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THE OFFICE OF LORD CHANCELLOR

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10.30 am

Witnesses: Lord Mackay of Clashfern and Lord Phillips of Worth Matravers

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Members present

Lord Lang of Monkton (chairman)
Lord Brennan
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Lord Lester of Herne Hill
Lord Lexden
Baroness Taylor of Bolton

Examination of Witnesses

Lord Mackay of Clashfern, Lord Chancellor, 1987–97, and **Lord Phillips of Worth Matravers**, Master of the Rolls, 2000–05; Lord Chief Justice, 2005–08; Senior Law Lord then President of the Supreme Court, 2008–12

Q16 The Chairman: Perhaps I may welcome our two distinguished witnesses this morning to our inquiry into the office of Lord Chancellor. Lord Phillips, you have particular experience as you were a senior judge when the Lord Chancellor's position was abolished, and you subsequently became the first President of the Supreme Court. Lord Mackay, you were a distinguished Lord Chancellor, and since then you have been active in this House as an observer of developments, but very much from an inside vantage point. We are very pleased to have you both here today and we look forward to airing some thoughts with you. To start, could I ask you both what is meant by judicial independence in the context of the Lord Chancellor's duty? There are mixed views on this.

Lord Phillips of Worth Matravers: I consider that judicial independence describes the position of a judge upon whom no outside influences are brought to bear, direct or indirect, in relation to the performance of his judicial duties.

Lord Mackay of Clashfern: Outside the confines of the court itself, of course, in most cases he or she expects to hear both sides of the argument. There are some other aspects that I would like to draw attention to. We are in a system where the state, in the shape of

the executive, is a party to a number of actions. One of the important features of the court system is that a time has to be fixed for a case to start. That is the role of the listing officer. The listing officer is a servant of the state, but I hope in the judicial arm of the state. It is therefore extremely important that the judicial officer who is the listing officer for the case is not influenced by private—what should I call them?—approaches by, for example, the Government either to bring forward a case because they think they are going to win or to put it back because they fear that it might damage some current proposal. Therefore it is very important that the listing officers should be as independent as the judges. It is also important that the judge responsible, usually the resident judge, gives general directions to the listing officer as to the way in which cases are to be listed. If then a departure from that general rule is contemplated, the listing officer would bring it to the attention of the judge.

I agree with Lord Phillips about the central meaning of the word "independence", but I think that respect for independence also implies respect for the authority of the judge exercising his responsibility as a judge in court. That respect has to be both in word and in action. It is undesirable for members of the executive, which is one of the arms of government, to be critical in a very definite way of the way judges perform their role. After all, the executive and the judicial, as well as the legislative, are the three arms of the state. If one arm is critical of another in the exercise of its functions without reason, it tends to damage the whole lot. If a house is divided against itself, it will not stand, and that is equally true of government in their three powers. Therefore the idea of respecting independence also carries with it the responsibility of carrying out the judgment, subject to appeal, of course.

That goes beyond simply the domestic law of our country. It also applies insofar as we have international obligations under treaties. The obligation to perform what the judges have decided is part of respect for judicial independence, subject to appeal.

The last point I want to make in this connection is that each individual judge is independent. No judge can tell another what to do except, of course, that a higher court can give directions to a lower court, but that is the judicial function of the higher court. However, no judge is entitled to tell another judge what to do. He can influence and argue with him, but he does not have authority to order him to take a particular course.

The Chairman: Thank you very much for that comprehensive answer. May I follow up the access to justice aspect of this? It has been suggested in the past that the duty extends to the maintenance of the legal process to the extent that judges have to be properly paid and lawyers have to be properly paid; in other words, government finance is brought into it. Do you think that is an important element of the issue we are addressing?

Lord Mackay of Clashfern: The oath which the Lord Chancellor has to take under section 6A of the Promissory Oaths Act 1868 makes particular reference to the support of the judiciary from that aspect. There must be some element of duty in relation to the judges themselves and their support in financial and personnel terms, and possibly in other assistance that judges may need in order to perform their functions properly.

