HOUSE OF LORDS

HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

Wednesday 21 May 2008

MR SEBASTIAN PAYNE, MR PETER FACEY and MR MICHAEL HAMMER

RT HON LORD FALCONER OF THOROTON QC

Evidence heard in Public Questions 141 - 216

2.

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Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill

on Wednesday 21 May 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L

Campbell of Alloway, L

Fraser of Carmyllie, L

Gibson of Market Rasen, B

Hart of Chilton, L

Maclennan of Rogart, L

Morgan, L

Norton of Louth, L

Tyler, L

Williamson of Horton, L

Mr Christopher Chope

Mark Lazarowicz

Martin Linton

Fiona Mactaggart

Emily Thornberry

Mr Andrew Tyrie

Sir George Young

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Memorandum submitted by One World Trust

Examination of Witnesses

Witnesses: Mr Sebastian Payne, Kent Law School, University of Kent, Mr Peter Facey, Director, Unlock Democracy, and Michael Hammer, Executive Director, One World Trust, gave examined.

Q141 Chairman: Can we welcome you very much to the committee and thank you for offering your time this afternoon to answer our questions on this inquiry. You need me to tell you - it is a formality - that members of the committee who have interests have declared those interests and a record of that is available also on the website. I do need to ask members if there is anything beyond that that they wish to declare. If not, welcome again and thank you for coming. I wonder whether I can start by asking what your opinion of the Government's proposals are for the resolution setting out the procedure for the parliamentary approval of the deployment of troops and, in particular, how could the Government draft detailed Commons resolutions, or - the suggestion that they make - how could that be improved, if at all, and, indeed, your view generally on that particular part of the proposal? Who would like to start?

Mr Payne: I am happy to start. I am Sebastian Payne. I would like, if I may, to answer that and make a couple of introductory remarks, because the questions that you pose, and some of the questions that you have asked in previous sessions, have tended to attempt to go at least into the fine detail of the drafting of the resolution, and I think some of the point of view gets lost; so I would like to say just a couple of words concisely. I certainly welcome the Government's impetus to constitutional reform, and that has been evident in all the debates in the Commons, the Lords, but with regard to the draft resolution on war powers, it gives the Prime Minister so much discretion it is far from obvious that it changes the

current position greatly. I think that is where the joint committee's over-arching question which you published is so important. Do the proposals rebalance the power between Parliament and the Government? My answer to that is, no, they do not. The reason for that answer goes to fundamental constitutional issues. You are asking us to discuss the detail of the resolution, but you are also concerned with does this deliver a rebalancing of the relations between Parliament and government, and I think the reasons for that failure to rebalance power can be summarised very succinctly. First, the Government controls the numbers in the House of Commons and the legislative programme and, secondly - which, of course, everyone is familiar with but it has a fundamental impact on that balance - the legal form of the Government's power, namely the Crown and the Royal Prerogative, place the Executive's authority, in effect, beyond the control of Parliament and, in effect, beyond the control of the courts and, also, those powers lack legitimacy. So I think the legal form of these arrangements, set large in terms of the Executive's powers in general under the Crown and in specific in the war powers, in fact, mean that the legal form determines the outcome that Parliament has less control than it might otherwise have.

Q142 Chairman: Before going on to your colleagues, if you say that the objective is not met, whatever the resolution says, what is your solution to the objective?

Mr Payne: The over-arching objective is this, and it is not something that would come out from any fine detail examination of the resolution. I think the legal form of government needs to be changed. In essence, the idea of the Crown as the legal entity and all the powers wrapped up in the Royal Prerogative are unworkable and, fundamentally, has to go. Quite frankly, I think the only possible way of doing that is through a written constitution, because it is such a fundamental change that no statute is going to deliver that.

Q143 Chairman: I am sorry to press this.

Mr Payne: Please do.

Q144 Chairman: That is a rather grand solution.

Mr Payne: It is, of course, a grand solution. You are saying, "We want to respond quickly to the Government by mid-July", but if you want an answer to what the problem is, then that is my answer; that in fact this sort of change is merely tinkering and it does not rebalance the power. I know Lord Norton in a previous session said there were three alternatives: to do nothing, the status quo resolution or a statute, but that, of course, is not the only option. There is the option of fundamental constitutional change, and, although I am happy, of course, to discuss all the pressing details, if you want an answer of what is the ultimate solution as far as I am concerned, there is a fundamental problem with the legal form of government, and I would add to that, not just the legal form, but also the political dynamics that flow from that, which is the institutional arrangements within Parliament between the Executive and the members of Parliament.

Chairman: We are going to come to your colleagues in a moment, but Lord Maclennan wants to come in.

Q145 Lord Maclennan: I want it to be quite clear that, although the task of getting a written constitution is a very major one, do you believe then that the only way to go for it is a big bang or are you prepared to see an incremental approach which could be by statute? Some aspects of the prerogative could be brought within a code or abolished in respect of certain powers at present?

Mr Payne: There are two aspects. Will the incremental approach deliver what I think is needed? The answer is, no. This is endemic to discussions throughout academia, Parliament and the press. You can talk about evolutionary change, but what in essence is wrong is so fundamental that I do not see how evolutionary change can deliver that.

Q146 Lord Maclennan: We are talking just about war powers.

Mr Payne: Then I come on to your second point: since the understated part is we are not going to get a written constitution, what can we do about it now - which I take to be the gist of your second point. I am actually against a statute. I know from your previous comments that perhaps you believe it is appropriate, but my concern about a statute is the impact of drawing the courts into adjudicating on these issues. That may seem contradictory, but it is actually not contradictory because we would expect the Executive to have high powers of discretion in war, and a written constitution can actually deliver

to the Executive appropriate discretionary powers. So there are two angles: one is how is the power encoded, and, secondly, what is the appropriate level of discretion for the Executive, and I think that a statute, under the current arrangements, is, in fact, undesirable. I know it may seem contradictory, but it is not contradictory, because the courts will be drawn in and, as the members of this committee may well be aware, the case of Gentle, decided by the House of Lord only a few weeks ago, shows all too clearly the scope for the appellate committee to be drawn into these matters.

Chairman: I am going to bring in Andrew Tyrie and then I promise that the other witnesses will come in, but I do so want to finish this point.

Q147 Mr Tyrie: You have answered three-quarters of what I was going to ask, I think. You have said the only meaningful way of doing this is with a written constitution. If we do not have a written constitution you do not favour a statutory approach but you would prefer to go down the road of a convention. Do you think that that confers any additional benefit beyond window-dressing?

Mr Payne: I think that it does confer a benefit in that it crystalises attention on these issues. It reverses the underlying assumption, which is the expectation that Parliament will be consulted. Then, of course, the problem is in the detail, which is what is going to happen in practice if this resolution is put into effect? So, yes, I do think it confers an additional benefit, but it does not rebalance the constitution. By the way, I am not here to knock the Brown Government's proposals, I welcome any stimulus to constitutional reform, but I do not think it is extensive enough.

Q148 Chairman: Peter or Michael.

Mr Facey: We do not believe that the Government's proposals go far enough. I would agree that the ultimate solution would be a written constitution, but, as a democrat, the only way to do that would be probably a constitutional convention, and I do not think that is within the power of this committee or us at the moment to deliver. Therefore, we would have preferred legislation rather than a resolution, but I think I recognise where we are and the likelihood of legislation is slight. We were involved in two attempts at private members bills to get legislation into the statute books, and they ultimately failed, but we do have some real policy differences between ourselves and the Government position. With do think there should be retrospective authorisation, we do think there should be regular reporting back

and it should not just be Parliament authorising action-decisions, we think there needs to be scrutiny of the decision-making process, not just authorisation of a decision, and we also believe that ultimately there should be a case for a joint committee to scrutinise the whole area, modelled on the German Defence Committee, which would be a committee of both Houses.

Mr Hammer: May I preface what I am saying. At the One World Trust what we are looking at is not necessarily a political solution or the viability of political solutions, but we are looking at what is being proposed from the angle of the accountability of the governance systems. That where we are trying, through our research, to develop our expertise. I think from that perspective our starting point would be very similar to that of Sebastian Payne, in the sense that in terms of the overall balance, in terms of the sharing of power on these decisions, the proposed war powers resolution does not really achieve a change of the balance. Our conclusion is probably, in the very, very long-term view, similar to Sebastian Payne's in saying that a written constitution is certainly desirable, but I think, in the meantime, I would be very happy to settle for a statutory solution in the sense that Parliament has the power to approve the deployment of troops and the use of force abroad through an Act of Parliament and should also have the right to review those decisions and have the power of reapproval. We have looked a little bit at comparative solutions in other countries, and even though several models may not be directly appropriate to the United Kingdom, such as very strong parliamentary control models that we have, for instance, in Germany or very strong budgetary control systems like in the United States, the overall impression that we get is that a statute-based solution does actually not prevent a government from taking swift action and protect the interests of troops. So the arguments which have led to the proposition of a large degree of discretion for the Prime Minister in the war powers resolution as currently proposed do not really seem to be substantive enough for us to actually say this is the right way forward. We would suggest that a statute-based solution is adopted, and it may in the long run pave the way for a written constitution, but that is certainly, I think, out of the question for this current process. The other point that I think I would like to briefly address in terms of the element of discretion is about the provision of information. We believe very strongly that for Parliament to play a role-making a decision it needs to be very well informed. That does not necessarily mean that all of the information that Parliament receives is necessarily put into the public domain at any given moment when it is actually passed on, but I think it does mean that if we are expecting parliamentarians to play the role that they are mandated to play by the people, they ought to be properly informed, and in that sense the war powers resolution currently has a huge degree of discretion for the Prime Minister to

control the timing of when information is being passed on but also how much information is being passed on and also, crucially, to whom. We feel that that solution needs to be addressed, and maybe that is where I can pick up your comment about the role of a committee to oversee these things. For us it was interesting to see that in the National Security Strategy the Government is very much saying there ought to be a committee that is overseeing the implementation of the National Security Strategy. We suppose that the use of force abroad is part of the National Security Strategy and, therefore, a committee that is not appointed by, and not reporting to, the Prime Minister but a full parliamentary committee to oversee this could very well be a useful tool actually get Parliament to perform its role that it is performing very well on many other domestic policy issues. So, if we are looking at the rebalancing of power, then maybe there is a possibility for Parliament to learn of the very positive and good practice in the monitoring and oversight of domestic policy issues and apply those also to the areas that are currently protected under the Royal Prerogative.

