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HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

TUESDAY 13 MAY 2008

PROFESSOR VERNON BOGDANOR CBE FBA, PROFESSOR STUART WEIR
and MR PETER RIDDELL

PROFESSOR STEVEN HAINES, MS ELIZABETH WILMSHURST
and PROFESSOR ADAM TOMKINS

Evidence heard in Public Questions 1 - 29

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Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill

on Tuesday 13 May 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L	Mr Christopher Chope
Campbell of Alloway, L	Martin Linton
Gibson of Market Rasen, B	Fiona Mactaggart
Hart of Chilton, L	Emily Thornberry
Maclennan of Rogart, L	Sir George Young
Norton of Louth, L	
Tyler, L	
Williamson of Horton, L	

Memorandum submitted by Professor Stuart Weir

Examination of Witnesses

Witnesses: **Professor Vernon Bogdanor CBE FBA**, Professor of Politics and Government, Brasenose College, University of Oxford; **Professor Stuart Weir**, Director of Democratic Audit, Human Rights Centre, University of Essex; and **Mr Peter Riddell**, Chief Political Commentator of *The Times* and Chairman of the Hansard Society, gave evidence.

Chairman: Can we thank you very much for coming along this afternoon to meet our Committee. We do apologise that we are just a few minutes behind and we will try and not keep you for longer than we need, but thank you very much indeed. Has anyone got any interests to declare among the Committee members?

Lord Norton of Louth: As Peter Riddell is appearing as Chairman of the Hansard Society I should explain that I am a member of Council of the Hansard Society.

Q1 Chairman: Are there any other declarations of interest? There is a list of interests that have been declared at the beginning which have been noted and are on the record. Perhaps we can return then to the business of the day, which is your evidence. The draft Bill and the accompanying White Paper mark, as you know, the next step in the Governance of Britain agenda and what we would really like, to kick off, is to ask your overall impression of the Government's approach to constitutional reform and whether you consider the Bill and the White Paper are appropriate vehicles for taking forward that agenda?

Professor Bogdanor: The measures in the draft Bill may be good measures or they may be bad measures, but I think it would be an exaggeration to say that if they were passed into law this would amount to constitutional renewal. It seems to me that there is a danger in the title of the Bill of raising exaggerated expectations which perhaps are not going to be a met and might perhaps lead to some popular disillusion if people really expected these proposals to lead to constitutional renewal. A part of the agenda in the White Paper, the section particularly connected with the Lord Chancellor, seems to me an attempt to reclaim powers that have been surrendered. I am referring to the suggestion that there might be targets in judicial appointments. Again, that might be a good proposal, it might be a bad proposal, but the Constitutional Reform Act specifically said that merit would be only the criterion for selection to the judiciary so that is a major proposal which would have the effect of reclaiming a power that was given up some years ago. The central theme of the draft Bill is to strengthen parliamentary accountability and, while that is obviously a good thing, I think it is reasonably fair to say that we are dealing with a part of the Constitution which, despite popular perceptions, is working fairly well, to the extent that it seems to me, if I may say so Chairman, that both the House of Commons and the House of Lords are much more professional institutions than they have ever been and much more successful at holding governments to account than they have ever been. I know that is not a popular perception but

that is what I believe. It seems to me that the part of the Constitution that causes the most problems is not the relationship between Parliament and Government but the relationship between institutions in general and what one might call the people or the electorate, and that is dealt with in the original document on constitutional reform in the section on localism where we talk about double devolution, redistribution of powers to local authorities, and so on. That seems to me what ought to be the central part of the agenda of constitutional reform, which I think would meet popular worries about the working of government, that the government is too much a matter of 'them', whether it be those in the Government and the Cabinet and those in Parliament and 'us'; we do not have enough influence in general over the workings of government, and I do not really think this particular draft Bill, good though it may be, really meets that central worry that I believe many people have.

Q2 Chairman: Professor Weir, you very kindly have offered us a paper on this and you use the expression that in your view it is simply a sleight of hand since generally the Government will still have the majority it needs. Would you like to expand a little on that?

Professor Weir: First of all, I think that what Vernon has said is the key to actually fulfilling the ambitions of the Green Paper rather more and that is to think about the rebalancing between the executive and local authorities. I do not think the concordat goes anywhere near beginning to fulfil that idea. As for sleight of hand, I also think it is very important that that Green Paper did actually recognise how damaging the resistance of Royal Prerogative of powers is, and will continue to be for some time, and therefore we think it is important that the Government has taken up the Public Administration Committee's timetable starting off with the priorities of war powers, ratifying treaties, and passports, but the real problem is they are giving power ostensibly towards Parliament and then they are taking it back with one hand or the other. They are retaining far too much 'wriggle room' to be able to evade the kind of accountability that is necessary, especially on very significant things like going to

war. I think I ought to add that placing the Civil Service on a statutory basis is a very important and a very genuine step forward. To some extent, my attitude towards the Bill is, yes, it is disparate but I think this is a time when we should take what we can get really because, from my point of view, the whole move towards constitutional reform in this country is beginning to founder generally, not just here, and so there is something in this Bill that is worth taking at the moment. I also think that Parliament needs to be more assertive. I agree with Vernon that there has been a marked raising of the game in Parliament recently, but I think it needs to go at least one stage further and I think we need to move away from a retrospective model of accountability, to one where Parliament can share with the executive in actually making policy and being consulted properly in advance. We have advanced in several of our publications, and especially in the foreign policy area that has been so, the idea of soft mandating which would allow select committees, as in Scandinavia, to share with ministers in the kind of deliberations that can lead to improved policy, and to hold the Government much more accountable when they go off to Brussels or to the IMF or wherever and actually get a report back on the basis of what has been discussed rather than just a ministerial statement. I think that is important.

Q3 Chairman: Before I call other colleagues, Peter Riddell, would you like to add something?

Mr Riddell: I have a number of hats. I am Chairman of the Hansard Society at the present time and I am Chief Political Commentator of *The Times*. The Hansard Society has got views and we did comment on the original Green Paper and I have asked the head of our Parliament and Government Programme to send it to your Clerk. Naturally what I am saying today is my personal view rather than the corporate view of the Hansard Society, which does not have views. What I would like to say is it is the glass half-full half-empty phenomenon. You can say looking at the totality, this is small stuff, which was the general reaction when we had the

statement from Jack Straw in March in relation to the big picture. There are a whole series of very big questions on Lords' reform and electoral reform, as Vernon and Stuart have said, central and local government relations, how far we can go towards a codified Constitution/Bill of Rights, those are the really big tricky issues. However, if you go back a few years to look at two principal things in the Bill, firstly (?) that was opposed by the then Prime Minister and (three years ago) the then Cabinet Secretary; that has all changed and, secondly, on war powers, and one of Lord Holme of Cheltenham's - if I can pay tribute to him as he died ten days ago, my predecessor as Chairman of the Hansard Society and Lord Norton's successor as Chairman of the Constitution Committee - major achievements when he chaired the Constitution Committee in the Lords was proposing the former which was largely taken up by the Government. When they produced that report in 2006 Lord Falconer, as Lord Chancellor, rubbished it, doing a parody of 'non-ripe time'. That has now been accepted and thus you have two fundamental things rejected two years ago now accepted. I think there are a lot of detailed points in both those proposals which no doubt we will discuss later but you have got to recognise that. In relation to the bigger picture, my concern is - and it runs through the whole basis of the proposals - how much is the Government just saying the executive is prepared to be a bit more transparent, create a few more hurdles to go through before it can get its own way, or how much is it really handing over to Parliament? I think that on a lot of the things, something which is non-statutory but was a big feature of Gordon Brown's statement last July for public appointments, really the power remains with the executive and there is little more both in transparency and one or two more minor hurdles have been created. Similarly, if you look through on war powers, there is a bit more but what has been given to Parliament is a bit limited. On the Civil Service the same, in a whole series of areas, the power really still lies with the executive. There was a very interesting exchange two weeks ago when Ed Miliband gave evidence to the Public Administration Committee of

the Commons in parallel, I know, to your own inquiry, when he was asked should the Ministerial Code be put in this Bill and he said, "There's a danger in that that it would make it justiciable," and I think that is a very interesting area of how much you are talking about the executive retaining control and how much the courts and the judges will become involved.

