

Procedure Committee

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

Wednesday 27 February 2019

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Members present: Mr Charles Walker (Chair); Bob Blackman; Mr Peter Bone; Bambos Charalambous; Sir Christopher Chope; Sir David Evennett; Helen Goodman; Mr Ranil Jayawardena; Sir Edward Leigh; Melanie Onn; Nick Smith; Alison Thewliss; Mr William Wragg.

Questions 46 - 91

Witnesses

I: Rt Hon Andrea Leadsom MP, Lord President of the Council and Leader of the House of Commons, and Rt Hon Geoffrey Cox QC MP, Attorney General for England and Wales;

II: Sir David Natzler KCB, Clerk of the House of Commons, and Mark Hutton, Clerk of the Journals, House of Commons.

Written evidence from witnesses:

- [HM Government](#)
- [House of Commons Service](#)

Examination of witnesses

Witnesses: Rt Hon Andrea Leadsom MP and Rt Hon Geoffrey Cox QC MP.

Q46 **Chair:** Leader of the House and Attorney General, thank you so much for coming to see us as part of our inquiry into the publication of Government papers. Let's just go straight into it. Attorney, why are you so concerned about this? Why were you so concerned about what happened a few weeks ago?

Mr Cox: Mr Chairman, any lawyer who is acting not in a political capacity but a professional one would tell you that his advice given to somebody who commissions it, whether it be Government or whether it be a private individual, has to be able to be completely confidential. Instead of being able to give the advice his client needs to hear, which may well be expressed for that particular client in blunt, succinct, even sometimes brutal terms, they will not get the message they need to hear, but if he knows or believes that there is a possibility that his advice may be published to the world, he will not be able to express himself with the directness, force and relevance that his advice may have if it is confidential.

The convention longstanding, over 200 or more years, enables the Attorney entirely privately to convey to the Prime Minister and to senior Cabinet Ministers and to departmental Ministers, when they need his advice, that advice under the cloak of complete privilege. The reason is simple: if he is not able to do that, it will erode his ability to be able to give the kind of frank, honest, clear advice that he needs.

My advice is a case in point. My letter written on 13 November was directed as part of a conversation that the Cabinet had been having with me as Attorney and the Prime Minister with me. I knew exactly how I needed to calibrate and express that advice to give the clearest types of warnings that I needed to give, having listened to Cabinet discussion over the previous several months. It was targeted precisely to that audience. It was expressed in such a way and with the emphasis needed, and parts of it were even in bold letters, you may have noticed, so that there was no chance that the meaning could be lost.

If I had known that what was intended to be a cumulative whole, possessed in any legal opinion of nuance and subtleties of meaning, was going to be put up on a rolling news programme for 35 seconds and only the bold bits looked at and none of the connecting bits, which informed and gave context to those bold bits, I might have—indeed, I would almost bound to have—reconsidered the nature of the advice I gave. That would have detracted from the force and point of what was needed to be said at the time it was said in November. That is the damage this will cause if the Law Officers Convention is able to be breached.

Q47 **Chair:** Attorney, you have every right to be pretty cross, but why could you not persuade the Whips on 13 November to your point of view? We



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chose as a party not to divide on the motion. Why were they not persuaded by your concerns?

Mr Cox: Mr Chairman, I have said already in the House—and I may very well attract the disapproval of my colleagues—I was not consulted. I did not know and in my view we should have opposed it. The position, however, is that the point of principle would have remained the same. What it meant was, and I fully accept this, that the Government did not have a lot of moral authority when we came before the House to say, “Please don’t force us to breach this important principle that sustains successive Governments in office and is part of the Cabinet collectivity principles”.

Q48 **Mr William Wragg:** In terms of that relationship between the lawyer and their client, is the House not the client, given that it is being asked to make a decision and should it not therefore have access to such advice?

Mr Cox: No. Forgive me, there is a clear distinction, William, if I might say so. My client, insofar as the analogy can be pursued, is the Executive. I am the Executive Senior Law Officer. I am retained to advise the Executive and the Government, and therefore what passes between myself and the Executive has to be confidential for the reasons I have given. Let me make it clear: the first limb of my contention for the importance of this principle was based upon the principle of free and frank advice. Of course there are circumstances in which that advice can contain highly sensitive material, either because of some ongoing negotiation or because it involves some covert or otherwise intelligence-related matter or whatever.

But when I come to the House, and insofar as I have a duty to the House—the Committee may want to explore the parameters of how the Law Officers see their duty—I am advising the House in all candour. But I am not necessarily giving it in the same way, with the same force, point and emphasis to my client the Executive, because in the Executive’s case, as I have explained, it is part of a conversation I am having with the Cabinet and I know who does not understand and the meanings and points that need to be enforced in that context. When I come to the House I am giving advice on the same point of law, but it may be that I do not need to adopt the same emphasis or the same bold letters in certain parts. It is just a question of whom you are addressing with your advice.

In other words, the advice I gave to the House was exactly the same in substance as I gave to the Government, but it was tailored to a different audience for a particular purpose.

Q49 **Mr William Wragg:** Is all of your advice written down or is some given verbally?

Mr Cox: Again, this is another important thing, and I am grateful for the question. The way in which a Law Officer gives his advice, particularly the Attorney, is that he is sitting inside the Cabinet. Quite often he will be



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asked his opinion in the Cabinet orally on a point, and he may know that he has had a go at expressing a particular point, but seeing the faces of his colleagues he may take the view that in writing he needs to emphasise one point or another. It is part of an evolving conversation that the Attorney has with the Cabinet. That is why it is so important to be private and confidential. It is protected for precisely the same reason as Cabinet discussions must be protected.

An Attorney's advice is often ad hoc in rapidly evolving circumstances on a discrete point. There may be no comprehensive survey of all of the points or all of the legal implications, because the Cabinet may have resolved their debate down to one question and one point.

- Q50 **Sir David Evennett:** I am very sympathetic to your point of view, but you are acting in three different roles, are you not? You are unlike others because you are a politician, a Member of Parliament, and you are also a member of the Government, the Cabinet, and you are a Law Officer. We know that conventions have all been changed. On what you said about the Cabinet, if only it were true that we did know what was going on, because an awful lot of the time the papers seem to know—

Mr Cox: You do not always believe what you read, Sir David.

- Q51 **Sir David Evennett:** I never do, or what I am told sometimes, but having said that, it is not quite the same between you and a client because you have three separate roles.

Mr Cox: Yes, but as you rightly say, you have to distinguish between the capacities in which I am acting. If I come to the House to answer questions in my ministerial capacity as steward of the CPS, then I am acting simply as a Minister. If I am giving legal advice to the Government, I am acting as their legal adviser. That is why the statute requires minimum qualifications for the Attorney General, because he has to be a lawyer and I am giving advice as an objective legal adviser, not as a politician, as you rightly say.

- Q52 **Bambos Charalambous:** On five occasions in this Parliament, Opposition Day motions calling for production of Government papers have been passed without a vote, and on four of those occasions the Government have provided information that was found to meet the requirements of the House. Going back to 13 November, why did the Government find it difficult to meet the requirements of the House in relation to legal advice for the withdrawal agreement itself?

Mr Cox: Because of the convention. If I understand your question rightly, then it is simple, because in this case it was legal advice given to the Government at a particular moment, in a particular context and in particular circumstances, which unless protected by the Law Officers Convention—which has been honoured and defended, I may say, by successive Governments for hundreds of years—will undermine the ability of the Attorney to do his job and the ability for the Cabinet to discuss matters that are connected importantly to questions of law. There was a



fundamental public interest at stake, which I may say the Ministerial Code sets out in clear terms. It says that the Law Officers' advice should not be disclosed, unless in exceptional circumstances where the Attorney agrees to it and the Government decide to do it, and those are very rare circumstances indeed.