Q149 Chairman: Two of you have said that you prefer the statutory-based solution rather than simply a resolution. There seems to be some reluctance by government, in part because of the possible legal liabilities that may, in consequence, appear for soldiers and other personnel. Do you have a view about that at all?

Mr Facey: I do not actually think, by having a statutory basis rather than simply a resolution, that you are opening up our troops to legal challenge to themselves. I think if the Government carries out the due process, I do not think it is possible for that to actually happen. I think, by doing it the way the Government proposes, you are creating more ambivalence and more wriggle room, which ultimately, I think, will actually serve our troops worse than having something which is clear and concise and where people actually know what is the case; whereas in what the government is proposing there is too much room to wriggle around; it becomes very difficult.

Q150 Chairman: Do you share that view, Mr Hammer?

Mr Hammer: I think I would take it from a different side of things. What is the fear of somebody who, on behalf of the state, in the United Kingdom or in another country that has a democratic oversight process over its decision-making, takes a decision that takes armed forces into conflict? If the Armed Forces commit war crimes, crimes against humanity or genocide, there are very clear rules under

international law how to deal with that. Currently the established assumptions about state immunity protects, of course, the United Kingdom as a state from prosecution as such, and so if the concern was that the Prime Minister was being taken to court for taking a country into an armed conflict situation that was later one considered to be the wrong decision, then it is the due process by Parliament that can best protect the office holder from being accused of having taken a wrong decision. However, if the due process is seriously flawed because the people who were supposed to provide the balancing view do not have the right information, not the complete information, and there is no reporting on these issues, then, of course, further problems could arise, but I would not share the big concerns that seems to be there; that by not going for a statute-based or by going for a resolution-based solution there would be greater or lesser protection. I think it is the due process involving Parliament that will actually protect the office holder, because the decision is being considered to be legitimate, and that is, I think, what we need to achieve. At the end of the day, there is probably not going to be any Parliament which is going to vote unanimously to take the country into a situation of armed conflict; you will always have a division on these issues; and so the question cannot be whether you can please everybody with a decision but whether the due process is supporting those who make the decision in the best possibly way.

Mr Payne: I would like to come in on that. I do not know the full extent of Peter Facey's assumption that there is no risk, but I know that on 13 May you were told, in no uncertain terms, by one of the witnesses that it was simply untrue, the fact that soldiers could face risk of prosecution. I think that that suggestion that you were given is just not accurate. In fact, I would like to draw the committee's attention to the judgment of the House of Lords in Gentle v The Prime Minister, in particular paragraphs 22 and 23 of Lord Hoffman's judgment, where he indicates that the International Criminal Court Act 2001 gave effect in domestic law to the Rome Statute of the International Criminal Court, and he elaborates. Obviously, I am not going to read it out, but he says it is of the utmost importance for soldiers to know that their actions are lawful and that the definitions of war crime, both in the Rome Statute of the International Criminal Court and in the International Criminal Court Act 2001, are drafted very widely. That is why Lord Holme and his committee were concerned about the legal effect. Indeed, it indicates the scope. Why was Lord Boyce so insistent? Why did we have the whole scenario with the Attorney General? Lord Boyce insisted on legal advice for exactly that reason. So I think it does no service to this committee to downplay that risk, and that is why, in answer to Lord Maclennan's question, I am against a statutory ground.

Q151 Baroness Gibson of Market Rasen: I think it would be helpful for the committee to know what your view is about the proposed definitions, in paragraph one of the draft resolution, of conflict decision and UK forces?

Mr Payne: Yes, I think this is quite revealing. My advice to the committee, if they ask for my opinion, is that they should compare the draft resolution with the convention suggested by the House of Lords Committee, and you should see what has been taken out in that difference. For instance, in the proposed convention suggested by the House of Lords Constitution Committee, rather than focusing on conflict, instead of talking about conflict decisions and UK Forces, they talk about deployment, inter-actual or potential armed conflict. I know when you had the former chiefs of defence staff in front of you the other day they could not answer it, and one of the members, I forget who, said this is like a theological debate between faith and belief. I think the problem with these definitions is you are being asked to resolve a problem that the Government has created by this. I think this is a case of the tail wagging the dog. It is not, "How can we explain away this theological complication which the chiefs of the defence staff cannot answer", the question is, "What do you want in the resolution and, therefore, how should it be worded?" It seems to me a good starting point is to turn to the convention proposed by the House of Lords Committee. The second thing is, I think Parliament should hand this problem back to the Government and say, "Okay, you define it and say what is excluded." Why should they suggest something that nobody can define and say, "Okay, armed forces consistent of all these things but X, Y and Z are to be excluded"? Let them defend that in debate. Why are they excluding? I think that is a far more practical way. You cannot answer this, it is evident, nor can any of the witnesses, so why go down that route at all?

Q152 Chairman: Does anyone share or disagree with that?

Mr Facey: I would agree with that totally.

Mr Hammer: I think, maybe as a comparative example, it is useful to look at what good practice in accountability systems reveals about what a good policy is for organisations generally. People usually tend to say, if you want to have a good policy of accountability, then be very clear about what you want to report on and what you want to decide, but also (and it comes back to this question of what the

exclusions are) define the exclusions, first of all, use a very limited list and define them as narrowly as possible. That, I think, is the problem or the concern that I would have around a term like "conflict decision", because it is very unclear actually what the decision is supposed to be about and the exclusions later on, as proposed, are, again, very much up to the discretion of those who take the decisions. I think that if there was any advice on the drafting, it was to go back and to say: be very clear about what you actually want to achieve with that decision and draft a list of exclusions which is, first of all, limited and very, very precise in terms of what it actually excludes.

Lord Armstrong: What was your opinion of the Government's proposed definition of "conflict decision" and "UK forces" as set out in paragraph one of the draft resolution?

Q153 Chairman: I think you have in part dealt with that. I wonder if we can move on to the area of the Prime Ministerial powers. I do not know if that is an area that you or perhaps Lord Williamson may want to pick up on.

Mr Payne: Could I add a rider which might be useful to Lord Armstrong's point? I would like to draw the committee's attention to Professor Peter Rowe's very helpful memorandum which is in the House of Lords Constitution Committee's report, where he sets out in considerable and scholarly detail what is meant by deployment. If one is focusing on deployment rather than conflict decisions, you might get a different result.

Chairman: Can we move on to Martin Linton.

Q154 Martin Linton: Following up on exceptional circumstances procedure, I wanted to ask you about various scenarios that one could imagine which would leave Parliament with no say about armed conflict. Shall we say some African country takes over St Helena, a battleship is sent off from Plymouth but without any announcement because of the need for secrecy. It becomes known when it is halfway there, and there is a parliamentary debate, but Parliament cannot take a decision because the exceptional procedures clause has been invoked. I wonder what your views are about whether it is possible, having promised Parliament a say in armed conflict, to have this very wide catch-all phrase of "exceptional" or "secret" - and I can imagine lots of other circumstances, "special forces" as well - to take it out of parliamentary accountability?

Mr Facey: I think overall the definition is too broad. It is not just the example you gave it. It is also the simple example that, if Parliament was in recess, that would be regarded as an exceptional circumstance, there would not be time to debate it and, therefore, effectively, you would only get Parliament being informed after the facts. There needs to be very tight definitions of "exceptional circumstances", there also needs to be retrospective approval. This is why an Act is so important. It is not just about having a situation where, if, for exceptional reasons, you cannot actually get parliamentary approval, you then simply need to report to Parliament. There needs to be a process whereby, if that is the case, and it should be limited to circumstance, then afterwards, giving your example, there should be an ability to have a vote to actually do it so that you can retrospectively approve that decision. The Government itself has said that would be demoralising to British Armed Forces. The reality is that in the circumstance you describe there would be a debate going on, it would just happen to be on News Night, the Today Programme or in The Sun, and I would think that would be more demoralising to British forces than actually having the debate in Parliament and then having a vote in Parliament which, ultimately, is most likely, in those circumstances, to support the Government action. In which case, as to the morale of British troops, they would know they were going into conflict with the full support of the British Parliament. I think you have to be very careful about the definitions and make sure that the words "exceptional circumstances" are as narrowly defined as possible and, please, remove things like Parliament being in recess. There needs to be a way for Parliament to be able to recall itself.

Mr Payne: The first wave of this debate, I think, aimed not in this committee but immediately after the Iraq War, was partly motivated by the desire to limit the possibility of war. Clearly, after the Constitution Committee's report, the debate moved on to trying to resolve the problem about the military being effective. Nobody, as far as I am aware, wants an ineffective military, not able to be deployed appropriately. To answer to your question, the problem is the interconnection of all the elements of discretion in the hands of the Prime Minister. Of course you would expect the Prime Minister or the Cabinet - it is rather ambiguous about who takes this decision, it says "or Cabinet" - but, anyway, you would expect the military to be able to respond at the instructions of the Government in the case of emergency, but it is then the question of: it is the Prime Minister who decides whether to bring to it Parliament, it is the Prime Minister who decides whether the security conditions or emergency conditions prevail. If you take the sum of all the discretions, of course what I take to be

your concern, which is effectively a loop-hole, could occur, but, of course, the Constitution Committee suggested that if there was an emergency the Government should provide information within seven days. That seems to me imminently sensible in that it imposes a discipline which is useable in a real emergency but not exploitable.

