ronnie Cowan:** The Act contains a 14-day period in which confidence in the Government can be expressed by the House, but no guidance on what should happen during this period. How did you understand that this 14-day period would operate?

Sir Stephen Laws: Is that for me?

Ronnie Cowan: Either or both of you.

Sir Stephen Laws: What I understood would happen was that there would be a period during which there was the possibility of putting a Government together. I think 14 days was discussed in the context of the five days that it had taken to put together the coalition Government. The assumption was, in the context in which all this was passed, that the Liberal Democrats would be negotiating with the other parties, and obviously with the Labour party, to put together a Government that could replace what by then would be a minority Conservative Government, led by David Cameron. So that's how it was going to be used.

There was always the possibility that that deal might have been done before the first vote of no confidence, but I think it was always envisaged that there would have to be some sort of negotiation in that 14-day period, and it would either work or it wouldn't work. The Prime Minister would stay in office until it was clear whether it had worked or not. If it had worked, he would have had a political imperative to resign. If it hadn't worked, he would stay on and see whether the House of Commons would vote for him again, and if it didn't there would be an election.

Q27 **Ronnie Cowan:** But the Prime Minister said he wouldn't resign.

Sir Stephen Laws: Then there would be an election. If he hadn't resigned when it was obvious to the electorate that what he ought to have done was to resign and let somebody else have a go, then he would expect to be punished in the election, and that is what would have persuaded him to resign. That's how I think it would have worked.

Q28 **Ronnie Cowan:** Do you think there should be clearer guidance as to what should happen in this 14-day period? I remember living through it at the time and it was changing on a daily basis, and people's understanding of it, and people's perception of what it was and how it should be used, and how it was being abused, was changing on a daily basis.

Sir Stephen Laws: Well, people had a lot of views about it, but essentially it's a time for a political negotiation, and people have a lot of different views in a political negotiation. It's what the position is at the end of the 14 days that will determine what happens next. The worst thing that could happen is that there will be an election and the electorate will decide, which is how democracy works.

Ronnie Cowan: That's not the worst thing that could happen.

Sir Stephen Laws: Precisely.

Ronnie Cowan: Lord O'Donnell, do you have anything to add to that?

Lord O'Donnell: You will remember the political circumstances: we were talking about the possibility of a change in the voting system to proportional representation because of that referendum. It was possible that we were going to be in a world where it was more likely that there would be changing coalitions, as you have seen in continental Europe where they have more proportional systems, and where you can have changes. Some parties get together, that falls apart, and then some other grouping comes together.

In that sense, people felt that the 14 days was a time when that would go through, and we had always assumed that if a stable coalition grouping came together during that period that did not involve the current Prime Minister, then the Prime Minister would resign. That is a very strong convention, and an important one.

Q29 **Ronnie Cowan:** Yes, but it is still a convention. If the Act is amended or replaced by a new Act, how are we going to deal with this confidence principle?

Lord O'Donnell: Stephen is probably better placed to know how to do it legally. It comes down to the point about whether you want this in convention or in law. That becomes about whether you trust people to behave properly or not.

Sir Stephen Laws: For a long time, I used to think, with a sort of parental affection, that the only thing wrong with the Fixed-term Parliaments Act was that it did not enable the Prime Minister to specify a vote as a vote of confidence and say to the House of Commons, "If you

defeat me on this, there has to be an election." That was a possible reading of the Bill as it was introduced in the House of Commons, but the amendments made in the House of Lords made it clear that only a specifically worded resolution amounted to a vote of confidence. The Bill as introduced allowed the Speaker to say that something else was a vote of confidence.

Q30 **Ronnie Cowan:** The next questions are on Prorogation. When the Fixed-term Parliaments Act was going through Parliament, consideration was given to including Prorogation in the Act. The Government rejected that move, saying that the conventions were "sufficiently strong" and that placing Prorogation in statute was "unwise and unnecessary". In the light of the Supreme Court's decision in the Miller-Cherry case, should the power to prorogue Parliament also be set out in statute?

Lord O'Donnell: Again, I will let Stephen start on that.

Sir Stephen Laws: My view on that is that what should be set out in statute is that Prorogation is not a matter for the courts. I do not think that the courts should decide Dissolution. Prorogation is an essential part of every Dissolution and election process. The decision in the Miller-Cherry case suggests that the courts might intervene in that, but for the reasons that I gave before I do not think that the courts should interfere in when an election is held and therefore what the election will be about.

Lord O'Donnell: There is a lot to be said for people behaving properly, as it were. Prorogation should be used in the right way, at the right time. Part of the problem was caused by a request for a Prorogation that was far too long and clearly raised questions about what it was all about. I would like there to be a convention that said, "There's this 25-day period. Let's stick with that."