Q53 Bambos Charalambous: But if it met the requirement of the House, if the House had divided and they were demanding this information, this advice—

Andrea Leadsom: Can I jump in there? To set the scene, obviously the humble address is a procedure of the House, and it is entirely for the House to decide on its procedures. We do welcome this inquiry. It is incredibly important. What we have seen in recent history is a new use of the humble address, which has not been used for a couple of hundred years and more recently it has come into quite frequent use.

What is important to note is that humble addresses are a very blunt instrument, so when they have been put forward, there is not the means for the person or the party who is putting forward that humble address to know first whether the information that they are seeking exists. They literally do not know if it exists. Secondly, that request has no context about whether publishing information about, for example, Carillion would transgress commercially important or sensitive or even market-moving information that the House is not in a position to know whether that is the case. Thirdly, because of the first two, the House does not know whether that humble address has been complied with.

What I think is useful in your consideration of this issue is what is the appropriate use of the humble address? Obviously in the case of the Law Officers' advice we have the Freedom of Information Act, the Official Secrets Act and the Ministerial Code, each of which sets precedent for what sort of information should never be disclosed in the public sense. That would include things like national security information; it would include not only Law Officers' advice, but even whether it has been given. It even goes further to what the advice is to saying it should not even be given that it was provided; then, of course, there are Cabinet papers as well. These are all very strict, pre-existing conventions.

To your point, Bambos, about why was it difficult to comply, it was because there was this conflict of different conventions. For me, as Leader of the Commons, who totally respects the right of the House to bring forward a humble address requesting returns of papers, the challenge for the Procedure Committee is to set out what is the appropriate way in which to do that and to address these three fundamental questions before bringing forward the humble address and to consider whether there would be some way to find out, first, whether the papers exist. In other words, if it was something to do with DExEU, could the Brexit Select Committee Chair possibly seek information on whether these papers exist? Otherwise it is a fishing expedition. For example, in the case of the Windrush humble address, the request that



came forward was exponentially costly and time-consuming, asking for every single email ever written. It was just an impossible request that would have taken months and months, significant amounts of time to comply with.

Number one: does this information exist in a way that is transferable? Number two: is it safe to hand it out and, if so, who should it be handed out to? For example, it could be under Privy Council terms; it could be to a Select Committee; it could be through a reading room. It does not have to be, as the Attorney General says, on the headlines with just the bits in bold that give no context. The third very important issue is once the Government have attempted to comply with the humble address, who decides whether the Government have complied? Again, we have had some problems there and in fact the case in the point with the Attorney General's legal advice, where there were some saying, "That is not complying", but nobody knows, because nobody knows what information was there in the first place.

I do think this inquiry is incredibly important in order for the House to be able to make best use of its important scrutiny role, but to also make sure that it is both relevant and useful to the House.

Q54 Bambos Charalambous: One of those humble addresses was for the impact assessments on leaving the European Union without a deal. Those were widely circulated in the media, so on that occasion, just to take your point, we knew it existed. We knew what was said and there was really no defence for Government not releasing those documents if they were already in the public domain.

Andrea Leadsom: Just to be clear, the original humble address requesting impact assessments, if I remember rightly, was complied with through a reading room. Those impact assessments, I think—correct me if I am wrong—were provided through a reading room. While there was some unfortunate leaking that we all deeply regret, it was not intended that those impact assessments went outside that strictly controlled publication to a Select Committee and, I think more broadly, to Members of Parliament, but within controlled circumstances.

You might say to me, "Well, that is not reasonable. They should have been published to the whole world," but the point is: who decides? I think that is where the Procedure Committee's help in identifying a proper procedure would be helpful, to make sure that we, as a Parliament and as a Government, are not releasing documents that are either incomplete or confidential to the point that they could be harmful to our national interest. As I recall at the time, the issue was whether that would harm our negotiating position. There needs to be the ability for the House to determine that before going to the extent of a motion for return, because it is a blunt instrument and there then is not the means for anyone to quantify exactly what that means.



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One final point on that, if I may, Charles, is the issue of when there has been a humble address and that has then been further defined later on. In the case of the Attorney General's legal advice, it was the case that the humble address requested a form of information that then the Shadow Brexit Secretary further refined from the Dispatch Box. Again, there is then an issue of who decides what conforming with that means, and again that is something that the Procedure Committee could very helpfully look at for the House.

- Q55 Sir Christopher Chope:** The Attorney General reminded us that the Ministerial Code says that the advice of the Law Officers should not be disclosed. We have had evidence to suggest that the substance of the legal advice on the withdrawal agreement had been disclosed to the press and was the subject of media reports on the weekend of 10 and 11 November.¹ Was any such disclosure authorised by you or another Law Officer?

Mr Cox: No.

- Q56 Sir Christopher Chope:** Do you recognise that those leaks were very similar to the content of your document?

Mr Cox: I read the reports. It was not clear to me whether what had been leaked was the full copy of my letter of 13 November. Somebody had clearly received some kind of report of what was in it, but whether they had seen—at least I speculate—the entirety of the advice, I am not sure. I am sure you do not mean, Christopher, that if something is leaked, it must be disclosed. It cannot be the case that if something gets leaked that thereafter there is an inevitable case for the disclosure of the advice.

- Q57 Sir Christopher Chope:** No, the purpose of my question is to emphasise that if the Ministerial Code is not enforced, that creates a problem for us as Members of Parliament, because it means that the press are in a privileged position. They are getting selective information, which may have been distorted in a way that suits the person who was the leaker. That is my concern.

Mr Cox: I would agree with that concern. It disturbed me greatly. The only modern case where an Attorney's advice has been disclosed of course was precisely because leaking had occurred some two years after the advice had been given. This is in Lord Goldsmith's advice on the Iraq war and the leak implied something that was not true. Therefore the judgment was taken voluntarily to release it so that the imputation of inaccuracy or lack of veracity could be gainsaid.

- Q58 Sir Christopher Chope:** If we are going to try to put the genie back in the bottle, you obviously agree that it would be a very good starting point

¹ Note by the Clerk: reports of the specific legal advice given to the Cabinet on the Northern Ireland backstop appeared in the press on the weekend of 1 and 2 December 2018.



to enforce the Ministerial Code, that the Attorney's advice is private and confidential to whom it is given. Was there a leak inquiry into what happened over that weekend?

Mr Cox: I cannot remember whether or not any inquiry was indicated. I would have to check.

Q59 **Sir Christopher Chope:** Taking that as a given—and these things should be enforced, in my view, by the Prime Minister—where we are now is that, as you put it very succinctly, you are potentially inhibited about giving the advice in writing that you gave on this issue because you are worried that it may get out in the open and therefore the temptation would be to give such advice orally rather than in writing. How do you think we could put the genie back into the bottle? Do you think there is any way in which we could, for example, put the Law Officers Convention about this into Standing Orders or give it to the Speaker to police in his discretion? Unless we can get back to that situation where you are confident that the advice you give is going to remain private and confidential, I fear that what is going to happen, if it has not already happened, is that you and your fellow Law Officers will be tempted to avoid being as blunt as you might otherwise be.

Mr Cox: It is a very good point, Sir Christopher. I will not deny that the impact of recent events is bound to have an effect on the way in which one considers, when one sits pen in hand, writing advices. In my own case, I can say that it is highly unlikely to affect my judgment or indeed the force with which I express it, but clearly I will have to have some mind to the potential for publication.