Mr Hammer: Just to add another element of complication, in 2007 the Government committed, in one of its public service agreements, to promote the responsibility to protect. Whether the implementation of that doctrine or the promotion of that doctrine is part of the National Security Strategy, in which it is also mentioned, or not is maybe a different question, but I think for me the question that arises from that is that in the future there may very well be cases where under that doctrine United Kingdom military personnel might be involved abroad, they might, under authorisation from the United Nations, be using force, and the question is whether the current formulations cover those potential cases as well, particularly also, coming back to this question of individual liability: because the United Kingdom, whether we like it or not, contributes actually a relatively limited number of people under United Nations peace-keeping operations, which means that acts of use of force would come down very clearly to very small groups of people, and so the more precise any legal checks can be, whether it is in the resolution or whether it is on a statute base, the better it is because the range of issues that might arise in terms of use of force abroad, I think, would just lend themselves to create confusion unless there was a very clear definition of what the text is actually supposed to address.

Q155 Lord Williamson of Horton: I would like to direct my question to all the witnesses, but I think that Mr Payne has already carried his logic right through to a constitution - of course I appreciate that as an honorary doctor of his own university - and Mr Hammer has commented usefully on a number of these points, but I would like to ask, more specifically, about the discretionary power of the Prime Minister under the draft resolution. Leave aside for a moment whether we should not have a resolution, what we have got here, under the draft resolution do you think (and I think Mr Facey might like to comment particularly on it) the Prime Minister should have the final say over such issues as the information given to Parliament - we all know the Iraq case, and it is not the same, but it was much disputed and the public knows a lot about it - and the exact timing of the vote and the decision whether exceptional circumstances do apply? At the moment we are confronted with a huge amount of discretion. I do not know if you would like to comment on that.

Mr Facey: I happen to think that the Prime Minister is given too much discretion in this proposal. For accountability to be meaningful, Parliament not only has to have the ability to take the decision but it has to be an informed decision. If you go back to the Iraq conflict, a lot of the concern was whether Parliament was sufficiently informed to take the decision it did. We have proposed the creation of a joint committee which would have the ability to take evidence, to scrutinise, to meet in secret, to be able to get information and then to give its opinion to Parliament as well as the opinion of the Prime Minister of the day so that Parliament would effectively have, yes, what the Prime Minister proposed, but would actually have a check on itself to enable it to take the final decision. We are talking here about whether or not British troops go into a situation where lives would be lost, either theirs or others, and that should not just be on the basis that the Prime Minister says, "These are the circumstances; please trust me", whoever that Prime Minister is, and we need to build a system which is robust enough. I think there are plenty of international examples where you can have a parliamentary committee which can take that role, which can be trusted sufficiently to take security information and, if necessary, meet in secret but can have the role of then advising Parliament in those circumstances.

Q156 Lord Tyler: Directly to follow up the point that has just been made, the vicious circle that the Executive, the Royal Prerogative, the Prime Minister can determine what information is provided and, therefore, the appropriate timing for giving that information and can then perhaps also insist that there is an exceptional situation seems to me very precisely where we are. I wonder whether the other two witnesses feel that the solution proposed by Mr Facey of a joint committee meeting in private would get over that particular problem, given that it is likely, at least, to have the constraint of perhaps a government majority on it but at least it will have to have some very careful checks and balances to ensure that it is receiving the information that can provide an opportunity to take a decision?

Mr Payne: If I can respond to that, I share Peter Facey's concern about information. In fact, Lord Norton, in one of the debates, said information is the key to this and, of course, it is the key to this because there was, in fact, as we all know, a vote in the Iraq War and look at the outcome. So the vote can only be a tiny part, a very important part, but only a part of the equation, because if the vote was all, then there would have been no debate now about this. As to whether a joint committee is the absolute answer, I think it would be rash to say one can invent one committee that will solve all the problems. I think there is a larger pattern that has to be revisited about the way in which Parliament receives information. A joint committee may be helpful, there may be other requirements, but certainly,

however both Houses think they should order their affairs, there is clearly a need for more information and a chance to feed into the policy cycle. I think this is one of the crucial things. It is not just information. At what point is Parliament going to influence events? That takes me to what I think is a key point, which that is this barrier between the Executive and Parliament in policy has to be revisited. We should not just repeat the mantra of the Executive and Legislature and imagine that they are forever divided. That is where the legal form matters. It might seem fanciful to talk about a written constitution and abolishing the Crown, but the legal form is one of the things that perpetuates this distinction; so internal changes within Parliament and a change to the legal form so that the Government cannot come round, as they did, for instance, in the Maastricht Treaty. They sent the Attorney General, Nicholas Lyell, and said, "We might not consult you at all." Ridiculous.

Q157 Martin Linton: What is meant by the legal form?

Mr Payne: The legal form is the Crown, and the Crown is the form in which the Government exercises power and the Royal Prerogative, and there are two flanks to that. There is the fact that the powers of the Crown, as you know, are outwith Parliament, they are not granted by Parliament, there are special requirements to exclude discussions that are linked to the prerogative. As you also know, if members wish to bring a bill - you know this better than I do - they have to seek the permission of the Home Secretary or the Monarch. There are all sorts of seemingly fanciful things that, in practice, limit oversight within Parliament, and then, of course, there is the judicial flank of this as well. Of course, that is the reason I am suggesting a written constitution, because I do not think it is a good idea for these sorts of issues to be dragged through the courts, but there are other issues of the Government's powers where it is all too appropriate for it to be subject to suitable limitations. To answer the question on committee, yes, better information. A joint committee: I think that is a very complicated question to answer.

Mr Hammer: I think that a committee, whether joint or not but, in my view, preferably joint because it would draw in a lot of advisory expertise from the House of Lords, could also be a very useful forum to, first of all, revisit decisions that may have been taken under the exceptional circumstances. Currently I cannot see any contingency measure for that under the proposed draft resolution and I think it is very important to have a validation loop and mechanism in place in order to make those decisions accountable as well. The second reason for a committee, I think, is also that the committees, in my

experience at least and from my observation of how the system seems to work, provide an excellent learning ground for how a strategy can be developed. If a committee could also be a joint committee that is particularly responding to the use of armed force abroad and receives reports that are integrated and really review the development of the National Security Strategy and how the United Kingdom responds to armed conflict, then I think that would be a very useful body to have. Currently what we see is that the departmental select committee system is reviewing how the Foreign and Commonwealth Office reports on the issue of the use of armed force abroad, how the Ministry of Defence is reporting on it, how DFID is involved in it, and so I think a joint committee would provide a very useful learning tool and I think that would be a very strong argument for one to have one. On top of that, of course, it would play an important role in revisiting decisions in each case and they could be bound by rules of confidentiality and secrecy as and when necessary. I must say of the assumption that seems to shine through the draft resolution that Parliament is an uncertain partner in making decisions that affect the security of operations or the safety of the troops, I do not see why. I am sure that if Parliament is able to take a very well grounded decision potentially on issues as complex as human fertilisation and embryo research, then I am sure that Parliament will be very much able to protect the interests of the troops when they are abroad. So I think the assumption that Parliament should be left out on that area because it cannot be trusted, in a way, I think, is extraordinary to me.

Q158 Mr Tyrie: You have all said that you feel that the Prime Minister is granted too much discretion under the proposals. What we are groping towards is something that can limit that discretion to give the public greater confidence that the Prime Minister is doing those things that he says he is doing; he is acting on the basis of information that he says he is acting on. It has always seemed to me that in these exceptional cases it is ex post scrutiny rather than ex ante scrutiny that is going to be more important, particularly where the Prime Minister feels the need to act quickly or on the basis of information that is largely secret in order to defend the country. Do any of you have worked out proposals for how we can strengthen ex post scrutiny, in particular to granting of a committee, whether or not it is a joint committee, to have much significantly greater powers than a select committee has, more akin to those that we see on Congressional Hill, to call for any papers that they want to see, albeit perhaps in camera, and to see all witnesses that they feel appropriate, including the individual rather than his superior who may decide to substitute for him? Would this not be the strongest constraint on a Prime Minister that if he did misbehave, that if he did over egg the case prior to war, he knew very well that it would all come out in the wash if we had a powerful ex post scrutiny system?

Mr Payne: Your question actually answers it. You say, what would you have: something more powerful? Yes. Your question is, in effect, a statement of what is possible and, therefore, I would adopt that observation of yours, a select committee something.

Q159 Martin Linton: The Stanley/Hutton inquiry!

Mr Payne: No, we are talking about congressional committees - that was Mr Tyrie's point - and, of course, there needs to be something more powerful. There are a number of interconnected factors which makes this committee working in a rather strange light. The consultation paper talks about a scoping exercise as to all the prerogatives; so that is one dimension that is uncertain. You are keeping the legal form of the prerogative but having a resolution, while simultaneously the Government is thinking about what to do about the whole class of prerogatives. Simultaneously they have put forward proposals on the Intelligence and Security Committee. Of course, what the Intelligence and Security Committee does is absolutely vital as well: hence the whole business of the Iraq War. So, yes. Mr Facey, I think, wants to come in.

Mr Facey: When we responded to the Government's consultation and actually to the consultation which the House of Lords Committee ran, we proposed such a committee, but it should also have the ability to act as a committee of inquiry and be able to subpoena witnesses and papers, that the chair of the committee would sit on the Intelligence Committee and it would have to be a very powerful body. It would, therefore, have to have constraints on it, and it would sometimes have to actually meet, therefore, in secret, but it is perfectly possible for Parliament to have a committee which was a trusted partner to the Executive which could, when things go wrong, act as an inquiry but also be there as things develop. It is not just about having scrutiny of the final decision, but it is scrutiny of the decision-making process. I think my biggest complaint about the Government's proposals is that the Government's proposals are effectively for information and approval for Parliament, not about Parliament actually scrutinising the whole of the decision-making process, and our suggestion for the committee, whether it is a joint committee or not, is a body which can enable Parliament to scrutinise the Executive and the decision-making process as well as being there at the final end of the process when it comes to approving a decision or not.

