HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Professor Stuart Weir and Dr Andrew Blick - Democratic Audit (Ev 04)

Introduction

1. The government's green paper, *The Governance of Britain* (Cm 7170) in July 2007 proclaimed the ambitious goal of "reinvigorating our democracy" through a variety of constitutional and political reforms that set out to achieve a "new constitutional settlement - a settlement that entrusts Parliament and the people with more power". The green paper set out proposals that were presented as being intended to answer "two fundamental questions: how should we hold power accountable, and how should we uphold and enhance the rights and responsibilities of the citizen?"

2. The most tangible product of this process is the Draft Constitutional Renewal Bill under examination by your committee and the accompanying Constitutional Renewal white paper. The draft Bill represents the government's answer to the first of fundamental questions that it posed. Answers to the second question remain at a formative stage.

3. In the following paper we have pulled together, rather hastily, a briefing on and response to the Ministry of Justice white paper *The Governance of Britain - Constitutional Renewal* (Cm 7342-I) and the Draft Constitutional Renewal Bill (Cm 7342 III), both published in March 2008. In order to provide an overview of the draft Bill's place in the effort to re-balance power between the executive and Parliament and improve the government's accountability to Parliament, we have drawn on matters beyond the contents of the Bill, as well as examining them closely. We have assumed that one of the values of pre-legislative scrutiny is that it need not be confined by the rules of the traditional legislative process.

4. We recognise the significance of the government's intention to limit its powers under the Royal Prerogative. This is a major step forwards. It is however a faltering step forwards that does not measure up to the goal of balancing the flow of power from the people to government with Parliament's power to hold government to account. We appreciate that the draft Bill is intended to be only the first stage of an ongoing process that deals with priority reforms. It is the manner in which the government's proposals engage with these reforms that concerns us. The draft Bill creates a series of accountability procedures and shifts in responsibility from the executive to Parliament. At the same time, the government seeks to retain an undue degree of discretion within new accountability procedures; and the shifts in responsibility, as in the proposals for dissolution, are more symbolic than real.

5. The paper provides a full analysis, but we list few examples of such concerns here:

· Ministers will be able "exceptionally" to bypass the procedure for parliamentary scrutiny of treaties, subject only to the proviso that in their 'opinion' they need to (clause 22).[1]

· The draft resolution on war powers allows the government to act without approval if security or circumstances of emergency - in the opinion of the Prime Minister - require it.[2] The Prime Minister is able to determine the timing of a vote and the information that is supplied to Parliament. The activities of the Special Forces are without the scope of the proposed Resolution.

· The Attorney General, a party political figure, will take on a statutory power to end prosecutions and investigations by the Serious Fraud Office if "satisfied that it is necessary to do so for the purpose of safeguarding national security" (clause 12)

· Clause 32 stipulates that civil servants must "carry out their duties for the assistance of the administration...whatever its political complexion", but omits the long-established corollary that they must be ready to serve a government of a different party. [3] The same clause allows for special advisers to be exempt from the core Whitehall requirements of objectivity and impartiality.

6. We also wish to drawn particular attention to clause 43 of the draft bill, "Power to make consequential provision". We urge the committee to seek to clarify the purpose of this clause which could be read as enabling ministers to amend any Act through statutory instrument. We assume that it is intended only to apply to amending the provisions of the prospective Constitutional Renewal Act, but even so we believe that any alterations to what would be an important piece of constitutional legislation should require full parliamentary procedure.

Reforming the Royal Prerogative

7. The capacity of Parliament to scrutinise the executive and to hold it to account is a vital component of representative democracy, and ideally Parliament should be able to share in policy-making and key decision-making - or at least be consulted - in advance as well as to scrutinise both retrospectively.[4] Democratic Audits over time have confirmed the generally agreed consensus that the Westminster Parliament is dominated by the executive and has insufficient powers to scrutinise government and to hold it to account.[5] The powers that the Prime Minister and ministers exercise in particular under the Royal Prerogative are not subject to effective parliamentary scrutiny, let alone approval, and yet they extend to vital issues, including making war and agreeing treaties, running the civil service, and making policy in the European Union, major international agencies and in foreign and diplomatic affairs generally.[6] It is unacceptable that political power can be wielded without any basis in Acts of Parliament or effective democratic parliamentary oversight, and sometimes without the knowledge of the legislature (and public).

8. We therefore broadly welcome the government's commitment to re-balance power between the executive and Parliament; to give Parliament more capacity to hold government to account; and to

carry out a full review of Royal Prerogative powers, making immediate progress in key areas, such as war and treaty making, the impartiality of the civil service and passports.

9. The Public Administration Select Committee (PASC) report on prerogative powers [7] made an unanswerable case for total overhaul of the Royal Prerogative; argued for immediate action on war and treaty making powers and control of passports; and set out realistic proposals for a thorough identification of the full extent of prerogative powers and their transformation over time into a set of powers exercised under Acts of Parliament, and subject to appropriate forms of parliamentary supervision. This report provides a sound basis for the government's review of the Prerogative and the powers it gives ministers, the "full extent" of which, as the white paper puts it, are "uncertain". [8]

10. In sum, we support the government's proposal in the draft Bill to place the civil service on a statutory base, with certain important reservations. But we regret that its proposals for immediate reform intended to render war powers and treaty making more accountable to Parliament fall short of what is required; and we are also very concerned that the review will be confined to those authorities "which are devolved from the Monarch to Her Ministers"[9] and exclude those that remain personal to the Sovereign. Falling into the latter category are two powers with considerable democratic ramifications - the power to dissolve Parliament and to appoint the Prime Minister.

11. The government's acceptance of the case for strengthening the impartiality of the civil service by placing it on a statutory basis is a genuine move forward towards greater constitutional clarity in the UK. But its position on other areas that we examine here is not so admirable. The government pleads the need for "flexibility" to justify its preference for parliamentary convention over statutory status in the case of war powers. Other representative democracies make such powers available to governments under constitutional or statutory rules with no great loss of flexibility. The degree of flexibility the government seeks to retain is precisely the flexibility that has discredited politics in this country in recent years by enabling governments to strong-arm policies through the House of Commons where their majorities normally deliver parliamentary subservience rather than accountability. By relying ultimately only on the force of convention, the government seeks too much flexibility.

12. Equally, the shift from executive discretion under prerogative powers to a House of Commons vote on the dissolution of Parliament is simply sleight of hand since generally the government will still have the majority it needs to enforce its will; and leaving the power to appoint the Prime Minister after a general election to the Monarch, instead of transferring it to the House, is in the first place wrong in principle, and would in practice mean that the choice of Prime Minister in a hung House will rest with the secret deliberations of a small group of civil servants and courtiers rather than to the democratic decision of MPs and parliamentary parties.

13. We welcome the government's intention to enable Parliament to debate and vote on the ratification of treaties. The government proposes that "present arrangements [i.e., the Ponsonby Rule] for parliamentary scrutiny should be placed on a statutory footing." The problem here is that, while a statutory rather than prerogative basis for treaty making is desirable, "present arrangements" are inadequate. As we explain more fully below, the Ponsonby Rule does not in practice lead to debates, let alone votes, being held on treaties (as the government noted in its consultation paper,

Cm 7239).[10] Here again, the government is pursuing an undue amount of flexibility to allowing for an op-out from the statutory process. We are also not satisfied that Parliament's influence over treaties should be confined to the purely retrospective act of agreeing to their ratification. We argue strongly below that Parliament should share in formulating the government's position in treaty making and international and EU negotiations through the process known as "soft mandating".

14. We now move to consider in detail the concrete proposals for reform of the Prerogative: two of PASC's three priority areas - war powers and treaties - and of the civil service (where PASC and the Committee on Standards in Public Life, among others, have made a strong case for reform). We cannot discuss action on passports, PASC's third priority, since the government has yet to provide details of its plans.

1. The Civil Service

15. Calls for a Civil Service Act to put the civil service on a statutory footing have been made for as long as the modern civil service has existed. The idea was first proposed in the Northcote-Trevelyan report of 1854, the document which came to be regarded as the foundation of Whitehall principles. But up to the present, the civil service continues to be managed under the Royal Prerogative, even though the Labour government under Tony Blair accepted the case for reform. We welcome the government proposal to place the civil service on a statutory basis, for a number of reasons. It is desirable as part of an overall abolition of the Royal Prerogative; and as a component in the complete codification of the UK constitution which we advocate. More specifically this shift is desirable because it would entrench the principles of impartiality, integrity, honesty and objectivity that are essential to the UK official machine.

16. Broadly speaking, we are supportive of the draft Bill's provisions. Correctly it will enshrine the "historic principle of appointment on merit on a basis of fair and open competition" and put the Civil Service Commission on a statutory footing, charged primarily with upholding this principle. We regret, however, that the Commission will not be able to undertake inquiries into the functioning of the Civil Service Code on its own initiative and will only be able to do so following a complaint by a civil servant or with the agreement of the government, advised by the Head of the Civil Service (the Cabinet Secretary).

17. The role of the Commission as guardian of a non-partisan Civil Service should not be circumscribed in this way. We welcome the setting out of the core values of the civil service on the face of the bill, but we recommend that explicit parliamentary approval should be required for the Civil Service and Diplomatic Service codes that the Bill requires the government to publish and lay before Parliament. While the proposed legislation refers to the need for officials to "carry out their duties for the assistance of the administration...whatever its political complexion" it does not mention the need to be able to serve future ones of a different party, a long-established corollary of the previous requirement.

18. The Bill confirms that the Prime Minister will possess the "power to manage the civil service". How might this power be exercised? We note that constant reorganisations of Whitehall departments, sometimes with serious constitutional implications (such as the formation of the Ministry of Justice) can take place with negligible preparation, let alone parliamentary

oversight.[11] The Bill should strengthen parliamentary oversight in this area. Finally we are concerned that security vetting will continue to be carried out under the Royal Prerogative. Since clearance procedures are a legitimate subject of public concern, with substantial human rights implications, there should be an appropriate parliamentary role in their development and operation.

19. We are concerned about the weakness of the draft Bill's provisions on the position of special advisers. We acknowledge that these temporary officials have an important role to play in supplying ministers with a distinct source of advice and support; and in protecting permanent civil servants from being asked to perform inappropriate tasks. However, we submit that a number of changes that the government does not propose should be made, many of which follow the recommendations of the Committee on Standards in Public Life (CSPL) and the Public Administration Select Committee over several years.[12] In particular, the number of special advisers in place each year and the *Code of Conduct for Special Advisers* should be subject to parliamentary approval; and more fundamentally, as the CSPL recommends, special advisers should no longer be categorised as civil servants, since such a description is clearly inappropriate. They belong in a separate category of state servant. Possibly, pending reviews of party financing, the political parties should meet the salary costs of special advisers in future, although it may be advantageous to subject them to the discipline of being state officials.

20. There is a clear need for discipline in the relationship between special advisers and permanent officials. There is a constant need to ensure that the activities of the former, who are partisan appointments, do not undermine the ability of the latter to retain their objectivity and party political neutrality and remain able to serve different ministers of varying parties. The purpose of special advisers is loosely described as being to "assist" a minister, a flexible definition that suggests that any number of possible tasks may be permissible. Presently the *Code of Conduct for Special Advisers* provides for special advisers to exercise what are in effect management functions over career officials, such as communicating instructions from ministers and asking them to take on tasks. These provisions should be removed from the *Code* and the purpose of special advisers should be clarified to rule out managerial functions. This is especially important as many of the problems that have arisen between special advisers and permanent staff have come about in part because of personality clashes that would be rendered less significant if their role were kept more strictly to assistance to ministers. It has been suggested that each department should devise its own concordat, agreed between the Secretary of State, officials and civil servants and governing how they should work together.

2. War powers

21. The government committed itself in the *Governance* green paper to provide Parliament with a clear role in decisions to enter into armed combat. Unfortunately it has concluded that this change should be brought about by a Commons Resolution rather than an Act of Parliament, though it states it is "not ruling out legislation in the future." The white paper argues that a "resolution will define a clear role for Parliament in this most important of decisions, while ensuring our national security is not compromised by the introduction of a less flexible mechanism." In other words, the government wants to retain executive discretion unbound by statutory rules of conduct.

