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Public Administration Select
Committee

Constitutional Renewal: Draft Bill and White Paper

Tenth Report of Session 2007–08

*Report and annex, together with formal minutes
and oral and written evidence*

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The Public Administration Select Committee

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Summary

We have previously published draft bills on the civil service and to legislate for other important ministerial powers—the ‘prerogative powers’—which are currently exercised without parliamentary approval. The March 2008 government white paper on constitutional renewal and the accompanying draft bill contain proposals in most of these areas.

In this Report we make constructive suggestions for improving the Government’s proposals, to ensure that when a bill is presented in Parliament it will be a landmark piece of legislation. Our aim is to open up the secret powers of the Executive to parliamentary approval and scrutiny.

We find much to welcome in the Government’s proposals for **the civil service**. After four years of consultation, it is now time to move to legislation. It is more than 150 years since the idea of a Civil Service Act was first mooted. The core values of the service—integrity, honesty, objectivity, impartiality—and its key characteristics—recruitment on merit and the ability to serve governments from across the political spectrum—have stood the test of time. The purpose of legislation would be to protect these core values and key characteristics against the kind of government that might seek to undermine them, in an environment where the understandings that exist now between civil servants, Ministers, and the Civil Service Commissioners had broken down. We make a number of suggestions to strengthen the provisions in the draft bill with this aim in mind.

The Government’s proposals on the other prerogative powers within our remit are disappointingly limited, especially given the Prime Minister’s undertaking to entrust “more power to Parliament and the British people”. What proposals there are would instead ask Parliament’s permission to continue with something akin to the status quo, and they contain loopholes which would allow the Executive to bypass Parliament at their discretion. We acknowledge that it would be foolish to establish a parliamentary safeguard which imperilled the success of military operations, but we find that the Government’s draft resolution on **war-making powers** leaves too much discretion in the hands of the Prime Minister. We describe the need to seek retrospective approval for urgent military operations as the price of democracy, and as a risk that Prime Ministers should have to weigh up before taking the extraordinary step of entering into a conflict without a prior mandate from the House of Commons. **Treaties** are not like wars, where the ability to take a decision instantaneously can make a real difference to success. Parliaments in other leading democracies have a decisive role to play in the making of treaties. Yet we find that the Government’s proposed parliamentary safeguard could be ignored at will, and is therefore no safeguard at all. We urge swift progress on the Government’s commitment to legislate on the procedures for issuing **passports** and we look forward to seeing the results soon of a **wider review of the prerogative powers**.

The Constitutional Renewal Bill, when it is finally presented to Parliament, should be a seminal piece of legislation, reshaping the relationship between Government, Parliament, the courts and the people. Our recommendations are designed to help ensure that this is the case.

1 Introduction

Background: our involvement

1. In 1853 Northcote and Trevelyan laid the foundations for a professional and politically neutral civil service. In January 2004 we¹ published a draft Civil Service Bill, reiterating their 150-year-old call for an Act of Parliament to safeguard their recommendations. In December 2004 the Government produced a draft bill of its own for consultation.

2. In March 2004 we published a draft Ministers of the Crown (Executive Powers) Bill, prepared by our Specialist Adviser of the time, Professor Rodney Brazier, to show a way of bringing within statute law the most important ministerial powers currently exercised under the royal prerogative without the approval of Parliament.² We recommended the implementation of proposals to ensure full parliamentary scrutiny in three areas in particular:

- i. decisions on armed conflict,
- ii. the conclusion and ratification of treaties, and
- iii. the issue and revocation of passports.

3. In July 2007 the Government published a green paper on the Governance of Britain, announced by the new Prime Minister as a blueprint for “a new British constitutional settlement that entrusts more power to Parliament and the British people”.³ This was followed in March 2008 by a white paper on Constitutional Renewal, which included a draft bill.⁴ A Joint Committee of both Houses of Parliament has been established to consider the Government’s draft bill.

4. The white paper and draft bill contain proposals in most of those areas that we have covered in the past. The Minister for the Cabinet Office has described as “absolutely fair comment” our suggestion that the Government had looked at our “back catalogue” in order to inform the draft bill.⁵ This Report brings our particular perspective to bear on these new proposals, for the benefit of the Government, the Joint Committee, and the House as a whole.

5. This Report makes a number of constructive suggestions as to how the Government’s draft bill could be improved. This is only natural: we have campaigned over the years for legislation covering these areas, and developed detailed views of our own on the form that a statute should take. Any criticisms that we make do not detract from our certainty that, when the Constitutional Renewal Bill is presented in Parliament, it will be a landmark piece of legislation. It will open up some of the main prerogative

1 More accurately, our predecessor Committee.

2 *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report from the Public Administration Committee, Session 2003–04, HC 422, p 31

3 HC Deb 3 July 2007, c 815

4 Cm 7342-II

5 Q 93

powers—the secret powers of the Executive since time immemorial—to parliamentary approval and scrutiny.

Conduct of our inquiry

6. This has had to be a speedy inquiry, to enable us to inform the Joint Committee’s deliberations—it is required to report by July. We have taken evidence from:

- the First Civil Service Commissioner (Janet Paraskeva)
- a panel of experts: Professor Robert Blackburn, Professor Peter Hennessy, and Sir Robin Mountfield
- the Minister for the Cabinet Office (Rt Hon Ed Milliband MP) and the Cabinet Secretary (Sir Gus O’Donnell), who are responsible for the proposals relating to the civil service, and
- the Minister of State in the Ministry of Justice (Michael Wills MP), who is responsible for leading Government policy on constitutional renewal.

We are grateful to all of our witnesses for their thoughtful responses to our questions and for making themselves available at short notice.

7. There are two main parts to this Report. The first looks in detail at the latest version of the proposals for civil service legislation. The second considers how far the Government’s proposals in relation to prerogative powers go towards meeting their stated end: “more power to Parliament and the British people”. We also consider briefly two opportunities which should not be missed in the bill.

2 Civil service provisions

8. **There is much to welcome in the Government’s proposals for the civil service.** The First Civil Service Commissioner told us that she welcomed the publication of the Bill and “agree[d] with the broad thrust of the provisions”.⁶ In Peter Hennessy’s view, “the current Prime Minister deserves an enormous amount of credit for bringing this forward”;⁷ while Robert Blackburn wanted “to congratulate the Government on actually grasping this nettle and bringing forward constitutional reform in this area”.⁸

9. It might be argued that, as an impartial professional civil service has now survived for 150 years on a non-statutory basis, Northcote and Trevelyan have been proved wrong in their view that without legislation their recommendations “would be imperceptibly, or perhaps avowedly, abandoned by their successors, if they were not even allowed to fall into disuse by the very Government which had originated them”. Why then bother placing civil service values on a statutory footing? The First Civil Service Commissioner explained to us why she viewed the Government’s proposals as more than a symbolic gesture:

The fact that, for example, the Commission would not be able to be wiped out at the stroke of a pen through an Order of Council is very important. If we had a regime which decided that, let us say, the Civil Service should become a political body, then not to have the core values of the Civil Service in relation to impartiality and objectivity on the face of the Bill would just allow that to take place. It is much more than symbolic and is actually very important in relation to the constitution of this country.⁹

10. The values of the civil service have survived for 150 years without legislation because the civil service they have created has served this country well, and this has been understood by Governments of all political persuasions. But, as Sir Robin Mountfield told us: “this is not a fair-weather Bill but meant to lay down the limits on what could happen if things went badly wrong”.¹⁰

11. **The purpose of putting the civil service on a statutory footing is to provide the service with some protection against the kind of government that might seek to undermine its core values. It is this kind of government that we have in mind when seeking to improve the draft bill. It is not enough to rely on the understandings that might exist now between civil servants, Ministers and the Civil Service Commissioners; it is important to envisage a situation in which those understandings may have broken down. This in our view is the whole purpose of civil service legislation, and the reason that it is required at all.**

6 Q 2

7 Q 49

8 Q 49

9 Q 3

10 Q 49

12. While the broad purpose remains the same, the detail of the Government’s proposals for the civil service has altered to some extent since 2004. A summary of the differences can be found in the annex to this Report, and are discussed where relevant below.

13. We agree with the First Civil Service Commissioner that “there are some ways in which it [the draft bill] could still be improved”.¹¹ We will suggest in this part of the Report how this might be achieved, considering one by one those sections of the draft bill relating to the civil service which have given us or our witnesses some cause for concern.

‘A few clauses’

14. A point that applies across the board relates to Northcote and Trevelyan’s belief that their recommendations could best be implemented through “a few clauses”. The Cabinet Secretary has used this statement to counter suggestions that additional detail should be placed on the face of the bill:¹²

The challenge for Parliament is to stick by what Northcote-Trevelyan said so that we keep it very focused and allow the Civil Service the flexibility to meet what will be the challenges, most of which I do not know, going forward over the next 150 years.¹³

15. We appreciate the spirit of the Cabinet Secretary’s remarks, but also see the need to ensure that a bill is not so pared down that it fails to protect the essential values of the British civil service. Sir Robin Mountfield has commented insightfully on what he describes as “barebones clauses”:

The principal dilemma is how to resolve the tension between entrenching key permanent principles and maintaining management flexibility. It is important not to impede the ability of the Civil Service, and the political process, to evolve rather than to ossify in a changing environment. Yet some of the recent and current changes in that environment are precisely those that make it more desirable than previously to entrench key principles.¹⁴

We support the Government’s intention to keep new civil service legislation focused and limited to ‘a few clauses’. As will become clear, however, our view is that a few clauses more are required to give adequate protection to the core values of the civil service.

Definition of a civil servant (clause 25)

16. Unlike the draft bill of 2004, which set out those bodies to which it would apply, this draft bill defines its coverage by seeking to set out those parts of the civil service to which it does *not* apply. We think that the Cabinet Secretary was mistaken when he told us that if the draft bill of 2004 had become law, “we would already be having to try and amend it in primary legislation” – secondary legislation would have sufficed to change the list – but we

11 Q 2

12 Qq 95, 118

13 Q 95

14 Ev 11

have no objection to either way of defining the civil service, so long as it is clear which public servants are civil servants and which are not.

17. The main practical difference between the two draft bills is that while the 2004 version covered the Government Communications Headquarters (GCHQ) “because there [was] no operational impediment to their inclusion”, GCHQ is explicitly excluded from the latest draft bill, because it “operates within a separate statutory framework which provides structures for Parliamentary oversight and for the investigation of complaints while leaving [it] the operational freedom [it] need[s] to carry out [its] duties”.¹⁵ The Cabinet Secretary expanded to us on this point: “We have decided to treat all of the three agencies in the same way because all of the agencies are covered by separate legislation already so you want them to be together.”¹⁶ Staff of the intelligence agencies are the only civil servants not to be covered by the draft bill (other than the separate Northern Ireland civil and court services).

18. It is true that, unlike most of the rest of the civil service, GCHQ and the other Agencies are already established in statute, and also true that they have to operate under particular conditions that do not apply to most of the rest of the civil service. The legislation covering the Agencies sets out to ensure that their activities remain within set purposes, and it establishes complaints mechanisms for the public if they are concerned about these activities. There is, however, no statutory provision that staff at GCHQ should be recruited on merit; nor do they have statutory access to the Civil Service Commissioners or any other external complaints handler.

19. The First Civil Service Commissioner was concerned that under the draft bill, staff at GCHQ and the other Agencies would no longer be able to bring their concerns to her.¹⁷ **The Joint Committee may wish to explore further if the draft bill would have the effect of restricting access to the Civil Service Commissioners by staff of the intelligence agencies, and if so, whether this restriction is appropriate. The Committee may also wish to explore if there is a good reason for excluding the intelligence agencies from the statutory requirement that their staff should normally be recruited on merit.**

Management of the civil service (clause 27)

20. The Prime Minister and Foreign Secretary currently have extensive powers to manage the civil service and diplomatic service, under Orders in Council made under the royal prerogative. In 2004 the Government set out on the face of its draft bill a list of these powers.¹⁸ These were intended to be used to make rules and set levels (for example, of salaries) applying to sections of the civil service. They were not intended to allow Ministers to manage individual civil servants. This was made explicit in a sub-clause:

Nothing in this section confers—

(a) power to recruit, appoint, discipline or dismiss civil servants, or

15 Cm 7342-I, para 175

16 Q 136

17 Q 27

18 Cm 6373, Clause 4

(b) any other power for the day to day management of civil servants.¹⁹

21. The draft Constitutional Renewal Bill would also provide these same Ministers with the power to manage the civil and diplomatic services. However, these powers are not set out individually. There is simply a sentence stating that this would “cover, among other things, appointment and dismissal and the imposition of rules on civil servants”.²⁰

22. We have not been able to explore why the Government has changed its position so dramatically. Ministers need the ability to appoint and dismiss Special Advisers, but **giving Ministers the general power to appoint and dismiss civil servants does not seem in keeping with the Government’s commitment to a civil service recruited on merit and able to serve administrations of different political persuasions. This is a matter that the Joint Committee may wish to investigate further.**

The Civil Service Codes (clauses 30–33)

23. Our draft bill would have provided in statute for the Civil Service Code to include the following duties:

- a) a duty to serve the duly constituted Government with integrity, honesty and political impartiality;
- b) a duty to discharge public functions reasonably and according to law;
- c) a duty to deal with the affairs of the public sympathetically, efficiently, promptly and without bias or maladministration; and
- d) a duty to act without fear or favour and with political impartiality in the provision of advice and the performance of public functions.

24. The Government’s own draft bill in 2004 would have required civil servants “to carry out their duties for the assistance of the Government, Executive or Assembly as it is duly constituted for the time being, whatever its political complexion”, and would have required the code to include the requirements that civil servants should carry out their duties:

- a) efficiently;
- b) with integrity and honesty;
- c) with objectivity and impartiality;
- d) reasonably;
- e) without maladministration;
- f) according to law.

¹⁹ Cm 6373, Clause 4 (4)

²⁰ Clause 27 (3)

25. The Government’s latest draft bill is much less prescriptive in this area, and would provide only for the Code (together with the Diplomatic Service Code) to require civil servants to carry out their duties:

- a) with integrity and honesty, and
- b) with objectivity and impartiality.

26. Sir Robin Mountfield has suggested that a combination of these provisions “would get much nearer to what is required, without impinging on matters where management flexibility is needed”. He has shown concern that the Government’s provisions would “leave Ministers largely free to decide even the main principles of the Code” and fails to distinguish between “impartiality” in the treatment of citizens and “political impartiality”. In his view, the draft bill has failed to capture an idea “central to the concept of a permanent and non-political civil service”, namely that “civil servants must behave in such a way as to be able to secure the confidence of a future administration of a different political persuasion”.²¹

27. Sir Robin has also suggested that the Code should be subject to debate and vote in Parliament. The Government’s draft bill provides only that the Civil Service Code, along with the Diplomatic Service Code and Special Advisers Code, should be laid before Parliament. In contrast, our draft bill of 2004 would have provided for the prospect of a binding parliamentary vote against the Civil Service Code.

28. Any code which failed to uphold the core values of the civil service as set out in the draft bill would be open to legal challenge. We would therefore insist on providing for parliamentary approval of the Civil Service Codes only if primary legislation failed to encapsulate these core values adequately. There is one area in which the draft bill is at best ambiguous in this respect. We are not convinced that the definition of “impartiality” is sufficiently clear on the face of the draft bill. We recommend that the need for civil servants to be able to work effectively for governments of different political persuasions should be set out explicitly in primary legislation. These provisions would obviously not apply to special advisers; nor should they necessarily apply to civil servants appointed on short-term contracts under one of the exceptions from the requirement for selection on merit.

29. The Civil Service Codes set out the detailed ground rules under which civil servants must operate. We intend to continue to examine closely any substantive revisions to the codes, whatever the parliamentary procedure to which they may become subject.

Exceptions from appointment on merit (clause 34)

30. The draft bill would allow certain appointments to the civil service to be made other than on merit following a fair and open competition. The categories of these excepted appointments are:

- a) appointments to be made directly by Her Majesty,

- b) appointments to the diplomatic service as head of mission or as Governor of an overseas territory,
- c) appointments of special advisers, and
- d) appointments excepted by the recruitment principles.²²

The issues around special advisers are well-rehearsed and rather different from the other categories; we deal separately with their appointment and role.²³ We consider below each of the other three excepted categories. **Appointment on merit is central to ensuring an impartial and capable civil service. Any exceptions from this principle need to have an unimpeachable justification.**

Appointments to be made directly by the Crown

31. This is a provision taken directly from the current Civil Service Order in Council. However, it seems there is some confusion as to which posts would be affected. The Cabinet Secretary told us that it referred to “Royal Household appointments”.²⁴ Yet the Royal Household is not normally considered to be within the civil service, and is unlikely to fall within the scope of the draft bill. Civil service appointments which are made by the Crown include:

- the Head of the Home Civil Service,²⁵
- ambassadorial appointments and governorships of Overseas Territories,²⁶
- certain statutory appointments, such as HM Commissioners of Revenue and Customs, the Forestry Commissioners and the Crown Estate Commissioners.

32. In most cases, it is unlikely that Her Majesty plays more than a constitutional role in the appointments process. **Whoever is formally responsible for making civil service appointments, it strikes us as wrong that the Commissioners for Revenue and Customs (to take one example) should be appointed other than on merit. We invite the Joint Committee to explore this issue in more depth.**

Senior diplomatic appointments

33. The First Civil Service Commissioner also drew our attention to the fact that the draft bill would exclude senior diplomatic posts from the principle of appointment on merit. We, like her, “would like to ask why”.²⁷ The Cabinet Secretary’s answer concentrated on a single case of unusual political sensitivity:

22 Clause 34 (3)

23 See paras 37–45.

24 Q 122

25 10 Downing Street Press Notice, 15 June 2005, online at <http://www.number-10.gov.uk/output/Page7658.asp>

26 HC Deb 5 July 2006, c 1161W

27 Q 1

I think something like 99 and a half per cent of all diplomatic posts are done by fair and open competition and the exemptions are very, very rare. The one that I guess I was most involved in was when I was working for Prime Minister John Major when he appointed Chris Patten to Hong Kong. I think there were very specific political reasons why he felt that was the appropriate appointment at that time. So I am with you, I would want these things to be incredibly rare, very exceptional, and for specific political reasons.

He omitted to mention a number of other recent cases, generally involving the appointment of former Members of Parliament as high commissioners in countries including Australia, South Africa, and, most recently, Malawi. In none of these other instances has it been clear why a former politician was the most appropriate candidate for the post, which would normally have been given to a career diplomat. While the Cabinet Secretary has said that he “would want these things to be incredibly rare, very exceptional, and for specific political reasons”,²⁸ nothing in the draft bill would provide this safeguard.

34. As the First Civil Service Commissioner put it, an appointment should be made “not ... as a prize but because they are the best person for the job”.²⁹ There may well be occasions when the most suitable candidate for a diplomatic post might be someone from outside the diplomatic service, quite possibly a politician. This would not be contrary to the principle of appointment on merit. What people find objectionable is that the Prime Minister or Foreign Secretary should hand out diplomatic posts as a form of patronage.

35. In our recent Report on pre-appointment hearings, we suggested that there was “a strong argument for requiring a pre-appointment hearing—even a binding hearing” where Ministers intend to make public appointments “without following the usual processes, where normal practice and the public expectation are that these appointments will be made on merit”.³⁰ The Government’s response was to state that it did “not consider it appropriate for Parliament to be involved in these appointments”, without providing any further rationale for its position.³¹ **We do not understand why it should ever be appropriate for the Government to make senior diplomatic appointments other than on merit following a fair and open competition. We call on the Government to make the public interest case for this form of patronage—if there is a case to be made—and we encourage the Joint Committee to consider whether this provision should remain in the draft bill. At the very least, it needs to be drawn more tightly to ensure that it could be used only very rarely.**

Appointments excepted by the recruitment principles

36. The draft bill would allow the Civil Service Commissioners to “except” (exempt) certain appointments from the merit and fair and open competition requirements. The First Civil Service Commissioner explained how she expected this provision to be used:

28 Q 119

29 Q 30

30 *Parliament and public appointments: Pre-appointment hearings by select committees*, Third Report from the Public Administration Committee, Session 2007–08, HC 152, para 43

31 Sixth Special Report from the Public Administration Committee, Session 2007–08, HC 515, Appendix, p 11

What we see is there are sometimes short-term business needs, short-term projects of several months for example, sometimes secondments of up to two years, and we do also have to have measures in place to help the long-term unemployed or those with disabilities. We have a responsibility as an employer to make sure that we do not put in place procedures that are so rigid that we cannot allow, from time to time, appropriate alternatives. It is something we monitor quite carefully through our auditing departments, through our compliance monitoring regime, and one of the things that departments have to report to us is how they have used exceptions in the more junior posts.³²

We can see merit in the provisions in the draft bill allowing the Civil Service Commissioners to exempt certain recruitments from the requirement for selection on merit on the basis of fair and open competition. We expect that they will be used sparingly. It is entirely appropriate that decisions of this kind should be taken by the Commissioners, rather than by the Government.

Special advisers (clauses 38 and 39)

37. Special Advisers have been a recurring theme of interest to us. As we have commented ourselves, “rarely can such a small group, fewer than ninety, even if the Chancellor’s Council of Economic Advisers is included, have received such disproportionate attention”.³³ We agree with the Government’s contention that Special Advisers “have a valuable role to play in advising and assisting Ministers on Government policy” by adding “an important dimension to the advice and assistance available to Ministers while reinforcing the political impartiality of the permanent Civil Service”.³⁴

38. Our draft bill of 2004 would have provided for the total number of special advisers appointed by Ministers of the Crown to be subject to the approval of both Houses of Parliament. We also set out what we saw as the appropriate role of Special Advisers: that they should be appointed only “for the purpose of assisting the Minister, member of the Scottish Executive or Assembly Secretary who made the appointment”, and not “for a period which extends beyond his term of office”. We also made clear that Special Advisers should not be allowed to “(a) authorise any expenditure of public funds; (b) exercise any management function in respect of the civil service; or (c) exercise any statutory power”.³⁵

39. The Government’s draft bill would not set a limit on the number of special advisers, but would require the Government to publish an annual report containing information about the number and cost of the special advisers appointed by Ministers of the Crown. As for Special Advisers’ powers, the draft bill states that Special Advisers are appointed to “assist” a specific minister and provides that the appointment must end when the appointing Minister leaves office. There are, however, no other explicit limits in the draft bill to the powers of Special Advisers.

32 Q 2

33 *Politics and Administration: Ministers and Civil Servants*, Third Report from the Public Administration Committee, Session 2006–07, HC 122-I, para 112

34 Cm 7342-I, para 188

35 *A Draft Civil Service Bill: Completing the Reform*, First Report from the Public Administration Committee, Session 2003–04, HC 128-I, p 8, clause 5 (3)

40. The Minister for the Cabinet Office told us that it would be “arbitrary” to attempt to set a limit to the number of Special Advisers, and that it would inhibit flexibility:

It is not my job to put a question to you but where would you draw that line? It goes back to Gus’s [the Cabinet Secretary’s] point about flexibility. The system needs to have flexibility to adapt to needs. ... In the end, a prime minister would have to answer to the court of public opinion on this question.³⁶

41. Our other witnesses expressed concern that the combination of not enforcing a limit on numbers of Special Advisers and not clearly defining their powers risked undermining the other protections afforded to the civil service in the draft bill. The First Civil Service Commissioner suggested that ...

The way it is written at the moment actually you could run a coach and horses through the entirety of the Civil Service³⁷

... while Sir Robin Mountfield has written that

the Bill should not legislate merely for fair weather. It may not now be the contemplation of either main party, but in principle it would be possible for a future government to sideline the Civil Service altogether and appoint large numbers of Special Advisers to run the administrative functions of government as well as the advice function.³⁸

42. The Minister for the Cabinet Office reminded us that the terminology used in the Government’s draft bill, which describes Special Advisers as appointed “to assist” their minister derives from our own draft bill.³⁹ This takes the phrase out of context, however, as our draft bill also set out clearly those functions that Special Advisers should not be allowed to carry out.⁴⁰ In 2004 the Government also saw a need to limit the powers of Special Advisers explicitly, mirroring the language we had used.⁴¹

43. The Government now apparently intends to rely on the terms of the Special Advisers code—amendable by Ministers without reference to Parliament—to define what assisting a Minister would mean.⁴² This risks undermining the otherwise laudable decision of the Prime Minister that no special advisers should be allowed to exercise management functions, authorise expenditure or exercise statutory powers. (Previously two of the Prime Minister’s own advisers had been allowed to do these things.)

44. It needs to be absolutely clear in primary legislation that no special advisers should be able to authorise expenditure, or to exercise either management functions or statutory powers. With this added protection, there would be no need for Parliament to control the number of Special Adviser appointments.

36 Q 162

37 Q 43

38 Ev 12

39 Q 168

40 See paragraph 38.

41 A draft Civil Service Bill: A consultation document, Cm 6373, p 7, clause 16 (8)

42 Q 170

45. There may also be an argument, as Sir Robin Mountfield has suggested,⁴³ for legislating to require Ministers to consider the advice given to them by civil servants (whether or not they choose to follow this advice).

Status and powers of the Civil Service Commissioners

46. The Civil Service Commissioners are in effect the guarantors of the impartiality of the civil service by overseeing the system of appointments to the civil service and by considering complaints under the Civil Service Codes of conduct. For the First Civil Service Commissioner, “demonstrating our independence as a Commission is going to be key and we want to make sure that we have the relationship right between government and the Commission”.⁴⁴ It is therefore crucial that any legislation should guarantee the independence of the Commissioners from the Executive.

47. There are three separate concerns in this respect about the provisions of the draft bill:

- i. Would the process for appointing the Civil Service Commissioners ensure their personal independence from the Executive?
- ii. Would the Civil Service Commission as a body have sufficient administrative and financial independence from the Executive?
- iii. Should the Civil Service Commission have the power to undertake investigations into the application of the Civil Service Code other than on the basis of a complaint from a civil servant?

Appointment of the Civil Service Commissioners (Schedule 4, Part 1)

48. The draft bill provides that the First Civil Service Commissioner would be appointed on the recommendation of the Minister for the Civil Service, following consultation with the First Ministers for Scotland and Wales and with the registered leaders of the two opposition parties receiving the highest proportion of the national vote at the previous general election. This would not prevent the appointment of a candidate against the wishes of the statutory consultees. Our draft bill proposed a procedure designed to ensure that there could not be a partisan appointment. This would have involved the agreement of the Leader of the Opposition and a parliamentary resolution, in line with the appointment procedure for the Comptroller and Auditor General.⁴⁵ **We are not convinced that consultation is an adequate safeguard to the independence of the First Civil Service Commissioner, and recommend that any appointment should also require the agreement of the Leader of the Opposition.**

49. The other Civil Service Commissioners would also be appointed on the recommendation of the Minister for the Civil Service, but under the terms of the draft bill “the Minister must not make a recommendation without the agreement of the First Commissioner, unless the Minister is satisfied that it is appropriate to do so”. The draft bill

43 Ev 12

44 Q 1

45 A Draft Civil Service Bill: Completing the Reform, p 16, para 5

provides a strong protection (the agreement of the First Civil Service Commissioner) which is immediately breached by a massive loophole (“unless the Minister is satisfied that it is appropriate”). **We suggest that the Joint Committee may wish to explore with the Government the circumstances under which it might be considered “appropriate” to make an appointment to the Civil Service Commission without the agreement of the First Civil Service Commissioner. Unless there is a strong justification for maintaining an exemption clause, we recommend that the draft bill should be clear that appointments of Civil Service Commissioners may only ever be made with the agreement of the First Civil Service Commissioner.**

50. The Government has provided in the draft bill that the Civil Service Commissioners should be appointed on five-year non-renewable terms, in line with a recent recommendation of ours.⁴⁶ The Government’s previous proposals would have provided for renewable three-year appointments. **Appointment to longer, non-renewable terms of office will strengthen the independence of the Commissioners, and we welcome this provision wholeheartedly.**

Administrative and financial independence (Schedule 4, Part 2)

51. This was one of the main concerns raised with us by the First Civil Service Commissioner:

Are we truly able to challenge, to take decisions, to be in control of our own budget, the staff we believe we need to appoint to the jobs that we know need to be done or indeed would there be undue interference from the Cabinet Office? If we have a senior staffing matter then we believe it is for the Commission to decide the level and appropriateness of the staff we need to appoint and not for that decision to be taken elsewhere.⁴⁷

52. There are no obvious ‘off-the-shelf’ structures suitable for the Civil Service Commission. Non-ministerial government departments have many of the features needed to secure independence from ministerial interference, and a number of regulators have this status, but their staff are civil servants—which would be odd given the Commission’s role in relation to the civil service. Under the draft bill, the Commission would be established as an Executive Non-Departmental Public Body (NDPB). Although this would give it a significant degree of operational independence, and would allow it to employ its own staff, it is left to the Government to determine “the sums ... appropriate for ... the carrying out of the Commission’s functions”. Moreover, when releasing this money, the Government would be able to “impose conditions ... about how some or all of the money is to be used”. This is rather as if the water and sewerage companies were given control over the budget of the Office of the Water Regulator (OFWAT) and were able to impose conditions on OFWAT as to how this money should be spent.

53. It is worth noting that the costs of the Commissioners are extremely modest in central government terms, at around £1.2 million in 2007–08.

⁴⁶ *Ethics and Standards: The Regulation of Conduct in Public Life*, Fourth Report from the Public Administration Committee, Session 2006–07, HC 121-I, para 81

⁴⁷ Q 2

54. The First Civil Service Commissioner expressed some qualified concerns about the NDPB model.⁴⁸ Our concerns are less qualified. Sir Robin Mountfield has put it well: “for the regulator’s resources to be limited by the regulated is in principle wrong”.⁴⁹ **The Civil Service Commission’s job is to regulate the Executive. It is therefore not appropriate for the Executive to have the power to control not only how much money is made available to the Commission, but also how that money should be spent.** Like the UK Statistics Authority, the Commission’s budget should be set outside the normal spending review process. We note that the Charity Commission is expressly protected from becoming “subject to the direction or control of any Minister of the Crown or other government department” in the exercise of its functions.⁵⁰ A similar provision would be entirely appropriate for the Civil Service Commission. In our report on Ethics and Standards, we recommended that the budget for the Civil Service Commissioners should be made available in the same way as the budget of the National Audit Office—through Parliament, rather than through the Executive.⁵¹ Sir Robin Mountfield agrees:

Direct Parliamentary provision, as with the NAO, seems the appropriate way forward given that, as with the NAO, it is precisely the Government which is being audited.⁵²

Our concern is to ensure that, whatever model is used, and however that model might need to be modified, the Civil Service Commission should have complete financial and operational independence from the Government. We invite the Joint Committee to consider further how this independence might best be achieved.

Investigations into the application of the Civil Service Code (clause 32)

55. Although the Commission would have the power to conduct investigations into complaints made to it by civil servants, we have heard some concern that it should also have the power to investigate issues brought to its attention by other means. At present it requires the Government’s approval, on the advice of the Cabinet Secretary. Indeed, this is a concern we have expressed ourselves on a number of occasions, most recently when responding to the Government’s consultation in 2004–05.⁵³ Others who shared our view were former Cabinet Secretary Lord Wilson of Dinton, the Council of Civil Service Unions and the Civil Service Commissioners themselves:

No-one is suggesting that [Government Departments] should ‘abdicate ... central responsibilities’. The suggestion is that there should be some form of external audit or inquiry where things may have gone wrong. This is quite a different matter. Enforcement of the Code must primarily be the responsibility of Parliament, and should be supported by the Commission with a power to make independent inquiry.
(*Lord Wilson of Dinton*)

48 Q 46

49 Ev 12

50 Charities Act 2006, s 6 (1)

51 *Ethics and Standards: The Regulation of Conduct in Public Life*, para 111

52 Ev 12

53 *The Governance of Britain, Analysis of Consultations*, Cm 7342-III, para 272

It is precisely in circumstances where departments may have failed to undertake their responsibility effectively that the Commission may well have a role in taking the initiative to conduct its own investigation. (*Council of Civil Service Unions*)

We continue to have concerns that individuals may be constrained from pursuing appeals for fear of the impact on their careers ... we have limited confidence in a mechanism which relies on civil servants taking the initiative. (*Civil Service Commissioners*)⁵⁴

To the best of our knowledge, none of the responses to the Government's consultation revealed concerns about giving the Commission this independent investigatory power.