Q160 Lord Norton of Louth: How do we get from here to there, particularly if you take the Government's proposal in terms of a bill? There are certain things some say you cannot legislate for, and Mr Payne has mentioned the centrality of information, but another point I mention is political will. If you have not got that, you are not going to achieve anything anyway. There is only a certain amount you can put in legislation, there is a certain amount you can embody in a resolution, but much of what you have just been talking about to some extent is a matter for Parliament itself. You cannot actually legislate for that. You can set up a committee now, a statutory joint committee. So what are the steps and how far can you actually put something in legislation that acts as a peg or a spur to delivering the rest of what you want to achieve?

Mr Payne: Could I respond to that. I take the point about political will. Indeed, Professor Vernon Bogdanor said that the question of war powers in his idea was a non-question. I do not agree with that, and I was thinking earlier, what can an outsider bring to this committee of parliamentarians who understand the process of how Parliament works much better than any outsider? The thing I thought was that, in fact, we are all rushing around making decisions, we are all doing too many things, and I think the fault-line is the impact of institutional structures on what you do. So, yes, the political will, but maybe you are limited. There is the argument about treaties. I think you were told off by Professor Hazell for failing to rise to the challenge of scrutinising treaties. Why does that happen? Presumably because the institutional structure makes it very difficult when there is a negative resolution for you to get on and do something. So political will, of course, is important, but then also the institutional structure, not just for parliamentarians but supremely importantly for parliamentarians, limits the way you act. I think it is not just a question of political will, although of course it is. They are not either/or; they both go hand in hand.

Mr Facey: I think you can put certain things into legislation which would move you forward. Having to actually have retrospective approval, having to actually, in an on-going conflict situation, not just have an approval once and then, five years later, have a committee of inquiry to see if we did it well, but actually having the Executive being forced to come back and to report to Parliament and be held to account. You can do, those things you can actually put into statute, and they would go a significant way to strengthen Parliament in its role of holding the Government and the Executive to account. Those things could be done and they would actually help. I think that would help move you in the direction you are talking about.

Q161 Lord Norton of Louth: But if it is in statute rather than resolution, presumably this would become a justiciable matter?

Mr Payne: It would. You are being asked to respond quickly to a proposal for a resolution, so there is no offer of a statute, and one of the things that seems to be vanishing in the discussions is the Government's original suggestion: should it be a resolution or a standing order? I know when you tackled Lord Boyce on that he declined to enter into the arcane details of resolution or standing order, but I have had some discussions with experts on this and it seems to me that you should be pushing for a standing order, because from what I was told at least it makes it easier for you to hold the Government to account on a point of order. Presumably there is the assumption that a standing order will give parliamentarians more strength. I know there is always a notwithstanding, but you have got to react quickly and a standing order is presumably better then a resolution.

Mr Hammer: I think in the majority I have said what I wanted to say earlier about the positive impact that a committee, preferably a joint committee, would have in terms of also providing a reporting focus and a learning ground to move on. I do not really see the issue of a statute being an issue of timeliness, because if the time argument applies I am sure that is an issue that could come under the exceptional circumstances. What is important is that there is a body that can revisit the decision, and I actually believe that if the troops abroad feel that Parliament is actually interested in what they are doing, they will feel comforted rather than feeling alone by more than just the Government being behind them. So I think that there are a number of distinct advantages. Whether or not the powers of a committee need to be improved compared to what other select committees would have, I think it is an important question. To me the most important thing is that it is the committee itself and Parliament that sets the rules for this committee, rather than the Government saying what it can publish and what it cannot publish and at what time it can do so. I am sure that the composition of the committee will actually provide a very sound basis of responsible treatment of all of the issues involved.

Chairman: I am going to apologise to everyone, because time is rushing by. What I am going to do now is to call on Lord Armstrong - he has a brief question - and then Lord Maclennan on this area. We did have lots of questions on treaties, but if you will forgive us what we would like to do is to send you

those in writing and maybe you could respond. We know what you look like; so when we read the answers we will be able to take better regard. First of all, Lord Armstrong.

Q162 Lord Armstrong: The thing that is troubling my mind is the situation you have where the Government says, "We intend to go to war", and then there is a long pause while these procedures are gone through, there is a resolution, or statute, there is a joint committee in Parliament, and in the meantime the people whom you are intending to go to war with are sitting there wondering what is going to happen and what the decision is going to be. Is that a tenable position to be in?

Mr Payne: Lord Bramall made the distinction we are all familiar with between wars of choice and wars of necessity, and, clearly, the Iraq War was planned a year before; so there was no problem with frightening the enemy by discussing it; it was discussed world-wide. Obviously, if there is an emergency, the troops respond.

Mr Facey: The fact is in most cases we do not go to war, we do not actually have wars in the old-fashioned sense and, in most cases, in the conflicts I can think of in my lifetime have not been ones which have blown up overnight, but if they are, then the Government responds and there needs to be a process for doing that and everybody has accepted that. In most cases, whether it is the Gulf War the first time round, or the Iraq War, or the Falklands, or wherever else, they are things which actually have quite long burn times. We are not in a situation where our opponents, or the enemies of the country, have got no information; they have got Al Jazeera, CNN, even the BBC World Service. The fact is, the rest of the country will be debating it on 24-hour news. It just seems to be very strange that the one place which is supposed to hold the Government to account is the one place which does not actually hold those discussions and those debates and be the focus of that rather than effectively having MPs appearing on the World Service or BBC News as a way of conducting that debate. I would much prefer it to be strengthened in Parliament.

Q163 Lord Armstrong: It is just the BBC World News, and those people, are not debating it before the decision comes into effect.

Mr Facey: In the case of the Iraq War we were debating it way before.

Q164 Lord Armstrong: I think we ought not to govern ourselves only by the Iraq War?

Mr Facey: No, and everybody has accepted that there needs to be a process whereby, if something actually happens, it happens quickly. The reason I am in favour of retrospective approval is so that you can take those actions and then come to Parliament. There needs to be the ability for the Government to act quickly in those circumstances. I question with you how often those circumstances will arise, but there needs to be a way of dealing with that and, I think, in all the proposals I have seen, everybody has accepted that has to be the case.

Q165 Lord Armstrong: And you accept that?

Mr Facey: Yes, I accept that, which is why I believe in retrospective approval.

Mr Hammer: I think it is important that the media are not the only source of information that contributes to decision-making in Parliament. Therefore, if the time limits allow it, of course more information, and from other sources, should be very much taken in. If we look at the German situation, for instance, where Parliament exercises a very strong control over the use of armed force abroad, it has ever since 1994, since the decision was taken to allow the use of armed uniformed personnel in the Balkans, developed a very streamlined and very fast two-hour procedure to actually deal with a lot of these decisions. What this does is that the general level of awareness about the situation rises to a point where Parliament feels able to make that decision either through a proposal of a committee or in plenary and it also provides the Government with, again, I think very, very important support for the decision that it would eventually take. There is executive responsibility for the decision, but, at the end of the day, the more Parliament can come in, the better it is for the perceived legitimacy of the decision in the country but also amongst partners, for instance, in the North Atlantic Treaty Organisation. I think that is a very important aspect, because we should not bring it back to the Iraq War, and I have really tried to avoid using that term, but that war has really split the alliance on a number of issues, and so I think it is quite important to look at this legitimacy amongst partners issue also, and I think Parliament can contribute to that, and it is one of the strengths of the Westminster system to actually work very co-operatively between the various branches of government.

Chairman: A final question from Lord Maclennan and if you could be good enough to answer as briefly as possible, that would be great.

Q166 Lord Maclennan: The witnesses have all indicated that there should be continuing scrutiny and oversight through a committee, or joint committee, or whatever, but do you take the view that there should be a formal opportunity provided in advance to Parliament, or any part of Parliament, to reapprove the original decision to commit to armed conflict, bearing in mind the dangers of mission creep and the conflict changing from what was originally approved? The second question is do you go along with this suggestion that the House of Lords should have no vote as part of the approval process?

Mr Payne: I think that Lord Maclennan is absolutely spot-on. If you look at the operations of the last 20 years they have often changed their nature and scale, and indeed even in the Iraq War the Prime Minister comes to the House and says one thing and the scale of it is still there. So, yes, it is essential - a re-approval process is essential otherwise it makes a nonsense of oversight of any sort. As to the House of Lords, that is another irony, is it not, because the composition of the House of Lords is not fixed. I find it slightly eccentric that the government is trying to fix in advance of their proposals what the role of the House of Lords is. They only want an opinion - maybe an opinion - and yet the reforms are not set, and I think it is very difficult until we see what the reforms are and how they will be elected, under what basis, to answer that question. But I think an Upper House has a very serious role in this.

Mr Facey: On the question of re-approval I think it is vital that particularly in ongoing conflicts there is an opportunity, probably every year, to come back and to actually look at the decision because you cannot be in a situation where five years ago you can commit yourself to a conflict situation and then Parliament at that point has no say in the matter again; there has to be a way in which that can be revisited because situations change. Where we are today is completely different than it was before the Iraq War and when the vote was taken in the House of Commons. In terms of the House of Lords, I think as long as the House of Lords is not elected then I think the final decision will have to be with the House of Commons. If we move, as I hope, to a more democratic second chamber then I do not think the same structure as you would have now can apply in those circumstances. I am always in favour of the maximum amount of checks and balances possible and therefore I would like to see a role for the House of Lords. One of the reasons why even under its present composition we suggested a Joint

Committee rather than simply a Committee of the House of Commons is because we think there is the right expertise in the House of Lords which could be added to the House of Commons and also it would make the Committee less, in some ways, partisan than the House of Commons could possibly be on its own.