Let me make it quite clear, so that there is no doubt. When I come to the House, as I did on 3 December, on the questions of substance of the law, its effect, its meaning, the weight to be attached to it as a matter of law, all that advice was precisely the same as I had given to the Cabinet. You cannot, as a lawyer, give one advice to somebody and then change your advice of the law, as those of the Committee who are lawyers would know. That would be unconscionable and no self-respecting lawyer could do it. It is the question of the pith, the emphasis, the brutality, perhaps the starkness with which one might express one's points that may alter.

How can we put the genie back? Certainly I would be reluctant to see it enshrined in Standing Orders or in statute, because I am always cautious about whether that improves something. It opens up unintended consequences. What would be helpful is if this Committee—and this is the key, if I may say so, for the Committee to do it—could make appropriate observations and recommendations about how matters should be dealt with in the future and could make clear statements as to the value and importance of the Law Officers Convention and its imperative need to be sustained in the interest of all Governments at any time.

Sir Christopher Chope: My final point is—sorry, the Leader of the House wants to come in.



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Andrea Leadsom: Would you mind if I comment? Thank you very much, Sir Christopher. As Government's representative in Parliament and Parliament's representative in Government, I take a view that obviously from Government's point of view it would be very helpful if the House did not do that. On the other hand, Parliament's scrutiny of Government is absolutely essential. As we know, Parliament is run primarily under conventions—and yes, under Standing Orders, but primarily under conventions. As I said at the start, this use of the humble address has been quite recently brought back in and under various Acts, Official Secrets, Freedom of Information and the Ministerial Code, the conventions are very clear to the House about Law Officers' advice, about Cabinet papers, about national classified information and so on.

It seems to me that the recent use of the humble address has not created a new convention, but has eroded what were previous conventions, which Parliament does accept, and voted for the Freedom of Information Act, which explicitly allowed for free and frank discussions between Ministers and officials and Law Officers and so on. I would like to say that rather than create a new Standing Order to make it a rule, it would be better if the House were to accept its own self-denying ordinance, as put forward by the Clerk of the Commons, that says that the House accepts that there are certain things—Law Officers' advice, nationally classified information, commercially sensitive information, Cabinet papers—that should not be suitable for this type of request for return and that that should be something that the House might wish to impose upon itself.

Q60 **Sir Christopher Chope:** Would you like to comment then on what happens when these papers are selectively leaked? Where does that leave the House? What do you think we should do in that situation?

Andrea Leadsom: I agree with the Attorney General that the fact that something has been leaked is subject to inquiries by Government and to certainly absolute anger and frustration. The Prime Minister is completely clear about the need for collective responsibility and for confidential documents to remain that way. Unfortunately, as we see right across every aspect of society, 24/7 media and this tendency to put things out and break confidence is an appalling fact, but it does not change the fact that we should therefore seek to maintain confidential items as confidential. As the Attorney General says, just because it has been leaked does not mean that it has to therefore be published.

Q61 **Helen Goodman:** Mr Cox, when you give your advice on the Prime Minister's renegotiated deal on the backstop over the course of the next few days, are you going to regard the humble address that the House has passed as covering that? Will you be publishing that or is the House going to have to go through this whole process again?

Mr Cox: No, what I have said is that I will give careful consideration to what the House of Commons has asked in the past and the assistance it feels it needs. Let me say at once I am not going to allow us to get into



the same position again, so I will give the assistance to the House that it requires. How I give that I will have to give careful thought to and consult within the Government, but the House will have a clear view from me as to the meaning and effect of any amended or supplementary or additional agreements with the European Union.

Q62 Helen Goodman: Mr Cox, you said that last time. Last time you said to the House, and indeed in your written evidence to this Committee, that you had spent two and a half hours at the Dispatch Box, responding substantively in the same way to Members as you had to the Government, but you did not initially produce the written documents. You have not answered my question, I am sorry to say. Are you going to produce the written documents next time?

Mr Cox: Helen, the point is this: I have not yet written anything because nothing has happened upon which my advice is to be given. When and if such an event takes place, I will give very careful thought to exactly how I express my judgment upon any text that is presented for my opinion. I will have very much in mind when I do on this occasion, unlike on 13 November, that the House may very well ask for my assistance on it, on the text. I cannot answer your question until I know how I am going to approach it. It may well be that I write a single document setting out my view of the effect of any such text. In that event, it may be that it is the same document as the Government receive and as the House will receive. Let me take my judgment as to what I do first and then I can probably answer your question. What I will do is seek to put the maximum information before the House.

Q63 Helen Goodman: But you are not accepting that the vote that the House had last time covers new advice that you may be required to give to the Government in the light of the Prime Minister's discussions on the backstop over the next few days. This is not automatic as far as you are concerned.

Mr Cox: As I recall the wording of the humble address, it referred to documents in the past that had been generated, so I am not sure other than as an expression of the will of the House at the time in relation to those documents that then existed it is applicable.

Let me say at once I am not going to stand on these kinds of black letter technicalities. The House will have my view and it will be precisely the same view as I would give to anybody, including the Government, on any such text.

Q64 Melanie Onn: In the Government evidence that we received the Attorney General's advice, disclosure was deemed to be not conducive to the proper conduct of public affairs and I would like to ask your view. Do you think that it is important for MPs to be able to understand how Cabinet and the Government reach their decisions, including if they take Attorney General advice or not, and then to be able to properly scrutinise the decisions that the Government have made on that basis?



Mr Cox: The advice that the Attorney gives must remain confidential, as it has for hundreds of years in successive Governments, except in wholly unusual and unlike circumstances to this one. I would certainly say that there is a distinction, remember, between the Government's view of the law, which can be given by the Minister from the Dispatch Box in the Department responsible, and is no doubt informed by the advice of the Attorney. The advice of the Attorney—just like your lawyer, if you take advice from a solicitor—has to remain private and confidential and privileged, as it would be in those circumstances from production in any court or to any other person, because your lawyer has to be able to give you completely candid advice and discuss all sorts of matters that you may not wish to be made public, by which I mean the concerns that an individual Cabinet Member may have. They even refer to a particular discussion in the Cabinet or with the Prime Minister. Those things have to remain private, but the Government's legal position on the point of law must become public and of course that legal position will be informed by the Attorney's advice. I say there is a distinction. The House is perfectly entitled, indeed must have, the Government's view of the law, but that is a different thing from having the Attorney's private advice about it.

Q65 **Melanie Onn:** The fact is there is a precedent for the House receiving copies of Attorney General advice in the past, yes, in exceptional circumstances. I am not entirely clear why if you are concerned about particular elements of the advice it could not simply be redacted for the purpose for which you have just disclosed—for example, if it is privileged conversation or it has an influence on national security so need not be shared. Why can redacted advice not be provided?

Mr Cox: Suppose that was the case here, and I had simply unilaterally presented you and the House with great passages of my advice blacked out. What sort of response would that have attracted from the House and the public?

Q66 **Melanie Onn:** We would have accepted it.

Mr Cox: Let us be honest. There would have been a howl of outrage and understandably so. The whole point the Leader has made is in a court there is a well-designed system to enable matters of public interest, commercial sensitivity, confidentiality to be vetted, to be examined and redacted, but on a motion there is no such facility and ability for the House.

When it comes to Law Officers' advice, that in any event would not exhaust the point. The point is, just as you are entitled, so is the Government to receive private and confidential advice. What the Government are not entitled to hold back is their view of the law, if the House asks, but they are entitled to expect that the Attorney's advice on it should be respected as confidential.