Lord Phillips of Worth Matravers: I endorse that. The administration of justice costs money and there is a limit to the economies that one can make without damaging the administration of justice. It is a tricky and delicate task, if you have to make economies, deciding where and how they should be made. It is a task that should be addressed as a matter of partnership between the Lord Chancellor/Secretary of State for Justice and the judges, and in particular for England and Wales, the Lord Chief Justice.

Q17 Lord Lester of Herne Hill: Many years ago, Lord Browne-Wilkinson gave a controversial lecture called "The independence of the judiciary", in which he drew attention to what he saw as the threat to judicial independence essentially from the Treasury through officials interfering more and more administratively with judicial independence. It was a view

that was contested strongly by Lord Butler of Brockwell at the time, as I recall. Is that problem which he raised a problem now, do you think? Is it the case that judges, not being fully in control of staff, who come from elsewhere, might find that they are not able to be as independent as they would like? As a rather unimportant example of the problem, in ancient times when I sat as a recorder, I remember when I began that I had court officials to stop me making an idiot of myself. By the time I stopped sitting, those officials had been removed because—

Lord Mackay of Clashfern: I believe it was that they were no longer considered to be necessary.

Lord Lester of Herne Hill: Indeed, it was deemed by the Treasury that they were no longer necessary. I wonder whether the Browne-Wilkinson problem is one that still exists.

Lord Phillips of Worth Matravers: The court administration and the civil servants who administer the courts come under the Ministry of Justice. One of the first issues that arose with the constitutional changes was the question of the loyalty of court staff. I and those acting on my behalf held protracted negotiations with Lord Falconer of Thoroton in relation to this. Initially, his attitude was, "I have to run the department. Their loyalty is to me. Of course I will listen to what you have to say, but I am their boss", basically. It ended up with an agreement that there should be a dual loyalty to both the Lord Chief Justice and the Lord Chancellor.

I believe that you will be seeing Lord Judge next week, who will be able to give you much better up-to-date information as to whether there are any problems with the courts service. My impression is that it works pretty well and that, on the ground, the local judges, the listing officers and the court staff work very well together.

Q18 The Chairman: Can you give us examples of how the Lord Chancellor has upheld the rule of law and judicial independence since the change?

Lord Phillips of Worth Matravers: It is difficult to do, and I would not like to do so specifically, but I am aware of one or two occasions when ministers—or perhaps a Prime Minister—have made comments which were not appropriate by way of criticism of judgments, where I have reason to believe that the Lord Chancellor at the time made it plain to the minister that that was not appropriate. The role of the Lord Chancellor in this respect does not happen in public; it happens in private and nobody knows specifically, unless he tells them, whether he has performed that particular function.

The Chairman: Is there something that could be done structurally to change that situation?

Lord Phillips of Worth Matravers: I do not believe that there is. One question we have been asked to consider is: should the Lord Chancellor make a report every year on certain aspects of his upholding the rule of law and judicial independence over the previous year, to which my inclination is to say no, because if he is doing his job properly, he is doing it privately and confidentially, and he could not be expected to report on that.

Q19 Lord Lester of Herne Hill: Public confidence is crucial, and to have a Lord Chancellor who commands public confidence about the rule of law is vital, but so for the law officers. I wonder what you both think about the role of the law officers, Scottish and English, in assisting the Lord Chancellor to uphold the rule of law.

Lord Mackay of Clashfern: I speak now of the ancient regime. I regarded the most important role of the Lord Chancellor in Cabinet as bringing to the attention of the Cabinet any matter which required the attention of the law officers, because sometimes, although the law officers saw papers, discussion tended to bring out something that needed the attention of the law officers. The Lord Chancellor was not—and, I do not think, ever should have been—the adviser to the Government; the law officers had that function.

One difficulty is whether the Lord Chancellor should bring to the attention of the Prime Minister something that suggests that what the Prime Minister has said is inappropriate; if that became public, I think the reshuffle tendency would arise quite quickly. That happened not only to the Lord Chancellor but also to the law officers in some circumstances. One has to be careful about how this can be done.