Mr Payne: On the question of the re-approval it might be useful to look at what timeframe is being considered because I think in the United States the President has a 60-day grace period pretty much to do whatever he likes - he for the moment - and I think it should be up to Parliament to decide what the review period is. The question of evidence is important as well, although I would argue that the evidence that is taken into account when reviewing a decision is the evidence that is available at the time of the review, so that if the mission develops into something that requires a different take on it then hopefully there would be evidence available to support that view as proposed by the government; so that the review would be timely as opposed to just taking a decision on an act taken three months ago or so, because that would not be inappropriate. The last question, on the involvement of the House of Lords, I would in principle agree with what Peter Facey was saying. I think in any bicameral system a consensus on such weighty questions such as going to war is preferable. So anything that could really help to bring in the expertise in the House of Lords in such decisions would be very useful. Maybe it is useful to draft something like a catalogue of issues on which the House of Lords has to be definitely consulted and in what ways that is being done, including on the question of the use of force, and it might exclude smaller missions under the UN aegis and it could include, for instance, bilateral or unilateral action if that is what the United Kingdom wants to take.

Chairman: Thank you very much indeed; we are grateful to you. In fact you can tell that the interest of the Committee is such that we have gone well over time. It does mean that we have not been able to ask you anything about the treaties aspect, so if it is acceptable to you perhaps we can send those questions to you for your responses.

Witness: Rt Hon Lord Falconer of Thoroton QC, a Member of the House of Lords, examined.

Q167 Chairman: Thank you very much and we do apologise for keeping you waiting. In fact every time I have to apologise because we are behind.

Lord Falconer of Thoroton: It was very, very interesting listening so it was not remotely problematic.

Q168 Chairman: We hope you enjoyed it and we hope that you enjoy the next 30 minutes or so. Can I say that we are aware that we did ask you to come until quarter to six and we hope that we will not keep you much beyond that?

Lord Falconer of Thoroton: There is no problem from my point of view.

Chairman: Thank you very much indeed. I have to say to you as well that we must note that Members have declared interests relevant to this inquiry in the Register of Members; they are available today and also on the Committee's website. May I first of all turn to Lord Hart?

Q169 Lord Hart of Chilton: Lord Falconer, you were the Secretary of State and the Lord Chancellor who was responsible for the carrying forward of the Constitutional Reform Act 2005, one of whose important features was the balancing of judicial independence and democratic accountability. Can you first tell us how significant you think were the changes made by that Act? Secondly, do you think that it is too soon to start making alterations to that settlement that you achieved? And thirdly, has it come to you in terms of thought that there are problems with the current judicial appointments system that you think should be made the subject of alterations and amendment in statute?

Lord Falconer of Thoroton: I think the changes that were made by the constitutional settlement that was reached by the 2005 Act were very significant. They took away from one individual, the Lord Chancellor, the power to appoint judges and placed them in a Judicial Appointments Commission, because I think we had gone way beyond the time where one person could decide who should be judges because judges are an incredibly important part of our constitutional framework. But in giving the power to somebody else you did need to ensure that there was proper parliamentary accountability because I think there should be accountability about how you appoint judges. And there was a quite detailed process that went on, which involved discussions with the judges; it involved a unique Select Committee in the House of Lords; it involved a very prolonged parliamentary process, and we reached

a point where I believe we had done well in reaching a sensible constitutional settlement ensuring proper independence in the appointment of judges. There could not be allegations of cronyism or of doing things that might undermine the standing of the judges, but at the same time ensuring that there was proper accountability. The broad conclusion reached was that you would have a selecting commission - the commission selects who should be the judges; they need to be approved by the Lord Chancellor but he or she cannot say, "I want X", all they can do in very limited circumstances is knock back proposals made, new proposals have to come and they cannot knock them back. So there is a role for the Executive but it is a very limited role and it does not prevent proper independence on the part of the Judicial Appointments Commission in the selection. I am surprised and disappointed that it is now being suggested, after this system has been going for 18 months, that certain changes should be made to it. I can see no rationale behind any of those changes; it is a complete rag-bag of things which appear to have no point. One of them, inadvertently, is quite significant; that is to remove the role of the Lord Chancellor from the appointment of judges below the High Court. I have made enquiries of the Judicial Appointments Commission. In the first year of their operations, from 1 April 2007 to 31 March 2008, they selected 458 people to hold judicial office and 21 of those were in the High Court. So 430 of the selections that they made will no longer be subject to the view of the Lord Chancellor. That is very significant, I think, because it means in the vast majority of judicial appointments there will be no accountability at all. There is a suggestion in the White Paper that the Lord Chancellor be given the power to give directions to the Judicial Appointments Commission. That is not included in the Act because it has neither been consulted upon nor developed. The idea that you remove such a large percentage of judicial appointments from accountability and there is some vague proposal for directions in the future seems to me to be a most unsatisfactory basis upon which to proceed. I believe that this has practical importance. If you had a situation where, for example, there was discrimination - not direct discrimination, I am quite sure that the Judicial Appointments Commission would never directly discriminate - suppose you had indirect discrimination over a long period of time, if you take away the Executive's power to say not "I want X" but "I am worried about the way that you are doing it", if you take away their power to do anything about it you remove the partnership element that was so important in relation to it. Speaking for myself - and I have tried as hard as I possibly can be not to be over-defensive of the scheme in which I felt very much involved - I am genuinely disturbed by what seemed to me to be either pointless or damaging proposals in relation to what was a well crafted and well worked out new process for appointing judges.

Q170 Fiona Mactaggart: Why do you think they did it?

Lord Falconer of Thoroton: Looking at the Bill as a whole I believe there is - subject to one point, namely the civil service stuff - next to nothing of significance in this Bill, subject to the civil service thing. And in relation to the judicial appointments stuff it is like filling in the time; it is so pointless. There is a bit in the proposed Bill that says medical checks should be done by the Lord Chancellor's Department rather than the Judicial Appointments Commission. It is intended that the Legislature in something called the Constitutional Renewal Bill shall deal with something that could, I would have thought, have been dealt with by some agreement between the two bodies. So I cannot offer any explanation apart from that; but I am keen, if I possibly can, to defend the settlement that we reached. It may be that there are problems with it but I am not sure that 18 months after it has been in operation is the time to reach a final conclusion about it.

Q171 Fiona Mactaggart: Have you ever had the experience as a government minister of being held accountable for something over which you have no influence?

Lord Falconer of Thoroton: No, I have not, and that seems to me to get to quite a significant point in relation to the Judicial Appointments Commission because if 430 of the appointments were beyond the reach of the Lord Chancellor what could he or she do if there is some suggestion - for example, as Lord Jack Straw said quite rightly - there are issues about whether or not the Judiciary is sufficiently diverse? If you cannot do anything else about 95 per cent of the appointments you are blowing in the wind at that point.

Q172 Fiona Mactaggart: Do you think it would stop people asking you questions about it if you were in that role?

Lord Falconer of Thoroton: Not the current one, but I suspect it would lead to the minister saying, "I am sorry, there is nothing I can do about it."

Q173 Lord Tyler: Does it not also follow that if the Lord Chancellor has no role in the lower levels of the Judiciary that the pool from which the higher level can be taken might also be so distorted, by which time of course it is too late? Am I putting that clearly enough?

Lord Falconer of Thoroton: You are. I agree with that entirely. You can appoint direct to the High Court, not appointing from a lower pool, but in addition to the main point about him or her being removed from appointments below the High Court it is also envisaged that he should have no role in relation to moving people from one place to another. So this is all completely reducing it and handing it over to a group of people where the single largest element is the Judiciary. I am not criticising the Judiciary, but it is handing it over to them.

Q174 Lord Maclennan of Rogart: You will remember Lord Falconer, the evidence that was received by the special Committee, to which you referred, on the Constitutional Reform Act of 2005 and the great debate about whether appointments to the Judiciary should be solely on merit.

Lord Falconer of Thoroton: Yes.

Q175 Lord Maclennan of Rogart: And the way that it was resolved was rather to accept that.

Lord Falconer of Thoroton: It was to accept that it should be on merit and I think it has to be on merit because if you want a diverse Judiciary you undermine appointments made of, for example, women or racial groups if you say that they are not on merit. So I think it should be very important it should be on merit, but there was a specific provision put into the Act to say that the Judicial Appointments Commission has to do all that it can to increase the pool from which selection is made. As I made clear throughout, I find it inconceivable that, for example, in relation to women there were not lots and lots of women of merit who could easily be appointed.

Q176 Lord Maclennan of Rogart: Do you think it is acceptable that the Lord Chancellor or the minister responsible should have the power to overrule the judgment of the Commission on that point?

Lord Falconer of Thoroton: I do not think he should overrule ---

Q177 Lord Maclennan of Rogart: Or direct.

Lord Falconer of Thoroton: --- the Judicial Appointments Commission as to who should be appointed. But having the power to reject particular appointments means that the Judicial Appointments Commission has to come up with appointments where they can explain why they are not producing, for example, more women or more people from ethnic minorities.

Q178 Lord Maclennan of Rogart: Is that not already provided for within the Act?

Lord Falconer of Thoroton: Not that I am aware of.

Q179 Lord Maclennan of Rogart: That the Commission has these guidelines that were set and produces reports on it?