Q4 Lord Maclennan of Rogart: On that very last point, do the witnesses have a view about the desirability of basic constitutional provision being justiciable? What objection would they take? That is a general questions and perhaps as a particular question on this, the Royal Prerogative is a step but it is a very minor step compared with what was recommended by PASC, and they recommended that prerogative powers should be put on a statutory basis. Is that a view which is endorsed by the witnesses?

Mr Riddell: On your big question, I think there needs to be a very much bigger debate about the relationship between Parliament and judges to move on that road, which is why I agree with Stuart here; before we get anywhere near a codified Constitution we have got to have a much clearer view of what we think the relationship of judges is with Parliament than we have now. The controversies produced by the Human Rights Act, which are quite considerable, have shown some of the difficulties there. In relation to prerogative powers, I think more is achieved, as Lord Maclennan is implying, given where we started from. I think the proposal on war powers to establish a convention is a reasonable compromise but it needs to be tightened up considerably, particularly on legal advice. The proposal on legal advice is inadequate in the Bill and in the proposed convention on that. I think that is a reasonable one. On the other aspects - treaty-making and so on and so forth - they are fair enough.

Q5 Lord Maclennan of Rogart: Why should there be a compromise on the principle enunciated by PASC?

Mr Riddell: I think it is flexibility. If you could find a legal formula which was sufficiently flexible for an operational basis, you could. I think the convention combines the virtues of both but it has got to be a tighter convention than so far proposed and it has got to be much tighter on the provision of legal opinion. The key issue after Iraq was not whether Parliament votes or not, Parliament can always vote on anything and it is not beyond the wit of MPs to force a vote on anything at any stage, as you will know from your time as MP, Lord Maclennan. The fact there has not been one on Afghanistan is an interesting point to make. I think the key issue is the provision of information. The problem was in 2002-03 the nature of the information provided. You could also argue in relation to Afghanistan that John Reid, the Defence Secretary, provided inadequate information about the significance of deployment in Helmand. That should be made more explicit, that should be tightened up a lot, particularly on the legal side whether you should have full legal advice. There was a very interesting lecture which Lord Bingham did in Cambridge a couple of years ago now when he said that the normal client relationship should not apply in times of going to war; it is totally different from advising on other things. That is a point that I suggest you might take up on that. I would say on going to war that full legal advice should be available and you should tighten up that but beyond that I think the convention provides the right flexibility.

Professor Bogdanor: I believe one has to ask the question of what it is that judges can be expected to do. There is a great danger that we are asking judges to resolve problems which have already been resolved at a political level. For example, when those who were against the ban on hunting brought that to court, it rightly said this was a matter for the electoral and parliamentary arena and not for the judges, and that the position of the judges would be devalued if it was thought that they were to become, as it were, a third chamber of Parliament. The judges also cannot deal with matters which are really matters of personal relationships. I am strongly in favour of putting the Civil Service on a statutory basis but it would be unwise,

I think, to exaggerate what can be achieved by that. If, for example, a minister does not wish to listen to the advice of a particular senior official, it could hardly be suggested the senior official would take the minister to court; it is not really a matter for the judges to deal with, it is not a properly justiciable matter. Where judges are at their best I think is in dealing with the problems of people who cannot easily get into the electoral arena, small and very vulnerable minorities, asylum seekers for example and suspected terrorists and the like. There is a great danger of extending the judicial role beyond what it can bear. On the general question of the Prerogative, while the political case is there, on the question of war powers, which no doubt we will come to later, I wonder if people are not there trying to resolve what is a substantive problem via constitutional reform. By that I mean many people regret that they supported the Iraq War, they believe that they were misinformed and they were not told what the true situation was and possibly, if there was another vote, the voting would be very different from what it was, but in practice it is extremely difficult for any Government to take this country into military action of any kind without the support not only of the governing party in Parliament but also of the official Opposition. I can think of only one military expedition in the 20th Century which was supported only by the Government and not by the Opposition and that was the Suez expedition and I think that is one of the reasons that it failed because the official Opposition was not prepared to support it. I wonder what effect a parliamentary vote would have and indeed a positive parliamentary vote need mean very little. Neville Chamberlain won a positive vote in 1940 after the Norwegian expedition but that did not save his premiership. I think one is in danger of trying to meet what is a substantive worry that many people have about the Iraq War and whether they were right to support it, through a constitutional reform.

Professor Weir: I would like to pick up on Lord Maclennan's question. I think there is a very real role for the justiciary, in contradiction to my two colleagues here. I think that is one of

the main reasons why the Royal Prerogative should be put on a statutory basis as far as possible. If you rely on convention, especially with all the kind of flexibility that is in the current proposal, we are almost replicating in fact the process that led to the approval of the Iraq War, because the Prime Minister will control the information that is made available to Parliament, he will be able to time the debate and so on and some aspects of that, like the deployment of special forces in advance will still be able to happen. Obviously you need - and I take Peter's point - to be able to get the judiciary and the executive actually to understand each other's role, but I think the point about putting this on a statutory basis is that you do make it justiciable and you do therefore have some kind of control over process which we do not have at the moment, and the whole point of it being justiciable and a statutory basis is that there should be clarity in what is possible and what is not possible, how government should behave and so on, and I am afraid that the proposals in the White Paper and the Bill leave far too much wriggle room for government to evade any kind of proper accountability.

Q6 Lord Tyler: I think all three of our witnesses are inviting us to be more assertive on behalf of Parliament, which surely must be our role as a Joint Committee looking at this Bill. Can I ask Professor Weir to expand a little on the section in his paper about the Royal Prerogative specifically dealing with the dissolution of Parliament and, by implication, the way in which a new government gets its mandate. Is he saying in his section 4, paragraph 37 onwards, that an incoming government should remain in a caretaker position until the House of Commons has actually approved the new Queen's Speech and then, by implication, a new government, and is that not really meeting what Professor Bogdanor is saying, that it is those sorts of issues in terms of the Royal Prerogative that are of interest to the public outside the Westminster bubble rather than whether the judges should be involved in really rather technical, erudite and esoteric issues?

Professor Weir: I quoted Professor Peter Hennessy in the paper saying that there were five or six occasions when a small elite group of officials and courtiers' task was energetically looking at what might happen after an election on five occasions since 1974, and it seems to us that the proper way of deciding who the next Prime Minister should be should be to leave that to a vote in Parliament and to Parliament to actually decide who should be the next Prime Minister, rather than the Queen advised by whoever advises her. This is especially important in terms - and I am not saying there is going to be a hung Parliament at the next election - of sooner or later I suspect there will be a hung Parliament, and then the whole process of deciding who should form the next administration becomes even more important because it really should not be down to the Queen and her advisers to make the decision. It should be a matter of negotiation within Parliament and the parties within Parliament. I think we in this country place far too much emphasis on getting decisions through very, very quickly and I think this is one of the reasons that the idea of continuous government and governance is a danger, and I think we can well wait a bit before we actually decide who the next Prime Minister is going to be if we actually do the job better.