56. The current First Civil Service Commissioner told us that she is “on the fence” on this issue, her main concern being that:

unless that power had some proper limits to it, in terms of the inquiries that we could and should look at, the floodgates would simply open and that we would be asked, because of incidents reported in the media for example, by the public and by MPs to investigate all sorts of issues many of which would have nothing at all to do with the Code. I guess our nervousness is about the resourcing of that.⁵⁵

57. She was certainly not as opposed to the power as was suggested to us by the Cabinet Secretary.⁵⁶ She remained worried that civil servants might be dissuaded from raising concerns “of any significance” through concern that it would affect their “career chances”.⁵⁷ She also recognised that, despite her good working relationship with the current Cabinet Secretary:

Clearly regimes change, people change, and that is why we need to explore this matter at some length so we put something in place that is not so draconian to be unworkable but at the same time offers some proper protection.⁵⁸

58. We remain convinced that the Civil Service Commission should have the power to conduct independent investigations into the operation of the Civil Service Codes, other than in response to specific complaints from civil servants, and without the need for Government consent. The draft bill currently *requires* the Commission to consider a complaint properly made by a civil servant.⁵⁹ This would not be appropriate for other kinds of complaint, as it would indeed ‘open the floodgates’ and overwhelm the Commissioners by forcing them to “respond to every irresponsible demand for an investigation”.⁶⁰ It should, however, be possible to give the Commission *discretion* to investigate matters. As Sir Robin Mountfield has suggested, this would “confer an independence” on the Commission which it currently lacks.⁶¹ It would then be for the Commission to decide

54 As above

55 Q 6

56 Q 140

57 Q 9

58 Q 12

59 Clause 32 (8) (b)

60 Ev 12 [Sir Robin Mountfield]

61 Ev 12

whether to consult with the Government before beginning such an investigation. **We invite the Joint Committee to consider further how the Civil Service Commission might be enabled to conduct independent investigations at its discretion, both in terms of the draft legislation and of any additional resources that the Commission might require.**

Provisions not included in the draft bill

Promotion on merit

59. One of the main concerns raised with us by the First Civil Service Commissioner was that the draft bill failed to enshrine the principle of promotion on merit as well as appointment on merit:

This is one of the issues that civil servants talk to us about quite often. The Civil Service Management Code is quite clear: it says that departments and agencies must ensure that “all promotions and lateral transfers follow from a considered decision as to the fitness of individuals, on merit, to undertake the duties concerned”. An opportunity will be missed, we think, if the principle of promotion on merit and its regulation were not included in the Bill.⁶²

The risk to be avoided is that promotion comes to depend on contacts or political persuasion rather than on ability. Sir Robin Mountfield has claimed that “in practice influence over promotions is one of the main ways in which patronage is now exercised; there is effectively no constraint on it at present”.⁶³

60. In his evidence to us, the Cabinet Secretary’s answers in this area were not wholly satisfactory. He pointed to the need to have “managed moves” below the senior civil service, and suggested (rightly, we suspect) that the Civil Service Commissioners would not want to be directly involved in promotions below the top 200 posts which they currently cover.⁶⁴ However, to establish a statutory principle of promotion on merit would not prevent ‘managed moves’ on level transfer; nor would it require direct input from the Commissioners in individual promotions.

61. Sir Gus also pointed out that the civil service already operates a system of promotion on merit: “for the whole of the half million Civil Service that is what we do”.⁶⁵ This is precisely the kind of established custom that is worthy of protection in statute. The fact that the civil service also already operates a system of recruitment on merit has not prevented the Government from proposing to put it into legislation. **The principle of promotion on merit which already exists within the civil service deserves to be placed on a statutory footing as much as the principle of appointment on merit.** This need not prevent ministerial involvement in helping to define the relevant qualities for a post, nor in helping to identify the best candidate to fill it.

62 Q 1

63 Ev 13

64 Qq 126-30

65 Q 129

Ministerial obligations

62. The Government’s draft bill in 2004 would have required the Civil Service Code to include a provision requiring ministers “not to impede civil servants in their compliance with the code”. There is no equivalent requirement on ministers in the latest version of the draft bill.

63. Sir Robin Mountfield has described this as “illogical”, pointing out that “many of the pressures on political neutrality come not from civil servants wanting to act in a partisan way, but from Ministers wanting them to do so”. He has proposed that legislation should entrench two of the provisions in the Ministerial Code, namely the requirement that Ministers should respect the political neutrality of the civil service; and the requirement that they should “give fair consideration to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions”.⁶⁶

64. The Minister for the Cabinet Office disagreed:

There would be two implications of doing what Sir Robin recommended in his testimony to you. One would be to put into statute ministers’ obligations, and one might think that was a good thing, but the other implication of it would be to make justiciable the question of compliance with the Ministerial Code, in other words put into the courts potentially the question of whether ministers were or were not complying with the Code. I think ministers should be held to account by Parliament. Ultimately, as we know, it is for the Prime Minister to choose who is and who is not in government, but ministers are held to account by Parliament and in the court of public opinion. To open up the question of whether a minister complied with the Ministerial Code into judicial review does not seem to me to strike the right balance between the proper functions of the Executive, Parliament and the courts in this country. Personally, I do not think that would be the right way to go.⁶⁷

I think any prime minister who came along and said, “I am going to change the Ministerial Code and ministers no longer have to uphold the political impartiality of the Civil Service and ask the Civil Service to act in a way which conflicts with the Civil Service Code”, that prime minister would be held to account in the court of public opinion, as I say.⁶⁸

65. We suspect it would be possible, despite what the Minister of the Cabinet Office told us, to impose a legal obligation on Ministers without making any of the Ministerial Code justiciable. However, it is certainly arguable that civil servants could use a legal requirement to act impartially as a shield against any requests from ministers that they should act otherwise (so long as this requirement is adequately defined). **We agree with the Government that the question of whether a minister is failing to respect the political neutrality of the civil service is better addressed as a political issue than a legal issue. However, this is an issue the Joint Committee may wish to consider further.**

66 Ev 12

67 Q 109

68 Q 111

Machinery of Government changes

66. We are in a continuing conversation with the Government on the way in which significant changes are made to the structure of the civil service.⁶⁹ There is currently next to no parliamentary oversight of proposed changes to the machinery of government, which can be disruptive and costly, yet which Prime Ministers can and do make without any form of parliamentary check. Recent examples have included the creation of the Ministry of Justice, taking on responsibilities from the Home Office, and the reallocation of the responsibilities of the Department for Education and Skills between a new Department for Children, Schools and Families and a Department for Innovation, Universities and Skills. We note Sir John Bourn’s recent remarks:

The machinery of government is in constant turmoil—new departments and authorities being set up and older ones shut down or amalgamated. Such churning costs millions of pounds and is largely irrelevant to the programmes and projects that have to be implemented. It should be stopped.⁷⁰

67. In the second of the three Reports we have published recently on this subject, we recommended that the Government should bring forward “measures to allow Parliament effective scrutiny of changes to the organisation of government itself” as part of the draft Constitutional Renewal Bill.⁷¹ The Government’s argument for not doing so has been that Government Departments have no legal existence other than through their Secretary of State. Thus to constrain the Prime Minister’s ability to organise Departments would effectively constrain his ability to reorganise his Cabinet.⁷² We have since described this long-standing situation as “putting the cart before the horse”.⁷³ **We recommend again that the draft Constitutional Renewal Bill should include measures to change fundamentally the way that Government is structured, by giving statutory functions to Government Departments, rather than to interchangeable Secretaries of State.** We invite the Joint Committee to support our position.

69 We reported to the House on *Machinery of Government changes* in our Seventh Report of Session 2006–07, published on 15 June 2007 as HC 672. The Government Response was received on 15 November 2007, and published with our Third Special Report of Session 2007–08 as HC 90. We continued the conversation with *Machinery of Government changes: A follow-up Report*, our First Report of Session 2007–08, published on 17 December 2007 as HC 160. We published the Government’s response to this, received on 25 April 2008, with a further Report of our own, published on 14 May 2008 as HC 514.

70 ‘Whitehall urgently needs to reform culture’, *Financial Times*, 13 May 2008

71 *Machinery of Government Changes: A follow-up Report*, First Report from the Public Administration Committee, Session 2007–08, para 12

72 *Machinery of Government Changes: Further Report*, Eighth Report from the Public Administration Committee, Session 2007–08, Appendix, pp4–5

73 As above, Report, para 4

Civil service: conclusion

68. In this part of the Report, we have made a number of suggestions for improvements to the draft bill. It is fair to say, however, that, even as it stands, **were the draft bill to become law, it would be a welcome improvement on the current situation, which affords no statutory protection whatsoever to the core values of the civil service. The Government has produced two draft civil service bills in the last four years. We trust that our recommendations will receive due consideration; but it is now time to move from consultation to legislation. We welcome the announcement that a bill is expected to be in the Queen's Speech this autumn.**

3 More power to Parliament?

69. The draft Ministers of the Crown (Executive Powers) Bill that we published in 2004 would have transferred substantial power from the Executive to Parliament:

- by allowing the armed forces to take part in conflict only if participation had been approved by both Houses of Parliament, either in advance or, in urgent cases, retrospectively within seven days.
- by requiring more important treaties to be approved by both Houses of Parliament before ratification.
- by requiring rules for the issue and revocation of passports to be approved by both Houses of Parliament.

70. The Government’s proposals in the same areas are more modest, especially compared with the bold language used by the Prime Minister in July 2007, when announcing “a new British constitutional settlement that entrusts more power to Parliament and the British people”.⁷⁴

War-making powers

71. The Government has decided (“while not ruling out legislation in the future”) to provide for oversight of conflict decisions by the House of Commons through a detailed parliamentary resolution. Except in urgent or secret cases—as determined by the Prime Minister—and except in operations led by Special Forces, the approval of the House of Commons would be obtained for decisions to commit the armed forces to conflict overseas. The approval of the House would *not* be sought retrospectively for urgent or secret operations.

72. The terms of the draft resolution are such that essentially it is left to the Prime Minister alone to determine the information on which the House would take its decision, and to decide what information should be made available in those cases where no parliamentary decision was sought. He could, for example, decide not to provide any information if to do so would in his opinion “prejudice ... the United Kingdom’s international relations”. In effect, the Prime Minister is made the “guarantor of the probity” of this part of the constitution. Peter Hennessy suggested to us that “in the City that would be called ‘insider trading’”.⁷⁵

If you are a Prime Minister you think in your head you have a special insight into the world and the dangers the world and the country is facing - Eden in 1956, Blair in 2003 - but they are the last people in the world who are going to be in a fit state of mind to judge, I think, what is proper for Parliament to have and what not; it is asking too much for a human being who is in a state of hyper anxiety to do that, and

74 HC Deb 3 July 2007, c 815

75 Q 71

I think that is the single greatest weakness in what the Government has brought forward.⁷⁶

73. This is a delicate area. Military operations often rely on surprise and secrecy for their success. It would be foolish to establish a parliamentary safeguard which imperilled this. To be of any value, however, the safeguard does need to act as an effective political check on a Prime Minister considering committing forces without the support of Parliament. **A Prime Minister should not be able to choose whether or not to seek the support of Parliament based on political expediency; nor should he be able to present information to Parliament in a way which is partial or subjective, leading Members of the Commons perhaps to support a conflict which they might not support if more information was available to them.**

74. **We are concerned that the terms of the resolution as drafted leave too much discretion in the hands of the Prime Minister. We would be more reassured if there were independent endorsement of information provided by the Prime Minister on a conflict, and of any decision that a conflict was too urgent or too secret to allow a prior debate and vote in the Commons. One option might be for this endorsement to come from the cross-party Intelligence and Security Committee.** This Committee already has access to information, “disclosure of which”, as the Government admits, “would be gravely damaging to the national interest and could put individuals at risk”.⁷⁷

75. We also are not convinced by the Government’s arguments against the House holding a debate and vote on an urgent conflict once it was already under way. It is notable that all but one of the respondents to the Government’s own consultation “thought that the Government should seek retrospective approval from Parliament if it had deployed troops for reasons of urgency or secrecy”.⁷⁸ **The Government is concerned that “there could be some very serious and undesirable consequences of a failure to gain parliamentary approval for an operation which was underway”, namely “to call into question the credibility of the UK’s use of force, our international relations and crucially, the safety and morale of the UK Forces”. This is the price of democracy, and is a risk that Prime Ministers should have to weigh up before taking the extraordinary step of entering into a conflict without a prior mandate from the House of Commons.**

76. In fact, the House already has the power to refuse to vote the money necessary to pursue a conflict: this would have the same effect feared by the Government—to call into question the credibility of the UK’s use of force. **An explicit vote on retrospective approval of a conflict decision would have at least the advantage of enabling the Prime Minister to secure a clear democratic mandate for his decision.** He might otherwise find that he is held entirely personally responsible if the military engagement were to prove unpopular or were to fail in its objectives.

76 Q 51

77 Cm 7342-I, para 235

78 Cm 7342-I, para 208

77. Peter Hennessy made two further forceful points in his evidence to us:

- i. that the full legal advice of the Attorney General on conflict decisions should be made available to Parliament—“make sure that, unless there is very good reason not to, the full opinion on the legality of the war is given you, not some shrivelled inadequate summary”.⁷⁹
- ii. that Parliament’s role in conflict situations should be enshrined in statute, rather than in a resolution—“if the rule of law does not apply to war, what is the point of it applying to almost anything else because it is the most dramatic, and drastic in many cases, act a State can take”.⁸⁰

78. Michael Wills put the Government’s counter-argument to the first of these suggestions:

I think it is clear that any lawyer, the Attorney General or whoever, knowing that their full legal opinion following the logic of their argument all the way through, is going to be put in full in the public domain, not necessarily as we all know happens treated objectively and faithfully in the public domain, could well end up being inhibited. It could have what we call a chilling effect on the advice.⁸¹

What is clear, and what all parties seem to agree, is that there must be a “full, frank statement of the legal basis” for military action. The contradiction we see is in how a statement can be full and frank, but yet less full and frank than the Attorney’s verbatim legal advice (else why not publish it?). One person’s “full and frank” may be another person’s “shrivelled inadequate summary”. **We suggest that the Joint Committee on the draft bill may wish to explore further if and how it might be possible to ensure that a genuinely full and frank statement of the legal basis for a conflict decision can be published without revealing the Attorney General’s full legal advice to the Government. The publication of the advice could well be the most straightforward solution.**

79. We agree with the principle of Peter Hennessy’s second point, but can also see that action under a statute on war-making powers (unlike under a parliamentary resolution) would be open to challenge in the courts. We can see why the Government and the military would not wish to risk having the basis for any and every future conflict decision pored over by the justice system. **A parliamentary resolution may, for the moment at least, be the pragmatic way forward, as a first step towards establishing a legal principle for parliamentary involvement in conflict decisions.**

80. We have one final thought on this area that the Joint Committee may wish to take forward. **It would be instructive to test the Government’s proposed procedure and the alternatives by using some recent conflict decisions as case studies and imagining how the Prime Minister of the day might have involved Parliament if the Government’s draft resolution had been in existence at the time.**

79 Q 51

80 Q 51

81 Q 176

Treaties

81. Part 4 of the draft bill concerns the ratification of treaties. Essentially, the Government proposes to formalise the ‘Ponsonby Rule’, under which treaties are normally laid before Parliament for 21 sitting days before ratification.⁸² There is also provision in the draft bill, however, for ratification of a treaty to be delayed if the House of Commons resolves that it should not be ratified.

82. The Government does not propose that there should be a debate and vote on every treaty, or indeed on any treaty. It would be for Members to demand a vote, and for the Government, if willing, to find the opportunity for this vote to take place.

83. Once again, there are exceptions to the standard procedure:

- Certain classes of treaty would not be covered by the procedure, either because the Orders in Council which implement them are already subject to a vote (eg double taxation agreements) or because an Act of Parliament already provides that they may not be ratified without a further Act of Parliament (eg treaties to increase the powers of the European Parliament). These exemptions give us no cause for concern. However, two other kinds of exemption deserve closer consideration.
- Under clause 22 of the draft bill, “if the Secretary of State is of the opinion that, exceptionally, the treaty should be ratified without the conditions ... having been met”, the treaty could be ratified without being laid before Parliament, or before 21 sitting days had elapsed.
- If the House of Commons were to vote that a treaty should not be ratified, the Secretary of State could lay a statement indicating that he “is of the opinion that the treaty should nevertheless be ratified and explaining why”, following which the House would have a further 21 sitting days in which to vote once again if it wished to insist that the treaty should not be ratified (clause 21 (5)). The Secretary of State could then lay a further statement, and the procedure would be repeated once again, or many more times, until either the House or the Secretary of State gave way (clause 21 (6)).

84. The Government’s commitment to transferring power from the Executive to Parliament in this area has apparently waned since July 2007, when the Prime Minister spoke of “put[ting] on to a statutory footing Parliament’s right to ratify new international treaties”. As we have shown, the draft bill would instead give Parliament a right to object to the ratification of treaties, but only if the Government decides to provide the opportunity for Parliament to object; and would then allow the Government to overrule any objection Parliament might make. This part of the draft bill thus establishes a very weak form of parliamentary safeguard, which, if it proves uncomfortable, the Government can short-circuit anyway.

82 For more information on the Ponsonby rule, and further background on the parliamentary scrutiny of treaties, see the Second Report from the Procedure Committee, Session 1999–2000, HC 210.

85. In most other countries, Parliaments hold considerable powers over the making of treaties.⁸³ For example:

- In the United States, the President may only make a treaty with the concurrence of the Senate by a two-thirds majority.
- In France, an Act of Parliament is required before the President may approve or ratify peace treaties, commercial treaties, treaties or agreements relating to international organisations, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory.

86. There are no exceptions to these provisions in these countries. Parliamentary approval must always be gained before a treaty can be ratified. This leads us to question the value of clause 22 of the draft bill, and the Government's suggestions that there may be rare cases in which delaying the ratification of a treaty could be detrimental to the national interest.⁸⁴ Why should it be open to the Secretary of State to ratify a treaty without meeting a very slight obligation to Parliament, when this option is not available to his international counterparts, where the parliamentary requirements to be met are much stronger?

87. Treaties are not like wars, where the ability to take a decision instantaneously can make a real difference to success. Treaties generally take a long time to negotiate, and the ratification process in other countries can take years to complete. 21 days seems like very little time for parliamentary scrutiny and a possible vote, as it is;⁸⁵ there are very few circumstances indeed in which it might be necessary to do without this short period of parliamentary consideration. The Government has provided examples of occasions on which the Ponsonby rule has not been followed in the past: not all of these seem to have been genuinely urgent cases.⁸⁶ It certainly does not seem right to us that it should be for the Government alone to decide whether to circumvent its obligations to Parliament. **A safeguard that can be ignored at will is no safeguard at all. Other leading democracies do not allow their Governments to avoid their obligations to Parliament at their sole discretion. At the very least, the bill should either (a) define the circumstances in which a treaty might need to be ratified without giving Parliament 21 days in which to consider it, or (b) make it for Parliament (not the Secretary of State) to waive the 21-day requirement. We also invite the Joint Committee to consider whether 21 days offers adequate opportunity for proper parliamentary scrutiny of complex treaties.**

88. The procedure proposed following a vote against ratification of a treaty is also suspect. The proposal seems to be that a Secretary of State could repeatedly ask the House of Commons to revisit its decision. This is constitutionally dangerous territory. If there is a debate and vote on a treaty, we assume that the Minister will have made his best arguments for the treaty in the course of that debate. He should not be allowed to second-guess the Chamber. If the House of Commons rejects a bill, the Minister cannot come back with the same bill a few days later, saying 'here is why I think this should become law despite you'.

83 HC (1999–2000) 210, para 13

84 Cm 7342-I, paras 159–160

85 Q 75 [Professor Robert Blackburn]

86 The Governance of Britain - War powers and treaties: limiting Executive powers, Cm 7239, paras 148–155

The House also has a long-standing rule that the same question should not be put to it twice in the same parliamentary session.⁸⁷ We see no reason why that rule should be cast aside in this case.

89. If the House of Commons votes that a treaty should not be ratified, the Secretary of State should respect this view, and the House should not be asked to consider the same question again before the next parliamentary session. Clause 21 of the draft bill should be amended accordingly. It may be of some comfort to the Government to consider that debates and votes on treaties are likely in any case to be few and far between.

Passports

90. Passports are issued and revoked by Ministers using prerogative powers. We welcome the Government’s decision, reported in the White Paper, “that it should remove the prerogative in relation to passports” and that it “has decided in principle that it will introduce comprehensive legislation on the procedures for issuing passports”.

91. We regret, however, that provisions were not included in the draft bill, and encourage the Government to make progress in this area. It is now more than four years since we identified passports as a part of the royal prerogative in urgent need of transfer to the statute book. The Government has proposed “that draft legislation should be published for consultation before it is introduced to Parliament”. **We recommend that the Government should announce the timetable for a consultation on passport legislation before the summer recess.**

Wider review of the royal prerogative

92. The draft bill that we published in March 2004 would have required Government to lay before Parliament a statement of all prerogative powers. As we explained at the time:

there can be no effective accountability without full information. Because Parliament does not know what Ministers are empowered to do until they have done it, Parliament cannot properly hold government to account.⁸⁸

Albeit four years later, **we are delighted that the Government has now decided to conduct a scoping exercise of the prerogative powers, to consider the outcome of this work, and to launch a consultation on next steps.**⁸⁹ The exercise is not altogether straightforward, as the Minister of State in the Ministry of Justice told us, “because some legislation either expressly or impliedly repeals a prerogative and it is sometimes not altogether clear whether the prerogative still in fact exists technically”.⁹⁰ **We trust that the results of the scoping exercise of the executive prerogative powers will be completed and published as soon as possible. The exercise may well reveal areas of the prerogative which would benefit from further statutory provision.**

87 Erskine May Parliamentary Practice, 23rd Edition, p 388

88 *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, para 59

89 Cm 7342-I, para 246

90 Q 210

More power or status quo?

93. The proposals in the draft bill and white paper that we have examined would not, as the Prime Minister suggested last July, create “a new British constitutional settlement that entrusts more power to Parliament and the British people”. They certainly do not involve the Prime Minister and Executive “surrender[ing] or limit[ing] their powers” to any meaningful degree. **What is very welcome is the Government’s acknowledgment that it is inappropriate for the Executive to wield power which it has never been given by Parliament, but which it has retained from the time when monarchs wielded absolute power. The Government’s proposals would effectively seek Parliament’s permission to continue with something akin to the status quo.** As one of our witnesses has put it,

“there is not really a firm emphasis upon the principle that Parliament should own these particular powers or should be the authority for these executive powers being exercised” ... “the government still wishes to retain its authority under the ancient theory of the Crown, simply imposing qualified procedural requirements in the exercise of these powers”.⁹¹

We have identified loopholes in the proposals, which would allow the Executive to bypass at their discretion even prior parliamentary scrutiny of their decisions. These loopholes need to be removed or, at the very least, tightened so that it is not for the Government alone to decide when it can use them.

94. **Rather than the status quo, however, we would have preferred to see Parliament and the people entrusted with real power, as promised by the Prime Minister. A perhaps unintended effect of placing prerogative power on the statute book without giving Parliament a role in how it is exercised is that it will become subject to scrutiny and decision, not by Parliament or by the people, but by the courts.**

95. If the House of Commons should find the proposals inadequate, the House of Lords is likely to have even more cause for concern. The Government would see the Lords fulfilling an advisory capacity only both for conflict decisions and for treaties: “just a sort of talking shop”.⁹² This pre-empts a final decision on the role of the House of Lords, and may need to be revisited in due course. **It is difficult if not impossible to pursue a coherent agenda of constitutional renewal in a landscape where the form and role of one of the main features—the House of Lords—remains undecided.**

91 Q 49; Ev 9, para 4.3 [Professor Robert Blackburn]

92 Q 77 [Professor Robert Blackburn]

4 Conclusion

96. Constitutional reform is technical and rarely urgent. Yet it matters enormously, as the Prime Minister has recognised. **Overcoming disengagement from our political processes and institutions is one of the greatest challenges faced by politicians today. We hope that all sides of the House will engage constructively with this agenda: this is not a matter for partisan politics.**

97. The language of the green paper on the Governance of Britain was commendable, as is the goal of constitutional renewal. We welcome the fact that there is a Minister dedicated to this agenda. **We also welcome the decision to legislate in those important areas of power held by the executive without Parliament’s approval. The clauses on the civil service—although they could be improved—are a major step towards meeting a long-standing gap in the legislative framework. There are disappointingly limited measures proposed for the other prerogative powers in which we have taken an interest.** There are a number of parts of the draft bill that fall outside our remit. We have not considered these at all, and trust that other Committees will examine them closely, not least the specially appointed Joint Committee.

98. When the Prime Minister announced the Governance of Britain programme, he talked about entrusting more power not just to Parliament, but also to the people. There is only one measure in the draft bill that would give power to individual citizens. This is the power to demonstrate in the vicinity of Parliament. It is not a new power: indeed it was limited only in 2005. In this context, **we welcome the Prime Minister’s announcement that the Government will consult on “a major shift of power directly to citizens themselves” and will bring forward measures on community empowerment, “to give people greater power to influence local decisions”.**⁹³ Measures of this kind were notably lacking in the draft bill, and we look forward to seeing the detail of the proposals.

99. The Constitutional Renewal Bill, when it is finally presented to Parliament, should be a seminal piece of legislation, reshaping the relationship between Government, Parliament, the courts and the people. Our recommendations are designed to help ensure that this is the case.

93 HC Deb 14 May 2008, c 1389

Conclusions and recommendations

Introduction

1. This Report makes a number of constructive suggestions as to how the Government's draft bill could be improved. This is only natural: we have campaigned over the years for legislation covering these areas, and developed detailed views of our own on the form that a statute should take. Any criticisms that we make do not detract from our certainty that, when the Constitutional Renewal Bill is presented in Parliament, it will be a landmark piece of legislation. It will open up some of the main prerogative powers—the secret powers of the Executive since time immemorial—to parliamentary approval and scrutiny. (Paragraph 5)

Civil service provisions

2. There is much to welcome in the Government's proposals for the civil service. (Paragraph 8)
3. The purpose of putting the civil service on a statutory footing is to provide the service with some protection against the kind of government that might seek to undermine its core values. It is this kind of government that we have in mind when seeking to improve the draft bill. It is not enough to rely on the understandings that might exist now between civil servants, Ministers and the Civil Service Commissioners; it is important to envisage a situation in which those understandings may have broken down. This in our view is the whole purpose of civil service legislation, and the reason that it is required at all. (Paragraph 11)
4. We support the Government's intention to keep new civil service legislation focussed and limited to 'a few clauses'. As will become clear, however, our view is that a few clauses more are required to give adequate protection to the core values of the civil service. (Paragraph 15)
5. The Joint Committee may wish to explore further if the draft bill would have the effect of restricting access to the Civil Service Commissioners by staff of the intelligence agencies, and if so, whether this restriction is appropriate. The Committee may also wish to explore if there is a good reason for excluding the intelligence agencies from the statutory requirement that their staff should normally be recruited on merit. (Paragraph 19)
6. giving Ministers the general power to appoint and dismiss civil servants does not seem in keeping with the Government's commitment to a civil service recruited on merit and able to serve administrations of different political persuasions. This is a matter that the Joint Committee may wish to investigate further. (Paragraph 22)
7. Any code which failed to uphold the core values of the civil service as set out in the draft bill would be open to legal challenge. We would therefore insist on providing for parliamentary approval of the Civil Service Codes only if primary legislation failed to encapsulate these core values adequately. There is one area in which the draft bill is at best ambiguous in this respect. We are not convinced that the

definition of “impartiality” is sufficiently clear on the face of the draft bill. We recommend that the need for civil servants to be able to work effectively for governments of different political persuasions should be set out explicitly in primary legislation. (Paragraph 28)

8. Appointment on merit is central to ensuring an impartial and capable civil service. Any exceptions from this principle need to have an unimpeachable justification. (Paragraph 30)
9. Whoever is formally responsible for making civil service appointments, it strikes us as wrong that the Commissioners for Revenue and Customs (to take one example) should be appointed other than on merit. We invite the Joint Committee to explore this issue in more depth. (Paragraph 32)
10. We do not understand why it should ever be appropriate for the Government to make senior diplomatic appointments other than on merit following a fair and open competition. We call on the Government to make the public interest case for this form of patronage—if there is a case to be made—and we encourage the Joint Committee to consider whether this provision should remain in the draft bill. At the very least, it needs to be drawn more tightly to ensure that it could be used only very rarely. (Paragraph 35)
11. We can see merit in the provisions in the draft bill allowing the Civil Service Commissioners to exempt certain recruitments from the requirement for selection on merit on the basis of fair and open competition. We expect that they will be used sparingly. It is entirely appropriate that decisions of this kind should be taken by the Commissioners, rather than by the Government. (Paragraph 36)
12. It needs to be absolutely clear in primary legislation that no special advisers should be able to authorise expenditure, or to exercise either management functions or statutory powers. With this added protection, there would be no need for Parliament to control the number of Special Adviser appointments. (Paragraph 44)
13. We are not convinced that consultation is an adequate safeguard to the independence of the First Civil Service Commissioner, and recommend that any appointment should also require the agreement of the Leader of the Opposition. (Paragraph 48)
14. We suggest that the Joint Committee may wish to explore with the Government the circumstances under which it might be considered “appropriate” to make an appointment to the Civil Service Commission without the agreement of the First Civil Service Commissioner. Unless there is a strong justification for maintaining an exemption clause, we recommend that the draft bill should be clear that appointments of Civil Service Commissioners may only ever be made with the agreement of the First Civil Service Commissioner. (Paragraph 49)
15. Appointment to longer, non-renewable terms of office will strengthen the independence of the Commissioners, and we welcome this provision wholeheartedly. (Paragraph 50)

16. The Civil Service Commission's job is to regulate the Executive. It is therefore not appropriate for the Executive to have the power to control not only how much money is made available to the Commission, but also how that money should be spent. (Paragraph 54)
17. Our concern is to ensure that, whatever model is used, and however that model might need to be modified, the Civil Service Commission should have complete financial and operational independence from the Government. We invite the Joint Committee to consider further how this independence might best be achieved. (Paragraph 54)
18. We remain convinced that the Civil Service Commission should have the power to conduct independent investigations into the operation of the Civil Service Codes, other than in response to specific complaints from civil servants, and without the need for Government consent. (Paragraph 58)
19. We invite the Joint Committee to consider further how the Civil Service Commission might be enabled to conduct independent investigations at its discretion, both in terms of the draft legislation and of any additional resources that the Commission might require. (Paragraph 58)
20. The principle of promotion on merit which already exists within the civil service deserves to be placed on a statutory footing as much as the principle of appointment on merit. (Paragraph 61)
21. We agree with the Government that the question of whether a minister is failing to respect the political neutrality of the civil service is better addressed as a political issue than a legal issue. However, this is an issue the Joint Committee may wish to consider further. (Paragraph 65)
22. We recommend again that the draft Constitutional Renewal Bill should include measures to change fundamentally the way that Government is structured, by giving statutory functions to Government Departments, rather than to interchangeable Secretaries of State. (Paragraph 67)
23. were the draft bill to become law, it would be a welcome improvement on the current situation, which affords no statutory protection whatsoever to the core values of the civil service. The Government has produced two draft civil service bills in the last four years. We trust that our recommendations will receive due consideration; but it is now time to move from consultation to legislation. We welcome the announcement that a bill is expected to be in the Queen's Speech this autumn. (Paragraph 68)

War-making powers

24. A Prime Minister should not be able to choose whether or not to seek the support of Parliament based on political expediency; nor should he be able to present information to Parliament in a way which is partial or subjective, leading Members of the Commons perhaps to support a conflict which they might not support if more information was available to them. (Paragraph 73)

25. We are concerned that the terms of the resolution as drafted leave too much discretion in the hands of the Prime Minister. We would be more reassured if there were independent endorsement of information provided by the Prime Minister on a conflict, and of any decision that a conflict was too urgent or too secret to allow a prior debate and vote in the Commons. One option might be for this endorsement to come from the cross-party Intelligence and Security Committee. (Paragraph 74)
26. The Government is concerned that “there could be some very serious and undesirable consequences of a failure to gain parliamentary approval for an operation which was underway”, namely “to call into question the credibility of the UK’s use of force, our international relations and crucially, the safety and morale of the UK Forces”. This is the price of democracy, and is a risk that Prime Ministers should have to weigh up before taking the extraordinary step of entering into a conflict without a prior mandate from the House of Commons. (Paragraph 75)
27. An explicit vote on retrospective approval of a conflict decision would have at least the advantage of enabling the Prime Minister to secure a clear democratic mandate for his decision. (Paragraph 76)
28. We suggest that the Joint Committee on the draft bill may wish to explore further if and how it might be possible to ensure that a genuinely full and frank statement of the legal basis for a conflict decision can be published without revealing the Attorney General’s full legal advice to the Government. (Paragraph 78)
29. A parliamentary resolution may, for the moment at least, be the pragmatic way forward, as a first step towards establishing a legal principle for parliamentary involvement in conflict decisions. (Paragraph 79)
30. It would be instructive to test the Government’s proposed procedure and the alternatives by using some recent conflict decisions as case studies and imagining how the Prime Minister of the day might have involved Parliament if the Government’s draft resolution had been in existence at the time. (Paragraph 80)

Treaties

31. A safeguard that can be ignored at will is no safeguard at all. Other leading democracies do not allow their Governments to avoid their obligations to Parliament at their sole discretion. At the very least, the bill should either (a) define the circumstances in which a treaty might need to be ratified without giving Parliament 21 days in which to consider it, or (b) make it for Parliament (not the Secretary of State) to waive the 21-day requirement. We also invite the Joint Committee to consider whether 21 days offers adequate opportunity for proper parliamentary scrutiny of complex treaties. (Paragraph 87)
32. If the House of Commons votes that a treaty should not be ratified, the Secretary of State should respect this view, and the House should not be asked to consider the same question again before the next parliamentary session. Clause 21 of the draft bill should be amended accordingly. (Paragraph 89)

Passports

33. We recommend that the Government should announce the timetable for a consultation on passport legislation before the summer recess. (Paragraph 91)

Wider review of the royal prerogative

34. we are delighted that the Government has now decided to conduct a scoping exercise of the prerogative powers, to consider the outcome of this work, and to launch a consultation on next steps. (Paragraph 92)
35. We trust that the results of the scoping exercise of the executive prerogative powers will be completed and published as soon as possible. The exercise may well reveal areas of the prerogative which would benefit from further statutory provision. (Paragraph 92)

More power or status quo?

