HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: Role of the Lord Chancellor and the law officers

Wednesday 9 March 2022

10.10 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie.

Evidence Session No. 1 Heard in Public Questions 1 - 19

Witnesses

I: Professor Graham Gee, Head of School and Professor of Public Law at the School of Law, University of Sheffield; Dr Patrick O'Brien, Senior Lecturer in Law at the School of Law, Oxford Brookes University.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Professor Graham Gee and Dr Patrick O’Brien.

Q1 **The Chair:** Thank you very much for coming today. We have a series of questions that we would like to ask you. The inquiry is about the Lord Chancellor and the law officers, but our focus today is primarily on the role of the Lord Chancellor.

I will open up with a general question and then invite my colleagues to add to those questions. In your view, how is the rule of law being protected within government, and how does the Lord Chancellor ensure this? In answering, maybe you could answer with reference to how recent events may have demonstrated a shift in how that duty to protect the rule of law is being performed. Who would like to start?

Professor Graham Gee: Morning. I am Professor of Public Law at the University of Sheffield. I am grateful for the opportunity to help the committee with this inquiry. The rule of law is a contested and uncertain notion and it is capable of being interpreted in multiple rival and opposing ways. What that means is that different Lord Chancellors, different law officers and different public officials who are at large might differently understand the nature, status, content and requirements of the rule of law.

At its heart is a very basic intuition that the law needs to be capable of guiding the behaviour of those who are subject to it. What that means in practice is that law needs to embrace certain characteristics, at least as a matter of degree. Law needs to be clear, coherent, intelligible, accessible, interpreted and applied by a system of independent courts that are staffed by judges who are equipped personally and professionally to resolve legal disputes impartially and according to law, free from improper pressure. Also it importantly has the idea of government according to law. Those who exercise governmental power must have a clear legal basis for so doing and must strive to exercise the power subject to the legal limits imposed on it.

The question was: how is that difficult, slippery idea promoted inside government? There are multiple ways, and I will briefly highlight a handful. The first is that all Ministers are subject to an overarching duty to comply with the law. That is set out in paragraph 1.3 of the Ministerial Code.

Secondly, it is the function of law officers to assist Ministers in addressing legal issues through the provision of legal advice and helping Ministers to act lawfully. The Ministerial Code provides that legal issues must be brought to the attention of law officers in good time before the Government are committed to making critical decisions that have far-reaching legal implications.

Thirdly, there is the role of parliamentary counsel in drafting legislation in ways that translates policy into good technical law, which embraces those

characteristics of the rule of law. Their role is to make sure that law is intelligible, coherent, effective and embraces all those characteristics.

I would also point to the importance of the Parliamentary Business and Legislation Committee, which oversees the preparation of legislation by government departments. Sitting on that are law officers, which gives them a vantage point for monitoring and identifying legal issues that might require their advice and intervention.

Finally, I would point to the important role of parliamentary democracy in disciplining Ministers—imperfectly, because all constitutional systems are imperfect—in our constitutional tradition of doing so reasonably effectively, providing a set of dynamics that draws on political and electoral forces that incentivise Ministers for the most part to seek to govern through settled law. Those are a handful of some of the main ways in which the rule of law is promoted.

You asked about the Lord Chancellor's role within that. Thereto the duties are somewhat uncertain, as this Committee noted in its report in 2014. Three things can be safely suggested. First, the Lord Chancellor is subject to that same overarching duty to comply with the law but, secondly, the Lord Chancellor has a more expansive duty and a more onerous one than other Ministers. That is clear from Section 1 of the Constitutional Reform Act 2005, and from the oath that the Lord Chancellor has to swear on appointment that they will respect the law. The third thing that can be safely suggested about the Lord Chancellor's duties vis-à-vis the rule of law is that they have a particular focus on upholding judicial independence. That is made clear by Section 3(6) of the 2005 Act.

Beyond that, things become much fuzzier indeed, and that is where there are competing interpretations. I will pause there because I have covered quite a lot already.

Dr Patrick O'Brien: I will add a little bit. Thank you for inviting me to speak to you today. I would adopt everything that Graham has said there. In terms of who protects the rule of law, we need to think of more than just the Lord Chancellor. Throughout government and politics, and indeed within the judiciary, there are guardians of the rule of law and judicial independence, and we need to be aware of all of those. There is a broader context; there is an ecosystem and there is the politics in which all of this plays out.

Specifically talking about the rule of law, if I was conducting an undergraduate law seminar I would begin by trying to nail down what it is that the rule of law is. There is a narrow conception of the rule of law and a broad conception. The narrow conception is the real core, government according to the law, that we do not punish anyone without there being a crime in place. There is also a broader conception of the rule of the law. When you mention recent events, I think that may be what your question is getting at—I do not want to speak for you, maybe we should clarify. That broader sense of the rule of law would include how government relates to judicial review and human rights. There are certainly lots of

valid viewpoints that would incorporate that as an account of the rule of law, but they are, as Graham said, politically contested.

In terms of the Lord Chancellor being a guardian of the rule of law, and Section 1 of the 2005 Act and those kinds of duties, the problem is that it is not possible to say that to a Lord Chancellor who simply disagrees with the idea that there is a broad sense in which the rule of law includes every aspect of judicial review or the human rights—because, if they do not agree with that, they will point to the fact that they are funding the courts and that traditional independence remains intact. If we are to have an argument about what the Lord Chancellor should do to protect judicial review and human rights, it needs to be in those terms; otherwise, we end up tripping over ourselves about terminology and philosophy, whereas what we are really doing is we are in legal politics. There are two viewpoints: they are contested, they always have been and always will be.

That would be as much as I want to say about that, but if you would like to press me further, I will—

Q2 **Lord Hope of Craighead:** I have a particular question about the judiciary. Could more be done, either by the Lord Chancellor or by others, to protect the independence of the judiciary? We had an example not all that many years ago when the Court of Appeal judges were publicly criticised in the press and the Lord Chancellor of the day was very slow to come to their defence. I am not sure that would be true today but it is an example of the concern one has now, compared with the Lord Chancellor in the old days, when they would be right at the front of protecting the judiciary. Is the present situation working satisfactory? If not, does there need to be more to make it work? What should that be? How should it be made to work?

Dr Patrick O'Brien: In my view, focusing on the Lord Chancellor in this context is no longer worthwhile because, functionally speaking, these aspects of the Lord Chancellor's role no longer really exist. I know there are formal duties that apply in the statute but, culturally speaking, Lord Chancellors do not have the political power and they often do not have the legal background to be attuned to the kinds of issues that you are talking about.

Specifically in connection with "enemies of the people" and the Miller case, I think there was an argument about whether or not that was a threat to judicial independence. I tend towards the view that it was because, of the 30,000-odd judicial figures in the country, there is a reasonable chance that some of those may have felt unable to conduct themselves and conduct their jobs without fear or favour if people were showing up in courtrooms and calling them enemies of the people. However, one swallow does not a summer make. We have not seen anything like that subsequently. The Lord Chancellor at the time was not a legal Lord Chancellor. There was heavy criticism from the legal profession and from the judiciary subsequent to that incident, which I think did have some effect. The reaction to the Supreme Court judgment

was much more muted. The reaction to the second Miller decision in relation to prorogation was much more of an even-tempered one in the media and in politics.

I think it was valid to have concerns about that, but we have not seen this developing as a trend. At this point, it might be fair to say it is just one of those things that happens every decade or two. It should not happen, but I would be reluctant to draw too many broad conclusions from it.

Lord Hope of Craighead: Thank you. Professor Gee, is there something wrong with the list of qualifications for Lord Chancellor? You will know that there is a list of qualifications, and the very last one in effect hands it over to the Prime Minister to select anybody he likes. There is no particular test at all in the very last qualification in the list. There was a lot of debate about it in the House of Lords when the Bill was being discussed, but we have the Act as it is now. Should there be greater emphasis on making sure that the previous qualifications, the legal qualifications, are really the test for selection as Lord Chancellor, and this idea that it should simply be anybody who is useful in the Cabinet should be discarded?

Professor Graham Gee: Thank you for that question. It is an important question that this Committee has turned its mind to in the past. The provision of Section 2 says you may want to take into account a series of factors, including a legal background and experience, but you also may take into account any other considerations you like, the effect of which is to render Section 2 as a bit of a dead letter.

I should acknowledge that many judges and lawyers place a very significant weight on the office of Lord Chancellor and, notwithstanding the reforms in 2005, the broad thrust of which were to dilute the significance of the office in our constitutional architecture for better or for worse, many still place a great attachment—many lawyers and judges—on this office and are keen for the occupiers of the office to have a legal background. I would also note that although there have been, I think, four non-lawyer Lord Chancellors in the middle of the last decade, there has been more lawyer Lord Chancellors than non-lawyer Lord Chancellors since 2005. In particular, we are in a bit of a run of lawyer Lord Chancellors since 2017 or 2018. I lose track of time.

My own view is that the most important qualifications for the Lord Chancellor are those that we would hope for in any Minister. They would include intelligence, industriousness; an ability to master a complex brief; the ability to delegate; the ability to set the strategic direction of the department and to inspire others to implement that direction; the ability to foster constructive relationships with a diverse set of internal and external stakeholders, including senior civil servants in the department and cognate departments; and vitally, of course, senior judges and other officials who help to populate the sorts of public bodies in the judicial ecosystem that Dr O’Brien mentioned. In addition, it is very important, as

in all ministerial offices, that the occupant commands the confidence of his or her ministerial colleagues and their parliamentary colleagues.

I think in all political office we would hope for the right dose of political courage, which would include in this particular office the courage that would be channelled towards the Section 3 statutory duty to have regard to the need to defend judicial independence. That set of ministerial skills can be possessed by lawyers in great abundance and non-lawyers in great abundance, and in very little abundance by both lawyers and non-lawyers. So I would prioritise those skills.

Just to spotlight the question about what a lawyer Lord Chancellor brings to the table, they might bring a sound understanding of constitutional principles and of the pressures and challenges that confront judges, litigants and legal professionals, and they might bring longstanding personal and professional relationships that might be helpful as a soft power currency in ministerial office when negotiating with particularly senior judges. Those would be the advantages.

The disadvantages would be that longstanding personal and professional relationships might make it less likely that a lawyer Lord Chancellor will bring sufficient scrutiny to the arguments that are made before that Lord Chancellor by senior judges. Senior judges are very skilled advocates. They make compelling cases and, rightly, they will be trying to pursue the judicial interest—and at times the judicial interest may be at odds with the public interest. Section 3 of the Constitutional Reform Act makes it clear that the Lord Chancellor must have regard to the public interest as well as when thinking about matters pertaining to the administration of justice.