Lord Falconer of Thoroton: The Lord Chancellor can give guidance to the Judicial Appointments Commission; he has not done so, so far. The guidance seems to me to be in a different category fundamentally from the ability after a period of time has gone by to say to the Judicial Appointments Commission in relation to, for example, where they do things like "bunk appointments" and they say, "Here are 20 Circuit Judges we want to appoint." If the minister has the power to say, "No, I am not accepting that because I am not satisfied that it is sufficiently inclusive" then that is a real and effective ability to make the Judicial Appointments Commission think again. That is a different power in terms of type to the ability to give them guidance.

Q180 Chairman: You have made it absolutely clear that new legislation is not necessary but do you see any weaknesses in the current judicial appointments scheme already identified that could be dealt with by some procedural changes?

Lord Falconer of Thoroton: Yes. I think there have been some teething difficulties as between the Judicial Appointments Commission and the Ministry of Justice. I think the process can be too slow. I think - and this is my responsibility, not the Judicial Appointments Commission - we were too slow to start with in identifying when vacancies might be coming forward. Once the vacancy arose we should have been much quicker in giving notice to the Judicial Appointments Commission, but I think those are the sorts of things you would expect. The one thing you do not want to do is to blunder in with more legislation. Let those processes be developed; those are precisely the sorts of things, if they are

causing difficulty, where, as it were, the government can be put under pressure and proper accountability can apply - but not legislate.

Q181 Lord Williamson of Horton: I wanted to come back to the point about the role of the Prime Minister and the Lord Chancellor. You have partly dealt with this but I want to concentrate on the question which is raised in the documents, but not in the Bill, in rather an unusual fashion, where it says, "The possibility of additional powers for the Lord Chancellor to set performance targets" - and I choose my words carefully, that is what is in the document - "and to direct the Judicial Appointments Commission in certain matters ..." Then they say that there is a reasonable case for this but they do not go beyond that. Would you like to comment on that point a little more fully? You did comment on the point about directions to the Judicial Appointments Commission but there is a wider point also raised by this document, which is that they set performance targets which are not, I may say, defined very clearly.

Lord Falconer of Thoroton: I think the performance targets they might have in mind is for example once you have received a vacancy notice you have to have made the appointment within three weeks or three months, or something like that. I suspect that is not an appropriate target to set in relation to a body like the Judicial Appointments Commission. They might mean some other sort of performance targets - appoint 15 women Circuit Judges by the end of the year. Again, that does not feel to me like an appropriate performance target. So they have not fleshed out any of this in the White Paper. I cannot imagine what sort of performance targets they have in mind, but any that I can think of I do not like the sound of. I think it is much better to have the power to say, "Look, I do not like the make-up that I am getting over the last six months." In practice the way it would work is that the minister would say, "I am worried about the pattern of appointments. A point may be reached where I will be forced to knock back an appointment in six months' time," and it gives him the power to be involved in a meaningful way in the process without ever getting to the point where he is selecting the individuals who are becoming judges, which is the real iniquity.

Q182 Lord Campbell of Alloway: As regards what worries me - and I have raised it before - is the appointment of the High Court Judges and it is very important, we both know well enough, that they have to be of a certain quality and it is not merely an intellectual quality - it is a quality to be a fair, patient judge. It is very difficult to do that unless you have the advice of somebody who knows about

the way they have conducted themselves as a Recorder, if you like, or as an advocate or at the Bar generally. Under the old system, which had disadvantages, one advantage was that there was a very keen knowledge in the Lord Chancellor's Department as to whether somebody was suitable to appoint or not. That has gone, and certainly I would not have thought for a moment that the present Lord Chancellor was of the quality of judicial experience to know very much. Do you not think that there should be some advice, such as from the Lord Chancellor or from one judge of the High Court, Court of Appeal, or indeed the leader of the man's circuit? Can you not see that there is something missing now when you try to appoint a High Court Judge?

Lord Falconer of Thoroton: In terms of making enquiries the Judicial Appointments Commission has to determine with whom they make enquiries, and I am absolutely sure - indeed I know - that they make enquiries in particular in seeking to determine from people who would know, for example the head of the division in which the person has sat as a judge, as to what his or her quality as a judge has been, and it is done on a systematic basis. I do not believe that the only way that you discover whether or not somebody is suitable to be a judge is by keeping records of soundings over a long, long period of time, and indeed if the system has been depending upon one person's knowledge of the potential pool from whom you select judges then inevitably the longer you are Lord Chancellor the less effective you became at that as you grew to know less and less and less about the Bar.

Q183 Lord Campbell of Alloway: It is not just one person, it is seeking the advice of one person who knows, that is all - or maybe more - but they ought to have access to the type of advice which I have suggested.

Lord Falconer of Thoroton: But the Judicial Appointments Commission is well able to get access to the proper enquiry of people who would know what the individual's performance, either as a part time judge or as a member of the Bar or as a solicitor or whatever he or she has done was.

Q184 Lord Campbell of Alloway: Yes, but there is no form of obligation.

Lord Falconer of Thoroton: They would not be performing their job as a Judicial Appointments Commission if they were not making proper enquiries.

Q185 Chairman: Is there a sort of template or a job description in a way that can be objectively assessed, because the very nature of appointments is that presumably the subjective view of how you got on with the other guys or your chambers or whatever is important, but that of itself, unless there is objectivity, means that some groups will be left outside.

Lord Falconer of Thoroton: I agree with that entirely.

Q186 Chairman: How does it work?

Lord Falconer of Thoroton: What has happened is that the Judicial Appointments Commission have published the key qualities which they believe are required for the various sorts of judicial appointment, because plainly the key qualities required for the Social Security Commissioner may be different from the qualities required for somebody who is in charge of an Immigration Appeal Tribunal or somebody who is a Circuit Judge doing crime. They published what the key qualities are to perform the particular function of a judge that they are looking for. They are exactly concerned about the point that you have made, which is that it has been done on a pretty subjective basis in the past and you need to be clear about what the qualities are.

Q187 Chairman: Do you think there should be greater parliamentary scrutiny as to how that does operate, that they are keeping to the rules?

Lord Falconer of Thoroton: I think it is a matter entirely for Parliament as to whether or not they do want to scrutinise it. They can scrutinise it through Committees by calling the Judicial Appointments Commission. If they believed there was a problem then it would be open to them to say, I think, to the Lord Chancellor, "These are wholly inappropriate qualities, we want you to do something about it with the Judicial Appointments Commission," and as long as the minister has some real involvement he or she then is in a position to do something about it.

Q188 Chairman: Could that be done without legislation?

Lord Falconer of Thoroton: That could be done without legislation, yes.

Chairman: One of the other areas we are looking at is the powers of the Attorney General, so we are going to move on to that, if we may, and Lord Tyler has some questions.

Q189 Lord Tyler: I am particularly interested in the question of the powers that the Attorney has to direct prosecutors on national security grounds but I am also interested in your view, as having been closely involved in all this and now as a very distinguished back bencher, whether you believe that in future the relationship of the Attorney to the Houses of Parliament - perhaps under a different government, a different Attorney - should be reviewed. The power that is specifically given to direct prosecutions on national security grounds, should that be one that is reviewed and perhaps in some way constrained in future?

Lord Falconer of Thoroton: When you say "direct prosecutors" are you talking about stopping prosecutions on national security grounds?

Q190 Lord Tyler: Yes.

Lord Falconer of Thoroton: I believe that there will be circumstances in which it is necessary sometimes for prosecutions to be stopped on national security grounds. I think that the Attorney General should have the power to stop prosecutions on national security grounds from time to time; for example, because people might be identified which would be detrimental to national security, or because there may be wider considerations that have an effect on national security. It is pointless for us to speculate on what they might be but there will be circumstances when that is so. So I am in favour of the Attorney General having that power. Times have changed from when the lawyers and the politicians were very closely linked. I think the difficulty is that unless the Attorney General is a wholly independent figure the difficulty of the Attorney General stopping a prosecution on national security grounds, without it appearing it is being done for political reasons, is very, very difficult. So I favour the retention of the power but I would have strongly favoured a much more wide ranging reform of the office of Attorney General than is reflected in this particular Bill. But I completely accept that obviously the Committee cannot rewrite the Bill because that is not the role of the Committee, so in a sense it reflects what I was asked about in relation to the judicial changes. There is nothing very much in this Bill which really changes the position of the Attorney General. There are some sensible provisions about changing when consent is required. It makes clear the position that I believe was

already the case that the Attorney General could not interfere and stop a prosecution unless it was one of those well recognised grounds because it makes clear that in the superintendence role that he or she cannot just stop the prosecution as part of the superintendence, although he or she can stop it if, for example, there is a good national security ground. So after what started off as a quite optimistic proposal to reform the office of Attorney General it has all sort of sunk into a number of slightly pointless provisions, is my feeling.

Q191 Lord Tyler: I think we are very sympathetic to that point of view - some of us anyway - but since you are in a unique position to guide us, since this is pre-legislative scrutiny on a draft Bill, that this provision is there for us to expand, how would you propose to expand it in a way that does make the Attorney more obviously accountable, obviously answerable and could get over the difficulties which you were identifying just now?

Lord Falconer of Thoroton: You do need the Attorney to have this power, I believe, because I do believe that from time to time national security will require the stopping of a prosecution. The Attorney General is already accountable in the sense that Parliament can require him to express views in relation to it. I am not sure, however, that accountability is the right way to be looking at this because I think the reason why you need now an independent Attorney General is because he does two things particularly, which I do not think should be susceptible to parliamentary accountability or pressure. One, he gives advice, in particular on international law, which means in relation to armed conflict. That is not a matter where, as it were, political pressure should determine what the advice is, by which I mean what is said to him in Parliament; it is simply a matter of what is his objective view as to what the right advice is. In every other area the person who is accountable is not the person who gives advice but the person who takes and acts on the advice. The second area is prosecutions and prosecutions are something that should be dealt with entirely separately from the political process. It is absolutely critical that in relation to determining whether or not prosecutions start or finish it must be done without reference to politics, and that should include whether you stop a prosecution on a national security ground. I believe the right approach is that the Attorney General should be a trusted, independent figure, broadly doing what he or she is doing at the moment, but appointed irrespective of what the government of the day is, so that he or she has a standing within the government that he or she gives definitive legal advice, gives definitive views on whether or not prosecutions should start or

finish, but is not any longer part of the government itself - part of the political government. But that is not what is on offer in this Bill.

