HOUSE OF LORDS

Constitution Committee

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

Wednesday 23 March 2022

10.15 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 King of Bridgwater; Lord Robertson of Port Ellen; Baroness Suttie.

Evidence Session No. 3 Hybrid Proceeding Questions 29 - 49

Witnesses

I: Sir Jonathan Jones QC (Hon), Former Treasury Solicitor, and Senior Consultant on Public and Constitutional Law, Linklaters LLP; Sir Richard Heaton, former Permanent Secretary, Ministry of Justice, and Warden, Robinson College, University of Cambridge.

USE OF THE TRANSCRIPT

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

Examination of Witnesses

Jonathan Jones and Richard Heaton.

Q29 **The Chair:** Thank you very much for coming to give evidence in our inquiry into the role of the Lord Chancellor and the law officers. We have a lot of questions. Please do not let your hearts sink at that phrase. It is motivated more by our desire to air the issues. Perhaps I can open with a broad question to start the discussion, and then follow that up with some supplementaries and invite you to advise us how you see the rule of law protected within the Government. What role do the Lord Chancellor and the law officers play in that?

Sir Jonathan Jones: To start with a few basic propositions, Ministers have to comply with the law, as we all do, and that is reflected in the Constitutional Reform Act 2005, where there is a reference to the Lord Chancellor and all other Ministers having a duty in respect of the independence of the judiciary, for example, and the Ministerial Code. That is not a statutory code, but none the less it has some status, and it makes reference to the overarching duty of Ministers to comply with the law. That is the basic structure—that Governments are supposed to obey the law.

The Lord Chancellor has particular statutory duties under the Constitutional Reform Act, which you will be familiar with, including the slightly convoluted reference to the rule of law, but also the reference to the Lord Chancellor's duties in respect of the independence of the judiciary. There are specific duties on the Lord Chancellor, and of course he swears a particular oath to uphold those things. I am sure you will want to come back to that. There is a particular framework around the Lord Chancellor.

The law officers, for whom there is not an equivalent overarching statutory duty as there is for the Lord Chancellor under the 2005 Act, none the less have particular duties in respect of the rule of law. They have some specific duties, including ones under statute, which they exercise in the public interest, independently of government. There is a mixture of roles there, some of which apply to all Ministers and some of which apply specifically to the Lord Chancellor and the law officers.

Sir Richard Heaton: Thanks for inviting us to give evidence today. I would start in a similar but slightly different place. It is not just the job of Ministers to protect the rule of law; it is the job of everyone who ever delivers a legal training course, everyone who learns about freedom of information or health and safety, every legal adviser in government. If it is down to one person to heroically defend the rule of law, you are in deep trouble. It is the job of everyone to mainstream the rule of law.

I find it really helpful to break down the rule of law into its component parts, some of which need defending, some of which need promoting or explaining. Within government, the Lord Chancellor's main rule of law duty is to make sure that there is a functioning justice system. It is

nothing to do with crisis or newspaper headlines. It is about making sure that the justice system is properly accessible and funded. That is the main job of the Lord Chancellor—protecting and defending the administration of justice.

Judicial independence, as Jonathan mentioned, is squarely within the Lord Chancellor's brief. That is not just independence in a separation of powers sense. It is making sure that the judges are properly protected, looked after, and understood within government and respected in a mutual respect and comity sense. On the judicial and administration of justice side, and the provision of access to the courts, that is absolutely central to the Lord Chancellor's function. Making sure that the Government comply with the law is an Attorney-General lead.

Q30 **The Chair:** Looking at recent events, such as events around the internal market Act or the *Mail's* reference to "enemies of the people", in your view have those events demonstrated a shift in how the duty to protect the rule of law is being performed? Sir Richard, perhaps you want to open and maybe even refer to the *Mail* case.

Sir Richard Heaton: The internal markets Act was after I had left government, I think. Certainly I was not closely involved in it.

The "enemies of the people" episode was, in a sense, a rather spectacular example of the general duty. The general duty is to make sure that the judges are understood, defended, looked after and not roundly abused. It is the Lord Chancellor's function to look after them and make sure that their needs and vulnerabilities are understood within government. The Ministry of Justice's and the Lord Chancellor's jobs are to be aware that sometimes judges may come in not for criticism but for abuse, and in those situations they need to be properly defended and looked after. That is an example of a general principle.

The Chair: In dealing with that particular incident, did it show any evidence of changes or differences in that role of protecting the judiciary?

Sir Richard Heaton: Do you mean changes from a prior point in time?

The Chair: Yes.

Sir Richard Heaton: It was an egregious, spectacular and rather extraordinary headline. Whether there is an analogue in a previous time against which one can measure the response, I am not sure. I cannot think of one. I have been in the ministry and its predecessor departments on and off for years. It is always understood that the judges are, in Alexander Hamilton's phrase, the weakest branch of government and require protection where necessary by intervention or by robust defence. I think that principle has always been understood.

Sir Jonathan Jones: On that, I agree that it was an egregious episode and a very bad example of the press weighing in to abuse judges in an ill-informed, damaging way, precisely because the judges had been called upon to adjudicate on a legal issue that had massively political

ramifications. This will happen from time to time. That just happens to be a really extreme example of the judges being drawn into the legal aspects of something that was massively contentious in the country, and the press in a sense taking advantage of that to pursue a political agenda by abusing the judges. There is no doubt that that is a very bad thing. It is the job of the Lord Chancellor to step in on occasions like that.

I would have thought, though, that a large part of the Lord Chancellor's job in defending, promoting and supporting the judiciary will happen behind the scenes within government, and with the judiciary itself. I do not think we should hang too much on one particular very public incident, striking though it was.

Turning to the internal market Act, which I was very closely involved in, going back one stage, this is about the relevance of international law as part of the rule of law. There had always been a specific reference to international law in the Ministerial Code, for example, so it was clear that the duty of Ministers to comply with the law included international law. That reference was dropped when the Ministerial Code was amended in 2015. As you will probably know, there was litigation on that and complaint about it.

The Government made clear, and I think Lord Faulks made clear in this House, that the dropping of the reference to international law was a change of wording but not one of substance. That was the position that the Government took in that litigation, and the court so found. In other words, there was no difference. International law still formed part of the rule of law and was still covered by the Ministerial Code. That is the background. That had always been the position and it was said not to have changed.

But it then changed in 2020 with the internal market Bill, when the Government took the position that they were free to promote legislation and Parliament was free to enact legislation that contravened the UK's international law obligations under the withdrawal agreement. As you will probably know, I disagreed with that view and therefore resigned as Treasury Solicitor. I disagreed with the Government's explanation of why they were doing it. The public explanation, which has been repeated since, was that, Parliament being sovereign, it was constitutionally and legally proper for it to legislate in that way—in other words, for it to legislate contrary to the UK's international law obligations.

For all I know, I assume that that is still the Government's position. I disagree with it, so it follows that I think that there has been a weakening of this Government's position on the rule of law, at least as it applies to international law and treaty obligations. I think that has done damage to our international reputation, and it has done damage to the extent to which the UK can be trusted to comply with existing, or indeed future, treaty obligations. That is therefore damaging not only to the rule of law but, more generally, to our reputation and our status.

Q31 **Lord Howell of Guildford:** Good morning. My question, Sir Jonathan,

was going to be precisely on that point, even before you spoke on it so eloquently. Does the rule of law mean the rule of international law, or should international law in practice, in real life as it were, be governed by somewhat different considerations—for instance, where a treaty binding the nation clashes with domestic law and the rights of citizens within the country, or with estimates of national security, or with the claim that other parties to international law have changed their position, or with circumstances that have changed radically?

Those are points that I think are covered in the Vienna Convention on the Law of Treaties, which was not much discussed in this great debate. I have been looking at some American judgments and comment. I just had a very interesting note from Justice Stephen Breyer, whom you may know, who has just resigned from the Supreme Court. He gives considerable weight to the Vienna convention and the right of Governments to move in areas where they challenge what appears to be international law. Are those considerations of any value at all, or do you make it absolute that international law and domestic law are all the rule of law?

Sir Jonathan Jones: This is a very big question, so I would answer in this way. My position would be that international law forms part of the body of law that binds the country and the Executive. This was always the position under the Ministerial Code and is said to have been still the position. International law is part of the rule of law.

One must be realistic about how particular pieces of international law are to be interpreted and applied. They may well have to be interpreted in ways differently from, say, a domestic statute. What a particular piece of international law will mean in a particular situation may well be subject to debate and dispute. That is right and proper. There may well be issues about how the law is to be enforced internationally, which will be different from how domestic law is to be enforced.

There is much subtlety here, but this is not the position that the Government took. The Government did not say, "There are good reasons why the withdrawal agreement should be interpreted in a particular way, because circumstances have changed". They did not pray in aid the Vienna convention, as you say, for arguing that circumstances have changed. The Government's statement was simply that it was open to Parliament to override the law, full stop, and that is what the Government were going to do. So I think there was a much bigger problem there in the Government's approach than one of mere interpretation or status. That would be my answer to that.

Lord Howell of Guildford: Is this an example of where a Lord Chancellor of a certain kind might be better than his Cabinet colleagues as an exponent of why the rule of law internationally was apparently being challenged or overcome, as in the case of the two clauses that caused so much furore and which I think were withdrawn later when it was claimed that there had been discussions with Brussels—the other party, in other words—and that reason had prevailed on both sides?

Sir Jonathan Jones: All I can say to that is that I think it has to be assumed the Lord Chancellor of the day had subscribed to the Government's position, as had the law officers. Indeed, the Attorney-General repeated in the House of Commons that this was the position of the Government to which all Ministers, including the Lord Chancellor and the law officers, had subscribed. I disagreed with it, but that was the Government's position. I think it is wrong as a matter of principle and that it has done some damage.

In the event, as you say, the relevant clauses were dropped, which is a good thing in my view, and it may well be that government feels that the clauses did their job as a kind of threat, because they encouraged the EU to enter into discussions. Those discussions about the Northern Ireland protocol are still going on, as you know. You can argue about that, but, anyway, I have explained my position on the principle.

Q32 **Lord Robertson of Port Ellen:** I wanted to follow through on this question of international law. I spent a lot of time in a previous job trying to lecture Governments who wanted to join NATO about the rule of law, judicial systems, anti-corruption laws and the rest of it. Therefore, coming to this and finding that your own Government appear to be neglecting basic principles is a bit of a rude awakening.

Subsequent to the internal market Act, which is what we are focusing attention on, the overseas services Bill landed in the House of Lords completely unamended and would have sought to produce a presumption against prosecution for various crimes committed by members of our Armed Forces overseas. As it came to the House of Lords, it would have allowed the presumption against prosecution for crimes against humanity, torture and war crimes, which seems to me to be quite bizarre. Ultimately, the House of Lords overturned that and the House of Commons eventually agreed.

How on earth was that legislation framed, drawn up, drafted and then taken to the House of Commons and pushed through the House of Commons without anybody really raising the red flag? We were not just in breach of treaty obligations; we were actually going to breach international humanitarian law of the most basic type. How did the system not pick that up if we have all these oaths and principles to do with the rule of law?

Sir Jonathan Jones: I am aware of that Bill, although I am not familiar with the background to it. I did not work on it and probably, if I had, I would be in a slightly difficult position talking about it. In short, I do not know what processes were gone through that resulted in the Bill getting into the state it did.

