

HOUSE OF LORDS
HOUSE OF COMMONS
MINUTES OF EVIDENCE
TAKEN BEFORE
JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

DRAFT CONSTITUTIONAL RENEWAL BILL

WEDNESDAY 25 JUNE 2008

MR GRAHAM ALLEN MP

Evidence heard in Public

Questions 688 - 708

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and reported to the House. The transcript has been placed on the internet on the authority of the Committee, and copies have been made available by the Vote Office for the use of Members and others.
2. Any public use of, or reference to, the contents should make clear that neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings.
3. *Members* who receive this for the purpose of correcting questions addressed by them to witnesses are asked to send corrections to the Committee Assistant.
4. *Prospective witnesses* may receive this in preparation for any written or oral evidence they may in due course give to the Committee.

Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill
on Wednesday 25 June 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L	Mr Alistair Carmichael
Campbell of Alloway, L	Martin Linton
Hart of Chilton, L	Ian Lucas
Maclennan of Rogart, L	Fiona Mactaggart
Norton of Louth, L	Mr Andrew Tyrie
Plant of Highfield, L	Sir George Young
Tyler, L	
Williamson of Horton, L	

Memorandum submitted by Mr Graham Allen MP

Examination of Witness

Witness: **Mr Graham Allen**, a Member of the House of Commons, gave evidence.

Q688 Chairman: Good afternoon. Thank you, Graham, for agreeing to come and talk to us. Indeed, it was an invitation from you to come and we were very pleased to accept it, particularly as we know of your long-standing interest in these issues, both in your writings and, indeed, the comments and issues you have raised in the House. What I would like to ask to kick off, is what your general views are on the draft Bill and whether, in your opinion, the draft Bill presents a coherent package of measures that would renew the constitution, which of course is its purpose. In asking that question can I also invite you to say anything on the generalities of the issues that you think is important?

Mr Allen: Thank you very much. Can I say that I regard it as a great privilege to address the Committee and, I think, be the only Member of the Commons to do so.

Q689 Chairman: Can I interrupt you immediately to say that Members have declared interests relevant to this inquiry and they are available today and on the Committee's website.

Mr Allen: Very important, and I am sure you all have a very strong interest to declare in making our society more democratic. I guess, probably, my history starts even before becoming a Member of Parliament, in that I was appointed by John Smith to look at constitutional and democratic reform a long, long time ago in the then Shadow Home Secretary, Tony Blair's, team, and I have had a very strong interest ever since. Pre-legislative scrutiny, incidentally, has been one of the things that I have campaigned for for 20 years, so I am absolutely delighted to be in front of this Committee for that reason as well. Also, I think timing is very important on these things. You only really get fundamental change when there is a change at the top; either when there is a change of party in control or when there is a change of personnel at Number 10 Downing Street, and of course that has happened in the not-too-distant past, and it is possible that it could happen after a General Election. So there is a tremendous opportunity for this Committee to look at some quite radical change and, if I may say so, I think probably there may be a case to be brought by the Trade Descriptions Act if we are talking about constitutional renewal in the very narrow confines that it is laid out in the White Paper. The Green Paper gave a little more scope, and I would hope that the Committee would take the chance to push at the boundaries and actually come forward with a wider analysis, quite frankly: one that does examine the role of our democracy and how we can push it out; one that has a vision for the future of our country as well as, no doubt, the vitally important things of whether someone can camp in a tent on Parliament Square; to be actually very ambitious and examine why our country does not have an effective separation of powers (where that leaves us), and ensure that a number of issues that are missing from the consideration currently are considered. That creative role, I think, is one that those of us who have been with pre-legislative scrutiny right from it being a concept to reality have thought