Prior legal experience might be outdated for a legal Lord Chancellor and might render the Lord Chancellor less able to understand the pressures and challenges faced by judges, litigants and legal professionals. It may result in him or her failing to bring a fresh eye and being unwilling to pursue reform, which might be much needed in the judicial system.

Lord Hope of Craighead: I will stop you there because there are further questions to come. Thank you very much, we will leave it there just now and come back to other points.

Q3 **Lord Falconer of Thoroton:** I will follow up one thing that Lord Hope has said. I am very interested in what your view is about what has happened in relation to judicial independence over the last 30 or 40 years. My sense is that for judges the key independence is from the Executive and that they feel free to make decisions. They are obviously not being told what to do by the Executive. Have they become more timid about taking on the Executive compared the mid-1980s, when Lord Lane, the Lord Chief Justice, accused the Lord Chancellor of being like Hitler because he introduced provisions for allowing solicitors to have rights of audience in the higher court? Now there is a school of thought that says judges are much more conscious of not upsetting the Executive. Yes, they will decide cases in accordance with the law, but they are much

more conscious of having to tread a more careful course. What is your view about that?

Dr Patrick O'Brien: To a certain extent I am going to have to plead the fifth, because I cannot comment on what is going on inside judges' heads. In the last few years, I think we have seen a slight softening on some lines in some aspects of judicial review, and this happens from time to time. If you take a long view of the common law over decades and centuries, you can see that we have activist periods and quiescent periods. Perhaps we are at the beginning of a more quiescent period. Why might that happen? Politics might be a reason for that, but I can put this slightly differently. We want judges to be sensitive to politics. Judges who are completely insensitive to politics and to general civil affairs end up saying silly things like, "Who are the Beatles?" and things like that. We want judges to be independent of mind but openminded as well. They have to be aware of their role in the culture. I do not think that they should step back from the judicial role to decide things without fear or favour, but sensitivity sometimes is not a bad thing. It is part of the dialogue that we see between the judiciary and the political parts of the state.

The core indicators of judicial independence are absolutely rock solid and have not changed: appointments have not been politicised; general transfer of personnel has not be politicised; and tenure and everything associated with it remains intact. The core indicators are absolutely unchanged but, again, to get back to the initial question, what we consider part of the rule of law is challenging the borderlines of judicial review and human rights law. Is that part of the rule of law; is that something that we should guard particularly? For me, that is more a political question.

Professor Graham Gee: It is a fascinating question. Just over 40 years ago would take us into the late 1970s, when Professor John Griffith at the London School of Economics wrote a very famous book called *The Politics of the Judiciary*. That book was an uncompromising and relentless critique of the judiciary's decision-making patterns over the 20th century. He was essentially saying that judges were too timid and were a "small C" conservative elite who were not willing to stand up to the established interests when those interests were called into question by individual citizens or groups of citizens in things like trade union litigation. Were John Griffith alive today, he would be astonished by the degree to which judicial attitudes, judicial cultures and patterns of judicial decision-making have changed over 40 years—and he would argue with not negative consequences.

I do not think we can be concerned about the robustness of judicial decision-making. They do decide without fear or favour in ways that are enviably strong compared to most of the world. Like Dr O'Brien, I believe that our tradition of judicial independence is robust. Like any traditions, it has highs and lows, ups and downs and light and shade, but it is a robust tradition. Inevitably there will be tensions between politicians and judges from time to time. Tensions are not a threat to judicial independence, for

the very reason why we insist on judicial independence in the first place. We want judges to have secure tenure and secure remuneration and to have judicial immunity in respect of their decisions, and a good merit-based appointment system, because we expect there to be politicians mouthing off from time to time or making proposals that might seem to compromise the constitutional position of the judiciary. Those safeguards are built in in anticipation of that. In the UK, we are very fortunate that they work, and they work in part because we have strong legal and political cultures.

The last point I would make is about the Lord Lane example, where I think he made that comment in the Lords possibly in the context of rights of audience changes. Today we might regard that type of comment as a failure of our system of judicial governance, if a senior judge felt the need to make such a comment in public. I would suggest one of the reasonable strengths of the post-2005 judicial governance system is that we do have more mature relationships that for the most part allow issues to be ventilated in private. Senior judges understand what it means to be an effective leader and how to use their political skills to negotiate with politicians. Often they do so, benefiting from the fact that the Lord Chief Justice will be in post for very much longer than Lord Chancellors these days.

Q4 **Lord Faulks:** It has to be remembered that the original plan was to get rid of the Lord Chancellor altogether. It proved not impossible, but certainly very difficult. The 2005 Act was to some extent a compromise to reflect the situation. What do you think has really changed about the Lord Chancellor since then? To some extent you have already answered that. But are we in fact—those of us who thought the Lord Chancellor had a very important role to play—hopelessly nostalgic? Should we confine him or her to history, on the basis that it is something that has hung on, but has no need of continuing any longer?

For example, when a Lord Chancellor can be a mid-career politician who may go on to other ministerial posts and who no doubt will wish to perform his or her functions in a way that meets the pleasure of the then Prime Minister, is that a useful role for a Lord Chancellor with the oath that he or she has to take?

Dr Patrick O'Brien: To take the first part, you have used some of my best lines in the asking of the question. With regard to the first point, without wishing to be pejorative, when you ask whether it is nostalgic to look back on the Lord Chancellor, in my view it is, yes. In those debates on what became the 2005 Act there is a quote, where I think Lord Kingsland moved an amendment saying that the Lord Chancellor in government is a great inconvenience to the Government and that is why the office should stay there. It simply is not true to say that the Lord Chancellor is a great inconvenience anymore. I do not think this was inevitable—

Lord Falconer of Thoroton: I think Lord Faulks's question is: should he be a great inconvenience?

Dr Patrick O'Brien: I can suggest why. Whether he should be or not and whether the old office can be resurrected might be a different question. Why has this happened? You answered some of the points in your question. You spoke about the fact that it is now a mid-career politician, when the political career incentives that apply to a person of this kind are simply not the same as applied to a Lord Chancellor, who, prior to 2005, had a judicial aura about them. They carried the prestige of an ancient office, but they would crucially have been a big beast around Cabinet and responsible for a big department. They would have been at the end of their career.

If you look at the figures for things like turnover, the most significant thing that has happened in the last decade is not that non-lawyers started to be appointed, but that the turnover for Lord Chancellors has fallen below that even of general Cabinet Ministers. The average tenure in post for a Lord Chancellor is 1.4 years; for general Cabinet Ministers, it is two years. Prior to 2012, it was nearly five years. That has all sorts of implications for the capacity of that person to do the job, even a well-meaning person. Anyone who goes into a job of this kind, which is subject to the history that you have described and subject to specific legal duties, will want to do it to the best of their ability. But if they know they are going to be out next week, they are not going to have much incentive to do it in a way that damages their career, or much capacity to develop the skills, understandings and connections that allow them to do that. This connects to a lot of the points that Graham raised in his last answer.

That explains from my perspective why I do not think the Lord Chancellor really exists anymore. The Lord Chancellor is a guardian of the judiciary in the same way that the Health Secretary is a guardian of the NHS. They will be regarded as good or as bad, they will be reforming or they will be conservative, depending on the temperament and the politics of the person who takes up the office. But their capacity to do the job is being hamstrung by the fact that they are just not in office long enough to get to grips with it, and they are not acculturated. A lot of the rubbing or the friction is because particularly non-lawyers, or people who have not practised for a long time, just are not in the same headspace as the judges and the lawyers. They do not behave in the way that the profession expects them to. I will let Graham come in.

The Chair: Before we move on to the next question, Professor Gee, did you have any final comment on that question?

Professor Graham Gee: I would disagree with Dr O'Brien in saying that the Lord Chancellor does not exist and has no value. Statements from some of the officeholders would suggest that is not true, and that they do see a difference between the role of the Lord Chancellor and their co-joined responsibility of being Secretary of State for Justice. I suspect there is marginal value in the Permanent Secretary on the first day a Lord Chancellor is appointed being able to say, "You have to take this special oath. These are your duties as Lord Chancellor—and they are distinct.

Yes, you may be concerned in your justice role about violence in prisons, drugs in prisons, the prison estate and reoffending rates. Those are important, but you have a special responsibility, different from most other Cabinet posts by virtue of the oath and by the virtue of these duties. You will have to go to the Royal Courts of Justice and swear in front of most of the Court of Appeal".

I suspect that matters on day one, and I suspect it matters when the senior civil servants are briefing the Lord Chancellor before they go to a Cabinet meeting. Of course, like every Minister, he or she may not be effective in performing those responsibilities, but that does have marginal value. In delicate constitutional systems such as ours that are customary in nature, we should be very wary of throwing too much down the sink.

Q5 **Lord Howell of Guildford:** We have already circled around the issue I want to raise with you, but the question I want to put is this: have the 2005 reforms and the resulting separation of powers—which after all was one of the reasons advanced at the time for having the reforms in the first place—been successful, or have they led to new antagonisms and concerns, in your judgment? To my mind, some of them are artificially exaggerated, but that is rather a different issue. What is the answer to the general question: have they achieved their aims or have they created more divisions?

Professor Graham Gee: Dr O'Brien and I, together with Professor Kate Malleson and Professor Robert Hazell, did a large project that studied these reforms between 2010 and 2015. That is a little bit historic now, but broadly our conclusion in 2015 was that the reforms had been largely successful in creating a new way in which to regulate judicial governance, leadership, administration and funding. It had translated or transformed an old closed insular system, heavily concentrated around the Lord Chancellor and a handful of officials in his department with only limited accountabilities into a much more open, transparent and inclusive approach to designing, implementing and overseeing judicial policy, involving multiple new actors and multiple new accountabilities. That creation of a new regulatory space for setting judicial policy has been an important change.

The new institutions that were created in 2005 had very rocky early years. The Judicial Appointments Commission's first decade was traumatic, but it now seems to occupy a secure position on the institutional landscape. The early years of the Supreme Court had a few rubbing points with the MoJ from time to time, but I think those have been mostly resolved. While people were concerned about things like the rate of pace of diversifying the judiciary and critiqued the JAC about that, and while some people are concerned about what they fear is the growing assertiveness of the UK Supreme Court as a partial consequence of the 2005 reforms, I think we can say those institutions are safely embedded in our institutional landscape.

The third change I would point to that has been an important success was not directly related to any of the particular reforms that were

instituted, but rather the reforms have helped to create a greater understanding among senior judges of the importance of leadership, inculcating a culture that understands the importance of value for money in the court system, the importance of consistency in the administration of justice and a need to tackle things such as court centres, where there might be problems in delivering justice sufficiently efficiently and in ways that are fair to the litigants that come before them. There was probably, at least as a partial consequence of the financial crisis, a realisation by senior judges that judicial independence cannot protect or insulate judges from across-the-board public sector cuts. Those are important by-products of the 2005 reforms.