I agree with your basic point, which is that if the UK is seeking to promote and uphold standards of the rule of law internationally, it does not help if we are undermining them domestically. That is part of my point about the internal market Bill. Of course there are safeguards within government on the drafting of legislation, among other things, and they include, as Richard has said, the role of government lawyers in advising

on the shape of the legislation, but also on its relationship with existing law, including existing international law.

I do not know what that advice was. I do not know what advice was given on this question of compatibility with treaty obligations. It would be surprising to me if that was not at least addressed. In the end, it is the judgment of Ministers as to what legislation to bring forward. I do not know, and if I did I probably could not tell you. We must assume that the law officers were familiar with that legislation and were content for it to be brought forward.

Beyond that, that is the system and it worked in the way you have described, which is that the Bill took that form and then had to be changed.

Sir Richard Heaton: To emphasise one of those points, I used to be First Parliamentary Counsel for a few years and there are very good lawyers at parliamentary counsel. There are very good lawyers instructing parliamentary counsel. You can be pretty sure that points such as the ones you have mentioned would have been picked up. Parliamentary counsel have a right of access to the Attorney-General, as all government lawyers do. That is, ultimately, where the legal advice, the legal green light, comes from.

Lord Robertson of Port Ellen: Nobody resigned in this case, so nobody felt that this was the point. I read Lord Bingham's lecture, which our clerks have provided for us, and talked about the problems of legislation—the sheer volume of legislation and, therefore, the difficulty of interpreting it—but international humanitarian law is crystal clear. It is open to no debate or doubt whatever. It is absolutely clear that laws on torture and crimes against humanity are sacrosanct. There is no statute of limitation on them. I wondered why nobody seemed to have put the flag up at any stage.

Sir Richard Heaton: Like Jonathan, I cannot comment. I do not know what flags were raised internally. I just do not know, sorry.

The Chair: To support Lord Robertson, in evidence that we are getting, and to some extent in your own evidence today, there is an ecosystem of lawyers supporting the Government. It is not just on two or three law officers. Did that ecosystem fail in that instance?

Sir Richard Heaton: As Sir Jonathan said, I simply do not know who took which point, who was worried about it, whether there was a countervailing legal argument. It sounds, from what you say, like there was not, but I do not know. I do not know who signed it off. I do not know which advice was given. It is really hard to comment.

Lord Robertson of Port Ellen: Should there have been something in the system that would have triggered the fact that international law was clearly being contradicted?

Sir Richard Heaton: That point should have been raised internally—I am not saying that it was not—and someone should have taken an authoritative view on it. Ultimately, that person is always the Attorney-General, because that is their job.

Q33 **The Chair:** Before we leave this point, Sir Jonathan has gone into some detail on the internal market Act. Going back to the *Daily Mail* point, Sir Richard, in evidence this committee heard, not particularly on this inquiry but more contemporary to the time, there seemed to be a rise in tension as to whether the Lord Chancellor was sufficiently protecting the independence of the judiciary. Did you sense that? Was that a justified view?

Sir Richard Heaton: The feeling that she did not was certainly an impediment to trust and good relations for some time after. I find it really hard from this distance to pass judgment or comment on whether she did. Reflecting on the episode, I wonder whether the ministry could have done more to be ready for such a headline, been sharper on the uptake or been quicker, but I do not want to criticise or pass judgment, or comment on the particular intervention made by a particular Lord Chancellor. Then you get into the timing of the tweet—whether he should have tweeted earlier and so on. It all becomes a bit shallow.

On the central point of whether there should have been intervention, yes, there was. I do not feel quite able to say whether it was adequate. Did the perceived failure do damage? Yes, it did. It is something that, to this day, a number of senior judges feel quite strongly was badly handled. It was a damaging episode, but I do not want to sit here and pass judgment on the Lord Chancellor of the day.

Q34 **Lord Hope of Craighead:** I would like to ask you a question about declaratory orders. As you know, if you bring proceedings against a private individual who is in breach of duty, you ask for a coercive order, an injunction. They are ordered to do what it is found they should do. In the case of a government body, the position is different. In practice, you ask for a declaratory order. According to Lord Reed in a recent judgment, the reason for that is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced.

I suppose there are two questions: should Governments comply with orders without being coerced in the way one would do with private individuals, and is Lord Reed being overoptimistic? Do the Government actually do what Lord Reed is saying they should do?

Sir Richard Heaton: I will start by saying that I have not been a government legal adviser for at least 10 years, so I am a bit out of date. Certainly in my day, a declaratory order clearly directed at government was treated as an authoritative statement with which the Government were obliged to comply. I know that the legal bloggers have taken different views on this, but I would take the fairly traditional view that a declaratory order, if designed to make it clear that the law has been broken but to avoid a coercive order for reasons of administrative

difficulty or whatever, was treated in government as something that was absolutely cut and dried. That would have been my traditional approach as a legal adviser years ago.

Whether the jurisprudence has moved on and declaratory orders are thought to be a lesser sort of beast these days, I do not know, because I have not been a practising government lawyer for 10 years. I would have always taken the Lord Reed view. That would have been my understanding back in my day.

Lord Hope of Craighead: Did you have difficulty in putting that point across? That was your view, as you have made clear. Did you struggle to get it across to the government officials and so on who were in breach of their duty?

Sir Richard Heaton: As I say, I have not been a legal adviser for a decade. Back in the day, no, it was a fairly established part of the legal furniture. Jonathan is probably in a better position to say whether the argument has moved on and whether it now has picked up a nuance that it did not have in those days.

Sir Jonathan Jones: I do not think it has changed. From a slightly more recent standpoint, I too would accept the Lord Reed view. As an article of faith, if a declaration is made against the Government or a Minister as to the position in a particular case, the Government will comply with that without being compelled to do so. That is still the orthodoxy. You or somebody may have in mind some particular cases where that did not happen. I do not have such cases at my fingertips.

There may be odd occasions where there are simply mistakes in the communication of an order, for example, or the way an order is understood. In a very large organisation such as the Home Office, there may sometimes be a slip where a declaration is not complied with. I do not have such cases at my fingertips, as I say. There may be examples of that, but the principle still holds good that, where the court has declared the law or the legal position to be something in a case, the Government comply with that.

Lord Hope of Craighead: Do you have difficulty in putting that point across? As I said to Sir Richard, I can well understand the view you would take, from your position, that you are trying to persuade Ministers to do what the court has said they should do. The question is whether the message will go through to Ministers so that they really understand that that is something they not only should do but must do.

Sir Jonathan Jones: Certainly there will sometimes be tough conversations with Ministers about a case that has gone badly and that they have lost. It is human nature that Ministers will not normally be pleased if they have lost a case and they have been told that a particular policy or decision is unlawful and they have to change it.

One sometimes has to have quite difficult conversations with them about the effect of that and the obligations under an order. I have had conversations of that sort with Ministers, but I cannot remember an occasion where, in the end, a Minister said, "I don't care about all that. I'm going to ignore it". If one got into that place, one would have to be giving some very harsh warnings as to what the court is likely to do, the likelihood that you will then face some kind of compulsory order, which will be worse, and the reputational and relationship damage that will be done. I cannot remember push ever coming to shove in that way.

Lord Hope of Craighead: To put it in another way, you would regard it as your function, having, as it were, lost in the court and received a declaratory order, to make the effect of that order clear to the Minister.

Sir Jonathan Jones: Absolutely, yes.

Sir Richard Heaton: That is how it was in Miller 1.

Sir Jonathan Jones: Both Miller 1 and Miller 2 were cases where, the law having been declared, however unwelcome that was to the Government, it was very clear what the consequences were and those consequences flowed. I have taken the view that, however controversial and contentious those cases were, and whether one agrees with the outcome in either of them, it was the rule of law working. These were arguable matters. Different courts had held differently on them in different jurisdictions and so on. In the end, the Supreme Court declared the law to be what it was and so be it. You can regard that as the system working and Ministers accepting that, however unhappy they may have been.

Q35 **Lord Faulks:** Good morning. I wanted to ask you about the role of the Lord Chancellor post 2005. You will both remember well that it seemed that the initial plan was to get rid of the role altogether. That did not prove possible. The 2005 Act changed the role of Lord Chancellor. I wonder whether you could help us with how you think it has changed. Has there been some knock-on effect on the role of the law officers, particularly in the context of their duty, as with all Ministers, but a particular duty to protect the rule of law?

Sir Richard Heaton: The role of the Lord Chancellor and the department that he or she leads has changed a lot. Some of the changes come from the 2005 Act and some from other sources. The main changes are these. First, it has become a big—forgive the phrase—delivery department, with thousands and thousands of people in executive agencies working on behalf of the department to run courts, prisons, tribunals, legal aid and probation. It went from being a small department housed in this building to a big delivery department, one of the big spenders in Whitehall. That changes the look and feel of the department, how the department does its finances and all the rest of it.

Secondly, the import of prisons in 2007 brought with it not just the delivery, which I have talked about, but the political noise of prisons. The

Home Secretary since time immemorial has faced the noise of prison riots, deaths in prison and prison escapes. All that politics came into the ministry, which was previously a quiet department and then became a noisy department.

The third big change that changed the mood of the place and its relationship with its counterparts was the spending cuts during the coalition years—the years of fiscal consolidation. That changed our relationship with the legal sector and to some degree with the judiciary, in particular on court fees, legal aid scope cuts, criminal courts charge, prison maintenance cuts and so on. Suffering from budget cuts was a really big existential thing for the department, and it is only now beginning to recover from it. The budget is now back where it was, but that was big.

Fourthly, the 2005 model was, in a sense, a stewardship model. It has been pitched into a very dynamic, unstable and fast-moving constitutional landscape. That has put pressures on a system that is essentially designed to provide stewardship.

Those are the big changes. It is a fast-moving, noisy department in a contested political landscape where Brexit and Covid have caused legislation to come through in great volumes, things have been different and fast, and people have had ambitions on changing the scope of fundamental rights, judicial review and so on. It has become a fast-moving department as well. In the years since Lord Falconer and I were there at the birth of the department, it has come quite a long way.

Sir Jonathan Jones: In truth, the role of the law officers has not changed vastly in that time. It has always included quite a strange mixture of functions, including as the chief legal adviser to government, also superintending the prosecuting authorities and some other functions in relation to prosecutions and criminal cases, including unduly lenient sentences, which is quite a big workload. Then there is a range of other slightly random functions conferred by statute, some of which are exercisable in the public interest independent of government.

I do not think that there has been a vast change to those functions or that mixture. The Attorney-General's office remains recognisably similar to what it would have been between 2000 and 2005—still a relatively small office.

Lord Faulks: It is located now within the MoJ, whereas historically, I think, it was actually in the law courts.

Sir Jonathan Jones: It was. That is before my time and the move to MoJ is after my time. All sorts of changes have happened to location and accommodation in that time. I do not regard that as massively significant. It has to be somewhere, and maybe sharing a building makes sense these days. I am talking about the period particularly since 2005. No doubt there had been changes before that, not least with the Prosecution of Offences Act and the creation of the CPS and the SFO.

Starting from the 2005 Act, I do not think—there are others there now who will have a more recent perspective than I do—there has been a huge change in the overall size and shape of the law officers' role. As I say, the 2005 Act did not make any specific reference to the role of the law officers and did not confer any particular new duties on them. In that sense, it is not a big change.

Is there a change in dynamic in government now that you have a different kind of Lord Chancellor? I do not really know. Maybe if the Lord Chancellor is not a lawyer and the Attorney-General is the only legal Minister, as it were, that makes a difference, but you would have to ask them. I do not think that of itself is a huge factor.

