

Procedure Committee

Oral evidence: Powers of the House of Commons to call for papers, HC 1904

Wednesday 20 February 2019

Ordered by the House of Commons to be published on 20 February 2019.

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Members present: Mr Charles Walker (Chair); Bambos Charalambous; Helen Goodman; Sir Edward Leigh; David Linden; Alison Thewliss; Mr William Wragg.

Questions 23 - 45

Witnesses

I: Nick Thomas-Symonds MP, Shadow Solicitor General, and Joanna Cherry QC MP, Shadow SNP Spokesperson (Justice).

Written evidence from witnesses:

- [Nick Thomas-Symonds MP](#)
- [Scottish National Party \(SNP\) Westminster Group](#)

Examination of witnesses

Nick Thomas-Symonds MP, Shadow Solicitor General, and Joanna Cherry QC MP, Shadow SNP Spokesperson (Justice).

Q23 **Chair:** Thank you very much. I am sorry we kept you waiting for a few minutes and I hope it was not too tedious for you. Thank you both for your evidence. Do you mind if we crack on straightaway? Do you think the Government have a leg to stand on in being concerned?

Joanna Cherry: Generally or—

Chair: No, in relation to the request and publication of papers and legal advice.

Joanna Cherry: I don't think so, Chair. No, I think they don't have a leg to stand on here.

Q24 **Chair:** Do you think they are being a bit precious?

Joanna Cherry: I think they are being a bit precious, yes. The fact is that they have to accept they are a minority Government, and in that situation, when they are taken to account in this way, they may not be able to muster the numbers to avoid being taken to account. That is just the reality of the legislature holding to account a minority Government.

Q25 **Chair:** Nick, you would agree? I am going to ask you a question. This is not meant to sound like a statement, but you would agree—there have been nine humble addresses, and the Government have defeated four and failed to divide on five. Parliament offers salvation to Government at times, doesn't it?

Nick Thomas-Symonds: Yes. I think that we have to see the use of the humble address mechanism in context. It is true that until recently it had been the mid-19th century when it was used, but it is being used in a context where the Government had been not voting on Opposition Day motions and then ignoring them. The Opposition are left with looking at other procedures that can possibly be used.

To flesh out what Joanna said about where the Government are on this, it seems that there are a number of safeguards on the use of the humble address and subsequent contempt motion. The first safeguard is that it was open to the Government between 13 November—that is when the humble address mechanism was unopposed—and 4 December, which is the date of the contempt motion, to have put forward proper compromise proposals if they wanted to, and they did not. Secondly, there is the safeguard of the Speaker having to indicate that there was an arguable case of contempt. Thirdly, there is the parliamentary majority; it was for the Government to vote down. The first motion was to try to avoid a vote on the contempt motion itself and refer it here. That was won by four votes by the Opposition, and then the substantive contempt motion was



lost. There are a number of safeguards in place even in this very particular Parliament with its historic issues and a minority Government.

Q26 **Chair:** What do you both say to the Government's concern that the use of the humble address could put national security at risk or perhaps elicit the release of confidential commercial information that could cost UK jobs? Do you believe those concerns hold water in this case?

Nick Thomas-Symonds: I think that is overdone. The safeguards that I have referred to are already in place. We have already had a situation under the humble address where there were regarded to be papers requested that fitted into that category. That was with the Brexit impact assessments. The mechanism used there was for the Chair of the Brexit Select Committee to look at them—I think there were four papers in the end that it was decided should not be released to Members of Parliament on national security grounds. Subsequently Members of Parliament, including myself, went over to the Department for Exiting the European Union to view them in that controlled environment. There are safeguards already there.

The issue and the great surprise for me was that for three and a half weeks the Government just sat realising that there were consequences to not complying with the humble address, and offered nothing by way of compromise that could have obviated the situation that arose.

Joanna Cherry: I think this point is well addressed in paragraph 13 of Dr Andrew Defty's written evidence to the Committee. He said it is a fair assumption that, "Neither Government nor Opposition would deliberately seek to damage national security in this way. There is no reason to suspect that an Opposition party would be more prepared to do so than the Government, and there are far fewer restraints to prevent Government from releasing damaging material than to prevent the Opposition from seeking its release". He goes on to make the point, "If there were genuine and compelling reasons why the release of papers might cause severe damage to the public interest" or be a risk to national security, "there are already mechanisms in place which might be used to persuade the Opposition to withdraw a motion, including, for example, by sharing material with Opposition leaders on Privy Council terms". Of course that would cover both the official Opposition and a third party which I represent.