Q192 Lord Tyler: But it could be.

Lord Falconer of Thoroton: Again, I assume your task is, as it were, to scrutinise the Bill rather than rewrite the Bill.

Q193 Chairman: Perhaps we can decide on that when we come to consider it!

Lord Falconer of Thoroton: Can I say two things? One, nothing I should say should be taken as inferring that I think there was any lack of independence on the part of any Attorney General or Solicitor General when I was in government, and I think every one of them I saw acted on the basis of what they perceived to be an entirely independent view. The reason I hold these views is because of public perception and because I know the atmosphere in which all Law Officers have to operate. The second thing is that it is hard to imagine somebody better equipped than the current Attorney General to make the switch from being appointed initially by a political government to somebody who becomes an independent Attorney General. I am sure there are difficulties but if you look at Scotland the current Lord Advocate was initially appointed as Solicitor General by a Labour Government; she then became Lord Advocate in the Labour Government; and when there was a minority Scottish Nationalist Government they felt able to retain her. She is the Lord Advocate at the will of the First Minister, but my goodness me the sense that the advice will be given independently gives a great boost to that, that it is somebody who can straddle both governments without there being any difficulty.

Q194 Chairman: It is always possible to tear up the party card but are you suggesting that that actually makes a difference in public perception?

Lord Falconer of Thoroton: I do. I think if you are the Attorney General who is part of a group of politicians making decisions about should we stop a prosecution which the Prime Minister is very keen to stop - and there is no secret about that - I cannot envisage that the public out there do not think that the fact that you are part of that group has an influence on your decision. I would like to make it clear

that I am not suggesting at all that that is what has happened, but the idea that the public do not think that you are - and this is not my word - part the "gang" must have an impact on public perception.

Q195 Fiona Mactaggart: I am very struck by the difference in your analysis about the appointment of judges and the need for a form of accountability - not in relation to appointing an individual judge but in terms of the whole class of this. Is there not a comparative issue about accountability for the system of prosecution?

Lord Falconer of Thoroton: Yes.

Q196 Fiona Mactaggart: That while one does not want an Attorney General who can prevent an individual prosecution or interfere in that way one does want a kind of accountability about the priority which is given to particular kinds of prosecution and the conduct of the prosecution service. How does that fit in the model you have just described?

Lord Falconer of Thoroton: Because what is being sought here is accountability on the part of the giver of legal advice in respect of the advice; what is being sought is accountability in respect of the decisions about prosecution, and the true analogy with judicial appointments is that you should not be involved in the individual judge being appointed, just as you should not be involved in whether an individual prosecution goes ahead or not; you should not be involved in determining what advice should be given. That has to be a matter which should be separate from politics. I do not think there is any conflict between the two things that I am saying because I am trying to get out of the political process the individual advice and the individual decisions about prosecution. You are absolutely right when you say that there needs to be some accountability for is the Attorney General good enough to do the job, are the prosecutors focussing enough on rape or white collar fraud, or whatever? But that comes from making a different political figure responsible politically for those sorts of issues. There would be no difficulty, I do not think, for example, in having an independent Attorney General responsible for the superintendence of the Crown Prosecution Service, which means making decisions about prosecutions stopping or starting; but on the policy of prosecutions, what the priorities are, the Lord Chancellor could be responsible for those - or another minister, if you wanted.

Q197 Fiona Mactaggart: So you would separate that accountability role?

Lord Falconer of Thoroton: Yes. I have said too that there is a third thing that the Attorney General does, which is nothing to do with politics, which is making decisions "in the public interest". So where you are dealing with money, for example, that gets lost because it is not quite properly defined the Attorney General has a range of decisions to make in relation to that. It is the case by case aspect or the giving of legal advice, which is an objective issue, which should be pushed offshore from politics; the question of how you run the CPS as a policy matter should be dealt with by somebody else. I think one of the difficulties is that the role of the Attorney General has tended to expand in relation to policy, which makes his or her independent role much more obliterated and confused.

Q198 Lord Maclennan of Rogart: The Attorney General in his or her role currently has to give advice to the government but also is strongly perceived by the public to be acting as the advocate for the government in giving that advice, and therefore there is a problem about whether it is independent or whether it is making a case. Is that really what lies partly behind your view about independence?

Lord Falconer of Thoroton: That is one very strong aspect of it. In relation to - and this is a very important issue - the use of force, the armed conflict stuff, the Attorney General's advice is effectively definitive because it is never going to come to court as to whether or not the advice on whether force was used was justified. That puts upon the Attorney General an incredible onus to give of his best in relation to what the advice has to be as his genuine view. There he is almost like a judge. There will be other issues where it is quite legitimate for the Attorney General to say, "We are being sued; it is best that the government take these defences, I am not quite sure whether we will win or lose." Again, he has to think about what is in the best interests of the government, but he has to give objectively his best advice. Whichever it is he has to objectively consider what is the right advice to give, and that is a function that I think is not at all political.

Q199 Lord Maclennan of Rogart: What is the practical way of ensuring by appointment that the individual is independent, because in many cases Law Officers have been plucked out of political obscurity from elevated positions in the profession and then have assumed the political colour?

Lord Falconer of Thoroton: There is one thing and one thing only, which is that by all means the Prime Minister should appoint the Attorney General but he should be appointed for a definitive period of

time. So just like the DPP or the Treasury Solicitor is appointed for five or ten years the Prime Minister of the day appoints but only after a process as occurs in relation to these offices, and then he or she is appointed on merit and is irremovable save for cause.

Q200 Lord Maclennan of Rogart: And we assume that your view is that that person should not be a Member of either House?

Lord Falconer of Thoroton: It is because Fiona's view is right - that there needs to be accountability for those things that are currently of a policy nature with the Attorney General, it does; but those policy issues should be transferred to somebody else. On the prosecution, on the advice and on the public interest issues it should be somebody who is not an MP. He or she might be a Peer for other reasons but they should not be appointed because they are a Peer; they should not be accountable in that way to Parliament, just as the DPP is not accountable to Parliament in that way.

Q201 Lord Armstrong of Ilminster: You have made it very clear, Lord Falconer, that you would like to see an independent Attorney General but that of course is not what the Bill suggests.

Lord Falconer of Thoroton: No.

Q202 Lord Armstrong of Ilminster: If one took the view in the Bill that the Attorney General should be a minister, should be a member of the government, do you think that the Attorney General should be a member of the Cabinet? Do you think that he or she should attend every meeting of the Cabinet if he is not a member? Do you have any view on that?

Lord Falconer of Thoroton: I do not think that the Attorney General should attend meetings of the Cabinet. I think the Attorney General should only attend the Cabinet to give the Cabinet legal advice as required, and he should not be a member of the Cabinet, obviously, on that basis. The reason I think that is because you need in relation to the Attorney General giving the advice to the Cabinet to make it clear that he is not part of that group, he is somebody advising that group, because only if he is somebody who is not part of that group can the advice be said to be objective. I think that that very point about whether or not the Attorney General should be a member of the Cabinet or whether he should attend the Cabinet rather demonstrates why the Attorney General should become an

independent figure, because he is unquestionably perceived to be a member of the government, the political government. I do not know whether or not the country used armed forces when you were a Cabinet Secretary but in my day when I was in the government the Attorney General was always a member of any inner War Cabinet, and that is what happened in relation to Iraq. So he became part of the group always - and that goes back a long, long way, nothing to do with our government. So you have the Attorney General, even if he is not a formal member of the Cabinet, as part of the group determining the decision in relation to war and peace and the use of armed conflict. If you are part of that group and things have changed to the extent that the Attorney General has to give an independent view about whether or not armed force is legitimate under international law it is quite difficult, understandably, to convince the public that that is a view entirely independent of the group of which you are a part.

Q203 Lord Armstrong of Ilminster: It certainly seems to me that one reason for the position of the Attorney General in these things is that he or she is giving legal advice. A decision may be taken by colleagues that is not in accordance with that advice, or not wholly in accordance with that advice, and the Attorney cannot be a member of the group for that purpose, does not share that collective responsibility. It goes on from that, does this not mean that the Attorney General's legal advice to ministers has to remain confidential?

Lord Falconer of Thoroton: Speaking for myself, I think it is inconceivable that the advice in relation to the use of force can remain confidential in the current view of the world. I do not know if you have had the military yet to give evidence to you, but they have all said, "The three things we want before we use force is parliamentary support, public support and it is clear that it is in accordance with international law." That is what everybody wants. The idea that we are not being told the basis on which we are going to war in relation to international law seems to me to be inconceivable now as a matter of basic transparency. In relation to other advice by and large I can see strong reasons for keeping it confidential because a lot of the advice you get is about dealing with other people and you do not want to tell them necessarily, if you are dealing with them for example in relation to litigation, what the strengths and weaknesses of your case are, but in something like the use of force the idea that you do not say the basis on which you are going to war in international law terms seems to be inconceivable. Just picking up your point, formerly it would be a committee of the Cabinet that will be responsible for determining the decisions in relation to how the war is conducted. There was certainly one in relation to the

Falklands; there was certainly one in relation to the first Gulf War, there was certainly one in relation to the second Gulf War. I think you will find that the Attorney is always on those committees, quite rightly, but if he is not an independent figure and he has the power to say yea or nay as to whether force is used it is putting him in quite a difficult position.