that pre-leg scrutiny should be doing. What is missing? I think some very big things are missing: a pathway towards the possibility of a written constitution for the United Kingdom; a possibility of genuinely independent local government, which is commonplace in most Western democracies but not in the UK; the whole question of the tremendous over-centralisation which has been the hallmark of governments of all colours over the last 30 years, possibly even (though even I tremor at this one) our relationship with Europe and how that might be better defined, and the wider view on prerogative powers. There is mention of some prerogative powers, for example, in respect of the appointment of the Prime Minister, but I think there is a much broader area that can be delved into effectively, and the national debate that was called for in the original *Governance of Britain* document could be inspired, I hope, by this Committee. A year ago, those of us who care about democratic renewal were excited in a way that we have not been for ten years; a new Prime Minister had come into office and he chose, when he could have spoken about global warming or any other very important issue, to make his first speech to the House of Commons on the question of democratic renewal. As an internal Labour Party matter, he also only made one commitment in his campaign to become the Leader of the Labour Party, and that was a commitment to legislate on democratic renewal. So I think all of us thought that this was a great new beginning and, whatever our differences, we could actually work together to find a new basis of democratic consensus that could last, perhaps, for a hundred years in our country. I think I would be fair to say that perhaps our expectations either were raised too high or that those expectations have not yet been met. Hopefully, this Committee will be one of the instruments by which we can push that agenda forward. Very specifically, of the evidence that I have put forward to Members of the Committee, the most important thing is the establishment of some form of process which takes your work on when you have finished; that you do not pack up and leave it – that there is a legacy. That legacy, I would suggest, would best be some form

of constitutional commission that I would ask that you consider proposing, to look at all those big issues, all those large visionary aspects of democratic renewal which, sadly, are not really touched upon in the White Paper that the Government has put forward. There is a number of other specific points I could make, Chairman, but perhaps I could conclude my opening remarks there.

Chairman: It may well be that you will be asked questions on a number of specifics.

Q690 Lord Tyler: Before I come to my specific question, can I take it from what you have just said that you would concur with the summary of the Commons Justice Select Committee as follows: “The draft Bill fails to achieve the purpose given to constitutional reform by the Prime Minister. It gives greater power to the Executive and it does not sufficiently increase transparency”? Is that a fair summary, do you think?

Mr Allen: I think that is an excellent summary, but it is not necessarily the conclusion of the debate. I hope that Members here realise their own strength and the extensive ability that pre-legislative scrutiny has to actually open up the debate in the way that many of us who are democratic reformers would like to see.

Q691 Lord Tyler: In your evidence you give a lot of support to the idea of a statutory solution in a number of fields. You refer to the need to make the process justiciable. What do you see as the benefit of justiciability, and do you have concerns about then the legal liability (for example, in war powers) of those who are serving on our behalf in the Armed Services?

Mr Allen: I am a great believer in writing down either what is or what you would like to create in the future, and I think if we continue to operate on the basis of convention – nods and winks – I think the elected element in our democracy is actually weakened. I would rather people know what we are doing in statute law; I would rather that we codified our rights; I would rather that we had in writing, for every school child and Member of Parliament

to examine, our own constitution. If we have a constitution let us write it down; let everybody share not only the secret but, actually, the glories of the constitution either that we have or that we could create. Taking something to court is of less concern than actually having it clear. So many of the things in a democracy, particularly when you are talking in the stratosphere of things like a written constitution, are not about the results and outcomes, they are to create the framework. In so many areas in our democracy we do not often know what the framework is; we have to engage in what John Smith called “judicial archaeology”. I think the more we can frame things in statute, the more we can codify things in a written constitution, the clearer the framework for debate will be. Not the answers to all the questions, whether it is on abortion or whether it is on the right to free speech, but the framework, the boxing ring, in which the genuine debate can take place. So I say that is the strength of codification and statutory power rather than, necessarily, that you can run to the nearest judge to referee for you.

Q692 Lord Tyler: Do you not think there is a specific risk in relation to the process on war powers if you make the actions of troops in any way subject to legal challenge?