When I was Lord Chancellor, I was at a meeting of justice ministers in Canada. The justice minister in Canada said to me that one of the strengths of the Lord Chancellor's office is that, on the whole, the Lord Chancellor will not be displaced unless he wants to go. That was clearly demonstrated to be false later, but at the time she said it, it was probably true. Therefore, there was a certain authority which it would be difficult to displace. On the other hand, in my time also, one had to be delicate about how one went about trying to improve matters.

Lord Phillips of Worth Matravers: Could I say a word on the rule of law? The rule of law is not readily defined or readily understood. You ingest it, if you are a lawyer, as part of your upbringing and your practice. Belief in the rule of law is almost like a religion: it is crucial; it governs the way you behave. If you are given office in government, where a rule of law issue arises, you will make it plain that that issue has arisen and make plain your view as to how the issue should be dealt with. If law officers have that background, one would expect them to perform that duty. The same goes for the Lord Chancellor. If they do not have that background, it is much more difficult. I was just imagining myself, having had no connection with the law, suddenly being appointed Lord Chancellor and Secretary of State for Justice. I would ask my officials for the relevant legislation, and the first thing that I would read in the Constitutional Reform Act 2005 is: "This Act does not adversely affect the … existing constitutional principle of the rule of law or … the Lord Chancellor's existing constitutional

role in relation to that principle". That would not mean very much to me; it really would not.

The Chairman: We may come on to the relationship between the Ministry of Justice and the Lord Chancellor's role, but Lord Lester has a question about constitutional propriety.

Q20 Lord Lester of Herne Hill: In a sense, it has been covered, but do you think that, in our system of government, the Lord Chancellor should be seen as the ultimate guardian of constitutional propriety across government?

Lord Mackay of Clashfern: It was a role that the Lord Chancellor formerly had. I think it is more difficult when he may have no judicial authority to carry it out.

Lord Phillips of Worth Matravers: I would answer that question "Yes, in theory." It is highly desirable that there should be an identified minister with responsibility. The Secretary of State for Justice, even if he were not also Lord Chancellor, would be the appropriate minister to have that responsibility. Problems may then arise of conflict of interest, but I think that it is a good thing that the statute identifies the minister who has that responsibility.

Lord Lester of Herne Hill: Is it not a matter of personal integrity and ethical sense rather than formal qualification? For example, my old boss, Roy Jenkins, was not a lawyer, but it seemed to me that he understood the rule of law better than many lawyers. I can think of some lawyers who still do not understand the rule of law. In the end, is it right that people matter more than formal qualifications in this area?

Lord Phillips of Worth Matravers: I would answer yes to that. I agree that you do not have to be a lawyer to understand the rule of law. What matters is that you should understand it, you should respect it and that you should have the clout in Cabinet to carry weight when you raise a rule of law issue.

Q21 Lord Lexden: I ask for your reaction to a statement in the written evidence that we have received. The statement is: "The Lord Chancellor's authority on broad constitutional questions is probably better seen as, at very best, providing sporadic and peripheral direction to the Government's agenda". Do you agree?

Lord Phillips of Worth Matravers: If it is supposed to be a description of the reality, it is probably right. If it is supposed to be a statement as to what the position should be, I would not agree with it. I think it should be a fundamental part of a minister's duty to look out for constitutional impropriety and draw attention to it.

Lord Mackay of Clashfern: You can see that if you have the general duty to be in that position all the time, it is only sporadically that you are required to operate it, because on the whole we hope that government will be carried out with complete constitutional propriety.

Q22 Baroness Dean of Thornton-le-Fylde: Whereas before we had the Lord Chancellor as a member of the Cabinet, we now have a Secretary of State for Justice holding the dual positions, probably a Secretary of State who is not legally qualified but also, if you like, climbing the greasy pole of career development—Lord Mackay mentioned Cabinet reshuffles. How do we ensure that the Lord Chancellor role, one person with two functions, has sufficient political clout with his colleagues around the Cabinet table on legal and constitutional matters when the individual holding the position may not be a qualified lawyer?