Dr Patrick O'Brien: In the sense that Graham is drawing on research that we conducted together, I would not disagree with any of that. Broadly speaking, whether the reform has been successful, it has been successful in what I understand to be a number of the core aims. First, is there a formal separation of powers? Yes, now there is. We have taken the Lord Chancellor outside the judiciary. A major government department is now run politically through the Commons as a conventional department, rather than in a semi-detached way, as the Lord Chancellor's department was.

You mentioned in your original question that relations were perhaps slightly less good than they were. In the project we ran together, we talked about this—that judicial independence requires politicians to support judicial independence. It requires engagement between all the stakeholders, and between judges and Parliament. An example of that is the fact that judges appear before this committee annually. There is a high signal to noise ratio in terms of the conflict that appears in the media versus actual problems in terms of judicial independence. Some of the noises offstage arise out of the fact that those political relationships between the political parts of government and the judiciary need to be kept close, and people need to see each other in real life.

Q6 **Lord Howell of Guildford:** I was really trying to ask why. There has been this growth in the noise of complaint in the political jungle, with very senior politicians saying that judges' powers have expanded and must be checked, and all that sort of thing. Can we touch at any point in the 2005 reforms where that might have been enlarged or aggravated?

In particular, in your list, Professor Gee, of qualities and tasks that a Lord Chancellor should now face, I notice you did not include the one that possibly those outside, non-lawyers and others, would have expected near the top: the capacity of a Lord Chancellor to defend the judiciary and explain to legislators, and indeed even to the Cabinet, who largely do not understand any of these areas, and to the media—who not only do not understand, but are generally basically hostile—just what the challenges and tasks facing the judiciary are today. I think personally that they are much greater, largely thanks to the growth of the digital age of communication and connectivity, than they were even 20 or 30 years ago. Is not that the kind of Lord Chancellor we need?

Professor Graham Gee: Among the list of attributes I mentioned was political courage as a general skill that all Ministers should embrace to the appropriate degree. For the Lord Chancellor, that political courage will have important purchase when they are called upon to vindicate the Section 3 statutory duty to have regard to the need to defend judicial independence.

We need to take a little bit of care when we think about these very important questions to acknowledge that there is room for the appropriate exercise of political responsibility for the constitution as a whole, including over questions of the proper ambit of judicial review. It would be a mistake for us, for example, to understand judicial independence to mean that it was an improper exercise of political action to decide, for example, to legislate to reverse a specific judgment, to legislate to provide for the ouster of judicial review in limited domains, or to legislate to amend important constitutional statutes, such as the Human Rights Act. Those political choices may or may not be good, desirable or prudent, but they are no way inconsistent with judicial independence and they are no way inconsistent with the Lord Chancellor's duties vis-à-vis that principle.

Dr Patrick O'Brien: It used to be said that the Government should not cheer when they won cases and boo when they lost. I think we are seeing a little bit more booing than there used to be, and this sometimes manifests itself in proposals to change judicial review or human rights law. As yet, there have not been many concrete proposals in that respect. We are seeing a slight failure of comity, in the sense of the duty the institutions owe each other to speak civilly and not shout across the public square, but I do not think it is any more than that, at least not for now.

Q7 **Lord Hope of Craighead:** I have two particular questions about the reforms in the 2005 Act. The first is on the appointment system to the Supreme Court, and the chapter in the Act that deals with that. In the old days, as a law lord, with other senior members of the judiciary, we used to go to see the Lord Chancellor in his room. We would talk about possible candidates and he would say, "Yes, I will take all these views into account", and make his decision. All of that was clearly not going to be sustainable and was replaced by the system set up in the Act. It included participation by members of the Supreme Court themselves in the process, supervised by an independent and impartial chair. Is the system as it is now working satisfactorily, bearing in mind the need to diversify and all the rest of it, which everybody is interested in, or are there further changes that ought to be made? I have another simple point, which I will come back to later.

Dr Patrick O'Brien: Diversity is the one aspect of the 2005 Act that has not worked quite as well as people expected. That is not to say that significant progress has not been made, but it has been slower than expected. It is difficult in these contexts to talk about very specific policies, and I would not want to do that off the cuff. Empirically, it seems that, when politicians have more discretion, they tend to be more diverse

in their choice of judicial appointments. One way in which to ensure that appointments became more diverse would be to offer a greater range of choice to whoever the appointing person is, so the Lord Chancellor for the Supreme Court. That is an approach that other systems take. I do not think it is objectionable. It is not necessarily, depending on how it is done, a threat to judicial independence, and it might achieve the results that you are aiming at here.

Lord Hope of Craighead: The criticism was they were choosing people in their own image.

Dr Patrick O'Brien: Yes, exactly. That is a separate issue. In terms of principle, it is probably not ideal that there should be representation for the existing court members on the appointing body to the Supreme Court. It might be more appropriate for maybe a retired judge from the court or existing members from the other courts of the UK, but it is not best practice to have people involved in selecting their successors, no.

Professor Graham Gee: I agree with much of what Dr O'Brien has said. There are signs of progress on diversity. The top court in the UK is more diverse and has been more diverse in recent years than under the pre-2005 approach, which is what Lord Hope has just described. We would hope that would be the case as we have an increasing cultural awareness of the importance of diversity and representation in society at large.

One of the early challenges for the selection body of the Supreme Court is that it is ad hoc. It is convened only when a vacancy arises, which makes it hard to think about succession planning or to manage vacancies that might come in quick succession. My sense is it has managed a working fix to that, as it has tried to bring together different vacancies and fill them in one. There is an issue there: would it be better for the UK to have a standing selection body rather than one that is convened ad hoc?

Dr O'Brien mentions the role for shortlists for senior judicial vacancies. I would strongly support that idea. I wrote a paper with Professor Richard Ekins on this very question last February, which argued for the Lord Chancellor to have an enhanced role over senior appointments for the Court of Appeal, senior judicial roles and the UK Supreme Court. We envisaged that the selection body would continue to do that very important vetting exercise so that whoever was on the shortlist we could be confident were people who were sound candidates with the right temperament and qualifications. The Lord Chancellor could then exercise discretion and could, for example, prioritise diversity considerations. Experience in other common-law countries shows that political leadership can be an important accelerant for diversifying the bench. It can be a hammer that breaks through that temptation in elite bodies to appoint in their own image.

Among the arguments we made for having a shortlist presented to the Lord Chancellor from which he or she could select was not only for political leadership on diversity but also on judicial independence. We

argued that in our tradition it is important to have an engaged Executive who understand the importance of a healthy, well-financed system of courts, not just to the rule of law, but to good government. The greatest threat we see to judicial independence today is not political criticism or political pushback. The real risk is political indifference—that over time we have non-lawyer Lord Chancellors or jobbing politician Lord Chancellors who do not realise that the court system is a vital national asset and an important public service that needs funding. We need to think about ways to furnish the Lord Chancellor's interest in the courts, and an enhanced role for appointments could be a way of doing so.

One very brief comment on the idea that Ministers should not cheer or boo when they lose cases. That is correct. In my view, the remarkable thing about recent years is how little politicians have criticised the courts, given the stakes in the questions that have come before the Supreme Court in Miller 1 and Miller 2. It is astonishing, given the polarised and febrile political environment at that time, that there was not more intemperate comment.

Lord Falconer of Thoroton: I am amazed by that. What did you think about the comment of the Prime Minister and the Attorney-General that the conclusions reached in Miller 2 by the Supreme Court indicated that judges had become more political and that a new system of appointment would be required? You did not regard that as an intemperate response?

Professor Graham Gee: No. They are not words that I would choose. Criticism of courts should be reasoned, well-evidenced and made with care. My observation is that sometimes politicians do not make well-reasoned arguments, do not always bring evidence to bear in their comments in a way that I might like as an academic, and do not always pay sufficient care to the comments they make. But political criticism of judicial decisions is an important by-product of the public power we ask judges to exercise. It would be inconsistent with the idea of self-government if we were to say to Ministers that you cannot criticise the courts, particularly if part of the vehicle for criticising the courts is to make a case that the law needs to be changed; where the law is reflected in judicial decisions, arguments about judicial decisions necessarily must come to the fore.

As a political community, we may need to become a bit more accepting that politicians will argue about judicial decisions in ways that are not lawyer-like. We have all the safeguards in place for judicial independence to make sure that judges are not affected by that. We can take comfort from our political history, which shows there is no evidence to suggest that occasional intemperate criticism from time to time by politicians of judges has ever affected the independence of our courts. If it had, we should worry.

Contrary to what Dr O'Brien said earlier, if any judges were concerned about the criticism that followed a case like Miller 1, I would venture we may want to reflect on whether that person is well-suited for judicial office, because judicial office needs to come with the ability to withstand

criticism. Nobody likes being criticised, and nobody likes being criticised for doing their job, but that is part and parcel of being a judge in a top court.

Dr Patrick O'Brien: This is one of the issues I disagree with Graham on. I think we have to have a range of personality types within the judiciary. There have been times in the history of the common law, including prior to the 2005 Act in the 1970s and 1980s, where there were numerous miscarriages of justice because judges were not particularly sensitive to the suggestion that, for example, the establishment might be wrong about something, that it might be possible that forensic science might be wrong, and so on.

Part of protecting the judiciary involves protecting people, but not from criticism. If you are sensitive to criticism then, yes, I agree, you should not be a judge, and you should not be lots of things that engage in public life. But the specific "enemies of the people"-type criticism, or criticism along the lines of, "These judges are wrong and we need new judges" are a little bit closer to the line for me. It is not that it should not be said—I agree with Graham that we cannot expect politicians to express themselves in the same way as the law expresses itself—but we should also be conscious of the fact that not everyone is Judge Hercules or Judge Superman, and we need to be aware of that. That is not a bad thing.

Q8 **Lord Hope of Craighead:** My second question is a very simple one. Did we get the name right? I mention that because one of the points made following Miller 1 was that the name "Supreme Court" had gone to their heads and it should be changed, and they should find some less provocative name. Was the name right?

Dr Patrick O'Brien: Personally, I do not think anything turns on the name. I do not think the name "Supreme Court" has caused judges to overreach, or anything like that. For me, I think Supreme Court is fine as a name.

Professor Graham Gee: I am aware of the argument that one of my collaborators has made in that regard. I find that unpersuasive. I think there are other reasons that are driving changes in judicial culture, for good and bad.

Lord Hope of Craighead: You would leave the name as it is?

Professor Graham Gee: I think we should focus on more important matters.