Lord Faulks: Picking up Sir Richard's point about the difference between a quiet and noisy department, do you think that the rule of law was better protected or able to be better protected when it was a quieter department without being diluted by all these other responsibilities?

Sir Richard Heaton: I have been debating this. I remember asking a similar question when I was Perm Sec at justice. Should prisons go? Should it become a law department exclusively? My answer was no, because I feared the disruption of machinery of government change and department standstill for six months where nothing happens. You do not want to take part in that sort of exercise unless you really know that there is an upside.

I am pretty equivocal these days. There is an argument that prisons dwarfs politics in a slightly unsatisfactory way. On the other hand, I can find quite a compelling argument for a big, effective, joined-up delivery department that understands justice at its core and the links between parts of the justice system. If, for example, a big department works in partnership with the judiciary to deliver a justice system, are you going to get a better, more effective justice system than if it is a small, quiet department with no resources, tucked away somewhere? It is an open question.

Lord Faulks: There are pros and cons.

Sir Richard Heaton: There are.

Lord Faulks: The role of the Lord Chief Justice has altered somewhat. How do you think the relationship between the Lord Chancellor and the Lord Chief Justice is functioning? Does it depend on the individuals?

Sir Richard Heaton: It is an incredibly important relationship. Although the department is dominated in political terms by prisons, the big, really important relationship in the department is between the Lord Chancellor and the Lord Chief Justice. They meet regularly. As the Perm Sec, I would meet the Lord Chief Justice regularly. The two organisations are jointly responsible for superintending the courts system. It is an extraordinary bit of governance and architecture. The courts service has an independent board but reports both to a judge and to a senior politician.

The two principals work together to deliver justice, which is a cumbersome bit of architecture. The relationship requires a lot of care and attention, and there are always issues to be discussed at a principal level. The two principals will tip each other off when something comes down the track that looks like it should engage the other. It could be a newspaper headline; it could be a Member of Parliament misspeaking and criticising the judiciary in a way that was unconstitutional.

All sorts of conversations need to take place between the two principals. Those conversations would not have been needed in the old days because the Lord Chancellor headed the judiciary and these days she or he does not. The head of the judiciary requires political support in order to do some of their functions.

Is it working well? It is assiduously looked after and invested in. I do not know what the current relationship is, but in my day I can confidently say that the relationship was pretty good. As I say, it was invested in heavily.

Sir Jonathan Jones: Richard has been much closer to the detail of it and the governance structures. There are two points. First, it is a vitally important relationship. More generally, the relationship between the different organs of the state, between Executive, Parliament and judiciary, needs to be nurtured and loved, whatever your structures. They have to find a way of working together. You will always have to have some politician, some Minister, with responsibility for aspects of the justice system, including its funding. That person has to have a functioning relationship with the judiciary. This is at the core of the conversation we are having.

Although we are talking a lot about structures and organisational design, in the end so much of this comes down to the individuals, how they approach their role and, indeed, the culture within government as a whole. What view does government have of the rule of law, as we have talked about, and the independence of the judiciary? Those things are at least as important as the detail of the governance structure or the allocation of responsibilities.

Q36 **Lord Falconer of Thoroton:** Could I deal first with the internal market Bill with Sir Jonathan? You have been pretty outspoken publicly about the role of the Attorney-General. Could you describe to the committee what you think the Attorney-General should have done in relation to the internal market Bill? What worries me about the evidence you have given is that you are absolutely clear that international law was being broken in the promotion of these relevant clauses. The Civil Service went along with the breaking of the law. Ministers went along with breaking of international law. You have also had the debate about whether international law is law. How was it not stopped?

Sir Jonathan Jones: There is a limit to how far I can take this conversation in a way, because I did as much as I could to stop it and I failed.

Lord Falconer of Thoroton: Is that because the Attorney-General failed?

Sir Jonathan Jones: The Attorney-General took the position, as did the Government, that what was happening was okay—constitutionally and legally proper—despite the fact that the Government themselves accepted, famously, that there was a limited and specific breach of the treaty. On the one hand, the Government were accepting that what they were doing was incompatible with the treaty. On the other hand, the Government were saying, and the Attorney-General herself was saying, that this was okay. There you have it. As far as the Government were concerned, that was their position.

The involvement of the Attorney, which sometimes happens only behind the scenes, in this case is perfectly open. She stood up in Parliament on a couple of occasions, I think, and defended and explained the position that the Government had taken. I disagree with it, but that was the Government's position.

Lord Falconer of Thoroton: As you point out, the disagreement was not whether it was in breach of international law. The disagreement was whether it was appropriate for the Government to do it. How was it consistent, if it was in breach of international law, as Ministers accepted—and Brandon Lewis, the Northern Ireland Secretary, made that clear—for civil servants and Ministers to act in breach of international law?

Sir Jonathan Jones: The difficulty I have is that I do not think that it was.

Lord Falconer of Thoroton: You do not think it was what?

Sir Jonathan Jones: Consistent.

Lord Falconer of Thoroton: The Ministerial Code and the Civil Service Code say that Ministers and civil servants cannot break the law. I am interested in how the rule of law was protected.

Sir Jonathan Jones: To avoid repeating myself, the other dimension to this is that the Government had legislated domestically to give effect to the withdrawal agreement, so you were talking about both international and domestic law. The Government then come along, deciding that they want to or might want to override some aspects of the protocol, and introduce domestic legislation to override those particular provisions.

As a matter of domestic law, it is to be expected that if those provisions had been passed in an Act of Parliament, in the internal market Act, domestic courts would have given effect to them. Assume, for the sake of argument, that they worked. As a matter of domestic law, the domestic courts would, to that extent, have given effect to them. That would have been the law domestically. That was part of the Government's story—that it was open to Parliament to legislate in that way, given the sovereignty of Parliament, and that domestic courts could therefore be expected to give effect to that law.

On the international plane, the Government were accepting that what they were doing was inconsistent with the treaty. That is the difficulty that I had, but it is not a difficulty that the Government shared. The Attorney-General is the Attorney-General. That is her view. As far as the Government are concerned, they must be taken to have accepted that view, with, I suppose, the exception of Lord Keen, who was the only Minister who resigned. There it is. That is the Government's position. I have explained why I did not agree with it.

Lord Falconer of Thoroton: Do you think it would have made a difference if the Attorney-General was not a politician, if the Attorney-General, as is the position in some states, was an independent person with security of tenure? I am not saying I support that. In fact, I do not, but would it have made a difference?

Sir Jonathan Jones: I am not really sure it necessarily would. Whoever the Attorney-General was, you have a system where somebody is giving advice that the Government are entitled to treat as authoritative, whether that is an official or a politician. Somewhere in the system, we are assuming that you will have a process where there is a senior adviser who gives the advice about which government is entitled to think, "That is the advice. That is the best advice we have".

That could have been an official. It could have been a politician. In our system, it is the Attorney, who is a politician. Either way, in the end you are dependent on the quality of the advice given. It might or might not be right, but the Government in this system are entitled to accept it and that is what they did. It so happened that I disagreed. My only option at that point was to resign, but I cannot see why that would have been any different if the Attorney-General had been an official rather than a politician. You would still have ended up in the same position if they had given the same advice.

Lord Falconer of Thoroton: In relation to the internal market Bill, would you have expected the Lord Chancellor to have taken a particular role, having regard to his duty to the rule of law? I am not asking about what the Lord Chancellor did.

Sir Jonathan Jones: The short answer is yes; I would definitely have expected the Lord Chancellor to be aware of and have a view on an issue of this sort. As I say, it was not some kind of secret. The Government were accepting in the House of Commons that they were breaking the law. They published a document that set out the reasons why and this was being hotly debated in both Houses, so obviously the Lord Chancellor knew what was going on. To answer your question in that neutral way, I would expect him—it was him at the time—to have a view about it.

Lord Falconer of Thoroton: Had the Lord Chancellor and the Attorney-General said, "No, we won't do this because it's against the rule of law", would it have happened?

Sir Jonathan Jones: I am assuming not.

Lord Falconer of Thoroton: Sir Richard, the current holder of the office is the Lord Chancellor and the Secretary of State for Justice. What difference does being Lord Chancellor, as opposed to just being a Secretary of State, make, if any?

Sir Richard Heaton: As you will remember, when the office was retained, our predecessors trawled the statute book and found lots of functions that seemed to have either a public interest character, rather than a political character, or a rule of law character, such as looking after judges and legal aid. We thought that those things were of a special quality and, for convenience and historical reasons, we badged them as Lord Chancellor functions. They are entrenched, to some degree, in statute. Those are really the functions where the Lord Chancellor has a Lord Chancellor hat on. The administration of the Prison Service, for example, is clearly not one of those and is therefore a Secretary of State function.

In practice, it is only one person and, generally speaking, the office gets used to either calling them Secretary of State of Lord Chancellor depending on preference. Where the lines precisely fall is blurred. On analysis, that is the distinction.

Lord Falconer of Thoroton: As you rightly say, the Lord Chancellor functions that were retained, including the one in Section 1 of the 2005 Act, which says that it does not change the Lord Chancellor's function towards the rule of law—

Sir Richard Heaton: I do not find that a particularly helpful or illuminating sentence, I have to say.

Lord Falconer of Thoroton: It is not well drafted, but the intention was that, if and in so far as the Lord Chancellor has functions to protect the rule of law, those are retained, because he or she, the person who is the Secretary of State for Justice and Lord Chancellor, is still to be the Lord Chancellor in that respect.

Sir Richard Heaton: Yes, correct.

Lord Falconer of Thoroton: As you say, that is a public interest function, rather than a party political function.

Sir Richard Heaton: It has elements of public interest, yes.

Lord Falconer of Thoroton: In relation to the "enemies of the people" incident, the Lord Chancellor at the time had been in office for quite a short period.

Sir Richard Heaton: Yes.

Lord Falconer of Thoroton: Tell us who your Lord Chancellors were. When you became Permanent Secretary, who was the Lord Chancellor?

Sir Richard Heaton: They were Michael Gove, Liz Truss, David Lidington, David Gauke and Robert Buckland.

Lord Falconer of Thoroton: You had a wide range there.

Sir Richard Heaton: Is that right?

Sir Jonathan Jones: I think that is correct—in that order, too.

Lord Falconer of Thoroton: Tell us what difference it made between the lawyers and the non-lawyers.

Sir Richard Heaton: From quite a small sample, it is quite difficult to generalise. I do not want this to turn into a personal gossipy chat about five very distinguished politicians. For example, David Lidington was not a lawyer, but he had a lot of the hinterland similar to senior lawyers and his thesis had been on the state of the medieval exchequer court, I think. He exercised some of the lawyer-like functions, despite not being a lawyer. David Gauke was a lawyer, although not a public lawyer. Robert Buckland was a consummate and distinguished lawyer.

If I was to provide you with some substance to the question, I suppose Robert Buckland, being a distinguished and practised, experienced lawyer, was more likely to take law points as they turned up in Cabinet—more able to take legal points on the hoof or without a brief, for example. Yes, to that extent it makes a difference, but I do not want to say that non lawyers are incapable of doing the job, because I do not think that.

Lord Falconer of Thoroton: Does it make a difference that they stayed in office for quite a short time? I do not know how many years you were there.

Sir Richard Heaton: It was five.