22. We advocate a statutory framework, on the grounds that any other arrangement will mean government will retain flexibility, not of the sort that is beneficial to national security, but open to abuse to the detriment of democratic principles and practice - as well as effective policy. Many other countries, including military allies of the UK in NATO such as the US and Holland, have firm statutory and constitutional provisions for securing the consent of their legislatures to war-making. There has been no apparent undermining of national security for them and we see no reason that there need be for the UK were it to adopt similar arrangements.

23. Our position is that not only the conduct of armed combat but the full prerogative powers for controlling the disposition of the armed forces, within and outside the UK, should be placed on a statutory basis and made subject to parliamentary oversight. Parliament would have to establish new procedures in cooperation with government for fulfilling its new responsibility. One way forward would be for the government to make an annual report to Parliament on its troop deployments, explaining what had taken place over the previous year and setting out its plans for the coming year for debate and, if need be, vote in the House of Commons (possibly informed by a prior debate in the Lords). Deployments in potential or actual hostile circumstances would be subject to prior (or in special circumstances swift retrospective) approval by the Commons (again informed by a Lords debate). Once entered into, the mandate for such operations would require renewal on a regular basis; and if and when the mission parameters changed.[13]

24. Contrary to the government's view that there is no need "for a new committee to oversee Parliament's decision making", it is our view that a parliamentary committee should be established to guarantee effective and timely parliamentary oversight. The committee, possibly a joint committee of both Houses, could take evidence, where necessary in secret, and report to Parliament. Its reports would inform the annual Commons debate. When the government was contemplating potential or actual hostile action this committee could determine the timing of a parliamentary debate and vote on a basis of a report by the government, within an agreed parliamentary framework. The committee would be able to require a government report and debate in the event of any deployment taking place without the government informing Parliament; if the mission parameters were shifting; or if there was a need for full parliamentary deliberation for some other reason.

25. The government's proposals not only rule out statutory oversight by Parliament, but also confine oversight to actual or possible armed conflict, and not the disposition of the armed forces as a whole. It does not cover the activities of the Special Forces - whose engagement is often a preliminary to larger scale combat. Retrospective approval will not be required for emergency deployments into actual or potential armed conflict, or for those which the Prime Minister judges should not revealed to Parliament in advance on security grounds. The reason offered for these omissions is that if retrospective support were not forthcoming, "there could be some serious and undesirable consequences". It is highly unlikely that a government - which by definition has the support of the House in general - would lose such a vote. But if it did, the implication would be that an action had been carried out which could not secure the support of the ruling party or parties. To allow governments to act without this basic level of support would be "serious and undesirable" indeed.

26. Moreover, the government will not give Parliament the opportunity to review commitments and prevent possible "mission creep", following an initial vote of approval. There are echoes of the disastrous executive drift in the US war in Vietnam following the 1964 "Tonkin Gulf" resolution in the UK's presence in Iraq and Afghanistan (where, with the latter operation, our military

deployment has escalated significantly over time, and was not even subject to substantive vote in Parliament).

27. There are four other issues germane to the power to make war or deploy troops into potential armed conflict:

1. It is clearly desirable that Parliament should have the power of recall during a recess if such action was likely. However while recognising that members as well as the executive should be able to recall Parliament, the government's proposal for recall by MPs sets the bar too high for recall in an emergency. The proposal stipulates that over half of MPs - who would be widely dispersed during a recess - would have to make the request for recall to the Speaker, who would then have discretion on whether or not to accede. The Hansard Society Commission report on parliamentary scrutiny recommended a far less onerous process: that after representations from one or more MPs, the Speaker should consult party leaders and then make the decision.[14] This low threshold may be open to abuse. We would suggest that a third of members, from more than one party, should be sufficient to secure a recall, and should have the final say. If an oversight committee, representative of appropriate select committees, were established to keep the government's conduct of military affairs under scrutiny, it could be given an emergency power to recall Parliament where action was imminent or to take action on behalf of the plenary if a recall was not practically possible (a similar arrangement exists in Germany).

2. The white paper argues that the Prime Minister should have the ultimate decision as to what information should be provided to Parliament about proposed conflict. We have recommended that a new oversight committee should determine what information is made available to Parliament. As we have seen all too clearly in the run-up to the Iraq war, and as in the Suez crisis of 1956, a government cannot be relied upon to present full or even accurate information to Parliament in such circumstances - and catastrophe followed in both cases.

3. We disagree with the government's view that the advice of the Attorney General should remain confidential in such circumstances. It is our view, see below, that a political Attorney General should not also be the government's chief legal adviser; but whether the AG or a civil servant gives this advice, it should be in the public domain. We appreciate that the government's legal advice should remain confidential in most circumstances, but when it comes to matters of war, putting people's lives at risk and affecting the UK's standing in the world, the full advice should be made available to Parliament and the public. Further, Parliament should be able to obtain its own legal advice (see our section on the legal system).

4. We also disagree with the government's view that the Prime Minister should be able to determine the timing of any vote. This should be a matter for Parliament.

3. Treaty ratification

28. The government enters into more than 30 treaties a year, covering a wide range of policy areas, from trade to military cooperation, to human rights, to security. At present there are only limited constraints on the complete freedom of action of ministers and officials to enter into binding agreements. If an agreement requires a change to domestic legislation, then this alteration must be enacted according to the appropriate parliamentary legislative procedures. There exists as well a

convention, the "Ponsonby Rule", according to which a treaty must be tabled before the House of Commons for 21 sitting days before it is ratified. If there is a request for a debate during this period through the "usual channels" or by a select committee in conjunction with the Liaison Committee, there is an understanding it will be granted.

29. The government proposes that "present arrangements for parliamentary scrutiny should be placed on a statutory footing." The problem here is that, while a statutory rather than prerogative basis for treaty making is desirable, "present arrangements" are inadequate. As the government noted in its consultation paper (Cm 7239), the Ponsonby Rule does not in practice lead to debates, let alone votes, being held on treaties.

30. There is however a positive dimension to the government proposal. It would make clear that "In the event of a vote by the House of Commons against ratification of a treaty, the Government could not proceed to ratify it". In such circumstances the government would have to drop the agreement, or start the 21-day process again.

31. We have two reservations about the positive nature of this development. First, ministers will retain the right "exceptionally" to bypass procedures, on a basis of their own judgement. The justification for this opt-out is apparently the supposed need to retain discretion for emergencies, during recesses and so on. But as a minimum, there should be more detail provided in the draft bill as to the circumstances under which democratic procedure can be set aside, and the alternative measures that will ensure accountability. Preferably, this proposal will be deleted altogether.

32. Second, as Parliament is presently configured, this change would have no practical impact, since debates and votes do not take place under the Ponsonby Rule, meaning that the opportunity to reject a treaty that the government proposal seems to provide would not arise. Parliament will have to change its organisation and procedures if it is to turn this latent power into a reality.

33. We recommend that a sifting committee should be established, possibly comprising members of both Houses, to monitor treaties as they are tabled before Parliament. The committee could forward the documents to the relevant specialist select committee or committees, for a report and an assessment of whether a full vote in the Commons was required (we agree with the government that the Lords, particularly as currently constituted, should not have the ability to block a treaty). The sifting committee could be empowered to require a debate and vote if the relevant committee thought that one was necessary (and it could decide to extend the 21-day period if necessary). A report by the select committee and any recommendations contained within it could inform the debate. The government has suggested it is open to ideas along these lines, though stressing, "It is for the Houses themselves to decide upon such arrangements". We trust that the government will encourage and cooperate with the reorganisations necessary to make a reality of parliamentary oversight of treaty-making; and support the allocation of increased resources in terms of staff support that will be entailed if the task is to be carried out effectively.

34. Finally the government notes that it does not support "a formal mechanism for the scrutiny of treaties prior to signature" on grounds of "the diverse circumstances and timeframes in which treaty negotiations are conducted". Here the government may be creating a straw man. As it notes in its summary of responses to its consultation and in the white paper itself, some respondents (including Democratic Audit) proposed the introduction of "soft mandating" to give Parliament the opportunity to discuss the government's position in negotiations over treaties, and more widely, in negotiations over EU affairs, UN and other international negotiations, including the UK's position in major inter-governmental bodies and alliances, in advance of decisions being taken and agreed.

35. This process in no way amounts to "scrutiny of treaties prior to signature". Rather it means involving Parliament in the negotiations leading to the agreement. It would require ministers (and often officials) to meet with the relevant select committee in advance of their attendance in international negotiations to agree a 'soft mandate' - that is, a general bargaining position and desirable outcome. [15] The minister would then report back to the committee; and if he or she had departed from the agreed position, would explain why they had done so. The process of soft mandating and the performance of ministers within it could help the committee decide whether a debate and vote in plenary was required; and inform its report on the treaty and any recommendations within it. The understanding that ministers and officials should cooperate with committees in a process of soft mandating should in our view be written into the *Ministerial Code*.

4. Dissolving Parliament and Appointing the Prime Minister

36. The *Governance* green paper (Cm 7170) states that the government intends to modify the Prime Minister's status as the sole person able to request a dissolution from the monarch and in practice determine the date of the next general election. It is proposed to develop a convention for requests to the monarch for dissolution of Parliament to be made subject to a prior vote in the House of Commons. In the first instance, the shift in power from a Prime Minister to Parliament is more apparent rather than real. A Prime Minister with a majority in the House would still retain the advantage over opposition parties in being able to determine the date of an election since he or she could generally count on his or her parliamentary majority to vote in agreement. We favour in principle the introduction of fixed-term parliaments to set in place a pre-determined democratic timetable for general elections. Fixed-term elections would remove the unfair advantage that incumbent Prime Ministers now possess in being able to choose the most advantageous moment to fix the date of a poll, and to tailor policies and government advertising to take full advantage. In circumstances where a government had lost the confidence of the House, this would be a matter for Parliament to resolve by establishing a new government.

37. More fundamentally however, both in principle and practice, it is wrong to leave the monarch's personal prerogative powers untouched, as the government intends. This decision would leave the Queen and her successors, hereditary heads of state, with the power to choose the Prime Minister after an election and to act as the only formal barrier to the abuse of the right of the Prime Minister to request dissolution. It is incompatible with democratic principle that the head of government should be appointed by a figure subject to no form of accountability and lacking in democratic legitimacy.

38. It is of course argued that these powers are theoretical only: the monarch is bound by convention not actually to exercise them; and is further bound by the parties' own choices when it comes to appointing Prime Ministers. However, as Professor Peter Hennessy has described, the monarch's "reserve powers" are "most certainly active when it comes to dissolving Parliament and appointing Prime Ministers". [16] Hennessy lists five occasions from 1974 onwards when the Palace, the Cabinet Office and No. 10 "were engaged in intense contingency planning in case the reserve powers should come into play", most recently when a hung parliament seemed a strong possibility. The fact is that in the event of a hung parliament, there is no transparent process by which the monarch can decide who to ask to form a government. Even from the point of view of the

monarchy itself, this arrangement is undesirable since the ruler may very well be drawn into political controversy if there is a need to resolve a deadlock.

39. The monarch would most likely take the advice of the three "guardians" of the prerogatives - his or her own Private Secretary, the Prime Minister's Principal Private Secretary (or presumably, now the post has been created, Permanent Secretary) and the Cabinet Secretary, on the basis of a "good chaps" consensus on responsible governance and possibly a "Precedent Book", a loose-leaf collection of internal guidance notes, documents and precedents, which is of course confidential.[17]

40. The viable alternative to existing arrangements is for the House of Commons to elect a Prime Minister. This is what the Scottish Parliament does for the purpose of selecting the Scottish First Minister, and it has proved effective. In cases where a single party had a Commons majority, the vote would be a formality. In other circumstances, it would be preceded by bargaining between the parties. But a Prime Minister elected in this way would have more legitimacy and probably stability than a candidate who emerged from within the "golden triangle" on grounds and principles that are unlikely to be fully divulged.

41. There is finally the monarch's right, which may or may not be regarded as a prerogative, to be informed, to be consulted, and to warn. We are informed that the Queen is a wise and shrewd counsellor. If this is the case, then let Gordon Brown take her advice, as he might that of any other person. But no one individual should by virtue of their birth enjoy privileged access to government. Weekly audiences between Prime Minister and monarch have no place in a mature democracy.