Q31 **Ronnie Cowan:** If we are not going to set it in statute, are there other safeguards—you touched upon one there—to regulate the use of a prerogative power?

Lord O'Donnell: Again, I will let Stephen start on that, who is much more expert on these things.

Sir Stephen Laws: Again, what I think is wrong with the Prorogation decision in Miller-Cherry is the fact that it arrogates to the courts the function that is really the function of the sovereign. The function of the sovereign, when the Prime Minister comes and asks for a Prorogation, is not to say, "Prime Minister, is this lawful?" but to say, "Prime Minister, is this wise?"

Now, I do not think it is right to speculate on what happened in that case, but it is clear that the fact that that is the system meant that the Prorogation that was asked for in the autumn of last year, although some people think it was excessive, was calibrated. It allowed the House to move a motion of no confidence if it wanted to. It did not forestall Royal Assent to the Benn Bill. It was for a relatively short period. There were lots of reasons why you could see that restraint had been exercised.

I suggest that that restraint is exercised because the system we have, which is that the Prime Minister does not want to do something that is politically objectionable and does not want to involve the Queen in anything that is politically objectionable, worked to enable him to ask for something that was not excessive. It was also compatible with the Northern Ireland (Executive Formation etc) Act 2019 and met all the deadlines that that Act provided for.

Q32 **Rachel Hopkins:** Lord O'Donnell, from the perspective of the civil service, is there an advantage to having more predictable parliamentary terms and fixing elections to one time in the year, as is currently the case under the Fixed-term Parliaments Act?

Lord O'Donnell: Yes, most certainly. I love the idea of fixed terms and longer terms—I like long-term Parliaments. When I talk to my senior colleagues, both while I was in a post and since, in places such as Australia and New Zealand where they have three-year terms, it is a nightmare. It is just constant electioneering. There is a lot to be said for a fixed term of a reasonable length, which allows you to plan. I have long been of the view that we should have spending reviews that cover the period of a Parliament—with let-out clauses in the event of, for example, something such as the coronavirus, because it is a big shock to the economy and obviously you will want to recalibrate. But in the absence of that, the ability to plan for the longer term is hugely important and that would certainly help Governments to work better.

Q33 **Rachel Hopkins:** Sir Stephen, from the perspective of those who draft legislation, how beneficial is having greater certainty on the timing of elections and parliamentary Sessions?

Sir Stephen Laws: I agree entirely with what Gus says. The Government has longer to do what it wants to do and to concentrate on government. There was a Minister who used to say that that civil servants ought to stay in post long enough to eat their own cooking. Governments need time to be tested on what they have achieved. As I said before, the weakness of the previous system was that you were planning an election after you were two and a half years in, because you thought it might be in the fourth year, and if it was not in the fourth year it might be in the fifth year, so you were constantly looking forward to the next election. If you could do a bit of governing instead, that would be good.

Q34 **Rachel Hopkins:** That brings us nicely into the third area of questioning, which you have both touched on. The five-year term of the House of Commons is one of the longest parliamentary terms in the world. We have touched on other countries, but the majority of European and Commonwealth countries have three or four-year terms. To both of you, what do you think the normal length of a parliamentary term in the UK should be?

Lord O'Donnell: Oh, I would definitely go for five years. I like the longer terms. If you think about any particular plan to look at infrastructure, at—as the current Government's phrase is—"levelling up" or at tackling some of the really big issues such as climate change and ageing, they are long-

term things. As in Stephen's lovely phrase about eating your own cooking, it is great to be there to see the consequences of the decisions you have made coming through. I would go long term, and I can tell you that there are a lot of my colleagues around the world who would love to increase the length of their Parliaments.

What goes with that, of course, and what we got as a side-product of coalition was Ministers in their posts for longer. I remember talking to David Cameron in the run-up to the 2010 election, when he was Leader of the Opposition. He had given me all sorts of views about what he might do if elected, and he said to me, "What would help you most?" I said, "Keeping Ministers in post for as long as possible." Having nine Ministers for Pensions in five years, which happened at one point, is just crazy, so longer-term Parliaments and longer-term tenures for both senior civil servants and Ministers would all be very good for Governments, which are increasingly having to face up to very long-term issues.

Q35 **Rachel Hopkins:** Sir Stephen, do you have a view?

Sir Stephen Laws: I agree. Five years.

Chair: Before we go to Jackie, Lloyd has a supplementary question.

Q36 **Lloyd Russell-Moyle:** On the five-year question, I take your reasoning, which sounds very good. Earlier, we mentioned the difficulty of the lack of cycles for other elections. If the arguments can be made for a fixed-term parliamentary election on a five-year cycle, with devolution and greater autonomy for Mayors, who are making some of those big strategic decisions, is there a case for those other elections to be on a five-year cycle, or whatever the agreed figure is? Is there a case for a figure to be cascaded to all levels of Government?