Q27 **Chair:** Nick, your evidence talks about Her Majesty's Loyal Opposition, and I imagine you attach great weight to the word "loyalty", and that Her Majesty's Opposition would not seek to do anything that would undermine the interests of the UK. Am I right in believing that? I think that is presented in your paper as evidence.

Nick Thomas-Symonds: Yes, that is our firm evidence. I am sure we will come on to the Law Officers' convention in due course, but I would point out at this stage that for that reason we were very careful in the way that the Shadow Brexit Secretary and I always presented this. We



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were not seeking to undermine the Law Officers' convention whereby the fact and content of legal advice is private. We were saying always that there is within Erskine May and the ministerial code a discretion to release that advice when Ministers see fit. What we wanted Ministers to do was to exercise that discretion in these very particular and exceptional circumstances. I would say that is evidence of a sense that we had of being very careful about that convention and its value, both now and in the future.

Q28 Mr William Wragg: I wanted to probe a little further. Do you think there are any categories of paper that should be off limits for the House?

Nick Thomas-Symonds: It is quite difficult to make a specific identification in that way. The obvious example, taking your question head on, would be something like national security. However, at the same time we would want the ISC and other bodies within the House, even in those particular circumstances, to be able to view those papers. I would be cautious to start categorising things as absolutely off limits, and then realising that there is an unintended consequence, and that a Committee of this House could require those documents for its deliberations and judgment.

Joanna Cherry: I agree with Nick—I thought I would never get to say those words. This needs to be considered on a case-by-case basis. It is difficult to identify a particular category without being given a specific case, and I think the safeguards exist, which I have referred to already.

Q29 Mr William Wragg: You would not see the need for the House potentially to pass a resolution limiting the scope of what it could request. It would be on a case-by-case basis, rather than the convention, and the Opposition parties would not ask for certain things if they had different routes to access them.

Nick Thomas-Symonds: I would be worried about a blanket resolution in that sense. I think you would end up categorising something if a particular Committee of this House—I used the example of the ISC which would be informed on national security, but it could be the Home Affairs Committee, the Defence Committee or any other Committee of the House—wanted documents by return, and then discovered that a motion had been put in place that excluded some of the documents that were vital to it. That is what would concern me about doing that.

Q30 Chair: Would I be right in thinking that you think the ultimate safeguard is the House of Commons choosing to vote down a humble address and the request contained within, and that would be exercised on a case-by-case basis?

Nick Thomas-Symonds: Yes, and it is the majority in the House of Commons on these issues that is vital. The key to the vote here that was won by four votes was the Speaker indicating there was an arguable case, and then the subsequent vote. That vote is always going to be here. With issues like this, it is not going to be the case that a tiny



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minority in Parliament, with a particular issue and a particular set of documents, is ever going to hold sway. It will always have to be a majority of Members of the House that provides that safeguard.

- Q31 **Helen Goodman:** At the beginning, Ms Cherry, your opening sentence was that the Government need to come to terms with being a minority Government. Could you explain how them being a minority Government has an impact on the principle at stake here?

Joanna Cherry: If you go back to why this has all occurred, the Government stopped voting on Opposition Days because they knew they were at risk of being defeated. When they knew they were going to be defeated, they stopped voting because they did not have an inbuilt majority.

- Q32 **Helen Goodman:** Yes, but that is not what our inquiry is about. Our inquiry is about whether or not we should have these humble addresses, and whether or not we should seek for the Government to publish legal advice.

Joanna Cherry: I appreciate that, but the inquiry takes place against the background of the context as to why the inquiry has arisen. My view, as the SNP said in its written evidence to the Committee, is that we support the use of the humble address. I was simply making the point that this Government do not have a leg to stand on because of the context in which this has arisen. The question I was answering was whether the Government have a leg to stand on.

On the specific question of legal advice, I want to make it crystal clear that the Scottish National Party has always been consistent in supporting the convention that the Law Officers do not normally even acknowledge whether or not they have given legal advice, never mind reveal it, unless there are exceptional circumstances. We have argued in the past that the invasion of Iraq was an exceptional circumstance because there the House was uniquely given the opportunity to vote on whether or not to go to war. In December 2015 we argued that the bombing of Syria was an exceptional circumstance. In relation to the legal advice on the withdrawal agreement, and particularly the backstop, we argued that it was an exceptional set of circumstances because the House was being called to vote on the withdrawal agreement that would have major socioeconomic consequences for the whole United Kingdom. We have never conceded. We have never gone against the convention. We have recognised that that convention exists and that it can be waived in exceptional circumstances. In fact, the Government themselves conceded that by not dividing on the original motion.