Professor Bogdanor: Our system is a parliamentary system and the test of whether a government has parliamentary support is the vote on the address that is presented. I think although in form it is true that the Queen appoints the Prime Minister, that is not the case even in a hung Parliament. For example in the hung Parliament in 1974, it was as a result of what the politicians did, it was very clear who was to be the Prime Minister and the Queen simply endorsed the decision which the politicians themselves had reached. That was also true in the two hung Parliaments of the 1920s, the Sovereign did not play an active role in those circumstances. On the question of dissolution, the question of whether Parliament should vote for dissolution is, in a sense, a political one and would not make any difference in normal circumstances because a government with a majority could always get that majority to

support a dissolution presumably. It would not matter when the Government did not have a majority, as in the circumstances in 1974, when Harold Wilson as Prime Minister was in fact able to choose a time to dissolve at his own convenience in October 1974. If the majority in Parliament had to support dissolution, that would give what one might call the pivotal parties in the middle, perhaps the Liberal Democrats and Nationalists, great leverage politically because they would then say to Wilson in the circumstances of 1974, "No, you cannot dissolve, we won't allow you to dissolve until conditions X, Y and Z are met." Thus it would alter the political balance power in the House of Commons. That may or may not be a good thing but it would be an alteration of the way things work.

Mr Riddell: Could I add on that to Lord Tyler, you have already addressed that problem with the Scotland Act. The Scotland Act specifically, mainly because the electoral system is highly probably going to produce no party having a majority, provides for the Scottish Parliament to vote and approve the choice of First Minister and thereby the Government. If there was either a change in the electoral system, which you would no doubt like Lord Tyler, I think you would probably have to put that in legislative form but *de facto*, as Vernon has said, that is what happens now but whether you make it statutory, you would if you moved to an electoral system which was going to move away a from majoritarian result. The Scotland Act seems to work perfectly smoothly and of course Alex Salmond does not yet have power over peace or war (even though it appeared so last week!) so it is slightly different which is the main argument for peace and war. We have an interregnum between the first Tuesday in November and 20 January in the States and, leaving aside minor powers, a major power, Germany, took two months before Angela Merkel was installed. Interim governments can deal with issues of peace and war and terrorism.

Q7 Lord Tyler: I am really asking our witnesses would it not be better if we are explicit that we are a parliamentary democracy rather than implicit? I confess to having an interest

because I have the scars of both February and October 1974, so I believe that if we are a parliamentary democracy the House of Commons should be where the power should lie.

Professor Bogdanor: Yes, I take your point, certainly on the formation of a Government. I think in the circumstances of 1974, Tony Benn said that "first past the post comes to be first past the Palace". This is highly misleading because the Palace does not actually play an active role and I think there would be a case for making that explicit.

Q8 Martin Linton: I want to take up Stuart's point about select committees. It relates to this because in our system, Stuart, the select committees tend to be independent ginger groups who hold inquiries and they keep the Government on its toes, but in the Scandinavian system that you referred to they are much more members of the executive and of course they do not really have the concept there of government backbenchers because every member of parliament is a member of a select committee which is an executive body which filters all ministerial announcements, so every member of parliament has a hand on the levers of power and it is a completely different approach. Do you think that is a direction in which we could go? One of the strange things about our system is we have these 250 or so Government backbenchers rattling around either being lobby fodder or sometimes being loose cannons but not having any clear hand on the levers of power whereas presumably one of the objectives of select committees was to give MPs more power not just more scrutiny.

Professor Weir: Yes, there was an excellent Hansard Society-commissioned report on accountability to Parliament which basically suggested - and Peter will correct me if I get it wrong - that Parliament should move to a much more committee-based process than it does at the moment so that committees took much greater leave. I am not quite sure whether they said that every Member of Parliament should be a member of a select committee or not but that is certainly what we have advocated in the recent work we have done. On making foreign policy, especially when you think about the role of scrutiny of European business, if

select committees were empowered by additional members and resources to be able to take on some of the sifting of European Directives and proposals then that would actually integrate it, so on agriculture, on foreign policy, or whatever, you are getting a more expert group of MPs looking at proposals and to, in a sense, mainstream European business along with a lot more of the foreign policy. I think that would an admirable way forward.

Q9 Lord Williamson of Horton: I wanted to ask a question or two on the ratification of treaties. It is fully covered in the paper which Professor Weir has put in but I have got two points. First of all, do all of you agree that this is a relatively significant proposal here in that of course there are circumstances in which government could not proceed to ratify a treaty. That is in my opinion quite a significant proposal and we should recognise that, but there are one or two points related to it on which I would be glad to have comment. The first one - and it is not commented on in detail in your paper - is what happens if the Government restarts the process and then again and then again? There seems to be a possibility in which you can restart the 21 days, and it is hardly commented on, but of course it is an important point in that you might then get back to circumstances when the Government would end up by ratifying it. So could I just ask for any comments on the importance of the proposal and any of the conditions - I quote one but there are others - which you might think significant?

Mr Riddell: Could I just say, it is important because it regularises the Ponsonby Rule and all that, and what has applied, and the fact that the EU treaties, which obviously you are very familiar with Lord Williamson, were anyway exempt from it in going through the parliamentary process of voted tax treaties. I was struck by that point again and again and again, perhaps a provision which says once a Session or something would be sensible there. My concern was partly defining the nature of treaties. A lot of the substantive documents are rather like statutory instruments and Directives. I saw one last week which was to do with missile defence and it was a memorandum of understanding between the US and UK

Government - far more important than 90 per cent of treaties going through, a really important statement. An earlier one at the end of 2006 was on Trident, the exchange of letters between President Bush and Tony Blair on that, and was far more important than any treaty. That is where I thought the weakness was because in practice something which was implementing agreements going back to the Act and the repeal and all the stuff that Macmillan did and so on and so forth, that actually is what should come before Parliament. I think that the definition of "treaty" and what was in it and what was actually being granted was desirable but no great shakes.

Q10 Lord Armstrong of Ilminster: I wanted to go back to the beginning of this discussion where I think all three witnesses in various tones of voice said that this was a half full glass or a half empty glass, and more trivial than real as it were. As one who has spent his career in the executive, I wonder whether there would be any support among the witnesses for the view that this constitutional reform is a never-ending process, it goes on and on, and it is an evolutionary process and whether there is something to be said for this Bill as being an evolutionary step forward where we can "suck it and see", as you might say, before decisions are taken as to whether to go further at a later stage?

Professor Bogdanor: I think that when Welsh devolution was being discussed the then Welsh Secretary, Ron Davies, said that Welsh devolution was a process not an event, a famous remark and I think that is true, as Lord Armstrong implies in his question, of constitutional reform in general; it is a moving picture. My criticism of the priorities in the Bill are simply this: that I think the whole phase of constitutional reform in 1997 has led to a very valuable redistribution of power but it has been a redistribution of power between various elites, elites in Scotland, Wales and Northern Ireland, the judges, government in London and so on, but the ordinary citizen, who may not want devolution and may not need to use the Human Rights Act, can say it has not actually brought me more power against the governing authorities, to

put it crudely, 'us against them', and it seems to me personally that the main priority for the next phase of constitutional reform should be to move in that direction rather than further redistribution of power between political and judicial elites.