36. What is very welcome is the Government's acknowledgment that it is inappropriate for the Executive to wield power which it has never been given by Parliament, but which it has retained from the time when monarchs wielded absolute power. The Government's proposals would effectively seek Parliament's permission to continue with something akin to the status quo. (Paragraph 93)
37. We have identified loopholes in the proposals, which would allow the Executive to bypass at their discretion even prior parliamentary scrutiny of their decisions. These loopholes need to be removed or, at the very least, tightened so that it is not for the Government alone to decide when it can use them. (Paragraph 93)
38. Rather than the status quo, however, we would have preferred to see Parliament and the people entrusted with real power, as promised by the Prime Minister. A perhaps unintended effect of placing prerogative power on the statute book without giving Parliament a role in how it is exercised is that it will become subject to scrutiny and decision, not by Parliament or by the people, but by the courts. (Paragraph 94)
39. It is difficult if not impossible to pursue a coherent agenda of constitutional renewal in a landscape where the form and role of one of the main features—the House of Lords—remains undecided. (Paragraph 95)

Conclusion

40. Overcoming disengagement from our political processes and institutions is one of the greatest challenges faced by politicians today. We hope that all sides of the House will engage constructively with this agenda: this is not a matter for partisan politics. (Paragraph 96)
41. We also welcome the decision to legislate in those important areas of power held by the executive without Parliament's approval. The clauses on the civil service—although they could be improved—are a major step towards meeting a long-standing gap in the legislative framework. There are disappointingly limited measures

proposed for the other prerogative powers in which we have taken an interest. (Paragraph 97)

42. we welcome the Prime Minister's announcement that the Government will consult on "a major shift of power directly to citizens themselves" and will bring forward measures on community empowerment, "to give people greater power to influence local decisions". Measures of this kind were notably lacking in the draft bill, and we look forward to seeing the detail of the proposals. (Paragraph 98)
43. The Constitutional Renewal Bill, when it is finally presented to Parliament, should be a seminal piece of legislation, reshaping the relationship between Government, Parliament, the courts and the people. Our recommendations are designed to help ensure that this is the case. (Paragraph 99)

Annex: Table comparing civil service provisions in draft bills since 2004

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
25	Application of Part	Bill extends to “the civil service of the State” with listed exclusions.	Parts of the civil service listed in a schedule, with a power for minister to extend or limit by order.	Bill extends to “the civil service of the State” with listed exclusions, with a power for minister to extend or limit by order.
25 (2)		Government Communications Headquarters (GCHQ) excluded from scope of Bill.	GCHQ explicitly included in Bill.	GCHQ implicitly included in Bill.
27	Management of the civil service	Ministers’ powers to manage the civil service not defined, but include among other things “appointment and dismissal” of civil servants.	Management powers listed: “nothing in this section confers power to recruit, appoint, discipline or dismiss civil servants”.	Management powers listed and can be carried out by order, subject to negative resolution procedure.
27 (4)		National security vetting to continue to be exercised under prerogative powers.	No mention of national security vetting.	No mention of national security vetting.
30	Civil Service Code	Minister may publish separate codes of conduct for civil servants who serve the Scottish Executive or Welsh Assembly Government	Single code for all civil servants in England, Scotland and Wales.	Single code for all civil servants in England, Scotland and Wales.
30		No parliamentary resolution on Civil Service Code	No parliamentary resolution on Civil Service Code	Code subject to negative resolution procedure
31	Diplomatic service code	No parliamentary resolution on diplomatic service code	No parliamentary resolution on diplomatic service code	No provisions on diplomatic service code.

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
32	Minimum requirements for civil service and diplomatic service codes	Codes must require civil servants to carry out their duties: (a) with integrity and honesty; and (b) with objectivity and impartiality.	Codes must also require civil servants to carry out their duties efficiently, reasonably, without maladministration and according to law.	Codes must also require civil servants to carry out their duties efficiently, reasonably, without maladministration and according to law. Duty to deal with the affairs of the public sympathetically, efficiently and promptly.
32 (6)		Civil servants must be allowed to complain to the Civil Service Commission if they believe they are being required to breach the Civil Service or Diplomatic Service Code, or if they believe another civil servant has breached either Code.	Commission must also hear qualifying complaints about breaches of Special Advisers Code.	Civil servants must be allowed to complain to the Civil Service Commission if they believe they are being required to breach the Civil Service Code, or if they believe another civil servant has breached the Civil Service Code.
32 (7)		Code may include provision about steps that civil servants must take before making a complaint to the Commission.	Draft sets out steps that civil servants must take before making a complaint to the provision (i.e use of department's internal complaints procedures, except where complainant could not reasonably be expected to do so.)	Commission may determine own procedure, but Code must provide for a mechanism for civil servants to complain directly to Commission where they reasonably believe they will be penalised for complaining to their own department.
-	Powers of Civil Service Commission	No provision.	Commission has power to request any person to provide information or assistance in investigating a complaint.	Commission has power to request any person to provide information or assistance in investigating a complaint.
-	Requirement on ministers	No provision.	Code must require ministers not to impede civil servants in their compliance with the code.	

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
33	Special advisers code	No parliamentary resolution on special advisers code	No parliamentary resolution on special advisers code	Code subject to negative resolution procedure
34	Selections for appointment to the civil service	Exemptions from selection on merit by open and fair competition include appointments to the diplomatic service as head of mission or Governor of an overseas territory.	Exemptions from selection on merit by open and fair competition include appointment as a High Commissioner.	No exemptions for any members of the diplomatic service.
35	Recruitment principles	Commission must publish "recruitment principles", following consultation with Minister for the Civil Service.	Commission may publish "recruitment code". No consultation requirement.	Commission may publish such codes as it sees fit. No consultation requirement.
36	Approvals for selections and exceptions	Commission may require certain appointments to be subject to the approval of the Commission. It may also participate in such appointments.	Commission may require certain appointments to be subject to the approval of the Commission. It may also participate in such appointments.	Commission shall take such steps as it sees fit to maintain principle of selection on merit, but in particular all appointments of over 12 months to the Senior Civil Service must be approved by the Commission.
38	Definition of "special adviser"	Special advisers appointed to "assist" a minister. No listed restrictions on what this might involve.	Special advisers restricted from: Authorising the expenditure of public funds Exercising any statutory power Exercising any management functions over civil servants Prime Minister allowed to exempt up to two special advisers from these restrictions.	Special advisers restricted from: Authorising the expenditure of public funds Exercising any statutory power Exercising any management functions over civil servants Prime Minister allowed to exempt up to two special advisers from these restrictions.

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
39	Annual reports about special advisers	Annual report must contain "information about the number and cost" of special advisers.	Annual report must name each special adviser; must give total number of special advisers, and by comparison present same figures for previous 5 years; and must present total costs of special adviser salaries, broken down to departmental level.	No requirement for annual report on special advisers.
-	Number of special advisers	No provision.	No provision.	Number of special advisers must not exceed a limit set by affirmative resolution of both Houses of Parliament. Limit of 12 special advisers working for Scottish Executive and 6 for Welsh Assembly Government.
40	Arrangements for Civil Service Commission to carry out additional functions.	Civil Service Commission may carry out additional functions with approval of Minister for the Civil Service.	No provision.	Commission may undertake such inquiries as it thinks fit into the recruitment of the civil service and the operation of codes of conduct.
43	Power to make consequential provision	Ministers may make consequential provision by order. Affirmative resolution of both Houses required if that provision amends or repeals an existing Act; otherwise negative resolution procedure followed.	Ministers may make consequential provision by order. Negative resolution procedure followed.	Ministers may make consequential provision by order. Affirmative resolution of both Houses required.

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
44	Extent, commencement, transitional provision and short title.	Ministers may commence parts of Act, or make transitional, transitory or saving provision, by order. No parliamentary procedure.	Ministers may commence parts of Act, or make transitional, transitory or saving provision, by order. Negative resolution procedure followed.	Commencement on named date. Ministers may make transitional, transitory or saving provision, by order. Affirmative resolution of both Houses required.
Schedule 4 Paragraph 2 (2)	Appointment of First Civil Service Commissioner	Appointed by Her Majesty on recommendation of Minister for the Civil Service.	Appointed by Her Majesty on recommendation of Minister for the Civil Service.	Appointed by Her Majesty on an address presented by the House of Commons.
Schedule 4 Paragraph 2 (3)		Before making a recommendation on appointment, Minister must consult First Ministers of Scotland and Wales and leaders of two largest Opposition parties.	As in 2008 draft bill.	Motion to appoint should be made by the Prime Minister acting with the agreement of the Leader of the Opposition.
Schedule 4 Paragraph 2 (4) and (6), and Paragraph 3 (4) and (7)		Commissioners hold office for five years, and cannot be appointed more than once.	Commissioners hold office for three years, with no limit on number of terms.	No fixed terms or limits on number of terms.
Schedule 4 Paragraph 2 (5) and 3 (5)		Terms on which Commissioners hold office determined by Minister for the Civil Service.	As in 2008 draft bill.	Terms on which Commissioners hold office determined by Minister for the Civil Service, subject to negative resolution procedure.
Schedule 4 Paragraph 3 (2)	Appointment of Civil Service Commissioners	Appointed by Her Majesty on recommendation of Minister for the Civil Service, with agreement of First Commissioner unless the Minister is satisfied that it is appropriate not to secure this.	Appointed by Her Majesty on recommendation of Minister for the Civil Service.	Appointed by Her Majesty on an address presented by the House of Commons. Motion to appoint should be made by the Prime Minister acting with the agreement of the Leader of the Opposition.

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
Schedule 4 Paragraph 6	Compensation for loss of office of First Commissioner	Minister may direct the Commission to pay compensation if a person ceases to hold office as First Commissioner.	Minister may direct the Commission to pay compensation if a person ceases to hold office as any Commissioner, not limited to First Commissioner.	Minister may direct the Commission to pay compensation if a person ceases to hold office as any Commissioner, not limited to First Commissioner.
Schedule 4 Paragraph 9	Committees	Commission may establish Committees and sub-committees, which may include persons who are not members of the Commission.	Commission may establish Committees and sub-committees, members of which must be Commissioners.	No explicit provision.
Schedule 4 Paragraph 11	Staff	No mention of a Chief Executive.	Commission must appoint a Chief Executive, with approval of Minister for the Civil Service.	Commission must appoint a Chief Executive, with approval of Minister for the Civil Service.
Schedule 4 Paragraph 13	Pensions	Employees of Commission covered by Superannuation Act 1972 – including First Commissioner	Employees of Commission covered by Superannuation Act 1972 – including any Commissioner	Commission shall provide for its staff and members to receive such pensions as it may determine.
Schedule 4 Paragraph 16	Financial provisions	Minister must pay the Commission sums determined by Minister as appropriate for exercise of its functions. Minister may impose conditions about how some or all of the money is to be used, subject to consultation with the Commission.	Minister must pay the Commission sums determined by Minister as appropriate for exercise of its functions. Minister may require the Commission not to incur costs or expenditure over a certain amount without his consent.	The expenses of the Commission shall be defrayed out of moneys provided by Parliament. Estimates shall be examined by the Public Accounts Commission.
-	Repeals and revocations	No provision.	Civil Service Order in Council 1995, Diplomatic Service Order in Council 1991 and various other provisions repealed or revoked.	No provision.

Clause no. (2008)	Title of Clause (2008)	Provision in draft Constitutional Renewal Bill (2008)	Provision in Government draft Civil Service Bill (2004)	Provision in PASC draft Civil Service Bill (2004)
-	Nationality requirements	No provision.	No provision.	Clauses removing existing nationality requirements for servants of the Crown, and empowering ministers to make new requirements.

Formal Minutes

Wednesday 21 May 2008

Members present:

Dr Tony Wright, in the Chair

Paul Flynn

Kelvin Hopkins

Mr Ian Liddell-Grainger

Julie Morgan

Paul Rowen

Mr Gordon Prentice

Draft Report (*Constitutional Renewal: Draft Bill and White Paper*), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 99 be read and agreed to.

Annex and Summary agreed to.

Resolved, That the Report be the Tenth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Thursday 12 June at 9.45 a.m.]

Witnesses

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Janet Paraskeva , First Civil Service Commissioner	Ev 1
Professor Robert Blackburn, Professor Peter Hennessy, and Sir Robin Mountfield	Ev 13
Tuesday 29 April 2008	
Sir Gus O'Donnell KCB , Cabinet Secretary and Head of the Home Civil Service and Rt Hon Ed Miliband MP , Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster	Ev 25
Mr Michael Wills MP , Minister of State, Ministry of Justice	Ev 37

List of written evidence

1. Professor Robert Blackburn	Ev 8
2. Sir Robin Mountfield	Ev 11

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is in brackets after the HC printing number.

Session 2007–08

First Report	Machinery of Government Changes: A follow-up Report	HC 160 (<i>HC 514</i>)
Second Report	Propriety and Peerages	HC 153 (<i>Cm 7374</i>)
Third Report	Parliament and public appointments: Pre-appointment hearings by select committees	HC 152 (<i>HC 515</i>)
Fourth Report	Work of the Committee in 2007	HC 236 (<i>HC 458</i>)
Fifth Report	When Citizens Complain	HC 409
Sixth Report	User Involvement in Public Services	HC 410
Seventh Report	Investigating the Conduct of Ministers	HC 381
Eighth Report	Machinery of Government Changes: Further Report	HC 514
Ninth Report	Parliamentary Commissions of Inquiry	HC 473

Session 2006–07

First Report	The Work of the Committee in 2005–06	HC 258
Second Report	Governing the Future	HC 123 (<i>Cm 7154</i>)
Third Report	Politics and Administration: Ministers and Civil Servants	HC 122
Fourth Report	Ethics and Standards: The Regulation of Conduct in Public Life	HC 121 (<i>HC 88</i>)
Fifth Report	Pensions Bill: Government Undertakings relating to the Financial Assistance Scheme	HC 523 (<i>HC 922</i>)
Sixth Report	The Business Appointment Rules	HC 651 (<i>HC 1087</i>)
Seventh Report	Machinery of Government Changes	HC 672 (<i>HC 90</i>)
Eighth Report	The Pensions Bill and the FAS: An Update, Including the Government Response to the Fifth Report of Session 2006–07	HC 922 (<i>HC 1048</i>)
Ninth Report	Skills for Government	HC 93 (<i>HC 89</i>)
First Special Report	The Governance of Britain	HC 901

Session 2005–06

First Report	A Debt of Honour	HC 735 (<i>Cm 1020</i>)
Second Report	Tax Credits: putting things right	HC 577 (<i>HC 1076</i>)
Third Report	Legislative and Regulatory Reform Bill	HC 1033 (<i>HC 1205</i>)
Fourth Report	Propriety and Honours: Interim Findings	HC 1119 (<i>Cm 7374</i>)
Fifth Report	Whitehall Confidential? The Publication of Political Memoirs	HC 689 (<i>HC 91, Session 2007–08</i>)
Sixth Report	The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications	HC 1081 (<i>Cm 1961</i>)

Seventh Report	The Ministerial Code: the case for Independent Investigation	HC 1457 (<i>HC 1088, Session 2006–07</i>)
First Special Report	The Attendance of the Prime Minister's Strategy Adviser before the Public Administration Select Committee	HC 690

Oral and Written evidence

Taken before the Public Administration Committee

on Thursday 24 April 2008

Members present

Dr Tony Wright, in the Chair

Kelvin Hopkins
Julie Morgan
Mr Gordon Prentice

Mr Charles Walker
Jenny Willott

Witness: Ms Janet Paraskeva, First Civil Service Commissioner, gave evidence.

Q1 Chairman: Let me extend a warm welcome to Janet Paraskeva who is the First Civil Service Commissioner. It is very nice to see you again. We have come to talk to you about the draft Constitutional Renewal Bill and in particular the element of it concerned with the Civil Service. As you know, this Committee has been banging on for longer than it can remember about the need for legislation on the Civil Service and we now have it, or at least the prospect of it, in a serious form. It is our job, along with other Committees in this House and in the Lords, to look at aspects of this Bill and we are particularly interested in the Civil Service side of it. We turn to you because we would like to know from you, as the First Civil Service Commissioner, what you, in general, think about the Bill as it has been presented to us in draft.

Ms Paraskeva: Thank you for the opportunity to come and give our views. We have spent a considerable amount of time looking at the Bill. In general we want to say we welcome the draft Bill's provisions as they affect the Civil Service. We were very pleased when we heard the Prime Minister launch the Green Paper last July saying that he was going to put the core values of the Civil Service into statute, a recommendation after all made more than 150 years ago. Some people say there is always a rush to legislation but this one certainly was not a rush. One of the other recommendations of Northcote and Trevelyan was that there should be Civil Service Commissioners and we too have been in existence for that length of time though changed in shape, form and status over those years.¹ What we see as the value of this is a real opportunity to put the core values of the Civil Service into statute (honesty, impartiality, integrity, objectivity) and to give an assurance to Parliament, to the public and to the Civil Service that these values matter and they not only matter but they will be protected. It is the adherence to these values which makes the Civil Service the envy of civil servants around the world. We know from visitors to the Commissioner's offices that we are asked time and time again how we manage in this country to have a Civil Service that lives up to these values, and I think that we do. We were also increasingly concerned

about the fragile nature of an Order of Council which, after all, could mean that anything could be amended by the government of the day very easily without parliamentary scrutiny. So the statute will be protection against that. Northcote and Trevelyan recommended a short Bill, and we support that, although there may indeed be parts of the Bill that need some further detailed thinking. It does set out the key principles and values but it does not focus on the detail. We do need to work on some of that detail, although it may change over time. It enshrines the core values of the Civil Service on selection on merit and that, we think, is essential. It requires the Minister to publish the Civil Service Code and that, we think, is essential. It sets up a Commission to regulate recruitment to the Civil Service and to hear appeals under the Civil Service Code and creates that Commission as an executive NDPB.² The legislation also formalises the current arrangements for special advisers. In broad terms we think the balance is about right between principle and detail, and the need for flexibility in the Code does remain. One of the first things I had to do when I took up the post almost two and a half years ago was to get involved in the rewriting of the 1996 Code. Had that been in legislation we would never have found the time to make the amendments that we needed. The changes we brought about to the Code have actually made significant inroads into people's understanding of the protection there is for them should they be asked to behave improperly. There are, however, a few gaps in the Bill we would like to draw to your attention. The first one is there is nothing there about regulating promotion on merit. This is one of the issues that civil servants talk to us about quite often. The Civil Service Management Code is quite clear: it says that departments and agencies must ensure that "all promotions and lateral transfers follow from a considered decision as to the fitness of individuals, on merit, to undertake the duties concerned".³ An opportunity will be missed, we think, if the principle of promotion on merit and its regulation were not included in the Bill. The second concern we have is about the removal of GCHQ⁴ from the coverage of the Bill. That would mean that selection on merit and

¹ Stafford Northcote and CE Trevelyan, *The Organisation of the Permanent Civil Service*, Parliamentary Papers, Volume XXVII, 1854

² Non-Departmental Public Body

³ Civil Service Management Code, Section 6.4

⁴ Government Communications Headquarters

the core values would not apply to the civil servants in that department and presumably, therefore, civil servants working at GCHQ would no longer be able to raise concerns with the Commission. That, we think, is a worry. We are already involved in the recruitment of security and counter terrorism posts at the Home Office, the chair of the Joint Intelligence Committee and GCHQ appointments; indeed I was also involved in the director general appointment at MI5 by invitation. I think it does raise a question, if one takes GCHQ out of the case of the Bill along with MI5 and SIS,⁵ about the civil servants in those organisations and whether we are treating them almost as if they were in an NDPB rather than as full civil servants. We are asking questions about why all of these organisations are excluded from some kind of regulation. The third point is that the senior levels of the diplomatic service are also excluded and we would like to ask why. We accept that special advisers should be excluded from the requirement given the nature of their personal relationship with the minister involved and that their appointment is only temporary and lasts only as long as the minister concerned. A fourth point is the absence of any reference to the Ministerial Code and the minister's duty to uphold the political impartiality of the Civil Service. We have had one or two queries raised with us by members of the public, and indeed by an MP, about ministers asking civil servants to behave in a way which certainly would show political partiality. Those are the four concerns we have in relation to gaps. We also have some concerns about the wording of the draft schedule which sets up the Commission as an independent body because demonstrating our independence as a Commission is going to be key and we want to make sure that we have the relationship right between government and the Commission. We need to clarify and resolve this with the Government during the consultation and I believe we will be able to do that.

Q2 Chairman: What are you particularly worried about?

Ms Paraskeva: The balance of independence. Are we truly able to challenge, to take decisions, to be in control of our own budget, the staff we believe we need to appoint to the jobs that we know need to be done or indeed would there be undue interference from the Cabinet Office? If we have a senior staffing matter then we believe it is for the Commission to decide the level and appropriateness of the staff we need to appoint and not for that decision to be taken elsewhere. I know you have some concerns too and no doubt you will be asking me about those. We are aware of the concern about whether or not commissioners should have the right to initiate and carry out investigations under the Code if we have not had first an appeal from the civil servant. We believe civil servants are more aware of the Code these days and I suppose, in a sense, we have been saying that we should look at this positively and make sure that people are aware of things rather than trying to deal with any problems that arise after. We are also a little

nervous about the resource implications of opening the flood gates to inquiries of all sorts and having to sort those that deal with the Code matters and those that do not. This is a matter we would not enter into lightly and maybe it is an issue we could explore further with you. At the present moment what I do if I am made aware of something that is of concern, and that query has not come from a civil servant, is I write to the head of the Home Civil Service and ask him to invite me to investigate. That arrangement, at the moment, is working very well but of course that depends on the relationship of the two people in office. We remain concerned that any formal power to initiate inquiries under the Code would mean that we could be swamped by disgruntled customers and the resourcing implications could be really quite significant. The second area I think you may want to explore is the whole issue of exceptions and why we allow what appears to be so many exceptions to our recruitment principles. What we see is there are sometimes short-term business needs, short-term projects of several months for example, sometimes secondments of up to two years, and we do also have to have measures in place to help the long-term unemployed or those with disabilities. We have a responsibility as an employer to make sure that we do not put in place procedures that are so rigid that we cannot allow, from time to time, appropriate alternatives. It is something we monitor quite carefully through our auditing of departments through our compliance monitoring regime, and one of the things that departments have to report to us is how they have used exceptions in the more junior posts. The third area is this whole business of laying the Civil Service Code before Parliament. As I understand it, the Bill provides for it but not for Parliament to debate the Code, and clearly that is a matter for the Minister. As I said earlier, I can see why the Code itself should not be on the face of the Bill simply in terms of flexibility, but of course the other side of that is vulnerability. Finally, one last point on something which is often raised with us is the approach of the involvement of ministers to appointments to senior Civil Service jobs. We have, in the last two years, evolved a way of involving ministers which does appear to be satisfying those in post, and that is to invite them, right at the very start, to agree the job and the person specifications for the senior posts and the marketing plan, to comment then on the skills, experience and expertise both of the long list and the short list, then to brief me or my fellow commissioners who chair the competitions or, if they so wish—and this has happened occasionally—to brief the selection panel on the kind of person they are looking for and the kind of skills they believe the post requires. We also allow ministers to brief the individual candidates. A member of our staff actually takes a note of that meeting, partly to protect the minister, the Civil Service and the candidate from any suggestion that favouritism might be present or that a choice that is exercised might raise questions about political impartiality. As I said to start with, the ministers who are involved in this way seem to be more than content with this approach. In conclusion we welcome the publication of the Bill. We agree with

⁵ Secret Intelligence Service

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the broad thrust of the provisions and we think there are some ways in which it could still be improved and we hope that the period of consultation will allow that work to continue.

Q3 Chairman: I am grateful for that. I doubt we can do justice to all of these issues this morning and we may have to have you back before we are done with this. I am sure you will give us some written evidence which takes those further. Do you think this Bill has more symbolic significance than actual significance?

Ms Paraskeva: Symbolism should not be dismissed as it is quite important. But I think the Bill has more than just symbolic importance. The fact that, for example, the Commission would not be able to be wiped out at the stroke of a pen through an Order of Council is very important. If we had a regime which decided that, let us say, the Civil Service should become a political body, then not to have the core values of the Civil Service in relation to impartiality and objectivity on the face of the Bill would just allow that to take place. It is much more than symbolic and is actually very important in relation to the constitution of this country.

Q4 Chairman: You raised it partly in what you said but there is an expectation that the Civil Service Commission are, in some sense, the regulator of the Civil Service: the people who ensure that the Civil Service behave in ways that we expect them to behave and other people behave in ways in relation to how we expect them to behave. The expectation would be, therefore, that this Bill might firmly put the Civil Service Commission into that role and that would involve it being more activist and operating on a wider front. I am not entirely clear whether you are signing up to that or not. The Bill does not but I was not sure from what you said whether you were signed up to that.

Ms Paraskeva: We certainly describe ourselves these days as a regulator but a regulator of entry on merit with fair and open competition and also a regulator in relation to appeals against the Code. It would take us into a completely different league were we to become a regulator of behaviour. The resource needs of the organisation would change rather radically. I do not think we are arguing for that but that does not mean to say we would not be prepared to discuss it.

Q5 Chairman: We have these periodic rows about politicisation; an ugly word but it matters what is behind it. When those rows blow up, usually around an incident of some kind and we have had a number of these, people expect the Civil Service Commission to be the body that finds out whether this is happening or not and does something about it. That certainly would take you into, as you mentioned, looking at promotion, internal appointment on merit, because the scope for politicisation operates at that point rather than the external point. If you are not actively engaged in that and you are not actively able to investigate these incidents when they arise and provide some sort of assurance, are we not missing a trick here?

Ms Paraskeva: I would think, and I am sure my fellow commissioners believe, we actually do deal with issues in relation to politicisation, it is who raises them with us that is the question. Certainly we have had raised with us queries about whether actions that have been required or asked of the Civil Service are, in fact, political actions. Interestingly, they have quite often been by ministers hence my comment about some reference in the Bill through the crossover with the Ministerial Code. If it is, in fact, politicians who are asking civil servants to behave improperly then that is something that also needs protection within the legislation. We would also expect people to be properly managed within their own departments and expect to be able to report any incidents that we pick up back to the department for the department to deal with. As you know, very few appeals come to us although appeals against the Code are on the increase. One of the things we are beginning to do now is to audit the procedures that departments have themselves for the monitoring of appeals and the way they handle appeals within those departments because we want to find out if civil servants are able to go to their managers and to their nominated officer and share concerns that they have. Which concerns are they? At which level are these problems happening and how widespread is this? Are we just frightened of something that does not exist or is there something that does need to be handled? I think it needs to be handled through the proper management of departments rather than by an outside body.

Q6 Jenny Willott: I would like to ask a couple of questions about one of the issues you mentioned which is around the power to initiate inquiries without having a complaint. In the analysis of the 2004 consultation nobody appeared to agree with the Government's position that the Commissioners did not need that power, including the Civil Service Commissioners I believe. You said you are not opposed to what is being proposed now. What brought around the change of view or is it not really a change of view?

Ms Paraskeva: I am rarely somebody who has ever been described as sitting on the fence but for once in my life I do almost feel as though I am on the fence on this one. Clearly somebody needs to be in a position to investigate and in many senses the Commission is exactly the right body to do that. The fear that we have is that unless that power had some proper limits to it, in terms of the inquiries that we could and should look at, the floodgates would simply open and that we would be asked, because of incidents reported in the media for example, by the public and by MPs to investigate all sorts of issues many of which would have nothing at all to do with the Code. I guess our nervousness is about the resourcing of that and how one would handle that. I do not think that should prevent us looking at how to set it up but it is a very real fear that we would open the flood gates to all sorts of other queries.

Q7 Jenny Willott: Is there potentially a reverse scenario that if you are not able to initiate your own inquiries then there might potentially be a sharp

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increase in the number of requests by civil servants asking you to get involved in particular issues and look at particular issues because they know that there is no other way you can look into them?

Ms Paraskeva: There may well be and we might argue that is a better way for it to come forward. I think our work is in promoting the Code and helping people to understand that the values are very important and we are there to protect those values. If they somehow are asked to behave in ways that mean they cannot uphold those values and their own department cannot sort that out, they can come to us and we will deal with it. We have seen a slight rise in the number of appeals that are coming forward and that is because we are promoting the Code. We think that is a better way to do it than simply chasing things that have gone wrong afterwards.

Q8 Jenny Willott: In which case, do you know why it was that in 2005 the view of the Commissioners was that you should have the power to investigate and initiate?

Ms Paraskeva: I think it was the same reason that I am on the fence. Somebody does need to make sure that if you are concerned about activity that you can go in and have a look and investigate what is going on. As I have said, the way around it that I have chosen to use is to write to Sir Gus O'Donnell and say we are aware of this issue, would you invite me to have a look at this matter. That has worked very well indeed so far.

Q9 Jenny Willott: The other issue that it raises is the Commissioners before you said they were concerned about the impact it might have on an individual's career if they have to come to you and raise a complaint. If that still remains the only way you can investigate something, do you have the same concerns about the impact that could have on careers?

Ms Paraskeva: That is a real concern whichever way the investigation takes place. If you go in and investigate you are still, in some senses, gaining information from the person who is involved and they may equally feel curtailed in giving that information if they feel that their career is under some threat if they were to put their head above the parapet. One of the reasons we want to audit how departments are handling appeals is we want to audit how appeals are handled within the departments, because one of the things we found out a couple of years ago when we first started to ask ourselves again the question about whether we should have investigatory powers was why is it we are getting so few appeals. Is it that everything is fine or is that there are things that are swept under the carpet? We were told, and I think it is probably absolutely right, that Permanent Secretaries have good systems in their departments for making sure that where civil servants are concerned they can actually raise these matters. They have somebody called a nominated officer who is outside of the HR and line management so that the matters are kept completely confidential. None of us can deny the fact that if you are going to raise a

concern of any significance you would be worried about whether or not that would affect your career chances. It is human nature to be worried about that.

Q10 Jenny Willott: Is there any evidence that it does?

Ms Paraskeva: We have certainly looked at complaints from people who believe that it has.

Q11 Jenny Willott: Have you upheld them?

Ms Paraskeva: We are in the middle of two at the moment.

Q12 Jenny Willott: The other issue with the mechanism in the draft Bill is that concerns that you might want to investigate would require the agreement of the Government for you to go ahead. Does that concern you in any way? If you have concerns that the Government would not necessarily want to agree that you investigate, how on earth would you go around that? Is it actually a genuine power to investigate if you have to get their agreement?

Ms Paraskeva: If they said no, what would I do? I would go to the chair of this Committee probably. At the end of the day, there are other places you can go if you feel that you have actually been thwarted in your ability to do your job. I would have thought this Committee was one of the places that one could raise any particular difficulties of that kind.

Q13 Jenny Willott: You are not too concerned about that?

Ms Paraskeva: I am not at the moment. Clearly regimes change, people change, and that is why we need to explore this matter at some length so we put something in place that is not so draconian to be unworkable but at the same time offers some proper protection.

Q14 Jenny Willott: If you had the power to initiate investigations, are there any issues you would want to investigate at the moment?

Ms Paraskeva: I do not know, to be honest. There may be.

Q15 Chairman: I am struck by the fact you seem to be saying, on this question of a wider investigatory role, you accept there is a role to be done, somebody should do it, but you do not think it could be you because of resources.

Ms Paraskeva: We certainly do not have the resources at the moment. The two inquiries that we have with us at the moment will mean that we are going to have resource difficulties because they are of such a serious nature that we are going to need legal advice. There is a very real resourcing issue in this whole area. We may well be the appropriate body but it would change the nature of us as an organisation. It would change the nature of our relationship with government departments, which is one where we try to work in partnership because we believe that is the best way to bring about the best behaviour. That makes me nervous, where you are able to bring about the best change because you have a good working

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relationship and that is put in jeopardy by a different expectation of your role. I think what I am saying is you do not take that path lightly.

Q16 Mr Walker: How do you regulate behaviour, the interaction between a minister and his or her civil servants?

Ms Paraskeva: We do not regulate behaviour. We can only regulate somebody who complains that behaviour has been inappropriate. In a case fairly recently, which was about a minister who had asked civil servants to do something, indeed to support a piece of legislation, we investigated and found that they were not civil servants but public servants and we had no right to comment at all. All we can do is to respond to somebody who says “My minister has asked me to take an action”. We then have to report it to the appropriate channels and that then goes back to Sir Gus O’Donnell.

Q17 Mr Walker: Can we have some examples, because this is a very in-house organisation? There is an audience out there of maybe seven people watching this and they will want to know when does it cease to be a proper relationship and enter into the realms of a political relationship and can you give us some examples.

Ms Paraskeva: If the minister was to ask his or her civil servants to politically support a piece of legislation that they were working on at the time.