Mr Allen: No, because we are not making the actions of troops justiciable, we are making the actions of the Executive justiciable, but making them clear – which is the most important thing. In case there is any misunderstanding, I actually believe in executive power being nimble, flexible and capable of going to war when they see fit. They have to respond appropriately if the nation is under attack, for example. I do not want a debate about that, I do not want us to have a 20-day discussion about that; the Executive have to respond quickly and so they should, but we should know that that is their power and we should also know that to legitimise that action within (I think I said in my remaining orders) 20 days there should be a proper report back to Parliament, and Parliament can then make a decision if it was not involved in the first place in the decision to go to war. On the Iraq example, of course, we did

have a discussion before we went to war. So there are many instances where diplomatic pressure is building up, and war is an extension of that diplomatic pressure, and it is possible to debate those issues prior to engagement. However, that is not my standard. My standard is that the Executive have the ability to go to war but then should legitimise it and have a troop deployment ratified by Parliament.

Q693 Chairman: You lightly dismiss the potential of servicemen being subject to court orders and the like. How would you avoid it once you have the issue in statute? It is wider than the decisions unless you exempt it by statute itself, is it not? How would you achieve that?

Mr Allen: Anyone that would be arraigned under this legislation (and I hope that would never happen) would be the Chief Executive – in our case the Prime Minister - although, of course, you do raise a very important issue there, Chairman, which is about the rights of Members of Parliament in this issue. As someone who was instrumental in organising the rebellion in Parliament on the Iraq war, I attempted to discover what liability I would suffer if I supported an illegal war. Unlike the Government, I was not, as a Member of Parliament, at liberty to hire legal advice. I attempted to do this; I saw the Clerk to the House and I was told this was not possible. So the legislature, when voting for war, does not actually have legal advice of its own. That is a wholly separate point to whether the Government's legal advice should be in the public domain, and I do not wish to state a position on that, but I do believe that Members of Parliament should have some form of access to proper legal advice when they are taking decision of that magnitude, which in certain circumstances could lead to those individuals being arraigned before the court if actions were taken which were inappropriate and found not to be legal, ultimately.

Q694 Lord Maclennan of Rogart: You have said in your introduction, Mr Allen, that you were interested in the wider issues of the prerogative power as being limited and made subject to democratic rule. Do you see the war powers issue as in any way special? Do you think we need a separate statutory provision to deal with war powers from the prerogative powers more generally?

Mr Allen: Since we are where we are I think we can deal with the war powers now, and I would have thought people of goodwill would find a way not to inhibit the Executive but, nonetheless, to have legislative oversight in statute. However, there is a much broader issue about prerogative powers, which are now probably far broader than the ones that led to the Civil War in 1640. They need to be written down. I see that the Government is saying it is actually trying to discover what they all are, and as a backbencher and someone interested in this area I have tried for many years to get a register of prerogative powers, but the key ones I think we know. Probably, above all, we are one of the few countries where our Chief Executive is either not directly elected by the electorate or is not ratified by the legislature. The fact that the appointment of the Prime Minister is still a matter for Royal prerogative, I think, is something that I hope this Committee would at least raise as an issue, if not seek to put a settled solution forward.

Q695 Lord Maclennan of Rogart: You have given a very positive reason why you prefer statute to resolution, but do you see any negative reasons why Parliamentary resolutions might not be the appropriate way of dealing with war powers?

Mr Allen: Yes, because we do not have a separation of powers; we have a unitary system and government would, essentially, instruct Parliament, as it did through the Iraq war by leverage upon Members of Parliament, on the way to go. I think if you have something in statute then at least it is quite a problem for governments to unpick that conveniently and in the short-term. Whereas resolutions of the House come and go, a whipped majority can pass and

unmake resolutions very conveniently. So something that is, at least, at the first stage of being embedded (that is in statute), I think, is a bulwark against arbitrary executive power, should that ever come to this country.

Lord Campbell of Alloway: You approach this on the basis I think that we have a written constitution, that the function of this Committee is to move forward away from whatever exists at present, and the separation of powers as it operates is not any good. Then, is this not right, you say that on the business of war you want to have proper advice. I must say, I do not know what on earth you are talking about. There is not such a thing as proper legal advice. All lawyers do their best to give their honest opinion according to their learning and one thing and another, but there is not such a thing as proper legal advice which is in any sense certain, and the only way we will get what you call “proper legal advice” is from the Attorney General, whose duty it is to try and give proper legal advice. What are you talking about with “proper legal advice” other than the Attorney General?