Lord Phillips of Worth Matravers: The answer is that you cannot. I am not sure that it matters whether he is a qualified lawyer if he is first and foremost a politician hoping for further political advancement. If you have a Prime Minister who believes in the importance of the rule of law, when he appoints someone to the position of Lord Chancellor, one would hope that he would appoint someone who already has standing and is likely to perform the role of guardian of the rule of law and judicial independence. One can point to a number of

examples of such appointments before and after the constitutional changes. But ultimately, appointments are in the hands of the Prime Minister.

Lord Mackay of Clashfern: When I was appointed Lord Chancellor, which is quite a long time ago, I was extremely junior, having come to the Cabinet for the first time, but I was put in a position that was quite high for one of my tender years. As the people above me disappeared, I gradually went higher up, until when Lady Thatcher—Margaret Thatcher, as she was—retired, I happened to be No. 2, and therefore had the responsibility of reading the Cabinet tribute to her.

The Constitutional Reform Act 2005 immediately resulted in the Lord Chancellor going down the Cabinet hierarchy. The fact that the Secretary of State for Justice is that first, and then Lord Chancellor, does not suggest that the Lord Chancellor's office is very important among secretaries of state as a whole. It may be that something can be done about that, but it depends to a great extent on what is wanted by those making the appointment.

Baroness Dean of Thornton-le-Fylde: I accept that you may have been junior in political terms, but in legal ability and experience you were senior, I suggest. When legal and constitutional matters were considered I should have thought that your voice carried much more weight than it would have done if you were a junior political appointment.

Lord Mackay of Clashfern: That is probably true, and I tried to exercise it with caution and discretion. It is just that the Lord Chancellor, whoever he was, was quite high in the Cabinet hierarchy right back as far as I can remember just by virtue of being the Lord Chancellor and because of the importance then attached to the responsibilities that he carried.

Q23 Lord Lester of Herne Hill: It seems to me as an observer over the last decades that whether a Lord Chancellor was influential was very much a matter of the politics at the time and the personality of the Lord Chancellor. For example, when I served the Wilson

Government as Roy Jenkins's adviser, Lord Elwyn-Jones was, in my judgment, much less influential than you were, Lord Mackay, when you became Lord Chancellor. You had the special advantage of being Scottish as well as having the confidence of the Prime Minister. The advantage of being Scottish was that you came from outside the English legal system and were able to take my profession by the throat and impose upon it much-needed reforms. But all that was happenstance and subsequent to your appointment. Some Lord Chancellors have been enormously influential, while they were there—for example, Lord Irvine of Lairg. Others have been influential because they were politically close to the Prime Minister, as with the current one. But it is impossible to lay down any conclusion or generalisation about this because it is like a kaleidoscope—it gets knocked politically and then how important the Lord Chancellor is or is not depends upon the pattern of the kaleidoscope.

Lord Mackay of Clashfern: That is true to some extent. On the other hand, Lord Elwyn-Jones was in a fairly high position in the Cabinet. I knew him pretty well but I still think that, by virtue of his appointment as Lord Chancellor, he held a position in the Government which would have been quite influential. It depends to some extent on whether a person exercises their influence, and how they exercise it. One thing which I remember well about John Major's Government was that he said to me at one point, "I don't want the Lord Chancellor to be involved in the nitty-gritty of party politics." That suited me absolutely, as it still does. That was the way these things were looked at in those days. It was not just the first Prime Minister I served; it was also the second.

Q24 Lord Cullen of Whitekirk: In connection with the role of the Lord Chancellor and its relationship with the judiciary, I would like to ask about the arrangements for the senior judiciary to communicate with Parliament. I am thinking of section 5 of the 2005 Act. While some holders of the office of Lord Chief Justice have regarded the exercise of that power under section 5 as being a nuclear option, when he gave evidence to us earlier this year, the

current Lord Chief Justice seemed to regard the nuclear option as indicating a declaration of war. He said, "I'd like to think I'd be free to make a direct representation without feeling that I was pushing the button that indicated war. It is sometimes better to have our unfiltered views rather than through a minister, or a minister reading them. This is an area we need to discuss because, on issues that are largely of a technical nature, our direct views are sometimes of great assistance, I hope." Can I have your comments on that matter?