Q18 Mr Walker: What is political support? How could a civil servant show or demonstrate political support?

Ms Paraskeva: By speaking in favour of the government’s position.

Q19 Mr Walker: If a Bill is going forward civil servants would have drafted that Bill. Do they have a neutral position on that Bill for or against? Their role is purely to draft it and advise on its ramifications.

Ms Paraskeva: Their role is to draft that Bill as objectively as they can in relation to the policies of the government of the day but they are not then able or free to say, in any public arena, this is a Bill that should be supported. That is what it means to be objective and impartial.

Q20 Mr Walker: Your role, I am sure, does not cover the police?

Ms Paraskeva: No.

Q21 Mr Walker: When the police tell everyone they need to support anti-terrorism legislation, that would not come into your ambit because they are not civil servants but public servants and you do not cover public servants.

Ms Paraskeva: We do not cover public servants.

Q22 Mr Walker: Should public servants be covered by some form of regulation? Are they covered by some form of regulation?

Ms Paraskeva: The only public servants who I believe are covered by any form of regulation are the appointments that my colleague, Janet Gaymer,

regulates, which are ministerial appointments to the boards of some of the public bodies established by government departments. However, I do not think there is any regulation or regulatory apparatus for the staff of those bodies.

Q23 Mr Walker: You mentioned that Permanent Secretaries managed their department closely to make sure this does not go on, as far as possible. If a Permanent Secretary—I am sure you have relationships with Permanent Secretaries—sees this going on, is he going to have a quiet word with the minister over a whisky late at night and say “Come on old girl, I think you are putting a little too much pressure on your team in this area. You just want to be careful.” Would that be how it is done, just a sort of friendly chat?

Ms Paraskeva: I am sure it would happen in all sorts of different ways depending on the relationship between the Permanent Secretary and the Secretary of State. Certainly I know that Permanent Secretaries would have a word with ministers and with Secretaries of State if junior ministers were asking their civil servants to misbehave. That is the way that most of us would deal with things: something is going wrong, somebody has a quiet word and puts it right and stops the activity where it is. That is what you would expect in a properly managed department.

Q24 Mr Walker: Grown up. We had Ed Miliband, who is a marvellous young Cabinet minister, come and see us. He is very nice to us and we have a good relationship with him. He was going on about ministerial training, something that I am personally fairly hostile to because it is brain washing but I think there is a role in ministerial training, if we are to have this, to make sure that fairly inexperienced people going into a new job, a totally new role as ministers of the Crown, understand exactly what the relationship is between themselves and a civil servant and it is incumbent on them not to cross that line and make that civil servant feel uncomfortable. You would support that training?

Ms Paraskeva: Absolutely. We have offered to take part in any of the ministerial training that is organised and to run, albeit a very short session, on this whole issue. As I said, I do believe the Bill needs to pick up this gap and we should be involved in that ministerial training so that we can share some of the experiences we have. You asked for an example. A more trivial one in some senses but raised indeed by a member of the House was civil servants being asked to change a minister’s Wikipedia entry. If it is a factual error, what is the problem but where does that stop and start?

Q25 Mr Walker: Doing their own PR on Wikipedia. You have an inspirational minister and the civil servants, his private office, get on with him or her extremely well. There is a danger that both sides can cross the line as they are pursuing this great common purpose, for example. How would that be managed, again in the sort of ways we have discussed?

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Ms Paraskeva: Most of this is managed in what you described as a grown-up fashion. It is only when people actually begin to feel uncomfortable about what they have been asked to do that they then would raise an issue with us if they could not have that handled within their own department. Of course at the most senior level there is nowhere else to go but to the Commission.

Q26 Mr Walker: But a Permanent Secretary could say to the Private Secretaries, to ministers “Listen, I know he is great guy/she is a great woman, to work for but you need to be careful.”

Ms Paraskeva: Absolutely, and they do.

Q27 Mr Prentice: I would like to run through some of the concerns you had which you outlined at the very beginning. We have already talked about promotion but you went on to express concerns about GCHQ. That was in the earlier draft of the Bill but it has now disappeared. MI5 is not covered and the security service is not covered. What practical difference does it make if you have disgruntled civil servants in these organisations and they have no-one to take their concerns to? What is the issue there? Why was GCHQ in the earlier draft and why was it dropped in the draft that we have before us now?

Ms Paraskeva: To answer the last bit first, it was simply to bring it in line with the other security services because they are not covered by the Bill. MI5 and SIS are not in the Bill. There is a sense that it was thought these three organisations should be on a par with each other. I will answer the first part with a question: why should those civil servants not have the same right of access as other civil servants to an outside body if, in fact, they are concerned about what they have been asked to do.

Q28 Mr Prentice: You would like to see the Bill amended to put the GCHQ people on the same footing as main stream civil servants.

Ms Paraskeva: The Bill is taking them out of that. The question is slightly broader: it is also where is the regulatory apparatus for our security services.

Q29 Mr Prentice: The next concern which you expressed at the very beginning was that the appointments to the senior diplomatic service were excluded. Think about political appointments such as Paul Boateng going to become ambassador to South Africa, Helen Liddell shooting off to Australia, Goodlad, the Conservative MP, going off to Australia beforehand, are you concerned that these senior diplomatic posts are being used as some kind of patronage?

Ms Paraskeva: We are concerned they could well be.

Q30 Mr Prentice: Are they? We have a record of MPs going off to be ambassadors in very important countries. Do you think that these appointments were a kind of reward for services rendered?

Ms Paraskeva: I think it would be inappropriate for me to comment on the past. What I would want to do is to say that all appointments should be made on merit. It is not impossible to argue that a senior

politician is exactly the best person for the job, which is what merit is all about, and for those posts to be given, therefore, to a senior politician. It should certainly not be as a prize but because they are the best person for the job.

Q31 Mr Prentice: Are there any occasions when it is appropriate not to appoint on merit?

Ms Paraskeva: One would always want the best person for the job. It is less the merit principle and more the method you use to identify that.

Q32 Mr Prentice: You may want to appoint someone who grew up in Australia. That could be a factor but that does not come into merit at all?

Ms Paraskeva: It does not come into merit but it might be one of the factors on your personal specification that you needed somebody who knew and understood, because they had born and bred in, the culture of that country.

Q33 Mr Prentice: You talked about absence in the Bill of any reference to the Ministerial Code. We all remember the Blunkett-nanny case and the Permanent Secretary at the time said at the time that no civil servant had done anything wrong and we believed that, but it got a huge amount of coverage. Do you think there should be a legal requirement in the Ministerial Code for a minister not to ask a civil servant to act in a breach of the Civil Service Code?

Ms Paraskeva: Yes, that is exactly the point I am making. There should be something there that actually holds the minister to account for the impartiality of the Civil Service.

Q34 Mr Prentice: Do you think this happens—I know it would not necessarily be reported but just your gut instinct—that ministers are asking civil servants to do things that are in some way rather improper?

Ms Paraskeva: No, I do not think it happens very often and we need to make sure it does not and we need protections in place. We do not have any evidence that there is widespread bad behaviour at all but one hears enough fear to make it clear that it would be sensible to have some kind of protection.

Q35 Mr Prentice: You say there is fear out there.

Ms Paraskeva: I think the newspaper coverage of the Wikipedia example has caused people to ask what should they do if they are asked.

Q36 Mr Prentice: What happened to the civil servant, the mystery blogger? What happened to that woman?

Ms Paraskeva: I have no idea what happened to that individual. Certainly at the Civil Service Live conference a few weeks ago where we had 6,000 civil servants we ran a question time session on the values and one of the questions we asked the panel, that included Sir Gus O’Donnell, was whether civil servants are able to write blogs. He said yes, of course, but they needed to be careful what they put in them.

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Q37 Mr Prentice: You talked about the Commission's independence and maybe you would feel constrained if the budgets were being determined by somebody else but the very fact that you and your colleagues are now being put on a single non-renewable five-year term you are really a free agent, you can say what you like and nobody can get rid of you. In a sense, where are the pressure points in this independence?

Ms Paraskeva: The pressure points may well come on our budget, for example, and currently our staff are given to us by the Cabinet Office and our staff are Cabinet Office staff. Under the legislation the staff will belong to the Commission. I do not manage the staff in the office, they are managed by the Cabinet Office, and the Bill will sort that out because it will give us an NDPB status where my successor, the First Civil Service Commissioner, and whatever board is established to run that organisation, will then manage the Chief Executive of the office who will manage the staff team.

Q38 Mr Prentice: Has it been an issue in the past or is this you trying to safeguard the future?

Ms Paraskeva: We have an issue that is current that could be problematic.

Q39 Mr Prentice: You are not going to tell us what this issue is that is problematic at the moment?

Ms Paraskeva: Not today.

Q40 Mr Prentice: Going back to what I said about people being appointed other than on merit, you said that exceptions could include bringing someone in for short-term business needs. The Civil Service is now incredibly porous; there is movement out of the Civil Service and into the Civil Service. The previous Prime Minister said a few years ago this is the way he wanted things to go. Under the present Prime Minister there is this leakage—I was going to say haemorrhage—of people who are civil servants into the private sector. I am thinking of Jobcentre Plus and so on and so forth. How can you police merit when there is this movement in and out of the Civil Service on a scale that is quite unprecedented?

Ms Paraskeva: Remember that 95% of recruitment is delegated to departments. What we do is audit their procedures against our principles. They have to answer to us through that audit process that they are following the principles which are about open and fair competition and appointment on merit. They give themselves a risk rating and where that risk rating over a number of years remains high then we need to expose that and ask them how they are putting their procedures right. The competitions that we chair for the most senior posts would also include for the top 200 all of those posts which might be managed moves, promotions, external appointments and also, because of my involvement in the Senior Leadership Committee, any of the exceptions to that. By being involved in those procedures I think we can regulate, through our involvement, at the very top end, and that happens quite effectively.

Q41 Chairman: There has been huge attention over the years to the exemptions, particularly to the extent to which there be can political appointees brought into government. You think of the attention given to the special adviser issue over the years. I want to ask you precisely whether you think the Bill gets that right. In a more general sense, from the political end, I wanted to ask about this curious relationship between ministers and civil servants. We had this discussion when we were doing an inquiry some time ago. The question arose as to the fact that we sit at the very end of a kind of international spectrum in terms of the ability of politicians to bring their own people into government and the huge fuss about this small number that do come in. We have the situation where ministers come in, put there by the head of government, but they are not given the ability to appoint the people who are going to do the business for them. Jenny, when we had this discussion, said when she ran a voluntary organisation she would never have taken the job on those terms if she could not have appointed the people to do the job for her. What I am asking you is, is there not a necessary tension here and have we got it right in terms of the ability of politicians to make sure they can get their people and have we got it right, in particular, about what we are saying about special advisers?

Ms Paraskeva: We have to remember that very few of us who have run organisations ever manage with the luxury of appointing all our own people. We usually inherited the team that was there and had to do what we had to do in the best way possible. I think that is what happens; ministers come and go.

Q42 Jenny Willott: It depends how vicious you are!

Ms Paraskeva: You then have to get rid of them but you inherit what you inherit. Ministers come and go and what we need to make sure is there is a stable and impartial Civil Service. That, I think, is why, when you asked me at the beginning whether the Bill was really important or whether it was some kind of the demonstration of intent, I said it is more than symbolic. You inherit the team that you have and that team must have been appointed to do the job properly. The issue of special advisers, in a sense, ought to give greater protection to the Civil Service to be objective and to give that advice in as objective a fashion as possible because the special adviser is somebody that the minister has brought with them and is able to put the political overlay onto the advice that is given. In a way that triumvirate is quite a good one. The minister is looking for the best possible advice and the objective civil servant is able to bring together the policy advice in relation to the policies of the government of the day but without any political bias. The special adviser is then able to say to the minister "But if you go this way X, if you go that way Y" in the political arena. I think that is a very helpful balance.

Q43 Chairman: There is no limit set in the Bill in terms of the number of special advisers. All that is being asked is that every year you have to account for how many you have appointed and how much they cost so

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potentially you could change quite significantly the balance between the permanent and the politically appointed.

Ms Paraskeva: The way it is written at the moment means you could run a coach and horses through the entirety of the Civil Service because there is no comment upon the number nor is there comment upon their role in relation to the permanent Civil Service. I might suggest that we would look at saying something about the role of the special advisers in relation to senior civil servants and who can instruct whom otherwise we may have left a rather large hole.

Q44 Chairman: Does this Bill tell us who the Civil Service belongs to? Who does it belong to?

Ms Paraskeva: Does the Bill tell us? I do not know that it does. It serves the government of the day and it belongs to the people of this country. Maybe it should say it more clearly.

Q45 Chairman: We have argued that Parliament should have more of a role in this in terms of setting you up, funding you, being reported to, and keeping an eye on you and protecting you. The Bill does not do any of that, does it?

Ms Paraskeva: In relation to the Commission or the Civil Service?

Q46 Chairman: In terms of the Commission.

Ms Paraskeva: In terms of the Commission, no. The NDPB model does not give us the kind of relationship that we have talked about in terms of this Committee.

I hope it would not prevent us doing the kinds of things that we have talked about, which is actually presenting our annual report to you and holding ourselves much more accountable to Parliament in that way. That can only be good in terms of the transparency of the work and accountability for our role. My being accountable to the Queen is, with respect to Her Majesty, not workable. My appraisal is out of date.

Q47 Kelvin Hopkins: It has been suggested to me that our draft of the Civil Service Bill is much better than what the Government has come forward with. Do you think that is fair?

Ms Paraskeva: The diplomatic answer would be to say that there is good in both. I actually believe that and I do think the consultation period should give us a chance to do some further work on areas of detail that we have discussed this morning. We have done very productive work with our colleagues in the Cabinet Office and feel very positive about that but not all the ends are tied yet and I hope we might have further conversations here so that we can get the best Bill possible.

Chairman: We have rushed through that and we may have to return to it. We are conscious of the fact that having waited 150 years we ought to make sure we try and get this as right as we can and we look to you to help us with that. I am sure you will be writing to us and we may be talking again but thank you very much for this morning.

Memorandum from Professor Robert Blackburn, PhD, LLD

In response to the request of the Committee for me to give evidence on the white paper and draft Bill on The Governance of Britain—Constitutional Renewal (Cm 7342, March 2008) with particular reference to the royal prerogative powers, my views are

1. Reform of the royal prerogative enjoys near universal support, including across the front benches of the three main political parties.¹ I welcome The Governance of Britain initiative launched by the Prime Minister on 3 July 2007, now taken further in the white paper and draft Constitutional Renewal Bill presented to the Commons on 25 March 2008. I have conducted a great deal of research and writing on constitutional and parliamentary practice, and been a long-standing advocate of the need for reform of the Crown prerogative powers.²

¹ The Labour Party in 1993 published policies to reform the royal prerogative in its *A New Agenda for Democracy: Labour's Proposals for Constitutional Reform*, endorsed by its party conference, but this section of the report was dropped by the leadership in late 1996, the year prior to Labour coming to power. The Liberal Democrats in their 2005 election manifesto backed parliamentary control of the prerogative powers, including a War Powers Act and a Civil Service Act. The Conservative Party's Democracy Task Force in 2006 recommended prerogative reform in *An End to Sofa Government and Power to the People*, with David Cameron the previous year promoting the idea of fixed term Parliaments to replace the prerogative power of dissolution.

² Relevant publications include Robert Blackburn and Raymond Plant, "Monarchy and the Royal Prerogative", in Blackburn and Plant (eds.), *Constitutional Reform: Labour's Constitutional Reform Agenda* (Longman, 1999); Robert Blackburn and Andrew Kennon, *Griffith & Ryle on Parliament: Functions, Practice and Procedures* (2nd ed., 2003); Robert Blackburn, *The Crown and the Royal Family*, Vol. 12(1) Halsbury's Laws (Butterworths, 4th ed. 1998); Robert Blackburn, *King and Country: Monarchy and the Future King Charles III* (Politico's, 2006); Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (Pinter, 1999); Robert Blackburn, "Prorogation or Adjournment before a Dissolution of Parliament", *Public Law* (1987) 533; Robert Blackburn, "The Dissolution of Parliament: the Crown Prerogatives (House of Commons Control) Bill 1988", *The Modern Law Review* (1989) 837; Robert Blackburn, *The Meeting of Parliament: A Study of the Law and Practice relating to the Frequency and Duration of the United Kingdom Parliament* (Dartmouth, 1990); Robert Blackburn, *The Electoral System in Britain* (Macmillan, 1995), chapter 2: "The Timing of General Elections".

2. I have the following comments and reservations to make about the draft Bill and other related proposals moving forward under the Prime Minister's The Governance of Britain initiative. Some are of a general nature about the process of reform being adopted, and others address the reform of particular prerogative powers.

The ad hoc approach of the Government

3. I believe the ad hoc approach which the Labour Government has adopted towards its constitutional reform objectives generally since 1997 is unfortunate. This is not conducive to a joined-up constitutional process. For this reason, I would have preferred to see a more comprehensive approach adopted towards reform of the royal prerogative. I believe there is a general mood across the political parties and in the country that the Government is not going far enough and is moving too slowly in its present constitutional reform agenda.

The form and drafting of the Bill

4.1 Is it the Executive (the Crown) or Parliament which should be the legitimising authority for executive action in the British state? I believe there should be a clear answer to this question.

4.2 Furthermore, principles of constitutional importance should be expressed clearly if citizens are to feel any sense of ownership. In other words, constitutional law carries a powerful symbolic and educative value in the political process, and is not simply the domain of lawyers versed in extracting meaning from tortuously expressed and heavily qualified statutory provisions and regulations.

4.3 In my view, the draft legislative proposals should clearly indicate that Parliament is, or will become, the source and legitimising body for the current executive powers under consideration, including armed conflict and treaty-making.³ However, the terms of the draft Bill and white paper would imply that the Government still wishes to retain its authority under the ancient theory of the Crown, simply imposing qualified procedural requirements in the exercise of these powers. In the case of war powers, they are not even constitutionally enshrined in statute.

4.4 "Henry VIII" clauses⁴ are particularly obnoxious in constitutional Bills. These allow the Government to legislate by way of a one-stop non-amendable parliamentary process, often timetabled by the Government when few Members will be present. There is a heavy onus on the Government to make the case for the "Henry VIII" clause in the draft Bill at clause 43, allowing ministers to amend such an important constitutional Act by way of statutory instrument. Its reasons should be closely scrutinised by the Joint Committee on the draft Bill.

4.5 Since the Government is not proceeding in a comprehensive fashion towards reform of the royal prerogative, the statute book would be neater and more accessible if there were separate statutes, entitled for example Attorney General (Role and Functions) Act, Civil Service Act, and Treaties (Parliamentary Approval) Act. Presumably it is now too late to change this, so the forthcoming Constitutional Renewal Act will proceed with an ad hoc diverse selection of five subjects.

The process of constitutional law reform

5. Government initiatives on parliamentary reform are prone to being too executive minded. The independence, work and authority of the Joint Committee set up to examine the draft Bill and recommend amendments will be crucial to the long-term success of these reforms in terms of strengthening parliamentary control over the Executive.

Concomitant constitutional changes

6. The success of prerogative reform especially on war powers and treaties will also largely depend on wider reforms to buttress the reality of the shift in power away from the Executive to Parliament. Measures to ensure full and proper information is provided by the Government in advance of its prerogative actions will be essential to Parliament being able to assess and form a view. The scrutiny and reporting work of Select Committees will be vital, and some strengthening in membership matters and clarity over jurisdiction would be welcome. The excessive use of parliamentary management techniques by the Government Whips' Office, notably time allocation and three-line whips, should be reversed.

³ For example French constitutional law that provides, "A declaration of war must be authorised by Parliament", and "Treaties . . . may be ratified or approved only under an enactment".

⁴ A provision which enables primary legislation to be amended or repealed by subordinate legislation, being named after the Statute of Proclamations 1539 which gave King Henry VIII the power to legislate by proclamation.

War powers resolution

7. The net effect of the proposed parliamentary resolution on war powers will allow the Government to retain the initiative and considerable control over how and when Parliament examines and approves executive decisions to enter into armed conflict. The resolution provides that it is for the Prime Minister rather than, say, the Speaker on representations from the Defence Committee, to decide when the debate and vote takes place.

8. If no retrospective approval is to be required under the parliamentary resolution, where the Executive proceeds to armed conflict without advance approval from the Commons, then in my view some positive requirement for a Select Committee inquiry and report to the House should be written into the terms of the resolution.

9. Under the Government proposals for a parliamentary resolution, it is the House of Commons that is vested with the power of approval, not jointly or severally with the House of Lords. The Government proposes a scrutiny reserve for the Lords instead, enabling Second Chamber members to express individual and collective opinions which may or may not be influential in the Commons.

10. However, in my view an elected Second Chamber should have a special role to play over public business of fundamental importance to the nation, which would include armed conflict and treaty-making, with concomitant powers of delay or veto.⁵ For this reason and others, I should prefer to see war powers regulation in the draft Bill or other primary legislation.

Ratification of treaties

11. On the drafting of clause 21, condition 4 allowing for MPs to think again could have been phrased more clearly; and I would have preferred clearer emphasis on the authority of Parliament over treaty-making.⁶

12. Of greater concern in terms of parliamentary procedure is whether 21 days is long enough for proper deliberation and scrutiny of the draft treaty (whereas in my view three months would be more appropriate); and whether the requirement for an explanatory memorandum to accompany the draft treaty should be written into the statute.

Wider review: dissolution of Parliament

13.1 The Prime Minister has said he wishes to seek the approval of the Commons before any future dissolution of Parliament. This matter has been referred to the Commons Modernisation Committee, chaired by a Cabinet minister, indicating its sensitivity as a subject to the Government.

13.2 It seems unlikely the Prime Minister will wish to diminish his freedom of action over setting the general election date, and the governing majority can be relied upon to support a motion from the Prime Minister on dissolution. Indeed, a rejection by the Commons would be tantamount to an expression of no confidence in the Prime Minister, which itself by convention is an occasion for dissolution.

13.3 The Government's detailed proposals on dissolution, which the Justice Secretary told the House of Commons on 25 March 2008 had been lodged with the Modernisation Committee, have still not been made publicly available to comment on. When they are, I will be preparing a written memorandum for the Modernisation Committee, which with that Committee's consent I will also send to this Committee.

13.4 However, any measure of reform emanating out of this initiative is likely to be welcome. At the very least, the House of Commons will be the forum to hear the public announcement and news of its pending demise first. In recent practice, conventional courtesies have been dispensed with and Prime Ministers have delivered news of a forthcoming dissolution and the election date direct to the press, leaving MPs to hear the news along with the general population.

Joined up constitutional reform

14.1 The issue of dissolution is a good example of how joined up constitutional change could work effectively. In my view, a new constitutional Act should provide for the life of Parliament, with both Houses being kept in permanent existence. General elections to the Commons could take place at fixed four yearly intervals (subject to a proviso for earlier dissolution in a prescribed crisis situation), with newly elected Members taking up their seats on an appointed day shortly after each election.

⁵ See Robert Blackburn, "The House of Lords", in Blackburn & Plant (eds), *Constitutional Reform: The Labour Government's Constitutional Reform Agenda*, op. cit.

⁶ For example, "No treaty concluded by the Government shall be binding on the United Kingdom unless (a) the treaty is laid before Parliament, and (b) within three months after it has been so laid, each House of Parliament by resolution authorises the Government to give consent for the United Kingdom to be bound as a party to the treaty".

14.2 Such a scheme would have two related advantages. First, if the Second Chamber is to be directly elected under forthcoming plans for its reform, it would create the option for the Chamber to be composed by a rotating system of direct elections, removing any question of rival mandates with the Commons. Second, it would remove the political vacuum that currently exists between the dissolution and meeting of Parliaments during election campaigns, in case for any emergency reason Parliament needed to be recalled.

14.3 In present circumstances, however, it seems unlikely that a coherent constitutional programme pulling together the various individual reforms taking place will occur. This, as I have commented above, I believe to be a mistake for the future stability of the constitution.

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Memorandum from Sir Robin Mountfield

CONSTITUTIONAL RENEWAL BILL—CIVIL SERVICE CLAUSES

I have been an advocate of Civil Service legislation for a long time. I therefore welcome the publication of these draft clauses. They are, however, in my view, barebones clauses—too limited in definition and scope to achieve what should be their main objectives.

The principal dilemma is how to resolve the tension between entrenching key permanent principles and maintaining management flexibility. It is important not to impede the ability of the Civil Service, and the political process, to evolve rather than ossify in a changing environment. Yet some of the recent and current changes in that environment are precisely those that make it more desirable than previously to entrench key principles. To cite just three:

- (a) the increasing mobility of staff into, as well as out of, the Civil Service, reflecting both increased job mobility in the economy generally and the desirability of strengthening the skills and experience available to the Civil Service. This is greatly to be welcomed; but mid-career entrants to the Civil Service, sometimes for short tenure, have not necessarily absorbed an intuitive sense of the proper boundaries of involvement in partisan matters. Codification and clarity are therefore more necessary than before.
- (b) Similarly, increased openness in government: this is desirable in itself; but it exposes civil servants much more than before to individual scrutiny and risks engaging them in advocacy or association with partisan policies. Again clarity is needed.
- (c) The old monopoly of civil service advice to ministers is, rightly and inevitably, gone; the Civil Service operates in a more plural world of multiple sources and contestability of advice. But instead of civil service advice being one source of advice—central and important because impartial—it has in some cases come to be marginalised: by Special Advisers who have become principal advisers rather than an additional source, or by outsourcing to consultants thought to bring more expertise or independence. Clarity is needed about the role of civil service advice in this developing situation.

In my view there are six areas where the draft clauses deal inadequately with this need for clarity, and need to be developed, in ways which entrench key permanent principles and Parliamentary scrutiny without impeding managerial flexibility.

1. MINIMUM CONTENT OF THE CIVIL SERVICE CODE

The use of the Code as the principal mechanism is right. By using the device of the contract of employment, the Bill leaves civil servants within the ambit of general employment law, with its protections for employees and employers, instead of creating a special class of employee with attendant risks of privilege, detriment and ossification. However, the purpose of the Bill generally is to entrench principles and constrain the arbitrary use of the prerogative outside effective parliamentary scrutiny. So provisions which leave Ministers largely free to decide even the main principles of the Code do not meet the requirement. The present clause 32 contains only brief guidance, compared for example to clause 6 of the Select Committee's draft Bill, or to clause 5 of the Government's own draft Bill of 2004. The word "impartiality" serves as an example. The present Civil Service Code distinguishes helpfully between "impartiality" (paragraphs 11–12), for example between individual citizens to whom civil servants are providing services, as most of them do, and "political impartiality" (paragraphs 13–14) which is a core principle for senior officials in the policy advice field. A combination of the Select Committee and 2004 Draft Bill provisions would get much nearer to what is required, without impinging on matters where management flexibility is needed.

However I think it is highly desirable to include, as a specified feature of the Code, that civil servants must not only serve the elected administration of the day, but must also behave in such a way as to be able to secure the confidence of a future administration of a different political persuasion. That is in the Code (paragraph 13); and it is so central to the concept of a permanent and non-political civil service that it should be entrenched.

2. RECIPROCAL OBLIGATIONS ON MINISTERS

It is illogical, in legislation designed to entrench the key principles of political neutrality of the Civil Service, for there to be no obligation on ministers. Indeed many of the pressures on political neutrality come not from civil servants wanting to act in a partisan way, but from ministers wanting them to do so. The Committee on Standards in Public Life and the First Civil Service Commissioner both take the view that the Bill should contain a direct obligation on ministers to uphold the political impartiality of the Civil Service. That is also my view: indeed I believe the substance of paragraphs 5.1 and 5.2 of the Ministerial Code (which has no statutory authority whatever, and is simply an emanation of the prerogative this Bill is intended to constrain) should be written into the Bill. This should cover not only respecting the political neutrality of the Civil Service (paragraph 5.1 of the Ministerial Code), but also the requirement to “give fair consideration to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions” (paragraph 5.2). Given recent events such as the decisions about the Iraq war, and more generally increased marginalisation of civil service advice especially at the centre of government, I think the case for a legislative provision on these lines is very strong.

The Government’s 2004 draft Bill (clause 5(10)) contained a provision that the “code must require Ministers not to impede civil servants in their compliance with the code”. It is unclear how a Code binding on civil servants could obligate ministers; but in any case even this inadequate provision is missing from the present Bill.

3. STATUS OF THE CIVIL SERVICE CODE

The Bill requires merely that the Code should be laid before Parliament. It remains therefore largely a prerogative instrument. It should be subject to affirmative resolution procedure, giving Parliament both a direct role in its content and an increased incentive to scrutiny.

4. SPECIAL ADVISERS

The Bill contains neither any specification whatever for the Special Advisers Code (other than that there should be one) nor a limit on numbers. Minimalists will argue that the stated intention of ministers that should be no more than two per Cabinet Minister, plus more in Number 10 and the Treasury, and that they should not manage civil servants, is adequate protection. But the Bill should not legislate merely for fair weather. It may not now be in the contemplation of either main party, but in principle under the Bill as now drafted, it would be possible for a future government to sideline the Civil Service altogether and appoint large numbers of Special Advisers to run the administrative functions of government as well as the advice function. That should not be possible without serious Parliamentary scrutiny.

The 2004 draft Bill contained some provisions in this area, albeit inadequate. The Consultation Document at that time said (para 39) “the draft Bill provides that no special adviser can authorize expenditure, exercise line management supervision over permanent civil servants, or discharge any statutory function”. Even this was qualified by the highly undesirable caveat, in a footnote, that they should be able to commission work from civil servants on behalf of ministers on the basis that this was not exercising a line management function—a caveat criticised by the Committee on Standards in Public Life. The 2004 draft Bill (clause 16(8)) however only said on this point that Special Advisers were not to exercise “any function relating to the appraisal, reward, promotion or disciplining of civil servants”, which would allow Special Advisers considerable scope to give instructions to civil servants, and which therefore would not achieve what the Consultation Document claimed. In my view the present Bill should specify explicitly that Special Advisers cannot give or convey instructions to civil servants. If this provision were included, together with the requirement in Clause 39 for an annual report to Parliament on numbers and cost, I do not think it is essential to have a Parliamentary control of the actual numbers.

5. POWER FOR THE CIVIL SERVICE COMMISSION TO INITIATE INQUIRIES

I can see no plausible case for the Civil Service Commission to be constrained in initiating inquiries on Civil Service ethical matters. This may in practice not be a problem at present; but any regulator’s powers influence not only the way it could behave, but the way in which it is regarded. Such a power would not require the Commission to respond to every irresponsible demand for an investigation; but it would confer an independence which, in this respect, it now lacks. The issue of resource constraint is clearly a factor: for the regulator’s resources to be limited by the regulated is in principle wrong. Direct Parliamentary provision, as with the NAO, seems the appropriate way forward given that, as with the NAO, it is precisely the Government which is being audited.

6. OTHER MATTERS

There are three other matters I consider should be dealt with:

- (i) External appointment to senior positions: present arrangements may in practice provide a workable compromise between ministers' understandable interest in top appointments and the need to avoid personal or political patronage. It would provide a much sounder basis, however, if the Civil Service Commission were required in the Bill to prevent ministers from exercising choice between candidates certified as "above the line".
- (ii) Internal promotions: in practice influence over promotions is one of the main ways in which patronage is now exercised; there is effectively no constraint on it at present. The Civil Service Commission should have powers to monitor practice and to intervene in the most senior cases.
- (iii) Dismissal: dismissal is another potentially powerful way of exercising ministerial power in a partisan way. The present Civil Service Management Code (para 11.1.1) says: "Because of the constitutional position of the Crown and the prerogative power to dismiss at will, civil servants cannot demand a period of notice as of right". The use of the very word "prerogative" indicates how inimical this is the purpose of the present Bill. Ministers should not have this unconstrained power.
- (iv) Civil Service Commission requirements on political neutrality: the time-honoured principle is appointment on merit. That, alongside the traditional practice of permanent, and usually career-long, appointment carried with it the natural meaning that anyone appointed was judged capable of serving alternative administrations. Some recent appointments, however, have been made—on acknowledged personal merit—of people who could not plausibly work for an alternative administration. The Civil Service Commission should be required, in the Bill, to recommend appointment on merit only of those people judged able and willing to serve future administrations of a different political persuasion, or at least to observe the entrenched provisions of the Civil Service Code.

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Witnesses: **Professor Robert Blackburn, Professor Peter Hennessy and Sir Robin Mountfield**, gave evidence

Q48 Chairman: Let me extend a warm welcome to our next set of guests. I am delighted to welcome Professor Peter Hennessy who is Peter Hennessy, Robin Mountfield, who is a distinguished former civil servant, and Professor Robert Blackburn, a very distinguished academic. We are very glad to see you all. We want to know what you think about what the Government is proposing in this Bill. Earlier on our clerk noticed that on the monitors around the building this was being described as the daft Constitutional Reform Bill but we want to see if that is, in fact, the case. We particularly want to ask you about the areas this Committee is particularly interested in. We have drawn on all of you before over the years with your expertise. Shall I ask you just in general to start with your general take on what the Government is now proposing and you can focus on the bits that particularly interest you if you like.

