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TAKEN BEFORE

Joint Committee on the Draft Constitutional Renewal Bill

DRAFT CONSTITUTIONAL RENEWAL BILL

Tuesday 1 July 2008

RT HON JACK STRAW and MR MICHAEL WILLS

Evidence heard in Public Questions 709 - 780

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Oral Evidence

Taken before the Joint Committee on the Draft Constitutional Renewal Bill

on Tuesday 1 July 2008

Members present:

Michael Jabez Foster, in the Chair

Armstrong of Ilminster, L

Campbell of Alloway, L

Gibson of Market Rasen, B

Hart of Chilton, L

Maclennan of Rogart, L

Morgan, L

Norton of Louth, L

Plant of Highfield, L

Tyler, L

Williamson of Horton, L

Mr Alistair Carmichael

Mr Christopher Chope

Martin Linton

Ian Lucas

Fiona Mactaggart

Emily Thornberry

Mr Andrew Tyrie

Sir George Young

Witnesses: Mr Jack Straw, a Member of the House of Commons, Lord Chancellor and Secretary of State for Justice, and Mr Michael Wills, a Member of the House of Commons, Minister of State, Ministry of Justice, gave evidence.

Q709 Chairman: May I welcome you both to our evidence session this afternoon. As you know, we have been hearing evidence from a number of witnesses on the Draft Constitutional Renewal Bill. In this session we are very keen to know the Government's view on some of the things we have heard, and indeed the purpose of the proposal. You will no doubt also have heard that a number of witnesses whose statements you may have seen have down‑played the significance of this Bill. I suppose the first question I would ask is: How does the Government respond to the criticism that draft Bill contains a number of disparate elements that do not collectively live up to the expectation of its title? I know that the suggestion is that you may like to open with perhaps five minutes of putting it in context. If you could deal with that question during your opening comments, that would be helpful. Before I ask you to do that, we do have to say that Members have declared interests relevant to this inquiry and they are available today and on the committee's website. Please, Lord Chancellor?

Mr Straw: Chairman, thank you very much for the invitation to Michael Wills and myself to come and give evidence to you. May I also thank you all for your labours. This is a collaborative exercise. It will be a year on Thursday to the day since the publication originally of the Government's written programme. I shall be issuing a written ministerial statement and a table of the progress that has been made since then, of which this draft Bill forms a significant but by no means exclusive part. The purpose of this programme, which is this stage of what has been a programme of significant constitutional reform going back to 1997, is to seek to invigorate our democracy, to clarify the role of government, to rebalance power between Parliament and the government; alongside that, although separate from what is in this Bill, to develop a stronger sense of what it means to be British and a British citizen. We look forward very much to the result of your labours because I have never suggested that any part of this process is, as it were, a final event. On your question, Chairman, is this just a disparate collection of changes, well they are certainly a number of separate and discrete changes. That is a self-evident truth. Is the whole greater than the sum of the parts? In my judgment yes, because they do represent a significant clarification and shift in power from the executive to Parliament and other changes as well. I have been reflecting, because obviously I have followed not every last word of the evidence but I have seen a lot of the evidence that has come before your committee, on how this and the other changes we have made may be seen in the future. I have been involved in most of the constitutional changes that have taken place over the last eleven and a half years, not all of them but most. On any one of them, one is capable of saying, "Well it was relatively minor, it did not make much difference", and so on, but if you add them all together what they do represent is a major change in our constitutional arrangements. I note that, quite separately from any evidence he gave to this committee, Professor Vernon Bogdanor said that all of these changes added up to "a quiet revolution". I am in favour of quiet revolutions rather than noisy ones because that is the British way, but I think that in time they will be seen in that way. There are

certainly - and we can come on to the specifics in a moment - very considerable demands for most, if not all, of the proposals which have been included now in the draft Bill.

Q710 Lord Maclennan of Rogart: Thank you very much, Secretary of State. You said this is not a final event. Does that mean that on a particular provision set out in the draft Bill, which presumably has gone through Cabinet Committee discussion and consideration, you do retain some open-mindedness because there is a gap, a wide gap in some cases, between what was originally put forward in what you described as the Governance of Britain programme and the particular measures as they have emerged. This is being done quite quickly by this committee. Evidence is being put together quite quickly. Can we assume that there will be an open-mindedness to a raft of different possibilities being discussed during the progress of the legislation through the House?

Mr Straw: Chairman, "yes" is my answer to Lord Maclennan. I have to deal with a large number of Bills, both in draft and sometimes without there being a draft, but in every case I have sought to take account of views of select committees of each Houses, both Houses and on the Floor of the House. Famously, the Freedom of Information Act was a very different animal when it received Royal Assent from how it went in, and that was as a direct result of Parliament acting to change it, but there are plenty of other examples. Everybody around this table is busy. I would not have been wasting the time of colleagues round this table if I and my colleagues in Cabinet and Michael were not going to take any notice of what you are suggesting. I have never suggested for a second that we have discovered the last word. It is simply not the case. Many of these things involve quite fine measures of judgment as well. I look forward to your views.

Q711 Lord Maclennan of Rogart: You put it forward that this was to be viewed in the context of other reforms that have taken place. In this particular Bill, what substantial changes do you see being made in the balance between the executive and Parliament?

Mr Straw: I see quite a number. For example, on war powers, which we may wish to get on to, I, as Foreign Secretary when it became apparent that we might go to war, felt, along with our late colleague Robin Cook, who was at that stage Leader of the House, that the existing convention, which was that Parliament would obviously be invited to debate a decision to go to war but would not do so on a substantive resolution, was wholly inadequate. So we got a specific and ad hoc agreement of the Prime Minister of the day and Cabinet colleagues that decisions, both in terms of our overall negotiating position in the United Nations and directly with Iraq, should be determined by vote of the House of Commons with the very extensive debate in the House of Lords, and then that the decision as to whether or not to enter into armed conflict should itself be endorsed, in this case in advance, by the House of Commons as it happened to be but not before the most extensive and electrifying debate on 18 March 2003. I felt that there was a very serious gap in the powers of Parliament over the decision to go to war, that the previous arrangements were inadequate. It had been a personal commitment of mine to ensure that the powers of the elected House should be formalised. There is then a debate about how you do that and whether essentially you follow the proposals of their Lordships' Constitution Committee for a resolution approach or the Public Administration Select Committee of the Commons for a more statutory approach. We came down in favour, so far, of the approach by resolution. If you look at I think it is Annex A of the March White Paper you see that is very specific. There is that; there is provision in respect of treaties. Some of the most contentious treaties are, in any event, subject to parliamentary process because they happen to be European Union treaties, but others are not. I just thought when I found out about the Ponsonby Rule - and it is quite difficult to find out about them actually - and I discovered the Ponsonby Rule when I had a submission about them as Foreign Secretary that they were quaint, to say the least, because Parliament was told about these treaties; it had 21 days to object. But even were Parliament under the Ponsonby Rule to vote against a treaty, it could still be ratified. I believe

that to be unacceptable. I still believe it to be unacceptable. Happily, my colleagues have joined me in that. There are some provisions in relation to the Civil Service where we are proposing to put the Civil Service on a statutory basis. With war powers and treaties we are modifying the prerogative; with the Civil Service we are replacing the prerogative basis of the Civil Service with an entirely statutory basis. I think that is very important. Then there is the area of the Attorney General, which I know has been the subject of quite a lot of debate. I think to have a proper statutory framework for the Attorney to remove his or her powers in respect of directions, apart from national security, and to have frankly a more modern approach to the relationship between the Attorney and the prosecuting authorities through the mechanisms that we propose like the protocol is really important. There has never been an occasion up to now where Parliament has had a proper say over a broad prosecuting policy. There will be, should this Bill go through, under the arrangements for the protocol to have to go before both Houses. Those are four examples. I could offer you many more

Q712 Lord Tyler: You reminded us just now that a year ago the Governance of Britain statement and then the Green Paper gave as its primary objective the invigoration of our democracy. Would you accept that some of the proposals you have outlined in recent weeks which are not in the draft Bill, for example on party funding, on individual registration, on weekend voting - and I would not expect you to include Lords reform or indeed voting reform - those three at least could be said to be much more likely to reinvigorate democracy than some of what our critics who have been in this room before have described as a rather rag-bag of proposals? Would you therefore consider the possibility that when the Bill rather than the draft Bill comes forward after the Queen's Speech in December that you could actually make it rather more aligned with that primary objective?