Professor Weir: I think it is important to recognise that this Bill is, in a sense, only half what the Government set out in the Green Paper in July 2007, and the second half is precisely supposed to be dealing with the issues that Vernon has been raising. I think that is a very, very important missing element, and I do hope the Government is going to go further forward and faster in that process. I think to some extent the Human Rights Act has acted to improve the quality of life and the dignity of ordinary citizens, especially through the work of institutions like the British Institute for Human Rights, which has been using the HRA to deal with issues in care homes and in public services to improve their quality and to make the staff and the processes fully respect the dignity of the people that are involved there, and I think that has been important aspect.

Q11 Fiona Mactaggart: Following on from this issue about whether we are on a process and what is missing at the moment, I think Professor Bogdanor has made it very clear that his belief is the bit that is missing is the devolution of power to local communities. If you accept that this Bill is not dealing with all the most important constitutional changes that you think ought to be being developed now what, Peter Riddell and Professor Weir, would you add that is not there?

Mr Riddell: I would have everything that is here but with tightening up in various areas. I have already mentioned earlier war powers. You could argue various things about the Civil Service element and in response to Lord Williamson I mentioned treaties. You can park that and that is desirable, I am saying there is nothing undesirable, if you can tighten it up. What is missing are, in a sense, the bigger picture things, some of which are involved with what Vernon Bogdanor would describe as the 'elites', looking at the House of Lords obviously as a

big thing, and we are promised some Government proposals within two months on that. There is also the electoral system, where is power shared there, and central and local government. I think that is something where, leaving aside the judicial point, we cannot yet think of a codified Constitution because we have not conceivably a consensus on what central and local relations are, not just between the centre and local authorities but between the centre and parts of England; we have an unstable relationship probably between London and Edinburgh; the relationship with Cardiff is evolving, and so on and so forth. Those are big picture things where the debate continues, to take up Lord Armstrong's point, and I think it sounds too dismissive to describe this as a 'consolidation' bill but there are aspects of that about this. In order to get a further big push, we have got to have a clear idea on these other elements which I think are very important, particularly towards central/local, do we want to have a look at the electoral system, all these bigger issues, and particularly at this point of judges and Parliament because we have got to decide how much is justiciable. One thing where very soon we will be having a debate, the Government is going to produce its statement on the Bill of Rights, and it is quite clear a lot of that is going to be declaratory and deliberately non-justiciable, and that is absolutely fundamental to everything. Until we are clear on that, it is very difficult to see how a lot goes further forward.

Professor Weir: I agree with most of the things that Peter has said but I think in terms of local communities we need to look very, very carefully at the whole structure of regional and local government in this country. The regional structures now are almost wholly unaccountable and they are very, very far removed from the lives of ordinary people and their communities, but even local authorities. We have the largest local authorities in the Western world, so far as I know, and there needs to be some real effort to take decision-making at local level far further down the scale than it is and we need to really very seriously introduce a much more democratic process at regional level.

Chairman: I am sure this part of the discussion could go on for quite a long time, but I wonder if we could move to some of the specifics in the Bill and invite Lord Norton to ask some questions about the war powers aspect in particular.

Q12 Lord Norton of Louth: In a way it leads on from what has been said and you may think you have answered the questions. Peter Riddell made the point: how much can you do by legislation when you are dealing with what essentially is a political relationship and, if you take war powers, is it really a matter of statute or is it really a matter of having sufficient information? You can prescribe that Parliament votes on the issue because, as the Peter Riddle said, Parliament can force a vote anyway, the important thing is not being able to vote, the precedent being set; it is having sufficient information as the basis on which to make an informed decision. How can one prescribe for that for legislation? Does what is proposed here really get to the nub of the problem, should it go any further, or should there be some alternative for actually getting what Parliament really needs if you are actually going to change substantially the relationship between Parliament and government?

Professor Weir: I think that other countries manage to have a statutory basis for such decisions as going to war, and they seem to have enough flexibility built in. So I think it is important to have a statutory process simply because you can then start prescribing rules for the amount of information that is given. I think that it is very dangerous that the Prime Minister will still control what information is given to Parliament and the timing of any vote in Parliament, because those were precisely two of the defects in the process that took place in advance of the Iraq war.

Q13 Lord Norton of Louth: But how do you get the information? Congress is powerful, but in the last century the President deployed forces abroad over 100 times and Congress

declared war twice. It is not really the formal aspect; it is making sure that the legislature has the information necessary. How do we provide for that?

Professor Weir: That is why I think it has to be in statute, because it strengthens Parliament's ability to demand the information. We have seen, for example, with the Scott Inquiry where Mr Justice Scott, I think, was able actually to demand information, as in the precise terms of his remit, which information would otherwise have been withheld from him. Of course, if you give people the power to demand things, you are going to get the result.

Mr Riddell: My own view is you have got to tighten up the convention a lot and make it much more specific. Taking up Lord Bingham's point that this is different from other bits of legal advice, it is neither commercially confidential---. It is accepted that the full legal advice will be available when this power is invoked. I think that has got to be made absolutely explicit. It also has to tighten up, which is very vague in the convention, the terms in which a statement is made to Parliament on the length of time of a commitment. This really did arise over Afghanistan when we had what was described as the second deployment, not the 2001 one but the expansion in Helmand, when a statement was made by John Reid which has turned out to be rather different from what has happened, as 70 families know to their cost through the death of their children. It was not a peaceful thing at all. That should have been made explicit so there you have got a bench mark of accountability. I am with Vernon Bogdanor too: one should not push justiciability too far - these are things for Parliament rather than judges - but I do think the bench mark of what is required should be much more specific than is in the current bill in relation to your responsibilities.

Q14 Lord Norton of Louth: You mean embodied in a convention.

Mr Riddell: Absolutely, and absolutely explicitly so. The precedent - there is far too much wriggle room there.

Professor Bogdanor: If one looks at the history of these matters, as I said a bit earlier, there is almost a convention that one cannot go to war unless the official opposition also supports it. The question of legal advice raises an issue which is of great importance in this draft Bill, namely the position of the Attorney General. I think the difficulty over the Iraq war was that you had someone who was wearing two hats, one a political hat and one a legal hat, and the person concerned said that he could set up, as it were, a Chinese wall - I hope these metaphors are not getting too mixed - between these hats so that at one time the hat sat in one way and at another time in another way. It is like the position the Lord Chancellor used to have. Under one of his hats he was a member of the Executive, another a member of the legislature and another a member of judiciary. I think it is one of the consequences of the Iraq war that the public, in general, do not believe any more that people are capable of wearing more than one hat. The public, I think, believe that the powers that are given to a politician will generally be used for political purposes and so the fewer those powers conflict the better, and I think the whole question of the Attorney General raises very fundamental problems about the separation of powers and about how the position of the Attorney General is compatible with the independence of other authorities such as the DPP and the SFIO; how it would make sense to have a minister who is responsible to Parliament but yet responsible for the working of bodies which are independent. There is a huge area of difficulty here which, frankly, I think the draft Bill does not confront.

Q15 Lord Maclennan of Rogart: I am at a little bit of a loss to know what the panel members who advocate reliance on a convention mean by that. Do they mean that there is a formulation which Parliament has endorsed, and which is essentially a regulation, or do they mean some notion that the Executive can invoke and can at will alter if it does not seem apt for the circumstances in which the issue has arisen? It seems to me that the use of the word "convention" is to suggest that there is a practice which has been followed for a long time but,

in fact, it is providing a cloak for Executive discretion which does not actually have any binding effect.