Lord Phillips of Worth Matravers: My initial reaction to this power, when I had it, was that it was a nuclear option. You would not want to exercise it unless there was a real crisis and you had tried every other means and you were really then trying to get the support of Parliament, probably in opposition to ministerial policy or conduct on a particular matter. But, as time went by, it seemed to me that it was desirable that the Lord Chief Justice should be able to communicate in some way or another to Parliament without exercising a nuclear option. An annual report is one way of doing that. But I have been thinking about it and I wonder whether an appropriate standing committee, perhaps a cross-party justice committee, to which the Lord Chief Justice could have access to express his views in a rather less dramatic way, might not be the best solution.

Lord Mackay of Clashfern: In the past, before these changes, the Lord Chief Justice and other judges, as well as the Lord Chancellor, were from time to time called before the Home Affairs Select Committee. On the whole, I think those exchanges were valuable. I think that it would also be desirable, if this system is to continue, that the President of the Supreme Court should also have a right similar to the one given to the Lord Chief Justice. I would like to see in due course, after September, the Supreme Court called the Supreme Court of the United Kingdom, and the supreme courts of England and Wales having the title that they formerly held before they became the senior courts. I do not know who the junior courts are exactly but, anyway, it would be advisable to do that. The other aspect of this

which ought to be mentioned is that the judicial arm is separate from the legislative and executive arms. One has to be careful that the exercise of judicial power does not become a matter of detailed discussion with a particular committee of Parliament. I think there is a risk in that. I do not say that it should not happen but there is a risk in it of the political point of view being attempted to be put over to the judges on these occasions, so a measure of caution is required. So far as I remember, when the Home Affairs Select Committee did it, there was never any difficulty of that kind. The judge's role was recognised and respected.

Q25 Lord Brennan: Section 3 of the 2005 Act requires the Lord Chancellor to pay attention to the independence of the judiciary and the administration of justice. It is a positive obligation. I wonder what you think about the attitude of Lord Chancellors over the last 10 years. Has their attitude to this obligation been characterised by interest or neglect? If interest, how have they displayed it? If neglect, what can we do about it?

Lord Phillips of Worth Matravers: During my time, I would say their attitude was certainly not one of neglect. They showed interest and, indeed, enthusiasm and I think they took their office as Lord Chancellor very seriously. I thought it important that at the opening of the legal year the Lord Chancellor should parade in all his finery because that would help to bring home the uniqueness and importance of his role. I think that the initial reaction of Lord Falconer of Thoroton was that he would sneak in in a suit and sit down quietly. I said, "No, you should be properly arrayed in all your finery with the Mace and officials." After that, I think the Lord Chancellor has always worn his robe on official occasions and all the ones I spoke to took their duties as Lord Chancellor seriously. They had all been lawyers in their time.

Q26 Baroness Taylor of Bolton: It was interesting that you talked a moment ago about the importance of the Lord Chancellor wearing robes to emphasise to the judiciary the importance of that role yet, when you answered about the role of the Lord Chancellor as

Secretary of State for Justice within the Cabinet, you said that you thought the incumbents saw their role as Secretary of State for Justice as the main focus of their attention and saw the role of the Lord Chancellor as being added on to that within the Cabinet. Can you say whether you think it is appropriate for the same person to hold both offices? As regards the Lord Chancellor being the Secretary of State for Justice in the Cabinet, with all the other responsibilities and spending commitments that brings, what potential is there for conflict of interest and other pressures pulling in different directions?

Lord Phillips of Worth Matravers: One has to distinguish between functions and the obligation that is reflected in the Lord Chancellor's oath to respect the rule of law and defend the independence of the judiciary. The day-to-day functions of the Secretary of State for Justice keep him extremely busy. He has an awful lot to do and he now has the prisons on his plate as well, so he is a very busy man. But, in performing those functions and in the Cabinet, he has the overriding obligation to act in a way which upholds the rule of law and the independence of the judiciary. I do not see that there is a conflict between them. There can be a conflict of interest, of course. He is running a department and he has a fixed budget and upholding the rule of law may require expenditure which he would rather not make, so there is that conflict. But if any minister is going to have the overriding obligation to uphold the rule of law and the independence of the judiciary, I think it should be the Secretary of State for Justice. If you divorced all his administrative functions so his only job was to uphold the rule of law, his work would not carry much weight.