Andrea Leadsom: If I can add just one sentence, Melanie, the other concern is in the event that Law Officers' advice becomes regularly



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requested and published the Government themselves will stop seeking Law Officers' advice on subjects that they are concerned about getting into the public domain. This was very well gone over in the Freedom of Information Act: the devastating combination of a Law Officer who does not want to give frank advice and a Government that do not dare ask for it, because it gets into the public domain. It is quite exceptional and we are talking quite specifically about this particular humble address, but I think that also extends to Cabinet. It also of course extends to nationally critical or indeed commercially sensitive information. All of these things, once they become standardised out in the public domain, means that you no longer want to talk about them for fear of that, and that of course mitigates against good governance.

Mr Cox: You have to remember that the Attorney by definition will only give advice on matters that are of exceptional importance, because most legal matters are dealt with in the Department by the departmental lawyers. The only time a point will come to the Attorney is if it is of particular complexity or of particular public controversy or of particular relevance to our international law obligations, all of which of course have acute public interest considerations attached to them. The exceptional circumstances point would apply to almost every advice that I write. Are we saying that every time the Attorney gives advice, his advice can be compelled from him on all of these sensitive and acutely important matters in the public interest? That will completely disable the Attorney from giving advice.

Q67 **Chair:** But it is never going to happen, Attorney. The reality is this is exceptional.

Mr Cox: I am reassured to hear you say that.

Q68 **Chair:** It will not happen, will it? The only way it will happen is if the Government cannot find salvation in a majority in the House of Commons and if it was to routinely happen the Government would have lost its majority and we will be heading towards a general election. The only reason this happened was the Government could not command a majority in the House of Commons or chose not to try to command a majority in the House of Commons. There will be a few people—maybe 100—watching this out there, and we must not allow them to believe that this is going to happen on a weekly basis because it simply is not.

Mr Cox: Mr Chairman, of course you are right, as ever, with sagaciousness, commonsense and appropriateness, but I would say that so precious a principle cannot be, if this House is to do its job aright, at the mercy of a majority. This is a principle and all of us should place it higher than the mathematical factors affecting party majorities.

Chair: I am not wholly convinced by that.

Q69 **Sir Edward Leigh:** It seems to me that many of those who puff themselves up in indignation about lack of transparency on this issue have forgotten that at the time of the Iraq war the then Labour



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Government refused point blank to issue the Attorney General's advice and it was only issued in circumstances two years later when the decision to go to war was long since taken. In my personal view, this issuance of your advice has been wholly injurious to the national interest and has driven a coach and horses through our negotiating stance. That is my personal opinion, but what are we going to do about it? I do not think that we can be at the mercy of majorities.

I have sat in so many Select Committees where Members have asked for advice of Ministers and we have been told again and again, I think in 11 separate Select Committees over 35 years, that there is absolutely no question, "You cannot have this advice to Ministers, Osmotherly Rules. We are not going to give it to you". The line has been held. I do not quite know why you could not really have held the line here. The Chairman said it is through a lack of majority, but presumably now are we saying that a House of Commons majority could impose its will on the Government and say that the advice the Cabinet Secretary has given to the Cabinet on a whim now has to be revealed? This is ridiculous. My question is to you, Leader. Is there no way you could have resisted this or will not resist in the future, because no lawyer, no Attorney General, will ever give honest advice again?

Andrea Leadsom: I completely share your concern that the frequent and varied use of the humble address has constrained in some ways the ability to manoeuvre for Government in the national interest. You are right that it has had an impact on negotiating position; it has had an impact on very long-standing conventions in the House. Luckily there have not been humble addresses on matters of national security, which I think the Government would very much have to resist to an even greater extent. You are right: we have, as a House and as the Chairman has said, because of the parliamentary arithmetic in effect been forced by the lack of numbers to accept certain things that defy long-standing conventions of this House and arguably go against the national interest and certainly make extraordinarily difficult certain aspects of governance today.

That is why I do welcome this Procedure Committee review because it does seem to me that the House fulfils an incredibly important scrutiny position, but in order for that to continue and not to simply rely on being able to force through on a majority vote, the House itself does need to take some responsibility for making sure that these things are in the national interest.

I would go back again to the concept of potentially using some sort of procedure that the House would agree to, to check first that the documents that are being requested exist, via a Select Committee Chair. Secondly, how could they be provided in a confidential way that does not damage the national interest? Thirdly, who decides and how will it be decided whether the humble address is being abided by? Those things, I think, without trying to constrain the House from its very important scrutiny means, should be something that the House imposes on itself, but with the proviso that certain things, these pre-existing conventions



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about Law Officers' advice, Cabinet papers, nationally significant material, must not be subject to this type of blunt instrument in future.

Q70 Alison Thewliss: You mentioned that so far as emphasis or otherwise the advice that you gave to Government would be essentially the same advice you would give to the House. Do I understand that correctly?

Mr Cox: On this point of substance of the law, in other words, it would not change. If I took the view a word meant something in a line of statute or treaty I would not give a different opinion to it.

Q71 Alison Thewliss: That would not change, so the only main issue here, I suppose, is that by the release of the documents that you gave, the advice to the Government, is that if the Government has clearly chosen not to follow your advice or have taken a different view of the law.

Mr Cox: The latter would be most unlikely, because the Attorney's position in Government is that he speaks with the authority to determine what the legal meaning or legal position is. That is unlikely to happen, which is why normally a departmental Minister could answer from the despatch box on any matter of law that arose, because he would have likely, on a Law Officers' point, taken the Law Officers' advice.

The reason why it arises is if people discern that there may be some political or other value in having the confidential advice that was given by the Attorney. Of course the leak about which Sir Christopher spoke trailed particularly the fact that I had been particularly stark, although the advice I gave to the House on 3 December was precisely the same in its substance, but the language that I have used that had been aimed at a particular audience at a particular time was what no doubt was the prize that was sought by means of the motion. That is precisely what is off limits, or should be, because otherwise the Attorney is not able to be candid.

Can I just say, Mr Chairman, it is important: the fact that I chose to give my consent to the disclosure of the advice in December does not set any precedent at all for what I will do in the future. This may well be to Helen Goodman's point part of the answer as well. I simply cannot accept that the public interest that is served by the Law Officers Convention can be abrogated even by a vote of this House, because I am the defender of a crucial public interest. I chose to agree to the publication of my advice in December because I took the view that there was an equal and competing public interest in the House's standing being upheld and its orders being complied with. But as the Leader has said, if it had contained information of a particularly sensitive character or if I had taken the view that it would be particularly damaging to our negotiating stance, then I might have been obliged to have taken a different view. It is odd, with respect, that an attorney—permit me a personal note, a somewhat rueful one—who was seeking solely to uphold in good conscience the public interest should have been the occasion of a finding against the Government of contempt, which in any court context would



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involve some contumacious disrespect of the House. There was none. As the Leader has said, our respect for the House was intense and complete, but it was solely because of this competing public interest that we took the view that we did.

Q72 Nick Smith: I am sympathetic to the Law Officer's argument that our Government, any Government, should get the best possible advice and it should be as clear as possible for the best outcome for the public. I absolutely get that. However, I think that the Leader should get a gold star for chutzpah this afternoon because I want to say: how did we arrive in this place? We arrived in this place because the Government were not giving sufficient attention to Opposition Day debates. The debates were desultory. The Government's response was poor. There were never any votes and, surprise, surprise, the Opposition and Members of the Government party showed their frustration in the run-up to this period. It is right to look at this lens of the telescope, but we should look at the other end too.

My question is to the Leader. Are the Government going to properly engage in Opposition-led debate and scrutiny again? Otherwise your words will be hollow.

Andrea Leadsom: The Government will always vote on a case by case basis on Opposition Days. I am just frantically looking for the number. I think that there have been 12 Opposition Day votes on Opposition motions. The Government decide on a case by case basis, but where the Government choose not to seek to overturn, so where the House decides on a particular resolution, what I brought forward was a proposal that there would be a statement by the Department dealing with the issues raised by the House within 12 weeks of that Opposition Day, and that has been the case.