Mr Riddell: As far as I understand the issue, I am sure if you talked to your noble and gallant colleagues in your House who have been former CDSs, their view is basically that the forces are not taken to court. The real issue is legal action against British troops. That is what it is about. I think you can harden up a convention, whether you call it a convention or whatever. The whole issue is: does this become liable to legal action against British troops? Not against government, against British troops - that to my mind is the fundamental issue - and I think there are understandable concerns, certainly from the generals I have talked to about it, of being tied up in legal action. This is nothing to do with Abu Ghraib or anything like that, but you get into a political dispute about whether the decision was taken properly by Parliament and that leads to soldiers being regarded as legally liable. That, I think, is totally undesirable.

Professor Weir: I am sure the whole point of having a statutory process is that you get the decision right in the first place, in most circumstances, and, therefore, you do not put troops in the front line, as it were, politically unless they have been sent to the front line militarily in the proper manner.

Lord Campbell of Alloway: I wanted to say briefly that the drift of the evidence we have heard is certainly, for me, a breath of fresh air. It is fresh but it is an evolutionary situation, but we perhaps have not moved in the right direction and we are seeking to move far too fast to no good purpose. On the question of Iraq, I think the sense - I am not sure of the evidence - is we ought perhaps to steady our approach. It is quite ridiculous to say, because we were all fooled by the intelligence, it does not matter whether the Prime Minister was or he was not because clearly everybody was and for some reason or other we went to war. We cannot go into that again, but in those exceptional circumstances it would be quite wrong to change our whole constitutional approach and to try and devise statutory provision and alter the powers

of the prerogative, because if we are going to war they have to be under the powers of the prerogative and it is idle to pretend that intelligence can be disclosed to either House, full, total, satisfactory intelligence, which justified action. You cannot do it. The evidence seems to me to be a careful approach, and this Bill as a whole does not really achieve any great advantage to the constitution.

Q16 Chairman: Would one of you like to comment?

Professor Bogdanor: If I may so, I do have a great deal of sympathy with those comments. It seems to me very difficult to define what armed conflict is. I think the last time we formally declared war was in 1942 against Siam. We saw in Bosnia, I think, how easy it is for what seems like a peace-keeping mission to turn very gradually into armed conflict. I think one needs to define very carefully what it actually means to go to war, to take military action, and I do think, as I said before, that in part we are trying to deal with a non-problem because I think it is very difficult for the Government to go to war, certainly without a majority of its own supporters, but without the support of the opposition. Secondly, we are trying to deal with a non-problem because people now regret, many, the way they voted on the Iraq war, but that would not have been altered if this particular part of the Bill had been on the statute book. If one played the film back, there would have been nothing different in that case or in any of the other military actions of the twentieth century. There might possibly have been a vote against the Suez expedition - I suspect not but it is possible - but that is a great exception, which perhaps does prove the point I have made again and again: how difficult it is to go to war if the official opposition do not support it.

Professor Weir: I would just like to make the point that the royal prerogative and the powers under it are far more important and far broader than simply the question of going to war or ratifying treaties indeed. All of our foreign policy, all our external policies, are basically conducted under the royal prerogative and very major issues of foreign policy, which have a

real profound effect on domestic policy as well, are decided in that way and, therefore, it is really very important to lift all of that out of the royal prerogative powers and have much more statutory-based powers so we have much more clarity of what is being done and we can broaden the whole process of getting foreign policy, European policy and domestic policy into one framework.

Chairman: I think we have been over-optimistic about how much we can get into this session, and so I am going to ask Lord Maclennan to ask a few questions on the Attorney General that he would like to ask and maybe if other colleagues could ask very pointed questions thereafter and anything else perhaps we could ask you to respond to in writing if there was anything additional.

Q17 Lord Maclennan of Rogart: Perhaps the core question about the Attorney General is described as the tension, which was mentioned in Professor Stuart Weir's paper, between a government minister acting as a senior legal adviser and the independent role that has to be considered in some of the other attorney's functions. Is that tension best dealt with by severing the functions, as is suggested in Professor Weir's paper, or would it be possible to contemplate the non-politicisation, if you like, of the role as a whole? Is there a case which ought to be considered for not having a political attorney?

Professor Bogdanor: It seems to me that if the Government wishes to appoint a lawyer as a government minister they should be perfectly entitled to do that, but that person should not be responsible for superintending the prosecuting authorities, the DPP and the SFIO, and so on. The Government's argument is that they need a lawyer at the heart of government who can be responsible for these functions, and I cannot understand why it should be that you need a lawyer at the heart of government and not, for example, a doctor at the heart of government, because, after all, government deals with health matters, or a teacher or an academic at the heart of Government. What is special about the position of lawyers? It seems to me, as I said

earlier, it does raise a serious problem if you say, as I believe you must, that the prosecuting authorities are independent. I think there is very considerable danger in the proposal in the draft Bill to allow the Attorney General, on grounds of national security, to direct a prosecution not be continued with because it would be perfectly possible for national security to be used as a cloak by a politician for some other matter, and there are suggestions, of course, that that has in fact happened in the recent past. I think these matters do need to be separated out, and it is certainly the case, as Lord Maclennan implied, that a number of countries which have a Westminster-type government like India and Ireland do have an attorney general who is not a minister, who is an independent figure. As I said earlier, if the Government wishes to appoint a political lawyer to the Government, then they should be entitled to do so, but that person should not be involved in superintending the prosecuting authorities.

Mr Riddell: I think there is an issue that there ought to be no part of the state which is not accountable to Parliament or the central state, and, therefore, I think there has to be someone who is accountable in that way. I do think that the regular attendance at Cabinet does produce more blurred lines in the sense that the Attorney ought to be called in only when there is a major issue on that. Also, in practice, in most cases, I think I am right in saying, and it certainly arose during Iraq, other legal advice is sought and often the Attorney is merely a channel for much more expert legal advice outside on that, and I think that where there is exemption, which is a national security exemption, from being involved in prosecution, again it has to be much, much tightened up to provide justifications, explanations, and so on, of the exemption to make it much harder than it was.

Q18 Chairman: I know, Professor Weir, you have a disagreement with that.

Professor Weir: I would only add to what has been said that I think it is wrong that the Attorney General is also the chief legal adviser. I think that should be depoliticised.

Professor Bogdanor: I do not agree with what Peter Riddell said - that every part of the state has to be accountable to Parliament. If part of the state, for legal reasons, is independent, which the prosecuting authorities are, that seems to me in contradiction to the idea it could be accountable to Parliament.

Mr Riddell: For policy. Perhaps I should say not only individual decisions but broad policy and money.

Chairman: I think we are going to have to leave it there. We are grateful for the very interesting session. If you would be agreeable, if colleagues who have not been able to ask questions because of the time restraint could offer that to you in writing and they could be responded to, that would be much appreciated. Thank you very much indeed.

Memoranda submitted by Professor Haines and Professor Tomkins

Examination of Witnesses

Witnesses: **Ms Elizabeth Wilmshurst**, Associate Fellow, Chatham House, and Visiting Professor, University College London, **Professor Steven Haines**, Professor of Strategy and the Law of Military Operations, Royal Holloway University of London, and **Professor Adam Tomkins**, John Millar Professor of Public Law, University of Glasgow, examined.

Chairman: Good afternoon, thank you and welcome to the committee. We are grateful to you for having made your time available and, Professor Tomkins, thank you for the paper that you presented in advance. We are conscious of the time restraint and we do apologise that we are a little late in kicking off but we will try and go as expeditiously as possible. Can I call on Lord Williamson to ask the first questions?