Q9 **Lord Howell of Guildford:** I am amazed that neither of you have made as much as I expected about the absolutely totally changed conditions of communication and exertion of authority in which the judiciary of today has to operate. It is totally different from even 15 years ago, at the time of the reform, let alone 20 or 30 years ago. As we know, the courts are swamped with vast backlogs, and they are surrounded by not mature, balanced comment and criticism about occasional judgments but a cacophony, and a continuous stream of blogs and protests.

We are in a populist age, fired by a huge volume of criticism floating around of things people do not understand or do not like. There is a lot they do not understand and do not like in the judicial world. Does this not require completely new levels of defence and explanation so that you do not get the kind of ignorant criticism, or indeed the very high-level criticism that Lord Falconer mentioned a few minutes ago? This is a different world. I have not heard much of that from you.

The Chair: When you reply, can you be succinct?

Dr Patrick O'Brien: Of course, I will be very succinct. I think it is a different world and it is not just a different world for judges. That is the difficulty I would have in responding in the way I think you are suggesting, because this is not just something for judges—it is something for everyone in public life and, indeed, everyone in private life. Social media, blogging, the existence of the internet and instant communications are changing society and changing politics in all sorts of ways, but it is not something specific to the judiciary.

What is specific to the judiciary—and what I think it is doing very well at—is communications. We get a lot more in the public domain instantly. We get summaries of judgments into the public domain instantly, and that is a good way of responding to this. But without heroic and frankly almost dictatorial restrictions on the internet and freedom of expression, I do not think we can hope to shield judges from the general development of public communications in this way.

Lord Howell of Guildford: Do you approve of televising?

Dr Patrick O'Brien: Yes, absolutely. I think that is a good move for public understanding. It humanises the process and humanises the judges. Anything—particularly in a very large society such as this—that allows people to be closer to the people who are making decisions is a very good thing.

Professor Graham Gee: I agree with what Dr O'Brien says. I would note there are mechanisms in place. The judicial communications office in England and Wales will push back at misleading press reports. The Lord Chief Justice, supported by other senior judges, will intervene at a local level, if local press is misreporting cases. I think social media is a new and difficult problem, and I am aware that senior judges are alive to that, particularly in the context of litigants in person, which is a particular challenge in recent years.

Lord Howarth of Newport: I would like to explore a little further the question already opened up by Lord Faulks and Lord Howell, helpfully illuminated in the responses from our witnesses, about the implications of the shrunken status and perhaps shrunken value of the Lord Chancellor since the 2005 reforms. It has been noted that the office may now be filled by a career politician still climbing the greasy pole, rather than a heavyweight figure, shall we say—a statesman at the apex of their career. The office is not necessarily held by a lawyer and it is combined

with that of justice secretary. Has all that led to a politicisation of the role of the Lord Chancellor? Has it made it harder for Lord Chancellors to defend the rule of law and made it more likely that they will tolerate the aggression of the Treasury in refusing to fund the system decently?

Dr Patrick O'Brien: Some of what I can answer in response to that will be repeating myself. Yes, it is more political—and it is more temporary, in a sense. For me, the main thing that has changed is that the tenure in office has dropped as low as it has. This means that in terms of standing up to demands from the Treasury, for example, an incumbent Lord Chancellor simply does not have the stature of Lord Chancellors in the pre-2005 age. It also means that a Lord Chancellor is unlikely to take a different view of the more politically contentious aspects of the rule of law than the rest of the Government. A Lord Chancellor is unlikely to have a different view on the responses to judicial review, for example, and some recent Lord Chancellors have led policy in this area, although the extent to which they have led policy or have attempted to manage it and strike a balance are difficult to see from the outside. Sometimes they have exerted something of a moderating influence, but that is only looking from outside. It is difficult for me to say.

Yes, the short answer is it is more difficult for them to stand up to the rest of the Cabinet, to Treasury demands, to a Prime Minister, for all the reasons you suggested in your question.

Professor Graham Gee: I agree that the Constitutional Reform Act in 2005 and subsequent dynamics have politicised the office. That was the purpose, in part, of the 2005 reforms. If you are asking if the reforms have been successful—yes, because they have politicised it. Does it mean the Lord Chancellor cannot be an effective operator inside government? I would say, no, it does not mean that. It means that the Lord Chancellor will be a political guardian of judicial independence, not just in the banal sense of being a politician, but in the more interesting sense of responding to the political process.

It might be political criticism in the media or from Back-Benchers or Parliament that impels the Lord Chancellor to encourage ministerial colleagues to ditch a policy that might compromise the constitutional position of the judiciary. It might be that the Lord Chancellor does the right thing only after exhausting all other possibilities. In other words, the Lord Chancellor as a political guardian is more likely to be reactive than proactive. But in discharging their departmental responsibilities for the courts and the judiciary over complaints, setting the aims of the court service, setting pay pensions and conditions of judicial service, the officeholder can contribute to judicial independence and to the rule of law in that way.

However, the office is not designed to fulfil the cross-government rule of law function. It is not designed to provide leadership on the rule of law that involves the Lord Chancellor advising or warning ministerial colleagues not to do something that offends the rule of law outside of his or her departmental responsibilities. If we were to ask the Lord

Chancellor to have that wider cross-government rule-of-law function, we would be setting up the officeholder to fail. We should encourage the Lord Chancellor to focus on their departmental responsibilities and their statutory duty for judicial independence and to discharge them effectively.

As for the Treasury, we might think about who we put in this office. Should the Prime Minister think about how we are populating all our roles? Having the former Treasury Minister as Lord Chancellor could be quite useful. David Gauke, as a former Lord Chancellor, has spoken of his reasonably long period in the Treasury as being a very important ingredient in how he was able to help to improve relations with the judiciary, vis-à-vis the judiciary at the time when he was Lord Chancellor.

Lord Howarth of Newport: Do you think the politicisation that you recognise has occurred has net been a good thing or a bad thing?

Dr Patrick O'Brien: I think it was an inevitable thing. It is difficult to say whether it was a good thing or a bad thing. I think the Lord Chancellor, as it was in 2005, was an anachronism. It was problematic less for the fact that it crossed the different branches of government than it did, but more for the fact that the Lord Chancellor had such a large department and so many roles without proper political accountability. Part of the objective of the Act was to give the office that accountability, and to that extent it has been successful. Where we see disagreement and upset on the part of the legal profession and judges is when the Lord Chancellor is not acting as the guardian they expect. However, I do not think that is possible, for all the reasons we have suggested already in the session.

Q10 **Lord Faulks:** You have very helpfully described the changed status of the Lord Chancellor and the politicisation of the Lord Chancellor. Do you think that puts an extra burden on the law officers being, at least in theory, the independent legal advisers to the Government? At one stage they did not even attend Cabinet as a right. They would have their offices in the Royal Courts of Justice and provided independent legal advice. With the change in the Lord Chancellor, what do you see the role of the law officers being?

Professor Graham Gee: I will have a first crack at that. When Dr O'Brien and colleagues and I did our work on judicial independence in 2010 to 2015, one finding was a sense that there would be an increased expectation on the Attorney-General in particular to have that cross-government rule of law leadership function because of the shrunken office of Lord Chancellor. We interviewed people at the heart of government who suggested there would certainly be a need for that greater leadership function by the Attorney-General. We spoke to people who indicated that some Attorney-Generals were trying to exercise and fill that gulf or gap.

I have not conducted any research on this question since 2015 so I cannot tell you whether Attorney-Generals and law officers are doing that in a systematic fashion. I know this Committee made the

recommendation in 2014 that the Attorney-General should attend the Cabinet to have that monitoring oversight of rule-of-law issues across government policy. That seems to me an eminently sensible approach, and I think the current Attorney-General does attend Cabinet.

Dr Patrick O'Brien: There is not much I can add to what Graham has said there. Our findings in the project we did up to 2015 were that multiple guardians of the rule of law and judicial independence were emerging within government and politics. We anticipated that the Attorney-General would become an important one of those. However, like Graham, I have not been able to conduct the kind of detailed research that would allow me to confirm that in terms of what happens inside government. It is certainly a role the Attorney-General should be equipped to perform, but I cannot say much more than that.

Lord Faulks: Is there a problem with the Attorney-General automatically attending Cabinet where he or she may be, as it were, part of the Executive, as opposed to the old situation where they were invited to attend Cabinet when there was a particular issue upon which their independent legal advice was required?

Dr Patrick O'Brien: I am afraid it is not something I have a strong view on. The advantage of having them there all the time is that they can see issues coming up as they come up. If they are only invited there, they will only see the issues they are invited to discuss. However, again, beyond that I would want to comment.

Q11 **The Chair:** What would be the downsides if you were just looking at it academically?

Dr Patrick O'Brien: The downsides of having the Attorney-General—

The Chair: There all the time, as opposed to being called when they are needed.

Dr Patrick O'Brien: The downsides of having them there all the time may be that they become more political, more involved in policymaking and more identified with the policies that the Government are trying to articulate or trying to develop. But it is a fairly finely balanced thing, in my view.

Q12 **Lord Sherbourne of Didsbury:** Can I come back to an issue we keep buzzing around and home in on that more? We acknowledge that the rule of law, administration of justice and so on are a fundamental part of our democracy. Therefore I was a little puzzled when Professor Gee, I think it was, gave a view that all that really mattered was that the Lord Chancellor should have the same qualities as another Cabinet Minister—and you gave a whole series of criteria. We have also been discussing whether there may be a Lord Chancellor who is a weaker person, a less effective Minister, a Minister who is in mid-career and trying to climb the ministerial ladder. Given that Ministers come in all shapes and sizes—we have seen in all Governments some Ministers who are less competent than others, and some who are much weaker vis-à-vis the Prime Minister

than others—does it matter more with the Lord Chancellor if they are a more incompetent or weaker Minister than any other department?

Professor Graham Gee: It matters to this Committee, and it matters to senior judges. As a lawyer myself, and as a professor of law, I have a strong investment in the health and well-being of our legal system, and the promotion of the rule of law in its own right to secure fairness and justice, but also as a tool of good governance. However, as a citizen I am also aware of the importance of having able Ministers exercising most of the key portfolios that populate a Cabinet.

I would be wary of doing anything that would unduly limit the exercise of a Prime Minister's discretion to decide who the best person is to fill this or that Cabinet post. If I were advising the Prime Minister, I would encourage them to think seriously whether certain roles might warrant longer in post because of the complexity of the challenges that might be part of that policy brief and also the importance of fostering positive relationships with external stakeholders. That relationship with the senior judiciary is a very important one that takes work and understanding. That may be an argument for having longer time in that office. However, I would not want to say that this is a post that is more important than many other posts in the Cabinet.

Lord Sherbourne of Didsbury: Before Dr O'Brien comes in, can I clarify what I am trying to get at here? It is not about what we think should be done, but whether you have a view, or whether there is any evidence, that having a weaker or less competent Minister as Lord Chancellor has an effect that we ought to be worried about—or does it not matter?