Just to push back slightly, Nick, the Government, Ministers, Back-Benchers, have fully participated in fact on a number of Opposition Days to a greater extent than the Opposition have themselves. The Government benches have certainly not been lacking in contributions. Ministers have absolutely responded to points raised in the Chamber and the Government have then brought forward their action plan within 12 weeks from that date.

There is in no sense any way in which the Government could be accused of failing to respond to Opposition Days. In fact, on a number of Business Questions Days, the issues around Universal Credit you can literally point back to the debates that have taken place on Opposition Days, the points that were raised and the way in which the Government have responded very proactively to those has changed the way that Universal Credit has been rolled out and that has been to the benefit of the country. There are a number of occasions where the Government's response has been more than fulsome to issues raised by Opposition Days.

Q73 Nick Smith: When is the next Opposition Day debate?



Andrea Leadsom: Those are announced every Thursday. We have had a number of debates that have been requested by the Opposition on particular statutory instruments that have been prayed against, which are very pertinent to leaving the EU. On things like the NHS 10-year plan, the Shadow Leader requested a debate on that. We have had a number of debates on really important issues with Members of the Opposition and on Government benches on things like serious violence and knife crime. What I always seek to do is to bring forward debates that have a great amount of interest across the House. Specifically in terms of Standing Orders, the Government of course abide by the number of Opposition Days set out in Standing Orders.

Q74 **Mr Peter Bone:** Following on from what Mr Smith said—and I think that he was making some very valid points—Leader, you said that the Government decide on a case by case basis whether to vote against an Opposition Day. The Chief Whip invited Conservative Members to abstain on the issue that we are talking about before us today. It took an active decision not to oppose the release of papers, so it is not right for the Government to say that the will of the House was tested on it. I think that if the Government had had the courage to oppose the Opposition motion, the Government would have prevailed, not only for all the arguments that the Attorney General has made, because there would have been Members in the Opposition party who would have recognised that this convention was being asked to be breached.

Attorney General, you said something very interesting there that I had not considered before. When the House decided that the Government were in contempt—and in my view it was absolutely in contempt and I voted for that contempt motion—you considered your position because I think that I am right that you said, “I had to consider whether I consented to release those papers”. I am presuming that one of those considerations was if you release those papers, were you setting a precedent for future Attorneys General, so we are right to conclude that you considered your position. Why did you think that that was not setting a precedent?

Mr Cox: Because I took the view, as I have said, that we were in an unprecedented situation. One had to look at the overall constitutional context. We have a critical few weeks and few months ahead of us. We are relying upon the House as a whole to reach a solution upon the question of our departure from the European Union. The House had expressed its desire to see the opinion and there were two prevailing reasons that made me conclude that it was right for me to consent.

The first was as a Member of the House I have an interest, as every member in this Committee has, in its reputation and standing being upheld. If I had declined to publish my advice, I would effectively be saying to the House, “Thank you for your judgment that the Government are in contempt, but I do not intend to comply”. Then there would have been a further development of a constitutional crisis and I felt that at this time in our constitutional history it was, first, important that the standing



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and reputation of the House was upheld, that Ministers showed that even if they believed, if I may say, that the House might have reconsidered its position, they should nevertheless demonstrate that the House attracts their loyalty and their respect, and secondly, because we have to work together in our current position in the House across parties and try to generate a better sense of trust. I realise that it is difficult, but it is something that I took into account. It was the peculiar constitutional circumstances we were in that ultimately persuaded me that it was right to consent, but I have to say it was a very difficult decision, Peter.

- Q75 **Mr Peter Bone:** Attorney General, if you had taken the other decision, not to release your advice—and it ought to be put on the record of course the contempt motion did not criticise you and I think the House holds you in the highest regard, it was a motion of the Government in contempt—could the Government have released the information without your consent?

Mr Cox: No.

- Q76 **Mr Peter Bone:** If they had not released and had already been held in contempt, presumably the way forward then would have been some sort of vote of confidence and the House would have decided whether they still had confidence in the Government?

Mr Cox: I suppose there were alternatives before the House, but one of them would have been to have sought to have brought a further motion naming individuals and seeking sanctions against those individuals. I hope that the House would never have reached that stage.

May I say candidly, I completely understand the frustration expressed throughout this Committee about the Government's position in not opposing the original motion. It meant that there was an inevitable build-up within the House of understandable frustration about the Government being seen to ignore the finding. I agree with you, Peter, that had the arguments been put on the day before the House had been annoyed, understandably, by the failure of the Government to contest the original motion, we might have prevailed. At least I hope so, because good sense and principle I would strongly contend does strongly militate in favour of us, all of us, respecting the self-denying ordinances and constitutional conventions. Ultimately, if we are to work together across often very strongly-held party divisions, unless we have some conventions we respect, some rules, then our democratic system will and does break down at these moments of great tension and pressure.

- Q77 **Chair:** The concern I have here and I pick up from Nick is that the Government took a very deliberate decision, because they were struggling to command majorities, not to divide on most Opposition Days. It has not divided on 25 Opposition motions. Her Majesty's Loyal Opposition then went back to an old process and utilised that process. It seems to me that the Government do not like that and are now asking the House to place limitations on its rights, and the House does not have



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a lot of rights when it comes to dealings with the Executive. We would not be here if a decision had not been taken in 2017 to break with practice, and the practice was to divide on Opposition motions and even the Government would amend them.

This is where I am struggling. I am struggling because it feels like the Government have gone, "We do not really like this and we do not want it to happen again. It is happening as a result of decisions we have made. We are making our bed and we are now lying in it and we now want the House to decide to limit its own powers in this area". I simply cannot see the House deciding to limit its powers, whatever the principles going forward, to make this current Government's life more comfortable.

Andrea Leadsom: Could I possibly tackle that? With the greatest of respect for your role, Charles, I just do not agree with you that that is what the Government are seeking to do.

Chair: That is absolutely fine.

Andrea Leadsom: Just to be really clear, as I said at the beginning, Parliament carries out an absolutely vital scrutiny role and the humble address, although it has not been used in a long time, now is being used. It has been used to deliver things for the House that the House is entitled to request.

However, the challenge with it is because it has not been used in a long time, it is a very blunt instrument. My observation, which I have tried to set out very clearly, is not to try to limit its use other than to say that there needs to be some means of turning it into less of a blunt instrument. For example, we have had humble addresses that request papers that may or may not exist in the format in which they are requested, that may be disproportionately complicated or overwhelming to try to seek, and indeed there is not a mechanism to say whether that humble address has now been complied with. There is the issue of the national interest, the negotiating position in the case of the EU, national security, Cabinet papers, all of these pre-existing conventions.

The use of the humble address is entirely respected. It is where it clashes with pre-existing conventions about the sort of information that should not be in the public domain on the one hand and then, on the other hand, there is the very practical issue about how you make a humble address work in practice so that the House gets what it wants rather than creating an intolerable or impossible burden.

Q78 **Chair:** I will wrap this up. Say the Committee was not minded to recommend the House reduce its powers and rights—I think that we would get pretty short shrift, because if the Government cannot command a majority in places I doubt that we would command a majority on this matter—but if we were to accept what has been said, that the current system goes from nought to 100 with no 50 in between, you would like to see a 50 in between where there could be a pause, a bit like coming to a jump where the horse and the jockey could gather



themselves before making the jump?

Andrea Leadsom: Yes, exactly.

Q79 **Chair:** I cannot speak for the Committee, but my sense is that the Government are not going to get everything that they want. However, I think that there is an understanding that the Government should be given an extra opportunity to reassure the House before the House in a sense—sorry to use the word—goes nuclear. Would that be somewhere nearing a happy circumstance?