Sir Robin Mountfield: As you know, I have been an advocate of Civil Service legislation for quite a long time and I welcome this very much. Having been away from the Civil Service a growing number of years I am conscious that I could be accused of golden-age-ism looking back to some mythical time in the past when everything was better. I do not believe that is true. I believe the Civil Service is vastly better now than the one I joined in 1961 in most respects. But it is subject to some new and enhanced pressures, particularly in the area of what is very loosely called politicisation. It is an inadequate phrase but it covers quite a range of things. Although I welcome this intention to legislate, these clauses are bare bones provisions. There are six areas

where I think it is deficient: one is in the degree to which it specifies what should be in the Code. Another one is the lack of reciprocal obligation on ministers. As you know, I have taken a view on this which you have not agreed with in the past. The First Commissioner and the Committee on Standards in Public Life endorse that view, that there should be a requirement in this Bill, particularly since this is a Bill to constrain the prerogative. It is precisely the prerogative power claimed for the Prime Minister to lay down the obligation on ministers that, in my view, needs to be constrained in this area.

Q49 Chairman: Would it be not be enough to get it clearly said in the Ministerial Code what you are asking for?

Sir Robin Mountfield: Yes but the Ministerial Code has no form of authority at all. It is not laid down even by an Order of Council. It is purely an act by the Prime Minister of the day. So there is no opportunity of scrutiny, no opportunity for Parliament to express views on it, and so on. I think this needs to be one of the fundamental features of any attempt to lay down the requirements of impartiality of the Civil Service. The third area is the status of the Code. This does not give Parliament any opportunity to approve or disapprove or scrutinise in a formal sense. I think the area of special advisers is grossly deficient. There is no prescription of what they can and cannot do. Even the Cabinet Office draft in 2004 made some attempt in this area although it was an inadequate attempt. In principle, as Janet Paraskeva was saying, as it is left, with no limit on numbers or on role, they could

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take over the whole show in effect. I am not suggesting for a moment that any immediately likely government would do that but this is not a fair-weather Bill but meant to lay down the limits on what could happen if things went badly wrong. Personally I think the Commission ought to have powers and resources to initiate its own inquiries. I think the resources issue ought to be of a second order. The idea that Parliament should own those resources and powers is probably the right way forward. Finally, there is a group of, one might think, rather minor considerations: for instance, the power to dismiss is described in the Civil Service Management Code, which is not part of this Bill, as a prerogative power of ministers. If the Bill is to constrain the power of the prerogative, that is something that ought to be constrained. The power to influence promotions is very important indeed, as you were saying yourself. A thing I personally think the Civil Service Commission's powers ought to reflect is they should have regard to an obligation on candidates to be willing to serve a future administration as well as the present one. That is a very crucial test of political impartiality and it has been ignored in one or two cases of people who may well have been the best candidate for the job in some merit-based sense but who could not conceivably work for a future administration; that, to my mind, runs against the drift of impartiality. I mentioned at the beginning the shortcomings in the prescriptions on the Code itself. It is a very short set of words, much shorter than, for example, either in your Bill or in the 2004 draft. It uses the word impartiality. I do not know whether lawyers could make sense of that. The present Civil Service Code distinguishes impartiality, which one might take to mean, for example, treating individual citizens fairly, and political impartiality which is a whole raft of different considerations and that needs to be teased out.

Professor Hennessy: I think it is a very valuable step forward. I think we are going to be concentrating, because you want us to, on the things that are not there and could be improved so before I mention my anxieties can I say two things. I think the current Prime Minister deserves an enormous amount of credit for bringing this forward. It is not a week in which credit for the Prime Minister is abundant; it is almost as hard to find as a new mortgage but it has to be said. Secondly, credit to you and your Committee because until you investigated the prerogative, which has always been the secret garden of the British constitution, we had no key to get into it. The Parliament, the public and the scholarly trade, like myself and Robert, had no real way of getting into the prerogative and one of the first things you did—and I am glad your clerks have produced it—was to get the first definition we have ever had of what they were. It is still incomplete and the White Paper promises more. All credit to the Prime Minister and all credit to you for getting it on the agenda. When it began it was regarded in some quarters as Nerds Incorporated. I remember the previous Prime Minister had a go, I suspect, at all of us in this room in a debate on a Committee report from here when

he said it is a fine thing for academic seminars but the people do not talk about it. You always know when people are on the rocks in this country politically when they either bring class into it or they mention the people. It means they are buggered and they do not know what to say next. All credit to you for sticking to it. I am with Robin on virtually everything he said about the Civil Service Commission side. I have just two thoughts on that before I say what I am really concerned about. When the Prime Minister came in with his draft of what he wanted to do in Number 10, the Civil Service Act was not there. It took a combination of Gus O'Donnell and Alistair Graham, the outgoing Standards Committee chairman, to get it in there which is interesting. It is to the credit of the Prime Minister that he put it in but it was not there in the original set that he came in with last June. What I am really concerned about more than anything else is war powers which is in the White Paper but not in the Bill because they are not going down the legislative route. I hope we can take a look at the war powers because there is nothing more fundamental. None of this is to do with nerds, or just a bit of it: the flag bit, which shows my age, and also the statement of national values. I am one those who follow that great Brit, George Formby. All we need to know is it has "turned out nice again". That is all we need to know and anything else will lead us into the realms of absurdity which, if we still had them, the Ealing comedies would take-off but we have ceased to be an Ealing comedy nation and discovered the importance of being earnest which I have to say I do regret.

Professor Blackburn: Like Peter, I would like to congratulate the Government on actually grasping this nettle and bringing forward constitutional reform on this area. Probably, like Peter, I have been discussing the Royal Prerogative for 25 years or more in academic circles. It is a band wagon that started to roll in the 1980s and there have been lot of blueprints and draft legislation prepared on this such as Tony Benn's Crown Prerogatives (House of Commons Control) Bill in the 1980s. It is quite interesting that now really there is almost universal support for reform of prerogative powers, certainly across the front benches of the three main political parties. It is a good time to be tackling reform of the prerogative because there does seem to be political consensus behind reform of the prerogative whereas earlier on in the 1980s it was seen as very far fetched. So now we are starting from a good point to actually tackle the prerogative powers. The Governance of Britain document is certainly the best statement of constitutional ideology that has been produced by government since 1997. That said, it is difficult for me to start from the Governance of Britain's Green Paper, and perhaps I can go a bit further back to what I would like to have seen in the Green Paper itself. Generally one thing that has worried me about the Labour Government's constitutional reform agenda throughout has been its rather ad hoc approach. Particularly with such a wide-ranging constitutional agenda there is big danger of things not being joined up. That applies generally across

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constitutional reform far wider than this particular initiative but also it applies, to some extent, to the prerogatives that are being tackled here. Even this Bill itself is really an ad hoc collection of five issues and is not a comprehensive treatment of the Royal Prerogative. One other thing that bothers me, and you referred to this in your previous session also, is there is not really a firm emphasis upon the principle that Parliament should own these particular powers or should be the authority for these executive powers being exercised. The drafting of the Bill leads you to the conclusion that the Crown or government still owns these but there are some procedural requirements they are going to have to go through to operate them. It is important today that statements of constitutional principle are reflected in the statute book. If an ordinary citizen wants to know what are the powers with respect to going to war, or the powers with respect to treaty-making, you would have thought they would probably go to a statute entitled something like the War Powers Act or the Treaties (Parliamentary Approval) Act but here it is the Constitutional Renewal Bill. There is the question of accessibility and clarity, both in the presentation of these particular reforms and actually, to some extent, in the drafting. The drafting even of the treaty section could be a bit clearer. The fourth condition is bit obtuse; you have to read it two or three times to actually get any meaning out of it. There are a few other matters that I would like to have seen in this Bill but I do realise that this is a rolling programme of the Government and they cannot deal with everything at the same time. I have, in my career, made a special study of the dissolution of Parliament and I would like that to have been dealt with in this Bill as well but that may be going a little bit too far for the Government. It did make it quite clear in the Governance of Britain Green Paper, and also in the Prime Minister's statement to the House, that there would just be a motion for Commons approval to a dissolution. But nothing would be clearer to symbolise that Parliament is the ultimate authority over these matters than an Act of Parliament determining actually control of its own life.

Q50 Chairman: I am interested in what you say but I am wondering whether it does not conflict with Peter's George Formby principle: it has turned out nice again. If you had said not so very long ago that in this country we are going to get a government introducing a raft of measures of this kind to produce improvements to the way in which we are governed and improve the role of Parliament in all that, and that somehow we had to wait until a government came along that had some comprehensive constitutional settlement in its pocket—we do not do it like that, do we? We do the "it is turned out nice again" bit, which means muddling along, adding bits and actually getting somewhere and writing it down as we go along. In terms of that, this represents huge progress, does it not?

Professor Blackburn: It does in that sense but there are two factors, one of which is there are so many constitutional changes that have taken place, and are proposed to take place, that they do need to be pulled together with a fairly comprehensive view of our constitution. The other thing, as I said earlier on, is Labour has had policies on this for a very long time. They had policies on this in 1993 to reform the prerogative. They have been around a long time so why is this happening right now? I suspect one reason it is happening right now is because the opposition parties have been advocating these policies.

Q51 Chairman: Governments get interested in these things in opposition and then lose interest in them in government. What is interesting about this is that they have been interested in it in government for a variety of reasons. Peter, can I come back to you on the war powers because that is something we flagged up as a key area in our prerogative report some years ago along with treaties. We have treaties in here, which is basically codifying the Ponsonby Rules, but on war powers, although we recommended a legislative approach, the constitution's first meeting in the Lords recommended a convention approach and the Government has gone for a convention approach. Is this not adequate?

Professor Hennessy: I will come to the convention bit in a moment because the convention, as it is, is deficient even though I would have preferred a War Powers Act like this Committee. Can I point out that there is a slight contradiction in the Government's attitude to this because in the National Security Strategy that was published last month Chapter 2, Guiding Principles, which I do not think many people read because principles are boring and it is written in the standard Whitehall porridge, but there is the nearest thing in there, which is significant in terms of legislation and war powers, to an apology that the Government has given for Iraq. It is there but it is immensely fleeting and it is only a sentence: "Overseas, our belief in the rule of law means we will support a rules-based approach to international affairs, under which issues are resolved wherever possible through discussion and due process, with the use of force as a last resort."⁶ That is the nearest thing we have had to an apology for Iraq but it was not noticed. What it means is the Prime Minister saying "I am anybody but Tony Blair and 2003 will never happen again." That sentence matters a great deal to the career Civil Service, the diplomats and the intelligence people. They noticed it and were very keen for something like that to be in there because they were deeply scarred by the abandonment of due process at pretty well every level and what the bulk of them regard as the illegality of that war. That really matters for Whitehall but it matters for Parliament too and also rules-based rule of law. I think that the rule of law does apply to war. If the rule of law does not apply to war, what is the point of it applying to almost anything else because it is the

⁶ Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an interdependent world*, Cm 7291, March 2008, p 6

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most dramatic, and drastic in many cases, act a State can take. But let's go to the convention as it now is. The thing that worries me most is the Prime Minister will decide on what information this House and the House of Lords is given before the convention, the resolution once it is through, is activated, and what worries me above all is the Attorney General's opinion, because if you remember from the Butler Report and from the subsequent leak of the full Attorney General's opinion of March 7, 2003, when you compare that with the shrivelled, inadequate, misleading version that was given, that is all the Cabinet got as well, on March 17 in an answer to the House of Lords, that is what really worries me because it is up to the Prime Minister, according to the White Paper, how much of the legal opinion is given, and they indicate they are going to give a summary, which was grossly inadequate. If you will forgive me for saying so, those of you who had worries about the war four or five years ago now, who may have voted for it with great anxiety and reluctance, if that full opinion had been available to you some of you might not have gone that way. I think it is absolutely fundamental, and more important than what I think is what the senior lord, Lord Bingham of Cornhill said in the Williams Lecture in Cambridge in November 2006 on the rule of law. "There seems to me to be room to question whether the ordinary rules of client privilege, appropriate enough in other circumstances, should apply to a law officer's opinion on the lawfulness of war: it is not unrealistic in my view to regard the public, those who are to fight and perhaps die, rather than the Government, as the client."⁷ I think that is profoundly true; Parliament is the client as well as the people, and you will remember what Lady Hale, the law lord, said in the *Gentle* case earlier this month in the House of Lords, that the full opinion, the one of March 7 2003, was "far from clear and unambiguous".⁸ The convention is all that we are going to get for the time being, though the Government does say in the White Paper they are open to the possibility of legislation later, but let's accept it is going to be a convention, then I think the single most important thing for the House of Commons, and this Committee is the sharp end of the House of Commons on this, is to make sure that, unless there is very good reason not to, the full opinion on the legality of the war is given you, not some shrivelled inadequate summary, and the greatest single failing I think on the road to war of 2003 was not you here but the Cabinet, because they did not insist on seeing the full opinion, only a handful of them knew what it was, and they did not test out the shrivelled, inadequate version that Lord Goldsmith gave in the House of Lords, and that was the biggest human failure of all. I have said to this Committee before that Mr Blair's Cabinet was the most supine since World War II—that is it will be

remembered, if I am writing the history, as "the supine Cabinet"—but that was the single biggest example of the price that was paid for their supineness, and you have to see if you can find a way of persuading the Prime Minister, and it will have to be him, to think again on this, and think again of the human pressures. If you are a Prime Minister you think in your head you have a special insight into the world and the dangers the world and the country is facing—Eden in 1956, Blair in 2003—but they are the last people in the world who are going to be in a fit state of mind to judge, I think, what is proper for Parliament to have and what not; it is asking too much for a human being who is in a state of hyper anxiety to do that, and I think that is the single greatest weakness in what the Government has brought forward. So I am with this Committee and would prefer a law, with all the caveats that are quite sensibly in the White Paper about emergencies and so on, but that is I hope what you will concentrate upon because that is the fault line beneath the war powers as proposed in this White Paper.

Q52 Chairman: I am really grateful for that; it is very helpful. I think it is probably true that the chief of staffs have prevailed in terms of setting their face against legislation, but I suspect they would be on your side, as they were, indeed, at the time of Iraq—**Professor Hennessy:** They asked for the opinion.

Chairman: Absolutely, in pressing for the opinion, so I think you invite us to do something which I think will command interesting and wide support.

Q53 Mr Walker: Do you think Parliament should be more aggressive in asserting itself and demanding rights, not waiting for the Home Secretary or whoever, the Lord Chancellor—I do not know what it is now, it seems to change on a weekly basis—to come up with these great ideas? Why are we not generating these great ideas and aggressively pursuing them?

Professor Hennessy: I have always wanted you to be like George III, "George, be King", I have wanted you to have a greater conceit of yourself than you have had in the bulk of my lifetime. You have much more of one than when I first came to the House of Commons to see you in action in 1964, the last day of the 1959 Parliament—what a smug crowd they were—and for all Harold Wilson's white heat, they were pretty awful as well. You are much better than you were, I think Robin was saying that about the career Civil Service, Parliament is much less a supine body than it once was but you have a long way to go, and I do think you should come up with things and I think on Robert's very interesting point about what the constitutional settlement as a whole looks like, you can do that, for example. I cannot confirm this because it is only one source but, at the beginning of the 1997–98 process, when Lord Irvine, and you might get him here and ask him if this was the case, chaired the Cabinet Committees on Constitutional Reform—and did them very well; proper Cabinet Government there, if nowhere else—early on the Cabinet Office Secretariat said: "Do you not think we should have a White Paper which

⁷ 'The Rule of Law, The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, www.cpl.law.cam.ac.uk

⁸ House of Lords, Opinions of the Lords of Appeal for Judgment in the Cause R (on the application of Gentle (FC) and another (FC)) (Appellants) v The Prime Minister and others (Respondents), Wednesday 9 April 2008,

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explains what the end state will be, how it all links together?" and he said, "I'll think about it", according to my informant and he came back—and you must ask him if this is true—and he said, "I have thought about your proposal and it is alright, it all does come together". "In what way, Lord Chancellor?" "In here", he said, tapping his formidable forehead. Well, great man though Lord Irvine was—not my favourite in terms of jokes but a very formidable person, I have a lot of admiration for him—that was not enough, and I think what we need, and you could do this, is you could pull together all the constitutional changes since 1997, blend them with this and say: "What do they amount to? What is the unfinished business?" and that would be a great service if you did that. As you know, I never come before you, Chairman, without suggesting another programme of work for you so I do not want to disappoint you!

Q54 Chairman: I am afraid I was Lord Irvine's PPS⁹ at the time!

Professor Hennessy: I remember!

Q55 Mr Walker: Can I ask the other two witnesses what their view is on the role of Parliament in driving change?

Professor Blackburn: Yes, I agree. It is a cultural matter rather than a procedural matter, and parliamentarians should be more assertive. It is certainly true that the Select Committees are frenetic in their activity these days. I think you need to be quite careful how you do choose the subjects and do not spread yourself too thinly perhaps, and it is very important that the Select Committees work together. Having some Select Committees working in conjunction on the same subject matter together is quite a formidable influence, I think. In a sense it is a shame that yourself and the Constitution Committee came to different conclusions about war powers, for example, and that slightly detracts from the authority of both. So I think this is a cultural matter but a very wide cultural matter, of course. The excessive use of the Whips and management techniques by the Whips, with three-line whips on things that would never have happened 20 years ago, is very important to resist, but that is up to individual MPs collectively as well.

Q56 Mr Walker: But, there again, we have the ridiculous spectacle of the media suggesting that a PPS is a member of the Government and calling it a split. Traditionally, 30/40 years ago, a PPS was part of the payroll vote, and it suits the media to talk these sort of minor ructions up as if they are important, and they are not, but that is more of an observation than a question. Sir Robin?

Sir Robin Mountfield: I regard what you are doing now as one of the more important areas that Parliament can influence, what is in the Bill; but, secondly, to my mind it is the scrutiny of how the Civil Service works that is really important, and that is where this Bill needs to be improved in a number

of respects. For example, the Civil Service Commission should be made to make an annual report on the operation of the Code, and you should be able to scrutinise them. It does not solve the problem but it gives you a specific opportunity to press these issues in a creative way.

Q57 Mr Walker: Professor Hennessy, you come across as a great fan of judges. There seems to be growing friction at the moment between the Government and judges, Parliament and judges, judges overturning—seemingly—laws passed by Parliament on, for example, deportation, asylum seekers, so on and so forth. How do you see this current concern resolving itself? We all seem to have a view on it as politicians.

Professor Hennessy: One of the things that really disturbed me, and I was fascinated by it, was the degree to which Tony Blair ran against the Human Rights Act which his Government had passed—I often got the impression he had not read it, certainly before it became law—and the judges have to go with what they have, and statutes conflict. We have a career judiciary that is not contaminated so that they are the ones without fear or favour who have to say that, and I do not want to be unkind to the political trade because you are very necessary and I love you dearly, but you get where you are, some of you, by mobilising prejudice more effectively than the competition; the judiciary does not. The judiciary are the sort of people—well, they are nerds. They are nerds in the public interest; they are fine-print people, and you have to have people like that. It is the same when politicians who are on the rocks, usually for their own faults, attack the BBC because it is "biased". Well, forgive me, but the last people in the world to detect genuine bias is your trade; that is what you are there for. So when people get cross with the judges it is an anthropological problem a lot of the time, and what is so intriguing for the older of us is that when we were young, and some of you here—I was not particularly—were on the centre left, or even a bit further left perhaps, in some cases, the judges could not be trusted because they did not like the working class; they did not understand them, and they were the bosses' tool which is why the Labour Representation Committee came into being. But now the people who laud and magnify the judges are the progressive centre left because they seem to be the last guarantor of liberty when the Cabinet gets another rush of blood to the head, and it has been one of the most interesting transformations in my lifetime of who is more disturbed by the judiciary than not. But, Heavens above, judicial appointments are very much part of this, but if that is ever tampered with that really is the road to ruin, and so many of the things we are looking at, including a clean and decent public service that is not contaminated either. It is like a clean water supply, you assume it is there until you know it is not, and you are, in effect, a kind of purification plant for these bits of the constitution, in this Committee, and it is absolutely vital that you should continue to be so, but the judges point is a very interesting one. When you think about it, ministers

⁹ Parliamentary Private Secretary

have a whole hierarchy of scapegoats when they do not get what they want. Quite often it is the senior Civil Service, and Robin as St Sebastian covered in arrows, then it is the wretched media, then it is the bloody judges, then it is backbenchers or select committees like you—I am glad to say that Robert and I are quite far down in the hierarchy of malice, academics are usually about no 6 scapegoat for their own failings, but that is often what happens when Home Secretaries really think they need to take on the judiciary. I think it began under the Conservative administration, I cannot remember the exact details, but was it not Mr Baker who was the first Home Secretary ever to have to deal with a contempt case? I may be wrong about that, but there was a great deal of bashing the judges going on then, by historical standards, and it is entirely to be regretted. I understand the factors that make for it but I think it is really quite difficult and I hope the judges stand firm. So, indeed, I am a fan of the judges—as I am of you lot. You do not look convinced!

Mr Walker: We must get you back more often!

Q58 Mr Prentice: Can I stick with you, Professor Hennessy and the war powers? You told us there was an abandonment of due process and you seemed to suggest that the Cabinet is just, well, a vegetable patch—

Professor Hennessy: That gives a false impression of vigour, actually. Vegetables grow!

Q59 Mr Prentice: These are very stunted vegetables. You talked about a full opinion needing to be available. Is there a full opinion? I tell you why I am asking you that. I remember a few years ago Sir Andrew Turnbull when he was Cabinet Secretary, and there was a ding-dong between him and Tony about the nature of the legal advice that had been presented to the Cabinet, and Sir Andrew said, “The six paragraphs”—or whatever it was—“is the full legal advice”. He said that; it is on the record; I remember the exchange between Tony—

Professor Hennessy: That was before the full opinion had been leaked, if I remember.

Q60 Mr Prentice: So the full opinion is—

Professor Hennessy: — the March 7 one which the Butler inquiry had to insist on seeing. They did want to show it to them and Robin Butler had to threaten to go public before they were shown the full opinion, and it leaked in the last few weeks before the last general election. So I am not sure if this Committee had the leaked version available to it when the Chairman got that—I do not want to suggest Andrew Turnbull is anything other than honest because he is a good friend of mine and also a straight man, but if you read the two opinions there is a world of a difference, as Lady Hale said this month, between the big one and the little one.

Q61 Mr Prentice: I do not want to take you down a blind alley but the argument at the time the “Cabinet” took the decision to go to war was that the Attorney General, Goldsmith, was there. He could take questions from Cabinet—

Professor Hennessy: But they only got the little opinion, and that was the problem. He spoke to the little opinion, as the Butler Report made explicit.

Q62 Mr Prentice: But my question is this, I suppose: what is the obligation on the senior Civil Service to tell it as it is to the Cabinet? I am not going to go through the history about this but papers were not circulated to the Cabinet because the person who chairs the Cabinet is the Prime Minister and the Chair decides which papers are circulated, so what obligation is there on the collective, the Cabinet, for the Permanent Secretary, the Cabinet Secretary, to say honestly what he knows?

Professor Hennessy: I think it is an absolute requirement of Cabinet Secretaries. There is no point having a career Civil Service on the Northcote/Trevelyan lines if it will not speak truth unto power at crucial moments, however inconvenient, and it was the Chief of the Defence Staff, Admiral Boyce, and Sir Kevin Tebbit, the Permanent Secretary, and the MOD who insisted on that legal opinion. Nobody else asked for it—not a Cabinet minister, not a Cabinet Office official. They insisted upon it after the chiefs of staff had had a discussion and General Mike Jackson said: “I have spent a great deal of time recently in the Balkans getting Milosevic behind bars in The Hague; I have no intention of occupying the next cell to him”, and it was the chiefs of staff and the Permanent Secretary and the Ministry of Defence who insisted on an opinion—nobody else—and I do not think that is the way to run a central government, full stop, either as a Prime Minister or as a senior official.

Q63 Mr Prentice: But history would not repeat itself. Lessons have been learned, have they? Cabinet members have effectively apologised?

Professor Hennessy: Yes, they have, and this National Security Strategy is what the apology is about. Never again.

Sir Robin Mountfield: The Ministerial Code includes a provision that ministers are required to give due attention to the advice of impartial civil servants, along with other sources of advice. My view is that that should be a provision in this Bill, along with the obligation to observe the political impartiality of the Civil Service. The reason is that I believe one of the greatest threats to due process in government at the moment is not politicisation of the Civil Service but its marginalisation. I think the Iraq situation, as I understand it not having been there, illustrates that; some of the people who knew where the bodies were and were known to oppose the war were not listened to.

Q64 Mr Prentice: So either you are on side or you are frozen out?

Sir Robin Mountfield: That is my fear. I am not saying it happens regularly in the ordinary humdrum business of government, but I think in certain critical moments it is a real danger in the way the system is presently working.

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Professor Hennessy: Only one official resigned, Elizabeth Wilmshurst, the No 2 legal adviser in the Foreign Office; none of the others resigned, and there is always that option. It is not for me to tell people to throw their hand in and resign; I was always trying to persuade you to resign on principle, Sir Robin—no, I was not, that is unfair, but it is interesting in that very few resigned over Suez. More resigned over Suez than over Iraq, but that is the ultimate option, and Elizabeth Wilmshurst did it.

Q65 Mr Prentice: And if we had had a few resignations from the Cabinet that would have changed the course of history?

Professor Hennessy: Yes. I am sure there were Cabinet ministers who did not believe a word of it, and did not believe in the war. Having been nice about the current Prime Minister, if the doubts I suspect he had in his head had been articulated in the autumn of 2002 that we cannot do this without a specific United Nations Resolution, matters might have been different—but he did not, did he?

Q66 Chairman: Robin, I am sorry we are going between issues here but it is inevitably the case, and I want to press you on why you think that Civil Service legislation is the appropriate place to put obligations upon ministers?

Sir Robin Mountfield: I know that is the position this Committee took when we were talking about a Civil Service Bill, but this is a Constitutional Renewal Bill whose main theme is really constraining the prerogative, and this is crucially one of the issues as far as the Civil Service is concerned where the prerogative in my view needs to be constrained. The current mischief is not, in my view, the will of civil servants to behave politically; it is the risk that ministers force them to behave politically. I am not suggesting this is endemic and widespread but it does happen, and it is important that we should be driving some stakes in the ground to limit the possibility of that happening in the future.

Q67 Chairman: But if we are doing something about the ability of civil servants to do something if ministers ask them to behave improperly, surely we are catching it at that end, are we not?

Sir Robin Mountfield: Yes, but it is a reciprocal obligation. If that were the case, why do you have a provision in the Ministerial Code?

Q68 Chairman: Because that is directed at ministers.

Sir Robin Mountfield: But it has no authority other than that of the Prime Minister.

Q69 Chairman: But, as Peter will tell us, it has developed in a typically British way to become now a kind of rule book, and woe betide a minister who offends against it.

Sir Robin Mountfield: Only if the Prime Minister of the day is willing to operate it in that way.

Q70 Chairman: Parliament and public opinion and the media have decided that it is a rule book.

Sir Robin Mountfield: If Parliament wishes to have a role in these matters it needs to have one; it needs to authorise those provisions and be able to scrutinise them. Authorisation and scrutiny run together; they are two sides of the coin.

Q71 Chairman: What is the view of the others on this?

Professor Blackburn: I have no view on that.

Professor Hennessy: I have always worried the Prime Minister had the last say on the Ministerial Code, but it is very difficult to find another system unless you have an outside person—well, you have an outside person now who advises. We went to the Comptroller and Auditor General to advise on these things because it was difficult for the Cabinet Secretary to do so. The person we have most to worry about in the British system of government in terms of excessive accumulations of power is the Prime Minister, and if the Prime Minister is the one who is the guarantor of the probity of the constitution at particularly difficult times, in the City that would be called “insider trading”. In my world it would be students setting their own exam paper and marking it. But because it is here we do not seem to worry—well, we do, but the world does not seem to worry much that the Prime Minister has the last say on what is right, and the qualities that make people Prime Minister are not necessarily at the higher end of the scale of fastidiousness that is required for that, so I have always worried about that. John Major’s great benefit was making Questions of Procedure for ministers, as it was then called, public, and it featured in the Lamont case pretty quickly, his housing problems, which we do not need to revive, and the press then made it paragraph 4 in every story about ministerial behaviour once it had been made public, so the person who made the most difference was John Major because until then it was classified for thirty years. We were the only system in the world where the guidelines for ministerial behaviour had a 30-year time lag put on them; in those days we did not see anything ironic about that because we were a secretive nation. At least we have come a long way since 1992, but I still worry about it.

Q72 Chairman: What about Robin’s point about putting obligations on ministers inside the Civil Service Act?

Professor Hennessy: Yes, the bit in the Ministerial Code. He is absolutely right about respecting the neutrality of the Civil Service; it has to be in there. Again, it does not apply to all ministers but a lot cannot believe, because they do nothing else except be politicians, that you can be very interested in government and public affairs without being excessively partisan. It is particularly important that in terms of incoming governments, particularly after a long period when one party has been dominant for a long time, which has been the modern way, even the more balanced ministers suspect that the officials are in the pockets of the outgoing rivals, and then it is a long learning curve, and something that can help guarantee that the incoming set of ministers does not

think they are the opposing side's supporters in private would help. When civil servants say: "It is not as easy as that, Minister", the easiest thing is for a minister to think to himself in the early days, when they are flush with enthusiasm and have what they call a mandate, as they conceive it, "This is not just obstructivism; he is a Tory", or "He is Labour", and one of the problems in 1997 after the long period of Conservative rule was that a lot of MPs and new ministers seemed to believe what they read in some newspapers—not all—that Mrs T had politicised the senior Civil Service. In fact, I think only two senior civil servants were politicised out of the whole lot of them but you will remember, Robin, how many of them came in thinking that you were a closet Thatcherite, which must have brought you intense personal grief, I suspect!

Sir Robin Mountfield: To my knowledge, incoming governments since 1964 have feared that the Civil Service has been captured by their predecessors. I remember in 1964 I was the private secretary to my then Permanent Secretary, who was a man of known left-wing tendencies, but he said to me, "You know, they hate us", meaning the incoming Labour Government hated the Civil Service because they had been captured. The same thing happened in 1979 and in 1997, that there was a fear by the incoming Government that the Civil Service had been politicised. Now, nobody can be made virtuous by Act of Parliament, but I do think some provisions can help to limit that by putting stakes in the ground.

Q73 Chairman: Sorry to detain you on this, but this is interesting. One of the lamentations you hear from ministers is that civil servants do not quite understand the politics of all this, and we have had Michael Bichard in front of us who is essentially signed up to this proposition, which is that basically a civil servant just needs to be far more politically acute than they traditionally have been, and far more in tune with what the politicians are wanting and saying. Is that not fair?

Sir Robin Mountfield: It is not my experience. Indeed, on the contrary. In my experience senior civil servants have pretty well-attuned antennae on political matters, sometimes almost excessively so, so I do not regard that as a serious problem. But in any case, we have more parliamentary secretaries and junior ministers in this country than anyone other than the Kenyan Government—

Q74 Mr Walker: Far too many.

Sir Robin Mountfield: —and we have special advisers as an alternative route, and to my mind it is the junior ministers and other ministers on the pay roll answerable to Parliament who are the right way of introducing political expertise into the system.

Professor Blackburn: Can I offer one observation about the Ministerial Code? One of the problems with the Ministerial Code is it tries to do too many things. It is a hybrid document, or more than a hybrid document. It covers the terms and conditions of the job, including financial interests; there are then statements of high constitutional principle about accountability to Parliament, and those really

would be better in parliamentary resolutions or a separate document; and then there are petty procedural matters about how people should behave with regard to Cabinet meetings. It is also, since it was published, somewhat of a glossy brochure as well: "This is how we operate". I think there is a case for dismantling these different purposes into different documents.

Chairman: The Government believes it has done some of that in the latest version of it. The Committee, by the way, is about to get another report on the Ministerial Code, picking up this question of independent investigation.¹⁰

Q75 Julie Morgan: I wanted to ask you your views on the people's attitude to all these matters. If you go back to the Iraq war, the Cabinet took the decision to go to war without the full legal advice. Parliament voted for it, but the public, or the people who speak to me, seem to think that their views were not taken into account at all. What can we do, or what can these proposals do, to try to address that gulf that does exist and, I think, has been increased, particularly since the decision to go to war in Iraq?

Professor Hennessy: Interesting. I think the subsequent election is the only way. Some calculations suggest Labour lost 40 seats because of the Iraq war, but it is very difficult to be precise about that, and some people think the leaking of the Attorney General's opinion with 10 days to go, a chunk of it and then the Prime Minister giving up the ghost and saying, "You can have the whole lot", do you remember, at his press conference, contributed to that. It is very hard to build the people, as it were, in the run-up to it because the people refresh the House of Commons and then they rely upon you. It is a very important question, though. If Tony Blair was here—he might have popped in if he was unveiling his pictures, as he was yesterday—he would say, "It is nerd time again, the people aren't interested", but I think the people care deeply about due process. One of the ways we imagine ourselves as a nation, and it is not a verb I would normally use because it is the sort of word sociologists use so I do not like it very much, is as "the due process nation". There are very few due process nations in the world—Canada is another one but they are very few and far between—and if people think something improper has gone on, and I do not just mean allegations of sleaze but in terms of sensible careful, rational government, they do not like it. It is good that the public is still shockable if they think ministers, MPs, or officials are falling beneath certain standards, and the moment they cease to be shockable we should worry. So your question is very important but it is very hard to think of mechanisms whereby anything plebiscitary could be introduced ahead of the conflict; it is just not like that. You have to rely on the various working parts of the constitution to do what the constitution requires them to do, whether it is senior officials, chiefs of

¹⁰ Public Administration Committee, Seventh Report of the Session 2007–08, *Investigating the conduct of ministers*, HC 381

staff, Cabinet ministers, Attorneys General, or MPs, because when you put them all together they are our last best hope, are they not? I really believe that.