Lord O'Donnell: I would say that there are some slight differences there but the short answer to your question is yes—I would like the terms to be much the same. There may well be local or national circumstances that might want you to deviate from that, but I would start from the presumption that they should be the same.

Sir Stephen Laws: I think I agree with that. I have never been wholly convinced by the argument that the electorate cannot cope with voting in two lots of elections at the same time; I think that is more of a political issue. I don't think it matters very much whether or not they coincide, but I agree that you could have something similar.

Q37 **Jackie Doyle-Price:** Lord O'Donnell, the Act includes a requirement for a review committee, but the Cabinet Secretary has suggested that the Government may move forward with legislation without having convened that committee. How important is it that we do go through that process, which is written into the Act?

Lord O'Donnell: It's amazing, isn't it, that when you move on from being a Cabinet Secretary to being a Member of the House of Lords, sometimes your views change? I would say the review is a very good idea. This is a difficult constitutional issue and my experience suggests to me that

constitutional issues need to be very carefully considered, because they can have unexpected consequences—let's put it that way. As Stephen was saying, you can't really predict what might happen. Current circumstances really throw that up quite seriously. I think that review committee would be a very important thing that we should do, and I think Parliament should make sure it happens.

Q38 **Jackie Doyle-Price:** In the context of your opening comments, which showed a very different political consensus to where we are now, which is almost entirely driven by behaviours, there does seem to be a need for a formal process to properly look at what has happened.

Lord O'Donnell: Yes, I would agree with that.

Q39 **Jackie Doyle-Price:** Sir Stephen, what would the consequences to the Government be of failing to comply with the Act by not establishing the review committee?

Sir Stephen Laws: If the deadline is reached without it having established the committee, it will have broken the law. I don't think it will do that, and I don't think it should do that. I think it is possible to comply with the requirement to have the committee in a way that is formal. If by then the Government has introduced a Bill and it is going through, all the consideration can take place on the Bill. Your Committee would not count as the one under the Act, because it has been established before the deadline, but it will have done the job. It is not that the job won't have been done—it will have been done. I would suggest that, if by the time the Government has got a Bill ready, perhaps it might submit that to pre-legislative scrutiny of some sort and regard that as the committee. If there is no committee by the time the deadline is reached, the Government will have broken the law, and it shouldn't do that.

Q40 **Jackie Doyle-Price:** Pre-legislative scrutiny would do the job? That does seem to be a legitimate way of dealing with it, particularly given that it is set out in the Act that the majority of the committee should be Members of the House of Commons.

Sir Stephen Laws: Indeed; that is what I think.

Q41 **Jackie Doyle-Price:** Fantastic. That is very helpful.

We have discussed the context. Back in 2010, there seemed to be a political consensus that we should move to more formal arrangements and remove the ability of the Prime Minister to set elections. We are now in a position where there seems to be a political consensus that the Fixed-term Parliaments Act should not continue, but not really a consensus on what should replace it, beyond that manifesto commitment that it should go. Do you have any ideas about what should replace the Fixed-term Parliaments Act, Sir Stephen?

Sir Stephen Laws: I think I am now in favour of going back to where we were before and adding a rule to exclude the courts from considering either Dissolution or Prorogation. What is crucial about any new system is that the responsibility for ensuring that Parliament is not paralysed and

the Government left incapable of governing should rest on one pair of shoulders so that it is a responsibility that will be discharged. I think that has to be the Prime Minister. If the Prime Minister has to share the responsibility of triggering an election if Parliament or the Government is paralysed with other members of the Cabinet or Members of Parliament, that responsibility stands less of a chance of being discharged when it needs to be discharged. That is the crucial thing: the Prime Minister should have the opportunity of drawing a line under a Parliament and Government that are no longer working.

Q42 **Jackie Doyle-Price:** Thank you. Lord O'Donnell, what do you think should replace it?

Lord O'Donnell: I am still very much a believer in fixed terms. There are lots of places around the world that have fixed terms. Personally, I would go for five years. If you were to look back behind a veil of ignorance in a Rawlsian sense, what would you want your democracy to look like? You would want it to have certain rules, and one of them would be that it is fair. To be honest, I think it is not fair for the incumbent to have the power to call an election whenever they like. It is not fair that different constituencies have different numbers of voters in them. There are certain things about our system that are just plain wrong. So I would say, "Can we use this opportunity to come up with a better system that creates a stronger, fairer democracy?" At that point, I would turn to Stephen and say, "Stephen, how could you do that?" because I do not have the legal expertise to know how we can make that work.