Lord Falconer of Thoroton: There were five of them, so one a year.

Sir Richard Heaton: Longevity helps, but then it helps at DWP. I was at DWP when there was a succession of six in a similar timescale, so longevity certainly helps, yes.

Lord Falconer of Thoroton: Can you think of a way that would make them more long serving?

Sir Richard Heaton: No, not if you preserve the principle that PM's patronage should be unfettered in ministerial appointments, which is a pretty cardinal rule that No. 10 will fight hard to defend. You could entrench the Lord Chancellor's role. You could give them a fixed tenure. You could have parliamentary hearings to certify their appointment. You could do all sorts of things, but I would guess that No. 10 would say, "Thanks but no thanks. If it's a political appointment, if it's a ministerial appointment, it should be unfettered in the traditional way". That is what you are up against.

Lord Falconer of Thoroton: At the point of appointment, new

Government or a reshuffle pending, does the Lord Chancellor and the Secretary of State of the justice department give advice to Downing Street about the wording of the Constitutional Reform Act, which provides that you have to satisfy a variety of statutory tests in order to become the Secretary of State and Lord Chancellor?

Sir Richard Heaton: It is the sort of thing I would have chatted to the Cabinet Secretary about, yes.

Lord Falconer of Thoroton: There was no formal written advice.

Sir Richard Heaton: Not in my time, no.

Lord Falconer of Thoroton: Would advice have been sought habitually from the Cabinet Office to the justice department as to whether the particular appointee will satisfy the test?

Sir Richard Heaton: There is no settled practice. Reshuffles happen very quickly. The degree to which you get notice or are consulted is pretty hit and miss, to be honest. One might have been consulted, but one might not have been. There was certainly no established practice.

Lord Falconer of Thoroton: Do you have any view about whether the Prime Minister would have been aware that the Lord Chancellor was the only job that had a statutory requirement before you could appoint?

Sir Richard Heaton: I am not close enough to the prime ministerial appointments to know. Yes, it is a statutory provision. You would expect those advising the Prime Minister and No. 10 to be aware of it, certainly.

Lord Falconer of Thoroton: On the "enemies of the people", what would you have liked to see happen? I am not saying criticise the Lord Chancellor, but it was a very serious attack on the judiciary. It was not just the *Daily Mail*. A Minister on "Question Time" also made an attack. What would be the normal response?

Sir Richard Heaton: The attack happened. The *Daily Mail* is not a government publication, so the Government were not responsible for the headline. The normal response would have been the judges being immediately comfortable that there was no implicit endorsement, that the Government were really strong that judges should be allowed to get on with their constitutional duty without being abused and that it is not just unfair but egregiously unconstitutional to attack the judges for doing their job. They need to hear that very quickly and clearly.

It has been said by some that it was not quick or clear enough in that case, but certainly that is what I would like to see. The generality is that that is exactly what happened. These things on a smaller scale happen quite a lot. If the Lord Chief Justice has got wind that something is about to happen, or if we have notice that something is about to happen, we get our line straight and make sure that there is a quick, swift government response that reassures the judges. When that does not happen, for whatever reason, it is unfortunate and damage is caused.

Lord Falconer of Thoroton: To what extent would the government machine, or the Lord Chancellor and the Secretary of State, have clicked into action on the "enemies of the people"?

Sir Richard Heaton: To be honest, I think we were better at clicking into action after than before. As I said earlier, looking back on it, I slightly feel that we could have been sharper, but for whatever reason we were not. I would like to think that now one of those headlines would be picked up almost before it is tweeted and the response is really quick and peremptory.

Lord Falconer of Thoroton: To what extent was the delay a political delay, by which I mean government was trying to agree how to deal with it?

Sir Richard Heaton: I either do not recall or do not know—one of the two.

Lord Faulks: The headline was the headline, but actually, in a sense, it was just a headline. You may remember that what was particularly unattractive were the detailed profiles of the judges, attributing them, effectively, to having a biased view because of their spurious Euro connections. Was that not, in a sense, more concerning than a headline, because a headline is born of people in newspapers trying to sell copy?

Sir Richard Heaton: That is a fair comment. Yes, at the time, certainly. The one that has really stayed with us is the headline, but you are right: at the time we were worried about both.

Lord Faulks: It is supposed to stay with you, because that is what newspapers do.

Sir Richard Heaton: Yes, indeed. You are right: the "we know where you live" element was particularly unpleasant.

Q37 **Lord Howarth of Newport:** Sir Richard touched on the question of resources for the larger department. Had the office of Lord Chancellor still been of the same stature as in the past, would it have been less likely that the Ministry of Justice's budget would have been such a conspicuous victim of Treasury austerity post 2010?

Sir Richard Heaton: That is a good question. I do not know. To cast your mind back to those days, I turned up just after the coalition period, and it was vulnerable because we were an unprotected department. Once you were determined to close the deficit and you protected education, health and all the rest of it, the unprotected departments took a hammering.

We were also vulnerable because we had a large budget, having become a big executive agency department. We were hoist by the fact that we had a large admin spend in an unprotected sense. Those two factors combined to make us very vulnerable.

Then there were some bets that did not pay off and some projections that went the wrong way—on the prison population, legal aid spend and so on. I am now reliving the reasons why this was such a nightmare Budget, which was not your question. I do not know, because I do not know what the counterfactual is. A small department would not have been subjected to big spending cuts; that is correct, because the Treasury would not have gone after it. It is a combination of being unprotected and having a large admin spend that made us very vulnerable.

Lord Howarth of Newport: Is it consistent with the fulfilment of their oath of office that the Lord Chancellor, or successive Lord Chancellors, have tolerated the reduction in their budget? It could be seen as tantamount to an abandonment of their duty to defend the rule of law and access to justice.

Sir Richard Heaton: Speaking for the ones that I worked for, every one of them sequentially went into bat and got budget uplifts. None of them actually accepted the status quo. They all realised that their duty as rule of law custodian was to recover some of the ground lost in the spending cuts. In a sense, they did not go along with it.

Some of them were more successful than others; some made the argument at a point when the Treasury purse strings were a bit looser and had more success. Our job, as the ministry, was to provide them with the evidence and the argument they needed to make the argument with the Treasury. On several occasions, we were successful, which is why now the department's admin spend is back up towards—I do not know what my numbers are—something like £9 billion.

Lord Howarth of Newport: Do you think the Treasury values the rule of law?

Sir Richard Heaton: I cannot speak for the Treasury. Yes, I think so. This is where, right at the beginning, I said that it is not just about defending and protecting. It is about advancing the case for and making it clear in lots of different contexts, including the economic one, that the rule of law helps the prosperity of the nation, helps our international performance and causes inward investment, because you can invest with confidence in a system of uncorrupted judiciary.

Those sorts of arguments certainly work well with the Treasury. It would probably prefer those arguments to abstract arguments about the rule of law, if I am honest. We would deploy whichever argument was likely to be successful with whichever interlocutor.

Q38 **Lord Hope of Craighead:** Should the Lord Chancellors remain in position for longer? Sir Richard, you gave a list of I think five during your time. How many years did that cover?

Sir Richard Heaton: It was five.

Lord Hope of Craighead: So it was five Lord Chancellors in five years. You compare that with Lord Irvine, Lord Mackay and Lord Hailsham. I

think Lord Mackay was in post for 10 years. Does length of tenure give more authority to the position? If so, should the Lord Chancellors remain in position for longer? How can that be achieved?

Sir Richard Heaton: Yes, length of tenure helps. I certainly think that. I think that in all government departments. As I said earlier, I felt that very strongly at DWP, when we had seven Secretaries of State in a rapid turnover, so it certainly helps. That is not to say that an effective Lord Chancellor cannot hit the ground running and be immediately effective, because they can, but with longevity you understand the budget cycle better. You understand spending rounds better. You understand and have perfected the rule of law arguments and how to make them to the Treasury, for example. Longevity would be a good thing.

How to protect or extend the lifetime of your average Lord Chancellor, as we said earlier, is very difficult. If they remain a political appointment subject to prime ministerial patronage, it is very difficult to fetter the Prime Minister's discretion by giving them fixed terms or parliamentary approval hearings. I do not have a ready answer for how to extend the life of Lord Chancellors while they remain ministerial appointments.

Lord Hope of Craighead: Is there any sort of consultation process? In view of the importance of the office, should more be done, possibly through the Ministerial Code or some other document, to say, "Well, in the case of the Lord Chancellor this particular office requires longer in office, and therefore you should be very careful about changing the position too soon"?

Sir Richard Heaton: That would be admirable. If you could persuade No. 10 of that, it might well be beneficial. Anything that entrenches the role, and gives it a bit of ballast and protection from regular reshuffle movement, would be helpful. As I say, you are going to find No. 10 not wanting to do that, because the unfettered right of the Prime Minister to pick their own Cabinet is pretty central in No. 10, so that is what you are up against.

Lord Hope of Craighead: I suppose a riposte would be to ask, "Is the Lord Chancellor any different from the Foreign Secretary?" and so on. From that point of view it is just an officeholder for a particular department, but is there something about the position of the Lord Chancellor as upholder of the rule of law that would give that particular appointment a special status and special consideration?

Sir Richard Heaton: This committee could make that argument. It is a decent argument and it has some force and merit to it. Whether it would carry politically, in a sense, may not be for your committee, but I agree you can make a special case. You can say this is a unique appointment with particular responsibilities set out in statute, fundamental to the rule of law. It is one that must be made more carefully than any other political appointment. Whether you succeed, I do not know, but it is an argument perhaps worth making.

Sir Jonathan Jones: I agree with everything Richard said. It just occurs to me that it might have the effect of making the job less attractive to certain types of holder. If it is a job that you have to do for a fixed period, unlike every other political appointment, you are skewing it. There are arguments for skewing it, but there are also arguments against doing so, because you will then take it out of the run of jobs that good people might want to do.

Sir Richard Heaton: It depends whether you want to attract a politician or someone who is actually in character not a politician.

Lord Hope of Craighead: Yes, and where the Lord Chancellor should sit, because the ones I mentioned are all in the House of Lords, of course. If it is the House of Commons, it is a politician with a career to think of, whereas in the House of Lords they have nowhere else to go, I imagine. The part of Parliament in which the Lord Chancellor now sits has a bearing on the turnover, does it not?

Sir Richard Heaton: Yes, that is probably right. Whether this is connected to the prisons argument or the nature of the department argument, or whether it is more palatable for a pure legal/constitutional Lord Chancellor to reside in the Lords rather than a Minister who is also responsible for prisons and those big, noisy, popular subjects, where naturally you would expect them to be in the other House, is a moot question.

Sir Jonathan Jones: There are arguments for and against all these things. In the end, my instinct is like Richard's. Politically, Prime Ministers will not want to box themselves into particular rules about particular ministerial appointments. However, over and above the particular provisions in the 2005 Act, which are unusual in that you have any kind of specific provision on a ministerial appointment, for what they are worth, I cannot see any Prime Minister or any Government being in a hurry to go further.

Q39 **Lord Howell of Guildford:** My question will be more about the future role of the Lord Chancellor and other law officers rather than the past role and events we have been discussing. I shall, I hope, be slightly less extensive than past questions. Do you see any priorities in the form of the role of the Lord Chancellor, and is it the appropriate time to do it? Are there some additional functions that the Lord Chancellor should take on?