Sir Robin Mountfield: My interest in this really is in one aspect of the extent to which the contents of the Code are prescribed in legislation. Your own draft included some provisions about how civil servants behaved in relation to members of the public. After all, nine tenths or more of the Civil Service never see a minister, they are engaged in service provision, so impartiality, integrity and so on in relation to them specifically seems to me an important feature that could be identified on the face of the Bill as something that needs to be provided for in the Code.

Professor Blackburn: Yes, I would agree with those points. One point I would mention is that I think the law should be intelligible on these matters; that really does matter. Symbolically it is important and people, if they want to find out for themselves what the principle is about a lot of these Crown prerogatives and powers, should be able to see them easily for themselves. I do not think this Bill achieves that terribly well though it is a creditable Bill in its objectives, as I said at the outset. For example, if you had a simple statement, “A declaration of war must be authorised by Parliament” or “treaties may be ratified or approved only under an enactment”, as in the French constitution, or if you had another provision which read: “No treaty concluded by the Government shall be binding on the United Kingdom unless the treaty is laid before Parliament and, within three months after it has been so laid, each House of Parliament by resolution authorises the Government to give consent to the United Kingdom to be bound as a party to the treaty”, I would submit that is much more intelligible than the type of drafting you see in the proposed legislation at present. Incidentally, on that point, and I do not think we will be getting round to this, insofar as the Bill deals with Parliamentary approval to treaties I do wonder whether the 21-day period is now too short if there is going to be any serious examination of draft treaties.

Julie Morgan: We have all said that these are very important changes and very welcome, and it would be good if the people were talking about them and discussing them in a way that maybe they are not.

Q76 Chairman: You want a “we the people” constitution. That is what you are after?

Professor Blackburn: Not necessarily—

Q77 Chairman: Not a George Formby constitution!

Professor Blackburn: —but I think things have got to such a state that it may only be possible to join them all up through a comprehensive survey of the constitution. There are bigger reforms taking place at the moment. To some extent the House of Lords reform, I think, has been stymied by lack of clarity over what its role and powers are, but those could have been fused in with other developments that have taken place, devolution, and possibly having special powers over treaty-making. But no special roles have been carved out for the Upper House, so it remains just a sort of talking shop, revising chamber,

very useful for giving opinions, for the benefit of the House of Commons, etc. To give another example, as it seems we will not be discussing House of Commons’ approval to general election dates, my own view is that there would be some merit in keeping Parliament in permanent existence, and there should be a constitutional Act which provided for that. Now, that would be quite useful if you thought, for example, that one of the best ways of reforming the House of Lords was to have a rotating system of election, and there is a great advantage in that because you reduce the problem of rival mandates. Hopefully we are not going to have the ghastly secondary mandate, which I fear could be on the cards, because that would actually increase the power of the Executive over the second chamber. But if you thought rotating elections would be a good idea, it would make it easier if Parliament is in permanent existence. Another ancillary benefit of that, incidentally, would also be that you would end this odd hiatus of about six weeks when no Parliament is in existence during a general election campaign. So all I am saying is you could tie up dissolution affairs with several other advantages at the same time. Now, you might not agree with all of those, that is just an example, but there are lots of other examples where constitutional changes could be interlocking with one another.

Q78 Chairman: You remind me of an Anglo-German conference I went to in 1997, when the Government just came in on the Government’s constitutional reform proposal, and the German professor got up and said: “But where is the plan?” and we do not really do plans, do we?

Professor Blackburn: It is easier to say in a constitutional statement clear matters of principle and then deal with the minutiae in acts of Parliament elsewhere, or another way to approach these reforms, incidentally, would be to have some clear statement of general principle like “Treaties must be authorised”, et cetera, and then deal with the detail in standing orders.

Q79 Jenny Willott: The point that you just raised around Parliament being in existence and so on has in some ways been dealt with in the devolved authorities. Julie and I are both Welsh MPs and the Welsh Assembly members are members of the Assembly up until the day of the election itself, and they remain Assembly members all the way through the election campaign; they also have fixed-term Assembly periods, which I think would be much more sensible, but there is also a link with something that was said earlier when we were talking about legal advice and who owns legal advice and who has the right to request it and so on. There was a massive row in the Welsh Assembly a number of years ago before the latest Government of Wales Act because it was set up in a different system and the Executive and the Assembly were not separate bodies legally, they were one, and it was very unclear to whom responsibility of the legal advice was owed, and there were a couple of instances where I believe the Assembly members and the Executive had different

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views on who should be entitled to access the advice and who should be able to have the full information, rather than just potted advice afterwards. That has all now been cleared up and they have done it the way Parliament has, so that the legal advice goes directly to the Executive and the Assembly members themselves do not have the right to ask for that or whatever, so it is interesting that there was an example within the United Kingdom which was the sort of model you were talking about, whereas now they have reverted to the old model.

Professor Hennessy: To say that maybe you could force the Government's hand is a little, perhaps, inflammatory use of language but if they will not move, if you recommended that certainly on peace and war the Attorney's opinion should be, as Lord Bingham said, for the country and for Parliament, that is the client, and they do not take any notice of you, why not suggest that the House of Commons appoints its own small legal staff, so you can have your own equivalent of a law officer who could advise Parliament in these circumstances? There are plenty of good international lawyers out there who, I am sure, would be more than glad to help, so why not do that? Find your own independent advice, and make them officers of this House in the way that the Comptroller and Auditor General is.

Q80 Chairman: That would not be as effective or as good as making sure we get the Attorney's advice.

Professor Hennessy: No, it would not, but if they will not listen to you, if you so recommend, why not propose that?

Chairman: That has been discussed, and we may return to it.

Q81 Kelvin Hopkins: On the last point, our Whips would like to say who is appointed, I am sure.

Professor Hennessy: Oh, you must not leave it to them. Absolutely not!

Q82 Kelvin Hopkins: As long as the Whips control who is appointed, then they would be happy about it! I agree with almost everything you have been saying, and it is very comforting, and I think we have made great progress, certainly on this Committee over a number of years now, but Peter laid great emphasis on the importance of Parliament challenging the Executive and being much more vibrant and strong, and certainly I think a number of us on this Committee have contributed to doing that—I think all Government members actually voted against the war, for example—but is it not putting too much on Parliament if you have a wilful Prime Minister who imposes his will over the Civil Service, tries to squeeze out opposition, implants special advisers with control over civil servants, tries to control the selection processes for his own party members in Parliament and then expects Parliament to press the nuclear button in a sense? If one constantly votes against the Government one is in trouble oneself but also one runs the risk—and the Whips always threaten this—of bringing the Government down. They say, “If you defeat the Government we will have a general election next

week, you have a marginal seat, you will not be an MP any more”—they use that pressure constantly. They have been using it this week with certain members. They do not bother to talk to me but with others they do; I know, they tell me. Our draft Bill is better than the Government's version, but do we not really need to make the Civil Service stronger? Get it back, in a sense? Give it independence and strength? I am a bit of a golden-age person myself and I liked the Sir Humphrey model better than what we have now. Then they could speak truth unto power, and we would have people in the Civil Service who are not just businessmen slotted in at a high level to speak the language of Blair or Thatcher but are genuine servants of the State who see themselves as special and different from people from outside; they have a loyalty to the State, a loyalty to the citizenry, and are strong, independent and objective advisers to Governments. Do we not really want to work hard to build up the strength and independence of the Civil Service, rather than rely too much on Parliament?

Professor Hennessy: I am a great believer in that. It is not “any other job” being a Crown servant, and when you were talking to the First Commissioner about who owns the Civil Service, it is the Crown. The reason we can have a Civil Service that transfers almost exactly from one administration to another is the binding notion of the Crown. It may be a fiction in some people's eyes but it is the best way to do it. It links the police, the intelligence world—everybody who is a Crown servant—and I think being a Crown servant is different, not just because you get less pay than almost anybody except university professors but because it is a job that really is different and special. You must let elected ministers prevail, of course, in the end, because that is the deal, unless it is illegal or they are taking short cuts or indulging in deliberate deception. You have the Accounting Officer's note. If they are using money you voted for specific purposes in Parliament for something dodgy, the Accounting Officer has the duty to point it out to the Committee on Public Accounts. That is how we could have stopped a Watergate here, if we had had one. The Cabinet Secretary of the day as Accounting Officer for the secret vote, as it was then called, could have said: “This money has not been voted for you to bug the Opposition's campaign offices”, if the Cabinet Secretary had been alerted. But I think it is a human factor, and you have put your finger on it. There is no point signing up for these special Crown service jobs unless you have a notion of their specialness, but a lot of people, if they are battered by special advisers or the Government has an overwhelming majority and the Cabinet are not exactly doing what they are required to do either, settle for a quiet life. As you know, you cannot dissent too often on too many things without being regarded as a bit of a fruitcake, you have to be discriminating, but peace and war? There is nothing higher. And Parliament is the last best hope. It has to be.

Q83 Mr Prentice: On this Accounting Officer question, we have this huge controversy at the moment over the 10 pence tax rate with five million

people losing out, one in five households. Is there any obligation under the Accounting Officer rules for the Permanent Secretary of the Treasury to have perhaps entered—I do not know what it would be called—a note of dissent or a note of caution? Something like that?

Professor Hennessy: I do not think so. Robin is the man to ask.

Sir Robin Mountfield: Accounting Officer minutes are about legality and propriety and value for money.

Q84 Mr Prentice: Not in terms of policy cock-ups?

Sir Robin Mountfield: Very difficult. A point can be stretched occasionally—after all, Accounting Officer minutes are very rarely done in practice. Occasionally it is threatened. Indeed, I threatened it myself on more than one occasion.

Professor Hennessy: Give us an example!

Q85 Chairman: Yes. Give us, as it were, the circumstances in which one might do that.

Sir Robin Mountfield: It would be contrary to my professional obligations.

Q86 Chairman: You are a free man!

Sir Robin Mountfield: Not as regards my duty in the past. It is difficult. It is a nuclear option and it does not happen very often, but the nuclear power operates in effect as a deterrent; it does give the Accounting Officer some opportunity to warn ministers if they are getting near the edge. Just to make one point on Mr Hopkin's point about the Civil Service having some more entrenched protection. The problem seems to me to be that right through this whole set of issues is the tension between, on the one hand, the necessary pragmatism and flexibility and the fact that the Civil Service has to work for the Government of the day, and on the other hand the need to entrench certain key principles. Now, the trouble is that, of course, principles are never going to be justiciable in a court. All they can do is provide us with a trip wire for Parliament to have some opportunities to scrutinise, and I think that is really the objective of these provisions.

Q87 Kelvin Hopkins: Would the Bill that the Government is proposing be improved by having some of the components in our draft Bill, like the definition of the Civil Service and what civil servants are? I think the wording of the Civil Service Code, Part II about the ethics of the Civil Service, would make a real difference. We would retain flexibility and whatever but it would improve the Bill, but the Government seems to be slightly drawing back from some of the recommendations.

Sir Robin Mountfield: That is one of my main points, that the Bill needs to provide rather more of the detail of what should be in the Code, without limiting the Government's flexibility in a managerial sense which is very important. The world is changing. Somebody referred to the porosity of the

Civil Service, the movement in and out—that is the reality, that is going to happen and is the world we live in. The rules have to provide for that but there are, nevertheless, underlying principles that need to be observed right through that, which are going to need to survive for a very long time.

Q88 Mr Prentice: The Government is proposing to transfer some prerogative powers to Parliament, and there is a reference in Volume I of this that the Government is conducting an internal scoping exercise on Executive prerogative powers. Is it not astonishing that there is no list of prerogative powers that we can look at?

Professor Hennessy: Yes.

Sir Robin Mountfield: I think the prerogative power in principle is everything except where elsewhere specified, is it not?

Professor Hennessy: Pretty well, and also in the 50s a very senior Permanent Secretary to his Private Secretary said: "The royal prerogative is what I say it is", and it is a wonderful portmanteau. This list you have is way ahead of anything we have ever had before. In fact, Walter Bagehot said famously, which Robert will remember because we had to read it when we were kids, that somebody should write them down; nobody knows which have lapsed. This is 1867 and is still in use. It is still a great mystery. The British constitution is a magical mystery tour.

Professor Blackburn: With all due respect, these you will find in any constitutional law text book, and they probably were taken from one, I would think. You need to understand about the prerogative, that it is, as one writer said, the residue of arbitrary authority that at any particular time is left in the hands of the Crown. The prerogative is just a fancy word, if you like, for a part of the common law which recognises and accepts that government has certain inherent powers which have existed since time immemorial to do whatever is necessary to govern the country, and those concern the fundamentals of any government such as defending the realm, keeping the peace, international relations, appointment of ministers. I am not sure that you can have an exhaustive list because the common law will accept that in certain circumstances government has got to do whatever is necessary in the circumstances. The prerogative in the common law is the other side of the coin for not having a written constitution, because the ultimate authority in the State with us is the Crown and what the common law allows the Crown to do.

Q89 Chairman: So we are trying to constitutionalise the prerogatives, at least those that seem to matter particularly.

Professor Blackburn: Yes. This is the way the Government is proceeding, and that is all that can be done at the moment.

Q90 Mr Prentice: Finally, we were talking in the earlier session about gaps in the proposals that are

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being presented to us. There is a big gap, is there not, in machinery of government changes? We have just produced a report on this.¹¹ Would you like to see the Bill amended to lay obligation on the government of the day to have the approval of Parliament before Whitehall, the departments, are reconfigured, or should we be bothered about that?

Professor Blackburn: My view is there should be an affirmative resolution before major structural changes are made. I think not every machinery of government change needs to go through a laborious process like that, but I think you could certainly describe in some provision the key machinery of government changes that should receive an affirmative resolution.

Professor Hennessy: I think, too, the last time I can remember that Parliament created a department was the Ministry of Defence Act 1946. It is the only Ministry I can think of that you cannot abolish without primary legislation and I should look at why that is the aberration. The Minister of Defence existed, Churchill was Minister of Defence during the war but he did not have a Ministry, and it was created to co-ordinate but Attlee made it into a statutory matter.

Sir Robin Mountfield: It had been the practice, I think, at one stage. The Ministry of Power, its predecessor the Ministry for Fuel and Power and, I think, maybe the Ministry of Agriculture had statutory powers at one stage.

Professor Blackburn: The Bill is a sort of ad hoc collection of five matters, so finding some common thread between them is a bit tenuous, though most of them have some prerogative aspect to them. The public order matter is out on a limb. It would make sense having machinery of government changes in the same Bill that deals with the Civil Service.

¹¹ Public Administration Committee, Eighth Report of the Session 2007–08, *Machinery of Government Changes: Further Report*, HC 514

Q91 Mr Walker: Professor Hennessy, on patronage, you talked about supine ministers. How about this for an idea? All Members of Parliament, regardless of what they do, whether in the Executive or back benches, get paid the same money. You will end the spectacle of people clinging on for grim life for their additional £30–70,000. It used to be that when you got in the Cabinet and you left the Cabinet that was the end of your political career. We now have the spectacle of people sitting in the Cabinet, then taking junior ministerial jobs outside the Cabinet. It may not fly but it does seem that a lot of people, when there is thirty grand extra in the pay packet, forget their principles.

Professor Hennessy: I am not sure that will work because the Brits will always settle for status rather than reward, and we talked about that when I came to see you about the Honours system. People will do anything for a little ribbon and a dash of enamel, and I fear that is the reality.

Kelvin Hopkins: And a chauffeur driven car.

Q92 Chairman: And the twist in that is that, knowing that, you can so use the system to produce benevolent outcomes. That is, in a sense using the culture to produce outcomes that you would not otherwise use. Anyway, that is a different story. We have only scamped across some of the territory but we have taken on board some of the points you have given us about what is good here, and also what we need to focus on to improve. This is the only chance we are going to get for quite some time to get our hands on some of these issues, and we want, within limits, to make sure we get them right, so not just today, thank you, but if you want to tell us other things too as we go through this process we would be very grateful.

Professor Hennessy: The British Academy are going to have a crack at it in June, so I will make sure you are invited to that.

Chairman: Thank you very much indeed for this morning.

Tuesday 29 April 2008

Members present

Dr Tony Wright, in the Chair

Paul Flynn
David Heyes
Kelvin Hopkins

Mr Gordon Prentice
Mr Charles Walker

Witnesses: Rt Hon Ed Miliband MP, Minister for the Cabinet Office, Chancellor of the Duchy of Lancaster, and Sir Gus O'Donnell KCB, Cabinet Secretary, gave evidence.

Q93 Chairman: I am delighted to welcome Ed Miliband, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, and Gus O'Donnell, Secretary of the Cabinet and head of the Home Civil Service, who have come to help us with our look at the Government's draft Constitutional Renewal Bill, particularly those parts of it which have interested this Committee and on which we shall report to the House. Thank you very much for coming along and talking to us about it. Do either or both of you want to say anything by way of introduction?

Ed Miliband: Very briefly, if possible, Chairman. Can I start by thanking you for the invitation to come to this Committee. Could I also put on the record our thanks to this Committee for all the work that they have done over a number of years in the whole area of constitutional renewal. You described in a recent debate in the House of Commons us having looked at your back catalogue in order to inform the Constitutional Renewal Bill, and I think that is an absolutely fair comment. I wanted to start by saying I think your work has been extremely useful to us. Let me make three specific points about our session today before handing over to Gus. The first is that the Civil Service aspects of the Constitutional Renewal Bill which we are going to be discussing today are very much a part of an overall approach to constitutional renewal which recognises that Parliament does need to be strengthened in relation to the Executive. That was very much the thrust of the statement that the Prime Minister made when he took office last summer. In a way, putting the overall operation of the Civil Service on statute and taking it away from being part of the prerogative is a recognition of that. Secondly, on the Bill itself, I think this is consistent with our approach over a number of years in relation to the Civil Service. The first act of the new Prime Minister, I believe, was to remove the Orders in Council which gave an executive role to special advisers. You have seen in recent years the publication of a new Civil Service Code, updated Codes of Conduct for ministers and, indeed, for special advisers and, of course, in a way the Bill is the most important development so far, putting the values of the Civil Service and its operation into legislation. The third and final point I would make, Chairman, is it is very important that this Bill does not simply try and preserve the Civil Service in aspic because I do think that the Civil Service, and in a way Gus has led the way on

this, has shown that it needs to evolve in relation to the diversity of its numbers, the way it understands delivery of public services, the way it brings in outside expertise. Very much our intention in framing the Bill was to provide sufficient flexibility for the Civil Service to adapt and respond to the big challenges that it and the country faces. In a way, I think that is the biggest challenge facing the Civil Service and, indeed, the Government over the coming years. The final thing I would say before handing over to Gus is this is a draft set of clauses that we have published and we very much welcome your input before we come up with the final product.

Q94 Chairman: That is interesting. Just on the last point you made, and it is something I was going to ask you about, you are really quite open to taking even substantial amendments, are you, to the draft Bill?

Ed Miliband: Definitely we are very interested in what you and others have to say about the Bill.

Q95 Chairman: Thank you very much for that.

Sir Gus O'Donnell: Could I just endorse what my Minister said about the role of this Committee in this Bill. I think this is a really significant moment and I feel very pleased to be here answering questions on Civil Service legislation. If you think of it, 1854, Northcote-Trevelyan came up with this set of values and they have endured. I think there is a lesson there. Despite the fact that the labour market and the Civil Service are fundamentally different from what they were in 1854 these values have persisted. The Civil Service is changing, as Ed said, and the challenges we are facing are very different. If you think of the numbers of the Civil Service alone, in the last 13 quarters they have been reducing every quarter and, if we carry on with current trends, in the next year or two we will be at the smallest size since the Second World War. We are delivering more with less. We are working more across departments. We are meeting our efficiency targets. For me, the value of this legislation will be does it help the Civil Service perform for the 21st Century and to do that there is just one thing I would stress more than any other: let us keep it simple. Northcote-Trevelyan endured because it concentrated on the values. When they finished their report they recommended that this be carried forward in a few clauses. The challenge for Parliament is to stick by what Northcote-Trevelyan

said so that we keep it very focused and allow the Civil Service the flexibility to meet what will be the challenges, most of which I do not know, going forward over the next 150 years.

Q96 Chairman: Thank you for that. I have lost track now of the number of Cabinet Secretaries that I have asked these sorts of questions to about Civil Service legislation and the contrary views that we have heard expressed over the years. I forget what I have asked you about this. Have you always been in favour of a Civil Service Bill?

Sir Gus O'Donnell: I have been in favour of a Civil Service Bill as long as it can be very principled and values-focused, and this Bill I am in favour of absolutely.

Q97 Chairman: What do you say to those people who say, "We have managed for 150 years quite happily without all this being written down"? Are we in some kind of difficulty now that makes us have to do this? Are these values under threat?

Sir Gus O'Donnell: No, I do not think so. All I am saying is here is an opportunity to put them in statute and they are there forever, so if there were a threat in the future, but actually no. If anything, partly with your help, the Civil Service Code has embodied these values, it is in the document that civil servants read and the Civil Service Commissioner helps us go and sell that. We did it recently at the Civil Service Live event with a question time chaired by Janet Paraskeva. I think we are getting the message across to people and the new Code puts it in very simple language. If anything, I think we are in a strong position now to guide against whatever uncertainties there might be over the next 150 years. If it is an opportunity to put them in statute and it is kept focused and allows the Civil Service to be flexible enough to meet the needs, whatever they are, over the next century and a half then that will be a very big positive.

Q98 Chairman: I am sure we shall come back to aspects of this shortly. Could I ask you a couple of other things to start with. One of the virtues of getting you here periodically, Gus, is we get replies to our reports. They arrive as if by magic after we have waited for several months. We invite you to come along and the day before you come we get these reports. We have had two, one on our report on machinery of government changes, which is to do with the ability of governments, prime ministers, to reorganise the machinery of departments basically without going through any defined process, and the second one on public appointments where you have given us a very detailed and helpful reply. Could I just ask about both of those. On the machinery of government changes we made an argument that essentially said if government was going to reorganise any other bit of the state it would go through quite an elaborate process to do it, it would issue consultation papers and there would be a whole great palaver about it but governments can reorganise themselves even on

a huge scale by a prime ministerial pen. We thought we can do better than that. You have told us in your report, "Oh no, we must stick with the existing system" otherwise it would basically dent the prerogative powers of the Prime Minister. The question I have for you is surely the whole point about this Constitutional Renewal Bill is to dent the prerogative powers of the Prime Minister, that is the underlying rationale. Why in this area are you using that as a defence against our report?

Sir Gus O'Donnell: I think that is because the Prime Minister takes the view that he needs to have the ability to shuffle around with his Cabinet, shuffle around with the posts, shuffle around with the responsibilities, as he did when he came into office with the creation of the Department for Children, Schools and Families and DIUS.¹ He takes the view that this is his job and he could not do that in advance and put consultation down, he needs to get on with it and have Cabinet ministers in post. It is a political decision very clearly by the Prime Minister that that is what he thinks is the right thing to do.

Q99 Chairman: But in relation to going to war he is saying that used to be the position but, in fact, we need to involve Parliament now. I cannot understand why, when we are making very significant changes to how government is organised, we cannot have some sort of similar procedure involving Parliament.

Ed Miliband: I am very sympathetic to the two reports you have issued on this. Let me explain the dilemma in this way and the reasoning behind our response. When it comes up to a General Election, for example, a new government coming in might well want to reorganise government. I do not think it would be right to say to a new government, "I am sorry, you will have to wait for a number of months in order to do that reorganisation". That is one aspect of it. Think of a government that is in power, as ours has been. Are we genuinely saying that we will consult in advance on a reorganisation of portfolios? Where would that leave ministers who were about to leave and lose half their portfolio or possibly all of their portfolio in the interim? I am sympathetic to this, but I cannot see how it is easy to do this in advance of any changes because a particular personality, an individual in our system, is intimately linked to the particular department and the configuration of that department for which they are responsible. You then come to the question of could we do it post any change that has been made. You suggested doing it by having these Transfer of Functions Orders done by affirmative resolution. Currently they can be prayed against and they can be debated on the floor of the House. My answer to that, Chairman, and again we did think about this quite hard, is you would then be saying to Parliament, "Have a debate on something which has already happened". I think the point of this Constitutional Renewal Bill is to give Parliament a say over things

¹ Department for Innovation, Universities and Skills

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over which they genuinely can have a chance to make amends. Realistically, you are going to have a government that has already made a change putting it before Parliament to be rejected. Of course, there is a strong feeling then that a Transfer of Function Order can be prayed against and government can think about how it handles that. I am sympathetic to the fact that reorganisations of government should be kept to a minimum. I think that is right, they should not be done for the sake of them, and I am sympathetic to the points and comparisons you make with other prerogative powers that have been put onto statute, but I cannot see a way of resolving the two problems that I have just identified.

Q100 Mr Prentice: At our sister parliament in Ottawa there is a Westminster system and changes to departmental organisation in Canada have got to be approved—this is my understanding—by the Canadian Parliament. If they can do it over there, why can we not do it over here? Secondly, we had Professor Hennessy before us last week and he told us that the Ministry of Defence was set up by statute after the Second World War, it may have been the War Office or something before then, so we already have a Whitehall department set up by statute and if the prime minister of the day wanted to change it then presumably the primary legislation would have to be changed.

Ed Miliband: As I say, these Transfer of Function Orders do have to go through this House where they are subject to negative resolution. The other point I would make is I think there is an appreciation of the need to set out very clearly the reasons for changes, and we have undertaken in our response to say all future changes will be set out as I think the changes were last summer, the reorganisation last summer when there was an explanatory memorandum setting out the reasons for the changes, and ministers should make themselves available to select committees to explain the rationale behind changes. I am not aware of the Canadian situation, I will undertake to look into it. What we must not do in giving Parliament necessarily powers to hold the Executive to account is put government into limbo. Having thought quite a lot about your response and our response to your response, I cannot see how we can necessarily enhance Parliament's powers in this area without having that effect and this would be constraining the powers of any prime minister from whatever party in a way that would not necessarily be helpful to our system.

Q101 Chairman: I think you are more sympathetic than the Government's reply, if I may say so, and we might have interesting further discussions about this. So much else in the Constitutional Renewal Bill used to meet objections of the kind that you have just advanced, which is that basically we could not work government if we do these kinds of things if we had Parliament involved in approving war and all that kind of stuff. We have gone beyond all that and we have found out there are ways of

solving problems if we really want to. That leads me to a second point. Reading the reply to what we said on public appointments and the criteria seems to be that these posts of particular public importance will be ones that deserve the involvement of Parliament and parliamentary scrutiny, the thought did occur to me on that test, and in the spirit of wanting to wrest prerogative powers away from prime ministers, which is the spirit of this Bill, why could the same approach not apply to the appointment of Cabinet ministers? Why should those appointments not have to run before select committees first?

Ed Miliband: I will let Gus answer that one!

Sir Gus O'Donnell: Are you talking about pre-appointment?

Q102 Chairman: Yes, pre-appointment. If a prime minister says, "I want to make this man Minister of Defence", he has to go and meet the Defence Select Committee and go through the same process that we described in relation to major public appointments.

Sir Gus O'Donnell: Well, certainly I have never worked with a prime minister who has thought of that one.

Q103 Chairman: No, but we are in radical new territory here.

Sir Gus O'Donnell: It would certainly take us into radical new territory. I just think of the practicalities. If somebody is put forward as the Defence Minister in the period before pre-appointment scrutiny, who is the Defence Minister?

Q104 Chairman: That will do as the first answer.

Sir Gus O'Donnell: Quite important if we have a real defence crisis. You would like to know there was a Defence Minister.

Q105 Mr Walker: Do you subscribe to the view that the captain should choose his team basically?

Sir Gus O'Donnell: Yes.

Q106 Mr Walker: The prime minister should choose his team?

Sir Gus O'Donnell: I think prime ministers should choose their Cabinet, absolutely.

Mr Walker: I think I might agree with that, Chairman, just to go against your line of questioning.

Q107 Chairman: I think Ed is certainly more interested in this idea than Gus was.

Ed Miliband: I am afraid, Chairman, you may call me a conservative on these matters but I tend to agree with the Cabinet Secretary on this issue. What we are trying to do here is strike the right balance between Parliament holding the Executive to account and, indeed, as I indicated in my opening remarks, it needs to be strengthened in that respect and that is the whole intention of the reform programme that we are talking about, but it needs

to do so in a way that does not gum up the works and stop the proper business of government happening.

Q108 Chairman: Let us move back to more solid territory. On the Civil Service legislation we have had the Government's draft Bill and back in 2004 we had a Bill produced by this Committee and have now got the Bill proposed in the draft Constitutional Renewal Bill. These vary in different ways. In a nutshell, can you explain the process that explains any of the changes between the Government's position in 2004 and the one that we have now?

Sir Gus O'Donnell: In many ways looking at it again, taking account of what we have learned over the last couple of years, in all respects what it has suggested to me is the point I made right at the start is far more important. Things can change very rapidly and it strongly suggests to me keep this principles-based, keep this values-based and do not try and tie down things where actually you think you have got it right but for reasons that you had not anticipated it turns out not to be quite right. For example, if you specify definitions in legislation and it turns out actually you would have had to change that definition and that would have involved a change in primary legislation if you had stuck with the definition you started with in the first place. What it has led me to think on and try to implement through this is to keep it as principles-based as possible.

Ed Miliband: The Chairman's is a very good exam question. From looking at it, obviously I was not involved in the 2004 draft Bill but I do not think there are what we would describe as material changes from that version to this. There are issues about the way that you define the Civil Service, for example, which has changed. We take account of certain changes that have been made. For example, we have given additional powers to the Civil Service Commissioner so that she can undertake inquiries in response to complaints from civil servants, which was a change made in June 2006. I stand to be corrected, but as I would see it I do not think there are material changes, certainly not in intention and I do not think in letter either from the 2004 version.

Q109 Chairman: We will produce a list of these and show you that there are changes and you will probably have things to say about all of them. Can I just ask you this because this was raised by Sir Robin Mountfield when he came to see us last week. He said that one of his concerns about where we are at now is the reason for having legislation of this kind was partly to make sure that ministers did not do things that ministers should not do in relation to threatening the integrity of the Civil Service. It was okay having a Civil Service Code but there was the other side of the relationship which was ministers either not statutorily having to listen to Civil Service advice or asking civil servants

to do things which were improper. He wanted the reciprocal obligation to be inserted into this Bill. Is that not reasonable?

Ed Miliband: I have looked back at your report on the draft Bill of 2004 and this Committee said that it was not minded to recommend that statutory form needs to be given to the obligations of ministers towards their civil servants. I agree with this Committee's report. Let me explain why. There would be two implications of doing what Sir Robin recommended in his testimony to you. One would be to put into statute ministers' obligations, and one might think that was a good thing, but the other implication of it would be to make justiciable the question of compliance with the Ministerial Code, in other words put into the courts potentially the question of whether ministers were or were not complying with the Code. I think ministers should be held to account by Parliament. Ultimately, as we know, it is for the Prime Minister to choose who is and who is not in government, but ministers are held to account by Parliament and in the court of public opinion. To open up the question of whether a minister complied with the Ministerial Code into judicial review does not seem to me to strike the right balance between the proper functions of the Executive, Parliament and the courts in this country. Personally, I do not think that would be the right way to go. I do not know but I assume that was why you did not think it was a good idea back in 2004–05, and I agree with you.

Q110 Chairman: We are in a sort of continuing discussion about this. We are interested in Robin Mountfield's position. If we are talking about core principles here, not about detailed implementation, one of the core principles is that ministers have to respect and comply too.

Sir Gus O'Donnell: I suppose I come at this as Head of the Civil Service thinking let us have a Civil Service Bill about what civil servants should do and the values that civil servants should operate. They are very clear, that is what this Bill is about. We have a Ministerial Code which handles what ministers should do and the Prime Minister is in charge of that. To my mind, the great value of this Bill is concentrating on the Civil Service.

Q111 Chairman: The Ministerial Code is non-statutory, a prime minister could abolish it tomorrow if he wanted to. It is a very fragile basis for a key constitutional relationship, is it not?

Ed Miliband: The requirement for civil servants to act on the four values that Gus talked about, including impartiality, is very clear and set down in statute. As I have said, there are complaints procedures if civil servants feel they are being put under undue pressure by ministers or others not to act in that way. I think any prime minister who came along and said, "I am going to change the Ministerial Code and ministers no longer have to uphold the political impartiality of the Civil Service and ask the Civil Service to act in a way which

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conflicts with the Civil Service Code”, that prime minister would be held to account in the court of public opinion, as I say.