Q696 Chairman: Could we ask you to restrict your answer to that specific point because I know we have to move on to a number of other issues.

Mr Allen: Improper legal advice is probably better than no legal advice at all, which is what I and a large number of parliamentary colleagues had in the run-up to the Iraq war. I think the Attorney General has a role in respect of the executive and I also think there is a very strong argument that the Attorney General’s advice should not be made public. There are other arguments, as you know, about it being made public. But I would have thought Members of Parliament acting in their legislative capacity, acting as elected representatives, should be entitled to know, for example, from a credible, independent legal source their legal standing in taking a decision to go to war, to sustain a war, in the very controversial legal standing as surrounded the Iraq war.

Q697 Chairman: Are you saying you think it would be right to at least have the opportunity for alternative advice?

Mr Allen: I think the Clerk to the House should be in a position to give Members of Parliament who wish it in extraordinary circumstances, such as being on the brink of war, what their personal legal position is as legislators. I do not want to be too dramatic but we have seen leaders and legislators in other countries actually brought before the International Court of Justice having made decisions on war-making and the prosecution of war. So at the time, when there was a lot of debate about the executive's legal advice, I was actually trying to get independent legal advice for the legislature which would give those Members of Parliament who wanted it some degree of reassurance about whatever path they chose in voting for or against a war that many people were saying was actually illegal.

Q698 Lord Plant of Highfield: Could I just take you into the kind of thicket of the relationship between executive discretion and parliamentary accountability, and you have already alluded to this. You have a number of proposals to make, and some of the people who have given and sent in evidence have supported some of the ideas you have, and I wonder if you could just elaborate on this general relationship between discretion and accountability. You say first of all that the Prime Minister should not have full control over the timing of any vote and the information which is made available to Parliament. You have talked about the need for Parliament to regularly renew a mandate for war, to prevent mission creep, and you have given evidence to us about retrospective agreement to military action when a decision has had to be taken quickly, and you have also recommended a scrutiny committee to have oversight of military activity. As I am sure you know, the Government seems to be rather strongly opposed to all of these proposals, so without going into one in any great detail, would you like to talk a little more about how you see the relationship between executive discretion and parliamentary accountability?

Mr Allen: I think we should not forget that on the last serious occasion when troops were deployed, which was the Iraq war, a time of great controversy and of different views, that when this matter came to the House of Commons it did so because of the benevolence of the Government, it did not do so as of right. We could have gone to war, and indeed have gone to war, purely on executive fiat, and there was a great deal of discussion about whether it should go to the House of Commons or not, and some have argued it only went to the House of Commons as a way of management control, let us choose the right time so we can get the result we want. We can all have different views about that but certainly it came to the House of Commons not because the House of Commons had any rights in the matter whatsoever but because Government, since Government controls the agenda of the House of Commons from dawn to dusk, made a decision that it felt it was appropriate for its purposes to put something to the House of Commons. I do not think that is sustainable in a democracy, there has to be a better way. It is not a winner-take-all, that Parliament will therefore be able to have oversight over operational matters or send individual soldiers to court or anything like that, this is about the spirit of a democracy finding form, and finding a form where people of goodwill in a very difficult position can actually find a means of reconciling views when the nation takes the most important decision of all, which is to put its armed services in the firing line. I think therefore it is incumbent upon all of us to find a way forward which meets all those obligations.

Q699 Lord Williamson of Horton: I wonder if I can ask about treaties, not strictly war treaties but other treaties of all kinds. Of course the draft Bill gives statutory effect to the Ponsonby Rule but it does not significantly alter the current mechanisms for parliamentary scrutiny. How do you think the Government's proposals on treaties could be improved and how could Parliament be more effective in the scrutiny of treaties? I just add that I am aware of course – I think it is in some of your work – that some things are covered by important

decisions in, for example, memorandums of understanding which are not classified as treaties, such as putting ballistic missiles in a country, so there are subsidiary points of considerable importance, but basically how do you think the Government's proposals could be improved?