I am going to put in three thoughts as to why there are additional functions. One, of course, is the vast growth in international law. I have some figures from the Treasury indicating that, in the 10 years since 2012, the number of international organisations with their own implications for our law, not necessarily always separate bodies of law, have doubled, and they probably more than doubled in the decade before that. We are dealing with a completely new world of international organisations impinging on our national affairs and the reconciliation between the two, with all the problems Sir Jonathan has mentioned.

Secondly, the judiciary appears to have become rather more public and

prominent. We are now having celebrity judges. I was always brought up to believe that the law should be anonymous, which is why judges wear wigs, and there is a real danger if judges begin to emerge as personalities on the public scene. Maybe it is impossible not to, given the digital age we are in and the vast expansion of information and connectivity. It implies a whole new task falls to somebody for keeping this entirely publicised and turbulent scene under control.

Thirdly, to the point that Sir Richard made, we are in a fast-moving constitutional landscape with vast constitutional issues. In our committee we take the view that they can be coped with, but for some people they raise suggestions of major constitutional reform. Indeed, the present Government had a manifesto commitment that there should be a constitutional reform committee. They have retreated from that now, but all these things seem to tell me as a layman that there is a huge new range of tasks for senior law officers and the Lord Chancellor in particular to tackle. Is that a fair assessment, and how would you react?

Sir Richard Heaton: That is a great list. Let me comment on a couple of those and add a couple. On celebrity judges, in my experience most judges do not wish to be celebrities and cannot think of anything worse. They assiduously court a low profile rather than a high profile. In a sense, in order to protect them and prevent them becoming celebrities, that is why they need the Lord Chancellor to do the looking after and protection. "We don't want to put our heads above the parapet. We don't want to be public figures. We don't want to occupy the political space, but that does mean you've got to bat for us. You've got to protect our budgets. You've got to make sure that we're looked after and secure", and all the rest of it. That is actually an argument for the Lord Chancellor becoming vigorous and active on the protection of the judiciary.

We talked about prisons and whether they might remain, and there are arguments both ways. There is a large body of government policy that has belonged to the Lord Chancellor in the past and now does not. That is the constitution, which we have not really touched on. The responsibility for the constitution is currently with the Cabinet Office, and it has been there since the coalition period. The DPM took it into the Cabinet Office. There is an argument that that should return to the Lord Chancellor, and if you were shuffling things around and taking prisons out of the Ministry of Justice you could put constitution back in. It would not create a big spending department, but that is a loose end or a loose part.

There is a very small one—but you will forgive me for mentioning it, wearing a previous hat of mine—which is responsibility for the statute book. It used to be a Lord Chancellor function and is not any more. It is currently with the Leader of the House, but the Minister responsible for the policy as to what goes into legislation is, as you know from this House, quite a big thing in government. That is possibly looking for a home.

The relationship with the sovereign goes with the constitution brief, but that has previously been with the Lord Chancellor and is currently in the Cabinet Office. What else was I going to comment on?

Lord Falconer of Thoroton: The Lord Chancellor still chairs the Regency Council, does he or she not?

Sir Richard Heaton: I believe that is right, and the Permanent Secretary remains the Clerk of the Crown in Chancery, crucially. Your observation about international law was an interesting one, which I have not really thought about. As a steward of the various international organisations and international obligations that we currently have, Jonathan might want to comment on that.

Lord Howell of Guildford: How do you feel about your task, Sir Jonathan?

Sir Jonathan Jones: Many of your examples are or could be extensions of the existing role. Celebrity judges, in a sense, is part of the wider issue we have been talking about: what is the relationship between the Lord Chancellor, the Executive and the judges? What does it say about judicial conduct and judicial profile? If there is an issue there it will fall fairly within the responsibilities of the Lord Chancellor.

The international dimension is an interesting one. It has a new salience, post Brexit, as we begin to make new international treaties and international relationships. There is also a big issue, which Lord Faulks will know the MoJ is on to, of how to promote the UK legal system internationally. There is an economic strand to that as well as a rule of law strand. You are probably right; there is probably more to be done in that space, and it may very well be that the MoJ is the right department to lead it.

Aside from that, there are always arguments for reallocating functions around different departments. Richard has mentioned responsibility for the constitution. Responsibility for freedom of information has moved around from time to time. Again, there will be arguments for and against making that kind of change. It probably matters less precisely where these functions sit, as opposed to the quality of the people doing them. There will be some things, which you have mentioned, that fairly sit within a constitutional rule of law department such as MoJ. For others, it perhaps matters less where they are done.

Lord Howell of Guildford: Many of the points we are discussing this morning are problems faced by many Governments across the world. They are not unique to us. Do you think we and the legal profession have a lot more to learn from changing foreign practices? I mentioned Judge Breyer in America saying that the American legal community has always taken great pride in learning from other countries. Are we learners as well as promoters?

Sir Jonathan Jones: I hope we are. I think we are. This is not just down to the Government. This is down to the judiciary and the professions, and there are all sorts of bodies that promote contact and engagement between the UK professions and their international counterparts, for example. A lot of that happens. I am sure the MoJ would regard it as part of its function to promote that kind of international engagement, to promote the UK legal system and the UK profession overseas, but also to learn from overseas practice. A lot of that probably goes on inside and outside government, and so it should.

Sir Richard Heaton: It is mostly with the Commonwealth partners. In terms of our constitutional and legal arrangements, in my experience we tend to look to the Commonwealth group of nations. Certainly we at the MoJ used to go to the Commonwealth law ministers' meeting, and it was a very useful format for learning and disseminating with countries ranging from India to Canada.

Lord Howell of Guildford: Do any of them have Lord Chancellors?

Sir Richard Heaton: There are none with that title. I am certain of that.

Q40 **Lord Hope of Craighead:** The question I have is whether the 2005 Act reforms have been successful. What one takes from the reforms is the move from the very small department, which Sir Richard described, residing in this building, with the Lord Chancellor and his relatively small staff looking after judicial governance, leadership, administration and funding in relation to the judiciary. That has all changed and moved to the much larger department. Has that move been successful from the point of view of the efficiency of the system and the preservation of its character and its standards?

Sir Richard Heaton: It is a mixed picture, as always. On the upside, the Ministry of Justice is now a more skilled department with access to a greater range of skills than the old Lord Chancellor's department would have been, by virtue of our size and expertise. We have digital teams that you simply would not find in a small department.

On the 2005 reforms, they successfully took the senior judge out of Cabinet. That has to be regarded as quite an important step, but I do not hear anyone suggesting it should be reversed. It was becoming increasingly difficult to defend the position where the head of the judiciary was also a Cabinet Minister. That was successfully done.

It created this really quite difficult bureaucracy I have described, where the Lord Chancellor and the Lord Chief Justice have to run things in tandem under what we call the concordat, part of which is in statute, part of which is not. That is quite a clumsy model, but it is, broadly speaking, a successful one. It requires an incredibly skilful chief executive who has about five different bosses. She has a Permanent Secretary, a Lord Chief Justice, a Lord Chancellor, a chair of the board and so on. It is a very difficult bit of governance, but it works. That is a positive.

The 2005 Act reforms took the Lord Chancellor out of this House's Speakership, and collectively you are in a better position than I to judge whether that is a success. It would be quite hard to imagine a busy politician sitting on the Woolsack for hours and hours each day, so that has to be regarded as a reform that has created capacity in government and was successful.

The 2005 reforms created a leadership role out of the Lord Chief Justice, and successive Lord Chief Justices have successfully delivered that role. I mark that down as a success. Those broad things that the 2005 Act and the concordat set out to do were successfully delivered.

The question we keep referring to is whether the judiciary and the rule of law are sufficiently protected, understood, cherished and nurtured within government as a result of the reforms? The story is pretty good, but we have discussed some areas where there have been difficulties or strains. The split of the Lord Chancellor role, taking judicial leadership from the Lord Chancellor, does not mean that we have forgone judicial independence. Judges remain protected, with the exceptions we have discussed, from undue influence from the Executive, for example. We have not lost those important principles. In a sense we might have strengthened them, by having both a politician and a senior judge looking after them.

I would not start from the proposition that the 2005 Act reforms have not worked. They created a new settlement, which has been tested quite vigorously by a fast-moving landscape, but the broad thrust of them is functioning.

Lord Hope of Craighead: The broad policy behind it is appropriate, too. Looking back now, would you have changed anything different in the way it was structured?

Sir Richard Heaton: As a drafter, I would have loved to have a go at Sections 1 through 5, and make them more flourishing, rhetorical and meaningful, but they achieved the separation of powers, which was the key reform in sight.

Sir Jonathan Jones: I agree with much of that. One thing we have not touched on is the Supreme Court, but, to answer the basic question, did the constitutional resettlement at the time make sense and has the statute achieved that? Yes, it has. It is taken the Lord Chancellor out of the judiciary. It has made that split, and of course it also took the Supreme Court out of the House of Lords. So it succeeded; it did what it set out to do. The Supreme Court now has a very distinct identity and profile, as you know very well, which you can regard as a success of that policy. That would probably be my assessment, too.

Lord Hope of Craighead: One of the concerns I had as somebody who was making the move from here to there was the funding of the court. You may remember that, when the Law Lords were in this building, funding came through Parliament. In a way, you could say that their

independence was complete there. They were completely isolated from the Government, having to compete for their budget through a different system. What they did was make a bid through the House of Commons. It was a very small budget required because all the services were provided for everybody else in the House anyway.

The move to the Supreme Court had a dramatically different effect, because the whole court had to be funded from money coming through the Ministry of Justice. The concern was that that might, in some subtle way, affect its independence.

Sir Richard Heaton: I hope that, functionally, it did not affect its independence. Please correct me if I am wrong, but I certainly do not remember a single occasion where there was a funding difficulty and the Supreme Court chief executive came to me to say, "We're not getting the funding we need. You must help us". We were acutely aware that we did not run the Supreme Court in the way we administer the England and Wales courts and tribunals, because it is a different beast.

I cannot remember how the funding fits in constitutionally, and whether it comes through us via the Consolidated Fund, but there was certainly a difference in quality between the conversations about England and Wales courts and the Supreme Court.

Lord Hope of Craighead: There were some difficulties to begin with, I know from my experience, but my understanding is that they were resolved fairly quickly, because the chief executive, Jenny Rowe, made her position absolutely plain. She had to fight for that initially, but it did settle down. One could say that the concerns that some of us had were not, in the event, realised.

Sir Richard Heaton: I am glad to hear it. That was my experience in my years there.

Sir Jonathan Jones: In that respect, the reliance of the Supreme Court on the Government for funding is consistent with the rest of the judiciary. For good or ill, whatever the tensions, one would hope that that is not going to undermine the independence of the court. I think you are saying that, indeed, has been the result.

Sir Richard Heaton: No, the argument would be more that it is undermining its UK status.

Lord Hope of Craighead: Anyway, there was a struggle to begin with, but everybody began to understand that they had their independent system and should be allowed to run it. Of course it had to be bid for, but the scrutiny was less severe than it was initially. That is the way it worked.

The Chair: Lord Hennessy, you were provoked into wanting to ask a question following Lord Falconer's exchange with our witnesses. Do you want to put that now?

Q41 **Lord Hennessy of Nympsfield:** It probably does not fit. I was just going to ask Sir Richard what he would have resigned over and what his red lines would have been when he was Permanent Secretary.

The Chair: Who wants to have a go at that?

Sir Richard Heaton: I am literally thinking.

Sir Jonathan Jones: I do not think I need to answer it.