Q19 Lord Williamson of Horton: Can, first of all, I ask whether all of you share the view which I think is expressed by Professor Tomkins in his note, which I have read with great interest, that this is more of a tidying up exercise in which they have selected a number of things and a lot of other things are not covered? That is my first general question. As we are having to put a lot of questions together, I will put one general one and then one specific one. That is my general point. Is that what most people think? The second one relates to the ratification of treaties, which is a quite specific point. Do you think that the change which has been made is a really significant one because, of course, it does make it possible for Parliament to stop the ratification of a treaty, although you could represent it for another 21 days, which is a separate point? Do you think that is really significant, and, if so, do you think the conditions surrounding it are damaging? That is to say that, though there is that power, the exceptions and other limitations are important? I am sorry to put so many things in one question, but that is what we have been told to do by the Chairman, and I am doing it.

Ms Wilmshurst: I do not really want to talk about the proposals other than treaties and war powers, but, in general, on treaties, I do not think that what has been done is significant, I do not think it really attacks the main problem, and on war powers I think it is a big first step but the devil is in the detail and, as was pointed out by previous witnesses, most of the exceptions and qualifications take away from the big statement that is being made. On treaties specifically, as I say, I think, in fact, the proposal is largely presentational, apart from the fact that the Commons can, indeed, stop, at the end of the day, the Government ratifying, which is unlikely to be used very much. The proposals simply legislate for what is already done under the Ponsonby Rule. I see a real problem about treaties elsewhere, which is that Parliament does not actually scrutinise them, and the provisions in the Bill do not do anything about that, I think it would need to change in the committees, but I know these proposals have been looked at in the past to allow more committees to scrutinise treaties and Parliament has not really wanted to do that. So I see the problem getting Parliament interested in significant treaties and I do not think the Bill does that.

Professor Haines: I would prefer to keep off the issue of treaties. My particular expertise is in the war powers area. My only comment about the treaty proposals is that, of course, Parliament does review a lot of what goes into treaties in the process of making sure that the legislation is acceptable prior to government ratifying. If it did not do that, we would not be able to meet our international obligations. I have not concentrated very much on the treaty side of this, but for some members of the general public certainly, and I would not suggest members of the committee, the idea is that Parliament currently does not review anything to do with treaties, which I think is quite wrong. I remember some years ago, when I was looking closely at the law of the sea convention, for example, in order for that to be ratified there was a whole raft of legislative action that needed to be taken before government could ratify, and so I am not entirely convinced that everything is all so bad in terms of

Parliamentary scrutiny of treaty ratification. On the subject of war powers, which is what I really came here to talk about and feel I have got some expertise in, the proposal in the resolution, in effect, it seems to me, is largely what we already have because, of course, the reference to Parliament formally in accordance with the resolution is *de facto* already happening and, on that basis, I am reasonably content with it because the issue of the detail, what principally concerned me when the proposal was first put forward some of months ago, was that we did not get into a position where Parliament was actively involved in decision-making during operations. It very much concerned me that we were going to get into that sort of situation at one point. As the debate progressed it became clear that this was not the general feeling, certainly in those sessions of conferences, and so on, that I attended, that this was the way we were going, and I think the draft resolution contained in the White Paper is not too far wrong, frankly.

Q20 Chairman: We are going to come back on that a little more. Thank you for your paper as well. I did not say that at the beginning. We are most grateful. Professor Tomkins.

Professor Tomkins: The answer to your first question is, yes, I do agree with what I wrote a couple of days ago. I have not changed my mind in the last couple of days. I say it is a tidying up exercise not in any sense to demean it, there are some very important proposals here individually, but I rather agree with what Professor Bogdanor said in your first session this afternoon; that to call this Bill a Constitutional Renewal Bill is an exaggeration, I think, of both the terms "constitutional" and the term "renewal". What is, I think, particularly disappointing about that, if I may say so, is how big the gulf is between the rhetoric and the promise of the Green Paper last July and the delivery and the reality of the White Paper and the draft Bill itself now. The Green Paper was genuinely exciting and quite astonishing in certain respects. Some of the comments that were made by the Government in that Green Paper to the effect that it recognises that it is difficult, inappropriately difficult, for Parliament

to hold the Government fully to account in the exercise of its prerogative powers and, in principle, the Government conceded in that Green Paper, expressly conceded, that it would prefer to exercise statutory power to prerogative powers. These are big statements, big grand statements, that talk about an on-going historical transfer of power from the Queen and the Crown and the ministers of the Crown to Parliament; if only there were any delivery of that in the White Paper and in the draft Bill. The only prerogative power, and it is only a small part of that particular prerogative power, that is going to be put on a statutory footing if the terms of this draft Bill are enacted into law is some of the power to manage the civil servants. The war power will remained a prerogative power, albeit that its exercise will be subject to some parliamentary oversight, not much more than we already have by way of convention, apparently, and the effect, as has already been remarked, of the proposals with regard to the ratification of treaties really does not amount to very much more than legislating the existing Ponsonby Rule into statute. One can have two approaches, I suppose, when confronted with an issue such as this. One can say, in comparison with what I would prefer as an interested citizen or as a constitutional analyst, this is not what I would want, but, frankly, that is probably neither here nor there for most of us. What I think is perhaps a better way to approach it is to think: "Let us take the Government seriously in terms of what it proposed last July and let us hold the Government to account for the ideas, energetic and I think quite innovative, bold ideas, that were articulated in that Green Paper and ask the question as probingly as we can: why does the White Paper and the draft Bill that accompanies it fall so far behind the promise of the Government's own suggested reforms and analysis of the problems in last year's White Paper?"

Q21 Chairman: On a point of detail, do you think it is right that the Government should be able to introduce a treaty resolution if it has been rejected by the Commons and, if so, how soon or how often?

Professor Tomkins: I do not have a problem with there being more or less endless dialogue or discourse between parliamentarians and members of the Executive with regard to what should happen to a treaty that the Crown has signed but has not yet come into force through ratification. It seems to me that the Executive is likely, if I may put it like this, to be bloody-minded about it only if the Executive has reasonable ground for behaving in this way, and likewise with Parliament, and if there is a genuine disagreement, let that disagreement be had.

Ms Wilmshurst: The other thing is that it may be a treaty which can be subject to reservations, and the Government may decide to put in reservations after the Commons have said, no, or circumstances may change. Other states may become parties, which may shift the conditions for membership. One could think of all sorts of reasons why the Government should be able to submit and resubmit.

Q22 Chairman: Do you have a view, if the House of Lords rejects, on a vote, a treaty, how that should be treated?

Ms Wilmshurst: I think it was quite elegant, the suggested provisions, that you then do not go ahead, I think, unless the Commons come in say, yes. It does give the House of Lords a real voice.

Q23 Lord Maclennan of Rogart: In an earlier session, which I think some of you heard, this afternoon, Mr Peter Riddell said that he did not think (and I paraphrase what he said) that war powers should be placed on a statutory footing because it was necessary to have flexibility, and flexibility seems to be the argument that is being deployed quite generally against putting the prerogative powers on a statutory footing. Professor Tomkins, you have written about this. Do you think that argument holds up?