Mr Straw: I think it is a matter of personal choice as to which you regard as more important. The party funding changes are significant but, because we were not able to reach agreement with the other parties, they do not go as far as, say, Hayden Phillips proposed. I certainly stand by them and I am always to debate them. I think the much more substantive constitutional change in respect of election arrangements was in the 2000 Act. This particular Bill will build on those arrangements. On individual registration, I think it is important; it is also very important that if and when it is introduced, it is introduced carefully and with adequate financial and administrative arrangements so that it does not lead to under-registration because that would produce a result the reverse of reinvigorating our democracy. I am looking at that very carefully. On House of Lord reform, certainly House of Lord reform is unquestionably a major constitutional change. This has been the subject of considerable debate inside the cross-party group that I have been chairing, on which Lord Williamson sat for quite a long period. I hope that it is of interest when it is published.

Q713 Lord Tyler: And weekend voting?

Mr Straw: I will ask Mr Wills to come in on weekend voting.

Mr Wills: As you know, we published a proposal on weekend voting. I think it will undoubtedly produce very interesting debate. It is a difficult debate to have. There are arguments for it; there are arguments against it in terms of cost and how we deal with people of a religious belief. I think it will also bring into play other ways in which people might want to suggest that we can increase the legitimacy of our election process. We do have a problem is 60 per cent and less turn out in general elections; and we have turnouts in local elections of 20 per cent and 30 per cent. Inevitably, that calls into question the legitimacy of our election system, and that is not healthy for our democracy. I think it is a profound debate that we can have. If I could just add one other point about the Bill, if I may, I think it is a very powerful statement that we believe as a government that this process of accretion of power to the executive, which has been well documented for decades now, actually has

gone too far and Parliament needs to reassert its proper role in our constitutional arrangements. When you take all these measures together, that is the fundamental message that we are trying to make here. I think it is a profoundly important one.

Q714 Sir George Young: Could I approach Lord Tyler's question from a slightly different angle - what ought to be in the Bill. You yourself, Lord Chancellor, said that it contains separate and discrete provisions, which is a politer way of what Graham Allen told us last week, which is that it was a hotch-potch. The question I want to put to you, and you may want to draw on your experience as a former Leader of the House with a nose for business management, is: if, for the sake of argument, someone was to say that parts of the Bill, for example the Civil Service section, are well advanced and have been around for some time and in a form in which they could make progress, whereas other parts of the Bill, for example judicial appointments, are not nearly so mature, then it might actually make sense and Parliament might be able to address the issue better if the Bill was disaggregated into component parts rather than put forward as a jumble, as we have discovered on this committee, covering a huge frontier of constitutional issues, some of which bear very little relationship to each other?

Mr Straw: If I may say, Sir George, I like your description of this Bill covering a huge frontier of constitutional issues. I would be very happy to adopt that in place of Mr Allen's rather pejorative description. So that accepted, good man though he is, there is a common thread, as Michael was rather more eloquently than me suggesting, between all of this, which is about change in the nature of our constitutional relationships and the relationships between the executive, Parliament and the citizen. Of course it would possible, perfectly possible as a matter of parliamentary procedure, to put Part 1, which is about demonstrations in the vicinity of Parliament, into the annual Criminal Justice measure, Part 2 into a law reform measure, ditto Part 3, courts and tribunals. On ratification of treaties there is a big problem. I wanted to do something about this when I was Foreign Secretary but trying to get a legislative slot when you are Foreign Secretary is very difficult indeed because the Foreign Office is not geared up to do legislation, number one, and, number two, you are often abroad, so it is tricky. That would be a problem. On the Civil Service, of course you could have a separate Civil Service Bill if you wanted but if you did that you would end up putting off these things for further years and years and years. No-one can argue, I think, by the time this is introduced that it has not been the subject of effective scrutiny. The fact of your committee, Chairman, I think makes my point. If I may say so, I have looked carefully because I know that not least Lord Falconer had a slight different of emphasis from me in respect of Part 3. I am happy to take account of what he said and what the committee finally says, but also perhaps more importantly to answer questions on why I think these provisions are good and why I think they would work.

Q715 Lord Norton of Louth: When this Bill was envisaged last year in the draft legislative programme for this session, it was styled the Constitutional Reform Bill, but now it has emerged as a Constitutional Renewal Bill. Clearly titles are important that they have meaning. I am really wondering why it is termed "renewal". If you take your opening comments, they may relate to constitutional change but it is not clear there is a clear theme of renewable in terms of our constitutional arrangements. Is this just an attempt to hide the disparate nature of the provisions or is there a clear, if you like, philosophical base to the Measure that leads to that title?

Mr Straw: There is a philosophical base to the Measure, and I have tried to describe that, Lord Norton, but I am not going to die in a ditch for the use of "renewal" over "reform". I was just asking Mr Wills if he remembers why we said renewal and not reform, and the answer, it now comes back to me, was much more prosaic; we were anxious not to cause confusion with the 2005 Act, that was all. But a rose by any other name I think would ---

Q716 Lord Norton of Louth: There is plenty of precedent for Bills having the same name as earlier ones, whether it is the Parliament Act or whatever, and it makes more sense to ---

Mr Straw: I saw this on the briefing. There is some elaborate answer to this which I could offer you but that is the truth.

Mr Wills: If I may, I think there is a difference and I would characterise it like this. Constitutional reform is continuing. Our constitution continues to evolve; all governments reform the constitution in some way or another. I think what we wanted to do with this Bill was to signal, as it were, a step-change. We have heard a lot of criticism about some of the individual Measures, but I think it is fundamentally important what we are signalling with this. We are signalling a recalibration of our constitution - that is fundamental - between the executive and Parliament. That is a fundamental part of the overall renewal of our constitution that I think most of this committee would agree is necessary in various ways. We may place the emphasis in different parts of it but I think everybody feels that our constitution has come to such a state that we have a very wide degree of disengagement among the British people from democratic process and we need to reengage them. This is part of that and recalibrating the constitution between the executive and the legislature; people have complained about powers going to the executive all that way for decades. What we are saying is that we need to draw a line and recalibrate. We have also made it clear that for us this is not a blueprint; it is a roadmap. This is part of the process, but it is beginning anew.

Q717 Lord Norton of Louth: If you take the modest changes to the position of the Attorney General, who has responsibility for health check on judges, they are minor recalibration; there is nothing fundamental in terms that would lead to say that this is renewing the part of the constitution as opposed to making particular changes.

Mr Straw: The health checks of course is a very minor part; there is no way one could adorn that particular change with the title a constitutional measure; it is just an administrative tidying up. In respect of the Attorney, and I do not accept your description, there are arguments for going further and I would like to share them, but I still believe that the changes that are being proposed in the White Paper in March and the Bill are significant for the reasons I have suggested.

Mr Wills: And I think the Attorney herself suggested that.

Q718 Mr Carmichael: The one thing that really struck me when you were giving the list of merits of the Bill was I think that you used the term "a sense of Britishness".

Mr Straw: I did.

Q719 Mr Carmichael: This is something which will doubtless be well debated in the streets of Glasgow East in the weeks to come. I look at this Bill and I see the Ponsonby Rule and I see the use of prerogative powers and the war-making powers being given to Parliament. I do not see an awful lot here that is going to have any real resonance in that debate about Britishness.