Q43 **Jackie Doyle-Price:** I get that completely, but what is missing from your answer is behaviour. Earlier, you talked about whether the way Prorogation was held was necessarily within the rules, but again, that was a function of the behaviour of Parliament, and in particular of the incumbent Speaker at the time. To what extent would you say that what is wrong with the Act has been the Act itself, and to what extent has it been the behaviour of individual parliamentarians and of the collective?

Lord O'Donnell: It is very difficult to separate those two things out. What I would like, and what I think you have to do when you are building systems for the way democracy should work, is to make them robust to people who may not behave as well as one would like, so that you constrain their ability to behave very, very badly. That is hugely important. Again, to be honest, we have observed times when people throughout the system have behaved badly.

Jackie Doyle-Price: That is very diplomatically put. Thank you very much.

Sir Stephen Laws: Can I just come back on the way people behave? On the question of paralysing Government and Parliament, when we were drafting the 2011 Act, we realised that it was going to be possible for an Opposition to keep a Government in place but deny it the capacity to govern. That was theoretically possible under what the Act provided for, but we comforted ourselves with the thought that that could not happen in

practice because an Opposition would not want to do that, because they would be punished in the subsequent election for having mucked up the government of the country. Now, you can say that the Act actually worked. That happened; the party that had been paralysing Government did not do well in the election, but it took rather a long time to do it, and it took longer to happen because of the changes that were made in Commons procedure that enabled the House of Commons to take on the task of trying to govern the country through legislative directions. I think the only way out of that is to go back to a situation where that is not only not practically possible, which is what we thought it was before, but not legally possible either.

Q44 **Jackie Doyle-Price:** Yes, there is a fundamental principle that the business of the House of Commons is determined by the Government because they need to legislate, and that was completely turned on its head, obviously. Before we move on, I want to ask about the 2017 election. You just said that a constraint on the Opposition would be that, if they did not concede to an election, they would be punished the longer they were complicit in paralysing government. But we actually had not got into a position of paralysis when Theresa May called the 2017 general election; it was done more on the basis of anticipated paralysis. Equally, you could argue that she was punished for bringing about an unnecessary election. Do you have any observations on that particular context?

Sir Stephen Laws: I think you're absolutely right: she was punished partly for calling an election that people saw as unnecessary. Going back to the earlier question, a Prime Minister who tried to hang on, when it was clear that an alternative Government could take over, would also be punished if he insisted on an election. That was a factor.

Q45 **Jackie Doyle-Price:** Lord O'Donnell, do you have any views on the 2017 election?

Lord O'Donnell: Clearly, it shows you that these things are unpredictable. What we observed was the Prime Minister going into it thinking she would strengthen her majority and put herself in a better position but ending up not doing that. That is the nature of democracy; that is what happened. But it did put us into a situation where we moved from a majority Government to a minority Government. We then observed the problems with minority Governments and the difficulty of making minority Government work, which is one reason why the contrast between the Government post the 2017 election, and the Government from 2010 to 2015, is quite stark. It is why, in some ways, I regard it as quite a worry that the full coalition period may have meant that—it is quite clearly the view of the Liberal Democrats at the moment—coalitions are off the cards for a long time, because they are seen to damage the small party. I think that's unfortunate, personally.

Q46 **Jackie Doyle-Price:** I tend to think that the Fixed-term Parliaments Act is being made a scapegoat for the issues around minority Governments. Do you agree or disagree?

Lord O'Donnell: Personally, I agree.

Jackie Doyle-Price: Thank you.

Sir Stephen Laws: I certainly tend to agree. On the subject of minority Governments, that is one reason why it is very important that we should get a solution that does not enable paralysis in the House of Commons to operate as a sort of alternative Government giving legislative directions. If coalitions become unlikely because of what happened to the Liberal Democrats in 2015—hung Parliaments are still likely to happen, and we have actually had quite a lot in the last 120 years—you have to have minority Governments that can work to some extent. They might not work as well as majority Governments, but they have to be able to work to some extent. Their working depends crucially on the fact that they stay in office until they are thrown out of office, and that they are not implementing the policy of one majority in the House of Commons one day and a different majority another day, so that they are doing all the spending but none of the taxing. The only way you guarantee that minority Governments work is to do what happened between '74 and '79: you keep going and do what you can, because the only alternative is to vote people out and have an election. Another alternative, which the Speaker provided in the last Parliament, reduces the stability of minority Government.

Jackie Doyle-Price: Thank you very much.

Chair: Karin Smyth.

Q47 **Karin Smyth:** I want to pick up on that and on something you said earlier about what might replace this, with regard to the 2011 Act not allowing the Prime Minister to come and move a "Back me or sack me" motion. Following on from what you just said, should anything that would replace it—this is for both of you—include the possibility that the Prime Minister could come to Parliament and say, "This is a minority Government. This is the coalition I'm holding together. I need a vote of confidence"?

