

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

Memorandum by David H Smith (Ev09)

Summary

I believe that the government's proposals fall far short of what is needed to achieve its stated objectives. Whether the proposals would achieve anything at all depends largely on how far Parliament is prepared to assert itself.

I make proposals for holding government to account effectively. I then discuss the government's proposals in the areas of Treaties and War Powers, in each suggesting ways in which Parliament's role can be strengthened somewhat.

Notes

1. Question numbers quoted below are the paragraph numbers in the Call for Evidence.

Overarching Questions

2. In the introduction to its White Paper the government sets out four key goals. I am concerned particularly with the third of these: "To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account." I believe that the government's proposals fall far short of what is needed to achieve this goal. The draft Bill does address (although inadequately) two important areas of foreign policy, Treaties and War Powers, by limiting the use of the Royal Prerogative. Very large areas of domestic policy are not addressed at all. How far taking an area outside the Prerogative improves accountability depends very much on how far Parliament is prepared to assert itself. I discuss the wider question of how the government could be held to account for all its actions in the next section. (Questions 1 to 3)

Holding Government to Account

3. The measures needed to hold government properly to account might well be beyond the scope of the committee. This section is nevertheless included in order to give a standard against which to judge the proposals.
4. Exchanges on the floor of the House of Commons do not in themselves provide an adequate mechanism for holding government to account. Good committee work is essential. Select committees of both Houses produce some good reports, but improvements could be made.
5. Select Committee work can be divided into two broad classes:
 - a. Examination of government performance after the event. This is necessary if government is to learn from its mistakes.
 - b. Examination of government policy, including scrutiny of draft legislation.
6. Much of the burden of examination of performance falls on the Public Accounts Committee, which considers around 50 National Audit Office (NAO) reports per annum and produces its own report in each case. It only has time to hear one day's evidence per report. More of this burden could perhaps be transferred to the departmental select committees. Accounting Officers could be required to report to them as well.
7. National Audit Office reports are often criticised for being too neutral and cautious. I have heard criticism a former senior civil servants who described the NAO as being 'tenacious over detail but inclined to miss the blindingly obvious'. If the burden on the Public Accounts Committee were eased it might be able to co-operate with the Public Accounts Commission in helping the NAO to overcome these deficiencies.
8. The House of Lords has a reputation for good committee work. If reform were completed it could do more. Although not the primary chamber it could ask the following questions of draft legislation:
 - Is it likely to achieve the stated objectives?

- Will there be unidentified side effects?
- Is it necessary, or could existing legislation be better applied?
- Is it proportionate?

9. Under the Bill of Rights the House of Commons has the right to call for 'people, papers and records'. It has extended this power to its committees through standing orders. However the government has made its own rules as to what evidence civil servants and ministers should give. Although the House of Commons has never formally accepted these rules, they are in practice accepted. Indeed as the Foreign Affairs Select Committee noted, in contrasting the information provided to the Butler and Hutton inquiries with the meagre information it was able to extract in its investigation into the circumstances leading up to the Iraq War, there is no mechanism by which it could have enforced its rights.

10. Despite all this, select committees can produce some highly critical reports. Few consequences follow however. One possible reason for this is that neither House votes on whether to accept the findings of its committees. If they did, it might just put pressure on the government to implement the findings. On the other hand, so long as both Houses for different reasons bend to the government's will, the effect of adopting such a voting practice might be simply that future reports would be bowdlerised to the point of meaninglessness.

11. There is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. A start could be made by defining War Powers (see paragraph 20).

12. I personally doubt if the House of Commons in particular will ever assert itself to the extent necessary to produce any real improvement, unless radical reforms such as a proportional voting system for the House of Commons combined with a requirement for Parliament to approve ministerial appointments are made.

Civil Service

13. I have not examined the government's proposals in this area in detail. However I believe that the breakdown of the doctrine of individual ministerial responsibility poses questions about the proper relationship between Parliament, ministers and civil servants that have yet to be addressed in the

UK. At some point the UK should look at the workings of the New Zealand State Sector Act 1988. I do not believe that the government's proposals address this issue at all.

Treaties

14. Treaties should not be ratified without an affirmative resolution of each House. However the House of Lords should not be able to withhold its consent for longer than a period consistent with the provisions in the Parliament Act for delaying ordinary legislation. I believe the requirement for parliamentary consent would give UK negotiators slightly more leverage. This answers Questions 31 and 33.