Mr Straw: I hesitated when I was going through that list of four because the specific proposals in respect of bringing out the great sense of Britishness are actually to do with the Bill for rights and responsibilities and the British statement of values, which is a separate part of this programme. Could I say this, Mr Carmichael, about whether this is going got be on the lips of everybody in Glasgow in the next four weeks? Probably not, nor in Blackburn, more importantly, much as I love Glasgow. What is interesting about these constitutional changes is that once they have come in and

bedded down, they do make a difference to people. In my constituency surgeries, people do now come and say they want to use their rights under the Freedom of Information Act. No-one spoke about it there, apart from me in my open air meetings in the town centre, and when I did start talking about the Human Rights Bill and Freedom of Information Bill people's eyes used to close over and they would go into Marks and Spencer. Now, they do say they want to make use of their rights under the Freedom of Information Act, and they do, because they have very significant rights in respect of the local public authorities, or for example, increasingly, not just crooks but good, honest citizens have a sense of their rights under the Human Rights Act. By God, if you suddenly decided to take away people's rights under the Freedom of Information Act or the Human Rights Act, people would certainly be screaming. Just because not every last detail of procedure in the House is followed publicly does not mean it will not turn out to be important.

Q720 Mr Carmichael: But the Human of Rights Act and the Freedom of Information Act were undeniably significant and substantial pieces of legislation. What here in this Bill is going to strike a resonance in the same way; what is going to be the thing that your constituents and my constituents are going to come to us and say, "This is what we want to use"?

Mr Straw: War powers: there is no greater and more significant issue than that. Not just in Blackburn or Glasgow but across the country people were very exercised on both sides of the argument in 2003 and indeed still are. One of the issues there was who was going to decide. One of the issues which has arisen subsequently is how much information should Parliament have; should Parliament have the same legal advice as is available to the Prime Minister and the Cabinet? These are really important issues, which we are seeking to pin down by the proposals here or any alternative to them. They are of huge importance. In respect of treaties, a large number of treaties are relatively minor in scope and no-one is suggesting that parliamentary time is going to be devoted to those. I personally happen to think that what we sign up to in treaties, even if they do not become part of our domestic law to which we are then committed, our commitment is longer lasting in practice than in respect of any domestic legislation because it is so difficult to gain international agreement for anything other than a bilateral treaty; and it is even more difficult to gain international agreement to end that treaty unless it has clauses within it which allow for its own expiry. Getting across to the public that, yes, their re-elected representatives and the people down this end will not only have a say but they will have a decisive say in terms of the House of Commons over treaties is very important. On the Civil Service, at one level it is not going to excite people but people want to know who controls the Civil Service, how it is controlled. I look across at Lord Armstrong and was reflecting on the fact that in the 1970s great screeds were written at the time about how the Civil Service was bypassing Parliament; indeed, that gave rise to the whole Yes Minister series of scripts to our greater entertainment. Life has moved on a bit since then and these days the demons are special advisers or the No. 10 machine or something like that. Anyway, there are always demons to be found, but there was a serious issue there. The proposal for the Civil Service to be put on a statutory footing has been around for many years. We are now doing it. Is that right? I defer?

Mr Wills: Yes. I think it was proposed under Northcote-Trevelyn originally. It was finally completed. Could I add something in relation to this? May I suggest that it is not just the outcomes of these reforms that are important but also the processes that are put in place. I was reminded when I was listening to your question, Mr Carmichael, just now about the select committees. Exactly the same arguments that you have used against this Bill probably could have been used against the introduction of select committees. I do not think anyone looking back on the history of select committees would think they have been anything other than an admirable innovation and have actually directly benefited all of our constituents by subjecting Ministers in successive governments to vigorous and rigorous scrutiny and affecting the way policy has been developed. A lot of these

mechanisms, as the Lord Chancellor has just set out, will in time in relation to events that we cannot yet foresee also benefit people precisely by placing Parliament much more centrally in the democratic process than it is at the moment. That, we think, is a good thing.

Chairman: We have an hour left to ask lots of detailed questions. I am going to ask Lord Campbell, then Andrew Tyrie and then Lord Morgan to ask their general questions and then we will come to some detail, please.

Q721 Lord Campbell of Alloway: Sir, it was, was it not, under your aegis when you were appointed Lord Chancellor and Minister of State that these disparate elements were collected and eventually appeared in this Bill? That is right, is it not?

Mr Straw: Yes.

Q722 Lord Campbell of Alloway: Is that right?

Mr Straw: Whether we call them disparate is another matter but discrete. They are certainly put in the Bill.

Q723 Lord Campbell of Alloway: I shall not entertain a nebulous repetitive conversation. If I may, time is short, I will ask you some questions and if you are kind enough to answer them, I would be grateful. The purpose for which you prepared this, if I have it written down right, was to shift power from the centre to Parliament and achieve a measured change in our constitution. Is that the basic purpose of this Bill?

Mr Straw: It is one of the purposes, my Lord, yes.

Q724 Lord Campbell of Alloway: Thank you. This is something, you said, that may be seen from the future.

Mr Straw: Yes. I think Kierkegaard said that whilst life has to be lived forward, it can only be understood backwards.

Q725 Lord Campbell of Alloway: Which specific provision in this Bill shifts the power - and I am not using the centre, it is the executive and by the centre you mean the executive, do you not - from the executive to Parliament? Which specific provision of the Bill does it?

Mr Straw: Chairman, I have already sought to answer those questions, but briefly those in respect of treaties, the Civil Service, war powers, some in respect of the Attorney General and some others.

Q726 Lord Campbell of Alloway: Which provision is that in the Bill?

Mr Straw: I can give you the sections or the clauses.

Q727 Lord Campbell of Alloway: Oh, I see, that section. You mentioned war powers twice. Is that an important consideration in the Bill for you in this context?

Mr Straw: It is in the White Paper. It is not currently in the Bill. It could be in the Bill should your committee and Parliament decide that it wanted a statutory basis for war powers rather than the current proposals.

Q728 Lord Campbell of Alloway: So for the purpose of the Bill we can ignore war powers? Mr Straw: No, I do not think you can ignore war powers and there will be a debate I think at Second Reading, and this has already been the subject of consideration by a parliamentary committee, about whether the method we are proposing in respect of war powers, which is to do it by formal resolution of each House, is the appropriate one or whether the proposals in the Public Administration Select Committee for there to be what was called a hybrid arrangement with a broad statutory framework then underpinned by resolution would be better or worse.

Lord Campbell of Alloway: The explanation, sir, again becomes totally nebulous. Where is a provision in the Bill which concerns war powers?

Chairman: I think we probably have had the answer to that, which is that it is in the White Paper.

Lord Campbell of Alloway: It is not in the Bill.

Q729 Chairman: Lord Chancellor, in answer to Lord Campbell, you are saying that if our committee thought that it was a good idea that it should be in the Bill, you would be happy to look at that?

Mr Straw: Of course, and it is perfectly possible because it would be in the scope for members of either House to move that a new part be created in the Bill to provide a statutory framework for war powers.

Chairman: Is that all right, Lord Campbell? Thank you very much.

Q730 Mr Tyrie: There are two quick things: first of all, I had not understood at all why if this Bill were disaggregated into more logical parts it would mean, I think you words were, putting off all the other things - if we were for example to put a Civil Service Bill through -for "years and years". Why is that? Why can you not introduce discrete Bills for those things that are ready?

Mr Straw: In theory, Mr Tyrie, you can of course; in practice and in my experience it is much more difficult to get parliamentary time and priority for a series of Bills than it is for one Bill. I think that has been a timeless verity. I also think it makes sense, for reasons that Mr Wills has spelt out, since these are parts of a whole and they arose from not separate consideration in different departments but as a result of very concentrated effort about how we did shift power from the executive to Parliament, it is worth putting them in a single Bill.

Q731 Mr Tyrie: They are only part of the whole in a sense that anything to which the word "constitution" can be attached in the vaguest possible way can be linked together. There is very little to connect demonstrations outside Parliament to a Civil Service Act.

Mr Straw: I do not dispute that particular point but I think there is a lot to connect the others as a matter of fact.

Q732 Mr Tyrie: Why do you think it is that Lord Falconer went out of his way not just to say he disagreed a little bit but to take the diametrically opposite view? He said that other than the Civil Service provisions there was next to nothing of significance in this Bill, which he described as a sort of constitutional retreat Bill.

Mr Straw: You will have to ask him why he decided that. I have asked him privately but I am not going into that.

Q733 Chairman: Has he given you an answer you can share with us?

Mr Straw: No.

Q734 Mr Tyrie: Why do you not give us an answer in general terms? You do not have to quote him.