Dr Patrick O'Brien: The question feels like bit of a hospital pass, I have to say. Like Graham, I would not want to get into saying that the law is more important than children's schools, hospitals or anything.

Lord Sherbourne of Didsbury: Why not? Is the law not more fundamental to our democracy than schools?

Dr Patrick O'Brien: Education is really important too. We can go down all these lines, but we will very quickly get into difficult political territory. Does the fact that a Lord Chancellor might not be competent cause more damage than the fact that an Education Secretary or Health Secretary might not be competent? Again, I think that is difficult to evaluate. Everyone should be competent, let us put it like that.

The one thing we can measure, because competence is difficult to measure, is tenure in office. We can see that the Lord Chancellor's tenure in office in the last decade has been significantly below both what it was and that of general Cabinet Ministers. However, I know this is part of a more general problem; even raising that point, there is a more general argument that Ministers should have longer tenure in office to allow them to conduct their roles. However, I would not want to engage in special pleading for the law, despite the fact I am a lawyer and I think it should be well-funded and the people should be competent.

Q13 **Baroness Fookes:** We have already established that the role or position of the Lord Chancellor has changed since the 2005 Act. Could we look more specifically as to whether that has affected the relationship between the Lord Chancellor and the Lord Chief Justice?

Dr Patrick O'Brien: There are now established mechanisms by which the heads of judiciary and the Lord Chancellor meet. Again, it is some time now since Graham and I conducted our research, but when we conducted it I believe there were monthly meetings and sometimes more regular meetings between officials. There is ongoing dialogue constantly there, as there should be, because a core aspect of the Lord Chancellor's responsibilities is the running of the courts.

Before coming to this meeting today, I had a look at some of the past evidence sessions with the Lord Chief Justice and the president of the Supreme Court. I do not get the sense—certainly from those public pronouncements or the speeches that judges have given—that there is a breakdown of communication between the Government through the Lord Chancellor or the heads of judiciary. In that sense, I think that the system is working relatively well, and I would adopt the response Graham gave earlier in relation to the various ways in which institutions have been set up following the 2005 Act to make it work well.

Professor Graham Gee: The Constitutional Reform Act rewrote the relationship between the Lord Chancellor and the Lord Chief Justice. The Lord Chief Justice was always the professional head of the judiciary in England and Wales, but since 2005 they have been the constitutional head as well and a lot of responsibilities previously exercised by the Lord Chancellor have been transferred to the Lord Chief. The Lord Chief now has to delegate a lot of responsibilities to other senior judges.

Dr O'Brien has been talking a lot, rightly, about the shrunken tenure of Lord Chancellors. What that means is that there are a lot more relationships between Lord Chiefs and Lord Chancellors. I think there have been 10 Lord Chancellors since 2005 and four Lord Chief Justices, which means 13 different professional relationships, which makes it hard to draw generalisations. That being said, the project that Dr O'Brien and I did identified early teething troubles, whereby Lord Chief Justices often felt that the Government were working under the pre-2005 system, even though it was now 2006, 2007, 2008, 2009 or 2010. It took a while for the tanker of state to turn direction and for that to then filter through to the mindsets of officials in the MoJ, the Treasury and the Cabinet Office. There were occasional disagreements in those early days. We saw that over the courts service budget in 2010 and over judicial pensions around the same sort of period.

Although there have been disagreements, the sense from our project was that the Lord Chancellors and Lord Chief Justices have managed to foster constructive relationships and were aided by the formal meetings that Dr O'Brien mentioned. Generally, I would suggest that Lord Chief Justices have found it easier to work with those Lord Chancellors who look most like pre-2005 Lord Chancellors, which is to say lawyers or people who

were towards the end of their political career. One point that we have not mentioned is that something like six out of the last nine Lord Chancellors have gone on to hold another Front-Bench position, which is an important difference from the previous approach.

There has been one very clear example of a spectacular breakdown in relationship between the Lord Chief Justice and the Lord Chancellor, which was with Lord Thomas and Liz Truss, following the "enemies of the people" episode that we have discussed. My view of the "enemies of the people" episode is more sympathetic than most, insofar as I do not see that there was a threat to judicial independence. I do not see that the Section 3 statutory duty was triggered. If the Section 3 duty was triggered, I do not see that it required a public press release. If it required a public press release, I do not think that it required a public release on the day of the headline itself. I think that a Lord Chancellor could reasonably have concluded that to issue a press release or to bring more attention to this issue may have been counterproductive. That is not an argument many lawyers and judges agree with, but it is my own view.

It is noteworthy that Liz Truss was reported to have briefed her ministerial colleagues on the morning of the day after the Divisional Court's decision not to comment on the decision pending the Government's appeal. That would seem to me to be an appropriate exercise of the Lord Chancellor's Section 3 duty. She was subsequently criticised for not making a public statement until 72 hours later and then not making a public statement that was sufficiently "muscular". That is an example of a clear breakdown, because the Lord Chief and other senior judges were very upset about that.

One thing that Lord Chiefs need to be very careful of, given that we are likely to be dealing with more of these more political Lord Chancellors in future, is how they articulate that frustration or how they manage that breakdown of relationship. When Lord Thomas appeared before this Committee in, I think, March 2017, he knew he was retiring in a few months. However, some of his comments about a sitting Cabinet Minister I thought came quite close to the line as to whether or not that was a prudent, at least, thing for a judge to say. He spoke about how he thought she was completely and utterly wrong and how she had failed in her constitutional duty, and he spoke about that in quite strong terms. That public comment by a senior judge about a serving Cabinet Minister is dicey political water, and there may have been more fruitful ways for the Lord Chief Justice to have relayed that comment. Therefore, I think Lord Chiefs have to be careful how they manage the relationship, as well as thinking about how Lord Chancellors need to manage the relationship with senior judges.

Q14 **The Chair:** Is it your view that the system has settled down since then? Is it working effectively and is it likely to evolve further?

Professor Graham Gee: I think the system is working passively well, recognising that no systems are perfect and there are pros and cons with

both. We have seen subsequent Lord Chancellors act in ways that are supportive of judicial independence. They would include, for example, David Gauke, who followed Liz Truss, who was quite critical of a Member of the House of Lords who had used parliamentary privilege to get around a gagging order. He made a public statement expressing his serious concerns about what he regarded as a misuse of parliamentary privilege, which undermined the constitutional position of the judges and, by extension, the rule of law. That seems to me an appropriate exercise of the Lord Chancellor's duty to defend judicial independence.

The Chair: Dr O'Brien, do you have any further comments to make on this?

Dr Patrick O'Brien: There is not much I would add to that, except to say that, from the perspective of the judiciary, specifically talking about the breakdown around 2017, the judiciary do not want a Lord Chancellor who has to be marched to the microphone and forced to defend judicial independence; they want someone who wants to do that. They want someone who will not do it through gritted teeth—they want someone who will do it expansively and because they feel that is the right thing to do. So part of the problem here has to be seen as a little bit of a culture clash. Again, without wishing to reopen old ground, this is because the expectations of the profession are often different from what the new Lord Chancellor will be expected to do or will be able to do. I think that explains partly why things played out as Graham has described.

Q15 **Lord Falconer of Thoroton:** The effect of the changes was that you removed the chief judge from the Cabinet and you replaced the chief judge with a Minister. That Minister then has to deal with the judges, and the Minister and the judges represent politics and the judges talking. I agree with Professor Gee that it has gone well, has worked and was inevitable. It led to particular problems at the time the settlement was introduced. First of all, how do you protect the independence of the judges? The way you do that is to place a special duty on the Lord Chancellor. Do you think that works?

Dr Patrick O'Brien: In short, yes, because I think, particularly for lay Lord Chancellors, the fact that legal duty is there at a very basic minimum will give their civil servants and their advisers something to point to, to say, "Listen, you need to take this seriously". However, I do not think it requires that the new Lord Chancellors be anything like the old Lord Chancellors.

Lord Falconer of Thoroton: Yes, I agree.

Dr Patrick O'Brien: It will be something much more minimal.

Lord Falconer of Thoroton: Do you also agree that, in performing that statutory duty, the Lord Chancellor, as the Secretary of State for Justice, is free of collective responsibility? If, for example, John Reid, the Home Secretary, criticises Mr Justice Griffith Williams for too low a sentence or the Prime Minister says, "The judges should now be changed because they have given a decision I don't like", the Lord Chancellor is able to

say, without breaking collective responsibility, "I disagree with that position. That is wrong, the person shouldn't have said it".

Dr Patrick O'Brien: It is not something I have formed a view on. That seems like a logical interpretation of the relationship between the convention and the statute; it seems like a sensible response.

Professor Graham Gee: I do not think there is clarity on the issue. What is plain is that collective responsibility makes it very difficult to know for sure whether any Lord Chancellor has discharged their duties effectively. Some research we have done suggests that they did so effectively behind closed doors, and we have seen some public examples.

Lord Falconer of Thoroton: The point I am focusing on is that collective responsibility requires Cabinet Ministers not to disagree in public, that they should resolve their differences privately on policy issues. In relation to this issue, the function of the Lord Chancellor, is it not a breach of collective responsibility if he or she regards the position as being, "I should speak out against that Minister"?

Professor Graham Gee: I think that is correct, and the statutory duty has to prevail over the convention. However, I would not accept as a proposition that the effective performance of that duty always requires a public comment. Sometimes a public comment can be counterproductive. We might hope that Lord Chancellors have a better understanding of the immediate political environment and hold them to account if we disagree.

Lord Falconer of Thoroton: On the rule of law, what role should the Lord Chancellor have played in relation to the proposal to break international law in relation to the Northern Irish protocol?

Professor Graham Gee: That is a tricky one.

Dr Patrick O'Brien: And I thought the other one was a hospital pass.

Professor Graham Gee: The relationship of the rule of law to international law and treaty obligations is not straightforward and is prone to being misunderstood as a result. Arguably we saw that, not only over the furore of the internal market Bill but when there was the controversy in 2015 over the revision to the Ministerial Code.

There is an argument that the rule of law applies differently to domestic law and to international law. It is a complex argument, but it runs a little bit like this. In our dualist legal system, which means we have differing ways of understanding domestic law and international law, the rule of law should apply primarily to domestic law, including domestic law that gives domestic force to international law and treaty obligations that have been incorporated into our domestic law by statute. We should treat them differently in respect of the rule of law, and Ministers may have a different duty as regards them.

The Ministerial Code provides that Ministers have an overarching duty to comply with the law. There is an argument that that should be

understood to apply only to domestic law, not international law. That is because otherwise Ministers could change the legal rights and responsibilities of people here in the UK merely by entering into international treaty obligations. That would be inconsistent with a piece of fundamental constitutional law here in the UK, which says that Ministers should not change legal rights and responsibilities unless authorised to do so by Parliament through statute.