Sir Stephen Laws: I think "Back me or sack me" is an essential part of any new system. One problem—not for you, really, and not for Parliament—with any system that involves changing the Prime Minister without having an election is that the systems for electing party leaders are matters for the parties. Lord Finkelstein wrote a really interesting article a couple of weeks ago in *The Times*, which I fully agree with, saying that the idea of changing the Government without an election requires some ability for one of the parties involved to change its leader, so that you can put together a new coalition, but that is not possible under the party leader election systems that the parties have at the moment. I am not sure anything can be done about that, but I think it is a factor.

Q48 **Chair:** We are going to move on now to our next topic for consideration, seeking the expertise of our two witnesses, which is the Coronavirus Act 2020 and, more broadly, some of the Government's response. If I could begin with a question to Sir Stephen on the Coronavirus Act, which was passed as an emergency piece of legislation, what are the challenges faced and compromises made in drafting emergency legislation?

Sir Stephen Laws: Almost all legislation is passed and prepared against a deadline that is shorter than the people preparing it would wish for. In some ways, it is just an exceptional version of that situation. Normally, people develop their own techniques for making sure that the best is not the enemy of the good, which we have heard quite a lot about in this context. What you are usually doing with emergency legislation is substituting proper scrutiny for subsequent accountability, both because there is no time for the proper scrutiny and also because, very often in the sort of situation in which you are passing emergency legislation, there is not the political room for proper scrutiny either.

That presents a problem if you are preparing the legislation in a hurry. There are a number of things that you have to be wary of to make sure they do not go wrong. You tend to get your instructions from people operating at the strategic level, without lots of input from people from the operational and tactical level, so sometimes you get things that you think won't work. There is the problem of integrating it into the existing law. Sometimes, the proper analysis for a piece of legislation is: "What do we want to achieve? What do we want to do to achieve it? What in the law is stopping us doing it? How do we change the law to enable to us to do it?" When drafting emergency legislation, lots of those steps are skipped—"What do we want to do? Let's take the power to do it." Then you have to balance the fact that you are getting less scrutiny against the fact that you want to make sure that you have not missed anything, because you are thinking about it in a hurry, so you take very general powers. Those conflicts need to be reconciled.

There is then the problem of making sure that all the bits of it hang together. One noticeable thing about the Coronavirus Act is how long it is. It is as long as it is because every single part of the United Kingdom has its own bit. If you had a bit more time, you might think, "A lot of this can be done together if we work out how it all fits together", but you don't have time to do that, so you set out each bit separately without trying to stitch them all together. I think that is a conceptual summary of the challenges.

Q49 **Chair:** Lord O'Donnell, do you have a quick comment on that?

Lord O'Donnell: Yes, what I would say about this is that it is an emergency, and therefore you need to get on with it, and you are not at all sure what powers you are going to need, and therefore you are going to move towards the legislation being much more comprehensive than you might actually need. The absolutely crucial safeguards in this are to have review period, like the six-month review that we have, and sunset clauses, such that this does not last beyond a certain period. They are absolutely crucial, because these things move very quickly. If you are still in this massive crisis in two years' time, we might just continue the legislation, and then we would have new legislation, but I think it is really important that Parliament keeps a check, particularly when you are taking sweeping, comprehensive powers.

Q50 **Chair:** That helps with my supplementary question, in particular to Sir

Stephen, about issues and problems found in the Act which are there because of the speed at which it was produced and passed. How, Sir Stephen, would you imagine those to be identified and, perhaps more importantly, rectified?

Sir Stephen Laws: Well, except in so far as they are powers that have been taken, they can only be rectified by amending the Act, if the Act isn't good enough. It will be for the Government to have the initiative on that, although it will doubtless take account of the views that are expressed in Parliament during the review processes. I am slightly nervous, because of events last year, about putting lots of provisions in statutes about parliamentary review. I think the Government takes account of what the House of Commons thinks without the need for lots of detailed provisions and votes, and reports, and so on. I think they will be identified out of the practice.

Q51 **Chair:** Just touching on that question, we are currently—the majority of us—dispersed around our constituencies. Do you foresee any issues with that, and with the Government taking a view, as you put it?

Sir Stephen Laws: Well, obviously it is going to be more difficult, but you are working to make sure Parliament continues to work, aren't you?

Chair: Thank you. I wonder if I could go to David Mundell, please.

Q52 **David Mundell:** Thank you, Chairman. Lord O'Donnell, when you were Cabinet Secretary and there was planning going on for a crisis such as a pandemic, to what extent did you foresee that that would be dealt with under part 2 of the Civil Contingencies Act 2004, or to what extent did you think that it would inevitably require bespoke emergency legislation?