Mr Straw: I am responsible for my views. This is why I disagree with him. I am happy to explain but I think that he is wrong in proposing that the Lord Chancellor of the day should hang on to certain powers in respect of judicial appointments and he is wrong, literally wrong, about the current operation of the Constitutional Reform Act 2005 in believing that the powers in that Act currently provide the Lord Chancellor of the day with a power to send back appointments if they are not sufficiently diverse; there may simply be an error by him. In a sense he is on the reactionary side there; I am happy to be in the other camp. I also understood him not to be in favour of any significant change as to how decisions on war were determined. Again, by introducing the word in a non-pejorative way, he is very much in the conservative camp on that, whereas I am in a different camp.

Q735 Mr Tyrie: It is almost unprecedented, is it not, while the same party is governing for two Lord Chancellors to have such diametrically opposite views on such major issues? Can you think of any other examples?

Mr Straw: I will have a good think.

Q736 Chairman: I am not sure it matters anyway, not in terms of consideration of the Bill. Is that good enough?

Mr Straw: On the Lord Chancellor, for my prep I will think of examples.

Q737 Lord Morgan: One of the issues that has arisen is whether this recalibration that you define, which is very important, so to speak is more apparent than real. One issue where it has arisen is about for example war powers. How much of a change is this when the Prime Minister can define exceptional circumstances, when the information perhaps given to Parliament forming a view might be very limited and not revealed to them, and whether the timing of a vote also might take place? Does this not perhaps seem like an area where the Royal Prerogative, instead of being given a decent Christian or un-Christian burial, is in fact alive and well?

Mr Straw: My Lord, personally I do not think so. There is certainly a case for the resolution to be strengthened, or indeed for the matter to be placed on a statutory basis, and there are fine arguments on this. Having been involved right at the heart of decisions about two wars in the last seven years, it is my strong belief that not necessarily the outcome of the decision, because I personally happen to think both were justified and I am not in any sense resiling from that, but the process leading up to those decisions and the level of public confidence in them would have been different. With Afghanistan, the decision in any event to enter into armed conflict there was principally based on a United Nations Security Council Chapter VII resolution, which was slightly different in a very specific circumstance. There were debates in the House of Commons; there was not much argument between the parties. Nonetheless, I think it would have been good, even though there was a broad consensus, if Parliament had had the information proposed here. In respect of Iraq, as I say, Robin Cook and I managed to persuade our colleagues as it were to have a bespoke equivalent of what is in this resolution, but I regret the endless arguments about the amount of detail that was provided in respect of legal advice, for example. My decisions at the time were exactly like Lord Goldsmith's

and the then Prime Minister's but with the benefit of hindsight I think we could and should have provided much more information to the Commons. Could I just make this point about secrecy in emergency: it may be that the views taken that this resolution which is down in Annex A of the White Paper in March do not quite go far enough, but even were this to be done, a Prime Minister would ignore this only at his or her peril. The truth about secret operations and emergency operations is that they are self-defined. It would have been impossible for a Prime Minister to say, "We are going to go to war in Iraq, but, but the way, it is a secret". We were acting out this drama about whether we were going to go to war in public, not least in the United Nations Security Council. Most conflicts in which we have been involved have been preceded by many days, weeks, months of argument and debate. Sometimes - Suez is the best and in a sense the worst example - that is not the case. If there were a process which would perhaps ensure that were a Prime Minister ever going to go down that route again they had second thoughts, it would be a good thing.

Q738 Lord Morgan: You say, and I understand the point, that issues are self-defined. I wonder if that is true. Do not issues change for example with what is called mission creep? Therefore, is there not a question that Parliament should have retrospective rights to approve measures?

Mr Straw: The issue of retrospection when a specific operation has been launched I think is very difficult because if you then have put your troops in harm's way, to have questions raised about not only whether they are acting lawfully but whether they are acting with the backing of Parliament is really difficult. I would worry about that a great deal. On the other hand, I accept that you can start in one way and then months down the road say, after renewal of a mandate within NATO or in the Security Council, that what the British forces are involved in is different. My own view about this is that if there is a decision point for the Government about whether to continue, then there would also need to be a decision point for Parliament.

Q739 Lord Armstrong of Ilminster: Do you think that our attitude to this is over-dominated by Iraq? Are we thinking enough about other things that could happen, other conflict situations that can arise? My own experience of course was with the Falklands, which was a very different affair and came out of the blue sky, as it were. I just wonder whether the Iraq experience is colouring the proposal on this to too great an extent.

Mr Straw: I think, my Lord, that Iraq certainly has coloured my judgment at this stage. The answer to that is "yes". I was in the House when the Falklands War arose, and I supported it. I think we were absolutely right. I thought that on 2 April 1982 and I still think we were right. Your Lordship will recall that the emergency debate, which is was on a motion for the Adjournment, only lasted three hours from recollection.

Q740 Lord Armstrong of Ilminster: On a Saturday morning.

Mr Straw: Indeed, on a Saturday morning but since we were all there, there was no reason why it could not go into Saturday afternoon. There was also no reason why the House could not have had a note from the Attorney saying whether it was lawful - it plainly was and there was not any doubt about that - and there have been a resolution about it, which would have been passed. The outcome would have been the same, for sure, but I think the process would have been better. Although now in retrospect people say the Falklands was fine, you will recall even more acutely than me, because you were right in the middle of it in a way that Opposition backbenchers were not, that it was by no means certain that we were going to win. There was quite a lot of controversy about aspects of it right up to the military victory and I think a clear resolution would have been a good idea.

Q741 Mr Chope: How does what the Lord Chancellor has just said fit in with what is happening in Afghanistan where originally when we went in we were told that it was possible that there would not be any British fatalities at all and now we have well over 100 and we are engaged in what most people regard as a war? Is that something of which the Lord Chancellor thinks Parliament should have been involved in expressly approving?

Mr Straw: First of all, as I have said, Mr Chope, the decision to become engaged in Afghanistan arose and continues to arise from specific United Nations Security Council Chapter VII resolutions, so it is slightly different. Although of course I accept the resolution whilst it allows us to take part, it does not require us to take part. Had, say, this resolution approach been already agreed and still more of a statutory basis had been determined, then, yes, there would have had to have been a debate on a substantive motion in respect of Afghanistan, as there was in respect of Iraq - full stop. The process would have been different.

Chairman: We probably do need to go on to the more specific questions.

Q742 Lord Williamson of Horton: As you know, Lord Chancellor, this joint committee has been subject to a bit of competition from the Public Administration Select Committee?

Mr Straw: I am sorry, I genuinely was not aware of that.

Q743 Lord Williamson of Horton: They have published their report now. In that they concluded that unintended consequence of placing prerogative powers on the statute book. They said it would become subject to scrutiny, and I quote "not by Parliament or the people but by the courts". Would you like to comment on that?

Mr Straw: Yes. I think they are wrong about that, with the usual respect to such an august select committee and good friends on both sides who sit on it, because what is behind that is an implication that the courts only judicially review executive acts if they are based on statute rather than the prerogative, and that to my certain knowledge is not the case. Decisions by for example the Lord Chancellor or in this case the Secretary of State for Justice, same person, under the Royal Prerogative of Mercy, which is literally a Royal Prerogative, are and have been judicially reviewable. What the courts look at is not the source of the power but the fact of the power. In some ways, if you have precision in statute, as opposed to imprecision in prerogative, the courts are less likely to try to second-guess what the executive is doing, provided the decisions have been made fairly.

Chairman: We are going to move on to war powers. Part of it has been dealt with, but Lord Armstrong will carry on with this.

Q744 Lord Armstrong of Ilminster: You say part of this has been dealt with but I do not think we have touched this afternoon on a point that was made to us in evidence that changes here could increase the potential legal risk to individual soldiers and make them more liable to be subject to legal sanctions or criticism or legal prosecution. I wonder what is your assessment of the risk that individual soldiers could face, whether it is under a statutory route or under a resolution as the Government proposes.