Lord Mackay of Clashfern: In answer to Lady Taylor, I was thinking earlier, when I spoke, of the fact that he is the Justice Secretary and Lord Chancellor in that order. That is the way in which he is described. The Lord Chancellor has functions which one needs to draw attention to in respect of the Crown Office. He is the Keeper of the Great Seal and the Crown Office is responsible for all arrangements in connection with a general election and

by-elections; it is important that that be done in a way that commands confidence in its independence. At the State Opening of Parliament the Lord Chancellor still presents to the Queen the speech that she is going to make, and recovers it from her when she has finished, which used to be a more arduous escapade than it is now. These are important situations in which the Lord Chancellor is robed, and should be robed—I entirely agree with Lord Phillips about that. It tends to emphasise that the Lord Chancellor has more than one office if, in fact, he is going to be the Justice Secretary as well. I agree that the administration of the courts alone, which would be the typical Lord Chancellor's function, would be such a small proportion of the total expenditure of the Government that his influence as Lord Chancellor in the Cabinet, unless he had influence for some other reason, would not be very high.

Baroness Taylor of Bolton: When we talked about the Lord Chancellor aspect of the person who is performing this role, the phrase "constitutional propriety and responsibility" was used. I cast my mind back to when Lord Irvine of Lairg was in this role and the Government of the day were introducing legislation on devolution. Lord Irvine chaired that particular Cabinet committee because it was such a significant constitutional change. It was not concerned with the rule of law or judicial independence but was a big constitutional change. Do you think that a Lord Chancellor should have an eye on the implications of constitutional change in that way?

Lord Mackay of Clashfern: Certainly. I think that Lord Irvine chaired that committee of the Cabinet and a number of others. When I was Lord Chancellor I did not feel very inclined to become the chairman of Cabinet committees because I felt that, in view of one's position, the influential people on Cabinet committee should be the elected Members of Parliament, and one had to respect that. I did not feel very inclined to become involved in that aspect. But I entirely agree that that was very appropriate for Lord Irvine and as regards other committees that he has chaired as well.

Baroness Taylor of Bolton: Can we assume from what you have both said that section 2 of the 2005 Act, which talks about the criteria for a person to be Lord Chancellor, is pretty well meaningless? It sets out a range of phrases about experience but goes on to say "other experience that the Prime Minister considers relevant", which reinforces the point that it is basically the Prime Minister who makes the appointment as he thinks fit.

Lord Mackay of Clashfern: It does not appear to be a very tight restriction on what he can do. One has to remember the change in the oath as well, which is in section 6A of the Promissory Oaths Act 1868, where specific reference is made to sustaining the judiciary. Section 17 of the Constitutional Reform Act 2005 provides for that.

Q27 Lord Lester of Herne Hill: This is an "emperor's clothes" question. We do not have a written constitution, unlike the rest of Europe and most of the Commonwealth, and the law officers are members of the Government who give legal advice, unlike in countries such as Ireland, Cyprus or Israel. Suppose, hypothetically, that Parliament introduces an unconstitutional measure—no brown people coming into this country, as it were. Under our present system, all these formal safeguards that we have talked about amount to very little, do they not? If you look at the Cabinet papers, as I have done, about what happened in 1968 over precisely such a bill, the safeguards were a waste of time. Is it not time that we thought more deeply, beyond the forms and the clothing, about more effective safeguards—I am talking about constitutional safeguards.

Lord Phillips of Worth Matravers: If you are asking where that leads, it probably leads, first, to a written constitution and, secondly, to an overriding power of the judiciary, whether in the form of the Supreme Court or a constitutional court, to strike down legislation that is unconstitutional. At present we have an unwritten constitution, which has worked because the importance of our unwritten constitutional principles has been recognised by government. That is partly why the office of Lord Chancellor has had the

standing that it has, because the Lord Chancellor was the person one would expect to give authoritative advice on the maintenance of our constitutional principles. If things change, so that the Government no longer think that constitutional principles are of that much importance and are irritated by advice from pedantic lawyers pointing out what the rule of law says, one is in trouble.