In other words, the dualism acts as a filter as to how we should treat international law obligations. It is like a fail-safe that is supported by principled and pragmatic reasons. Principled reasons would say that, in pursuit of self-government through national parliamentary institutions that pursue the public interest, we need to be able to, at least in theory, depart from international law, even if there are very good reasons why we would generally never wish to do so. Pragmatic reasons are that it may be necessary sometimes to depart from international law in the national interest, because international obligations may imperil important national interests.

Lord Falconer of Thoroton: In answer to the question of how the rule of law protected in government—the first question the Chair asked—the first bit of the answer was that all Ministers are under an overarching duty to comply with the Ministerial Code, which includes an obligation to comply with international law. If that is the code, what role did the Lord Chancellor have in relation to ensuring that the requirement in the Ministerial Code to comply with international law was complied with?

Professor Graham Gee: The Ministerial Code was revised in 2015 to remove that explicit reference to international law, so that it now only reads that Ministers have the overarching duty to comply with the law.

Lord Falconer of Thoroton: The court said that included international law.

The Chair: Lord Faulks, you have a point on that.

Lord Faulks: I answered a question about that in Parliament. I said that the obligation included an obligation to obey international law insofar as it was ascertainable. That comment was then approved by the courts. On whether they were right and whether I was right, of course I am interested to hear your views.

Lord Falconer of Thoroton: Do you think that was right?

Professor Graham Gee: Lord Faulks is always right, in my experience.

Lord Falconer of Thoroton: I agree with that.

Professor Graham Gee: There are very good reasons of foreign policy and political morality why Ministers should adhere to international law and honour UK treaty obligations in almost all situations. Those good reasons include that we should have due regard to how other states will view the UK’s compliance or non-compliance, and also we should recognise that it is in the UK’s vital national interest for there to be a

stable, rule-based, international legal order. However, in recognising that we have a dualist legal system, there is an argument that one of the implications of there being that system is that we need to have a different understanding of how the rule of law speaks to domestic law from how it speaks to international law, and that may in turn have implications for how we regard Ministers' duties to adhere to the overarching duty to comply with the law.

Lord Falconer of Thoroton: Do you agree with that argument?

Professor Graham Gee: It is not an argument to which I have turned my mind at much great length. I think it is a coherent argument that deserves due consideration and reflects the very first point we made, which is that the rule of law is a contested notion that is capable of being interpreted in different ways.

Lord Robertson of Port Ellen: A small follow-up to that, to give you another example on which to give a view. In the last session of Parliament, the overseas operations Bill sought to give a presumption against prosecution for British military serving overseas. In the Bill that came from the House of Commons to the House of Lords, the presumption against prosecution also applied to war crimes, crimes against humanity and torture. Should there have been somebody in the legal system who cried foul at that point, since it was quite clearly something that was against even domestic law, never mind international law?

Professor Graham Gee: I am aware of that episode, but I have not looked at it. As with all questions of legislative change, it is a question of political judgment as to whether or not it is a good idea to pursue it. I do not see much to be gained by having an argument about that sort of provision, which is dressed up in the language of the rule of law. Lawyers often want to argue about the rule of law, and that can be important when we are thinking about the health of the administration of justice, and so on and so forth. However, sometimes we just need to get to the heart of the matter and say, "Is this a good sound moral proposition or not?"

As a legal matter, the fundamental constitutional law of the UK is based on parliamentary sovereignty. That means this institution can legislate in any way it chooses, including ways that are inconsistent with international law. That is the law. We should then have a debate as to whether the exercise of that legally unlimited law-making power to exempt people from prosecution for war crimes is a good or a bad thing. We should focus on the questions of political morality and not questions of law, which is what lawyers always get excited about, but can often avoid us focusing on the very important issues at hand.

Lord Falconer of Thoroton: Therefore international law should not be regarded as the same as law?

Professor Graham Gee: I am not going that far. It is a different species of law from domestic law.

Lord Howarth of Newport: Accepting the legal analysis of Professor Gee as to the distinction between domestic law and international law: is there not, however, a cultural and political problem, if a Member of the Cabinet stands up in the House of Commons and announces that the Government intend to breach international law, albeit in a "limited way"? Does that not have a very important effect on the public's perception of the Government's regard of the rule of law and the value of the rule of law—because the public do not understand the distinction that Professor Gee has just described? In that situation, what was the proper responsibility of the Lord Chancellor as defender of the rule of law?

The Chair: Dr O'Brien, you open on that.

Dr Patrick O'Brien: We are getting further and further into very deep politics. The distinction I drew at the beginning between core rule of law and penumbral broader rule of law is what I would fall back on here. The core of the rule of law is fairly clear-cut: the Government and citizens have to obey the law, the law should not change too much, it should be possible to understand it, and people should not be punished without there being pre-existing law in place. The problem when we start to go beyond that is when matters that we are talking about are politically contested. Therefore, as much as we might disagree and regard it as profoundly immoral that anyone should be exempt from prosecution for war crimes, it is not necessarily or straightforwardly part of the rule of law.

In your question, you talked about the cultural aspect of the Lord Chancellor's role. Culturally, from where the Lord Chancellor was coming, it was about protecting the judiciary and the domestic legal system. Once we get beyond that, it is certainly possible for the Lord Chancellor to take a view. Morally, as a person and a politician, this should be something they would speak up against. Whether there is a specific part of the Lord Chancellor's duty to defend the rule of law that applies there becomes more ambiguous, depending on what is involved.

There will be times when Governments may legitimately, through Parliament, wish to deviate from international law. I do not think either of those examples represent one of those times. I think they were both very badly advised. However, the reality is that it is complex.

Lord Falconer of Thoroton: Does the Attorney-General have a different role? If you spoke to the Secretary of State for Defence when he was engaging in a bombing campaign of Yugoslavia, for example, he was seeking advice from the Attorney-General as to what is in accordance with international law—and then there is the much more obvious example of the invasion of Iraq. Where do you say the rule of law fits in relation to those two examples?

Dr Patrick O'Brien: In relation to Iraq, for example, if I remember the political history of that correctly, the Attorney-General was required to

give very specific advice to cover the military so that the military was conscious and happy to go in without risk of prosecution. That is very clearly the job of a lawyer to say what the law actually is. In the examples that you are describing here, there is no doubt as to what the law actually is. What is in doubt is how we are going to respect it.

Again, I am in a slightly conflicted position here, because I very much agree with what I take to be the background assumptions that are motivating the questions. However, analytically I think we have to be a little bit careful and a little bit conscious of the fact that there is more contestation, once we go beyond the very core of what a legal system is, about what we can call, solidly, the rule of law.

Lord Falconer of Thoroton: We do not, as a matter of constitutionality, contest the proposition as a nation that we must comply with international law. We cannot use force without it being in accordance with international law; we cannot bomb Belgrade without it being in accordance with international law. That is beyond contest as a matter of our constitution, is it not?

Professor Graham Gee: I will have a brief go at that. Having a dualist legal system means that we acknowledge the possibility of a potential dissonance between domestic law and international law.

Lord Falconer of Thoroton: You are confusing two things, I think, Graham. First, does it become part of our domestic law, and what constitutionally is the obligation of the state to comply with international law?

Professor Graham Gee: I am reminded of a quote from Philip Sales, now Lord Sales, who says that the potential dissonance between domestic law and international law is the price that we pay in pursuit of self-governance within the nation state. As a constitutional matter, if the Government felt that it was in the national interest to depart from international law because some obligations of international law were imperilling a vital national interest, it would be constitutionally appropriate—assuming that, on the political judgment with which the Government arrived at it, it would be a very rare occasion and a decision taken with great gravity, as we would hope. The ultimate sanction would be the sanction that is at the heart of our customary constitution, which is that of political accountability.

I make a brief point in response to Lord Howarth, who was concerned about the damage that that sort of statement the Minister made in the context of the internal market Bill might do to public understanding of the law. I would suggest that the public damage was likely very limited indeed, because most of the public, with great respect, will have been paying little attention to the legal niceties of that debate. To give you an example by analogy, many of us—less so me—were vexed about the "enemies of the people" episode and were concerned that the Lord Chancellor's failure to exercise and make a public statement sufficiently quickly would damage public understanding or views on the judiciary.

Subsequent research has shown that it had no negative impact on public understanding or views of the judiciary at all. I tend to feel that, on public understanding of these issues, the public is much more sensible than many of us who get excited about constitutional questions are, largely because people are not often paying very close attention to them.

Lord Robertson of Port Ellen: I want to follow up Lord Falconer's statement with a specific example that comes to me now. During the Kosovo campaign, I wanted to bomb electricity sub-stations in Belgrade. The Attorney-General came to tell me that I could not do that because it would be against international law because it would be disproportionate; it would stop the functioning of the Belgrade sewage system, which would mean that sewage would backfill, diphtheria would arise as a consequence, and therefore it was not proportionate. I spent a whole night learning about the Belgrade sewage system, which turned out to be gravity-based rather than electricity-based, so we bombed some of the electricity sub-stations. The Attorney-General is telling me that I cannot do it because of international law, yet the Government come along with the overseas services Bill to produce a presumption against prosecution for war crimes. Surely there is an obligation, is there not, on the law officers to tell the Government that they should not be doing that because it legislates to break international law?

Professor Graham Gee: In our constitutional system it is permissible to legislate contrary to international law. That has been upheld by our courts. Whether that is politically wise is a different question. What are the Attorney-General's responsibilities? Neither Dr O'Brien nor I have researched on the Attorney-General, but I would suggest that the advice that you received from the Attorney-General in that example sounds very sensible, measured, and led to an important and calibrated response. It sounds like an appropriate exercise of that duty.

To take the context of the internal market Bill, if the Attorney-General arrived at the view that this was such an important national interest and that the political circumstances were so complicated and unlikely to lead to any other way of resolving this national interest, I do not see any need for the Attorney-General to resign just because the Government decide—hopefully after due consideration—that they will legislate in a way that is inconsistent with international law.

Lord Falconer of Thoroton: There are quite a lot of things that are unconstitutional that the courts will not enforce. One of them is international law that has not been brought into our domestic law. However, we have a system, do we not, whereby the Ministerial Code requires Ministers to comply with international law, and civil servants are not allowed to break international law? Does that not give rise to a constitutional convention that we will not break international law even though the courts will not enforce international law that is not incorporated into our domestic law?

Professor Graham Gee: I am not sure that I would frame it as a constitutional convention, but there is a longstanding practice the

Ministers will strive to adhere to international law and our treaty obligations under a sound set of non-legal reasons that underpin that general practice.