Q112 Kelvin Hopkins: Our system has a tendency to concentrate power in the hands of the Prime Minister and Downing Street and it works because there has been an effective system of pluralisation, there have been different centres of power which have a degree of independence, the key one of which I think is the Civil Service.

Sir Gus O'Donnell: Absolutely.

Q113 Kelvin Hopkins: There is a view that the Civil Service has been progressively undermined in its independence. You may disagree, but this is a view of the world and one I hold to myself. Does this not provide an opportunity to break with that Blair regime, or what has happened under the Blair regime, and re-establish the Civil Service as an independent body which can, as the saying goes, lead truth unto power, advise ministers and have a different coherence of its own and is not just a plaything of prime ministers. I speak as a person who is naturally conservative about these matters and I do have a view of the golden 1980s of these things and I rather admire the Sir Humphrey view of the world which I think was better than what we have had in recent years. Do you think this is an opportunity to re-establish what we have lost?

Sir Gus O'Donnell: I am afraid we start from rather different places.

Q114 Kelvin Hopkins: I thought we might.

Sir Gus O'Donnell: I do not accept the premise. I do think we are in an age now where the Civil Service is very strong, we attract the best. When you think of where the university graduates want to go, recent events have made it even more attractive for them to join the public sector, particularly the Civil Service, than possibly places elsewhere not so far from here, the financial sector. I do not have a problem with that. We are attracting very good people and are retaining them. I think we are very effective as a Civil Service, much more professional than we have been. I am afraid your golden age of the 1980s, if we look on it we did not have professional finance directors and the HR service was slightly embarrassing. I lived through that. I was recruited in 1979 and the fast-stream there was not tapped into if you happened to be anything other than white male Oxbridge, that was the vast proportion of people we were getting into the fast-stream, but now we have majority female entry into our fast-stream and are taking a much more diverse pool and, therefore, getting much better talent. I would be very happy to stand up and say I think the Civil Service now is better than it has ever been, not just it has not declined. We are very happy to speak truth unto power and that is why the Civil Service values—honesty, objectivity, integrity and impartiality—are absolutely right and that is why I value this Bill. I am strongly in favour of those things. I do not think it is a plaything, it is there to advise and it

does give very strong, very clear advice on the basis of analysis of evidence and its ability and professionalisation to analyse evidence is hugely better than it was in the 1980s. I remember trying to give some advice to a Chancellor in the 1980s and on the basis of the crudest possible economic models it would take me a long time to estimate the impact of particular policies. With modern day computing I can do a hundred times as good a piece of work in about a tenth of the time. The technology has allowed us to be much more evidence-based and we also have a lot more data on which to collect that evidence and we do pilots. This golden age was not as evidence-based because there was not as much evidence and it was much harder to analyse because we simply did not have the tools. If I wanted to analyse what is the worldwide knowledge on a particular subject now I could get a vast proportion of it from the Internet.

Mr Prentice: So you did an analysis on the abolition of the 10p tax rate?

Q115 Kelvin Hopkins: I am pleased about all this professionalism and evidence-based and so on but, nevertheless, the Civil Service is different from other parts of our polity in that it is driven, and has to be driven, by a sense of commitment to the public interest. It has an ethos which is very powerful and absolutely vital to government.

Sir Gus O'Donnell: Absolutely.

Q116 Kelvin Hopkins: It is my impression that this has declined over time and we now have imported people from the money-making parts of the institution, if you like, and Mammon has been confused with public service, and even though I am sure that people are very professional, this fierce sense of loyalty to the citizens, to the public sector, to public service, to the nation, in a sense, is very different from that of those who work (very brilliantly no doubt) in the City and elsewhere who are interested in making money and running businesses and so on. I know people who want to work in the public sector for the public service; they do not want to work in the profit-making or profit-driven sector and they are very different, and that is the difference between the old Civil Service and the new Civil Service that there is this overlap.

Sir Gus O'Donnell: I think there is one piece of evidence that contradicts that, the relative pay levels that you are talking about actually have gone the other way, so public sector pay relative to that in the financial sector means that you are much better off in the financial sector than you were, rather than in your period when it was actually much closer. I think now you have to have a much stronger public sector ethos to be in the public sector because you are actually taking a much bigger financial cost to not going wherever you can be paid the most, so we have a very strong public sector ethos.

Q117 Kelvin Hopkins: If we can move on to politicisation because we had some of your retired former colleagues with us a couple of weeks ago,

and they were saying that back in the 1970s there used to be a range of views within the Treasury, for example between Keynesians and neo-Liberals and monetarists or whatever, and there was a debate. Certainly I know that my own tutors in economics at university would say if economic policy changed there was always somebody who made one yesterday—"I have another model for you, Minister," for example after a devaluation or after being rejected from the ERM and so on—but the politicisation of recent years has meant that opposition within the Civil Service and the range of views within the Civil Service has been narrowed and we have become more focused and there is a view which is the view that everyone takes of the world now, there is not a difference of view about how we run the economy, for example. Is it not healthy to have a range of views within the Civil Service, particularly in the Treasury?

Sir Gus O'Donnell: I think it is very healthy to have a range of views, I strongly agree with that. One thing I would say is that we now have access to views not just within the Civil Service but internationally, and if you want to look at the international evidence now, at the push of a button you can get what anybody has written on, say, running the economy. Things have evolved over running the economy. As you say, in the 1970s—and I used to teach it—there were Keynesians versus monetarists. The one thing I would say about macroeconomic performance post the move towards inflation targeting is that it has been enormously better than it was before so the degree of debate has diminished somewhat. If you look at average growth rates, the variance in growth, the variance in inflation and the level of inflation, if you take those as a guide to the quality of macroeconomic performance post the inflation-targeting period, it has been enormously better than it was in your golden period of the 1980s or the 1970s, vastly better.

Q118 Kelvin Hopkins: Just a final point, a question I asked last week, in our draft Civil Service Bill, a number of things notably were missing from the Government's version, a definition of the Civil Service and the State at the beginning, which I think was very good, and the other thing was a list of values for the Civil Service, which is omitted from the Government's document. Do you not think it would be better to take more of our original into the Government document?

Sir Gus O'Donnell: I am with Northcote-Trevelyan; keep it short with few clauses, and it is very, very important that we have the values there.

Q119 David Heyes: I want to ask you about the key provision in the draft Bill which relates to fair and open competition for appointments and it says that selection must be on merit and on the basis of fair and open competition. If that is true—and obviously we would all subscribe to that—why have you provided exceptions from the rule in relation to the obvious examples, Crown appointments and diplomatic appointments?

Sir Gus O'Donnell: First of all, I am very strongly in favour of fair and open competition. I think it is a hugely important guarantee that we get the best people in the best jobs, and that is very important and particularly important for all the top posts. I think that there may well be occasions when you need an exemption and you mentioned the diplomatic one, and again I would stress I think something like 99.5% of all top diplomatic posts are done by fair and open competition and the exemptions are very, very rare. The one that I guess I was most involved in was when I was working for Prime Minister John Major when he appointed Chris Patten to Hong Kong. I think there were very specific political reasons why he felt that was the appropriate appointment at that time. So I am with you, I would want these things to be incredibly rare, very exceptional, and for specific political reasons.

Q120 David Heyes: But the draft Bill gives total exemption for diplomatic appointments.

Sir Gus O'Donnell: It allows for that exception. I would want that exception to be used incredibly rarely.

Q121 David Heyes: What about Crown appointments, what is the justification for exempting them?

Sir Gus O'Donnell: What particular ones are you thinking about?

Q122 David Heyes: I do not know but that is the provision that the following selections are exempt from this requirement: selections for appointment to be made directly by Her Majesty.

Sir Gus O'Donnell: They are Royal Household appointments.

Q123 David Heyes: And the reason they are exempt?

Ed Miliband: My understanding is those would be the people who work in the Royal Household who are in a particular position in relation to the Royal Family, and I think we can understand some of the reasons why those might be exempt.

Q124 David Heyes: The Chairman has referred to your response to our proposal about pre-appointment hearings. In responding to us, you said that the reason for not having pre-appointment hearings for senior diplomatic appointments is because all public appointments are made on merit. Is there not a clear contradiction here?

Ed Miliband: If I may on this, I understand, just to echo what Gus said in relation to the Diplomatic Service, that this should be a power that is used very rarely. We have actually looked back at the historical records on this and it may interest the Committee to know there have been 11 such appointments in the last 40 years, starting in 1968, so this is a power that is used very rarely. If the Committee has concerns about this, I do not think that pre-appointment hearings are really going to be the way to solve this. Pre-appointment hearings

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are designed—and this is something the Committee very much recognises in its report—for posts, and I quote from your report, “for which accountability to Parliament and the public are an important part of the role”. If you are talking about the Governorship of Hong Kong for example, I do not think that is in the same category, so the Committee might want to look for remedy, if it worries about this issue in relation to the Diplomatic Service, and I think it is justified because it is a very rare power that would be used, but I do not think the pre-appointment hearings is necessarily the remedy for that.

Q125 Chairman: Can I just come in on David's question on Crown appointments, I think you had better drop us a note on this because I do not think it can be the case we are simply talking about Royal Household appointments here; we are talking about appointments that are made by the Prime Minister in the name of the Queen, there is a category of appointments, and I think you ought to dig out the category and tell us about it and then try and tell us why that category should be exempt from appointment on merit?

Ed Miliband: Fine, we will do so.

Q126 David Heyes: As I said, the draft Bill is strong on merit in terms of appointment, but it does not have the same requirements in relation to advancement and promotion; why is that?

Ed Miliband: Gus, you might want to talk about that because they are directly in relation to your role.

Sir Gus O'Donnell: When we get somebody in the Civil Service, and we are absolutely clear about this, that at the top levels of the Civil Service we are into fair and open competition. As you manage someone, the half a million civil servants, through their careers, there are all sorts of considerations where you can have managed moves and the like, so I do not think it would make sense to micromanage this very much. What I have done is to bring the Civil Service Commissioner into the appointments for example of all permanent secretaries and now I have extended that to the top 200, so she has a role in all of those appointments and I think that has gone much further than we have ever done before and I think that is really useful, but I do not think we should get her in to micromanage all the individual promotions. That is a job for managers within departments to do.

Q127 David Heyes: The lack of any Code to support promotion and advancement leaves the door open, does it not, for ministerial vagaries? We all remember the Thatcher test about “Is he one of us?” There should be an opportunity in this Bill to close that down.

Sir Gus O'Donnell: This will be covered by the whole of the top 200 appointments within the Civil Service which are under a competitive process with the Civil Service Commissioners involved on all of those posts.

Q128 Mr Prentice: I think I am right in saying that when we had the First Civil Service Commissioner in front of us last week, Janet Paraskeva, she expressed some concerns about this, that although recruitment into the Civil Service is on merit, then promotion once inside the Civil Service is not necessarily on merit. I hope I am not putting words into her mouth.

Sir Gus O'Donnell: It is on merit.

Q129 Chairman: No, she was saying it did not come under the rubric of the Civil Service Commissioners and that is what her concern was.

Sir Gus O'Donnell: But it is regulated, it is within our standard employment methods. What I am saying is for the whole of the half million Civil Service that is what we do.

Q130 Mr Prentice: Okay, so people are promoted on merit, that is what you are saying?

Sir Gus O'Donnell: Yes.

Q131 Mr Prentice: I was just going back to the Treasury Capability Review, and you were the former Permanent Secretary there, and on page 21 it says that 37% of the Treasury's senior civil servants believe that there is a fair system of career progression. It got me thinking about the other 63%. The most recent staff survey confirms that confidence in the system of promotion is declining. That is in the Capability Review of the Treasury which was just published, I do not know, just a few months ago, so there is an issue there, is there not, if it has been identified in the Capability Review?

Sir Gus O'Donnell: Absolutely, the Capability Review process that I started.

Q132 Mr Prentice: Yes!

Sir Gus O'Donnell: And that we now actively monitor what staff think about these processes I think is a very important and good step forward. You will find in any organisation if you ask those sorts of questions you will not get 100% answers. Those answers are disappointingly low, I accept that, but it is not because of processes, what is happening within the Treasury for example is it is a department with a very high turnover, which is unusual.

Q133 Mr Prentice: Is it perhaps a possibility of sour grapes there because you have targets—and I sound like the school swot here and I am really not—and in the Autumn Performance Report you talk about by April 2008 (that is this month, this year) departments would reach the following targets, and I do not think they have been met: 37% of women in the Senior Civil Service, 30% of women in top management posts, that is pay bands two and three, ethnic minorities and disabled staff and so on. I just wonder if this whole issue of fair promotion within the Civil Service is being coloured by those targets which are being laid down to increase the percentage proportion of women and ethnic minorities in senior jobs?

Sir Gus O'Donnell: No, I think you have to understand we do all of these things following employment law, and we cannot legally discriminate in favour of women or ethnic minority groups.

Q134 Mr Prentice: So it is just aspirational?

Sir Gus O'Donnell: No, it is very important, I strongly support those targets. Those targets were set at quite aspirational levels and to get to those would have required us to improve our performance. I stress when you compare what is going on in those numbers with the private sector you will find a dramatic difference.

Q135 Mr Prentice: I do not doubt that.

Sir Gus O'Donnell: — An enormous difference, which I think it is worth thinking about why that is, so we are doing enormously better than the private sector on our diversity numbers particularly with regard to gender and particularly with regard to women at the top, but, no, we do not—we are not allowed to—discriminate in favour of those groups, that would be illegal.

Q136 Mr Prentice: I just wanted to take us on to the scope of the Bill because in the previous Bill, the 2004 Bill, GCHQ² was included. It is not included in the present Bill and neither is the Security Services, MI5, and I was just left wondering what was the thinking in government when this change was made?

Sir Gus O'Donnell: Sure, the idea here—and this comes back to what I said earlier about the approach—we have said this Bill covers the Civil Service and then listed the exemptions as opposed to 2004 when we were trying to list the things that it covered, and if we had done that we would already be having to try and amend it in primary legislation because it would have been inappropriate, so this time we have said the whole of the Civil Service with the following exemptions. We have decided to treat all of the three agencies in the same way because all of the agencies are covered by separate legislation already so you want them to be together. As I am the accounting officer who goes across all of the agencies, it seems to me very sensible that we actually treat them together.

Q137 Mr Prentice: So an aggrieved civil servant, whether a spy in MI5 or a radio operator, if they still have them, in GCHQ, if they had a problem with the Civil Service Code and so on, they would be expected to sort that out with their line management?

Sir Gus O'Donnell: First of all, they have slightly different Codes for the agencies. They all have their own Codes based upon the values of the Civil Service, so very similar to the Civil Service Code but slightly different, and, secondly, they have special complaints procedures, so they have an independent person that they can go to, because we

are aware this is a potential problem, and that person can then refer those complaints directly to the Prime Minister.

Q138 Mr Prentice: Who is the independent person that an aggrieved person at MI5 would go to?

Sir Gus O'Donnell: They have their own special complaints person.

Q139 Mr Prentice: A secret person?

Ed Miliband: I know this was the subject of discussions with Janet Paraskeva last week and, if I may say, I think there was some confusion about this, but my understanding is that it is the case that there has been an independent staff counsellor at GCHQ that people with grievances can go to, and that is the case now and that will not change as a result of this legislation.

Q140 Mr Prentice: It all sounds a bit arcane, does it not, but the point that was raised with Janet Paraskeva last week was whether the Civil Service Commissioners should have the power to initiate inquiries, and when I was reading the consultation to the document everyone was in favour of the Civil Service Commissioners having the power to initiate inquiries and yet you, the Government, has decided they are not going to have that power; why?

Sir Gus O'Donnell: That is a slightly different point. I am not sure that the Civil Service Commissioner herself is in favour of having the power to initiate inquiries.

Q141 Mr Prentice: Tony is going to come in and rescue me here I suppose, again, but I think she made the point that it could be opening the floodgates and that if you give the Civil Service Commissioner the powers to initiate investigations, then she is going to be completely overwhelmed. That is different from saying that she may not see a role for the Civil Service Commissioners.

Ed Miliband: One thing I referred to earlier which has changed since then, because I know at the Committee with Janet you referred to the responses to our consultation, is us recognising that civil servants will be able to take complaints to the Commissioner, so it is the case that civil servants who have a concern, a worry about what is happening, they can go to her and she will then investigate it. I suppose my perspective on this about this question of initiation of inquiries and whether Janet Paraskeva should initiate inquiries—and Gus will have his own perspective on this—is that we have got to be very careful not to politicise her post and other posts because we all know what happens when you put someone in this position, when she can initiate her own inquiries subject to views from anyone is that it immediately becomes a cottage industry of people seeing something in the newspapers and then writing to her and saying, “I demand that you investigate this.” What I think is good about what we have done is we have said to civil servants who are worried about what is happening (and, after all, they are in quite a good position to know what is happening in the Civil

² Government Communications Headquarters

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Service) is they can go to her and say, "I have an anxiety, a worry about a particular situation; please will you investigate," and I think that is the right course of action and the right way of protecting the role of the Commissioner.

Sir Gus O'Donnell: And that is my impression of discussions that I have had with Janet. We do not have a difference of view about this. If a civil servant goes to Janet and Janet wants to investigate something, that is absolutely a good thing as far as I am concerned.

Q142 Chairman: This is quite an important point and one obviously we shall say something about when we report on this. I think what she actually said was that she thinks there is absolutely a need for someone to do this job, she was not sure that it was her, and it seemed to be largely a matter of resources for her, but she said if it was not us she could not think who else could properly do it. For example, a number of complaints come in—you get this with the Ombudsman—which often reveal some general issue and it is daft to be able to deal with individual complaints but then not to go and investigate the general issue.

Sir Gus O'Donnell: She can do all of that.

Ed Miliband: She can do that.

Q143 Chairman: It is not clear from the Bill that she can do that on her own initiative.

Sir Gus O'Donnell: No, but you talked about her getting five or six complaints. That is what the new version of the Civil Service Code says; that you can go to the Civil Service Commissioner. If she gets five or six complaints of a different form and then if she were to say to me, "Look, I am really worried about this specific area, I would like to look at it," I would be completely happy for her to do that.

Q144 Chairman: Yes, but she has to come and ask you and there has to be agreement and so on.

Sir Gus O'Donnell: I would not turn it down.

Q145 Chairman: If the Civil Service Commissioners are the guardians of the Code and if they are the guarantors of these values that are being adumbrated in the Bill, then surely it makes sense to give them whatever power they need to make sure that any worries about the operation of those values and the aspects of the Code can be investigated, not merely through hearing individual complaints?

Sir Gus O'Donnell: Which you would do by allowing her to take complaints from civil servants and follow them up, and I think that is precisely what she can do. I am not quite sure what more you need but if there is anything that you think could strengthen the values then again, like I say, I think that is quite important.

Q146 Kelvin Hopkins: Just to go back to appointments, and I do not expect really to get the answer I want and I expect I can anticipate the answer I will get, if we can use the example of Nigel Lawson when he was Chancellor, he wanted people

in his private office who were simpatico of his view and before we went into the ERM (this is something that I think is public knowledge) and he surrounded himself with people in his private office who took a similar view to him rather than people who would say, "Actually, I am sorry, Minister, I do not think we should be entering the ERM at the present parity is a good idea," he had people around him who would say, "Yes Minister, I agree with what you are saying."

Sir Gus O'Donnell: This is in your golden age of the 1980s?

Q147 Kelvin Hopkins: Slightly after but nevertheless—

Sir Gus O'Donnell: No it was not, I was there.

Q148 Kelvin Hopkins: This is a real example and indeed I hope I am not treading on toes. This is an example of politicians insisting on civil servants being appointed with a particular view. Subsequent to that we have had a very strong Prime Minister who was, among other things, concerned to make sure that his people got safe parliamentary seats and had a range of special advisers making sure that ministers and civil servants indeed were in line. Are you suggesting to me that they were not equally concerned at making sure that their favourite civil servants got senior jobs during that time?

Sir Gus O'Donnell: I do not know what to make of this. Nigel Lawson appointed me as his press secretary, it was wonderfully successful in that within a couple of months he had resigned, so did that mean I was particularly favoured by him? I think Nigel Lawson, who I know, had a very strong regard for people who actually would stand up to him and would argue with him. He liked nothing better than an argument with economists about matters, and I can tell you I was involved in them, particularly when he came out to Washington, there were a number of times when he gave speeches there on the pros and cons of the ERM. There was a very strong debate within the Treasury about whether exchange rates and shadow exchange rate targeting were the right things to do. I can talk about it because some of the papers have been released now. There were a number of people who thought an independent central bank was the answer rather than exchange rate targeting. There was a very healthy debate. I think this is what strong ministers of all parties do: they value people strongly putting the counter argument because they know, when they come out of that policy, they are going to be in Parliament. There are going to be people opposing it and they would like to have heard those arguments. They may not agree with them, but I think good ministers of all persuasions value strong officials.

Ed Miliband: I agree.

Q149 Kelvin Hopkins: They still made the wrong decision in the end on the ERM but nevertheless perhaps Ed can tell me a little bit about the subsequent regime, the Blair regime. My

impression is that it was much more controlled and centralised than any previous government had been.

Ed Miliband: There is a point of disagreement on this. I think your question is partly about special advisers and partly about other aspects of so called politicisation. I just do not believe that 70 special advisers or however many there are across government are somehow undermining the value of the Civil Service. I was a special adviser in the Treasury when Gus was the Permanent Secretary there. I think good special advisers—I am not necessarily putting myself in that category—prevent the politicisation of the Civil Service because they do the political thing that ministers want to have done and which would be inappropriate for civil servants to do. I go back to my opening remarks, without getting into the question of golden ageism or not. When I think about the big challenges the Civil Service faces going forward, I just do not recognise the description that one of the big challenges is whether it is going to become a politicised service. I have worked with many civil servants both at the Treasury and now at the Cabinet Office. I do not know their political views. I do not seek to know their political views. Obviously that would be the wrong thing to do. What I want is people who are effective and able. I meet lots of exceptionally able and bright civil servants who would serve any government, in my view, of any party.

Sir Gus O'Donnell: This point about good special advisers being good for the Civil Service is really important. I would worry and I worry most when you have an area where there is a weakness and a risk that you might get the civil servants trying to fill a vacuum where there is poor political advice because the special advisers are not providing it. That is why having the values in the Bill will be really important. Good special advisers that do that well are very good news for the Civil Service and keep us out of that territory.

Q150 Mr Walker: Sir Gus, how do you think the Freedom of Information Act has affected government and your relationship with ministers and special advisers, because there is concern out there that although it seemed like a good idea at the time you have civil servants running around saying, "For God's sake, do not write anything down", so you get more of this sort of sofa government as opposed to government where there are notes and a record taken of decision making.

Sir Gus O'Donnell: There are very many aspects of FOI that we should say are unambiguously good. Access to information for the public in all sorts of areas I think is hugely useful. It can take up quite a lot of senior time. Just referring to that last question, I remember spending a lot of time on FOI requests relating to papers going back to ERM entry, for example, which obviously you would not discuss with the current set of ministers. They do take a lot of senior Civil Service time and these papers would be released anyway in due course. It is very important for the Civil Service in terms of

giving their honest, objective, impartial advice that we do write down that advice. It is very important that ministers carry on asking us for it. Freedom of Information has some exemptions in terms of advice to ministers. The one thing that I worry about is the uncertainty. You cannot quite tell in advance, because of the way the FOI Act is written in terms of that public interest test in each individual case, whether something is going to be subject to that overriding clause or not. That is the one area where I say I have some doubts but in general I keep telling everybody it is absolutely important that we write down all of our advice. We should be proud of our objective advice and it will in due course see the light of day. I think it is very important that we have that safe space to advise ministers and to speak the truth under power without knowing that it will be in the public domain very quickly because of an FOI request. I think there is an exemption there and it is important that it is upheld.

Q151 Mr Walker: You do not think it did contribute to this sofa style of government that *The Daily Mail* likes to write about?

Sir Gus O'Donnell: No.

Ed Miliband: I agree with Gus that there is a big culture change that FOI brings. I think that overall it is a positive culture change for government. In 20 years' time people will wonder what all the fuss was about probably because people will adapt. New people will come into the system that are used to it. At the moment of change it always has an impact. From the point of view of ministers, my only thought on this is what is unusual about government is that ministers individually can express their view but then they have a duty to go out collectively to defend the position of the Government, even if that is contrary to their view. I think ministers need to be able to do that in a way that is not going to then put them in a very awkward position very soon after, because that is one of the duties of being part of a collective. You go out and defend the position of the collective, but you need to be able to express your view. This is not a reference to any particular case but I think that would be my only—

Q152 Mr Walker: You do not want it to stifle debate amongst colleagues.

Ed Miliband: Exactly.

Q153 Mr Walker: On constitutional reform, when did it all go so terribly wrong that we needed constitutional reform? Maybe it has not gone wrong. Maybe it just part of the progression and growth of our democracy. Was there anything over the last five, ten, 15 or 20 years that stands out in your minds as something that needed to be addressed and will be addressed by this proposed legislation?

Ed Miliband: In a way, we are of the same generation coming into Parliament. I was reading over Easter—which makes me sound a bit sad—a biography of Disraeli and Gladstone. What was

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remarkable was the length of their speeches but I will leave that to one side. What was also remarkable, without sounding pompous about this, was the extent to which Parliament was the site of fevered, excited debate. It seemed like every night but I am sure that was not the case.

Q154 Chairman: That was before the Whips arrived.

Ed Miliband: That may or may not be true. For our generation, I feel that over the ten or 15 year view, Parliament needs to be strengthened because it is sad that Parliament has become less important in public debate. My impression would be that people of our generation see it as less important to speak in Parliament than to go on the BBC or Sky. I think that needs to change. For me, one of the important aspects of this constitutional renewal, quite apart from the need to hold the Executive to account which is always an issue—the power of the Executive waxes and wanes—is the need to strengthen Parliament and make it a site at which important debates and important things happen. That is why I think the legislation is important.

Sir Gus O'Donnell: I would just add that from the Civil Service point of view this is an opportunity. If you are having a Constitutional Renewal Bill you do not get these opportunities very often. Therefore, I would say let us make the most of it and use it to enshrine the values, but I do say with some slight trepidation that what might come out might not be as simple, clear and useful as what goes in.

Mr Walker: If we had a strong, self-confident Parliament we would be taking the lead on this and we would not need the Executive to take the lead. I think that is a sad reflection on our chamber. I hope, if we do bring this Bill forward, it is the last time the Executive will need to bring a Bill forward and Parliament, when it feels it is losing authority and power, will take actions from within itself to address the concerns of the public.

Q155 Mr Prentice: David Owen, when he was before us a few weeks ago, said that the Freedom of Information Act is just changing everything. Of course, Sir Gus, you turned down one of my requests under the Freedom of Information Act for information on Lord Ashcroft and the nature of the undertaking that he gave in March 2000 before he was ennobled, having been turned down twice for a peerage before then. I am taking it to the Information Commissioner. Is the Information Commissioner overturning an increasing number of decisions that the Civil Service is taking, you and after it has gone to appeal? Would you know?

Sir Gus O'Donnell: I could find out the exact numbers for you. My impression is that he is not but I do not have the actual numbers. Obviously, remember, with FOI requests, there was a vast number that happened at the start. Whatever statistics you get, you need to analyse them quite carefully. I stress what I said at first. The vast proportion of FOIs will relate to questions from the public so you might get a misleading number. They

might all go through, so you might get a very small proportion that have gone to the tribunal. I think the class you are interested in is a slightly different class of FOI requests, is it not?

Q156 Mr Prentice: Richard Thomas may take a different view of what constitutes the public interest than you may. It was Richard Thomas who said MPs' expenses have to be published and it may be Richard Thomas, the Information Commissioner, who tells me what Michael Ashcroft said before he was ennobled. He may say that it is in the public interest for me to be told, although clearly you do not think so.

Sir Gus O'Donnell: Sometimes we do come to different views.

Q157 Mr Prentice: I understand that. It is not personal.

Sir Gus O'Donnell: I mean in other areas like what is value for money and what is sustainable, because we certainly would not have these in the Cabinet Office.

Q158 Mr Prentice: Can I just ask about special advisers? I do not want to misquote Janet Paraskeva again, if I misquoted her before, but she I think told us that the failure to put a limit on the number of special advisers could pose problems down the line. It could, she said, drive a coach and horses through the Civil Service. Sir Robin Mountfield said much the same thing. Is there a problem? May there be a problem down the road that the Government is not taking this opportunity to set down in statute the number of special advisers that can be appointed at any given time?

Sir Gus O'Donnell: Given the current sorts of numbers, 70 to 80 out of a Civil Service of half a million and a senior Civil Service of 4,000, that is why I do not worry about this argument about politicisation. With these sorts of numbers, it is not a problem at all. Indeed, good quality special advisers around the system, two per minister in general, work well.

Q159 Mr Prentice: Robin Mountfield, a former mandarin, a top man like you, said the draft Bill was grossly deficient when it comes to special advisers. The fact that we only have 70 or whatever it is that you have just mentioned does not mean to say that an administration in the future could not pump huge numbers of special advisers into the senior Civil Service and completely neuter it. It would be perfectly possible.

Ed Miliband: I think that is very unlikely to happen.

Q160 Mr Prentice: Why are people like Robin Mountfield and Janet Paraskeva saying that?

Ed Miliband: I am not sure that Janet Paraskeva was saying that. I think I indicated earlier on and I think you said this in one of your reports on the question of special advisers that rarely can such a small group have received such a disproportionate attention. I just do not recognise the anxieties that

people have. What have we done? We have a special advisers' Code of Conduct. We have transparency. There is an annual report on the number of special advisers and their pay. We have talked about the Civil Service Commissioner and some of the powers that she has. I suppose I would just echo what Gus said. The idea that 70 people in government can overwhelm a huge Civil Service is just not an idea that I recognise. Actually, it is very important that it protects the impartiality of the Civil Service because it means that civil servants are not expected to do things that they should not be doing. Any political things that need to be done are done by special advisers.

Q161 Mr Prentice: On the issue of the moment, on the abolition of the 10p rate of income tax, I take it that the permanent Civil Service in the Treasury would have explained to the then Chancellor the consequences of following the policy when it was adopted that there would be five million people who had lost out. I take it that the senior Civil Service would have made that absolutely clear?

Sir Gus O'Donnell: In the run up to a Budget, the Treasury will have advised the Chancellor on the aspects of his policies and the distributional consequences of the decisions he was making. Absolutely.

Q162 Chairman: Can I just come back briefly to the special adviser point? You think of the volume of commentary on this over the years. The point that is being made is if this Bill, albeit a simple, short Bill, is to do with putting lines in the constitutional sand then one of the lines surely is about the balance between the politically appointed people and the permanent Civil Service; and yet that line is not drawn. You say, "Oh well, the present situation seems all right" but it does not tell us anything about the enduring nature of that balance over time. I think that is the worry that people might have.

Ed Miliband: It is not my job to put a question to you but where would you draw that line? It goes back to Gus's point about flexibility. The system needs to have flexibility to adapt to needs. Given everything we have said about the nature of the British Civil Service and what is being put into statute, I cannot see circumstances in which the fears Gordon has raised would be realised. In the end, a prime minister would have to answer to the court of public opinion on this question. Your Committee rejected the idea of an arbitrary limit for reasons I fully understand, because of the need to have some flexibility in the system. I am fully in favour of lines in the sand.

Q163 Chairman: Perhaps we need a non-arbitrary limit.

Ed Miliband: I think limits are arbitrary in this respect. That is my view.

Q164 Chairman: Apart from special advisers, are there circumstances in which people could and should be appointed to the Civil Service who could not serve equally any administration?

Sir Gus O'Donnell: I think that is very unlikely. Sometimes we will get specialists in on short contracts if we want someone with a particular set of skills but that is normally someone who has a very unusual specialism, quite often an IT specialism.

Q165 Chairman: That is thought to be a fundamental principle?

Sir Gus O'Donnell: Absolutely.

Q166 Chairman: If it is a fundamental principle, why not enshrine it in a Bill that is about fundamental principles?

Sir Gus O'Donnell: Surely that is about the value that civil servants have to be impartial. That is very clear.

Q167 Chairman: The test of being able to serve any administration in all appointments other than special advisers would be one way of formulating the principle.

Sir Gus O'Donnell: Absolutely. If I was doing an interview for an individual who was coming in on a short term contract, I would be absolutely clear. Someone who comes in as a civil servant is absolutely there to work loyally for whatever the elected government is. If that changes, they carry on working loyally for that government.

Q168 Chairman: There has been not only discussion about numbers and their balance in the system but what special advisers can do. There is a different formulation that has crept in here. Under the old Ordering Council the formulation was that special advisers were there to offer advice to ministers. That is what their role was. That has now changed to "assist ministers" in the Bill before us. Some people are worried about what "assist ministers" means. It goes to the question of the extent to which they can be a conduit for instructions to civil servants. This seems to have now become a grey area which is not resolved by the Bill. If the Bill is about fundamental principles, this surely is a fundamental principle.

Ed Miliband: There is a certain irony because the word "assist" came from your draft Bill as I understand it.

Q169 Chairman: We are allowed to ask questions about our own formulations.