Mr Cox: In relation to the Law Officers' advice, I have to say that what the Leader is proposing is that there are certain categories of material such as Law Officers' advice and national security material that simply could not be disclosed. If it is national security, you clearly have a serious problem over the implications of that. If it is the Law Officers Convention, then the Ministerial Code places it absolutely clear upon Ministers, Mr Chairman, that I am bound by a duty not to disclose either the fact or substance.

Q80 **Chair:** Why would Her Majesty's Loyal Opposition request and try to secure information that would put the country's national security at risk? It is the Loyal Opposition.

Andrea Leadsom: Precisely because the humble address does not enable Her Majesty's Loyal Opposition to understand the significance, the potential implications of the information that is being sought. That is the point about it being a blunt instrument. A humble address is a request for information without knowing, first, whether the information exists or, secondly, what form it takes.

To your point about their gathering up before the jump, what in the normal sense of a humble address would be incredibly helpful is to seek out whether it exists, how it could safely be distributed and to whom, and who decides when it is complied with. That would be very helpful, but the AG rightly points out that there are certain categories that have pre-existing countervailing conventions against any form of disclosure at all. That really is where there are potentially very real concerns about using a humble address to overturn those pre-existing conventions.

Q81 **Chair:** I have a final question and then I will wrap this up. I do apologise. If a humble address was made that the Attorney General felt jeopardised the national security and the Attorney General or the Leader of the House made that case from the despatch box, do you not trust the House of Commons then to say, "No, we will negative this humble address. We will vote against it"?

Mr Cox: It is not a question of trust. The House and this Committee has the right to do what it chooses, of course it does. It establishes its own procedures on the recommendation of this Committee. It is sovereign. It can regulate its own affairs.



The question is the Executive too has legitimate interests. It is a separate part of the constitution. It is accountable to the House, but it also has its own duties that it must uphold. Those are duties to other parts of the constitution, including the sovereign. If the House consistently puts those duties in conflict, then it is an acutely difficult situation for those who face those intersecting duties. All I say, as the senior Law Officer, to the Procedure Committee is that this Committee could legitimately recognise that in such a situation there ought to be some reasonable consideration of the situation that places a Law Officer in. I am not seeking to abrogate the House's powers in any way. I am just asking for what we have characterised as this Procedure Committee's recommendations as to self-denying ordinances when it comes to so important a constitutional principle.

Q82 **Chair:** Thank you both. You have been absolutely charming and informative. We would love to have you back at some stage, but I am sure you have other things to be getting on with.

Mr Cox: I can't think of anything more pleasurable, Mr Chairman.

Andrea Leadsom: Quite right, always a pleasure.

Chair: I am sure we wish you the best of luck, both of you, in your journeys. Thank you very much.

Andrea Leadsom: Thank you.

Examination of witnesses

Witnesses: Sir David Natzler KCB and Mark Hutton.

Q83 **Chair:** Sir David, I cannot tell you what a pleasure it is to have you before us. It may be your last appearance in public. You have not made many appearances. It may be your last public appearance, sorry, but you have not made many, which is the sign of a wonderful clerk. Mark, thank you for joining Sir David.

Sir David, Mark, you have listened to what has been said. I am concerned for this reason: I am concerned that the House has very limited and very few rights. It does tend to exercise its rights responsibly and with due consideration to the ramifications. I—and I think others on this Committee; it may not be a uniform point of view—would be very reluctant to do something that would restrict the rights of the House to exercise its rights. However, is there the possibility of something that could be inserted, as I think you, Sir David, have suggested, in this process that would allow the sharing of information in a more contained environment before those seeking that information decided to move on to a more open environment? Perhaps if that contained environment met and assuaged their concerns they would feel they would not need to take it to the next stage and have that vote on the Floor of the House for full and public publication.



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Sir David Natzler: I did not hear all of the previous evidence, but Mark did. I think that we have to separate what happened in November/December from the bigger question that you are asking, because as questions and answers have said, that was in a particular political context, to be candid, about Opposition Days, irritation on behalf of the Opposition that they felt they were not being listened to, the partial leaking of an Attorney General's advice to the Cabinet, which is unusual, I think, and therefore the knowledge that there is no doubt there was advice in this case.

It is not like the famous impact assessments, where it turned out that they were misdescribed or that there was a misunderstanding that had arisen. It is absolutely clear there was advice on a highly political subject, which again is not always the case. It is not a particular case or involving, so far as I can see—and again I may be wrong—negotiations. This was the meaning of an agreement that had been reached with the EU post-negotiation. In other words, the agreement, if not initialled, was already come to, and the House wanted to know what the Attorney General's view of one particular aspect of that agreement was.

I am not obviously going to argue whether that is a good precedent or a bad precedent, but it was a rather unusual set of circumstances. Is it possible to imagine a situation in which the Opposition—and it will generally be the Opposition because they are likely to command the majority, but it could of course be a Backbench Business Committee sponsored motion or indeed a non-official Opposition party. It could be on one of the three days given to the other parties, as it was in the Syrian case in 2003, I think, where Plaid Cymru were the ones who put the motion down.

It is not just the official Opposition. Is it possible to imagine a situation in which they seek Law Officers' advice in a mood of academic abstraction in which they are quite happy to have several weeks of discussions first as to exactly how they are to phrase their request as to the detail of the information they want, as to the class of information within that advice that they are willing to see not published at all or only published to Members or only to a certain category of Members, and then eventually, after several weeks of chewing this over, coming forward with a still controversial but, as it were, thought-out motion? I think that that is for the birds.

The way this motion arose is it comes into the Table Office on day one and it is on the Order Paper on day two. One has to remember the timing situation. It is very different from a Select Committee. I am sure you are thinking how this would affect Select Committees, who have used the delegated power from the House, but it is the same power that has been delegated to Committees to get papers since time immemorial and still do every week. They have the advantage of having a possibility of give and take with a Government Department, so they can go back and forth and eventually reach hopefully a solution that works for them. If it is



something that has come into the Floor of the House, probably from an Opposition party, probably in the heat of the moment, so an issue that is suddenly really live and they want to get on with it, I find it hard to imagine how you would be able to look at each case separately and in an orderly way.

It would of course be possible to have a self-denying resolution, there is no doubt about that. We do that with the sub judice resolution, which is entirely in order not to conflict with the courts. If you think that the Executive vis-à-vis Parliament occupies a vaguely similar relationship, different, but also a two-sided relationship, as Parliament occupies with the courts where we say of our own volition and the Speaker enforces a rule that we do not seek to interfere with that justice, then that would be perfectly possible to do for one or more defined classes of documents from an address.

I think that it is difficult to imagine in practice how it would work in advance of such a motion. Afterwards it is of course possible, which is what happened with the impact assessments. There was a lot of give and take between the Brexit Committee and the Government and a broadly satisfactory solution was reached. In the three weeks from 13 November to 4 December I am not aware of any attempt being made by the Government to come forward and say, "We recognise this order, but we would like to moderate it in some way". What happened between 13 November and 4 December is they published a legal assessment, I think, which was evidently an attempt to say, "Here is what you maybe want" but it evidently was not what most Members wanted. Afterwards, if you knew there was a mechanism and the Government were not going to be in trouble for using it, I can imagine one.

It is a very long answer, Chairman, I am sorry.

Q84 Sir Edward Leigh: I think I am right in saying that if a Government does not have a majority, if somebody puts down a humble address, basically the Government have no escape in terms of contempt, but you can comment on that.

My next question is I am not saying that this Committee would want to, but if this Committee wanted to protect national security, the Attorney General's advice to Government and the advice of senior civil servants to Government, which is a tradition, what procedural device, what air raid shelter, what bunker could we put it in so that in the future, if the Government lost their majority, they would not have to reveal this because somebody moves a humble address?