Dr Patrick O'Brien: There are also legal obligations in international law, obviously, and that is where the role of the Attorney-General differs from that of the Lord Chancellor for cultural reasons. However, to circle back to the Lord Chancellor here and the nature of the rule of law, if we smuggle all of law, all of legal culture and all of international politics and international relations within rule of law, we are asking for the Lord Chancellor to be a very specific kind of individual, which I do not think the Act requires. The Act, broadly speaking, as we have dealt it with earlier, does not require the person to be specifically anything. I will bracket the war crimes thing, because I do not think anyone should ever suggest anything like that. But if we are saying that it requires a specific political viewpoint on a wide range of policies, we are really saying that the office requires a specific set of political commitments. That is where this becomes problematic, because we are saying that on the one hand the Lord Chancellor's official role may be to take a particular view on a politically contested matter, but with a political party hat on they would have to take a different view, and reconciling that will be quite difficult. Why that may be a problem is, if the Lord Chancellor becomes the bad-news fairy for everything, that will completely eviscerate the role. If the role of Lord Chancellor is just, as I think it is, culturally and historically, about protecting the judiciary and the court system here, it is a role that can be carried out and can be understood. Then the role of the law officers is to provide advice on what the law is, and how to comply with it. That is a different role; the Lord Chancellor is not a law officer.

There might be all sorts of views that we could take on a number of rule-of-law issues. We might regard many current proposals as being quite bad for moral or political reasons or for what are, in the broader sense, legal reasons, but that does not mean that it is sensible for the Lord Chancellor to be the person who is in the firing line, articulating a particular viewpoint, particularly if that is a political viewpoint.

Lord Falconer of Thoroton: From time to time there will be massive issues that arise in government that affect the rule of law. Iraq was one of them. Prorogation was another. Nobody expects the Lord Chancellor to be across every single issue about the rule of law, but from my experience in government, there will be these big, whopping issues that come up from time to time, which absolutely indicate what a particular Government's commitment or otherwise is to the rule of law. Does the Lord Chancellor have a specific constitutional role in relation to those sorts of defining rule-of-law issues that come from Section 1 of the Constitutional Reform Act and from his oath?

Professor Graham Gee: I would say no, for many of the reasons that Dr O'Brien mentioned. The office is not designed to perform such a function. If we wanted it to perform such a function, we would need to think differently about who was in it, what the qualifications were and

how long a person would be in the post. But the constitutional vase has been broken, and we cannot glue the pieces back together and expect that we can recreate the sort of Lord Chancellor we had when you assumed the office, Lord Falconer. We are setting officeholders up for failure if we hold them to those sorts of expectations. We would be much better to try to cultivate a set of shared expectations around the Lord Chancellor's departmental responsibilities for the courts and judiciary and hold them very closely to account as to how they deploy those functions.

Q16 **Baroness Fookes:** I am a non-lawyer in a room full of the most distinguished lawyers, so the question I want to ask is probably naive. Is international law always crystal clear or is it open to interpretation that might lead to arguments as to whether we are following it or breaking it?

Lord Howell of Guildford: Quite right. That is the right question.

Dr Patrick O'Brien: As many of the issues that have already been raised suggest, a lot of international law is deeply contested, which is why I would be concerned about bringing the role in this direction. Centuries ago, the Lord Chancellor used to be talked about as the keeper of the king's conscience, but I do not think the office can be that anymore. Some aspects of international law are very solid, such as the laws of war and humanitarian law, but a lot of international law is much vaguer. The possibility of coming to a clear answer on it, or requiring a Lord Chancellor to give a clear answer or come to a clear position, requires too much. To come back to the core point, I think that is expanding the rule of law and the 2005 Act reference to the rule of law in Section 1 beyond what was originally intended and beyond what could be carried out by someone who is in this position.

Professor Graham Gee: I agree with what Dr O'Brien says. Much law, whether domestic or international, can be dense and confusing and subject to debate. It is also the case that there are lots of different types of international law: treaty obligations, general principles of international law and decisions of international tribunals. In recent years in this jurisdiction and in this country, the decisions of international tribunals such as the Strasbourg Court have been a particularly difficult issue for Governments of different political stripes. Baroness Fookes's question has hit on a very important issue, in saying that there are a lot of different types of international law and they present slightly different challenges for Ministers and Governments. If we were to go down that rabbit-hole—

Baroness Fookes: We would never re-emerge.

Professor Graham Gee: Possibly.

Q17 **Lord Faulks:** I want to ask you about the boundaries in the role of Lord Chancellor—this new and reduced role, politicised and reduced in the way that you have described. Professor Gee, you said you would welcome the requirement for the Lord Chancellor to produce an annual report. What I am struggling to understand from the evidence of you both is what the report would cover in terms of what are particularly Lord Chancellor-like

obligations as opposed to Secretary of State for Justice-type obligations. What would be the headings?

Professor Graham Gee: That is a good question. I cannot remember making that argument but I will take your word for it. I suppose the idea behind that sort of suggestion would be trying to underscore to the officeholder the importance of the functions that they have been asked to perform, particularly if they were a non-lawyer.

The sorts of areas where we might be interested in how Lord Chancellors have discharged their functions would be on relationships with the judiciary. I know that is the policy area that several Lord Chancellors have prioritised, often on the back of sometimes bumpy relations that their predecessor and the Government had enjoyed with the judiciary. We may be interested in how the Lord Chancellor is viewing the funding of the courts, the challenges that he or she sees confronting the courts, and the reform packages that are planned for the courts. I think we would be interested in their approach to questions of pay, pensions and conditions or judicial service, not least because, if we are concerned about the health of the judiciary, one of the areas that we should be concerned about is shortages in recent years for filling vacancies on the circuit bench and for district judges. We should be interested in their views on the quality of the court estate, which I think is problematic in some areas. Those are among the sorts of areas, whether in terms of an annual report or an evidence session before a committee such as this one, in which we might be interested in the views of the Lord Chancellor.

I shall make one additional point, if I may. I have suggested that there is value in the post-2005 Lord Chancellor, in the special oath and the statutory duty in making the officeholder realise the weight of responsibility on his or her shoulders. At the same time, I think we are in danger of clinging to what I have called the saviour theory of the Lord Chancellor, and in thinking that whether the Lord Chancellor makes a public statement or responds proactively and energetically to this or that tension is a critical barometer of the health of judicial independence in the UK. That reflects a pre-2005 mindset and does not tally with the way we have designed the post-2005 office.

Perversely, I sometimes worry about why we are spending so much time, in my case writing about the Lord Chancellor, and in the case of lawyers and judges in talking about the Lord Chancellor, when one of the goals of the 2005 Act, for better or for worse, was to shrink this office. While we ought to be holding the officeholder to account and thinking about whether the post-2005 way we have designed the office can be improved, I worry sometimes that it means we are missing the bigger picture. Is the complaint system working, and is it sufficiently transparent? We should be thinking about concerns about the infrastructure of the courts, technologically and building-wise and the like. We might be better thinking about taking a 15-year later or almost 20-year later health check on the other parts of the judicial governance arrangements that have flowed out of the post-2005 arrangements. The Lord Chancellor is a shiny object that is perhaps distracting us at times. I

say that after having written an awful lot about the Lord Chancellor in recent years.

Lord Faulks: I share your feelings, Graham.

Q18 **Lord Hennessy of Nympsfield:** Can we come back briefly to the significance of the Lord Chancellor's oath? It has been fascinating hearing Patrick this morning unfolding the argument that there is a kind of Bagehotian shift, using Walter Bagehot's distinction between the dignified bits of the constitution and the efficient—a kind of slippage of the office of the Lord Chancellor from the efficient to the dignified, to a middle-ranking position in the Cabinet.

I would argue perhaps the other way—that no other Minister, let alone a middle-ranking one, has an oath on which to rest their functions comparable to the Lord Chancellor's oath. Just listen to it, "I do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible, so help me God". That has a certain epic quality to it. No other Minister has anything like that.

For me, that still makes the Lord Chancellor the pre-eminent speaker of law unto power, not least in the Cabinet room. I would argue that, despite all the changes that you have both been describing so well and so vividly, the Lord Chancellor's oath and the office of Lord Chancellor remains one of the deep safeguards of our constitutional system and that we are in danger of writing it off too easily. It is a very special position and for the health of our wider constitution, it must remain so. What do you think?

Dr Patrick O'Brien: I suppose it is my misfortune to disagree with you, in the sense that I think if we just look at the more political science statistics for the office as well as the performance post-2012—I think the main turning point is in 2012; that is when the first non-lawyer was appointed and that is particularly when turnover started to accelerate—we can see that the office simply is not what it was. For the reason that you suggested, it is distinguished, and it is marked out from the general milieu of Cabinet Ministers. However, I do not see that functionally the office is distinct from a Minister for Justice that you would have in any other comparable European country. They also will defend the judiciary and try to defend their stakeholders; they also will take the rule of law and the funding of the courts, access for litigants and so on, very seriously.

I follow on from what Graham said just a moment ago. I absolutely agree that focusing particularly on the Lord Chancellor risks missing the way the system works now, which is with quite a wide variety of institutions—without wishing to be pejorative, quangos such as the JCIO for complaints—and we have to work out how the whole ecosystem works. This particular narrow issue of the extent to which the Lord Chancellor can be the keeper of the conscience is quite a small part of the overall picture now. If we focus specifically on very core judicial independence,

you would have to say that, possibly because of the oath and because of the position in which the Lord Chancellor is placed, the system is working well. The indicia for judicial independence, if you look at international principles like the Bangalore principles—any of the international documents, there are loads of them—in all its legal systems, the UK is doing very well. In that core respect, I think things are fine, but we have to be aware that the Lord Chancellor is no longer autonomous and there is lots more going on.]

Lord Hennessy of Nympsfield: Patrick, you are taking a narrow gauge view of the office of the Lord Chancellor and the oath. I would take a broader gauge view. Perhaps you are making, Patrick, while not meaning to, the case for a beefed-up Lord Chancellor's oath because I think we have never needed it more than we do now.

Dr Patrick O'Brien: The case for a beefed-up oath? Do you mean specifically in—

Lord Hennessy of Nympsfield: If somebody said to you, "Could you strengthen the Lord Chancellor's oath?" how would you do that? If I commissioned you to do it, what would you draft it? This Committee could redefine it, could we not?

Dr Patrick O'Brien: I think that Lord Chancellors, broadly speaking—again, I suppose I am taking this narrow view—do what you want them to do. The problem is not, I think, that Lord Chancellors have become delinquent. It is rather that the surrounding political culture has become possibly less deferential. There is less comity between the institutions, and I think that is a problem and something that we need to think about. I do not think that is particularly the responsibility of the Lord Chancellor, although it is something that a Lord Chancellor can input on. Governments are less respectful of courts; there will be more public friction. I cannot speak to what happens in private, but perhaps there is more private friction too. I do not know.