It might be of interest to the Committee to know that unlike the UK Government's ministerial code, the Scottish Government's ministerial code does cover the potential situation of an exception, and states in paragraph 2.39(b), "The Law Officer Convention that the Scottish Government, like the UK Government, does not, other than in exceptional



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circumstances, disclose the fact that legal advice has or has not been given to the Government by or sought from the Law Officers, or the content of any such advice". The Scottish ministerial code recognises the exception of exceptional circumstances and says that it is something that the UK Government also recognise. I think the fact that the Government chose not to divide on that meant that they conceded the point on exceptional circumstances and I made that very point in the debate on 3 December.

Q33 Helen Goodman: I want to tease out what in this saga you think is exceptional. Are you saying that what is exceptional is the context and the fact that they were ignoring Opposition Day debates? Is that what is exceptional?

Joanna Cherry: In my evidence earlier I talked about the context in which this inquiry is taking place. My evidence on the waiving of the convention on revealing legal advice relates to the exceptional circumstances that I have just described.

Q34 Helen Goodman: If I might say so, you said quite a lot. Are you saying what is exceptional is the fact that it was the House taking the decision rather than the Executive?

Joanna Cherry: Yes, that is what I just said. The House was being called on to vote on the withdrawal agreement, and so the House was entitled to see the legal advice about the withdrawal agreement, and particularly about the backstop that was such a contentious issue. As we have seen, because the legal advice about the backstop was revealed, and because the Attorney General, in my respectful opinion, was commendably frank about his advice when questioned about it, we know now that there are very real issues about the backstop.

Q35 Helen Goodman: Mr Thomas-Symonds, when Lord Morris came to give evidence to us he spoke at some length about the special status of legal advice, and he said that he thought legal advice to Ministers should be treated like the advice of a family solicitor to an individual. Do you think that is a good analogy?

Nick Thomas-Symonds: I do think that is a good analogy, and I read Lord Morris's evidence in detail before I came here today. But in that analogous situation the client has the right to waive privilege, and the Government technically would be the client in those circumstances. To address exceptionality for a moment, it is the unique constitutional, political, economic and social implications of Brexit and the withdrawal agreement, and of course the backstop, is very much part of that.

The other major concern I had, which I made in my speech in the House on 3 December, was that aspects of the Attorney General's advice had been selectively leaked to the press the previous weekend. The fact that the advice existed—well, that part of the convention was breached anyway because, if I recollect correctly, bits of it were being covered on the front page of *The Sunday Times*. There was also a concern that what



this selective leaking meant was a situation in the House where we were seeing parts of the advice. We knew it existed but we could not see the full advice. While I am not saying that that goes to the central issue of what is exceptional—I think the central issue of exceptionality was Brexit and the withdrawal agreement itself—that was obviously a huge aggravating factor in everything. We knew the advice existed, but it was being only partially appreciated by MPs because of the way it was selectively leaked.

Q36 Helen Goodman: I did not think this analogy was at all convincing. Don't you think there is a difference between my private concerns if I am getting divorced or selling my house, and something that is essentially a public interest matter? How can you draw an analogy with a country solicitor?

Nick Thomas-Symonds: I think you are absolutely right to distinguish the two situations. The point of comparison I was using was simply the issue of privilege, the issue of legal confidentiality. Clearly, if you went for legal advice you are entitled to that, but you can waive it if you want to for a particular issue. In this case you are absolutely right that there is a wider public interest issue and that does distinguish it from the country solicitor situation, but it is still the fundamental issue of confidentiality of legal advice.

Q37 Helen Goodman: Why should this advice have a different status from any other advice given by senior civil servants to Cabinet Ministers?

Nick Thomas-Symonds: There is a distinction, first of all, because each Department will have its own legal advisers anyway, and then there is the Attorney General's advice. I say that its status is different in these particular circumstances because of the nature of Brexit and because it is such a huge decision, but I am not arguing—I think Lord Morris expressed concerns before you, Chair, about the Attorney General being worried about committing certain things to paper on the basis that it might end up in the public domain. That would be a concern if there was continuously an issue of legal advice being disclosed, but it is not. This is a truly exceptional situation. I do not want to get into the issue of what was disclosed in relation to the motion, but what ended up being disclosed was something that was very narrow on the Northern Ireland backstop.