The Role of the Attorney General

42. It is a basic democratic requirement that the legal system is separate from and not subordinate to the executive; and that governments are subject to the rule of law and act and are seen to act in compliance with legal norms. It is to satisfy these democratic principles that the office of the Attorney General (AG) urgently requires reform. The office is held at present by a party politician and minister, who attends cabinet and participates in government decision-making, while at the same time superintending the main prosecuting authorities, reviewing sentences and providing legal advice - which almost always remains secret. The House of Commons Constitutional Affairs Committee (now the Justice Committee) accurately expressed the dangers of this anomalous situation in its report of July 2007, *The Constitutional Role of the Attorney General* (HC 306), recognising that there are "inherent tensions in combining ministerial and political functions, on the one hand, and the provision of independent legal advice and superintendence of the prosecution services, on the other hand, within one office".

43. In recent times these tensions have become matters of pressing concern and have arguably contributed to growing public and expert disillusion with governance in the UK. The confusion over Lord Goldsmith's legal advice seeking to legitimise the invasion of Iraq in 2003, at first revealed only partially, arose suspicions that he had "been got at" and led to pressure for its publication in full. When it was published in May 2005 it transpired that the view expressed internally was more equivocal than the official justification provided for the military action. During 2006-07 the ongoing investigation into "cash-for-honours" allegations aroused concern over the problematic position of the AG in having the final say on whether prosecutions were to be conducted. Many of

those involved in the investigation were his political colleagues and close friends, including the Prime Minister, who had made him a peer and who was responsible for his appointment.

44. In each case the contradictions between the impartiality required by certain parts of the role and the partisanship associated with others were clearly visible, to the detriment of confidence in the political and legal system, and possibly contributing to unlawful actions and undermining the rule of law.

45. The *Governance* green paper in July 2007 seemed to promise reforms to remove the "tensions" in the office so that public confidence and trust in the office of the AG could be restored. But after consultation the government has expressed its intention that the AG should remain the government's chief legal adviser, a parliamentarian and a cabinet minister, while continuing to superintend the prosecuting authorities. Under the draft Bill, the Attorney General will retain a role in formulating criminal justice policy, in conjunction with the Home Secretary and Justice Secretary. We fear that this position will continue to undermine respect for our political and legal systems, and inevitably so.

46. There are safeguards of a sort. The government proposes that the Attorney General may not give a direction "in relation to an individual case"; and it will require the statutory establishment of a protocol between the AG and the main prosecuting authorities. The Director of Public Prosecutions, Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions will be given fixed-term appointments to enhance their independence.

47. We endorse these changes but regret that the AG will be given a role in individual cases with "implications for national security", a power that will extend to "investigations being conducted by the Serious Fraud Office". This is entirely improper. The prosecuting authorities should be left with the responsibility for all decisions on prosecutions, and the courts are quite capable of handling sensitive security matters through the public immunity interest process. The concept of "national security" is notoriously susceptible to distortion; and leaving any such decision in the hands of a minister is likely to provoke public suspicion of abuse for political ends.

48. The final decision on all prosecutions must rest with the Director of the SFO. Otherwise there may be more decisions that arouse suspicion and may be ruled unlawful. We note that, presently, the AG does not have an explicit power to instruct the SFO Director, so the *Constitutional Renewal* proposals will actual worsen the position. We support the government's plan to reduce the number of cases in which the consent of the AG is required for prosecution under certain offences, and we recommend that legislation should go further and shift the power completely to the DPP or other appropriate Director. The effect would be to depoliticise decisions over prosecutions.

49. We see no difficulties in principle with the plan to end the power to "enter a *nolle prosequi*" [i.e., stopping a trial on indictment]. Unlike the government, we believe the power to refer "unduly lenient" sentences to the Court of Appeal should not continue to be held by the AG, but should reside with the prosecuting authorities. There is always a danger that populist pressure rather than reasoned judgement will motivate the use of such an authority while it remains in the hands of a party politician.

50. We support the government proposal to "modernise" the oath of the Attorney General (and Solicitor General) to require respect for the rule of law (though we question whether "modernise" is the correct term). However, there is not yet a proper definition of the rule of law in statute, and we

recommend that the government take the opportunity presented by this Bill to establish one.[18] We add that, as noted by the then Constitutional Affairs Select Committee, upholding the rule of law should be a matter for all ministers, not just those who have taken an oath so to do.

51. We endorse the government support for 'improved mechanisms whereby Parliament could hold the Attorney General to account' including a specific select committee. We urge the government to ensure that this change takes place, and not hide behind statements that this is a matter for "Parliament to decide".

52. The government argues that it would be inappropriate for the advice of the Attorney General to be published "on a routine basis". We respect the need for the government not to show its hand in advance of legal proceedings, but we advocate a shift in the direction of openness, especially around crucial decisions such as that of going to war. We suggest that the Information Commissioner could have a role to play in establishing ground rules for the disclosure of legal advice and ensuring they are adhered to.

Recommendation for a reformed office of Attorney General

53. We agree with the views expressed by the former Constitutional Affairs Select Committee and JUSTICE, among others, who recommend that the role of chief legal adviser to the government should be separated from that of the AG and performed by a civil servant from a legal background (who could still be attached to the department of the Attorney General and could draw on the support of experts in different legal fields, including international law). The Attorney General could continue to be responsible for formulating criminal justice policy in conjunction with the Home Secretary and Justice Secretary, and they should properly maintain oversight over the conduct of the prosecuting authorities. But they should have no power to intervene in decisions over specific prosecutions or criminal investigations.

54. The chief legal adviser, as an official, would be governed by the Whitehall values of integrity, honesty, impartiality and objectivity as set out in the *Civil Service Code* (and in the draft Bill). In our view holders of the office should be able to attend cabinet and provide advice to its members when required. In an arrangement analogous to the Accounting Officer principle, these legal officers would be accountable to a parliamentary committee that would focus on the nature of the advice they provided, rather than the merits of the policy to which it related. It would probably be appropriate for a new parliamentary committee to be formed, possibly a joint committee of both Houses, and could also hold the AG accountable in his or her reduced role along with the DPP and the directors of the other criminal prosecution agencies. This committee should have access to expert legal opinion of its own so that it could provide Parliament with an expert view to assist in its deliberations.

Judicial Appointments

55. We hold strongly to the principle of a judiciary independent of the executive and broadly celebrate the judiciary's fierce attachment to its independence. It is regrettable that the executive's formal but uncertain progress in this direction has not always involved the full consultation necessary - including the landmark decision in June 2003 to abolish the office of Lord Chancellor and establish a Supreme Court.[19] There is a need for fuller public debate around the role of the judiciary that extends beyond often exasperated ministers, politicians, civil servants and legal experts and practitioners; and takes part within the framework of a broader constitutional settlement.

56. The government has consulted on the withdrawal of the executive from the appointment of judges; and whether Parliament could play a role in the process. The Lord Chancellor will be removed from the selection process for judicial appointments below the High Court and the Prime Minister will be removed entirely from the process. This proposal does not go as far as that put forward by the Law Society for the complete removal of the executive from the appointments process and the establishment of the Judicial Appointments Commission (JAC) as a non-ministerial department, independent of the Ministry of Justice, that would make recommendations to the Crown.

57. The government's principles for judicial appointments are set out in the Bill. They are: an independent judiciary; appointment on merit; equality; openness, transparency; and an efficient, effective system. We note that those who made submissions to the consultation on judicial appointments suggested a number of other principles including accountability; flexibility; proportionality; security of tenure; skill; diligence; understanding; impartiality and integrity. We endorse the view that "diversity" should be established as a principle in its own right, not merely as a subdivision of equality.

58. The Lord Chief Justice will no longer be required to consult the Lord Chancellor before deploying, authorising, nominating, or extending the service of judicial office holders. But the Lord Chancellor may be given additional powers to set performance targets for and to direct the JAC in certain matters. There is some cause for concern at the possibility that a political figure, the Lord Chancellor, will be granted an enhanced ability to intervene in the work of the JAC, which should be independent of the executive. Any powers the Lord Chancellor does exercise should be directed exclusively towards the more effective realisation of the rule of law that, as we have suggested, should be defined in statute; and they should also be subject to full parliamentary accountability. We are also concerned about the possibility that the Lord Chancellor may be given licence to delegate judicial appointments duties to junior ministers or senior officials, on the grounds they may be used to bestow political favours. This plan is not in the Bill. But we note that the government is considering the issue further.

59. Statutory salary protection will be introduced for certain tribunal judges, in line with judicial officers in the courts. Parliament will not be given a role in the appointment of individual judges but will hold pre-appointment hearings for future chairs of the JAC. The views of Parliament will not be binding upon the government. We consider the merits of the proposal for a number of public appointments to be preceded by parliamentary hearings below. As far as the judiciary is concerned, we agree that parliamentary scrutiny should be directed towards the prospective chair of the JAC (who can continue to give evidence as well once in post). There would be a danger of politicisation of the process if individual judges were subjected to parliamentary questioning. What is important

is that Parliament has oversight of the overall parameters of policy and can act as a guardian of the rule of law and the principles required for it to be meaningful.

60. We suggest that the most appropriate parliamentary forum for pre-appointment hearings and the oversight of the judicial appointments system would be some kind of joint committee, perhaps comprising representatives of various interested specialist select committees and other significant figures. It could scrutinise, amongst other matters, the performance of the JAC against the principles of judicial appointment, within which should be included diversity. It may be the case that some form of the newly-developed Canadian model could be adopted, whereby judges are subject to post-appointment hearings.

Reform of the Intelligence and Security Committee

61. The Intelligence and Security Committee (ISC), a non-parliamentary committee of cross party MPs and peers appointed by the Prime Minister, is responsible for scrutiny of the Intelligence and Security Agencies. The Prime Minister consults the opposition over appointments. The ISC is based in the Cabinet Office and meets in private. It reports to the Prime Minister and its reports are then published with sensitive material deleted.

62. The position of Democratic Audit is that the ISC should be fully reformed as a joint parliamentary committee, reporting to Parliament, with an appropriate mechanism to allow the security agencies to request deletions as appropriate (the Prime Minister would receive an unexpurgated version and where necessary decide upon contested deletions). The committee should normally meet in public, with provision for private hearings, and work from the parliamentary estate with parliamentary staff. The newly-formed committee could also take on scrutiny of the National Security Strategy, published as part of the *Governance* agenda. This broad-ranging document extends beyond the work of the security agencies and is designed to make debate about the anti-terrorism strategy more open.

63. The government is, as a first stage of change, proposing measures that go part-way towards integrating the committee into Parliament (seemingly following consultation only with the ISC itself). There will be an attempt to hold some meetings in public; provide the ISC with a team of expert staff; and locate it outside Cabinet Office premises. Its reports will be debated in the Lords as well as the Commons. Parliament will be given the opportunity to nominate candidates for appointment to the ISC; but the Prime Minister and Leader of the Opposition will have the final say. In fact, this process more or less mirrors practice for the selection of members for parliamentary select committees, but it is our view that the dominion of the party whips over the composition of these committees also requires reform.