Ed Miliband: Indeed you are. I think you can see from the actions that the Prime Minister took when he came into office that it is not the intention to give executive powers to special advisers. Indeed, he abolished the exception that made that possible, as I said earlier. I think it is pretty clear from the Bill that ministers do not exercise line management functions over civil servants and if the job of a special adviser is to assist a minister then special advisers themselves are not exercising line

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management functions over civil servants. That is the logic behind it and there is certainly no intention to make that possible.

Sir Gus O'Donnell: I am very glad the Ordering Council has gone. I think it is very important that special advisers are not ordering around civil servants but in terms of assisting ministers that is what they are supposed to do.

Q170 Chairman: The only question is quite what assisting ministers involves. It would be nice to get a little more clarity. Perhaps we shall by the time this process is finalised.

Ed Miliband: That is set out in the Code. The Code is pretty extensive on this.

Q171 Chairman: When Peter Hennessy was here last week he was welcoming of much that the government was doing. He regretted the fact that

there was not a full blown War Powers Act but he accepted the fact that the route which has been taken here, which is to go by convention, is the only show in town. What he was absolutely adamant that Parliament should press for was that in situations where the country was being invited to go to war and when Parliament was being invited to approve that the Attorney General's opinion should be publicly available to Parliament. What is the argument against that?

Ed Miliband: I think this is a subject for the questioning of your next witness. I think this is one of the areas that is obviously being looked at and, to be fair to Michael Wills who you have before you next, it is very much within his remit.

Chairman: I suppose we can accept that as a transitional answer. Thank you very much, both of you, for coming along. We have not of course done justice to it but we have done some justice to it. Thank you very much for coming and talking to us.

Witness: **Mr Michael Wills MP**, a Member of the House, Minister of State, Ministry of Justice, gave evidence.

Q172 Chairman: I am delighted to welcome Michael Wills, who is the Minister of State at the Ministry of Justice, to continue our discussion about the draft Constitutional Renewal Bill that is before us now and aspects of it. Do you want to say something by way of introduction or do you want us just to ask our questions?

Mr Wills: I had understood you really wanted to talk about the review of the royal non-personal prerogatives so I was going to make a few remarks about that. However, I can see from your very interesting briefing note that you want to range far more widely than that in which case perhaps you would like just to crack on rather than hearing my rather restricted remarks on the prerogatives.

Q173 Chairman: It may add up to the same thing anyway. You heard the question that I asked at the end of the last session about the Attorney General's legal advice. They batted this to you. Why do we not just have you answer it?

Mr Wills: I think it is very important in such important issues for the life of our nation that Parliament and the people have a clear understanding about the legal basis on which the Government is proceeding. That I think is agreed generally. We all agree on that. There are particular problems in the full legal advice being put forward. Let me explain a little bit about what I mean by that because this goes to the heart of a very important issue in front of government at the moment in relation to Freedom of Information. It is our view that government is not the owners of such information. It is the custodian of it and that is a very crucial distinction, in my view. It means that there must always be a presumption that we release public information to the public. That is what we have done with the Freedom of Information Act. That is what the recent reforms that we have undertaken since this Prime Minister took office do, to extend the

scope, to consult on extending the scope of Freedom of Information. It is done on that basis. Equally it means that there are times when it is in the public interest for that information not to be made publicly available. That is the basis on which we proceed. When we look at the detailed legal advice that the Attorney General gives the Government on this particular issue or more generally, I think we have to be clear that there are times when such advice would be inhibited in its full frankness if it was known that it was going to be made available for publication. That in the end is not in the interests of good government. It is not in the interests of the public. What the Government needs in these circumstances is full, frank, uninhibited, unbiased, objective advice. Knowing that the full advice, every sentence of it, would be made publicly available could inhibit that and that in the end, in our view, is not in the public interest.

Q174 Chairman: We do not want to revisit Iraq but the Government with its welcome commitment to involving Parliament in these decisions now—obviously the question arises about the legal advice that is available to Parliament in those situations. It becomes untenable, does it not, for government to say, "We are going to invite Parliament to give a view on war and peace but we are not going to invite it to see the legal basis for our position"?

Mr Wills: With respect, that is not what I said. I think it is important that Parliament is given the legal basis on which we are proceeding. I was drawing a distinction between a statement of the legal basis which would be a full, frank statement of the basis on which we are proceeding and the verbatim, full transcript of the Attorney General's advice. There is a distinction there and that is the distinction that I am seeking to draw. I absolutely

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agree with you that Parliament should be given the legal basis on which we are proceeding and on which any government is proceeding.

Q175 Chairman: The reason for not having the full statement of the Attorney General's advice is what?

Mr Wills: It is what I have just endeavoured to set out. In the case of legal advice given by the Attorney to the Government, if it was known that that was going to be made fully publicly available, all the details of a legal opinion which can follow convoluted argument in the full knowledge that bits of it might be seized upon by some of the less benignly intentioned sections of our democracy, that might inhibit the frankness and objectivity of the advice being given. That is not in our view in the public interest. It is in the public interest that Parliament and the people should have the legal basis on which we proceed.

Q176 Mr Prentice: Surely it is important to follow through the logic of the legal advice? If the summary is a faithful representation of the full advice, why can we not have the full advice when we are talking about sending our military to war?

Mr Wills: It is a crucially important decision. It is absolutely vital that government has access to the fullest, frankest, often perhaps unwelcome advice, whether it be from lawyers or from military experts. If the process risks prejudicing the frankness of that advice, the objectivity of that advice, there is a problem. I think it is clear that any lawyer, the Attorney General or whoever, knowing that their full legal opinion following the logic of their argument all the way through, is going to be put in full in the public domain, not necessarily as we all know happens treated objectively and faithfully in the public domain, could well end up being inhibited. It could have what we call a chilling effect on the advice. This is a delicate balance. I understand the scepticism about this and it is important that the legal basis is given to Parliament. We do not think that fundamentally distorts the process.

Q177 Mr Prentice: I understand that but Peter Hennessy, who knows the internal wiring of the British Government like no one else, said it was so important that if the legal advice was not made available by the Government to Parliament then Parliament should appoint its own chief legal adviser, who would offer advice to Parliament on whether we should go to war.

Mr Wills: I am afraid I have not seen his evidence.

Mr Prentice: Am I misrepresenting him?

Q178 Chairman: No.

Mr Wills: Was he saying precisely that it was very important that every word of the legal advice was disclosed or there should be the legal basis, because there really is a difference.

Q179 Mr Prentice: We do not want to return to Iraq, but it is important. The context was that Peter Hennessy back in 2003 said there was an

abandonment of due process. At the time the decision was taken to go to war, there was not the full legal advice. There was only the summary, the Attorney General was present and so on. It is I suppose learning from that experience that we were taken to war after due process had been abandoned. That is why he comes on so strongly about Parliament having the right to demand full legal advice that was preferably given to the Cabinet by the Government.

Mr Wills: On the fundamental point about the importance of due process in this and in every other important area, we are in complete agreement. That is one of the fundamental drivers of this bit of legislation and a lot of the Governance of Britain. It is to introduce system and process into the operation of government. It is the essence of the prerogative powers that they have been largely unfettered and they are not subject to that kind of due process. That is precisely what is driving us in this area on the fundamental point. On the point of detail about whether due process depends on the full legal advice being given in all its logic, every word of it, or whether an honest, open, legal statement completely consistent with that legal advice but not actually a transcript of it would fundamentally compromise due process I think we disagree on, if that is what you are arguing, that it is absolutely essential that the full legal advice be disclosed rather than the legal basis for the proposed action. We disagree, I am afraid.

Q180 Chairman: Can I move us into more general territory? As I understand it, your role is generally to go around stirring up excitement about constitutional reform matters and to stimulate interest in Britishness, British values and trying to get some statement of these and so on. This must be hard going. I say that having just looked at this *Hansard* report on political engagement for this year where they do this survey each year. They say how the public do not understand any of this and, since 1997, MORI has found that no more than 2% of the British public have identified constitutional reform as one of the most important issues facing the country. They go on to find that they are only interested in three issues. Two are about the voting system and the third, which they do get excited about, is the West Lothian question, although they do not call it that. This is difficult territory, is it not? That is the stuff we do not want to talk about, the stuff that the public do want to talk about, and the stuff that we want to talk about they seem not at all to be interested in.

Mr Wills: It is hard and I think we have to be realistic. These sorts of process issues, wiring issues if you like, about power in our society are often very difficult. There are moments in our national history when they become extremely important and they crystallise into very high level issues but for most of the time, quite understandably, people are concerned with the state of their mortgages, the state of the economy, whether they have jobs, the state of public services, crime and immigration. These are front line issues which all politicians have to deal with and they are inevitably going to be more salient

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than these sorts of issues, often because they are quite complex and technical. There are two things that I would say in relation to that. If we get this programme of reform right, we will be setting in place mechanisms and changing the way that our constitution operates in ways that we hope will engage people more over time. The effects will not be instantaneous and sometimes government has to take a step back and say, “Look, we are going to put the mechanisms in place to do the right thing, the effects of which will take place long after our political lifetimes.” Constitutional change often is like that. Sometimes it is much more dramatic. The effect of the Freedom of Information Act in changing the political path has only just begun. The effects of it will only properly become evident, I think wholly beneficially in my view, perhaps 20 years from now because it takes a long time to change political cultures which is what essentially that is about.

Q181 Chairman: What progress are you making with this attempt to get an articulation of British values?

Mr Wills: We are about to launch the process for it. It is a process which we want very much to be owned by the British people themselves. We are adopting an innovative mechanism of policy formation. There will be a lot of consultation, town hall meetings, a significant online presence and so on. In the end, all that will feed into two citizens’ summits, the first of which on a regional basis will decide whether there is a need for such a statement of British values. We believe that there is a very strong case for articulating what it is that brings us together as a nation, but we want to hear from the people themselves on this. The second one will deliberate on what it should be. By a citizens’ summit I mean a demographically representative body of the British people that will come together and deliberate on all the arguments. They will have access to all the information from the consultation, access to witnesses who will come and give evidence, some of which will inevitably be hostile to the Government and the Government’s position on this. They will then, as a body, deliberate. The outcome of those deliberations will come to Parliament in keeping with our belief in representative democracy for Parliament to take the final decision.

Q182 Mr Walker: I am just amazed. How can Parliament legislate on what British values are? It just seems absolutely amazing to me that we are going to do this sort of road show. We are all going to get together in these citizens’ summits and have a think about what our values are. What on earth do you think will come out of that? What is a British value?

Mr Wills: To call it a road show rather demeans what is an innovative, new, democratic process in which the British people will come together to discuss precisely these issues. There is a lot of cynicism in London about this particular issue. What is extraordinary is that if you ask people outside the confines of Westminster, Whitehall and

what used to be called Fleet Street what it means to be British they will come up with their own answers, often very thoughtful and considered answers because our national identity is something that matters to all of us. It is not that this is a myth, that somehow we are searching for something that does not exist. It does exist. It exists in all countries and most other democracies have a way of expressing themselves in certain ways. You may think that expressing it through the values that bring us together is the wrong way of doing it and other people may agree with you. I would just ask you to reflect on this, as you find this so astonishing. If you accept that there is such a thing as a national identity, which the great majority of people share—and I am sure you do believe that—where does it reside? It does not reside in 19th century articulations of blood and soil. No one believes that any more. It is pernicious nonsense. If it does not reside in those 19th century notions, where does it reside? I would absolutely welcome your contribution to this process and debate. If you can persuade everyone else that this is an astonishing waste of time which I fundamentally disagree with, that is the democratic process, but we should discuss it.

Q183 Mr Walker: I can assure you I am not going to take part in this. I will tell you what a British value is. It is one man, one woman, one vote. That is a pretty good value in a democracy. Unfortunately, the Joseph Rowntree Foundation has reported that in many parts of this country it is one man, one woman, three or four hundred votes, so why do we not start there and restore confidence in our electoral system that has been so thoroughly debauched over the last decade?

Mr Wills: I do not agree with that interpretation of The Rowntree Report but can I thank you for your contribution to the debate on the British statement of values? You have just made a contribution. I am very grateful for it. We will register it and pass it on.

Q184 Mr Walker: Please do not pass it on.

Mr Wills: It will be recorded.

Q185 Mr Prentice: The Joseph Rowntree Foundation that reported yesterday said our elections were wide open to fraud. We have had judges over recent months and years saying that the UK is like a banana republic when it comes to our elections. The Electoral Commission has for three years now been insisting that the Government bring in individual voter registration. Why is the Government resisting this if it is still resisting it?

Mr Wills: We are not resisting it. It is a big change. We have to make sure that it takes place in a way that does not decrease participation in elections. That is the issue.

Q186 Mr Prentice: Does not the integrity of our elections trump that?

Mr Wills: The integrity of our elections is paramount. I do not recognise the descriptions that you have just given. The Joseph Rowntree Foundation report is more balanced in all the detail

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than the representations we have just heard. Of course there are issues. Of course there have been instances of fraud and they have to be tackled and they will be tackled. We face as a democracy certain challenges and we have to find our way through them. Participation is declining. I think it is right that the Department should look for ways of increasing participation in our elections. Postal votes is one of them. If the system is opening itself up to fraud—and there have been cases of it—we have to close those processes which do render it open to fraud. We are looking at the question of individual voter registration. We are not resisting it, but we have to be sure that any changes we make do not worsen the problem in another area.

Q187 Mr Prentice: I have an instance in my constituency at the moment where there are 27 voters registered at a certain address which begs the question who the head of household is who signed the form certifying that the other 26 are legally entitled to vote. The only way you are going to get round that is to go for individual voter registration with identifiers, whether it is national insurance numbers, photo ID or whatever it is. It has to happen quickly, I put it to you.

Mr Wills: As the Secretary of State said in the House of Commons this afternoon, the processes that would be needed to put it in place would not be in place before the next general election, but it is something that we are looking at.

Q188 Chairman: Is it not even more difficult because I think I am right in saying that almost all the abuse cases that we have had have involved minority communities?

Mr Wills: I cannot answer for the statistical analysis.

Q189 Chairman: We should not be mealy mouthed about it. It is importing cultural practices from one place to another. If we are serious about Britishness, surely one of the things we have to be serious about is telling everybody who lives here about the integrity of democratic politics.

Mr Wills: Of course. This is fraud. This is a crime. People go to jail for this sort of thing. There is no question about conniving at it in any way whatsoever. Of course it is wrong. It is a crime.

Q190 Chairman: If we are honest, we have been so anxious to get turn out up that we have been rather casual, have we not, about some of the implications of it?

Mr Wills: No. I do not think we have.

Q191 Chairman: We have, because we have resisted individual registration.

Mr Wills: From memory, I cannot recall many people in this House resisting the idea of doing what we can to encourage postal voting to increase participation. This has undoubtedly opened up problems and we have to deal with them. We are dealing with them. No one is complacent about this issue. I agree with everything you have said about the integrity of the electoral system. Somehow the

idea that we are just shrugging our shoulders at it, saying that it does not matter and belongs to that community or this community is simply not true.

Q192 Kelvin Hopkins: A simple solution would be to adopt what they do in Northern Ireland. In Northern Ireland, we used to have regular abusers registered. Now they have rigorous controls of postal voting so that you have to show a passport to get a postal vote and individual registration. Do that here and solve the problem. I hesitate to say this in public but one of the reasons why our party is reluctant to do this is that it might dent our support in certain areas. That is a political consideration which I say in front of a Conservative colleague. I think that is something we ought to address.

Mr Wills: If I can just reassure you, the Northern Ireland example in our view as well is enormously important. It is being studied with great care at this moment.

Q193 Kelvin Hopkins: I had a discussion with you shortly after the new Prime Minister took over about the prospects for constitutional change. You were very enthusiastic and so was I. Is this not an opportunity to clear the decks and clear out the stables of what went on with the previous regime, to have a new constitutional settlement in a sense which opens up democracy and diffuses power away from the centre?

Mr Wills: I agree. I would argue that what we are doing is just that. If we try and define in a sentence what this is about, it is about diffusing power. It is about the redistribution of power in our society. It is an argument, a discussion about where power is located and where it should be located properly. I agree with you. Healthy democracies have power diffused widely. That is a constant challenge. This is not a one off solution. What we know is that power clusters chemically around power and therefore it is a constant exercise to keep breaking it up. It is why I personally believe that Freedom of Information is so important, because that is one of the greatest dissolvers of accumulated power potentially in a democracy, but it is by no means the only thing. What we have to do is to recognise that the character of our democracy has changed. We have to be very careful about measures of direct democracy which sometimes seem a very attractive panacea. We are bringing forward measures of direct democracy. We are not against it. But sometimes people talk as if direct democracy is a panacea for all the accumulated problems in representative democracy with which we are all familiar, but actually there is also a great risk of direct democracy. It can place power disproportionately in the hands of the wealthy and the powerful. That is something that we always have to be on guard against. That is what we are trying to do. This Bill is part of that process but it is by no means all of it. We are shortly going to be announcing the consultation on the Bill of Rights and Responsibilities which will be an important part of this process as well, into which incidentally, just to return to the vexed topic of the British statement of value, we see the British statement of values

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forming potentially an important part. Any rights and responsibilities in the end, any Bill of Rights anywhere in the world—and it is in our own history—have been rooted in the values of the society for which it provides part of the governance. Somehow or other, if we are to proceed with a Bill of Rights, there will have to be some statement of the values of the society which give those rights force and validates them.

Q194 Kelvin Hopkins: Going back to the point that Tony made about only 2% of the population being interested in constitutional reform, is that perhaps because they do not appreciate the significance of constitutional procedures or constitutional power; that we do not have enough of it in Britain constraining the Prime Minister and that our system permits a wilful Prime Minister to do things which in no other policy would he be permitted to do? The last Prime Minister, if he did one good thing, made us more aware of the problems of having a wilful, powerful Prime Minister who aggrandises power and drives us for example into illegal wars.

Mr Wills: If it was as simple as that, we would have half solved the problem already. I think it is much more complicated than that. The problem is that the importance of these issues is always just one removed. If people are worried about schools, education, crime or immigration, what they actually need to know is that they have the hands on the levers of power to effect change and that their voices can be heard. Historically, they have been able to do that at elections. If they do not like what they are getting, they are able to say what they think through their vote. For many that increasingly is not satisfactory. So we have to provide ways for people to have an influence on policy making between elections, systematic processes by which their voices can be heard consistent with a system of representative democracy. That is what we are trying to develop and that is what we will be publishing documents on in the next month or two.

Q195 Mr Prentice: You talk about real power. A lot of people out there think it is just pretend power. You just told us that we are going to have a Bill of Rights and Responsibilities. Is this going to be a kind of mission statement or will it give people rights that they do not have at the moment? Will it be justiciable? Will people be able to go to the courts and force the Government to act because their rights are being infringed? How different is it from the Human Rights Act that is already on the statute book? What do you mean by a Bill of Rights and Responsibilities?

Mr Wills: Just to be clear, I said that we would start a consultation on a Bill of Rights and Responsibilities. However, that is not to say all the questions you ask are not extremely pertinent. I am afraid they slightly pre-empt my brief today. We have not published the document. When we publish the document, I would be very happy to come back to the Committee and answer all these questions, but it is just a little bit premature and you will forgive me.

Q196 Mr Prentice: I understand that. I am not going to press you on it. I only say that because in the next month or so we are going to get an NHS Constitution. I am left wondering whether this NHS Constitution is going to give people rights that they do not have at the moment. I think this is a problem for the Government because if you have an agenda to give people real power then you have to be serious about it. Otherwise people will just laugh in a mocking way.

Mr Wills: They tend to do that anyway, I am afraid, whatever the subject. All I would say to you is that your points are very well made. I agree with you. We will not be bringing forward anything which does not in our view make a real difference.

Q197 Kelvin Hopkins: Is it not the case that the real reason why people are not interested in voting any more is that they do not think the politicians make any difference because they do not really think they have any choice any more? The centre is now controlling the whole range of policies, a very narrow range of view, even to the extent of controlling who gets elected in safe seats to make sure they are in line with the regime, that kind of thing. They have given up because they do not think there is real choice. When they see New Labour versus New Conservative, they think: what is the difference?

Mr Wills: I think there are many reasons for the issues around participation. One of the big questions that we will all have to answer is whether the decline in participation has stabilised, whether if we had more contentious politics, where politics were genuinely more between polar extremes rather than clustering around the centre at the moment, you would see increases in participation. In France where there appeared to be a real choice at the last presidential elections we saw an extraordinarily high turn out. These are unknowables and we will all have to make our own judgments on those. On those judgments will depend quite a lot of our continuing reform programme.

Q198 Mr Walker: As you rightly said, we have a general election. We elect the government of our choice and after four or five years or whenever we get the chance to move those people on or keep them in place. How is it in between those periods that you would allow people to exercise power and influence the democratic decision making process?

Mr Wills: We are going to be publishing a document shortly which sets out some of the mechanisms. It is a green edged document because I think governments have to be extremely careful about being too prescriptive in these areas, but essentially there are already some mechanisms in place—referendums for example—and it is important that we have a growing understanding of when it is appropriate constitutionally to have a referendum. We are trying to make more systematic the various engagement processes that have grown up piecemeal over the last few years. I am talking about things like citizens' juries and, as I have described, citizens' summits. These are often rather glibly derided as

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focus groups. Focus groups have their place but what we are looking at much more seriously are deliberative mechanisms which other countries—Canada and Australia—have tried, where citizens come together to inform the policy making process. We have to understand that as politicians and civil servants we do not have a monopoly of wisdom. It is often the people who are closest to the problems that are trying to be solved that have the best solutions. We need better mechanisms to hear from them.

Q199 Mr Walker: This is where I get slightly concerned. If we were to be doing these in the sixties, we would still be locking up homosexuals and hanging people. If we had had citizens' juries in the sixties, the majority of people would say, "Homosexuality? That is not nice. We do not like that. Hang 'em all high." We are elected to lead this country. That is what we are sent to Parliament to do. In a sense we are professionals for four or five years.

Mr Wills: I agree. We are still governed by Burke's dictum about owing our voters our judgment as well as our industry. That is absolutely fundamental. At the start of this document we have what I hope you will agree when you see it is a robust defence of representative democracy precisely on the grounds you mention. That is why these are mechanisms to inform policy making, not to dictate it. Parliament in the end will have the final say and that is crucial for exactly the reasons that you mention. It is because Parliament and our system of representative democracy allow much greater space for deliberation. It is much more effectively scrutinised by the media and within Parliament. For all that people say about Parliament, it is becoming in my view a much more effective scrutiniser of government. These two processes of accumulation of executive power and more effective scrutiny have been going on side by side. It is crucial that we not only keep that but build on it. This is the fulcrum of our democracy and nothing we are doing will challenge that.

Q200 Chairman: Charles's question goes to the heart of the Britishness stuff too. I do not understand whether this articulation of Britishness, this statement of values that is coming, is going to be an aspiration—that is, a statement of what we would like to be—or whether it is a statement of what we are. If it is a statement of what we are, it is going to have some pretty unpleasant stuff in it.

Mr Wills: That depends on your point of view of the British people. I would describe it as a mixture of both description and aspiration. In the end, we have quite deliberately given the control of this process over to the British people in a way that we do not propose to replicate very widely in terms of policy making, but this is a special issue. We think it is important that they have it and it will be for them to decide. In my own view it should be about the best of what we are. Like all nations we have patches which we would rather ignore and that will be part of the discussion. In the end, Parliament will make

its own judgment, for all the reasons that Charles has just mentioned, about whether it agrees with that deliberative process. In the end, all of us as democrats must have some faith in the representative body, 500 or 1,000 demographically representatives of the British people. I do.

Q201 Mr Walker: It is called Parliament. We have 656 of us. I do not understand why we need another 1,000 people who are unelected and may not be representative. This is where it falls down. We have the House of Commons. "Commons" means common people, ordinary people, 656 of us. Maybe it is too many. Maybe it is not enough but that is what we do and I do not understand why these 1,000 people transported into this auditorium will be gifted with any more insight than we have.

Mr Wills: They will not necessarily but it is a question of increasing the range of mechanisms. We are not proposing this to replace Parliament. We are saying there are certain very specific issues to consider like a British statement of values. I note your scepticism—I say "scepticism" rather than "cynicism"—about the whole process but just assuming that you could be possibly persuaded that this was a worthwhile exercise at least as a discussion, imagine what would happen if Parliament took this on to itself. Immediately out there people would say, "Who are you?" Large numbers of the British people do not feel we represent anybody except ourselves and however invalid we may think those opinions are that is what they feel. If we look at the equivalent statements in other democracies, in the United States, in continental Europe and elsewhere in the world, these are profoundly important in their national lives. It will only take root and endure if you believe that that is worth doing if the British people themselves have ownership of the process. That is what we are trying to achieve. Parliament will be fundamentally involved. We are not excluding Parliament from this. You will be able to have your say in great detail and Parliament will have the final decision. It is an addition, not a replacement.

Q202 Chairman: When Peter Hennessy was here last week, he reminded us of what I think he called the George Formby view of these things which was, "It's turned out nice again" and we should not go off looking for systemic solutions. We should muddle along—I am paraphrasing him now—as we have always done at a high level. If you had to say historically what had been distinctive about the British, it would be things like, unlike foreigners, they do not have to fly flags and swear oaths of allegiance. When we start telling people they should fly flags and swear oaths of allegiance, we start looking silly, do we not, and very un-British?

Mr Wills: With great respect, you are conflating giving people the opportunity to do something with forcing them to do it. They are very different things. Giving public buildings the opportunity to fly a flag on St George's Day is one thing. Forcing people to have them in their front gardens is something completely different. We are not forcing anyone to

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do anything. That is the whole point, but we should be able to give people these opportunities. National identity is very important to the great bulk of the people of this country. Having said that, the question is what then? Do we just let it be important to them and, as a government, do nothing much? Do we not discuss this issue because we feel it is so well established we do not need to have a national debate about it? It is something we feel intrinsically and people can express it for themselves as they wish? I understand that argument very, very clearly. For most of the period since the Second World War, we have not discussed it. Before then it was a matter of vigorous, national concern. If you look back into the late 19th century, this was the stuff of a lot of discussion about what it meant to be British. We may disagree with the conclusions that the British people came to at that point, but it was a matter of vigorous, national debate. If we as Parliament, as democratic politicians, do not enable a process for discussion and deliberation on this, there are poisonous influences in our society that seek to colonise this territory for themselves. If you leave a vacuum at a time of profound social and economic change globally from which none of us is immune, we may be very disappointed to see what comes in and fills it.

Chairman: I understand the point but I happen to think that muddling along is our greatest salvation. Gordon?

Q203 Mr Prentice: I do not know if I am persuaded by all this.

Mr Wills: You might be persuaded.

Q204 Mr Prentice: Can I go back to citizens assemblies and you mentioned Canada? In Canada there was a citizens assembly set up in British Columbia and they were to go away and come forward with a recommendation on whether or not to change the voting system from first past the post to PR³. In Ontario last year, or the year before, a citizens assembly was set up to look at the voting system in Ontario. On both occasions the citizens assemblies stuck with first past the post. If you want to give citizens real powers, why do you not have a citizens assembly to look at first past the post in the Westminster Parliament? The ultimate decision would rest here in Westminster. Or why do you not have citizens in Scotland deliberating on whether the Scottish Parliament should have tax-raising powers? The Prime Minister has set up a Constitutional Commission to look at these things. Why not hand it over to a citizens assembly? It comes back to the point I made at the very beginning about whether this is a pretend exercise or whether it is actually delivering real powers to people which they can exercise. Are you with me?

Mr Wills: It certainly is not intended to be a pretend exercise, there is no doubt about that. As the Chairman has pointed out in the very excellent Hansard study, this is not a vote-winner, this is not what people are talking about on the doorsteps,

there is no point in doing that sort of exercise at all. This is about re-wiring power in our society but it has to mean something, and everything we are doing we want to mean something. Some of this we have to proceed quite carefully and cautiously with because potentially this is radical constitutional change and it must endure, it must be sustainable across parties and over time, and you have to proceed cautiously with that. In relation to the voting systems we have published a very thick tome—

Q205 Mr Prentice: It was not very well received, was it?

Mr Wills: It was not very well received by those in favour of PR because it did not come out with an unequivocal recommendation of PR. I think actually if you read it, you will see it is very fair-minded in analysing various systems of electing parliamentarians and the various merits and disadvantages of each of those systems. We published it precisely in that way to inform the debate about the future. We cannot ignore discussion about the voting system in discussing all these wider areas. Whether it is appropriate for a citizens assembly to say that, or Parliament, or a referendum, this is something which has to be discussed.

Q206 Mr Prentice: Are there big gaps though? We had Robert Blackburn, who is a professor of constitutional law, in front of us last week, and he accused the Government—and I hope I am not misrepresenting him again—of adopting an ad hoc approach. You have constitutional renewal which takes in flag flying, the reform of the Civil Service, war-making powers, treaties, it is all very ad hoc and there is nothing to link it altogether. I think that was the criticism he was making. If you are coming forward with legislation grandly entitled “constitutional renewal” there has to be more of a linkage there.

Mr Wills: I do not think I would describe it as ad hoc, I would describe it as a step by step approach, and for the reasons I have just outlined I think that is important, but I would argue that there is a fundamental driving analysis behind this, and I would argue there is a theme behind all these different bits of work that we have put in place. Just to repeat myself briefly, these are the things such as that power tends to accumulate towards the powerful, healthy societies have mechanisms which diffuse that power constantly, and what we are trying to do is produce new mechanisms to meet new challenges.

Q207 Chairman: Finally we are getting to the question you came to talk to us about although we are just ending. Professor Blackburn, just mentioned, did say what Gordon said he said but he also said in a note to the Committee, which I think goes to the heart of the whole question of prerogative powers and their transfer and so on, “In my view, the draft legislative proposal should clearly indicate that Parliament is or will become the source and legitimising body for the current executive

³ Proportional Representation

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powers under consideration, including armed conflict and treaty making. However, the terms of the draft Bill and the White Paper would imply the Government still wishes to retain its authority under the ancient theory of the Crown, simply imposing qualified procedural requirements in the exercise of these powers. In the case of war powers they are not even constitutionally enshrined in statute.” So the question will be, the aspiration is there from the Prime Minister’s original statement to put Parliament in the driving seat, to transfer executive powers, but if you look at it and ask which powers have unequivocally been transferred, it is very, very hard to find any. What you can find is, as Professor Blackburn says, some procedural constraints on those powers inserted, and that is quite a different enterprise, is it not?

Mr Wills: I am not sure it is quite as different as you are suggesting in fact. What we are trying to do is fetter the power of the Executive, and if you call that procedural constraint on the Executive, it is, but we are trying to systematise and regularise some of this—something which in practice is already taking place; I do not dispute that for a second. These are difficult issues. On the question of war powers, for example, we conducted a very wide-ranging consultation, we had very different responses, including from people who were extremely worried about this, exactly the same with the position of the Attorney General, and all these different areas, and there are very different points of view about all this. I come back to the fundamental point that any constitutional change, unless it takes place out of war or revolution, has to be careful because it has to endure in a democracy. As far as possible we have to proceed as consensually as we can. It is not always possible but as far as we can we have to start from that supposition because you cannot change your constitution at every election.

Q208 Chairman: No. People point, as Professor Blackburn has done, to the gap between necessarily the rhetoric and the reality. The statements were, “We are stripping the Executive of its prerogative powers and enthroning Parliament”, but, when you look at it, that is not what is happening, we are inserting Parliament into part of the picture but in each case there is a saving power for the Executive.

Mr Wills: I think the test is how this will all look in 20 years’ time. Well, it is an important point. If you look at the 1832 Reform Act, at the time this was seen as revolutionary but actually very, very soon it

was seen as a timid move, not nearly far enough, we had two other great suffrage acts and actually the whole process was not completed until well over a hundred years later. You need a bit of historical perspective to judge the true significance of these measures. We want this to be significant, we have made it clear this is not a blueprint, it is a route map, and this is the beginning of a process of change. The symbolic significance of this is considerable in our view. Whether it actually puts everything on a statutory basis and fully codifies these non-personal prerogatives is another matter, but I think the changes are considerable and we want them to be considerable and we will continue with this process. This is not the end of the story.

Q209 Mr Prentice: When are we going to get the full list of prerogative powers because you are scoping at the moment? When will you finish your scoping?

Mr Wills: I am sorry, this is not going to be a very satisfactory answer, I am afraid, but as soon as possible. Your report four years ago did say that was the very least the Government could do and we agreed.

Q210 Mr Prentice: We wanted a requirement in six months, I think from memory, and we are four years down the track and you are still scoping.

Mr Wills: Yes, and this is, as it were, a new administration. The scoping has begun now. It is taking us rather longer than we had hoped. We have had a lot of replies in. It is sometimes quite difficult to identify, for example, because some legislation either expressly or impliedly repeals a prerogative and it is sometimes not altogether clear whether the prerogative still in fact exists technically. Some of the big obvious ones we are dealing with in this Bill but there are an awful lot of them tucked away and if we are going to do this we need to do it properly. It needs to be fully comprehensive and then we can deal with it. It is being done, I can assure you, and I am happy to come back in a few months’ time and answer for any further delays but we do want it completed as quickly as possible.

Q211 Chairman: That is a fine offer which we accept. We are very grateful to you for coming along and talking to us in this rather non-joined-up way about a variety of things and I suspect we shall do it again when you visit us. We have enjoyed it very much. Thank you very much indeed.

Mr Wills: Thank you.