Mr Allen: I think these are points of interest and I will gladly answer that question, but in terms of the broadest context set by the Government over a year ago, that we wanted to invigorate our democracy, clarify the role of Government both central and local, and rebalance the power between Parliament and Government in order that Parliament can hold Government better to account, this is relatively small beer. I hope that the bigger brewery will be examined by the Committee in its recommendations. On treaty-making specifically, I think there should be debates and votes on treaties. These are said to be extremely important events that bridge different countries, why can the legislature not have a serious impact into this process? Why can there not be interaction at the front end of discussions rather than merely, and often nominally, ratifying things once they have been decided? Other countries, particularly European countries, have found ways of doing this and their civilisations have not collapsed as we know them. Probably finally, the point you made about what is a treaty, currently a definition of a treaty is drawn very, very narrowly and does exclude memoranda, it does exclude non-binding arrangements and declarations. So you can come back from a summer recess as a Member of Parliament and find seven or eight treaties have been ratified in your absence, some of some significance, and that the days that they have lain on the Order Paper have been taken into account as holiday days. That was certainly the case when I last looked seriously at this about ten years ago, and that really is the exact opposite of proper scrutiny and accountability. Gladstone, as in so many areas, got it right, when he said the role of Parliament is not to run the country but it is to hold to account those who do, and I think on treaty-making we have singularly and emphatically failed to live up to that democratic promise.

Q700 Lord Armstrong of Iminster: I now turn to the Civil Service and perhaps you will understand why I have a special interest in that. You have suggested I think that there should be parliamentary scrutiny of the Civil Service Codes which are going to be provided for under the proposals in the draft Bill. The draft Bill would require the Codes to be laid before Parliament, they would then be able to be scrutinised by the PASC, of their own mere motion as it were, do you think we should require more than that in terms of some kind of parliamentary approval, or is it sufficient from your point of view for there to be the opportunity for scrutiny created by the transparency of the Codes in terms of being laid before Parliament? If I may put the other point about machinery of government changes, do you feel that Prime Ministers should be required to seek parliamentary approval for changes in the machinery of government? It would be fair to say that a number of our witnesses have said that this is essentially a matter for the Prime Minister who has to be able to act very fast, for instance when there is an elected change of government on an election or indeed after any general election, or indeed when there is a major change which he wants to make, and it would be difficult to do it if it had to wait for parliamentary approval.

Mr Allen: Again, anyone who has followed anything I have ever written on this stuff realises that I am not trying to constrain the executive, I am trying to empower the legislature so that proper scrutiny, proper transmission of information takes place. This is almost going from democratic renewal into good manners but I think there should be an interaction between the executive and the legislature of a nature and of a trust that does not take place at the moment; the way that Parliament's views are treated, or the way that select committee reports are treated, petitions, et cetera. The small change of interaction between the executive and the legislature I think could do with a little bit of love and attention.

Q701 Lord Armstrong of Iminster: Do you want more than the draft Bill proposes on the Codes, for instance?

Mr Allen: On the Codes, I would be happy for that spirit to pervade the discussions around the Codes. I have no strong feelings that the Codes must be done in a particular way, but I think it would be a courtesy not least for the House of Commons to be involved in the process in some mutually acceptable way. I think you would argue similarly for the transfer of functions. No one should, in my opinion, stand in the way of the Prime Minister doing reshuffles and ministerial reorganisations, but of course it would be very helpful for there to be a reporting mechanism, a response mechanism, from the House of Commons on what it felt about the reorganisation. Sometimes these things take forever to catch up. I am minded of the Legal Affairs Select Committee which we now have, that has gone through various incarnations. It failed to be one of the select committees created in 1979, I am told, because at the appropriate Cabinet meeting the then Lord Chancellor, Lord Hailsham, coughed when this particular issue was raised and Norman St John Stevas nimbly said, “But of course it won’t apply to legal affairs” in order to get this through at the first Cabinet meeting.

Q702 Lord Armstrong of Ilminster: It was before I became Cabinet Secretary, I must tell you!