National Audit Office and Comptroller & Auditor General

64. Financial scrutiny is fundamental to effective democracy. Since Parliament has little direct independent influence over the budget, scrutiny of spending after the fact takes on a heightened importance. Fortunately the National Audit Office (NAO) has long proved excellent at this function, both through its own reports and the support it provides to the Public Accounts Committee, arguably the most effective of parliamentary committees. However, the government is acting upon the recommendations of the Tiner review following the controversy surrounding the

previous Comptroller & Auditor General. [20] The reforms will be included in the Constitutional Renewal Bill, but are not present in the draft version. We believe their absence should not prevent consideration of them by the joint committee. The NAO is to have a board with a majority of non-executives, including a non-executive chair, to set its strategic direction and support the C&AG. Future C&AGs will have fixed terms of ten years. We have one concern. In the past, it was generally assumed that C&AG's were in their last full-time post before retirement. Such may cease to be the case. Special attention must be paid to the conditions under which they may accept posts after their term in office has ended to ensure that confidence in the system is protected. The Commons Public Accounts Commission has said that it is essential that, subsequent employment could not be seen as a reward for actions taken while C&AG, and for that reason there should be a lifetime prohibition on C&AG or former C&AG accepting any post in any body which the NAO has audited or which is in the gift of the Government. Apparent conflict of interest could also arise over some other posts in the private sector, for example with defence contractors or other suppliers to the public sector [21]

Parliamentary scrutiny of public appointments

65. As part of its re-balancing between the executive and Parliament, the government plans to introduce public scrutiny of certain senior public appointments through pre-appointment hearings by relevant select committee and pre-commencement hearings for "market sensitive" posts. The government has produced a list of 20 posts that it considers suitable for consultation with the Commons Liaison Committee. Fine in principle, but once again its good intentions are undermined by its unwillingness to relinquish control. The Liaison Committee has objected to the government's intention to control which posts are to be the subject of hearings, and to conduct the process only on a "trial basis" to ensure, as the white paper puts it, "that the right balance is struck between strengthening the role of Parliament in scrutinising public appointments and maintaining an appointment process which is proportionate and continues to attract high quality candidates." Members of the committee have put forward 40 additions to the government's list. [22]

66. The government also wishes to prescribe the direction of questions, saying that they should "focus on issues of professional competence and on the candidate's suitability for the role" - criteria that might unhelpfully exclude the possibility of a useful discussion of policy issues; and (as the Liaison Committee has noted) personal independence.

67. It ought to be the prerogative of Parliament to determine which posts are suitable for scrutiny (though committees should consult government on their choices) and to conduct the hearings as members see fit. The government's fear that "high quality candidates" might be put off by the process are understandable, but one quality that all those who hold high public office must possess is the ability and willingness to respond to questions about their role and performance. Such people are not likely to be frightened or alienated by effective pre-appointment scrutiny. In any event, given the government majorities on committees and the whips' role in selecting members, select committees are likely to tend more towards moderation in their questioning and findings than aggressive interrogation or unreasonably hostile findings. If they were to raise serious concerns about a particular candidate, the government would be well advised to take it seriously, both in its

own interests and those of parliamentary accountability. However in the final event their conclusions are not binding on ministers.

Managing protest around Parliament

68. The human rights of assembly, demonstration, protest and speech are protected under the Human Rights Act and the European Convention on Human Rights. These rights are integral to democracy; and being able to exercise them in the vicinity of Parliament is of added symbolic value. The government under Tony Blair severely restricted the exercise of these rights around Parliament in the Serious Organised Crime and Police Act 2005 (SOCAP). The government will now repeal the relevant sections of the Act. It ought to be left to the Metropolitan Police to weigh how to deal with any assemblies or protests in a proportionate manner as prescribed in law, subject finally to the jurisdiction of the courts.

69. However, the white paper states, "Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order to ensure that Members are able freely and without hindrance to discharge their roles and responsibilities" and invites the "views of Parliament on whether additional provision is needed." We understand that continuous protests in the vicinity of Parliament can and in one case does cause considerable disturbance - as protests anywhere else can do. It would in our judgement harm both the standing of government and Parliament were "additional provision" in policy to give the convenience of Parliament priority over basic human rights of speech and protest.

A BRIEF GUIDE FOR THE JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL

Proposal	*Significant document/s and formal procedures*	*Comments*
The Four Goals		
'To invigorate our democracy, with people proud to participate in decision-making at every level'	*The Governance of Britain*, Green Paper, Cm 7170, July 2007	This is a key aim if the government is to restore public confidence in our democracy, but there is no sign that the government will seek to deal with the formidable social and economic obstacles to fuller participation.
'To clarify the role of government, both central and local'	*Governance* Green Paper	Proposals in the draft bill do clarify some issues, but the insistence on retaining ministerial discretion continues to leave wide areas of ambiguity that can be exploited by the executive.
'To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account'	*Governance* Green Paper	A vital reform, but the *Governance* proposals to strengthen Parliament are more apparent than real. On almost every issue, the emphasis on discretion again vitiates a necessary and long overdue goal.
'To work with the British people to achieve a stronger sense of what it means to be British, and to launch an inclusive debate on the future of the country's constitution'	*Governance* Green Paper	This has so far been a top-down, confused and confusing process. A Green Paper on Rights, Responsibilities and Values is to be published in advance of a Citizens' Summit that is to formulate the British statement of values.
Limiting executive powers:		
War powers	*Constitutional Renewal*, Ministry of Justice, Cm 7342, March 2008 (following consultation paper)	The intention to give Parliament the final say on the use of armed force will be set out in a Commons Resolution, and not in statute; and the government will retain significant 'opt-outs'. Once it has approved military action, Parliament will have no control over possible 'mission creep'. Legislation is not ruled out for the future.
Treaty ratification	*Constitutional Renewal* (following consultation paper)	Parliament to be given statutory power to veto treaty ratification. But this is a 'take it or leave it' retrospective power, with no role for Parliament in the

		negotiating process. It is not yet clear how Parliament will be able to make effective use of the power and whether a 'sifting' process will be set up.
Dissolutions of Parliament	*Governance* Green Paper	Giving Parliament a vote prior to a Prime Minister's request to the monarch for a dissolution is a symbolic gesture that will make hardly any difference to the balance of power between Parliament and the executive. It begs the question whether it remains appropriate for the monarch to retain the personal prerogative power to grant (or withhold) consent for a dissolution.
Giving the House of Commons the ability to request a recall of Parliament	*Governance* Green Paper; Modernisation Committee inquiry to be held	The bar is set too high, demanding a request from a majority of MPs who will be widely dispersed during a recess; and then leaving the final decision which should rest with MPs to the discretion of the Speaker.
Civil Service Bill	*Constitutional Renewal*	A valuable measure that will put the civil service and Civil Service Commissioners on a statutory footing and enshrine key values. However, the Civil Service Commission will not have the power to hold inquiries into compliance with the *Civil Service Code* on its own initiative; and tensions around the position of special advisers are unresolved
Wider review of the Royal Prerogative	*Governance* Green Paper; *Constitutional Renewal*; a consultation paper is to be published following an internal government 'scoping exercise' on executive prerogative powers.	All Royal Prerogative powers should either be placed on a statutory basis or terminated. It is right (as the Public Administration Select Committee advised in its authoritative report; HC 422, 2004) to prioritise war powers, treaties and passports; but it is essential to move fast towards full public consultation on the whole process. It is a mistake to rule out reform to the personal prerogatives of the monarch, especially with regard to the choice of a Prime Minister that ought to be the prerogative of the House of Commons.
Reform of the role of the Attorney General	*Constitutional Renewal*; consultation paper	The proposals do not fulfil the government's original intention to remove the tensions inherent in a

		government minister acting as senior legal adviser and supervising the prosecuting authorities. While providing some safeguards, the Attorney General will continue to serve as the government legal adviser and is given an explicit power to halt prosecutions and investigations on undefined national security grounds. The AG will report annually to Parliament and swear to respect the rule of law.
Distancing the executive from judicial appointments	*Constitutional Renewal*; consultation paper	It is right to exclude the Lord Chancellor and Prime Minister from the processes of appointing senior judges. However the Judicial Appointments Commission will find it very difficult in practice to broaden the composition of the judiciary and needs to be governed by wider criteria for appointments, including a commitment to diversity.
Ecclesiastical appointments	*Constitutional Renewal*; Archbishops' consultation paper and report approved by General Synod.	It is proper to remove the Prime Minister's active role in making appointments; but there is a failure to address the broader issues of its privileged status over other faith communities and its proper place within a largely secular society.
Distancing ministers from the granting of honours	*The Governance of Britain;* Sir Hayden Phillips, Cabinet Office, 2004 HHHhasdf	Continuing commitment by Prime Minister and ministers not to alter recommendations for honours. But the whole process is too opaque and exclusive to command public confidence.
Parliamentary oversight and executive accountability:		
A parliamentary role in key public appointments	*Governance* Green Paper; Commons Liaison Committee, *Pre-appointment hearings by select committees*, HC384, 2007-8 (response to government list of posts)	The proposal for select committee pre-appointment hearings and pre-commencement hearings for 'market sensitive' is potentially a valuable development. The government is seeking to control the list of posts that will come under scrutiny.
Parliamentary scrutiny of the National Security Strategy; reform of the Intelligence and Scrutiny	*Governance* Green Paper; *Constitutional Renewal*; *The National Security Strategy of the United Kingdom*, Cm 7291,	It would be consistent with the government's aim of strengthening Parliament if oversight of the strategy were given to a parliamentary select

Committee	March 2008	committee, perhaps a joint committee of both Houses, rather than left with a committee of prime-ministerial appointees, albeit chosen from within Parliament and from parliamentary nominees
Draft legislative programme in advance of the Queen's Speech	*The Government's Draft Legislative Programme*, Office of the Leader of the House of Commons, Cm 7175, July 2007; Modernisation Committee, *Scrutiny of draft legislative programme*, January 2008	A good proposal. The government produced a draft legislative programme in July 2007 that the Commons debated on 25 July 2007. However the timing came shortly before the ten-week summer recess and select committees did not take advantage of the opportunity to examine the proposals. If the proposal is to work effectively, committees must find ways of working in the recess.
Annual debates on departmental objectives and plans	*Governance* Green Paper; Modernisation Committee inquiry underway	Potentially a valuable idea, especially if the debates can be linked to the work of select committees and committee and parliamentary input into Public Service Agreements (PSAs) (see also below).
Greater transparency for government expenditure	Commons Treasury Committee, *Comprehensive Spending Review 2007*, HC 279 2006-7; Liaison Committee, *Parliament and Government Finance: Recreating Financial Scrutiny*, HC 426 2007-8	Simpler reports at the three stages in the expenditure process - plans, estimates and out-turns - would assist greatly in improving Parliament's performance in scrutiny and oversight of government expenditure. We also recommend that Parliament's role could be further strengthened if select committees were involved in the drafting of PSAs across the spectrum of government.
Parliamentary oversight of the Office for National Statistics (now the UK Statistics Authority)	*Governance* Green Paper; Statistics and Registration Service Act 2007	A good ongoing reform. The independence of official statistics with parliamentary scrutiny is an important component of a modern democracy. The Treasury Committee took evidence from the nominee for chair of the new body and its report was debated in the House on 25 July 2007.
Reform of the National Audit Office and office of Comptroller & Auditor General	*Constitutional Renewal*; Commons Public Accounts Commission, *Corporate Governance of National Audit Office*, HC 402, 2007-8	The broadly positive proposals of the Tiner review, most notably the creation of a board to oversee the NAO, are to be included in the Constitutional Renewal Bill. It is unfortunate that the government has

		been unable to include them in the draft bill.
The introduction of regional ministers and regional select committees	*Governance* Green Paper; Liaison Committee, *The work of committees in 2007*, HC 427, 2007-8	Regional ministers have been appointed; the proposal for regional select committees is floundering, being unpopular in the House and probably unworkable. We believe that England requires an elected tier of regional government; meanwhile there is an urgent need to improve democratic oversight of the largely unaccountable mechanisms for regional governance.
Changes to the *Ministerial Code*	*Governance* Green Paper; *Ministerial Code*, Cabinet Office, July 2007	An independent adviser on ministerial interests is in post and ministers are expected to accept the business appointment rules. But the *Code* continues to be issued under prerogative powers and is the creature of the Prime Minister and Cabinet Secretary. They devise the rules and are ultimately responsible for their enforcement. There is no provision for parliamentary oversight.
'**Reinvigorating**' **democracy:**		
House of Lords reform	*The House of Lords: Reform*, Cm 7027, 2007.	Cross-party negotiations on a wholly or substantially elected second chamber and the removal of hereditary peers are said to be making progress; a white paper is due before the summer recess. A key issue will be the representativeness of the electoral system and its relationship with the system for elections to the House of Commons.
Enhancing the role of backbench MPs	Commons Modernisation Committee, *Revitalising the Chamber*, HC 337, 2006-7.	The real key to enhancing the role of backbench MPs within a more effective House would be to require all backbench MPs to participate in a strengthened and expanded select committee system, which could then feed in to the work of the Chamber
The UK Parliament and devolution	*Governance* Green Paper; cross-border and cross party review of the Scotland Act 1998	The government is committed to maintaining the Union as it 'represents our values and gives them expression in the world' (hence in part the 'British values' exercise which is not concerned only with integration of

