# HOUSE OF LORDS
# HOUSE OF COMMONS
# JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

*MEMORANDUM BY MARK RYAN*

1. My name is Mark Ryan and I am a Senior Lecturer in Constitutional and Administrative Law at Coventry University. My submission, however, is made in my own personal capacity and indicates my personal observations on the Draft Constitutional Renewal Bill. It in no way reflects the views of my employers (Coventry University).

2. At the outset, the Government should be commended on its inclusive approach to constitutional reform in relation to the Draft Constitutional Renewal Bill 2008 (hereafter the Bill). Indeed, producing the Bill in draft form will ensure that it is subject to effective pre-legislative scrutiny and provide those outside Government with an opportunity to shape its provisions. Unlike other countries which are required to adhere to specified procedures in order to modify their constitution, in the United Kingdom, our uncodified constitutional arrangements can be amended at will and with little fanfare. In this context therefore, it is imperative that any constitutional changes are secured in the most consensual and participatory way possible. After all, as has been said before, the British Constitution is not the preserve of any one political party, or indeed the Government of the day for that matter. My observations will be confined to selected aspects of the Draft Constitutional Renewal Bill.

3. In terms of the overarching questions, the Bill is consistent with the United Kingdom's historical approach to reforming the constitution which is to amend it on an incremental basis (Q1). There is also no objection in principle to the Bill containing disparate elements and provisions (Q2). In fact, the Constitutional Reform Act 2005 simultaneously (and successfully) comprised provisions relating to the reform of the Lord Chancellor, the reform of judicial appointments and the creation of a Supreme Court. The Bill as a whole does re-balance the relationship between the executive and Parliament in favour of the latter; however this constitutional shift of power could have been made more pronounced (Q3).

4. In terms of the Civil Service (Part 5), by enshrining the core values which underpin the Civil Service, the Bill will enhance the accountability of civil servants. The Bill will, however, also (and arguably more importantly) provide the Civil Service with protection by preventing the above values from being undermined or diluted by any future Government (Q4). Placing the Civil Service Commission on a statutory basis should enhance the independence of the Commissioners (Q5) and the Bill should specify to whom Civil Service Commissioners should make recommendations (Q6). In terms of initiating investigations, the Civil Service Commission should be authorised to initiate investigations, thereby equipping it with a pro-active role (Q7).

5. Given the nature of the advice that Special Advisers provide (and the relatively short duration of their employment), it does not seem problematic for their appointment to be excluded from the principle of selection on merit based upon open and fair competition (Q8). The Bill should be amended so as to specify the number of Special Advisers, thereby creating a statutory cap on their numbers (Q9). The Bill should also specify their precise constitutional role and powers - in this way their responsibilities would be limited by stipulating exactly what they are expressly permitted to do. Although clause 39 of the Bill provides for the Minister for the Civil Service to lay an annual report before Parliament concerning Special Advisers, in effect, this provides Parliament with information (e.g., the number and cost of Special Advisers), rather than any de facto control. On a related issue, the Bill should be amended so as to provide for the Special Advisers Code of Conduct (clause 33) to be subject to Parliamentary approval, and not just simply laid before Parliament.

6. In terms of protests (Part 1), by repealing sections 132-138 of the Serious Organised Crime and Police Act 2005, the Bill will re-balance the constitutional equilibrium between the right to protest within the vicinity of Parliament and the rights of Parliamentarians to perform their constitutional responsibilities without interference (Q11). Notwithstanding this, Parliament remains a special case (not least because of its symbolic constitutional importance) and it may, therefore, be necessary to provide the police with residual powers, to be exercised on an ad hoc basis and only when strictly necessary, in order to regulate access to Parliament (for example, to take account of a specific and urgent security threat) (Qs12/13).

7. In terms of the Attorney General (Part 2), my preference is that from a constitutional perspective, the office of the Attorney General should be separated from that of a Government Minister and a member of one of the Houses of Parliament (Q14). As the Bill, however, does not adopt this approach, my observations will be predicated on the model advocated in the 2008 White Paper (paragraph 51) and adopted in the Bill viz., that the Attorney General will continue to be a Government Minister and a Parliamentarian.

8. The powers of the Attorney General are circumscribed and decreased to some extent by the current provisions of the Bill (Q15). In terms of the power of the Attorney General under clause 12 to intervene in order to safeguard national security, although it is appears inevitable that such a residual power should exist, its use however must be tightly constrained and involve Parliament at some point in the process. At present, under clause 14 the Attorney General is required to lay a report before Parliament after a direction has been issued under clause 12. It is suggested that the Bill be amended so as to provide that any proposed use of the power under clause 12 is immediately brought to the attention of a specially appointed Select Committee. This committee could thereafter alert Parliament if concerned about the Attorney General's proposed use of his/her power under clause 12. The committee would ideally be a joint one comprising very experienced politicians embracing all political parties as well as independent members. The use of judicial review in relation to the use of the Attorney General's power under clause 12 would, however, not be appropriate as not only would the nature of matters concerning national security inevitably be regarded as non-justiciable, but it would also infringe the separation of powers. In doing so, it could threaten the independence of the judiciary.