Q38 Helen Goodman: What I don't understand is how we are going to decide what is exceptional and what is not exceptional. For example, if you are a person who has been denied some benefit—we have a lot of very bad cases of people who really are struggling to survive. It is pretty life or death for some of those people, and yet the Department for Work and Pensions will be appealing judgments in the courts all the time. That group of people who are affected would think that that was pretty exceptional, but I don't think that you would be asking to waive the convention on legal advice in that case. Maybe you would both like to respond to this—I would like you to say why.



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Chair: Then we will have to take another question, Helen, because we are running out of time, so briefly, if you could.

Joanna Cherry: In that situation, if the constituent had a particular question about the policy that was being applied to them, their MP could ask a question of the Minister for the DWP and, additionally, the constituent has a legal remedy. The point about this situation was that the only person who could answer the question we had—"we" being the Opposition—about the legal advice that had been given to the Government on the withdrawal agreement, was the Attorney General. It is really quite a different situation from the one you describe where there would be a double remedy of taking legal action and also asking questions through the individual's constituency MP.

Nick Thomas-Symonds: Briefly, I think the ultimate answer is obviously a parliamentary majority, which is what I said earlier. That is the ultimate answer as to what will be considered exceptional. In very broad terms, it would be something of profound constitutional, political, social and economic significance, which is what I regarded this particular situation to be.

Q39 **Bambos Charalambous:** Purely on the example about the revocation of somebody's citizenship or passport—should that advice be disclosed, or do you think potentially it should not be?

Nick Thomas-Symonds: I think the answer to that is no because, without commenting on the individual case, that could very clearly end up before the courts in due course. You would expect always in those circumstances that confidential advice on both sides would be respected.

Joanna Cherry: I agree with that. Clearly from what has been said in the Chamber this afternoon and what has been reported in the newspapers, there is likely to be litigation by the family of this young woman, Ms Begum, and so it will be litigated before the courts. In this situation there was not going to be any litigation so there was not that remedy/concern.

Q40 **Sir Edward Leigh:** Mr Thomas-Symonds, I was here during the debates on the Iraq war—I was one of only 17 Tories to vote against it. I seem to remember there was quite a lot of controversy about the Attorney General's advice to Government. The House of Commons has not forced the Government, according to our brief, to reveal papers against their will since the 19th century. I am a bit perplexed as to what is so different, in terms of national interest, importance and controversy, between the Labour Government's attitude to revealing the Attorney General's advice on the Iraq war, and the Labour Opposition's attitude to revealing the advice on the withdrawal agreement—they are both pretty controversial and pretty important—apart from the fact that you are now in opposition and you were then in government, which is a perfectly good answer.

Nick Thomas-Symonds: I think it is fair to say that those two scenarios certainly give rise to different interests. I was not a Member of Parliament



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at the time of the Iraq war. I think the advice was disclosed but it was in 2005—it was disclosed later but not at the time. For an answer on the 150 years, I refer back to my earlier evidence about the issue with Opposition Day motions. The reason that we have ended up reaching for the humble address mechanism is because we were looking for something that we felt we could have an impact with for robust scrutiny.

Q41 Sir Edward Leigh: I can see your frustration. By the way, I spoke up in public against the Government not accepting Opposition Days, and I argued at the time that I thought it was a dangerous precedent. Let us just focus directly on the Attorney General's advice on two very significant occasions: the Iraq war and the withdrawal agreement. I am struggling to see why one is more important or more difficult than the other.

Nick Thomas-Symonds: My personal opinion is that it is not and that the Iraq war legal advice should have been disclosed as well. That is my personal opinion.

Q42 Sir Edward Leigh: So that is now the official view of Labour. Assuming you become the Government at some time, which obviously you will—eventually you will be a Government, and you will be faced with a situation. You will get legal advice and probably the Attorney General will say, "It is going to make life very difficult if this is revealed in the public domain". For instance, we might be in a treaty negotiation, as we are now on this—what could be more important than that?—or let us assume we have a Blairite Government in the future who are thinking of invading somebody else. You are saying that in such a situation you believe that you should pretty well always reveal your Attorney General's advice.

Nick Thomas-Symonds: I am not committing to invading anywhere. The point I would make is that that discretion already exists within Erskine May and the ministerial code. You would have to make a judgment on a case-by-case basis about whether it fits into the kind of issues and the level of significance that I previously mentioned. That is the answer to your question: it would be judged on each particular basis.

Q43 Sir Edward Leigh: All right, but I think we can take it that if we have something that is really difficult and controversial in the future when you are the actual Solicitor General, your advice to a Labour Government is going to be that generally, as a matter of course, although it is discretionary, you believe the Attorney General's advice should be revealed. Be careful what you say now.