		new immigrants). The minority SNP administration in the Scottish Parliament is committed to a referendum on Scottish independence in Scotland by 2010; in response the Scottish Labour party has called for an early referendum. There is also the National Conversation in Scotland, a Scottish governments process. In Wales the All Wales Convention is supposed to be deciding when to hold a referendum on the Assembly getting equal powers with Scotland. In England, there are calls for an English Parliament which have not had much purchase.
Parliamentary elections	*Governance* Green Paper; *Review of Voting Systems: The experience of voting systems in the UJK since 1997*, Cm 7304, 2007	Reform of the disproportional system for elections to the House of Commons seems likely to remain in the long grass, though there have recently been suggestions that ministers are considering the Alternative Vote as an alternative. AV would mean that all MPs were elected on a majority of the local vote, but is more or equally disproportional in its effects.
Making Parliament more representative and extending women-only shortlists for parliamentary candidates beyond 2015	*Governance* Green Paper; *Discrimination Law Review: A Framework for Fairness*, consultation paper, Department for Communities and Local Government, June 2007.	A Speaker's conference will consider weekend voting, lowering the voting age to 16, registration reforms and the representation of women and ethnic minorities in the House of Commons. There may be measures in the new Equality Bill to extend the right of political parties to have women-only short lists beyond 2015. The gross inequality between men and women in Parliament will not be overturned by purely partial and discretionary measures that do not bind political parties. Moving election days to the weekend is a long overdue reform
Petitioning Parliament	*The Governance of Britain - petitions: the Government's response to the Procedure Committee's first report, session 2006-07, on public petitions and early day motions*, Office of the Leader of the House of Commons, Cm	The current rules for petitions are designed to discourage them. The government has agreed the cautious proposals made in the Procedure Committee report (April 2008) that in no way match the arrangements for petitions that the Scottish Parliament has adopted and could form a

	7193, 26 July 2007	progressive template for reform at Westminster and make a contribution to bringing Parliament and people together. The Procedure Committee has now produced a similarly cautious report on e-petitions.
Protests around Parliament	*Constitutional Renewal*	The government will repeal the restrictive measures that prohibit protests around Parliament in the Serious Organised Crime and Police Act 2005. But Parliament is to be given the right to make its own regulations which could risk putting the convenience of members ahead of the human rights of assembly and protest. The decisions should rest with the Metropolitan Police.
Right of charities to campaign	*The Governance of Britain*	It is important that charities should be allowed to campaign more effectively for the purposes for which they were established as long as they do so impartially and objectively. The Charity Commission applies very restrictive rules, based largely on a blunt prohibition on suggesting or proposing changes in the law in the UK (or elsewhere).
Devolving powers to 'local communities'	*Strong and Prosperous Communities: The Local Government White Paper*, DCLG, Cm 6939, October 2006; *An Action Plan for Community Empowerment Building on Success*, October 2007.	The government is preparing proposals for greater community involvement in the work of local authorities, introducing community 'calls for action' rights, making use of citizens' juries and similar mechanisms for consultation and possibly balloting on spending decisions. Researches into the efforts of local, health and other authorities to involve the public have demonstrated how difficult it is to achieve genuine and representative participation.
A 'Concordat' between local and central government	**Governance of Britain**	Concordat negotiated and published in December 2007. The Local Government Association regards it as a first, though small, step in an ongoing process of devolution of policy-making to local authorities
The state and the citizen:		
A 'common bond' for all citizens	Lord Goldsmith QC, *Citizenship: Our Common*	Lord Goldsmith's report on citizenship seems to be concerned more with

	Bond, March 2008	exclusion than inclusion. Any common bond for citizens must be based on an inclusive definition of citizenship and should leave proper space and dignity for residents of the UK who are not citizens. The rule of law and human rights provisions should apply to every resident regardless of their citizenship status
A 'British statement of values'	*The Governance of Britain*	No significant progress. The only discernible move has been to give government buildings the right to fly the Union flag whenever they wish.
A 'British Bill of Rights and Duties'	*The Governance of Britain*; Michael Wills, 'Kick-starting a national debate on a Bill of Rights and Responsibilities', speech to Department of Political Science, University College, London, 5 March 2008	No significant progress. A Green Paper is expected in the next few months. JUSTICE has published a thorough examination of the possibilities.
A 'concordat between the executive and Parliament'	*The Governance of Britain*	No significant progress. Would be a 'soft' alternative to proposal below
A 'written constitution'	*The Governance of Britain*; Jack Straw, 'Modernising the Magna Carta', speech to George Washington University, Washington, DC, 13 February 2008	No significant progress. Would be a 'hard' alternative to proposal above

[1] *Draft Constitutional Renewal Bill*, clause 22.

[2] See: *Constitutional Renewal*, Annex A, 'Draft detailed war powers resolution', p.54.

[3] Ibid, clause 32.

[4] Section 7, Representative and Accountable Government, *Handbook on Democracy Assessment*, op cit.

[5] See, for example, Chapter 14, 'Heckling the Steamroller', in Weir, S, and Beetham, D, *Political Power and Democratic Control in Britain*, Routledge, 1999; and Chapter 7, 'Servants of the People?', in Beetham, D, et al, *Democracy under Blair*, Politico's, 2002 (second edn).

[6] See with regard to the use of prerogative powers in foreign and EU policy-making, Burall, S, et al, *Not in Our Name: Democracy and Foreign Policy in the UK*, Politico's, 2006, and *A World of Difference*, a report by Democratic Audit, and the Federal and One World Trusts, 2007.

[7] *Taming the Prerogative*, HV 422, 2003-04.

[8] Cm 7342 - I, p.62 .

[9] Cm 7342 - I, p.62 .

[10] *The Governance of Britain: War powers and treaties: Limiting Executive powers*, Cm7239 October 2007, pp82-3.

[11] See PASC, 7th Report of 2006-7, *Machinery of Government Changes*, HC 672.

[12] See for example, CSPL, *Defining the Boundaries within the Executive*, Cm 5775, 2003.

[13] See Burall et al, *Not in our name: Democracy and foreign policy in the UK* , op cit, pp 187-88; and Blick, A, and Weir, S, 'Parliamentary Approval for Making War', submission to the Constitution Committee, House of Lords, September 2005.

[14] Hansard Society Commission on Parliamentary Scrutiny, *The Challenge for Parliament: Making Government Accountable*, Vacher Dod, 2001, pp. 86, 88, 113.

[15] See further, Burall et al and the *World of Difference* report cited above.

[16] Hennessy, P, *The Hidden Wiring: Unearthing the British Constitution*, Gollancz 1995, ch. 2

[17] op cit. This description is a summary of Professor Hennessy's fascinating exploration of this arcane process.

[18] See: Rt Hon. the Lord Bingham of Cornhill, KG, 'The Rule of Law', 6th Sir David William Lecture, 16 November 2006.

[19] See: Dawn Oliver, 'Constitutionalism and the abolition of the Office of Lord Chancellor', *Parliamentary Affairs*, vol 57 No. 4, 2004, pp754-66.

[20] See the appendix on the NAO's corporate governance in the Public Accounts Commission report, *Review of the National Audit Office's Corporate Governance*, HC328, 2007-08

[21] House of Commons, The Public Accounts Commission, *Corporate Governance of the National Audit Office: Response to John Tiner's Review*, HC402, 2007-8, p.6.

[22] See: house of Commons Liaison Committee, *Pre-appointment hearings by select committees*, HC384, 2007-8.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Malcolm Jack, Clerk of the House of Commons (Ev 02)

Demonstrations in the Vicinity of Parliament

Introduction

1. The starting point for consideration of managing protest around Parliament is in the Government's intention to repeal Sections 132-138 of the Serious Organised Crime and Police Act 2005 (SOCPA). That undertaking is now provided for in Clause 1 of the Draft Constitutional Renewal Bill.

2. While intending to repeal sections 132-138 of SOCPA so that "people's right to protest is not subject to unnecessary restrictions",[1] the Government has also indicated that it believes "Parliament itself is well placed to contribute to proper consideration of what needs to be secured in order to ensure that Members are able freely and without hindrance to discharge their roles and responsibilities".[2] To that end the Government "invites the views of Parliament on whether additional provision is needed for the purpose of keeping passages leading to the House free and open while the House is sitting, or to ensure, for example, excessive noise is not used to disrupt the workings of Parliament".[3]

3. This paper focuses on what might be considered necessary by way of additional provision to the Bill in order to ensure Members' free access and for excessive noise to be controlled.

Background

4. Some background to the present situation may be helpful in putting into context what additional provision Parliament might seek by way of the legislation. That involves considering the genesis of the SOCPA provision and the role of the historic sessional order.

5. Parliament Square has long been a focus for public interest. In the nineteenth century there were frequent demonstrations for trade union rights; suffragette protests culminated in the Black Friday riot of 1913; in the 1970s anti-apartheid and other demonstrations were staged, and more recently

pro- and anti- hunting protests. Since June 2001, Mr Brian Haw has staged a "permanent peace protest"[4] opposing US and UK actions against Iran and Afghanistan.

6. Acts of Parliament intended to prevent large numbers of people approaching Parliament include the Tumultuous Petitioning Act of 1661 and the Seditious Meetings Act of 1817, both now repealed.[5] The orderly control of public protest nationally is now governed by the Public Order Act 1986.[6] This requires organisers of marches to give six clear days' written notice to the police and permits the police to impose conditions on a march if they believe there is a risk of serious public disorder, damage or disruption.

7. Since 1713 the House passed a series of Sessional Orders at the beginning of each session. The Order relating to the Metropolitan Police was passed in its most recent form in every session from 1842-2006. It required the Commissioner of the Metropolitan Police to ensure that "the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House during the Sitting of Parliament, or to hinder Members by any means in the pursuit of their Parliamentary duties in the Parliamentary Estate". The Order was transmitted to the Metropolitan Police Commissioner with the intention of the Commissioner giving directions to constables under powers contained in the Metropolitan Police Act 1839.

8. In November 2003, the Procedure Committee undertook an inquiry into Sessional Orders and Resolutions. In evidence to that committee, the Metropolitan Police drew attention to the limitations of the Order. The Commissioner's directions, for example, did not include a power of arrest. They noted that no prosecutions had been brought under the 1839 Act for many years, and that its provisions "lacked teeth".[7]

9. The Procedure Committee concluded that the introduction of fresh legislation was needed to ensure that the police had adequate powers in this area. They recommended that the Sessional Order should only continue until such legislation was in force. The Government accepted this recommendation.[8] In the current session, no Sessional Order was passed in the Commons (though the Lords passed their equivalent order).[9]

10. The Serious Organised Crime and Police Act (SOCPA) 2005 placed on a statutory basis the framework for dealing with static demonstrations in the vicinity of parliament (the intention being that marches would be dealt with under the Public Order Act). Sections 132-138 of the Act provide that:

- Any person who demonstrates, or organizes a demonstration, in a designated area (specified by regulation) without prior authorisation by the Commissioner is guilty of an office subject to penalty of imprisonment or fine or both.

- Six days' written notice is required if authorisation is sought.

- The commissioner may impose requirements on any one seeking such authorisation to prevent "hindrance to the proper operation of Parliament", or other disorder or disruption.

-- No loudspeakers may be used other than by the emergency services.