Mr Straw: I do not think there is any basis for that concern, I really do not. It can be dealt with. If the approach adopted is one by resolution, then there is no change in the substantive law; there will be a change obviously of parliamentary procedure. Were it to be included in statute, then all the drafts have made it absolutely clear that nothing in the statute suggests or implies that that would be

any liability falling on individual service personnel. I understand the anxiety but I think that it is not one that could or would arise in practice.

Q745 Chairman: Would it specifically provide an exemption from liability if it was determined in that way?

Mr Straw: If you went down the route of statute but, as you know, currently the Government's preferred route is to go down the path of a resolution which is not, by definition, procedural within Parliament and non-statutory.

Q746 Lord Maclennan of Rogart: You have shown yourself to be quite open-minded, if I may say so, Lord Chancellor, about the issue of statute or resolution. Some of the witnesses we have heard from on the subject have suggested that a resolution is easily alterable by the government of the day under the stress of the circumstances which give rise to its being possibly used and employing their parliamentary majority to do so. In those circumstances, is it not more attractive to have a statutory basis, which is not so malleable in the light of the circumstances?

Mr Straw: Lord Maclennan and Chairman, of course that is one of the arguments in favour. That has to be balanced by the arguments the other way, which is that the legislation may be too prescriptive, too restricting of genuine military discretion within the overall political decisions made by Prime Minister, Cabinet and Parliament. I think, however, in practice if Parliament, both ends, had agreed a resolution, it would be a very unwise Prime Minister and Cabinet which chose, when it came to an issue of deployment of British forces and putting them in harm's way, to ride roughshod over those provisions. It would be a very foolish thing to do. I think it is significant that over Iraq - it was of course intensely controversial - the Government did not have to do any other than go down the traditional route, which was to have a debate on the Adjournment. In any event, I thought that it was not going to be possible to sustain the legitimacy of the decision if we did.

Q747 Lord Maclennan of Rogart: Many other countries do have greater power than Britain and a statutory basis for the exercise of war powers.

Mr Straw: They do, and personally I am not scared about this. You simply have to be very careful about what goes into the statute. The alternative we looked at was what we described as a hybrid, which was a light statutory framework with a resolution inside it. It is for the military to speak and not for me, but their anxiety, which I fully understand and indeed in this respect support, is that if you are too prescriptive you can end up in the position that one or two of our European allies are in where the detailed rules of engagement are the subject of line-by-line debate in their parliament, which then produces almost risible results when we are apparently fighting alongside forces from our European allies who have to be back in barracks by nightfall and who are constricted from when they can let their guns off. So it is a non-trivial issue which has to be dealt with if you were to go down the statutory route.

Q748 Ian Lucas: Following on really from that point, some of the evidence we have heard has related to the difficulty in defining terms like "armed conflict" and "armed forces" and how Parliament will be able to deal with issues with difficult definitions. How will Parliament know when they need to make a decision, given that issues like whether deployment is the moment that authorisation is required or whether when armed conflict starts is the issue, when those issues are not clear? How would we know when the decision needs to be made?

Mr Straw: Mr Lucas, the definition of armed forces is pretty straightforward. It happens, because I was looking it up earlier, to be in section 374 of the Armed Forces Act 2006. It simply defines what

is an airman, what is a sailor, what is a soldier, and so that is pretty straightforward; it is a matter of fact. Armed conflict: there is no specific definition but there is plenty of discussion, including in the Manual of the Law of Armed Conflict, which I have been reading for my prep. For example the following guidance may be given: Any difference arising between states and leading to the intervention of members of the Armed Forces is an armed conflict. An armed conflict exists whenever there is a resort to armed forces between states or protracted armed violence between governmental authorities and organised armed groups within a state. In other words, a high state of civil war, as opposed to the much lower level of state insurgency. I think you do know what an armed conflict is when you see one. I accept what Mr Chope is saying that sometimes you get a situation where it may start off as what appears to be peace keeping in a very benign way and then develops into peace making or something greater, or armed conflict, and that is more complicated. Think about the major armed conflicts in which the United Kingdom has been involved in recent years. They have been: the Falklands, the First Gulf War, the Balkans, Afghanistan and Iraq. I think they all were clearly armed conflicts.

Q749 Ian Lucas: Do you see any case for coming back to Parliament when the nature of the conflict perhaps changes? I am thinking here specifically about Afghanistan.

Mr Straw: I tried to deal with that in respect of my answer to Mr Chope. It is a fine judgement, and not for someone in my seat but for the Defence Secretary, the Prime Minister and the Chiefs, as to whether it would be highly disruptive but my own rule of thumb is that, if there is a moment where there is a choice before government as to whether or not they could end involvement, then that choice ought to be reflected by parliamentary decision as well.

Q750 Lord Norton of Louth: Coming back to what we were discussing very much at the beginning, which is Parliament's role in relation to treaties, and you were going through what is included in the Bill in Part 4, if you look at the current practice, we have about 30-odd treaties a year ratified, most of them on technical matters and therefore not likely to come before the House, so it is the exceptions that would be engaged here. If you think about present practice in terms of the Ponsonby Rule, it is not clear from the way that this Part is drafted how much it will actually move us away from the existing practice, in other words, a large part of the provisions appear to embody existing practice. The only difference is the requirement that the House would be able to vote and therefore trigger a certain response from government. How far does it actually really differ from existing practice? The other point I was going to make is, it engages the House if the House votes in such a way, but, coming back to Mr Wills' earlier point about the importance of embodying processes, there is actually no clear process in the Bill that would ensure the House has that opportunity. How does one deal with the point about if you take 21 days, and if you are going to have a proper parliamentary provision for scrutiny - and one would expect that to be through Select Committees - actually allowing time for that process and then ensuring there is actually time on the floor of the House to consider, say, a proposal not to ratify?

Mr Straw: Lord Norton, the fundamental, substantive difference - and it really is fundamental- is that under the Ponsonby Rule, as I said earlier, Parliament has a vote but it can be of no effect, and the executive can go ahead and ratify the treaty. Under this, under clause 21(5)(b), if Parliament votes against the measure, it cannot be ratified. That is a very big difference. I accept, however, the burden of the second part of what you are saying, which is that, in a sense, the arrangements for getting a vote have been left at large, basically for the usual channels and for people to make a noise. It may be that your Committee, Mr Chairman, comes to a view that there ought to be more specific provision in here. I do not think I am giving anything away: the anxiety of business managers, and it will ever be thus, is that if you lay too much down in a Bill in terms of procedure, the discretion of business managers may be limited. There are other considerations as well.

Q751 Lord Norton of Louth: I accept your basic point. In constitutional terms, it is a major change, giving Parliament powers it has never had before, but it could be meaningless if you then do not have the mechanism to give effect to that change. Then there is the allied point which I am going to come on to: you mention not putting too much specific in the Bill, but the Bill then has provisions for exceptional cases, so, in a way, the Government has wiggle room for getting out of it actually being debated. How does one, if you like, entrench the mechanism to ensure that what the Bill seeks to achieve it actually delivers?

Mr Straw: First of all, an awful lot in this place is done by convention and no-one should ignore the power of that. Having been a business manager, it is very powerful. The fact that one has previously done something in the past, unless you have the consent of the House, is a reason for continuing to do so. I accept the point you are making that at the moment the exact procedure for triggering what are substantial powers is not specified. You could either leave it to the usual conventional arrangements, because in practice, where you have a negative resolution in a Statutory Instrument, if enough people complain about it, there is always a vote on it, or you could make provision in the Standing Orders of the House, each House, that if X number said they wanted a debate and vote, there would have to be a debate and vote, and you could also add if you wished that the appropriate subject Select Committee should produce a report on it, or you could embed it in statute. It may be - and I am thinking aloud here - that the second suggestion is the more satisfactory of those three.

Q752 Lord Williamson of Horton: This is a specific point on treaties. We have been told that many treaty-like documents, such as memoranda of understanding, exchange of letters between governments, UN security resolutions and so on, may be more important in their effect than most treaties but do not fall under the Ponsonby Rule. I think, for example, the stationing of ballistic missiles, which is pretty important, was the subject of a memorandum of understanding between the US and the UK. What steps would the Government foresee to ensure effective scrutiny of such documents? It is a bit weird to settle everything on treaties but to leave out some very important things.