I am not sure we can put the genie back in the bottle and bring the role of the Lord Chancellor back to what it was. I think that the problem more broadly, and the rule-of-law problems that we are hitting on here, are not really problems of the court system per se, or relationships between the courts and government, so much as they are problems about how we handle accountability, and the extent to which there should be accountability for government to the legal system and the extent to which the Government are prepared to accept that.

Lord Falconer of Thoroton: I am bewildered. The whole thing was changed in 2005, and it was intended to. I cannot for the life of me see why, with the new political Secretary of State for Justice and Lord Chancellor, that person could not also have a particular responsibility for ensuring that, if the Government sought to undermine the independence of the judiciary, he or she would be obliged to take what steps as she or he thought were appropriate to try to protect the judges. Secondly, if she or he thought there was a threat to the rule of law in what the

Government were doing, which did not mean making sure that they complied with the law in every case, he or she would have a responsibility to do what he or she could. What is wrong with that?

Professor Graham Gee: I suggest that there will be some officeholders who will fulfil that sort of role by virtue of their inclination and possibly their background, but we cannot expect it of every officeholder, given the way in which that the office is designed.

Lord Falconer of Thoroton: But we were trying to make sure that they would. They may have failed—there may be failures in it—but that is not the same as saying what they should and should not be doing.

Professor Graham Gee: My suggestion would be that the Act succeeded in politicising the role in a way that allowed it to fulfil that departmental rule-of-law function, making sure that we have an independent, reasonably well-resourced judiciary and that all the accompanying responsibilities are reasonably well performed. The drafters, the Government, did not succeed in crafting a Lord Chancellor who is able to fill a wider cross-government rule of law leadership role.

Lord Falconer of Thoroton: What should we do to do that?

Professor Graham Gee: I do not think we can recreate the Lord Chancellor—

Lord Falconer of Thoroton: I am not saying that we could.

Professor Graham Gee: I think we are looking at it in the wrong way for looking at the Lord Chancellor. I take Dr O'Brien's point. We should be looking at other issues. We should think about the rule-of-law culture, which is also about the role of courts, because one of the best ways in which to have very positive relations and a flourishing rule of law is for courts to act within settled law and respect settled constitutional principle. That does not mean pulling their punches when there is a clash between an individual and a governmental body—of course not—but just adhering to settled law. That is the best way to have a strong, undergirding political commitment to an independent judiciary.

Lord Howell of Guildford: The Act was 17 years ago and no one is suggesting to put things back as they were or put things back in the bottle. That is not the way the world works. What one is saying is that there has been a huge transformation in conditions, both political and in the judicial world. A vast age of uncertainty has arisen, challenging all sorts of fundamental principles and certainties. The constitutional fluidity at the moment is a sort of protection, but our constitution is under challenge, not least from the devolved nations and from pressures for independence of one large part of the United Kingdom. Do you not think that, in that totally new situation there is a role for—call it a Lord Chancellor—a very powerful and respected individual to protect the judiciary from all these new challenges and to explain both ways, to the judges and, facing the other way, to the legislators, how we manage and

cope in this very dangerous era we are in? I am amazed that you do not see the need for something very powerful, dignified and respected in place of the old Lord Chancellorship.

Dr Patrick O'Brien: I think the yin and yang of what the 2005 Act did was one part of it made the Lord Chancellor smaller, more political and more accountable. This was a good thing, for lots of reasons, again not least because the Lord Chancellor's department had become enormous, and it was an anomaly that it operated under special rules and was not particularly accountable. The yang of that, which inevitably comes with that, is that the officeholder is more political and less able to be the kind of person that you were describing. There is a turning point a few years later, from 2012, where it becomes a lower-level ministerial appointment rather than a top-level one of someone who is late in their career.

The difficulty with putting someone new in place is that, if they do not have any political heft, no one is going to listen to them. They are just going to be someone annoying, who goes around buzzing in everyone's ear. If they do have political heft, they will be political and they will be accountable, so they will not be the little fly buzzing in everyone's ear.

It is very difficult to conceive of a new role that could be conjured up that would do what you are suggesting. I am not saying it is a bad idea, but I cannot think of a way that it could be brought into being. Again, to go back to the broader context, there is a broader context in which our constitutional culture has to some extent less comity, and is noisier and rowdier. We have talked about social media in that context, and the wider national and global affairs that connect to that. It is very difficult to envisage a role that could be created to be the keeper of the Government's conscience in that way.

What we have to do is focus on articulating what the problems are with all of these threats to the rule of law and potential threats to the judiciary, so that they do not come into being. I think that for the most part, those arguments will have to be had politically. If there are threats to the core indicators of judicial independence—which, very stripped down, are salary, tenure, politicisation of appointments, politicisation of the locations where a judge might sit and so on, as well as funding of the courts perhaps—then we have a problem that is a little bit more measurable and objective and that we can talk about. But these broader rule-of-law problems, while they may be deeply worrying, are contestable and are contested. The arguments primarily have to happen in politics, rather than in this kind of rarefied, semi half-light between politics and law.

Lord Faulks: One of the matters that we have not discussed particularly is the question of resignation. From a Lord Chancellor, perhaps of the sort that Lord Hennessy describes, the threat of resignation—if he or she gives advice to the Prime Minister and to the Cabinet and it is ignored—is a very powerful one. If we have the rather watered-down, amorphous-type role that you have now described, that completely goes, does it not?

Dr Patrick O'Brien: I think that is the role that we have. I accept the criticism that that may not be a good thing, or perhaps something has slipped through our fingers that once was good. But with any ministerial office, with a Minister quitting and getting his or her speech in Parliament the next day explaining why, with a public letter to the Prime Minister, has the potential to cause political problems. It has the potential to create a form of political accountability for whatever policy that the Lord Chancellor has decided that he or she has to resign over. It will depend on the surrounding argument, but that was true even pre-2005.

The Chair: Lord Hennessy, do you have any further comment to make?

Lord Hennessy of Nympsfield: I do not want to sound aggressive because it goes against my nature, but Patrick refers to political culture, legal culture and political scientists. This is nothing to do with any of that. It is a question of spirit. It reminds me of Ernest Bevin once describing his beloved working class. The problem, he said, is the poverty of their aspirations—and I think that is what our academic colleagues have been suffering from today.

Lord Falconer of Thoroton: Patrick, can you recall either an Attorney-General or a Lord Chancellor in recent times—and take recent times as being the last 100 years—who has ever resigned on a point of principle?

Professor Graham Gee: I could not think of a Lord Chancellor who would even have gone anywhere near threatening to resign before 2005, maybe because they did not need to—people like Lord Mackay were held in such esteem—but resignations as a tool are always context dependent. If you have a weak Prime Minister, any Minister resigning suddenly becomes a little bit of—

Lord Falconer of Thoroton: I wanted to focus on the principled Lord Chancellor who threatened to, and then did resign, or similarly the Attorney-General. My only knowledge of a Lord Chancellor resigning is Lord Kilmuir, who was sacked by Harold Macmillan, and he complained bitterly that he was being sacked. He said to Harold Macmillan that he had had less notice that he would give to his chef, to which Macmillan replied, "It is much easier to find Lord Chancellors these days than chefs". I am interested to know if there has been a Lord Chancellor in the last 100 years—or Attorney-General or indeed Solicitor-General—who has resigned on a point of principle. The only one I can think of is the Advocate-General, Lord Keen, who resigned on a point of principle in relation to the rule of law.

Lord Faulks: Presumably the point is also that the threat of resignation itself, or the possibility of resignation, is itself a significant inhibitor on a Government who are even contemplating breaking the rule of law.

Lord Hope of Craighead: Did Lord Keen threaten to resign? I do not think he did.

Lord Faulks: No.

Lord Falconer of Thoroton: I think that Edward's point is that the threat of resignation, or resignation itself, is a damaging act for the Government if from an officeholder like the Advocate-General or the Lord Chancellor. I just wonder if it ever happened—it is a factual question.

Dr Patrick O'Brien: I cannot think of any examples.

Professor Graham Gee: Nor I.

Q19 **The Chair:** On that pause, we will probably bring the session to a close. I would like to ask one last question of my own to Professor Gee. Earlier on in this session—I may not have the precise words, but the record will have them—you said, Professor Gee, that political criticism of judicial decisions, when based on reason and well-evidenced argument, was a good thing. Just so I understand the fullness of what you were saying, what do you say we can rely on with confidence to protect the independence of the judiciary when it is not reasoned and well-evidenced?

Professor Graham Gee: My advice to somebody concerned about this would be not to worry so much. We have all the safeguards for judicial independence that ought to provide more than adequate insulation for judges who are the subject of such criticism. I think we need to be much more open to the fact that, if a Prime Minister or a Home Secretary describes themselves as appalled by a Supreme Court decision, as they did in 2010 perhaps, on R v F, or maybe in 2011 or 2012, that is a muscular criticism of a judicial decision on an important issue. That particular decision pertained to the registration requirements for sex offenders, so it was a high political salience issue. It is appropriate for the Prime Minister to explain or to indicate that he or she is concerned about a legal decision. We should not worry that it is going to be any threat to the independence of the judiciary. Any judge sitting in a top court who felt intimidated by that sort of comment ought not to be in that top court. We have all the arrangements in place to make judges feel secure that they have the space to make decisions that the Government do not like, knowing full well that from time to time Ministers will criticise them for those decisions.

As an asterisk to that case: in that instance, I believe that the then Lord Chancellor, Ken Clarke, wrote to the Prime Minister and Home Secretary reminding them of their obligations to take care when commenting on judicial decisions in public—an example perhaps of a Lord Chancellor vindicating their Section 3 statutory duty post-2005. I would suggest that it is an example that was not really necessary, because the criticism was appropriate, in my view.

Lord Hope of Craighead: I was in that case, and I do not think we felt in the least intimidated.

Lord Falconer of Thoroton: You would say that, would you not?

Dr Patrick O'Brien: Most of the time criticism is not a problem—and it is not new either. We had David Blunkett, when he was Home Secretary,

and we had *Spycatcher* and we had criticism of Lord Goddard when he was Lord Chief Justice. This has very long roots, and it has not caused any great rupture. It is not a threat to judicial independence in the vast majority of situations. It may be uncomfortable, and it is noisy and rowdy, and in some circumstances it may be a failure of comity, again in the sense of respect owed by the institutions to each other, but it is not a threat to judicial independence.

The Chair: With that word, thank you very much indeed for coming and giving evidence today. You have given us quite a lot to think about and have stood up to the challenges that were thrown your way quite rapidly at various points.