11. SOCPA received Royal Assent on 7 April 2005. As preparations were being made to implement its provisions, Mr Brian Haw won an application for judicial review on 28 July. He argued successfully that the creation of an offence triggered by the absence of prior police authorisation "when the demonstration starts" did not apply to him since his demonstration had 'started' before the enactment of the bill.[10] The Government successfully appealed against this judgement on 8 May 2006 when the Court of Appeal found that it was clear that the intention of the Government was that the provisions of the Act should apply to all demonstrations regardless of when they began.[11]

12. Mr Haw had by this stage obtained authorisation under SOCPA for his protest, but the police imposed a number of restrictions on him, including one that limited his placard display to a maximum width of three metres. Mr Haw refused to comply with these with the result that the police removed his placards on 23 May 2006. On 22 January 2007 Mr Haw successfully contended in the Westminster district court that he had not breached police conditions. The judge ruled that the conditions were unclear and had not been imposed by the Metropolitan Commissioner himself but by a more junior officer. The judge ruled that the Commissioner had no powers to delegate such actions to a more junior officer.[12] CPS has now successfully appealed against this point.[13]

13. In July 2007 the Government published its Green Paper The Governance of Britain. The issue of protests in the vicinity of Parliament was dealt with under the chapter "Re-invigorating our democracy". The Government noted that "strong views" had been expressed both in terms of the principle and practical application of sections 132−138 of SOCPA.[14] It acknowledged that the right to peaceful protest was an essential civil liberty and was also protected by Article 10 of the European Charter of Human Rights. Consultation has been undertaken; the results are set out in Part 3 of the Constitutional Renewal documents.

Parliamentary needs

14. One difficulty in finding a solution suitable to Parliament is the Government's assertion that it "will not pursue harmonisation of the sorts of conditions that can be placed on marches and assemblies in the Public Order Act 1986"[15] (set out in para 6 above).

15. This conflicts with the views of the Metropolitan Police Service (MPS) which, in its response to the consultation document argues for prior notification of assemblies "in the close proximity of Downing Street and Parliament itself."[16] While considering the area defined by SOCPA to be too large, the MPS states its view that "prior notification is necessary to allow it to effectively manage the very large number of protests that take place in this small area."[17]

16. I am advised that the Serjeant at Arms agree with the MPS's view that prior notice should be given but that the area affected should be limited to comprise:

- That area of Abingdon Street adjacent to or opposite the Palace of Westminster

- St Margaret's Street

- Parliament Square

- Bridge Street

- Parliament Street

- Whitehall, south of Horse Guards Avenue

- Downing Street (if Parliament decides not to prohibit protest in this street)

- King Charles Street

- Victoria Embankment adjacent to Portcullis House

- Thames adjacent to Palace of Westminster.

17. The rationale for prior notice relates to the two principal requirements for Parliament, namely;

- unimpeded access to the Parliamentary estate for Members of Parliament (especially during times of sittings of either or both Houses);

- control of intrusive sound systems (loudspeakers etc) disrupting the work of parliament.

18. The two principal requirements do, of course, need to be met in the case of demonstrations whether or not subject to prior notice. In particular, pavements and roadways adjacent to Carriage Gates, St. Stephen's Entrance, Peers Entrance and Black Rod's Garden Entrance where there have been incidents involving Members trying to access the Houses either by vehicle or on foot, need to be kept clear of demonstrators.

19. The problem is that with the repeal of SOCPA provisions and in the absence of police powers of arrest in cases of offences of the sort given in the Public Order Act 1986, there would be little effective control of these areas, nor would there be any means of controlling intrusive noise from loudspeakers. As was acknowledged by the MPS and the Procedure Committee in 2003, the Sessional Order is insufficient an instrument to achieve this end.

20. A further point, supported by the Serjeant at Arms, is that overnight or permanent demonstrations should not be allowed on Parliament Square. Given recognition of the right to demonstrate legitimately, there seems no rationale for permanent demonstrations which are unsightly and may cause additional difficulties as more pedestrians are attracted to Parliament Square as a result of proposals on World Squares.

Conclusions

21. While understanding the democratic right to bring protest to Parliament, the House authorities responsible for order and security support the view of the Metropolitan Police Service that there should be a stipulation for notification of demonstrations within the area defined in paragraph 16 above in the interest of maintaining public order and safety.

22. Whether or not such a provision is made, the House authorities consider that Clause 1 of the Bill should include provisions giving the police powers of arrest similar to those given in the Public Order Act in respect of demonstrators in the immediate vicinity of the Palace of Westminster so that free access to both Houses is maintained. They should apply to individual as well as to group demonstrators. They also consider that powers to control intrusive noise should be written into the Bill.

23. The House authorities see no justification for overnight or permanent demonstrations in Parliament Square once new regulation governing orderly and legitimate expression of opinion is in place, particularly in view of the likely use of the Square as a World Square.

Malcolm Jack

Clerk of the House of Commons

May 2008

---

[1] The Governance of Britain - Constitutional Renewal, Part I, para 30

[2] Ibid, para 28

[3] Ibid, para 29

[4] www.parliament-square.org.uk

[5] Sessional Orders and Resolutions, Third Report from the Procedure Committee, Session 2002-03, HC 855, Ev 2

[6] Managing Protest around Parliament, Cm 7235, p9

[7] Sessional Orders and Resolutions, Ev 42

[8] Ibid, p2

[9] HL Minute, 6 November 2007

[10] R (on the application of Haw) v Secretary of State for the Home Department and another (All England law report).

[11] R (on the application of Haw) v Secretary of State for the Home Department and another (All England report).

[12] http://news.bbc.co.uk/1/hi/england/london/6287091.stm

[13] Note from Home Office

[14] The Governance of Britain, Cm 7170, p48.

[15] The Governance of Britain - Constitutional Renewal, Part I, para 26

[16] Managing Protest Around Parliament, Response from Metropolitan Police Service, p3

[17] Ibid, p 3

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the House of Lords Constitutional Committee

Introduction

1. In the Committee's 7th Report of Session 2006-07, The Governance of Britain (HL 158), we acknowledged that the Government's reform agenda has "profound constitutional implications which will require detailed consideration" (para 3). We therefore welcome the opportunity to contribute to the work of the Joint Committee by commenting on some aspects of the Draft Constitutional Renewal Bill and the accompanying White Paper.

2. In due course, when the bill is introduced to the House of Lords, we will carry out our usual detailed scrutiny of its provisions and report to the House. In this memorandum we confine our remarks to five main areas on which we feel able to comment at this stage. These are: the process by which constitutional change is being implemented and the scope of the draft bill; the proposals in Part 2 of the draft bill on reform of the Attorney General; the proposals in Part 3 on judicial appointments; the proposals in the White Paper on war powers; and the proposals in Jack Straw's statement of 25 March 2008 in relation to the Law Commission.

Process and Scope

3. We welcome in general the process by which the Government are taking forward their proposed reforms. The Green Paper in July 2007 (Cm 7170), the subsequent consultation papers-on managing protest around Parliament (Cm 7235), the role of the Attorney General (Cm 7192), war powers and treaties (Cm 7239) and judicial appointments (Cm 7210)-and most recently the White Paper, draft bill and analysis of the consultation responses (Cm 7342) have laid the ground for effective pre-legislative scrutiny. Legislation introducing constitutional changes of first-class importance ought in our view always to be subject to wide consultation, to be published in draft and to be subject to pre-legislative scrutiny. This has not always happened in the recent past.

4. While we have no doubt that the Joint Committee, which met for the first time on 6 May 2008, will discharge its role effectively, we note that it has been asked to report to each House by 18 July 2008. The Cabinet Office's Guide to Legislative Procedures accepts that "a committee will normally require at least 3-4 months to carry out its work" (para 18.1). Given the wide scope and general importance of the draft bill, we are disappointed that only two months have been allowed for pre-legislative scrutiny.

5. The draft bill, though relatively short, deals with five completely separate areas of proposed reform: demonstrations in the vicinity of Parliament (Part 1); the Attorney General and Prosecutions

(Part 2); courts and tribunals (Part 3); ratification of treaties (Part 4); and the civil service (Part 5). Whatever may be the underlying themes of the Government's Governance of Britain reform programme, the draft bill is in truth a miscellaneous provisions bill. While we accept that a single bill may be the most convenient vehicle for implementing those aspects of the reform programme that require primary legislation, we are concerned that there is a risk that in this conglomerate of topics, the separate parts-each important in its own right-may be subject to less effective scrutiny than might otherwise be the case.

1.

6. The inclusion of civil service reform as Part 5 of the draft bill is of particular concern to us. On the one hand, we are pleased that the Government have stopped their prevarication over when to bring forward legislation on this aspect of the constitution. On the other hand, we are unconvinced that these important reforms can receive the attention and scrutiny they require, either inside or outside Parliament, if they continue to be part of a larger bill dealing with a range of other important issues. A separate Civil Service Bill is in our view needed. The draft bill should be amended to give effect to this. This is not merely a matter of process but also of substance. While we have not carried out any detailed scrutiny of the provisions of the draft bill relating to the civil service, it is plain to us that there are constitutionally significant gaps in what is proposed. For example, the constitutional requirement for a politically neutral civil service ought to be enacted in primary legislation, as should an obligation for civil servants to act lawfully. It is in our view insufficient for such requirements to be placed in a code.

Part 2 of the draft bill: the attorney general

7. We trust that our recent report Reform of the Office of Attorney General (7th Report of Session 2007-08, HL Paper 93) will prove to be a useful handbook for the Joint Committee. It is accompanied by evidence from Baroness Scotland of Asthal and papers from two constitutional experts with sharply divergent views (Professor Anthony Bradley and Professor Jeffrey Jowell QC). Without seeking to resolve the debate on the future of the Law Officers-that will ultimately be a matter for each House-we give an account of the role of the Attorney General and offer analysis of the main arguments for and against change in three distinct areas: legal advice, prosecutions and criminal justice policy. We also consider the question of accountability.

8. There are three points we wish to make in relation to the provisions of the draft bill relating to the Attorney.

<u>Legislating on rule of law responsibilities</u>

9. First, the draft bill makes no express provision on the Attorney's role in relation to the constitutional principle of the rule of law. The Constitutional Reform Act 2005 section 1 makes express reference to the Lord Chancellor's role: "This Act does not adversely affect-(a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle". It would in our view be odd for the Lord Chancellor's role to be acknowledged in this way but for the statute book to say nothing about the Attorney's role. Both of these great offices of State have rule of law responsibilities and this should be acknowledged.

10. How might this be achieved? Section 3(1) of the 2005 Act makes plain that "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary" and under section 3(6), the Lord Chancellor must have regard to "the need to defend that independence". Consideration should be given to a similarly worded statement in relation to the rule of law, with all ministers and civil servants having a duty to uphold the rule of law and the Lord Chancellor and Attorney also having a greater duty to defend the rule of law. We see merit in the idea that the Attorney's responsibilities in relation to the rule of law-and possibly the responsibilities of other ministers-should be acknowledged in legislation. The Constitutional Renewal Bill would seem to be a suitable vehicle.

Oath of office

11. The Government are proposing a new oath of office for the Attorney and suggesting that the form of the new oath does not need to be contained in legislation on the ground that the current oath is not prescribed by statute. When new oaths were required for the Lord Chancellor and Lord Chief Justice of England and Wales following the 2005 reforms, amendments were made to the Promissory Oaths Act 1868. A similar approach ought to be taken in relation to the Attorney's oath for reasons of consistency and accessibility. We agree that the oath of office for the Attorney needs to be updated. This should be done through primary legislation rather than executive action. This would also give Parliament a welcome opportunity to debate and approve the oath. This is particularly important if the Constitutional Renewal Bill (contrary to our suggestion) makes no express reference to the Attorney's rule of law responsibilities.

Annual report

12. We welcome the proposal in clause 16 of the draft bill to create a statutory requirement for the Attorney to lay an annual report before Parliament. This would be a useful way of enhancing the accountability of the Attorney.

13. Clearly it will be for Parliament to devise effective procedures for ensuring that the growing number of annual reports relating to the administration of justice are scrutinised appropriately-notably, the annual report of the Judicial Appointments Commission for England and Wales, the Lord Chief Justice's Review of the Administration of Justice in the Courts, the annual report from the chief executive of the Supreme Court and now the annual report by the Attorney. Scrutiny should be approached in a proportionate way that avoids committees of each House merely duplicating the work of others. We do not regard it as part of our remit routinely to carry out oversight of these reports; that is, in our view, a responsibility best carried out by the Commons Justice Committee.

Part 3 of the DRAFT bill: courts and tribunals

14. As a preliminary point, we note that part 5 of schedule 3 to the draft bill (removal of the Lord Chancellor's functions in relation to lower-level judicial appointments) makes a large number of small amendments to provisions contained in the Constitutional Reform Act 2005. In our 14th Report of 2003-04, Parliament and the Legislative Process (HL Paper 173), we recommended that

"where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and this should be included in the Explanatory Notes to the bill" (para 98). It would be helpful if the Government were to produce a Keeling-type schedule relating to part 5 of schedule 3 to the draft bill and to include that schedule in the Constitutional Renewal Bill's Explanatory Notes when it is introduced to each House.