Sir David Natzler: The answer is a resolution. The House can simply resolve that it is of its own volition, restraining its own power by saying a humble address cannot be moved for the following categories of documents. Would that be easy to implement? In terms of Law Officers' advice, I think that the answer is yes. The test has to be on a Tuesday at 5.00 pm whether a clerk in the Table Office, on being shown the text of a



humble address for the first time by the Opposition, whether it is susceptible to objective analysis. But I think that if it is Law Officers' advice—we had no doubt when we saw the motion going down, and we obviously discussed it, that it was seeking Law Officers' advice. If there had been a resolution that said, "This cannot be moved for, it is disorderly" we would have so said to the Opposition and if in any doubt we would have asked the Speaker, I am sure, to enforce it.

National security is a little bit more difficult, isn't it? Having been clerk to the Defence Committee for six years, I am conscious that the Ministry of Defence thinks that quite a lot of things are injurious to national security, which on further examination are shown to be potentially disclosable without a risk, sometimes as a result of amendment or redaction or whatever. It may not be quite as serious as they think because they go by their security, what they have stamped on the top, so everything is restricted and then it just moves on up.

Would that be easy to enforce? No. Let us say that someone were to seek something following the Chagos Islands advisory or judgment, seeking to know something about the base at Diego Garcia that is not in the public domain—I don't know what—as part of an Opposition debate. It would be difficult for the Table Office to judge in a few hours whether this infringes national security or not. You would want some mechanism short of ringing up the Ministry and asking them what they think. Therefore I am hesitant on national security.

On straightforward advice from officials, whether senior or junior, I do not think that is difficult. Normally, it either is advice or it isn't. My doubt arises from things like risk registers. I think that under the Labour Government, was it not, we have certainly had risk registers asked for. That was a sort of fashion at some point. It is not exactly advice to Ministers, but it used to be regarded as something like it. I think they have now been put in a different category possibly. If you had a resolution it would have to be susceptible to rapid interpretation and enforcement or else the motion would appear on the paper the next day. Or you could have a rule that before moving for a humble address you had to give a reasonable period of notice.

That rather constrains the Opposition if it the Opposition's pursuit of something urgent. But if, let us say, it was a week and there was a mechanism either involving officials in the Commons trying to find out and advising the Speaker or a Member-led operation that could be rapidly put into scope saying this is what they wish to move for, it could raise issues of national security and national interest and the Government have raised the red flag. Let us now get a decision from some proper body as to whether it does or it does not.

Q85 Bob Blackman: I missed some of the earlier evidence as well because I was attending a DL Committee. My concern is the Attorney General is an acting Member of Parliament, a Senior Law Officer to advise the Cabinet,



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not to advise the House effectively, and his primary responsibility appears to be as a Member of Government who gives the Government advice on what should be done.

My concern is, coming from a local government background, on any council in the country there will be a statutory law officer who gives advice to the council and the councillors on the actions they are going to take and gives them legal advice appropriately. There does not seem to me the same sort of position to enable the House to get legal advice. What do you think should happen going forward so we, as Back-Bench MPs, can get legal advice for the decisions being taken?

Sir David Natzler: You should really ask the Attorney General. On the first one I know he is a Government Minister. He also has responsibilities to the House as the House that he takes very seriously. He said quite frequently during his oral answers and in particular during his statement that he is keen to advise the House.

What he told the House about what the backstop means, again very simply, seems to me exactly what he had written in his letter. In the letter he wrote it in a perhaps less dramatic way, but there did not seem to be any difference and I think he just said of course there would not be any difference. He comes to a legal view and if someone asks him in the House what is his legal view, I think he will give it on something like a treaty.

It is a slightly unusual case that has brought us here because this is not a case involving an individual and the likelihood of a prosecution succeeding or failing or the legality of actions, as in the case of Iraq in 2003 and Lord Goldsmith's advice, or indeed the case that Lord Morris raised about the bombing of Kosovo. One cannot help but see the point that there was a risk in both cases that the United Kingdom would be some sort of international tribunal and if it was known that our principal legal adviser to the Government had said, "We only have a 60:40 chance of surviving a challenge under international law if we do this" that is incredibly damaging to the interest in trying to defend the nation. But in this case it obviously was not like that. It was just saying that the backstop is permanent.

On the second point we have the Office of Speaker's Counsel. She is not spending most of the time advising the House as a whole, but is always happy to offer advice. She is the general counsel for the House administration so 95% of her time every day I am in contact with her seeking, as the equivalent to a local authority counsel, as to whether what we are doing under employment law and procurement and so on.

But I think Members do not want to know what she thinks about or would not want to know what her predecessor thought about the attack on Iraq. They wanted to know what Lord Goldsmith had said, not perhaps because they wanted to know what his opinion was but whether it coincided with



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the actions that were being taken, as I think was hinted in the previous session.

Q86 Bob Blackman: Apart from the Attorney General questions in the House that come up every five or six weeks, there is no opportunity for the House to question the Attorney General unless he or she makes themselves available for a debate or some form of discussion. That is something that concerns me and I am sure other members of the Committee as well so we could hold the Attorney General to account.

Sir David Natzler: You can put in a written question for the Attorney General at any time. I do not know how many go in. I suspect not many. From memory, he has a duty to advise the Privileges Committee.

Chair: Yes, the Attorney General's office gets a few questions and provides a few answers slowly.

Mark Hutton: Other Committees have access to other legal advisers. It is not the same as getting the legal advice the Government had from the Government's Law Officer, but there are ways Members, as Committee members, can have access to legal advice where that is important for what they are doing.

Sir David Natzler: They use that point a lot. I would not want the impression to be given here or elsewhere that we are short of legal advice. It is more that you want to know what he said, not what other good legal advice might say. QCs' opinions are constantly, in my experience, quoted against one another in a parliamentary context.

Q87 Alison Thewliss: You suggested a cross-party Committee could review in confidence the information demanded by the House and determine what would be appropriate to release. Could you tell us more about how you would envisage such a Committee working and what would be the practical considerations around that?

Sir David Natzler: It is a proposition. It may not find favour with the Government. Assuming that is vaguely *ex post facto*, in other words, we are not trying to fit this into a very hurried timetable before the House is asked to decide. Members who might be experienced in dealing with this, supported by similar staff, would be the best people to do it. There are Committees that have a lot of experience in dealing with this because they are dependent on Government for information, much of which is classified in one form or another.

In the last 40 years of the current Select Committee system there has barely been one deliberate leak. There may be the odd inadvertent release of information. I think they are trustworthy to Government. They know the chairs they are dealing with and you might have it as a sub-committee of the Liaison Committee comprised of the obvious Chairs plus one or two more that were ready to be activated where it is necessary.



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When we have had addresses where things have been sent to Committees, including to the Work and Pensions Committee, you know who you are dealing with. It is the Chair and the Clerk of the Committee and it is easy for Government. I see it is difficult for Government when they are dealing with the House as a whole. Who do they go to? Who speaks for Europe, that old question? Who speaks for the House in terms of taking judgments on complicated matters of that sort?

The Liaison Committee might be seen to be a surrogate for a House type Committee and also they have experience. That is how it might work. They would have rapid discussions with the Government and that is certainly my long experience on the Defence Committee, where I think I spent 20% of my time negotiating with the MOD perfectly reasonably and rationally saying, "Well, let me just push you on that. Why is that a threat to national security?" Of course they would not always explain why and you have to take some things on trust, but it does work and in the end you get information out there and both sides feel content.