Mr Allen: So it took a good 20 years I think for that omission to be put right. So I think there are ways in which that level of interaction can take place. I do not necessarily think that needs big, show-stopping bits of legislation to do it; I think it just needs a better and more co-operative, more of a partnership, arrangement between the legislature and the executive.

Q703 Chairman: Should there be a select committee to look after the Attorney General?

Mr Allen: I do not have any strong feelings on that, Mr Foster. That is one I would want to think about because, again, I would not want the Attorney to feel under direct parliamentary pressure before offering straight legal advice to the executive.

Q704 Lord Hart of Chilton: You have said in your evidence under the heading of judicial appointment proposals that you do not think the proposals provide the full overhaul of the relationship between the legislature and the judiciary that is required. The evidence we have been getting is really to the effect that it is a bit too soon to start making changes to the 2005 Act provisions because they have really only been in operation for 18 months. Given this “full overhaul” you obviously do not think the provisions in the draft Bill are sufficient. Can you help us with what you think should be there?

Mr Allen: Yes. As someone who wrote some of the early policy papers on the creation of a Ministry of Justice and a number of other areas, the argument that things happen too soon in the British context gives me reason to have a wry smile, frankly. Someone told me that the seating arrangement in the House of Commons came from a king who gave his chapel to the commoners some 900 years ago and the experiment is still under consideration and we are not quite sure whether we are going to make it permanent or not. I think if you are into democratic renewal in a very serious way and have got a broad vision of where you want to go, then I suspect some quite radical changes will be necessary in the relationship between the judiciary and the legislature and the executive. Much as I am delighted to see what we call the Supreme Court taking shape on the other side of Parliament Square, I think we will probably need to go a lot further. But in the short-term having proper scrutiny of judicial appointments done sensibly, done after consideration and discussion with the judiciary, I think is a step which we need to take in the very near future.

Q705 Martin Linton: Whose side do you take on the issue of the Attorney General? Should the roles be split: political and legal?

Mr Allen: Again, I do not regard this as one of the keystones of the democratic renewal debate frankly. Where the separation of powers needs to be in the UK, the dissolution of a unitary system, where the elected element in a constitution is actually quite weak, where

Members of Parliament are actually quite weak in the shake down of political power, where power is vested largely in a Prime Minister who is not directly elected and a media who of course have no affinity with the ballot box at all, I would have thought those were some of the bigger issues. In terms of the Attorney General's role, I think the Attorney General must maintain impartiality and independence and I would be loathe to bring forward measures which would compromise that.

Q706 Lord Armstrong of Iminster: Mr Allen, I was intrigued by your last answer but one and your comments on the present configuration of the Chamber of the House of Commons being as it has been for the last, I think you said, 900 years and I am not going to quarrel with that.

Mr Allen: Probably an exaggeration.

Lord Tyler: 450!

Q707 Lord Armstrong of Iminster: Are you suggesting you would like to see a semi-circular chamber as on the continental model?

Mr Allen: I would like to see electronic voting, then we would be able to knock out the lobby walls and you could build back a seat for every Member of Parliament and you could then have a proper exchange of views. I think you have already decided in your own arrangements that you get a much better interaction and better body language than when you are in this exchange of artillery fire which we have in the House of Commons. I have often said that I have never actually participated in a debate in the House of Commons as anyone outside would understand the word "debate" in the English language. I have shot volleys across to the Opposition and had custard pies come back in the other direction, but not actually had an interaction and a conversation as we are doing here. I think we let down the electorate, and that is why the forum of British politics has moved from the Chamber of the

House to the studios of the *Today* programme and *Newsnight*. I think this pre-legislative committee actually can take some quite serious steps to restore the forum of British politics to this House and take other steps to genuinely hold the executive to account. It is a great prize that you have in front of you, I hope you have the boldness to seize it.

Q708 Chairman: Your support for the Lords procedure is noted although I suppose it has to be tempered with the ending of a session. I think we have got to that point. Can we thank you very much indeed for coming and giving your expertise, uniquely, because a number of colleagues have given their written representations but only you, Graham Allen, did we ask to come along to speak to us and we think that was a very good idea. Thank you very much indeed.

Mr Allen: It has been my privilege, thank you.