Mr Straw: I think, my Lord, they would have to be done on an ad hoc basis. It is certainly the case that there could be a memorandum of understanding on X, which is a much bigger issue, than a treaty on Y. What, however, we have to deal with here is the legal status of these instruments. Since memoranda of understanding do not have the same status in international law as treaties, presumably that was why it was chosen to be a memorandum of understanding rather than a treaty, then it would not fall within this area. For the future, I could envisage that, if such a memorandum were disclosable, albeit in confidence, it might be examined by a Select Committee, it might be examined by Intelligence and Security Committee, and certainly would have been examined, I suspect, by at least the chairmen of the relevant Congressional Intelligence and Security Committees.

Q753 Lord Maclennan of Rogart: Lord Chancellor, the Governance of Britain White Paper and this Bill all place great weight on Parliament, but particularly upon the House of Commons, for scrutiny to enhance the role of Parliament. I wonder if any consideration has been given to the possibility of some sort of power-sharing arrangement which recognises that one or other House might more sensibly take the lead in these issues in view of the fact that there is a quite serious possibility of overload for parliamentarians, particularly, I think it has to be said, Members of the House of Commons, with new economic scrutiny committees, subject committees, Public Accounts Committee, treaty committees. Has any thought been given to the possibility of sharing out these roles?

Mr Straw: Lord Maclennan, your specific suggestion is that the load, for example, in respect of scrutinising treaties might be...

Q754 Lord Maclennan of Rogart: Yes, this is an example of further overload...

Mr Straw: It might be worth a detailed examination. I would have to talk to colleagues about that but, in principle, I think very strongly that the work of the Commons and the work of the Lords should complement each other. I certainly think that the work of the European Committees in the House of Lords has been very significant and complementary to the more partisan scrutiny in the House of Commons. We are open to suggestions on that.

Q755 Lord Hart of Chilton: This is a question about judicial appointments.

Mr Straw: You had better declare an interest!

Q756 Lord Hart of Chilton: My declaration of interest is well there. The work done in relation to the Constitutional Reform Act 2005 was carried out comparatively recently in terms of rebalancing the accountability of the executive and the independence of the judiciary. Central to that was the creation of the Judicial Appointments Commission and it has only really been under its own steam for about 18 months. It is only for about that period of time that its corporate plan has been in existence and there is only one year's data of its work. The first question is, do you think it is too soon to make changes to the judicial appointments process?

Mr Straw: I think it would certainly be too soon to pull the whole thing up by its roots but these changes that I am proposing are, I think, sensible ones. I do not suggest these ones are earth shattering. Much more significant changes on judicial appointments, the whole relationship between the executive and the judiciary, were made in this Act, and I am the first to commend my good friend, the noble and learned Lord Falconer, for what he did there. However, what I have spotted is that one or two of the processes, frankly, were over‑bureaucratic and it is sensible to streamline them; they just are. As I was reading through Lord Falconer's evidence, or gobbets of it, earlier today, this may be a consequence of having a Commons Member, with much wider responsibilities than the traditional Lord Chancellor, also as Lord Chancellor, because it was my suggestion, and nobody else's, that the Lord Chancellor's power, which is pretty limited actually under section 90 of this Act, to reject or refer back appointments of the judiciary up to and including the level of the circuit bench should be removed. It was just adding another process and delay without any particular benefit. Lord Falconer when he came here suggested that, if I were to give up the power in what is section 90, then I would not have any power left, for example, to refuse a set of selections on the grounds that they were not sufficiently diverse, but when I said in opening, Mr Chairman, that Lord Falconer was wrong about that, he literally is, I think, incorrect in his remembrance of this part of the Act. Section 90 of the Act does give a limited power to refer back a selection, but in respect of an individual, not the whole competition, one individual, and that has to be done on very specific grounds, basically, that they are not qualified for the job. What I am retaining is the power - and it would be slightly modified, if you look at Schedule 3 of the Constitutional Reform Bill - in respect of these appointments, circuit judge and below as well as High Court and above, a power to pull the whole process for that particular so-called vacancy notice. So if I judged that, for some reason or other, the Judicial Appointments Commission had come up with a set of recommendations for appointment which were wholly inconsistent with, say, the diversity of the pool of applicants, then I could simply withdraw the vacancy notice. That power is being retained. There are one or two other minor things, like medicals, where it is just silly that too many weeks are elapsing given the current drafting of the Bill although the basic structure of this Act is a sensible

one. I have never put an Act on the statute book - and I have put a lot on - which with the benefit of hindsight could not be slightly better drafted in one particular or another.

Q757 Lord Hart of Chilton: The weight of the evidence that we have been hearing is that, quite right; there are minor changes that could well be made, but it is not absolutely necessary at this time to involve legislative change and it would be far better to wait until you have a few more years of seeing how the system that was adopted in 2005 beds down and works out.

Mr Straw: I do not think we are really disagreeing, Lord Hart. I am not proposing to pull up the basic architecture that is in here; not at all. What I am proposing to make are some rather limited changes to streamline the process. In practice, no Lord Chancellor of the future is going to wish, I think, to intervene in recommendations about some hundreds of judicial appointments below the High Court bench for district judges and, at their level, members of tribunals and circuit judges. Different considerations apply in respect of the High Court because it is only for High Court judges and above that they have quite the level of tenure, and also that Parliament is involved in their removal, because it is they who can be removed only by an address of both Houses to Her Majesty. Of course, the other really significant difference between the High Court bench and the others is that the High Court is a court of record, so its judgments are binding on all the other courts. It is a significant difference. I think the limited powers there in respect of any individual, as well as the rather more significant ones for the higher judiciary, ought to be retained.

Q758 Lord Armstrong of Ilminster: If I may, I will turn to the Civil Service, Lord Chancellor. I do not certainly want to question the general idea of us having legislation catching up with Northcote and Trevelyan, as Mr Wills said just now. There is one strange point in this, that the Government's Bill in 2004 specifically excluded from the Ministers' general power the power to manage, the power to recruit, appoint, discipline or dismiss civil servants, or any other power for the day-to-day management of civil servants, whereas in this Bill the general power to manage the Civil Service specifically covers appointment and dismissal and the imposition of rules on civil servants. This appears on the face of it to be a very dramatic change - that was the word used by the Public Administration Select Committee. Is it as dramatic as it seems?

Mr Straw: I do not think it is as dramatic as it seems, although I have to say, when I looked at the wording, I could see why the Public Administration Select Committee were concerned, and it may be sensible, Mr Chairman, if I sent to your Committee a short memorandum about this. My understanding is that the reason why there is a difference between the previous draft Civil Service Bill and this one is because it was originally proposed to retain under the prerogative powers of appointment and dismissal, and what we are seeking to do is to have the powers of appointment, et cetera, in a statutory framework. At the same time, there has to be a Minister responsible for the Civil Service to Parliament but in practice whose powers are very constrained, and that Minister is the Prime Minister. I am certainly happy to look at the drafting but it was put in this way for the best of reasons, not for the worst. I will, if I may, send your Committee, as I say, Mr Chairman, a short memorandum about this.

Q759 Lord Armstrong of Ilminster: I think one aspect of this which concerns me is that this provision makes the Minister at least technically accountable for appointment and dismissal of civil servants, and that this could mean that individual appointments and dismissals could be the subject of parliamentary discussion in a way which they cannot be now. Is that the intention? If it is not the intention, I think it needs to be made clear.

Mr Straw: I agree with you. As I went in to look at this, as I say, the intention is clear and there is obviously no intention whatever that Ministers or Parliament should be able to argue that X rather

than Y should have been appointed, because that would take us back to the days before the Northcote-Trevelyan reforms, so we will obviously look very carefully at your report and at the current drafting.

Mr Wills: We can certainly make this intention clear in the passage of the Bill, just so it is literally clear in the parliamentary proceedings.

Q760 Lord Armstrong of Ilminster: Yes, but if we are going to put this in statute, a declaration---

Mr Wills: No, no. We will both look at the drafting. The Secretary of State has already said that, but we will also make our intentions absolutely clear, because I think we are in the same place on this.

Lord Armstrong of Ilminster: Thank you.