Mark Hutton: It works in the various ways it could work where both sides are interested in getting the information that is at the heart of the motion's request. Sometimes, to take Mr Smith's point, these motions have been put forward not entirely in pursuit of those particular pieces of information. Where that is the case, even after the event, arrangement to manage the process is less likely to produce a successful outcome and may put Members in a politically rather difficult position.

Q88 **Mr Peter Bone:** There is a convention, is there not, that Law Officers' advice is not provided to the House? That is the convention, as we understand it. On occasions in the past the Government has decided to publish Law Officers' advice. If that convention is turned into a resolution of the House, what is to stop the House doing what it might be asked to do later today, to suspend in that case Standing Orders and do something completely outside the normal convention? If it is the case that a resolution could just be suspended like that, what is the purpose of it? You might as well just stick with a convention and let the House make its decisions as it goes along.

Sir David Natzler: You are quite right. Of course, as we know, we have never discovered a fool-proof means of entrenching a resolution so it cannot be overturned by a simple vote. I think that is true. Over the years people have talked quite a lot about entrenching constitutional style resolutions. I suppose the answer is twofold.

First, if you set up a regime by resolution you raise the bar in it perhaps to be able to overcome it not by entrenching it but, for example, the timeline. If the timeline says you need to give two weeks' notice of a motion from address you do not have the time to overturn that as well when you make an application so you still have the time. It still becomes a weapon of not last resort, but slightly higher up the bookshelf in order to get it done. That time limitation would be one thing, an extra level of nuisance.



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You could table a motion saying, "Notwithstanding the resolution of the House of 2019, blah blah blah, this House moves ..." That is absolutely right. The advantage is everyone can see what you are doing and there is no doubt you are overturning a convention. It may be that people who are otherwise unaware this is going against convention.

Secondly, the convention, as observed by successive Governments, is a fact of, and I am reading the substance of advice from, is not disclosed outside Government. It is not a parliamentary convention. It is respected, but as the Attorney General and the Leader said, it is something to do with the Ministerial Code that is interesting again, but nothing to do with us. It is a convention the Executive observed except, as you also sagaciously observe, as the Speaker would say, unless they want to publish it, in which case they do. It is quite a convenient sort of convention. You do not publish it when you do not want to, but when there is, as in 2003, excerpts and again in 2005, for very good public interest reasons people said, "What was the advice?" They said, "We will publish it exceptionally".

Mr Peter Bone: Can I carry on? Sometimes the Government may possibly leak part of it as well. Heaven forbid that be the case, but I wanted to take this opportunity, if it is all right, to thank Sir David for all his work. It is an appropriate place to do it, being the Procedure Committee. When I first came to this House I found the centre of the world was the Table Office with immense help and Kate Emms was in there at the time. This chap used to come wandering in and he was obviously very important and they all hushed and listened. Then I found you in the office down the corridor and the amount of information David gave to me and other new colleagues was immense. This place will be so difficult after tomorrow when you leave and it is with genuine heartfelt thanks to you for what you did. I can honestly say if it was not for you, Sir David, I would not have been able to cause as much havoc as I have.

Chair: Do not say the same thing.

Q89 **Sir Christopher Chope:** Although Peter Bone and I often do say the same thing, I will not on this occasion except to endorse what Peter said about David's fantastic service. David and I were on the Select Committee and he was the Clerk of the Select Committee when other applicant countries were trying to join the European Union. That dates us both in a sense. He was marvellous on that Committee, as on many other things.

In one of his last bits of advice to the House that he is giving us today, can I ask him to reflect upon the Ministerial Code he just made reference to and the interaction between that code and the codes in our House? One of the problems is that the Speaker can enforce a rule against sub judice against other Members with the help of the clerks. The Speaker could enforce a resolution in relation to not disclosing the Attorney General's advice, but the Speaker has no right to raise complaints about breaches of the Ministerial Code.



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I speak as somebody who has been on the Standards Committee for a long time and there seems to be now a growing gap between the practice of the Government on a Ministerial Code controlled solely by the Prime Minister and the code of conduct that affects everybody else as Members of Parliament. I wonder whether I could tempt Sir David into thinking about whether there should be some sort of unification of these codes and a common enforcement mechanism so we are all on the same level playing field.

At the moment, as we heard in earlier evidence, if you are in the Government and you choose to leak selectively the Attorney General's advice, leaving Members of Parliament completely in the dark, how are Members of Parliament going to be able to get even with such a breach of a code over which they have no control?

Chair: Sir David, this will be your last answer to this Committee, so the floor is yours.

Sir David Natzler: I was going to pass it to Mark. Let me start. I have some sympathy with that view because I see the problem. The problem, as you know, arises in the fact that Ministers, although accountable to Parliament for their ministerial actions and decisions, are not accountable to Parliament for their ministerial behaviour. That is the Ministerial Code, you are answerable to the Prime Minister who appoints, as you know. I think there is still an adviser on the Ministerial Code. Is that right?

Sir Christopher Chope: Yes.

Sir David Natzler: I cannot remember. Is it still Alex Allan? I think it is.² They can then be called in to investigate, but only by the Prime Minister. Is that right, Helen?

Q90 **Helen Goodman:** Alex Allan has been around for a million years, has he not?

Sir David Natzler: That applies to many of us. As opposed to Members, who are responsible to the House and obviously Ministers, who are Members, are responsible to the House for their behaviour as Members through the code of conduct, now including the behaviour code reflected in the code of conduct.

The problem arises, does it not, from the mixed constitutional system we have? We have Ministers who are Members and we also have Members who are not Ministers and inevitably if they have accountability for their behaviour to a Prime Minister it would be wrong for the House of Commons to be able to enforce that. You could complain under the Ministerial Code and Members do, from my memory. I do not know how often, but they can write to the Prime Minister and say, "I think someone has broken the code". I think the waters are further muddied and that

² Note by the Clerk: The Prime Minister's Independent Adviser on Ministers' Interests is Sir Alex Allan KCB, appointed in November 2011.



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when I was going to ask Mark about the 1997 resolution that the Blair Government gave the House early on.

Mark Hutton: It was just before the election. It was the Major Government's last act.

Sir David Natzler: You are right. It was John Major. About accountability with the House resolving what Ministers should do in their relationship with the House. This is where the two intersection bits come and we do have some responsibility for that resolution. If in theory they have breached that resolution, they have breached a resolution of the House. If, for example, there is a duty of candour, from memory, this is not the sort of thing you would expect in such a thing, but I am not sure we have ever taken it with the House the seriousness it could be taken. There is not an immediate means of investigating it.

Mark Hutton: It starts with the phrase, "But in the opinion of this House". That does not exactly suggest a strong enforcement mechanism behind it. Probably it has never been something that has been seen as within the House's remit to enforce.

The point I would add is where there have been cases or occasions when a possibility of reaching a common agreement on how the relationship should work, emerge and develop, the House has not always been very keen to adopt them.

If you take the Osmotherly Rules, for example, about how civil servants and Ministers should behave in their conduct with Select Committees, the House has never endorsed them. The Liaison Committee has never endorsed them so we have not been prepared to sign up to the limitations on the accountability those rules would contain. I do not think the Government would ever sign up to a set of rules that contained no limitations on accountability, so the House and the Government both have to compromise if something is going to be reached. So far they have not done.

Sir David Natzler: When Mr Bone said the Cabinet might as well be televised, it did occur to me if Ministers are all breaching these rules of confidentiality in a very serious way, if it was happening in a Select Committee of this House we would not be laughing. The contrast did strike me.

Q91 **Chair:** As a loyal servant of the House for 43 years, Sir David, do you think the House should guard its powers jealously?

Sir David Natzler: Yes.

Chair: Thank you. Can we wish you a very long and happy retirement?