Chair: You are leading them. Ultimately, Sir Edward, the House divided and decided by a small majority that it should be published.

Sir Edward Leigh: All right. Can I answer that? I think the only thing that is different between this and the Iraq war is not the level of interest or importance, but the fact that this time the Government did not have a majority. Let us be brutally frank about it.



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Nick Thomas-Symonds: I think it is fair to say that parliamentary majority in our governmental system is obviously extremely important.

Sir Edward Leigh: All right, that is a fair answer.

Nick Thomas-Symonds: It is. Parts of our Constitution are written but it is not codified. We do not have that codified Constitution, and without it the parliamentary majority is very important.

Sir Edward Leigh: Might is right, really.

Chair: My memory is a little hazy but during the Iraq war I think the Labour Government had a small majority and voluntarily chose to publish the advice. I was being facetious there—it was a big majority.

Nick Thomas-Symonds: I think they published it in 2005.

Sir Edward Leigh: All right. Well, I have said my piece.

Q44 **Mr William Wragg:** If I summarise what I sense from both of you, it is that if Parliament is a protagonist in the decision-making, it should have access to the legal advice on the business or motion that is put in front of it. Is that what you are saying or is there an exception to that?

Nick Thomas-Symonds: I think there will be a lot of the Attorney General's advice on different things. I am certainly not suggesting that the Attorney General should produce his advice on every single thing that appears before Parliament. The point I am making is what is in Erskine May and the ministerial code, which is that there will be very exceptional circumstances when that is the case, and I believe the vote on the withdrawal agreement was one such case.

Joanna Cherry: I think a famous English judge once said—I can't remember who it was—that you cannot define what exceptional circumstances are, but you know what they are when you see them. That sounds a bit facetious but it is correct. I would not wish to define exceptional circumstances. I think Sir Edward is correct to say that the big difference is that the Labour Party at the time of the vote on the Iraq war and the legal advice had a very significant majority, and this Government do not. In fairness to Nick, I have heard many Labour Party Members concede retrospectively that the legal advice ought to have been released, and that those were exceptional circumstances.

The position of the SNP Scottish Government, who have been in power for the last 11 years or so in Edinburgh, is that they do not normally reveal legal advice but, as the ministerial code says, it can be done in exceptional circumstances.

In preparing for this, I was looking at the debate that eventually took place in Parliament at Plaid Cymru's insistence, looking at the issue of the legal advice on Iraq after the fact. Some very important points were made in that debate, including by right hon. Alex Salmond, the former First Minister, who was then the MP for Banff and Buchan. He said that



the fundamental point in this argument was that the party to the decision about whether to go to war was not the Government but Parliament—the client was Parliament and the people of the country were entitled to see the legal base on which they were committed to conflict. He said that was a crucial aspect of the debate, and that the Foreign Secretary at the time had made great play of the fact that the House was given the unprecedented opportunity to make a decision on whether to go to war. Mr Salmond said that if the House has been called upon to make such a fundamental decision, surely the unavoidable conclusion is that the House, on behalf of the people it represents, should be given all possible advice on which to base its decision.

I would say that is a good explanation of why the Iraq war, and the decision to leave the European Union with the withdrawal agreement that the Prime Minister has at present, are exceptional circumstances in which the House is being called on to make an enormous decision in an unprecedented situation.

Q45 Chair: I don't want to detain you for long. Does anybody else want to ask a question? Let me just read you something from the Government evidence that was submitted to us—I am going to quote directly since we are in the business of quotes: "A recent motion for return sought to require the Government to provide to Parliament Cabinet sub-committee papers. This motion was ultimately defeated because a majority across the House recognised that the confidentiality of Cabinet papers was essential to the vital and longstanding constitutional convention of collective Cabinet responsibility".

In those two sentences, it seems to me that the Government recognise that Parliament can exercise good judgment on individual matters. If it exercised its good judgment in relation to the publication of Cabinet papers, surely the Government might have to accept—they may not have liked the decision reached—that Parliament exercised its good judgment in relation to the release of legal advice about the backstop.

Nick Thomas-Symonds: Yes. I think that illustrates the point I made about the safeguard that exists with a majority in Parliament. Clearly that judgment is different from the one made about the backstop, and illustrates the point that under the current situation, safeguards are built into the system.

Joanna Cherry: I agree with that.

Chair: Does anybody want to ask another question? I think Joanna has to rush off to another meeting. Thank you both for coming. It was an excellent evidence session.