15. If the government requires parliament's consent before ratification then it would be in its interest to arrange parliamentary scrutiny of draft treaties. Such scrutiny should consider what domestic legislation might be required in order for the UK to honour the treaty. It is already the practice not to ratify EU treaties without passing the relevant domestic legislation. This practice should be extended to extradition treaties. The handling of trade treaties is a different matter. Parliament is not currently well informed in advance about the possible implications for domestic legislation. It should be much more assertive in probing this. This answers Questions 32 and 36.

16. The government did not in its white paper make its case for overriding parliament's refusal to consent to ratification in exceptional circumstances in accordance with Section 22 of the draft Bill. If it really believes there might be treaties whose ratification is so urgent that parliament cannot be recalled, then it should give examples. This answers Question 34.

17. If the government wishes to enter into any written agreement with a foreign power or international organisation, but argues that it is not a treaty on the grounds that it will not be bound under international law, then it should be required to obtain an affirmative resolution of both Houses to treat the agreement as other than a treaty. The question of whether international law applies may not be clear. Even if it is clear it would not be bound in law, the other party may be in a position to apply effective sanctions. In particular I believe that trade agreements should be regarded as treaties. The WTO Disputes Settlement procedure is very different from the way that other branches of international law are enforced, and the government may therefore claim that trade agreements negotiated through the WTO do not bind the UK under international law. This partly answers Question 35.

18. A treaty does not normally take effect until both (or all) parties have delivered the appropriate instruments. This exchange of instruments is commonly referred to as ratification. If the government uses the definition in clause 24, subsection (3) of the draft Bill, then it may mislead parliament into believing ratification is complete, when in fact only the UK has signed. It may do

this in order to push through the domestic legislation without opposition. An example is the Extradition Treaty with the USA of 2003 and the Extradition Treaty of the same year. This completes my answer to Question 35.

19. None of the above would substantially improve parliament's performance in holding government to account unless it shows a greater degree of independence than of late.

War Powers

20. As stated in paragraph 11, there is no place in a modern democracy for the use of Prerogative powers, other than those exercised by the sovereign in person. Parliament should claim through legislation its right to be the sole source of executive authority. Parliament's view of the extent and nature of the powers it should grant government in relation to the deployment of the armed forces is bound to change over time. It is therefore desirable that these powers be time limited. The powers initially granted should lapse after 18 months, unless in the meantime parliament had voted to extend them. This vote should be held 12 months after the powers take effect, thus giving the government 6 months to bring forward new proposals in the event that existing powers were not renewed. The draft Bill only covers the deployment of the armed forces outside the UK. Taking this power outside the Prerogative would be a start and could provide a model for the future.

21. Some decisions as to the maintenance, equipment and development of our armed forces are also conducted under the prerogative. The government's powers in these areas ought also to be defined in legislation, but this is probably beyond the scope of the Bill and therefore of this committee.

22. The resolution route to defining War Powers, worded as it is as, "an humble address", is not consistent with the transfer of executive powers from the Prerogative to legislative definition. The provisions of the draft resolution should therefore be included in the Bill, prefaced by the wording,

"Her Majesty graciously surrenders, and Parliament accepts, her authority and responsibilities over the deployment of Her armed forces outside the UK, except that She reserves Her right to recall forces back to the UK in defence of the constitution. Parliament delegates the powers thus granted to it, to the Prime Minister in cabinet, subject to the following conditions..." (Question 37)

23. I would make a general point on Question 38: There are several references in the draft to the Prime Minister's powers. Whatever happened to collective cabinet responsibility? I am aware that it has been the practice to treat defence issues (such as the acquisition of nuclear weapons) in a highly secretive fashion, the cabinet being bypassed. Is this not an opportunity to challenge these practices?

24. In individual cases the Prime Minister or cabinet might have to decide the timing, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 38i)

25. In individual cases the Prime Minister or cabinet might have to decide what information to provide, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignored the criteria, then he or she should be heavily censured. (Question 38ii)

26. In individual cases the Prime Minister or cabinet might have to decide whether emergency or security conditions apply, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 38iii)

27. There should be a requirement to seek retrospective approval where exceptional circumstances have been deemed to apply, (Question 38iv). Where Parliament does not believe there is an issue approval could be given without debate.

28. There should be a regular re-approval process. Where Parliament does not believe there is an issue approval could be given without debate. (Question 38 v.)

29. In individual cases the Prime Minister or cabinet might have to decide to deploy special forces without prior approval, but should act according to criteria set by parliament. If there is insufficient time to include these criteria in the current Bill then a new Bill should be drawn up as a matter of urgency. If in retrospect it is found that the PM has ignore the criteria, then he or she should be heavily censured. (Question 39)

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