Lord O'Donnell: To be honest, we took the view that the Civil Contingencies Act gave us quite a lot of control and that, if in the event of a crisis and the things we had to do we needed more, then clearly the circumstances at the time, the nature of the crisis being so pervasive, would allow us to do that quickly. So we hoped we had got enough; and, remember, those crises that we went through—we didn't, in the end, have to go to full lockdown. So we were talking about circumstances that were less severe; but we certainly did do planning. We had planning groups set up. One of the things they were set up, and were prepared, to consider was whether we needed to have extra legislation or not. That is why we set up ministerial committees, and the like—to deal with the fact that we had recognised that pandemics were top of our risk register.

Q53 **David Mundell:** So from what you are aware of, do you think that we could have proceeded on the basis of the Civil Contingencies—or that it is appropriate to have emergency legislation in this instance?

Lord O'Donnell: I think in this instance, given that it is a much bigger issue and that the way the Government has handled it has involved much more draconian steps, it was right to have the legislation there and to give ourselves—the Government—the possibility of doing more things beyond that Act. For example, not quite having the triple lock might be one of those. Because, also, you weren't quite sure how far this problem would

go. There were some very dire predictions and it is still unclear how it will evolve; so I think it was important to have enough power in place, subject to the point I made—reviews and sunset clauses.

David Mundell: Thank you.

Chair: Ronnie?

Q54 **Ronnie Cowan:** The effects of the covid-19 pandemic are going to be felt through the United Kingdom for many years to come—not just for the economic effect but also because of the high number of deaths that we are going to experience in the UK compared to other countries in the world. The UK Government's risk register listed pandemics as both probable and highly disruptive. Should the Government have been better prepared for the coronavirus pandemic?

Lord O'Donnell: It is very difficult for me to say that, because I have no idea of the level of preparedness there was. All I can say is that when I was in post, we were stockpiling antivirals in 2006-07. We were building up PPE in 2008-09. We stockpiled antibiotics in 2009-10.

What I would say is that one of the difficulties you face in government is that when you put that at the top of your risk register, you tell people, "This is really important", but when it comes to it, the immediate and the visible overtake the longer term and the invisible. If you have a health budget that is running hot, very rarely would we accept a situation where we have got lots of spare capacity—the whole just-in-time thing and all the rest of it.

I think it is very hard to get Ministers to decide that actually they are going to spend some of that really scarce budget on things that you are really rather hoping never get used. That is a problem with our system that we need to try to solve.

Q55 **Ronnie Cowan:** Rather than stockpiling PPE, antibiotics or whatever we require, because we do not know what the pandemic is going to be—actually, influenza was the pandemic expected to be the one that would hit us—should there not be a plan in place to say, "This is how we will approach it"? Taiwan learned from the SARS outbreak. When covid-19 came along, Taiwan said, "You hit it hard and you hit it early."

New Zealand followed their model, and the last thing I saw for deaths in New Zealand, which has a population of just under 5 million, was that it was 14 people. If you equate that to the UK, we would be looking at deaths of about 200. We are looking at more than 20,000. Rather than thinking about having to stockpile equipment, should we have had a strategy in place that said, "This is how we can reduce what happens. This is what we have to do to contain a virus at airports and seaports and within our community"?

Lord O'Donnell: I am afraid I am not in a position to know what the strategy was, because I have been out of office for the best part of a decade. Personally, I think that you are absolutely right.

Of course, the best way of handling these things is by tracking and quarantining people as early as possible. I am still not quite sure why we have not done more on stopping people flying into the country from places where the pandemic is still rife. Yes, there are some perfectly legitimate questions. I think the issue for us now—it is an issue that I have been trying to grapple with—is, given where we are, how do we find our way out of this? I instituted some reviews in my time into how the Government had managed SARS and things like that. It is very important that we look back on this and learn the lessons.

One of the lessons that will be really important and may well be missed is for God's sake don't come out of this with a set of issues about how you manage this kind of crisis alone. We need to tackle the issue of how we allow for the fact that we need to give more weight to contingency spending—it may not even be in health; it may be in the cyber area—where it is not going to have immediate results. You are not going to be able to have a Minister opening a hospital. These things are not as politically salient, and we need to give that more weight in our system.

Ronnie Cowan: Sir Stephen, do you have anything to add?

Sir Stephen Laws: I don't think I have anything to add to that.

Chair: Lloyd, followed by Karin.

Q56 **Lloyd Russell-Moyle:** Lord O'Donnell, on that final point, you mentioned earlier your desire generally for budgeting to happen in five-year cycles and so on. Is there a case for certain budgets or certain spending that is not politically contentious, but maybe not politically advantageous either—such as contingency spending—to be able to be agreed over even longer periods of time on a cross-party basis? Is there some kind of place that we need to get to?

One of the things that was always the pride of the NHS was that we were very good at squeezing out waste compared with other health systems in the world; that has actually now maybe bitten us on the bottom, as it were. How do we get that political agreement, when it has to be over decades, potentially?