Sir Richard Heaton: That is moral smugness. I suspect it would not have been a rule of law issue. I suspect, if it were to have come to that, that it would more likely have been something on the other side of the House, if something horrific had happened in prisons for which the administration of prisons was responsible, and I was indirectly or directly responsible. My stay-awake moments were more on that side than on the rule of law side, if I am honest, looking back on the five years.

I hope there would have been rule of law red lines. I am pleased to say we did not come across one, so it is a notional question. They ceased to be the black letter law questions because I ceased to be a legal adviser, and I was really clear that I was not my own legal adviser. I took legal advice from the excellent team that Jonathan provided me with. I do not think it would have been a Jonathan-style law point. It would more likely have been an operational failure point, if I am honest.

Lord Hennessy of Nympsfield: You sympathise with Jonathan's resignation, I am sure.

Sir Richard Heaton: Yes, I do indeed. Jonathan and I go back years and years to the Attorney-General's day. An aspect between the two departments that we have not really touched on is that they are co-housed, which was deliberate. Lawyers in government and people exercised in the rule of law need to be in touch with, look after and watch out for each other. There were several occasions as Permanent Secretaries when Jonathan and I would discuss something that was coming up in Cabinet or in litigation, or that required careful handling. The rule of law partnership happens at all sorts of levels in government, not just at ministerial level.

Sir Jonathan Jones: I do not feel smug about having resigned. In a way, I am always happy to talk about almost anything else. It is a shame that we reached the point where I felt that was necessary. Throughout my previous career, tough issues and problems would come across my desk, as no doubt were coming across Richard's desk. You do not resign; you just try to deal with them. Sometimes they will be difficult calls, and life goes on. It is very much a last resort, and that is why we have touched on it. I think I made the right decision, but I regret that it was necessary and I do not feel smug.

Sir Richard Heaton: It is withdrawn.

Baroness Suttie: Do you think the role of Lord Chancellor is still

necessary?

Sir Richard Heaton: Not particularly with that title, no, but as a custodian of very important jobs with a public interest element and a rule of law element, yes. If you remove the job and regard all this as purely Secretary of State territory, you lose something quite significant. I would have come to the same conclusion as we came to back in 2005. Whether you use this label or not, there is something about championing the rule of law within government that requires special protection, and all the ancillary functions listed in the schedule to the 2005 Act somehow need to be preserved, protected or entrenched. The short answer is yes.

Sir Jonathan Jones: I agree, for the same reasons. These are important functions. They have to live somewhere. It is right that there is a Minister who has responsibility for them. The title matters less.

Q42 **Baroness Fookes:** Could we turn to the role of the law officers and one of the key points about them? Is it more valuable that they are members of the Government offering advice, or should it be farmed out, if that is the right expression, to non-political legal advisers?

Sir Jonathan Jones: I did two stints in the Law Officers' Department, then the Attorney-General's office, as it became, including as its head. This is an issue that comes up from time to time, to which there is no absolutely obvious right answer. There is an advantage in the Government's senior legal adviser being a politician who is regarded as an equal (give or take, because that can vary over time), is trusted to be part of the inner circle, attends Cabinet, certainly at the moment, and is seen to be on the Government's side. Every client wants a lawyer who is on their side.

Equally, what is important is that any lawyer, including an Attorney-General, is capable of giving independent advice, including sometimes unwelcome advice, and therefore has the clout and the status that enables them to do that. You want both those things, and therefore there is an advantage in having a law officer who is part of the inner political team.

Sir Richard Heaton: For those reasons, I agree. A political Attorney-General is more likely to deliver rule of law compliance or legal compliance than a pure hired hand.

Baroness Fookes: You mentioned in earlier answers to questions that there is a whole web or network of lawyers who can provide advice. I imagine that, however good an Attorney-General is, they cannot know everything about everything. Is there anything you can tell us about how it works in practice?

Sir Richard Heaton: We both pursued careers in exactly that. I joined the Government Legal Service in the Home Office. Nowadays every department has its own in-house team of lawyers, all employed by the Treasury Solicitor, but in those days all employed by the departments. We gave advice on litigation, policy formulation and legislation. We were

hierarchically arranged. We had a right of access to senior lawyers to give us cover or to give authoritative advice on difficult points. We had access to the Attorney-General's office, to give advice on really difficult points or points with a cross-government importance. That system prevails, and it is one of the most successful cross-cutting shared services across government. Thank you for mentioning it. It is a really important part of the architecture, which Jonathan used to head.

Sir Jonathan Jones: In total, there are probably well over 2,000 lawyers across government as a whole advising all departments. The Attorney-General, whatever their background and particular areas of expertise, will have access to that body of departmental lawyers and to external counsel. You have a system, of which the Attorney-General's office is quite a small department supporting the Attorney, and the law officers themselves are the apex. That is how that works.

Q43 **Lord Faulks:** You mentioned the possibility of giving unwelcome advice, and that is something that lawyers are used to giving in all sorts of capacities and contexts. Surely there is a natural human tendency on the part of the Prime Minister to favour an Attorney-General, in terms of appointment, who he or she thinks is more likely to give advice that is friendly rather than unfriendly, and welcome rather than unwelcome. Is there a risk that, if a law officer is given freedom to speak about all sorts of policy areas, not the law, through which it will be clear that they are identified with the Government's general thrust and direction of policy, the whole independence of the law officer could seem to be somewhat compromised?

That would not be the case if you had an Attorney-General such as they have in Northern Ireland, or even a very senior lawyer such as the Treasury Solicitor or someone of that sort being the Attorney-General, giving unwelcome advice, not associated with any executive function, and not talking about policy. Would that not give the general public more confidence?

Sir Jonathan Jones: That is definitely a risk. It is a risk in the current system, where you have a politician who, like every other Minister, is appointed at the choice of the Prime Minister, that they are seen to be too close to the Government, too close to the politics of the day, and too willing, therefore, to give convenient advice. That is a risk in this system, but there are some countervailing advantages, which I have touched on.

You also want somebody who is completely trusted to be part of the most sensitive councils of the Government, who can be told all the Government's secrets, to whom the Government are willing to go for advice. I am not saying it is impossible to have some of that in another model, but one of the advantages of the current model is that, at its best, you will have a politician of whom that is true, who is absolutely trusted and part of the inner circle, and therefore is best placed to give the best advice.

There is the countervailing risk that you mentioned. As with a lot of this, as I have said already, in the end it comes down to the character of the individual and how they weigh up those responsibilities, because ultimately any lawyer is not doing their job unless they give the best frank advice, which may not be the convenient advice. That is true of an Attorney-General, as it would be for any other legal adviser. Those are the pros and cons.

Sir Richard Heaton: Sir Jonathan is right: there is a risk there, but I do not feel strongly on which way you go on this, to be honest. I can see arguments on both sides. I would stick with the political model, but I rather like the Northern Ireland model as well. I have nothing to add.

Sir Jonathan Jones: We may come on to this; I do not know, but the other aspect of the role, beyond the legal adviser role, which we have focused on in that conversation, includes responsibility for the prosecuting authorities. So long as you have that mixture of functions, there is a particular benefit in having a politician performing them, because they can then be accountable to Parliament in the way an officeholder could not. That is another factor.

Lord Faulks: We will come on to the accountability to Parliament. If we stick to the political model of an Attorney-General, is there any way his or her role could be modified or realigned, so as to improve the protection of the rule of law and to give him or her some better-defined role, somewhat separate from the Executive?

Sir Jonathan Jones: There is something to be said for looking at a statutory framework for the Attorney-General of a kind that we have for the Lord Chancellor. Words in a statute are not everything, but they can help to define the parameters of a role. It may be that the 2005 Act is not the best model, but it is just an example. I think I am right in saying that it is a unique example of a statutory framework for a particular Minister. There might be a case for doing something for the Attorney-General, just setting out in broad terms the responsibilities for the rule of law and the public interest, to set some parameters around that.

I mentioned the Lord Chancellor's oath earlier. The Attorney-General swears an oath, which is fabulously antique. There might be a case for updating it. These things may be symbolic, but symbols can matter, and it may just be worth revisiting some of that.

Q44 **Baroness Fookes:** Let me come back on this question of qualifications for the law officers. They are normally—always, as far as I know—lawyers. Presumably we are dependent to some extent on how many fully qualified lawyers enter Parliament. Could you ever see a problem with having sufficient people to recruit from?

Sir Richard Heaton: In the Commons, yes, but you always have the option of appointing distinguished lawyers directly into this House. That is the precedent that Lord Falconer set. If you admit that that is a possibility, the answer is no, but you are right: if you want to fill your law

officer posts from the House of Commons, you are limited in the way you described.

Baroness Fookes: We have a fallback position, as it were.

Sir Jonathan Jones: It has been quite commonly used, of course. Just to add to my earlier answer to Lord Faulks, if you were to have a statutory framework for the Attorney-General, it might be worth including something in that about the minimum legal qualification that an Attorney-General has to have, whichever House they come from.

Sir Richard Heaton: If we are talking about revisiting the statute and doing the same for the two officers, Lord Chancellor and Attorney-General—this is territory that I am nervous about straying into—you might try to set out what you mean by the rule of law. We have had a fascinating discussion. I think it covers judicial independence and maintaining a decent justice system, but once you start to explain exactly what the functions are it is quite difficult to go to an Attorney-General or Lord Chancellor and say, "It all starts with Section 1", when it is an extraordinarily passive and opaque sentence about not affecting the existing principle without explaining what it is.

If these issues are really important and Parliament will do something to entrench it, Parliament might want to explain what we are talking about.

Baroness Fookes: Would that not be a minefield?

Sir Richard Heaton: It might well be, but I just thought I would raise it.

The Chair: Can I put one very precise point? This has come up in previous evidence sessions about where the Attorney-General is attending Cabinet, and that balance between collective responsibility and protecting the rule of law. When those do not necessarily align, even in the mind of the Attorney-General, what are the key issues that come into play? Is there a point at which they are simply not compatible?

Sir Jonathan Jones: There may be. To put it bluntly, if the Government want to do something that is unlawful, we have talked already about all the other checks and balances there are in the system for advising Ministers on where the boundaries of the law lie. You might hope that obvious legal problems will have been ironed out long before something comes to Cabinet, but the system is such that, for all sorts of understandable reasons, Ministers may sometimes want to do something that they do not understand the law prevents them from doing. They may want to take some legal risk. They will get some advice. That will normally put them on the straight and narrow, but ultimately it is the Attorney-General's job to do that.

If there is a particular policy or decision that the Government want to take, and it would be unlawful, that is where the two things collide. At that point, it is the role of the Attorney to say, "No, you can't do that". Very often the conversation will not stop there, because then it will be the

job of the Attorney and other advisers to find other ways of developing an alternative policy or mitigating the legal risk, whatever it may be.

It is quite rare you get to that point where there is an obvious clash, but you can certainly see circumstances in which it might happen. That is part of the system we have described, but ultimately the Attorney-General has to give frank advice when that is the case.

Baroness Fookes: Could resignation, the ultimate weapon, which you deployed yourself, have a modifying effect on a Cabinet?

Sir Jonathan Jones: It could. That is true of any Minister threatening to resign. It is quite a serious threat if you are trying to block something you do not agree with. In the case of an Attorney, that might include circumstances where the Government are set on the course that the Attorney thinks would obviously be unlawful. It just tends not to happen, for all sorts of good reasons—mostly, we hope, because the system works before you ever get to that stage, to round off the edges.