15. Save for one matter, we do not at this point wish to make detailed comments on the substance of the proposals in relation to courts and tribunals. In our 6th Report of 2006-07, Relations between the executive, the judiciary and Parliament (HL Paper 151), we surveyed the changing constitutional landscape in which the judiciary operates. We did not, however, focus on issues relating to judicial appointments.

16. The one point we do want to raise concerns the proposal in part 4 of schedule 3 to the draft bill in relation to the filling of judicial vacancies in England and Wales other than by recommendation of the Judicial Appointments Commission. The provision is a Henry VIII clause which would empower the Lord Chancellor, after consulting the Lord Chief Justice, by order (subject to affirmative resolution in both Houses) to amend schedule 14 to the CRA 2005. Schedule 14 lists the judicial offices which must be filled by recommendations from the JAC. The Explanatory Notes do little to explain why this provision is included; there was no discussion of it in the consultation paper. This provision seems to relate to an idea reported at para 138 of the White Paper, said to have emerged "in discussions with the judiciary and JAC". The policy goal seems to be that some judicial vacancies, especially in the tribunal system, should where possible be filled by redeployment of currently serving judicial officeholders rather than by a competition for a new recruit run by the JAC. The White Paper states "The Government therefore proposes to enable the Lord Chancellor to transfer a number of appointments to the Senior President of Tribunals but with a longstop provision requiring a JAC selection where the deployment arrangement is not possible". As this proposal was not covered in consultation, the Joint Committee will no doubt want to scrutinise it with special care.

17. We are concerned by the apparent breadth of the Henry VIII power, which seems far more extensive in its potential operation than is necessary to give effect to the proposed policy. The substance of the proposal also appears to us to have constitutional implications. Powers to redeploy judges always carry with them a risk to the principle of the independence of the judiciary. It is important that there should be effective safeguards so that judicial independence is not compromised.

War powers

18. Although there is nothing in the draft bill about war powers, the accompanying White Paper announces the Government's intentions on this issue and we understand that the Joint Committee will be considering these proposals. The Committee has considered this issue in great depth and produced two reports: Waging War: Parliament's Role and Responsibility (15th Report of Session 2005-06, HL Paper 236) and Waging War: Parliament's Role and Responsibility-Follow-up (3rd Report of Session 2006-07, HL Paper 51). In light of this, we wish to make the following points to the Joint Committee.

19. First, we very much welcome the general thrust of the Government's war powers proposals as set out in the White Paper. Adopting a "detailed resolution" on parliamentary approval of the deployment of troops into armed conflict would, in our view, be an effective way of introducing a new convention similar to that which we recommended in our 2006 report. For the reasons set out

in that report (para 104), we believe that putting the deployment power on a statutory basis would be inadvisable.

20. Second, we have three concerns about the draft resolution contained in the White Paper.

- First, we are concerned that the draft resolution states that the House of Commons "may" send a message to the House of Lords asking for its opinion on a proposed conflict decision. We believe that any resolution should include a requirement that the Commons must (except, perhaps, in certain very carefully defined circumstances) await the opinion of this House in respect of the proposed deployment before making its final decision. Either way, it needs to be established what is meant by the "opinion" of the House of Lords, since this implies a formal decision-which may involve a vote.

- Second, we regret that the draft resolution does not provide for retrospective approval of deployments in cases where forces have been deployed without prior parliamentary approval for reasons of urgency or national security. We reiterate our belief, set out in the 2006 report, that if troops have to be deployed without prior parliamentary approval, "the Government should provide restrospective information within seven days of [the deployment's] commencement or as soon as it is feasible", at which point parliamentary approval should be sought in the normal way (para 110(3)).

- Third, we are concerned that the draft resolution omits any requirement for a re-approval process, even if a deployment's nature, scale or objectives alter significantly. We believe that, in addition to keeping Parliament informed of the progress of deployments, the Government should be required to seek a fresh approval if the nature of the deployment changes substantially. This is vital if 'mission creep' is to be avoided.

LAW COMMISSION

21. There is nothing in the draft bill or the White Paper about the Law Commission, but in his statement to the House of Commons on 25 March 2008, Jack Straw announced that the Government "intend to strengthen [the Law Commission's] role by placing a statutory duty on the Lord Chancellor to report annually to Parliament on the Government's intentions regarding outstanding Law Commission recommendations, and providing a statutory backing for the arrangements underpinning the way in which Government should work with the Law Commission" (col 23). Following Lord Hunt of Kings Heath's repetition of the statement in the House of Lords, Lord Norton of Louth sought clarification about whether the Law Commission proposals were to be included in the Constitutional Renewal Bill. Lord Hunt replied that "we will need to feel our way forward as to how best to take forward Law Commission proposals" (col 474).

22. This Committee strongly supports the work of the Law Commission and has long been concerned about the number of their reports that appear largely to have been ignored or forgotten by the Government. Indeed, our former Chairman, Lord Holme of Cheltenham, wrote to Baroness Ashton of Upholland on 24 October 2007 suggesting that the Government should respond to each Law Commission Annual Report by setting out the reasons for the delay in responding to or implementing any outstanding reports. We therefore strongly support the proposed annual report by the Lord Chancellor and the idea of putting the relationship between the Law Commission and the Government on a statutory basis. We further believe that these provisions should be included in the Constitutional Renewal Bill when it is introduced to Parliament.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by the House of Lords Delegated Powers and Regulatory Reform Committee

Draft Constitutional Renewal Bill: delegated powers

1. This memorandum responds to your invitation of 13 May to the Delegated Powers Committee to contribute to your Committee's scrutiny of the draft Constitutional Renewal Bill. The Committee considered the draft bill at its meeting this morning. We have been assisted by a memorandum by the Ministry of Justice about the delegations in the draft bill.

2. We value the opportunity to contribute to the pre-legislative scrutiny of this draft bill and set out below an overview of our opinion on the proposed delegations. In making these observations, our opinion should not be taken to prejudge our position should a bill be introduced: we will report to the House at that stage on whether its provisions inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny. I should also note that we have considered each issue purely as a question of delegation and not of policy.

Documents to be laid before Parliament subject to no procedure

3. The bill requires a number of documents to be laid before Parliament (subject to no procedure) and we have considered whether four of these provisions amount to delegations of legislative power. The documents are the protocol for the running of prosecution services at clause 3 and the codes of conduct for the civil service, diplomatic service and special advisers provided for by clauses 30 to 33. As currently drafted, the protocol which would result from clause 3 appears to us to be a non-binding statement of how the Attorney and each of the Directors will usually relate to each other when carrying out the functions allocated to them elsewhere in statute, rather than a document which would create enforceable rights or duties. The codes of conduct provided for by clauses 30 to 33 appear to us to be management documents. None of these documents, as currently provided for, thus appears to us to amount to a delegation of legislative power. If, by time of introduction, the Government intend more than this, we would welcome that clarification.

Henry VIII powers

4. The draft bill contains eight delegated powers, including the usual commencement order power (clause 44). There are four Henry VIII powers in clauses 8 and 43 and in paragraphs 18 and 70 of Schedule 3, all of which are affirmative: we consider clause 43 below, but the others do not seem inappropriate in terms of their scope or parliamentary procedure.

Civil Service Commission: additional functions - clause 40

5. Clause 40 enables the Minister for the Civil Service and the Civil Service Commissioners to make arrangements for the Commission to carry out functions in relation to the civil service in addition to those conferred on it by Part 5 of the draft bill. The memorandum does not address the purpose of this power and, in view of clauses 26(4)(b) and 40 (2), we would expect it to do so were such a provision to appear in a bill before the House.

Power to make consequential [1] provision - clause 43

6. Clause 43 enables provision (including transitional, transitory or saving provision) to be made by order in consequence of the bill, and subsection (2)(a) enables the order to amend, repeal or revoke any provision made by or under an Act. Such an order is subject to the negative procedure unless it amends or repeals an Act, in which case it is affirmative. This is well precedented and not inappropriate. We suggest that the power at clause 43(2)(a) should expressly be confined to the amendment of Acts passed before or in the same session as the bill. While that paragraph does not include the words "whenever passed", the specific power conferred by clause 8(1) is limited to the amendment of an "existing enactment", which might raise the inference that the unqualified reference to "an Act" in clause 43(2)(a) is intended as a reference to any Act. It should also be made clear whether incidental or supplementary provision may be made under subsection (1).

GOODHART

14 May 2008

---

[1] For the nature of consequential provision see Craies on Legislation, 8th Edition (Ed Greenberg), paragraph 14.3.11.

HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by Professor Adam Tomkins (Ev 01)

Putting the Draft Constitutional Renewal Bill in Context

1. The Draft Constitutional Renewal Bill is more of a tidying-up exercise than it is a fundamental reform to the British constitution. This is not to trivialise it or to say that it contains no measures which are important in their own right. But, when compared with previous rounds of constitutional reform witnessed in recent years (e.g. the Human Rights Act 1998, the Scotland Act 1998 and arguably even the Constitutional Reform Act 2005), the Draft Constitutional Renewal Bill is not of the same order of importance, constitutionally. More pressingly, perhaps, neither is the Draft Constitutional Renewal Bill the most significant set of proposals currently being debated in the arena of constitutional reform. The 'national conversation' initiated by the Scottish Executive in August 2007 has at least the potential to lead to radically more fundamental constitutional reform than any proposal contained in the Draft Constitutional Renewal Bill. Parliamentary scrutiny of the future of the Union is a matter for another day, no doubt. Nonetheless, a sense of perspective is called for.

2. This is especially the case, perhaps, given the size of the gap between some of the Government's rhetoric in its various 'Governance of Britain' papers and what is actually proposed in the draft legislation. In last summer's Green Paper, for example, the Government wrote about 're-invigorating our democracy' and suggested that its proposals would go a long way 'to rebalance power between Parliament and Government'. From the Green Paper of July 2007 to the White Paper and Draft Bill of March 2008 there appears to have been a substantial shrinkage of the Government's ambitions. While it may be the Government's intention that the 'Governance of Britain' or 'constitutional renewal' agenda should be ongoing and should not be confined to the present Draft Bill, there is much that was canvassed in last year's Green Paper that has not been taken forward in the White Paper and Draft Bill. Some matters remain, apparently, for the future (e.g., the commitments to establish a Youth Citizenship Commission, to start a national debate on a British Bill of Rights and Responsibilities, and to revisit issues of House of Lords reform). Others are seemingly being taken forward, but elsewhere (e.g., changing the conventions governing the dissolution of Parliament, such that the Prime Minister will be required to seek the approval of the House of Commons before asking the Monarch for a dissolution; and amending the Standing Orders of the House of Commons so as to enable backbench and opposition Members to seek a recall of Parliament - both of these matters, as I understand it, are currently before the House of Commons Modernisation Committee).

3. Perhaps of more concern for this Joint Committee, however, is the fact that even within the areas of the Green Paper that do find some expression in the Draft Bill, there appears to be considerable slimming down of ambition. In the Green Paper, for example, it was stated that 'the Government believes that the executive should draw its powers from the people, through Parliament' (para. 14). I agree. But there is nothing in the Draft Bill to write such a principle into our constitutional law. In the Green Paper it was further stated, of the Government's prerogative powers to deploy troops and to ratify treaties, that 'In a modern 21st century parliamentary democracy, the Government considers that basing these powers on the prerogative is out of date' (para. 17). Again, while changes of detail are proposed in the White Paper and Draft Bill with regard to both powers, it is clear that both are intended to remain firmly based on the prerogative, albeit that the exercise of these prerogative powers will be subject to moderately enhanced parliamentary oversight.