Q204 Lord Armstrong of Ilminster: I think I am right in saying that in the case of the Falklands, which is the only one of which I have direct experience, that he was invited - it was a he then - to the meeting of the War Cabinet, as it was called, when there was a legal issue, but not when there was not.

Lord Falconer of Thoroton: And it was not just the second Gulf War with us, there were also issues about Kosovo. The Attorney initially was not in 1997 on those things, but then got on to that and then thereafter was always on, and I thought that was on the basis - though you may know better than I - that he or she had always previously been on the pre-1997 position, but I may be wrong about that.

Q205 Lord Armstrong of Ilminster: In the Falklands he was often there because one was talking about rules of deployment of forces and sometimes there was a legal issue in that, but it was only for the legal aspects to which he was invited.

Lord Falconer of Thoroton: Things have really changed. The two examples of the change are the well known story that the Law Officers opposed the intervention in Suez, even without knowing about the collusion, and they were just ignored. Reginald Manningham-Buller came and saw Anthony Eden and said, "This is all unlawful, what you have done," to which Anthony Eden said, "We did not go there because of law, we went there because of policy; please do not mention the law again." And he and - I think it was Harry Hylton-Foster - the Solicitor General went out with their tails between their legs. It is not just that, it is also the close relationship between lawyers and politicians. I am always struck by the story that in 1918 our most important relationship was with America. Though the Ambassador to America was important who should Lloyd George have? He decided he would have Rufus Isaacs, who is the Lord Chief Justice. So he has Rufus Isaacs in and says, "Would you go and be the Ambassador to the USA?" And he said, "Of course. It does not stop me being Lord Chief Justice, does it?" Of course not! So he goes off and is Lord Chief Justice and Ambassador to America for three years. In 1921 Lloyd George has a problem with India - who is the best man for this? Rufus Isaacs. He summons Rufus Isaacs back from America and says, "Will you be Viceroy of India?" He says, "Yes, I will be. I

assume I can continue to be Ambassador to the USA and Lord Chief Justice?" And Lloyd George says, "I think the boats are not quite so good to India," and so he goes off and is Viceroy of India. Then he comes back and is Foreign Secretary - the law and the politicians completely as one. That is not the nature any more of the relationship between the lawyers and the politicians - things have changed.

Q206 Sir George Young: Straight from the Mikado!

Lord Falconer of Thoroton: It is!

Q207 Lord Tyler: That final bit sounded like a job application! I want to go back for a moment to your concept of the more independent role and you suggested that the DPP might be a model.

Lord Falconer of Thoroton: Yes.

Q208 Lord Tyler: But would it not be more appropriate to think in terms of the Comptroller and Auditor General, who has a very special relationship with Parliament, because I think the role that you are describing still does have very significant parliamentary significance and in those circumstances we would have to have some explicit linkage to some part of the body politic.

Lord Falconer of Thoroton: The reason I go for the DPP rather than the Comptroller and Auditor General is because although there is a significant role in giving advice to Parliament - and I think the Attorney General as an independent figure should be accessible to Parliament to give advice on particular issues - the main day to day function of the Attorney General in relation to his legal function is to give advice to the Executive. Therefore, I do not think that a figure like the Comptroller and Auditor General would be remotely appropriate as the parallel.

Q209 Martin Linton: Just a very short question. I can absolutely see your distinction between different roles of the Attorney General and that the case by case prosecution decisions should be seen to be independent. But are there not some decisions on prosecutions that actually require somebody with a political mind?

Lord Falconer of Thoroton: Most certainly not and I think the moment you get politicians trying to influence those decisions you get into big, big trouble, and that is why I think you should put it offshore. I suspect in relation to the role of the Attorney General although there will be bits of his role that you could say the Lord Chancellor could be responsible for, that the overall role of the Attorney General should be like the Cabinet Secretary. If the Cabinet Secretary behaved inappropriately - which he never would do, I am quite sure - the person who would be responsible in an accountability sense would be the Prime Minister, and it should be like that with the Attorney General, it seems to me.

Q210 Mr Tyrie: As you know, the Justice Select Committee has come out with proposals that are not a long way away from what you have been proposing. They are slightly different but the main thrust is the same and the main problems identified by that Committee are the same as those that you have identified today. But that is not what is on offer, so it appears. Therefore, we are likely to be faced, at least for a while, with struggling on with the current arrangements. I think it might be helpful if you could just elaborate on what you think the consequences are of struggling along, what the risks are of struggling along. I do not want to put words in your mouth but I do think that there is a problem of credibility with the existing arrangements and I wonder whether you could elaborate on that just a little?

Lord Falconer of Thoroton: I think the problems of struggling are very, very greatly alleviated by the fact that the current Attorney General, Baroness Scotland, is held in very, very high regard by politicians, lawyers, judges and the public alike, so that will have the effect very significantly of reducing the problems. However, the two obvious problems that arise are, first: should there be in the future a question about whether or not there is a questionable international law basis for the use of force in the future? I am doubtful, in the light of what happened on the previous occasion, whether or not the authority - and it is only if it is doubtful because in some cases it will be utterly obvious that it is okay and therefore there will not be a problem - if it is a genuinely difficult question are the current surrounding circumstances such that the Attorney simply saying, "I believe it to be okay in international law," does that carry enough weight? That is the first identifiable difficulty. The second identifiable difficulty is the national security issue that Lord Tyler raised with me, which I do believe has to be preserved. I do not think it will be possible to stop such a prosecution unless you do it on the basis of seeking outside advice and then probably disclosing the substance of that advice, which might well be very detrimental, unfairly, to the person in respect of whom you are stopping the prosecution.

So because of our recent experience, which I do not think is to do with the personalities but I think is to do with the fact that we live in a much more transparent time, the current arrangements are very severely wounded in trying to deal with these most difficult and perhaps most significant parts of what the office of the Attorney General has to do.

Q211 Chairman: A final short question on a very big issue, namely the resolution process for war powers and decisions. Can we just ask you, do you think that this is the way forward - you may have heard some of the evidence from the earlier witnesses about the options of legislation? And most especially could you give us your comment on whether you feel that the reservations of government to go down the legislation route has validity in terms of protection of military personnel?

Lord Falconer of Thoroton: I am strongly against legislation. I believe that the draft detailed War Powers Resolution is pretty dangerous. I was horrified - not in any personal sense - to hear the evidence that was being given to you. This is adding a layer of legality which is unnecessary and problematic. I say it adds a degree of legality because assume that such a resolution is passed, that does not deal at all with the issue of whether or not it is lawful in international law terms. The question of re-approval that you were discussing, reading the resolution, which is set out at page 53 of the White Paper, you will have to get, it seems to me, approval again on the terms of the resolution, if what has been approved in the first place does not cover what then happens. So to take an obvious example, force was used in the invasion of Afghanistan, in effect to depose the government of Mullah Omar. Would you need another resolution to send a larger force to protect the work that was being done in Helmand Province? I assume that you would. But these interesting issues, all being set down in this legalistic way, will lead to people, I would have thought, constantly going to court just to review the Prime Minister. This is an example: it says in paragraph 3(5): "It is for the Prime Minister to determine if the emergency condition or the security condition is met." Suppose it is argued that no Prime Minister could possibly have concluded that the emergency or security condition was met, having done something the equivalent to a statute why would you not go to court and try and challenge that? This is to meet a problem I believe does not exist. I am strongly of the view that you could not use force now without the consent of Parliament, and indeed looking back at least to the Second World War in practice Parliament has always given its consent. It may not always have passed a resolution - it did not pass a resolution, for example, in relation to the Falklands War because it was absolutely clear that it had the wholehearted consent of Parliament. But why are we putting in a new layer of legalism which, whatever some of the

Generals may think, will cause more difficulties for them rather than less, because instead of giving them the security that it is bound to be lawful if a resolution is passed, it just gives lots of people another basis for attacking the legality of what has happened. I think the best solution in this area is some way or another it should be made clear that the Executive cannot use force unless Parliament agrees; how it agrees is a matter to be determined on each occasion, which I think is already in effect the constitutional position, and leave it at that, rather than this over-complex arrangement, which I think just leads to difficulties going forward. Just one final point. You need Parliament's consent but the people who wage war are not Parliament, it is the Executive; the Executive make the decision about whether we go to war because they have the information, they have the military to give them advice as to what is possible. They are making the decisions about how war is waged. Of course Parliament has to consent but if you adopt a process which gives the impression that Parliament is making the decisions - they have to approve it, but it is actually making the decisions - you are slightly, I think, dividing the responsibility from the formal power.

Q212 Mr Tyrie: Have you seen the House of Lords report on this proposing a convention?

Lord Falconer of Thoroton: I have.

Q213 Mr Tyrie: Do you think that is a sensible way forward?

Lord Falconer of Thoroton: I think I am not quite even with the House of Lords' position in relation to this. I am of general acceptance that you need Parliament's consent to the use of

Force and do no more than that.

Q214 Mr Tyrie: Are their convention proposals already a bridge too far?

Lord Falconer of Thoroton: I am too ignorant of the detail of their report to know whether or not they go into the detail of this.

Q215 Mr Tyrie: It would be helpful if you could come back to us on that.

Lord Falconer of Thoroton: Yes.

Q216 Chairman: Can we thank you very much and in saying so can we finally ask you this? Was it a complete waste of a tree? Is there anything in the Bill that you do feel we should look at?

Lord Falconer of Thoroton: As I say, I do not know enough about the civil service proposals. I know that there is widespread support for civil service legislation. What I do not know is whether or not any of these proposals actually make a difference to the current position. I have only commented on the things that I know about; in relation to the things that I know about this is a sort of Constitutional Retreat Bill! To call it a Constitutional Renewal Bill in my view is a little bit over-claiming.

Chairman: Can we thank you for your expert and indeed unambiguous evidence!