Lord O'Donnell: Yes, and obviously getting agreements over decades is virtually impossible in our system, and will be even harder if we do not have a nice long fixed term; I just put that in as an aside to connect the two.

You are absolutely right in your point about cross-party agreement. In preparing for this, I discussed it with Bruce Mann, who at the time was the head of the civil contingencies secretariat, and one of the things he emphasised to me and reminded me about was the fact that we got cross-party agreement on a lot of these plans. I think that is absolutely crucial.

I am a firm believer that all politicians are trying to do their best for the country, so I think this is an area where, particularly in the light of this episode, we might well be able to get some really good, sensible long-term

agreements, where we can just all accept that this is a very sensible thing, that people like the Public Accounts Committee will be onside for this, and that the Select Committees will be asking people, "How are you doing with your contingency planning, and have you set aside enough money for these various contingencies?"—not just looking at the risk registers, but actually saying, "Have you spent the money on the mitigation?" That is the crucial point.

Q57 **Lloyd Russell-Moyle:** Is it enough just to allow that to be ad hoc—in other words, for the Committees that already exist to do it and we hope that the Government of the day will reach out for political consensus—or does there need to be some sort of formal structure now established that embeds that: even a kind of contingency committee or a contingency working group or something that actually has some political balance? I do not know if there are advantages of doing it in a more ad hoc way or a more structured way.

Lord O'Donnell: Given my background as a former permanent secretary of the Treasury, this is all about the money in the end, so I would start from looking at the spending review process: when we do spending reviews, can we set aside these moneys, and then can we set up the structures where Parliament has a very clear role in looking at whether those contingency spends have been made? That could be the Public Accounts Committee, it could be various Committees, but I think that sort of structure would work rather well.

Q58 **Lloyd Russell-Moyle:** Sir Stephen, was there anything you wanted to come in on in terms of the structures of cross-party working on this?

Sir Stephen Laws: I think the only thing I wanted to say was that what comes next with this cross-party working thing is that they will have the advantage of looking at this in the context of a crisis that has actually happened. People are asking why the Civil Contingencies Act has not been used.

I can see that there are things in the Coronavirus Act that could not be being done under the Civil Contingencies Act, and I can see that the parliamentary control of the Civil Contingencies Act was a worry if Parliament might not be meeting or might be diminished in numbers, but it was a peacetime plan that, it seems, has fallen apart on its first contact with the enemy. Next time people try to revise the civil contingencies arrangements in peacetime, they will have recent experience of wartime, and they might come up with something that can be used next time there is a crisis.

Lloyd Russell-Moyle: Thank you.

Q59 **Chair:** Can I ask Lord O'Donnell to sit back slightly from his screen? We were at risk of almost losing his eyes at a point there, and I want to have him in the maximum appropriate shot.

May I ask him whether it was his role as Cabinet Secretary and the role of the Cabinet Office to ensure the co-ordination and accountability that he spoke of in terms of contingency planning across Departments?

Lord O'Donnell: The Cabinet Office has no formal powers on that, but we have political persuasion. Our role really was to look at the civil contingencies, develop the risk registers and then there would be mitigating actions that you would put across to Departments. During my time, we set up a Cabinet Committee, which was chaired by the then Secretary of State for Health, Patricia Hewitt, to implement the various issues and to make sure that, as I said, those stockpiling ideas that we did—antivirals, PPE, antibiotics—were actually implemented.

Q60 **Chair:** So was it an obvious choice to appoint the Health Secretary of the day to fulfil that role?

Lord O'Donnell: It was, because the pandemics we were thinking about then were largely in the form of flu pandemics—that was where we were—and if we still think about pandemics in the main area of health, it still is.

However, the crucial point is that you cannot just have those committees dominated by health. This is the focus of a paper that I have published this morning: in the end, all these issues come down to trade-offs between health issues, and you need to take account of all the wider issues—things like the economy, mental health and various other issues—in respect of the decisions you make.

Chair: Thank you.

Q61 **Karin Smyth:** My question, Lord O'Donnell, was going to be about the ability, when you were Cabinet Secretary, to ensure that all Ministers and the Cabinet gave contingency priority, and how you would make them do that. I think you partly answered that in your last answer—perhaps the reality of the now means that once people have lived through something like this, they are more aware of contingency. Can you elaborate on how you would impose on various Ministers the importance of contingency at the time?

Lord O'Donnell: Sure. I think I mentioned before what I would go for. As you say, it will be easier now, because we have just been through this process—or we are going through it—and it will be fresh in people's minds. I would build into the system of spending reviews that you are giving certain amounts to various Departments, but as part of that you would expect them to allocate the amounts that are necessary to meet the mitigating factors you need to meet to hit your risk register.