Professor Tomkins: With respect, no, I do not think it holds up at all. There are lots of examples on the statute book of very general statutory powers which are enjoyed by the

Executive - section one of the National Health Service Act is a good example: there should be a duty on the Secretary of State to (I forget the verb) to provide for a National Health Service. There was a lot of talk in the earlier session about justiciability. That in itself is not a justiciable duty, because it is a duty which is owed by the Secretary of State to the public at large and not to a particular group of identifiable potential claimants, but it is a perfect example, it seems to me, of a statutory duty placed on the Executive which has an appropriate but a very significant amount of flexibility inherent within it. There are lots of different ways in which the resolution versus statute argument with regard to war powers cuts, but I do not think that it cuts in terms of inflexibility or rigidity. For me, there are two points of constitutional principle at stake in terms of thinking about war power and legislating on war powers. The first is (and this is an echo of what the Government said in its Green Paper last July) that in constitutional principle it ought to be the case that the Government of the day has only those powers which the people, through their representatives in Parliament, have by legislation conferred upon it either expressly or by necessary implication. That, it seems to me, is a principle of our unwritten constitutional order and has been for some hundreds of years - since the mid-seventeenth century, I would date it - and so, if we are to take that principle seriously, it seems me to lead to the conclusion that all prerogative powers should be abolished and replaced with statute, and that seems to be the direction in which the Government was proposing to push in its Green Paper last July, which was, given that it was a Government paper, genuinely interesting. This is my second point of principle, I suppose. Even if that approach is disfavoured for some reason, it still seems to me the case that there is a very powerful constitutional argument in favour of subjecting the exercise of non-statutory or of prerogative powers to parliamentary account, and that, it seems to me, could be done equally well by statute or by resolution, and that is what is proposed here, of course. It is not proposed to turn a war power into a statutory power; it is proposed to subject the exercise of

the war power to rigorous parliamentary accountability; and there the issue is not whether you do it by statute or whether you do it by resolution, you could equally well do it by either; there the issue is what is the content of the resolution or what is the content of the statute, and that is an issue you might perhaps want to talk about in a few moments.

Q24 Lord Maclennan of Rogart: The issue of the protection of our troops, of our service men serving people, from charges of illegality has been raised. Would they be better protected by a parliamentary convention or by statute?

Ms Wilmshurst: In the Bill which was put forward in the consultation paper there was a specific provision ensuring that the troops themselves would have immunity from prosecution in relation to any doubt or question about whether parliamentary approval had been achieved or not, and it is perfectly possible to do. I was puzzled by Professor Bogdanor's insistence on that as a reason for not putting this in legislation. It is very easy to solve that problem.

Professor Haines: Can I just say that I have always been very bemused by this great concern about our troops being somehow legally responsible for a decision to deploy force overseas, and, obviously, the clear example of this sort of action is the Iraq invasion of four or five years ago. It is not they that bear that responsibility, and the sort of erroneous claims that have been made and, indeed, made by some people who ought really to have known better, that somehow members of our Armed Forces are likely to face prosecution for the fact that the United Kingdom arguably waged an unlawful military operation is simply not true. They do not have that responsibility. The way I describe it, if I am trying to describe it to people, is that the responsibility of soldiers, sailors and airmen is largely a tactical responsibility. The responsibility to decide whether or not we deploy armed force is strategic responsibility, and the only people that can be held responsible for decisions at each of those levels are those people that are exercising those responsibilities. It is not any part of a soldier or sailor's responsibility to exercise his or her judgment over the decision to go to war in the first place.

They are, of course, accountable to other things, like the law of armed conflict or international humanitarian law, as we often call it, the Geneva Conventions and so on and so forth, but in terms of the use of force, the decision to use force, this is not something that they are subjected to. If you are focusing in on somebody like, for example, the Chief of Defence Staff, then, clearly, the CDS, in producing his CDS's directive to mount an operation, has to consider, as does his staff, the legal side, but, as Lord Boyce did in the case of Iraq, that is a responsibility that discharges simply by asking government to confirm the legality of the action; but servicemen, generally speaking, are not responsible for those sorts of decisions.

Q25 Lord Morgan: It seems to me the thrust of what you have said is that we should have a different language, a different way of looking at the constitution, a more formal way, and a constitution that is based less on convention, which may or may not take a written form. It seems to me this underlines many of the points, and a point with which I agree actually, about war-making powers and the Armed Forces in other ways. Are you all really asking for a form of constitution of a kind that we have not had over the centuries and one which would involve active citizenship and formal ways of defining that citizenship? The other thing I would like to ask, slightly more specific, is about the provision of information. The decisions about war-making powers, whether they are taken through convention or through some kind of legislative procedure, depend on correct information being provided, including legal information perhaps from the Attorney General. How does one actually achieve that and how does one reach the situation whereby we avoid the ignoring of official information, as I gather led to the resignation of one of the panel, or whether, alternatively, as happened in the time of Suez, that information was mooted and then thrown away, and in this case the information from the Attorney General Manningham-Buller, who should have resigned but in fact became Lord Chancellor, that in fact information was taken from elsewhere. Without some kind of legislative formal sanction, how do we avoid that kind of subterfuge?

Professor Tomkins: In terms of your first question about the form of the constitution, I do not think I am advocating a new form of the constitution. No, I think I am advocating a strengthening of a very old form of the constitution. I think the British constitution is a parliamentary constitution. We have, in a sense, two sovereign authorities in the British constitutional order, we have the Crown and we have Parliament, and the grand narrative of British constitutional history is of a tussle of power between the authorities of the Crown and the authorities of Parliament. That is what the form of the prerogative is about. It is about Parliament trying to reclaim, or perhaps to claim for the first time, ownership of these relevant sorts of powers. It does seem to me that a resolution as opposed to a statute is a perfectly sensible way of proceeding here, and we have got a good relatively recent precedent - lawyers, of course, love precedents - in the resolutions that both Houses passed just before the 1997 General Election on ministerial responsibility and accountability to Parliament, which of course had been a matter of huge controversy during John Major's time in office, with several ministers, it seems to me, trying deliberately to rewrite the rule book that governed them because they could, because the rule book that governed them was an internal government document then called *Questions of Procedure for Ministers*, now called *The Ministerial Code;* and after the Scott Report, the Public Service Committee of the House of Commons, as it then was, chaired by Giles Radice at that that time, tried to take ownership of these questions and say: "Look, these are constitutional obligations of accountability that are owed to Parliament and we, Parliament, will take ownership of the rule book and we will say these are the terms and conditions on which ministerial responsibility will now be understood", and this was then written into the constitution in the form of the passing of these two parliamentary resolutions which are now in paragraph one of *The Ministerial Code,* but no longer for the Government itself to change when it suits the Government of the day because of the exigencies of any particular political scandal. The form of the constitution that

I am advocating in terms of reform of the prerogative is a form that follows on from this history, it seems to me, a history of Parliament claiming for itself the constitutional responsibility, the awesome constitutional responsibility, of holding the Government to account for what it does and for what it proposes to do. So I do not see it as a new form of constitution as a law or necessarily as having very much to do with active citizenship. I think it has at lot to do with active parliamentarians though. I suppose, if we were to pan back a little bit and to think about the vast array of constitutional reform that we have witnessed in Britain in the last ten or 11 years, it might be that we can say this about it. There are only really two great institutions that we have invented to which we can hold the exercise of government power to account - there is politics and there is law - and what we have done in the last ten years in the United Kingdom is greatly to increase the ability of the law, in particular the ability of the courts, to hold government to account. That is the most significant consequence, for example, and it is just one example, of the Human Rights Act. What we have not done very much of in the constitutional reform that we have seen in the last decade is to improve the way in which the institutions of politics - and, in particular, Parliament - can hold government to account. Again, that is why I thought that last summer's Green Paper was so genuinely interesting, because it seems to be recognising that and wanting to do something about it. On your more detailed point about information, this is not a new problem. Parliament wrestles all the time, on a daily basis, with government about access to information; it is what Parliamentary questions are all about. To go back to the Scott Report, which has been mentioned several times this afternoon, a big part of the argument about the Scott Report was all about the quality of information that ministers were prepared to give in answers to Parliamentary questions. Parliament, it seems to me, already has a whole range of offices that enable it to negotiate with the government about the provision of information: you have the Table Office, you have the Speaker's Office and now, of course, also you have the

Information Commissioner. It would not surprise me (and I am not a freedom of information expert) if between those institutions Parliament could not figure out a way of getting access to the information it needed in order to make a full and informed vote on whether to send troops into conflict overseas or not.