By "compromise on the law", I do not mean a compromise where we just go ahead and break the law, but a solution that mitigates the legal risk and is at least legally defensible. That is what tends to happen, which is why you do not tend to get law officers or senior lawyers resigning. That is a good thing.

Sir Richard Heaton: It should not be just the lawyers around the Cabinet table who are troubled by an egregious departure from the rule of law. It should, and I am sure has in the past, sound with all sorts of Ministers who feel uncomfortable with the Government departing from a clear legal rule or principle. Rule of law should not just be something agitated on by lawyers, because that would be a shame. It is an important constitutional principle.

Q45 **Lord Robertson of Port Ellen:** To come back to this question, you said these things tend not to happen, which is back to Peter Hennessy's "good chaps" rule of things that normally happen. Sir Richard mentioned that it is better to have a politician as Attorney-General rather than a pure hired hand. Those were your words I wrote down.

What if you have in the job of Attorney-General a very, very partisan individual, who takes that partisan role to an extreme, and their legal judgment is then affected by that? Does that not compromise the status of the Attorney-General? If it is somebody who is active and engaged in a partisan way, does that not militate against the independence of the job?

Sir Jonathan Jones: As I said to Lord Faulks, it could do. All these appointments are plainly politically partisan, because they are politicians, they are members of political parties, and they are appointed to a Government. Our history and practice has been to appoint politicians to these jobs, so to that extent they are partisan. You can regard that as being a plus of the system for the reasons I explained. They are part of the political team, they sign up to the Government's agenda, and they can be expected to help support it.

Those are advantages, but the risk that I talked about and that you are touching on is when the partisanship spills over into skewing the legal advice. That would obviously be a problem. That is a risk with our system. I do not think it is necessarily unique to a political Attorney-General. There is always a risk that a lawyer gets too close to a client and starts skewing their advice. We have talked about the safeguards around that, the checks and balances in the system, including the role of all the other advisers, government lawyers and others who will be pointing out the risks. Very often external counsel will be involved and so on.

There will be plenty of things to check that risk of, say, an Attorney-General being too politically blinkered in their view, but in the end our system is such that the Attorney-General's advice is their advice. If they choose to reject the warnings or the advice they are getting from elsewhere, that is the system. It is their advice. That, I think we are agreed, is just a risk inherent in the fact that the Prime Minister chooses an Attorney, and under that system that will be a politician.

Lord Robertson of Port Ellen: The only check is the official resigning, rather than the Attorney-General resigning.

Sir Jonathan Jones: We come back to that, but it is obviously a last resort. In all of this—I repeat myself a bit—the system will be only as good as the individual who holds the post, particularly given that our system is such that the Attorney-General's advice is their personal advice, whatever support or whatever input there may have been to that. It is a personal role. Ultimately, with all the checks and balances in the world you are going to be dependent on the person doing the job.

Lord Robertson of Port Ellen: It tends not to happen until it happens.

Sir Jonathan Jones: It tends not to happen because the checks and balances mostly work and people do not want to break the law, I hope, including, as Richard said, all the other Ministers sitting around the table or any other Ministers involved in the decision. Yes, the system mostly works.

All the time around government there will be thousands of decisions being taken every day, some of them very sensitive, many of them involving legal advice from these hundreds of lawyers I have talked about, where this will not be a problem. Legal advice will be taken and heeded, and Ministers and decision-makers will do the right thing. That will include taking some legal risk, fine, and then defending their position in court, but never truly having a rule of law clash. There are good reasons why that is very rare.

Lord Robertson of Port Ellen: You are here because it has happened that you believed that the Government were breaking international law and the Attorney-General was supporting a position that clearly meant that the Government were breaking international law. The judgment of the then Attorney-General was that the Government should break

international law, so the only safeguard against that was the Treasury Solicitor resigning.

Sir Jonathan Jones: In that case that was so. I am trying, as we have been doing throughout this discussion, not to unduly personalise this, but it will be apparent that I disagreed with the Attorney-General on that analysis and that I therefore could not support the position that she and the Government were taking. In that particular case, I did not think there was any alternative, but what I am trying to get across is that that is rare, if not unique, which is a good thing. All the time, the system will be working in such a way that that situation does not arise.

Lord Howell of Guildford: You have frequently made the point this morning that it all depends on the individual and the right person. Would you also agree that it depends very largely on the right time as well? At times of great international tension or national disunity, the voice of the Attorney-General will get a different hearing.

There was a marvellous quote from Asquith given in our briefing. This was in the First World War. He said, "In dealing with an opponent who has openly repudiated all the restraints, both of law and of humanity, we are not going to allow our efforts to be strangled in a network of juridical niceties". Presumably that was a pretty good put-down for any legal points about international law that were being heard at the time. It is really horses for courses.

Sir Jonathan Jones: One person's legal nicety is another person's rule of law. I struggle to remember a time when we did not think we were living through difficult times and we needed strong government and strong defence for the rule of law. That is certainly true now.

Lord Robertson of Port Ellen: Why should the law officers' legal advice not be made public? I can see why civil servants' advice to Ministers on policy matters should be kept reasonably confidential in order to allow the debate to continue, but why should legal advice being given by the law officers not be made public?

Sir Jonathan Jones: I am a traditionalist on this. On balance, I support the traditional view as set out in the Ministerial Code and so on, which is that advice of the law officers will normally be confidential, in the same way as any other legal advice. There are good reasons why legal advice is treated as confidential and privileged, which are well rehearsed. The basic point is that those seeking the advice can do so in the knowledge that that process is confidential, that details of the arguments being used and so on will not become public, and most importantly of all that they will not be deterred from seeking advice in the first place because of the risk that this will all become public later. These are very good reasons why legal advice is subject to this very special category of privilege, and that applies to all of us when we are seeking legal advice. It rightly applies to the Government.

What Governments have done when there are particular legal questions on government action is not to disclose the Attorney's legal advice, but to publish some kind of statement setting out the legal arguments and the legal basis on which the Government are acting. That may feel like a rather technical distinction but it is quite an important one. In doing that, of course, Parliament and everybody else is entitled to be sure that the explanation being given is an honest assessment and is consistent with the advice that is being given. To that extent, that is a responsibility of the law officers within government to ensure that what is being said publicly is legally defensible and is legally consistent with the advice that is given.

That is where I would end up. Parliament and the public are very often entitled to and will expect an explanation of legally contentious actions of the Government, but most of the time—it is never an absolute rule—the actual advice given should remain confidential. That is the orthodox view.

Lord Robertson of Port Ellen: It is a very orthodox view. Richard, do you agree?

Sir Richard Heaton: I do not disagree with that. There is a second part of the convention that I have never found as convincing: the fact that the Attorney-General has been consulted is never disclosed either.

On publishing the precis, the summary advice, that is often very helpful, but it is really important to be clear whether that is advice or advocacy. Sometimes there is a danger that, when you do a precis for presentation to the public, you produce a piece of advocacy rather than advice. If it is labelled as advice, it really needs to be a summary of the advice, rather than a spin or an assertion of a legal position.

Lord Robertson of Port Ellen: You take the orthodox view on the client/lawyer responsibility, but we are talking here about the Government being responsible to Parliament, so it is slightly different. The legal advice that has been given is the property of Parliament, at the end of the day, and even the obligation to give a summary tends to underline that fact. Why should it not be available to Parliament to know what advice the Government were getting?

Sir Jonathan Jones: My answer to that is the one I have already given. The way of balancing these different considerations, including the right of government to obtain legal advice in confidence, with its accountability to Parliament, is the one I have suggested, which has been used in the past. It is the publication of a sufficiently explanatory and accurate account of the legal position on which the Government are proceeding.

You said that the advice is Parliament's advice. Most Governments would disagree with that. It is the Government seeking the advice and it is the Government's advice, and accountability to Parliament is then a separate element. The question then is how the Government best satisfy that accountability.

In many cases, the Government will also be accountable to the courts. In not all, but many, of the sensitive cases we are talking about, there may be the threat or the prospect of judicial review, for example. For the Government to start disclosing their full advice, including tactical advice, advice on arguments to run and so on, would put them in a uniquely disadvantaged case compared to every other litigant if the matter came to court. No other litigant would ever disclose its legal advice.

Accountability to Parliament is one element, but we also have to take account of the possibility of litigation, accountability to the courts, and the right of the Government, if challenged in court, to put forward their best case, as any litigant can do, and not to have that compromised by being put in this uniquely disadvantaged case of having to do all their legal thinking in public, which no other litigant would do.

Q46 **Lord Falconer of Thoroton:** I am very interested in what you are saying about the publication of advice in the context of international law, in particular the use of force. Sir Richard said it is never quite clear whether it is advocacy or advice. Do you think Parliament is entitled to know the strength or otherwise of the international law case? That is obviously a reference to Iraq. It is never going to be tested by litigation.

Sir Jonathan Jones: That is true. There will always be exceptions. This is not an absolute rule; there may be cases when the right thing to do is to publish the whole advice. That absolutely will be an exception, but even the Ministerial Code accepts that on occasion the law officers may consent to this and so on, and there are occasions when clients waive privilege. I have described the general rule.

Use of force may be such a case where, if not the full advice, some kind of fuller assessment that, as Richard has said, is plainly the honest account of the legal basis, rather than just advocacy, could be published. That may well be an exceptional case for going a bit further.

Lord Falconer of Thoroton: Lord Robertson has mentioned the overseas operations Bill. A major question arose as to whether it complied with the Human Rights Act. There is an obligation to place a certificate. If it effectively amounted to allowing people off war crimes, it may well not have complied. Is that an area where you think Parliament should have known the extent to which the Executive thought this would give rise to problems in the future?

Sir Jonathan Jones: Yes, but, again, that does not necessarily mean disclosing the letter of the internal advice. That may be a case where what needs to happen is to have an honest discussion, which may or may not involve the Attorney, but would involve the relevant Minister explaining the Government's legal position and why they have taken a view in that case that the legislation is compatible with the UK's international obligations. If they do not, you make them think again.

That is in the same category where Parliament is entitled to know what the legal issues are and what the Government think about them without necessarily seeing all the detail of the internal advice.

Sir Richard Heaton: I have briefed Ministers for debates in this House and the other House; you do not invite them to disclose the advice, but you tell them they are going to be pressed really hard by their opposition spokesman on the legal basis for what they are asserting—Section 19 compliance, for example. It is not the same as disclosing the advice, though.

Lord Falconer of Thoroton: We have it at the moment in the House of Lords, where it is said that the Nationality and Borders Bill is contrary to the refugee convention and that they are proposing breaches of international law. The Government say, "Well, we don't think it is", and then a debate goes on in which everybody says, "This is the reason why it is". Why should you not say, "The Attorney-General has advised that it is okay, and that's why we are doing this"? What would be wrong with that?

I completely see Jonathan's point: "Don't disclose your position because you would be disadvantaged in court, unlike an ordinary litigant". But, with something as important as that, should Parliament not know the basis upon which the Government are legally operating?

Sir Jonathan Jones: What you described is a case where the Government are not really giving an explanation at all or are giving no adequate explanation. Ultimately, it is a political question whether the Government should be called on to give a fuller explanation, but, even so, that would not necessarily involve disclosure. This is a slightly technical distinction, but it is worth hanging on to. Every other party will be in a place of being able to take legal advice; then they may have to explain their legal position, and that is really what we are talking about, without disclosing the underlying advice.