Q761 Chairman: What is the justification for the statutory provision excepting diplomatic appointments from selection on merit?

Mr Straw: I was about to be facetious but I will not! First of all, in practice - and this practice has been under successive governments - there are different arrangements for the appointment of heads of mission, Ambassadors and High Commissioners, which is that the Foreign Secretary of the day and, of course, for some of the top-level appointments, the Prime Minister of the day, are much more heavily involved in those appointments than an equivalent Secretary of State, and Prime Minister, is in respect of domestic appointments, and there are good reasons for this. You are having to select an individual, and they may be at grade 5, Assistant Secretary or grade 3, Director level, and not at a grade 2 or grade 1 level. They are going to represent Her Majesty and the United Kingdom to government X or government Y, and the political consequences with a small "p", the diplomatic ones, if you like, of choosing the wrong person, who may be very well qualified in other respects, are far greater than if you happen to put a particular grade 5 into the wrong post in the Ministry of Justice, or even a particular grade 5 into the wrong department inside the Foreign Office. Just so we are clear, it was not that I had when I was Foreign Secretary any involvement in who went in at grade 5 or even grade 3 to particular posts within the Foreign Office, because that was not necessary and it would have been unjustified, but it is in respect of ambassadorial appointments. There was a very formal process: they went through a board, there was discussion on merits. I did not ever acting improperly and I am quite sure my predecessors did not, but I did sometimes say "Honestly, given all the things that are going on in this country, this person's experienced" - I would discuss it with the Permanent Secretary - "My view is we should have X rather than Y." I think that is a really important discretion for a Foreign Secretary. The other point here is that there are some appointments which have always, frankly, been political. So, for example, Lord Carrington was High Commissioner to Australia in the 1950s, and there were others made by previous Conservative administrations. Under this administration we have had a number. It was an appointment by then Prime Minister Tony Blair that now Lord Goodlad should become High Commissioner again in Australia, and we have also appointed two at the time Labour Members of Parliament to be High Commissioners respectively to Australia in succession of Lord Goodlad and in South Africa, and in previous years you have had sometimes the UK Ambassador to the United Nations being a party political appointment. That happened with Lord Richard and in the Sixties - I will remember his name in a moment but there are plenty of examples, and that is why we want to keep the discretion.

Chairman: Rather than excepting the position, would it not be best to redefine what "merit" meant and actually set out perhaps in the Bill or elsewhere precisely the criteria for such appointments?

Q762 Lord Armstrong of Ilminster: The trouble is, merit implies competition, and in most of the cases you referred to there was no competition.

Mr Straw: Yes. There are two things going on here, Mr Chairman. One is that in the generality of cases, certainly in my experience as Foreign Secretary for five years, there was of course competition. The only candidates presented who one could conceivably have appointed were ones who had come through the Diplomatic Service and who met all the criteria. One never looked at people who were below the line, who were not suitable, who did not have the languages, but quite frequently, as I say, it was X rather than Y, and I think that is a discretion which a Foreign Secretary and, for the top-level appointments, a Prime Minister, would want to keep. On the others, as Lord Armstrong has indicated, it is not that people like Lord Patten, who was appointed Governor of Hong Kong, or Lord Carrington or Mr Boateng and so on, who we have appointed, were unmeritorious, but it is the case that there was not exactly a competition that would be worthy of that name in a formal sense. We can look at the wording of it but my guess is that Prime Ministers of the day, as I say, and Foreign Secretaries would wish to have that discretion available for a very limited number of appointments. It is rarely more than two.

Q763 Lord Campbell of Alloway: I want to ask you a couple of questions about special advisers. The first is, why is there no provision in the draft Bill to restrict the functions of special advisers and the second is, why is there no provision in the draft Bill that would prevent the Government making an Order in Council provision to allow special advisers to be appointed with executive functions? You gather what is behind this, because the Prime Minister's first act on taking up office in 2007 was to revoke the provision in the Civil Service Order in Council which enables special advisers to be appointed with executive powers. If Mr Brown takes that view and does that, what is the answer to the two questions I have put?

Mr Straw: The answer is, my Lord, that there is no intention for special advisers to have executive powers. We will obviously take account of what your Committee says, Mr Chairman, about the exact wording but there is not any intention for special advisers to have executive powers. When Mr Brown became Prime Minister he revoked those earlier two Orders in Council. You could argue the case for the Orders in Council, which were established in 1997 - I will not do that now but anyway, they were revoked. As to the second point, I should perhaps reassure you, Lord Campbell, that the possibility of making an Order in Council, which is essentially under prerogative powers, in respect of special advisers will not exist once the Civil Service, including the employment and conditions of special advisers, is placed on a statutory basis. So it goes. That would be the end of it. The only way of providing for that sort of power would be on the face of the Act.

Q764 Lord Campbell of Alloway: Yes. You would think that this should be on the face of the Bill. You think the questions do not require any clarification?

Mr Straw: As I say, I do not, because Ministers cannot act unless there is a power, and if there is no power within the Civil Service parts of this Bill as it becomes an Act...

Lord Campbell of Alloway: It is a little difficult to understand. Can you help on this? I do not know enough about the Civil Service but it seems a bit odd to me.

Q765 Lord Armstrong of Ilminster: I think it is being suggested that if there are statutory provisions to cover these matters, you would not then be introducing an Order in Council.

Mr Straw: You could not.

Q766 Lord Armstrong of Ilminster: You could not do that and that may be right. I have two points. One point is whether there should be some specific exclusion of any power for special advisers to recruit, manage or direct civil servants, which was suggested to us in evidence, and secondly, why there is no cap on the numbers of special advisers,. A number of people in evidence have suggested that there should be a cap on the number of special advisers.

Mr Straw: I do not know the answer to the last question, my Lord, because in practice there is a cap. I think you established the cap originally, Lord Armstrong, because I was one of the first special advisers when you were Principle Private Secretary.

Q767 Lord Armstrong of Ilminster: And a very good one too, if I may say so!

Mr Straw: I felt the same way about you. I think I still have the correspondence. I will need to come back to the Committee on the second question. On the first question, again, we can give consideration to this, Mr Chairman, because there is not an intention that special advisers should manage or should have executive powers. I was a special adviser for three and a half years, I have been a Minister now for over 11, and I think the arrangements work very well. It is inappropriate for your special advisers to manage civil servants. You do it in proper order. You make sure that your special advisers, if they come to you, as quite often they may do, and say "Can I get the Department to do X?" I say, "Yes, tell the Principal Private Secretary to advise that out."

Chairman: From one special adviser to another.

Q768 Mr Tyrie: We were both special advisers.

Mr Straw: Indeed.

Q769 Mr Tyrie: I never, as far as I know, as far as I can recall, tried to defend government policy in public meetings. Do you think special advisers should have that role, which is, some would argue, akin to what a Minister should be trying to do?

Mr Straw: Not really, no, is the answer. I certainly did not.

Q770 Mr Tyrie: That has gone on in the last 11 years, and it would be helpful if you now think that is another thing that we should row back from, as with the Orders in Council.

Mr Straw: I would need to look at that part of the Ministerial Code which refers to special advisers, but the rule when I was a special adviser was basically you had to keep your head down. Of course, you would go to party meetings, you would go to private meetings, but you were not there to attend public meetings, and indeed, when I became the parliamentary candidate for Blackburn in the summer of 1997, I had to resign as a special adviser.

Q771 Mr Tyrie: Do you think special advisers should represent Britain abroad in formal meetings?

Mr Straw: There are sometimes special advisers in the Foreign Office. You can have expert special advisers, Mr Tyrie. I would like to know the specific example you have in mind. You can sometimes have experts, say, who are called special advisers, and I would not have a problem about their representation in particular cases, but should they act as Ministers, as it were? The answer to that is no.

Q772 Lord Maclennan of Rogart: In the context of the overarching philosophy, or purpose, if you like, of rebalancing power between the executive and Parliament, which we started out discussing, do you think it would be acceptable to have a provision in the Bill establishing the Civil Service, in the statute, which acknowledges the wider duty of civil servants to Parliament as well as their direct responsibility to Ministers?