Constitutional Renewal and Constitutional Principle

4. I will return to the detail below but, before doing so, it may be worth pausing to reflect a little on the constitutional principles that may be said to underpin this incredibly important area of our constitutional law. One of the most striking features of the Green Paper were its citations of history. The proposals explored in the Green Paper were explicitly set in the context of the United Kingdom's ongoing, historical constitutional development. A major theme of that development is the transfer of power from Crown to Parliament. As the Green Paper expressed it, 'reforms have developed our country from a feudal monarchy where the King's word was law and only a tiny minority had any real influence, to a representative democracy governed through a sovereign Parliament elected by universal suffrage' (para. 2). As matters stand, however, the transfer is incomplete. Britain's constitution, even now, is not a full parliamentary or democratic one. The Crown retains very significant powers. Some continue to be exercised by the Monarchy itself (e.g., appointment of the Prime Minister, dissolution of Parliament, and royal assent to legislation) but the bulk of the Crown's powers are now exercised by the Prime Minister and by other Cabinet Ministers and officials (e.g., the making of treaties, the deployment of the Armed Forces, the conduct of diplomacy, the governance of Britain's overseas territories, the appointment and removal of Ministers, the appointment of peers, the grant of honours, the claiming of public interest immunity, and the granting and revoking of passports, as well as others).

5. Now, it is clear that, as the Government accepted in its Green Paper, 'when the executive relies on the power of the royal prerogative ... it is difficult for Parliament to scrutinise and challenge government's actions' (para. 15). This is a reflection of the view established by the House of Commons Select Committee on Public Administration, which reported in 2004 that, when exercising the Crown's prerogative powers, Ministers have 'very wide scope to act without parliamentary approval' (Taming the Prerogative, HC 422 of 2003-04, para. 12).

6. If we take seriously the claim - and it is the Government's claim - that our country is a 'representative democracy governed through a sovereign Parliament' (above), then it follows that current constitutional practice with regard to the prerogative is contrary to principle. The transfer of power from Crown to Parliament must be completed. In a representative democracy governed

through a sovereign Parliament such a claim would surely be axiomatic. There would be no reason to regard it as either bold or controversial. The starting principle for executive power should be the same for central government as it already is for local government: namely, that the government may exercise only those powers which are expressly or by necessary implication conferred upon it by statute. If this is sufficient for local government why should it not also be for central government? The personnel of central government is already drawn from Parliament and once in office the government is of course accountable to Parliament for its policies. Given this, there is no reason not to extend the control by Parliament over the government also to its powers. Thus, Government should possess only those powers which the people, through their elected representatives in Parliament, have expressly or by necessary implication conferred upon it by statute. This, it is respectfully submitted, is the constitutional principle on which the governance of Britain and on which a programme of constitutional renewal should be based.

7. One of the more disappointing aspects of the White Paper and Draft Bill is that, unlike last year's Green Paper, they do not seem to reflect this underlying principle. In the Green Paper the Government expressed its belief that 'in general the prerogative powers [exercised by Ministers] should be put onto a statutory basis and brought under stronger parliamentary scrutiny and control' (para. 24). (There was no suggestion that the powers exercised by the Monarchy itself should be amended in these ways.) In the White Paper and Draft Bill, by contrast, only one prerogative power is proposed to be put onto a statutory footing (i.e., the power to manage the civil service - clause 27) and the proposed increases in parliamentary scrutiny and control fall considerably short of what they might have been.

8. Three areas of the prerogative are proposed to be reformed in the White Paper and the Draft Bill: the management of the civil service, the ratification of treaties and the deployment of the Armed Forces. It is not clear why these particular prerogative powers (and not others) have been selected for 'renewal'. While the most recent political controversy concerning a prerogative power revolved around one of these three - the Blair Government's deployment of the Armed Forces in the Iraq War - recent decades have witnessed controversy in other areas, not touched on in the Government's present proposals. One obvious example is the use by Ministers in John Major's Government of the prerogative power to claim public interest immunity (PII) in order to attempt to prevent what turned out to be material evidence from being disclosed to the defence in a series of criminal trials in the early 1990s, trials concerning the export of arms and 'dual-use' goods to Iraq. It was the scandal which this gave rise to that led to the establishment of the Scott Inquiry, which reported in 1996. One question which may usefully be explored, perhaps, is why the Government finds it necessary or appropriate to make amendments only to some of its prerogative powers, and not to others. As the example of PII suggests, it cannot be because all other prerogative powers operate without difficulty. The Government's current proposals for piecemeal reform are difficult to reconcile with its more robust statements in last year's Green Paper (e.g. at paras 15 and 24, cited above).

The Ratification of Treaties

9. The Government proposes in essence to convert the existing convention governing Parliament's role in the ratification of treaties (the Ponsonby rule) into a rule of law by enacting it in statute. While doing so, it should be pointed out, the rule will be strengthened in terms of its legal effect, in that, under the Government's proposals (and subject to exceptions - clauses 22-23), it will be legally impossible for the Government to ratify a treaty should the House of Commons vote against its ratification. Thus, while the power to ratify treaties will remain a prerogative power in the hands of Ministers, the lawful exercise of this power will be conditional upon the Commons' approval. (Such approval does not have to be express: as the Draft Bill stands a treaty may be ratified as long as neither House resolves that it should not be ratified - clause 21.) If these proposals are enacted, were the Government then to purport to ratify a treaty in the face of a Commons vote that it should not be ratified, a court of law would likely be able to quash such a ratification on a claim for judicial review. I say 'likely' because there is House of Lords authority in support of the proposition that the ratification of treaties is a non-justiciable issue (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 418, per Lord Roskill). Notwithstanding its source, it may be doubted that this ruling would survive the passage of legislation such as that proposed here. For the avoidance of doubt, however, it may be that Parliament should consider whether it might expressly provide that any future ministerial attempt to ratify a treaty in the face of the opposition of the House of Commons is intended to be a matter amenable to judicial review.

10. Parliament might also be advised to consider whether the extensive ministerial discretion retained in clause 22(1) is appropriate (the 'exceptional cases' clause). Parliament's position might be better safeguarded, for example, by the addition of a statutory duty on the Secretary of State to take all such steps as are reasonably practicable to ensure that no treaty is ratified without the conditions in clause 21 having been met. Whether such a duty should be enforceable by Parliament or in the courts of law (or both) is a further matter that might usefully be considered.

The Deployment of the Armed Forces

11. The Government proposes the creation of a new resolution of the House of Commons, detailing Parliament's role in decisions to deploy Her Majesty's Armed Forces in armed conflict overseas. The principle, new to our constitution, to be articulated in the resolution, is that the approval of the House of Commons should in general be obtained before the Government deploys the Armed Forces in conflict overseas. Currently there is no such requirement for parliamentary authorisation, even if, as was the view for example of Prime Minister Tony Blair, the events of 2002-03 leading up to the Iraq War had made it politically unthinkable that Government would in the future deploy troops in overseas combat without parliamentary debate. The new principle is warmly to be welcomed. It is an important step in the rebalancing of power from Crown to Parliament that was referred to above.

12. However, while the headline move is to be welcomed, the detail of the Government's proposals leaves much to be desired. The following are examples (see White Paper, paras 218-23):

a) The Government currently proposes that there should not be a requirement to obtain retrospective approval for a conflict where prior approval was unable to be sought;

b) Similarly, the Government does not currently accept the need for a requirement for any regular parliamentary re-approval;

c) The Government is opposed to making any special arrangements for the recall of Parliament if a deployment is necessary when it is either adjourned or dissolved;

d) The Government believes that it is for the Prime Minister to determine what information should be supplied to Parliament in the approval process;

e) The Government is opposed to allowing the legal advice of the Attorney General as to the legality of the proposed action to be disclosed to Parliament;

f) The Government is of the view that it is for the Prime Minister to determine the appropriate timing for the involvement of Parliament in the approval process

Each of these facets of the Government's proposals has the potential significantly to reduce - perhaps even to undermine - the headline move.

13. For reasons of constitutional principle, this is greatly to be regretted. But it is not difficult to remedy. What is needed is a clear starting point. Three such starting points suggest themselves: (i) priority should be accorded to the fundamental constitutional principle that in the exercise of its powers the Government should be as fully accountable to Parliament as possible; (ii) priority should be accorded to what the Government calls the 'imperative of the safety and effectiveness of our Armed Forces' (White Paper, para. 221), bearing in mind all the time the great variety of circumstances in which they may find themselves, and the consequent need for flexibility and speed of response; (iii) recognition should be given to the fact that these principles collide and that a sensible policy approach would be to seek to balance or reconcile them as far as possible.

14. Now, it may be argued that, in a process of 'constitutional renewal', if we are to take the idea of renewal seriously, the matter should be approached in the first of these ways. As the Government's proposals stand, it is clear that the second of these ways has dominated the Government's thinking. This explains the Government's stated preferences in points (a)-(f) above. Wherever there is a clash between the interests of constitutional accountability to Parliament and those of retaining maximum government flexibility and control, the Government's current proposals come down uncompromisingly in favour of the latter.

15. By way of contrast, it may be worth sketching what points (a)-(f) might look like if either the first or third approach were to be adopted instead. The first approach, rooted most strongly in constitutional principle, would lead to the following proposals: (a) that retrospective parliamentary approval would always be required should prior parliamentary approval not be available; (b) that regular parliamentary re-approval would be a routine aspect of the system; (c) that Parliament should be recalled if its approval was needed when it was adjourned or dissolved; (d) that

Parliament should have the right to demand any information it required in order for it to have as full knowledge and understanding as possible of what it was being asked by the Government to approve (albeit that there might need to be special provision made for some such information not be released into the public domain); (e) that while the legal advice of the Attorney General should not normally be disclosed, the decision to send the Armed Forces into conflict overseas is of such importance as to warrant an exception to that general position; and (f) that the Speaker of the House, or the Chairman of the Liaison Committee (or of the Defence Committee or the Foreign Affairs Committee, etc) should determine matters of timing.

16. Alternatively, were it to be felt that the two approaches should be balanced against one another, the position might look something like this: (a) retrospective parliamentary approval should in principle be required where prior parliamentary approval is for some reason unavailable; it would surely be only in the most exceptional circumstances that such retrospective approval would be refused - Parliament would not act in this manner unless it had a compelling reason for doing so; if such a compelling reason exists, then it follows that Parliament ought to have the power to intervene; (b) regular parliamentary re-approval should be a part of the system; the arguments in favour are stronger than those against - in particular it is important to guard against 'mission creep' and this would be difficult without some facility for regular re-approval; (c) Parliament should be recalled if necessary; the Government has offered no strong counter-argument, and none exists; (d) Parliament should have as much control over the information flow as is possible; disputes between Government and Parliament about access to information could be referred for mediation to the Information Commissioner; peculiarly sensitive information could be communicated to senior parliamentarians on Privy Counsellor terms; (e) where there was cause for disquiet about the legality of proposed conflict, the Attorney General's advice to the Government should be disclosed; the decision to deploy the Armed Forces in conflict overseas is of such a magnitude that it trumps otherwise sound arguments in favour of legal confidentiality; (f) questions of timing ought to be negotiated between the Prime Minister, the Speaker and senior parliamentarians such as the Chairs of relevant Select Committees.

17. The conclusion is self-evident: whether an approach rooted in constitutional principle is adopted, or whether what I have called a more balanced approach is taken, the shape and the workings of parliamentary involvement in decisions to send the Armed Forces into conflict overseas look very different from the proposals currently offered by the Government. To add a footnote to this point, it is worth noting that a large majority of the respondents to the Government's consultation exercise on war powers and treaties were in favour of incorporating retrospective approval into the system, of recalling Parliament where necessary, of requiring the Prime Minister to provide much fuller information than the Government is suggesting, and of incorporating regular re-approval in the system so as to guard against mission creep (see Governance of Britain - Analysis of Consultations, Cm 7342-III, paras 309, 315, 321, 335).

18. Even if either of these approaches were to be adopted, however, the reform effected by such a resolution would be relatively modest. It would still not be the case that the executive power to deploy Her Majesty's Armed Forces in conflict overseas would be 'drawn from the people, through Parliament' (cf Green Paper, para. 14, cited above). On the contrary, it would remain firmly rooted in the prerogative powers of the Crown. Only statute could effect reform to this, the underlying

constitutional problem from which the issues addressed here flow. Subjecting the Government's prerogative power to wage war to parliamentary oversight is a welcome move, but it is no substitute for the constitutional reform we really need.

11 May 2008