Chairman: Could I say, I do apologise to witnesses but I know that the Committee has to stop at about 3.30 because there is a Statement in the Commons. So what we would like to do in the last ten minutes is to look specifically at some of the issues relating to the war powers. I know we have strayed into them already, but I have Lord Maclennan, Lord Norton, Lord Campbell and Lord Armstrong. I wonder if they could be as brief as possible.

Q26 Lord Norton of Louth: It really follows up on what Professor Tomkins has said; he has indicated that it does not matter whether it is statute or resolution in terms of stipulating the right relationship between Parliament and government when it comes to the Armed Forces. In terms of the resolution, the appendix to the Government's paper provides us with a template (in the light of what Professor Tomkins has said I address this as well to Professor Haines), if you had to write the resolution, how much different would it be from what is actually in Annex A? I think Professor Haines said it would relate particularly to definitions within that. Is there anything that should not be there or, perhaps, more importantly, that is not there?

Professor Tomkins: I took up a lot of time with my last answer. Maybe I can refer you, Lord Norton, to my written evidence, because I actually address that question in paragraphs 13 to 16. I would prefer that the constitutional principles, I think, should inform this debate rather than in the way that it is currently drafted, with those points (a) to (f) that are listed.

Q27 Lord Norton of Louth: It actually fundamentally changes it. So, in fact, you want something that is very different, if you pursue what you identify there.

Professor Tomkins: It is different in the detail. The headline remains the same. The headline is that it remains a prerogative power, exercisable by Her Majesty's Ministers but they are accountable for the exercise of it to Parliament. I suppose what I am trying to do is to beef up what the accountability amounts to. So, yes, there should be retrospective approval if there is not prior approval; yes, there should be regular Parliamentary re-approval; yes, there should be a recall of Parliament if necessary – it should not be for the Prime Minister uniquely to determine what information is given to Parliament. I agree with the points that have been made earlier about legal advice from the Attorney General being disclosed in these sorts of questions, and the questions of the timing, again, should not be uniquely for the Prime Minister.

Professor Haines: I am reasonably happy with the resolution; I think, in a sense, it is telling us what we already know and what we already do. I was slightly concerned when I saw the consultative paper from the Ministry of Justice last November about reliance on the law of armed conflict as a means of defining what sort of military operation we were going to be seeking Parliamentary approval for. I am sort of persuaded, I think, that what we have got in the resolution is okay. The difficulty for me was at the other end of the scale; in other words, what I was saying was that I did not want to see Parliamentary involvement in the decision-making around all deployments of military force. I am very happy indeed (and, indeed, it already happens, does it not, with Parliamentary debates and votes in the case of the Iraq war) over major combat deployments along the lines of the Falklands, the two Gulf Wars and Kosovo. This is already happening, and I do not have a problem with it. Of course, in those circumstances we are talking about the law of armed conflict applying. I think that is okay. The other emergency deployments – the sort of thing that I was thinking of, like a non-combative evacuation operation, for example – would be covered in the resolution by the emergency condition in paragraph whatever it is (3.2). "Approval is not required for a

conflict decision if the emergency condition or the security condition is met", and the emergency condition is that a conflict decision is necessary for dealing with an emergency. A non-combative evacuation operation, for example, would be precisely that. So that resolves that. Can I just say something, though, since I am speaking, about this business of accountability? The point that I made to the consultative process back in January (and I copied that to the Committee in lieu of my proper submission later on) is that I believe in some ways we have got it wrong. If we are trying to restrain government in any way I think the answer is post-deployment scrutiny of the information. The information that is going to be provided by the Prime Minister, Government and so on in providing the backdrop to any decision is not going to be – this resolution would not have had any impact, for example, on the decision over Iraq five years ago; this resolution, if it had been in place then, would not have had an impact on that Parliamentary vote. The problem that I have, of course, with that vote was that I felt that the decision to go to war was wrong, and it was wrong for a variety of reasons, strategic as well as legal, but the legal one, in particular, I think is very important. I think it is important that Parliament has the ability to scrutinise very rigorously the legal basis for an operation. If that operation is determined to be unlawful then there should be steps beyond simply Parliamentary scrutiny, which I have mentioned in my submission. That is the end that I would like to see tightening up – the scrutiny process once the decision has been made and the deployment has been completed.

Ms Wilmshurst: If I can just add my tiny bit, on the question of timing – when should the Prime Minister go to Parliament to ask for approval after taking the decision – there is nothing about that in the resolution. There is the question of information - it is left entirely to the Prime Minister without any benchmarks. There is the question of re-approval if the mandate had been changed - it is left entirely, all of this, to the Prime Minister. The only way that I could see to solve these real difficulties would be to strengthen the Committee's abilities to

discuss and question the Prime Minister. I do not actually agree that the Freedom of Information Act is going to help us here; I think it really has to be Parliament, and, also, putting into the resolution some benchmarks as to what the Prime Minister should consider in giving this information. With the legal advice, the previous advisor stated that the Attorney General ought to give his advice and ought to be available to Parliament. What sort of advice would an Attorney General write if he knew it was going to be available to Parliament? What sort of advice would he have written on Iraq? I know exactly what he would have written; he would have written the good bits, he would not have written: "No, Prime Minister, I must advise you …"; he would have given that orally to the Prime Minister. I think it has to be for Parliament to say: "We will call in the Attorney General and question him, and call in the Prime Minister, or whoever, and say: 'This information – we are not sure it is right'", and do it in a Committee structure, and if it is necessary to have that Committee not available to the rest of the House, then fine.

Professor Tomkins: There is just one tiny point: would there be anything to stop Parliament from seeking its own legal advice?

Q28 Lord Maclennan of Rogart: Is there not a difficulty with a resolution approach that that is something which can be altered in the light of the circumstances of the day, whereas a statute has got the force that it is there and it is the backdrop against which the executive has to take its decision.

Ms Wilmshurst: It is for that reason that I would have a preference for a statute, yes.

Q29 Lord Maclennan of Rogart: Professor Tomkins has six points he has made in paragraph 12 of his paper, all of which ought to be in the resolution, if there is a resolution. They would equally be capable of being translated into a statute position.

Professor Tomkins: They would. As for questions of content it does not matter whether it is a resolution or a statute; you can have the same language in either a resolution or in a statute.

Chairman: I wonder if Lord Armstrong and Lord Campbell will forgive me, because you were to come in, but I am conscious of my MP colleagues. Are they able to stay for five minutes? With some reluctance, I can see!

Mr Chope: It is only that, as you know, Chairman, if you are not in for the beginning of the Statement you rule out the opportunity of asking any questions.

Q30 Chairman: I think, probably, we ought to call a halt. I do apologise to the witnesses because this happens in Parliament. Can we thank you very much for coming, and can we add that if there is anything we wish to ask you – and you have been already very kind – you will be able to respond to the questions we did not get round to?

Professor Haines: Certainly, yes.

Chairman: Thank you very much indeed.