Mr Straw: I would be very interested in the idea that lies behind what you say. I think you have to be very careful about the wording because the loyalty of civil servants is to the government of the day. It is not that you are asking civil servants to abandon their opinions; far from it. Indeed, I like officials to have opinions. I would never dream of asking an official how they voted and I do not give a fig about how they do, but what you want is people who have opinions but also can take a detached and balanced view of issues, then when you say "The decision is X rather than Y," they get on and implement it. At the same time, the loyalty is to the government of the day, not to Parliament. At the same time, I am concerned to ensure that officials and many other people have a sense of rather broader responsibility, a recognition really of the centrality of Parliament in our constitutional arrangements. It is an obsession of mine to ensure in each Department I have worked in that officials at every level treat Parliament properly. One of the changes I have always introduced, for example, is to insist that parliamentary questions have to be approved by people at grade 5 or above, as written ministerial statements have to, otherwise they just get handed down, and the moment you get the grade 5 or above having to do that, they start to pay more attention. So, as far as I am concerned, these things matter. I would be ready to look at the wording but we have to make sure it does not collide with, say, the day-to-day duty that officials owe directly to the government of the day.

Q773 Lord Armstrong of Ilminster: Is it not just a matter of loyalty but a matter of accountability?

Mr Straw: Indeed, yes.

Q774 Chairman: Is there not a practical issue, in that if you are on a local council, the council officials talk to you as a councillor, whichever party you happen to be? Civil servants do not talk to parliamentarians, unless their Minister agrees. Is that not a difficulty for parliamentarians who are not members of the government?

Mr Straw: Yes, there is in fact a great deal more discussion these days than there was and, for example, the Select Committee has meant that officials quite often go to Select Committees and give evidence without Ministers being present. Again, I think it varies very much from Department to Department. In a Department like the Foreign Office, officials, members of the Diplomatic Service, who are based for the time being in London, as well as those in missions abroad, are all the time giving briefings to parliamentarians from all parties. There is this difference, Mr Chairman. Local authorities are run in a different way, or a classical British local authority is. Say you have a mayoral system - I do not know this absolutely for certain but I think the relationship between the mayor and his officials in London is similar to that between a Minister and his officials, and both are different from that of a traditional local authority. As I say, I am not certain about that but I am pretty certain. It would be difficult to see how the system could operate otherwise.

Q775 Martin Linton: I do not want to cause unnecessary controversy but it has always seemed to me that Ministers could sometimes do with more rather than fewer special advisers. Has there never been a time, particularly when you were Home Secretary, when you could not have done with additional special advisers if it had been possible to appoint more?

Mr Straw: There is an argument that we should move over to something like a French cabinet system, where you bring in a whole raft of people, some of whom are drawn from the Civil Service, whose political views are known to you, and others you have brought in. There is a separate argument to go down the route of the American system, but those are big questions which I do not think one can resolve within a Bill of this nature.

Q776 Martin Linton: There would be an argument against the cap on the number of special advisers.

Mr Straw: It cuts both ways. If you have a lot of special advisers, you also then have an issue of how you ensure their loyalty. There is a management issue if you have too many "irregulars" around the place. My frustration in the Home Office when I was there was that I did not have a speechwriter, because they had never had a speechwriter in the Home Office, and I was pushed through loads of hoops to get a speechwriter. In the Foreign Office they always had a speechwriter and, probably thanks to Lord Hart, the Lord Chancellor's Department has always had a speechwriter. That is where I felt the real frustration and there is an issue, let me say, also about the intersection between the special adviser who handles the media and press offices, and I do not think we have resolved that properly at the moment. Again, we did it better in the Foreign Office, where my predecessor, Robin Cook, had appointed a man who was actually officially Head of News but it had been a quasi-political appointment. He was running the News Department, and did it very well, but in application of the Civil Service rules, because you need to feel comfortable. Sometimes I do not feel comfortable but you need to feel a sense of ownership for the person who is the Head of the Press Office, but that is another issue.

Q777 Chairman: Some colleagues in the House have suggested that maybe the Bill should also include key values of being a civil servant or a member of the Civil Service, such as competence, efficiency, commitment to delivery, which are sometimes complained of against civil servants. Do you see a place for such a statement of values in a Bill of this nature?

Mr Straw: I am certainly ready to consider it. Without being too picky, the point to emphasise here is that it is the Prime Minister who is the Minister for the Civil Service, so you would need to take his view on that and also the view of the Head of the Civil Service and the Head of the Diplomatic Service.

Q778 Chairman: We do not have very much time left, and one area we have not dealt with is the changes for the Attorney General's responsibilities. As you know, the Commons Justice Committee has concluded that the Government's proposed reform of the Attorney General, in their words, "fails to achieve the purpose given to constitutional reform by the Prime Minister". You will probably know that even Professor Robert Hazell is somewhat sympathetic to that view, although he supports the views of the Government generally. What do you say about that?

Mr Straw: First of all, I think what is in the Bill, and in the narrative in the White Paper, is fully consistent with what the Prime Minster said in the House on 3 July last year and also what I said in the Green Paper. Opinions differ about this. There is a division of view about whether you split the role of the Attorney - you can do it in a number of ways but anyway, whether you split it so you have a senior legal adviser to Ministers and the Government who is not also a politician. You could split it so that the Crown Prosecution Service or the prosecution departments became a non-ministerial government department, a bit like the Revenue. I happen to think that the proposals which are in the Bill - obviously, I do not want to pre-empt your Committee, Mr Chairman - broadly are the right way forward. They provide for the role to continue, which I think is really important, as someone who has never been Attorney, but I have certainly made use of successive

Attorneys' services as a legal adviser. I think it is really important that you have someone who is independent, who can serve you up with the advice you do not want to have - and they do - but who is able to take account of the milieu in which you operate, and, secondly, who is responsible for the work of the prosecuting authorities, because in every system that I know it has to be somebody who is accountable for the prosecuting authorities. In quite a lot of systems it is the Minister of Justice. In our system I think on the whole it works rather better to have a dedicated Minister who is slightly at arm's length from the rest of us who is handling prosecutions. The other thing we are doing, as I said in my opening remarks, is clarifying the role of the Attorney in respect of prosecutions, ending any power they may have in respect of directions, except for national security grounds, and making a much better set of arrangements in terms of the protocol, which I think is really important. It is a very significant development.

Q779 Mr Chope: Can I ask about the scope of this Bill? In answer to an earlier question the Lord Chancellor said that to extend the Bill to war powers would be within the scope of the Bill. Looking at the long title of the Bill, unless war powers were specifically included in it, it would seem to me it would not be within the scope, because the Bill is a ragbag of different provisions, including the reform of the Civil Service. If the Bill's long title said something like "to make provision for the transfer of powers from the executive to Parliament," then I could understand the Lord Chancellor's earlier reply, but it specifically does not do that. It is not a broad Bill. It does not do what it says on the face of it, in other words, to change the constitution, to renew the constitution. Would the Lord Chancellor accept he cannot have it both ways? Either he needs to have a really broad Bill with a broad scope which could enable any of us who can come up with ideas for transferring power from the executive to Parliament to bring forward new clauses which would be within the scope, including perhaps the issue of war powers, or have a Bill which is basically a miscellaneous provisions Bill, a ragbag of odd provisions in relation to the constitution, and a separate Bill relating to the Civil Service. At the moment, we have the worst of all worlds, the prospect of a Bill with lots of individual bits to it, with a title which does not relate to the contents.

Mr Straw: I think the contents are what matter rather than the long title itself. As Mr Chope knows, whether a Bill is in scope is a matter for the House authorities, and they are guided by what is in the long title but that is not conclusive, and long titles can be amended. In the light of what you say, Mr Chope, I will certainly look at whether we amend it. Your proposal may be better for the long title. I certainly have no intention that the long title should constrain whether there could be a debate about war powers, for example.

Q780 Chairman: Thank you very much. I think we are all very proud to be members of the Constitutional Renewal rather than the Miscellaneous Provisions review, so we will keep it there for the moment. Can we thank you very much indeed for giving such useful evidence over a very long period, and we are grateful to you for what you have said.

Mr Straw: Thank you very much, Mr Chairman.