I stress that this is not just about the Health Department—it could be lots of other Departments—so let us not just fight the last war; let us make ourselves aware of the behavioural bias in the system, which is always to do with the immediate and the visible and not to do with the long-term planning.

Q62 **Karin Smyth:** I was a health service manager at the time of the 2009

pandemic, so I remember very well the stockpiling and the operation that we ran on the ground. The changes to the health service as a result of the Health and Social Care Act 2012 did make a difference in 2013. Following on from 2014, there was a test run of the new systems, although it was delayed, but we still do not know the results of Operation Cygnus and the test run. In your view, how usual is it for the lessons learned from a major incident-planning exercise not to come before the Government in a period of what is now up to four years?

Lord O'Donnell: My approach to all these things was that every crisis is something to handle but also something to learn from. You should have a review afterwards and you should publish the review. We had one, I think, after swine flu and the like. It is really good to get on and publish those reviews.

Sometimes, when you are doing table-top exercises, it may be that you want to create a certain amount of confidentiality around them. I have done some of them with exercises to look at terrorist events, for example, and we have found some issues that really should never have been there. If you have a process whereby everybody is going to come to those meetings and they are not going to treat them in the right way, it might get incredibly defensive.

We need to manage this vision of transparency with the kind of attitude they have in, let us say, air traffic control, where every single near miss is logged, there is a no-blame process and everyone gets on and learns from them. That is where we need to be. The problem is when you get into a mindset where everybody gets incredibly defensive, does not say what they really mean and tells you that it will all be fine, when actually they know that there are certain problems. I would like to get that openness in advance and manage that with the right amount of transparency that encourages openness to continue. That is where it is quite tricky.

Q63 **Karin Smyth:** Thank you. I think Sir Stephen said that you have strategic and operational planning, which are sometimes remote from each other. How would you suggest that the system learns? I think your response, Lord O'Donnell, is really about the strategic side, because people are much more honest about the operational side and those relationships. What did you learn from the swine flu pandemic about the interplay between the operational learning and willingness to be transparent and the strategic, Government level?

Lord O'Donnell: Sorry, is that for me or for Stephen?

Q64 **Karin Smyth:** I think it was something that Sir Stephen said, but I am interested in your experience from 2009 and how that might help, and then Sir Stephen can follow up on it.

Lord O'Donnell: There were lots of different crises. There were health crises, but also the global financial crisis, of course. You make a very good point about the operational side. You think you have processes that are working, and then suddenly it turns out that actually they rely on a contract with a country and that contract is not worth what you thought it

was, and when it comes to it you cannot actually get the equipment in those advance purchases that you thought you had contracted for.

It is absolutely crucial when you do these exercises that you have the people who have dealt with the operational issues, and say, "Yeah, you had these rules in place, but we couldn't possibly work with them because they just did not work."

You are completely right. The crucial part about learning from coronavirus, when we come to do that learning, will be to have the operational people—the people who are in charge of procurement—who can say, "Here were the real obstacles, and here are the things that went wrong, and this is how we must try to build a system that is much more robust for the future."

Sir Stephen Laws: I don't think I have anything to add, except that it goes right across the board. My experience of the strategic and operational level was often in drafting tax. You could have wonderful schemes devised at the strategic level at the Treasury, but you have to ask the tax inspector whether they will actually be able to collect the money.

Q65 **Karin Smyth:** Thank you. As an emergency planner at the operational level after 2013, I completely concur. We do need to learn that. Finally, do you think, Lord O'Donnell, that the fact that the emergency turned out to be less important in 2009 was problematic for what happened afterwards?

Lord O'Donnell: That is a very good question. It is difficult to know how it influenced people's behaviour. In 2009, yes, bizarrely we actually got some criticism for having spent too much money in certain areas. To me, that seems rather counterproductive. People need to realise that when you are in these emergencies, you actually need to throw money at certain things and you need to do it quickly. You need to suspend that value-for-money consideration that you would have had before, and just get on and do things. You need to cut through, and people need to feel safe in doing that.

Yes, 2009 worked out one way. I would like to think that people were smart enough to realise that we just got lucky, in a sense. There are plenty of people at the Wellcome centre who were telling a lot of us about the issues there could be if we had a virus that not only was quite lethal, but also had a high level of transmission. That was the worst case that everybody needed to be thinking about. Hopefully in the future we will learn from this, but in a very broad way.

Karin Smyth: Thank you.

Chair: I thank both our witnesses this morning—Sir Stephen Laws and Lord Gus O'Donnell. I think that this spirit of openness and transparency will be very useful as we go forward with our meetings next week. I thank all Members and those who have facilitated today's meeting. I think that it has gone almost flawlessly, but that might tempt fate for our next time in

this format. I wish everybody well.