Lord Mackay of Clashfern: I would like to try to answer that a little bit more. The law officers have been in government distinct from the Cabinet, always described separately. My understanding of the office of law officer is that in matters connected with the law, prosecutions or anything of that kind, he has responsibility. He is not a member of the Cabinet—he has no responsibility of the collective type. He has to give his own point of view and stand by it. He is entitled to take the views of his Cabinet colleagues if he wishes to, and give them such effect as he thinks right. However, he has the ultimate decision, and that is the foundation of our prosecutorial system, for example. The idea of going to a written constitution attracts some lawyers. The difficulty about that in our country is that it is not at all likely, certainly in what is left of my lifetime—which is probably quite short—that this country will accept rule by lawyers. The rule of law and rule by lawyers are not necessarily the same thing. The idea that there should be a court that tells Parliament what to do is something that our people, so far, will not wish to indulge in.

The Chairman: Thank you. I was briefly drawn to thinking about Europe when you said that, but I had better not draw you into that.

Q28 Lord Brennan: Lord Mackay, in your last answer you described the constitutional position of the Attorney General and law officers. In practice, in government, what is the constitutional interaction between Lord Chancellor and Attorney General?

Lord Mackay of Clashfern: My understanding of it—it was not always the understanding—is that the Lord Chancellor is not the legal adviser of the Government; the senior adviser to

the Government is the Attorney General. The Lord Chancellor's function is to ensure that, if there is a legal and constitutional issue on which it is necessary to take the Attorney General's advice, that is done. I have a number of examples in my head—I do not need to trouble you with them—where that happened and the Attorney General was then brought in. As you know, the Attorney General can take advice from anybody he likes, but he is ultimately responsible for the advice that he gives to the Government. Nowhere has that been more forcibly and clearly illustrated than in the case of Lord Goldsmith and the Iraq war.

Lord Lester of Herne Hill: Quite so, but in the case of the Suez affair, when I was in the army, we know that Anthony Eden's Government deliberately did not take the advice of the law officers about the legality of what they were doing. That illustrates, does it not, the fallibility of any system if there are people who are unwilling to work it properly.

Lord Mackay of Clashfern: I think that you will find, if I am not mistaken, that in that case the advice came from a quarter different from the one I have seen.

Q29 The Chairman: I have one final question. You have covered the ground and I will ask a question simply by way of reprise. We have covered the topic very well, but the question is: should there be a Lord Chancellor? If so, what should be his or her functions and, if not, who should perform those functions? This gives you a chance to roam freely—and please feel free to do so.

Lord Phillips of Worth Matravers: Should there be a Lord Chancellor? Tony Blair said "No, we'll abolish him", but it was then discovered that quite a number of functions go with the office. However, if one puts those on one side and looks at the Secretary of State for Justice and Lord Chancellor, and whether it is necessary to add the words "and Lord Chancellor", I would say that it is not necessary any more. But that does not mean that that particular minister should not have precisely the same responsibility and duty to take the

particular oath to uphold the rule of law and the independence of the judiciary. The Lord Chancellor's office is important at the moment because that is an oath that the Lord Chancellor takes in that capacity.

Lord Mackay of Clashfern: I would add that there is of course a provision that makes interchangeable the discharge of their duties by the secretaries of state. All secretaries of state are one—there is one office of secretary of state, as I understand the constitutional position—therefore the Secretary of State for Defence could be called upon to exercise the functions of the Secretary of State for Justice. However, the Lord Chancellorship is not subject to that rule and it is therefore extremely important that the title of Lord Chancellor be retained by somebody who has the responsibilities of the oath that is referred to in section 6A of the Promissory Oaths Act 1868.

The Chairman: Thank you very much. It has been a fascinating and extremely helpful session. I am sure that the committee is most grateful to you both for giving your time to be here. We shall read in the transcript what you have said with great interest. I have no doubt that it will contribute in large measure to our report.