9. The issuing of an annual report (clause 16) by the Attorney General appears to be a sensible provision (Q16), although the report provides Parliament with information only, rather than control. The Attorney General should attend Cabinet only where it is strictly necessary (i.e., to clarify and advise on legal issues) (Q18). A provision to this effect should be inserted into the Bill. It should be possible for any likely issues requiring the input of the Attorney General to be clearly identified in the Cabinet agenda beforehand. The content of the Protocol appears appropriate, although Parliament should approve it formally (Q19). Any review of its provisions should, similarly, be subject to Parliamentary consent.

10. The Attorney General's constitutional role to protect and advance the rule of law should be made a statutory requirement (Q20). This statement (Oath of Office) would be declaratory and reflect the importance and symbolic value of the rule of law in our uncodified constitutional arrangements. Given the varying interpretations of the rule of law, however, this statement should not be justiciable and so not enforceable before the courts. The power of the Attorney General to enter a nolle prosequi should be abolished (Q21) and the setting out of the tenure of office for the various Prosecutorial Directors is appropriate and should enhance their independence (Q22). The verbatim legal advice provided by the Attorney General should not be disclosed (Q23), however, a very general and broad outline of such advice should be provided in the event of Parliament formally requesting it.

11. In terms of judicial appointments (Part 3), it is never too early to revisit and reform judicial appointments if it is deemed necessary to do so (Q24). It is appropriate to remove the Prime Minister from the process of appointing Supreme Court Justices to the nascent Supreme Court, as such a role under the Constitutional Reform Act 2005 is superfluous (Q25). It is opined that reducing the role of the executive in the process of judicial appointments would not leave a gap in constitutional accountability. In fact, it would help to realign our constitutional arrangements in accord with a purer separation of powers (Q26). The Judicial Appointments Commission Panel should be established and is to be welcomed (Q29).

12. In terms of treaties (Part 4), the problem with this aspect of the Bill (Q31) is that it has been drafted in the context of a partially reformed House of Lords. Indeed, the process is still ongoing and very much a live constitutional issue. It is imperative that constitutional amendments - such as Part 4 of this Bill - are not viewed in isolation and purely in terms of their own individual merits, but also how they relate to (and impact upon) other aspects of the constitution. As a result of the debates and votes that took place in March 2007, the Government has made it clear that it is currently working towards reform of the House of Lords on a cross-party basis with a view to creating a largely or wholly elected second chamber. As currently drafted, clause 21 of the Bill ascribes more importance to a resolution of the House of Commons that a treaty should not be ratified, than to a similar resolution by the Lords. This state of affairs would appear to be constitutionally and politically acceptable in the context of the Parliament of June 2008, in which the Upper House is partially reformed. If, however, reform of the House of Lords takes place along the lines as envisaged by the Government (ie, a largely or fully elected second chamber is created), then in these changed circumstances, the Upper House should be conferred with an equal power to veto the ratification of a treaty. It is Parliamentary approval which is sought after all. As a result, a

sunrise clause should be inserted into the Bill so as to provide both Houses with an equal veto in the event of a largely or fully elected second chamber being established. This provision would reflect the greater constitutional legitimacy associated with a largely or wholly elected second chamber.

13. There is going to be, inevitably, constitutional concern expressed about whether a Secretary of State should be able to repeatedly place a treaty before the House of Commons after it has already rejected it (Q31). This raises an issue of constitutionalism and whether the executive should just simply accept a decision of the democratically elected House of Commons that a treaty should not be ratified. It is submitted that the House of Commons Public Administration Select Committee made a valid point when it recommended in its recent report (May 2008 - paragraph 89) that in the event of the House of Commons voting not to ratify a treaty, the Secretary of State should be prevented from re-introducing it during that particular Parliamentary session. The Bill should be amended so as to give effect to this sensible recommendation.

14. It is opined that there is also likely to be concern about clause 22 which in effect enables the Secretary of State to by-pass Parliament (and the requirements set out in clause 21) so that it does not have the opportunity to vote on a treaty. The exceptional circumstances which trigger the power in clause 22 should be specifically set out in the Bill. It is also suggested that any proposed use of the power under clause 22 should be subject to the scrutiny of a joint Parliamentary committee which could report to Parliament if it was not satisfied that the circumstances identified by the Secretary of State fell within the category of being exceptional (Q34).

15. In respect of the negative resolution procedure proposed by the Bill, this should be replaced with a positive resolution, thereby providing Parliament with more control over the process. This would help achieve the Government's primary objective of redressing the executive/Parliamentary balance. In fact, during his Parliamentary Statement on the Bill, the Secretary of State for Justice and Lord Chancellor indicated that he would look at the issue of a positive resolution.

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9th June 2008.