Sir Richard Heaton: I agree. If there were a convention that government sometimes waives its privilege, one of the factors leading it to waive privilege would be the lack of any litigation downside. If it is not a case likely to be litigated, that might be a factor contributing to a waiver of privilege. If that were to become a convention, that would be a sensible part of it.

The Chair: I am conscious of time. We have not done full justice to this question on accountability to Parliament but we have probably taken the key point, which is the disclosure of advice.

Q47 **Lord Hope of Craighead:** My question is about the Attorney-General's function in relation to prosecution. Is it appropriate for the Attorney, as a member of the Government, to be involved in decisions about prosecution at all?

Sir Jonathan Jones: You are going to have to have somebody in government who is responsible, one way or another, for oversight of the

prosecuting authorities. At the very least, they will need to take decisions about funding. There is a similar point there to the Lord Chancellor's responsibility for relations with the judiciary.

As to whether the law officers should be involved in individual prosecution decisions, I regard that as a separate question. As you will know, there is a framework document that sets out the relationship between the Attorney-General and the CPS, and a similar one for the SFO, which aims to put some parameters around what the superintendence function means and what it does not mean, in particular the very limited circumstances in which the law officers would ever get involved in individual prosecution decisions.

There is a distinction to be made. The overall oversight function has to be done somewhere in government. The Attorney may be as good as anyone else, and there may be good reasons why it is somebody who is not also responsible, for example, for the police and for the court system. That leads you to the Attorney-General. There is a separate question about whether superintendence carries with it a role in taking individual prosecution decisions. This framework document that I have talked about aims to set some limits on that.

Lord Hope of Craighead: There are some cases where the prosecution cannot proceed unless the Attorney authorises it to go ahead. It is a limited class of cases, but is there any concern that that goes too far, and that the Attorney should not be involved at all in these decisions?

Sir Jonathan Jones: There are quite a lot of offences of that kind and the list is periodically added to. It is quite a convenient way of adding in an extra filter for categories of offence of perhaps the most serious or sensitive kind. What then matters is that the Attorney-General carries out the consent function diligently, independently of government and in a principled way. Provided that is done, you have the safeguard without undue political interference. All Attorneys will say—and the document I have referred to makes this clear—is that that is how they approach that function.

There are some functions, of which that is an important example, that Attorneys perform independently of their political role, independently of government and in the public interest. That is the position. Again, whether any one particular Attorney-General lives up to that standard will be down to the approach of an individual Attorney-General, but I have never seriously heard it said that successive law officers do not approach that role in that principled way.

Lord Hope of Craighead: Is the division of responsibility between the Attorney and the directors—the DPP and so on—sufficiently clear? This goes back to the document, does it?

Sir Jonathan Jones: This goes back to the document, and that has its origin in a version that I had a role in producing some years before, in around 2009, which we called a protocol at that point. Essentially this

framework document performs the same role. It sets out the nature of the superintendence function, the governance relationship that exists between the CPS and the Attorney, and how individual prosecution decisions will be taken. It is pretty clear and it is public, so that is a helpful document.

Lord Hope of Craighead: Yes, so it is available to the public to scrutinise.

Sir Jonathan Jones: It is available. Hand on heart, I am not sure the version I have is the most up-to-date one, but this is public and it performs that function.

Lord Hope of Craighead: Sir Richard, do you have a view about this?

Sir Richard Heaton: I have never really been involved in public prosecutions, so I do not.

Lord Hope of Craighead: It is rather different in Scotland. The position of the Lord Advocate is very different, because everything proceeds in his name, all the prosecutions, so he has a general oversight. The Attorney's position is quite different. The day-to-day running is in the hands of the directors.

Sir Jonathan Jones: That is correct. Again, this document aims to make clear how that works.

Q48 **Lord Falconer of Thoroton:** Do the Attorney and the solicitor have a very important role in making it clear within government there is to be no interference in prosecutions and the key importance of Ministers not interfering? Lord Hope is right that in Scotland the Lord Advocate has a specific decision-making process in various prosecutions, not just the ones that need consent, but others. In England that is not the position, but from time to time Ministers say terrible things about prosecutions.

It was not terrible, but Jeremy Hunt commented on a prosecution that was going on. It was in the papers, and it immediately had to be taken down. I hope the Attorney sorted that out. The current Attorney-General made a comment on the process of justice in relation to Dominic Cummings. The role of the Attorney in England and Wales is to protect the integrity of the prosecution system from government interference, is it not?

Sir Jonathan Jones: I am not going to comment on a particular incident, but the principle—I actually have it in front of me—is set out in that document. On the one hand it says, "The CPS is independent in making decisions whether or not to prosecute a case", and then it adds, "The Attorney-General is responsible for safeguarding the independent decision-making of the CPS", which is your point, and is my analogy with the role of the Lord Chancellor vis-à-vis the judiciary. You will have your views on how well that task is performed in a particular case, but that is the position.

That is another reason why there is value in having a Minister, with a seat in government and influencing government, who is responsible for oversight of prosecutions, and can if necessary make that point in the same way the Lord Chancellor might make it in respect to the judiciary.

Lord Hope of Craighead: Would the Attorney be accountable to Parliament for the performance by the DPP of his or her functions?

Sir Jonathan Jones: Yes. Certainly in my time almost all parliamentary questions to the law officers were about the performance of the CPS or the SFO. That may have changed, but a part of their accountability to Parliament was precisely that, answering for the performance of the prosecutors.

Lord Hope of Craighead: I take from what you are saying that that avenue of accountability to Parliament on the way the prosecution services are handling their affairs is a valuable aspect of our system.

Sir Jonathan Jones: I do, which is why I made the point when talking to Lord Faulks about the pros and cons of having a non-political legal adviser. While you have this combination of functions where the Attorney is also responsible for superintending the prosecuting authorities, there is advantage in that person being a politician who is answerable to Parliament.

Q49 **The Chair:** Conscious of the time, I will open with the question, but will simultaneously call in Lord Hennessy with his supplementary. We would have taken this question more slowly, but for the time. What are the constitutional boundaries that constrain the Lord Chancellor and the law officers?

Lord Hennessy of Nympsfield: I would like to ask about the salience, significance and specialness of the Lord Chancellor's oath. I know that every Secretary of State is a privy councillor and therefore swears the privy councillor's oath of confidentiality, which Lord Radcliffe made much of in his last inquiry into ministerial memoirs in 1975, but there is something supercharged—I wonder if you agree—about the Lord Chancellor's oath. The Tom Bingham phrase, "guardians of an all but sacred flame", comes to mind. Do you think that there is something particularly potent about the Lord's Chancellor's oath, which is of continuing value, that makes that office very special? There is an Attorney-General's oath, but it is almost completely incomprehensible to anybody, let alone the lay reader. Do you think that oathing should be part of our report as something to be encouraged, refined and strengthened?

Sir Richard Heaton: I will take both of those together. The short answer is yes. I do, partly because of the nature of the oath—it is well written, rhetorical and has real bite—and partly because it is crucially taken in public, in court 4 of the Royal Courts of Justice, sitting next to the Lord Chief Justice and all the heads of division, with a crowded public gallery. Yes, it has potency and significance, and it happens within days of a Lord

Chancellor taking office. If they do not read any briefing they will stand up and make this oath, and they will want to know what it means. I am actually a bit of a believer in the oath. I wonder if, as a tool, it is something we might use a bit more widely.

For your opening question, we touched on the constitutional boundaries. The Lord Chancellor is a Minister, part of a Government, doing political stuff, but also carries these really important public interest rule of law duties, burdens and responsibilities, and they cannot be traded with the political stuff. They are, in their own terms, incredibly important. In my experience Lord Chancellors get that, either immediately or in due course.

What could we do to clarify it? You could clarify the language of the Act. As we have discussed, you could entrench or formalise the appointment of the Lord Chancellor. You could narrow the tasks allotted to the Lord Chancellor so that proportionately they are spending more of their time on this stuff.

If I was briefing a new Lord Chancellor today I would absolutely start with the rule of law. I would start with their solemn function of providing for an independent judiciary and a functioning justice system, and working with the Attorney-General to promote the rule of law within government. It is incredibly important. There is an apparatus to support it. Could it be better? Yes, undoubtedly. Has it tripped up over the years? Yes, undoubtedly. Are there other ways of creating a settlement that protects the rule of law even better? There may be, but we have a system that does it now, and it needs to be cherished and supported.

Sir Jonathan Jones: I agree with all of that. I particularly agree with, however symbolic they may be, the important symbolism of oaths. The law officers do swear their oaths. The idea of—I was going to say "public theatre"—the publicness of the oath in the eyes of the profession and the senior judiciary is important. It does mean something. I would be in favour of updating the oath that the law officers take. We did think about this at one point but nothing came of it.

Earlier I talked about the possibility of doing something for the law officers by way of a statutory framework as part of updating their oath, and part of making clear their responsibility for the rule of law, by analogy with what the 2005 Act does for the Lord Chancellor. I do not have a blueprint for that but it is worth thinking about, because at the moment there is no statute on the overarching responsibilities of the law officers. Maybe there should be.

Lord Hennessy of Nympsfield: It is part of our international reputation, really. Again, it is the Tom Bingham line: "The rule of law is the nearest we are likely to approach to a universal secular religion". It does matter to the country as a whole, and way beyond the law, that we are a kind of high priest, a gold standard nation, when it comes to that. It is very much part of how we all wish to see the country. Perhaps even at a meta-global level I would put a boost behind your very welcome

thoughts on how things can be improved, and perhaps extended and clarified.

Lord Falconer of Thoroton: Did your searches reveal where the law officers' oath came from? Could it be changed without statute?

Sir Jonathan Jones: I do not believe it is statutory. I assume it could be changed, but under the Gordon Brown Government, when we were looking at the governance of Britain, there was talk of legislating for some of the things we are talking about, including the relationship with the prosecuting authorities and putting what was then the protocol on a statutory footing, and so on. We thought we might do something about the oath, but none of it happened.

There is scope for revisiting that. You could probably do some of it without statute, but what we said is that there is some value in having a solemn statutory code for some of this stuff, over and above practice.

Lord Howarth of Newport: I would like to pursue the question of oathing a little further and ask you a question that may be considered fanciful, but I would be very interested to know what you think about it, in light of the many years of experience that you both have at a very senior level in government.

If we think it is a good thing that the Lord Chancellor takes this solemn and hallowed oath of office, which anchors that individual in the role and helps to define what it is, and at the same time affirms certain constitutional principles, would you see benefit in other Ministers, including the Prime Minister, taking an equally solemn oath that expands their role beyond the privy councillor's oath and equally helps define what it is that constitutes their duty in office?

Sir Richard Heaton: The short answer is yes. I had "PM takes oath?" written down in my notes in manuscript. Yes, there might be something in that. What you put in it I do not know, but it goes back to my earlier thought about the rule of law existing beyond the concerns of lawyers. I am sure the PM's oath would go beyond the rule of law, but it would be amazing if there were a symbolic importance attached to the rule of law in offices other than the legal ones.

Sir Jonathan Jones: I agree.

Lord Howarth of Newport: I am delighted that our distinguished witnesses agree with me.

The Chair: We are a couple of minutes over but it was well worth it. Thank you very much indeed for coming. Your insights are incredibly valuable and help us to reflect on these issues. I said in opening that we had lots of questions. We probably did not put all of them, actually. Thank you very much for tolerating them so well. I really appreciate you coming.