

**Submission to the House of Lords Constitution Committee
Additional Statement**

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1. The First Report of the House of Lords Constitution Committee came to the decision that the Committee would focus on “*significant* constitutional issues”, determining what those are by concentrating on the “two p’s: principal and principle. In order to be significant, a constitutional issue needs to be one that is a principal part of the constitutional framework and one that raises an important question of principle.”ⁱ

2. The Committee’s Fourth Report recognised the need for an authoritative body, outside government, to keep the constitution under review and to monitor parliamentary change. The Committee considered the case for a Standing Commission on the Constitution in the light of its own existence and concluded that the creation of such a Commission was not necessary. At the same time, the Committee recognised that it was also creating a substantial burden for itself, “since we have a major responsibility to discharge”.ⁱⁱ

3. Democratic Audit considers that the existence and the wide-ranging role of the Royal Prerogative passes the Committee’s “two p’s” test. The prerogative is certainly a principal part of the constitutional framework in the United Kingdom and it raises a major issue of principle: is it legitimate in a representative democracy to confer powers on the executive that ministers may employ in a number of significant policy areas without reference to Parliament? The existence of such powers contravenes the first principle on which Democratic Audit’s framework for democracy assessment, which is widely used and accepted around the world, is founded.ⁱⁱⁱ This framework constitutes a more theoretical, and universal, expression of the basic British constitutional position – that, as Jack Straw recently said on BBC Radio 4, “The government proposes, Parliament disposes”.

4. The Public Administration Select Committee considered the role that the prerogative plays in British governance and its report in March 2004 concluded that the case for reform of the prerogative was “unanswerable”, recommending that the use of

prerogative powers should be made subject to more systematic parliamentary oversight.

^{iv} Democratic Audit recently combined with the Federal Trust and One World Trust to examine the accountability of the executive to Parliament in its conduct of external affairs and found that the use of the Royal Prerogative was a major obstacle to accountability and transparency of policies that are of great significance to the daily lives of British citizens in the modern globalised world. ^v

5. For the purposes of our previous evidence to the Constitution Committee, we accepted the PASC view that reform of the Royal Prerogative was likely to be a complex and time-consuming task and that it was therefore expeditious to concentrate upon priority areas, such as war powers, treaty making and passports. The Committee's decision to examine the case for and against war powers legislation complied with that view. But we are concerned that this one issue – of parliamentary approval for the deployment of the armed forces – might be resolved very narrowly, in the first instance, not least as the Committee's report might well focus on the flawed Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill introduced into the House of Commons by Clare Short MP in 2005. Our wider concern is that piecemeal reform in this one area might close the door on consideration of the continuing use of prerogative powers, and not only in the conduct of foreign policy.

6. Therefore we urge the Committee to consider and report on the question of war powers within the wider perspective of across-the-board reform of the Royal Prerogative. It would be appropriate for the Committee to do so, given the responsibilities of its brief and its developing role as a parliamentary Standing Commission on the Constitution. The Committee's views are likely to prove influential in the light of current cross-party interest in wider reform of prerogative powers. There is one existing model for wider reform. Lord Lester's Constitutional Reform (Prerogative Powers and Civil Service etc.) Bill, which has its Second Reading in the House on Friday (3 March), provides succinctly for parliamentary authority for the exercise of prerogative powers (including war-making powers) and oversight by a joint Executive Powers Review Committee.

7. At the same time, we recognise the importance of dealing with the executive's powers to engage in military actions abroad. The recent deployment of UK troops to Afghanistan has emphasised once more the urgent need to introduce parliamentary

control over such decisions. The executive was able not only to embark upon a war without formal parliamentary approval, but has now substantially altered the parameters of British involvement, again without seeking parliamentary approval. There is a marked contrast with other democratic members of Nato, such as Holland, where the Dutch Parliament played a major role in such decisions.

8. However, we do not think that current bills such as that introduced by Clare Short MP are sufficient. As we have seen, in both the UK and the USA in respect to the invasion of Iraq, if we simply require a Prime Minister or President to seek parliamentary or congressional approval in advance (or even in fact after hostilities might have commenced), they can prepare for and wait until the moment arrives when it is politically impossible for members of the legislature to oppose going to war –and in the UK, giving their “whole-hearted support to the men and women of Her Majesty’s Armed Forces”. In these circumstances, there is no collective judgment, merely a collective charade. (We can set out in detail how Tony Blair MP and President George W. Bush so prepared the ground.)

9. It is vitally important to strengthen the ability of Parliament to *dispose* when the executive *proposes*. In the case of going to war or despatching troops abroad, Parliament needs to create a deliberative mechanism for doing so to ensure that its members are not rushed into judgement and are enabled to come to a fully considered decision. It is for this reason that we proposed in our initial submission to the Constitution Committee that Parliament should establish a committee of both houses to assume strategic oversight of the UK’s international and defence interests and policies. We think that this joint committee should have a wide-ranging brief, taking on important long-term issues, such as international security, geo-political change, intervention in failed states, humanitarian catastrophes, developments in the European Union, world trade, and so on. (The list is potentially endless and here again Parliament should dispose.) Its inquiries and analyses of such issues would provide the perspective for its primary responsibility to consider policies on the resolution of “hot” issues, such as the previous Iraq and present Iran crises, and to maintain a watch over British joint UN and Nato missions abroad, as for example in Iraq, Afghanistan, Bosnia, Kosovo, Sierra Leone.

10. Several members of your House have in fact made the case for a Lords treaty committee, or an international affairs committee. The Power Commission has also recognised the need for strategic oversight in international affairs, with a more specific proposal for an “over-arching Select Committee to scrutinise the Executive’s activities in supranational bodies and multilateral negotiations, particularly in relation to the European Union.”^{vi} We think however that such a committee should have a wider brief; should make use of the more dispassionate expertise that the House of Lords can contribute; and that the model of the Joint Committee on Human Rights is the proper one for such a strategic role (though one of our academic colleagues has suggested that the *collegium fetialis*, the sacred congregation in the Roman republic, charged with sanctifying treaties, declaring war and sometimes carrying out negotiations, provides another looser model).

11. We are aware of the sensitivities around such a proposal. But our study of parliamentary oversight by existing departmental select committees has convinced us that they are too busy, too reactive and too short-term in outlook to take on the wide-ranging strategic role that is required. Indeed, in evidence to our joint inquiry with the Federal and One World trusts, the former chairman of the Foreign Affairs Committee emphatically dismissed the idea that his committee could or should take a strategic view. Thus a Joint Committee would supplement, not supplant, existing committees, and questions of demarcation should and could be amicably resolved. Its joint composition ought to give it a more disinterested perspective than a select committee of MPs could provide.

12. If war is the continuation of policy by other means, then it is imperative to get the policy framework right in the first place and to ensure that any resort to armed conflict or military deployment is undertaken with clear long-term goals in place. The strategic committee could provide the policy background to any international situations in which British troops might be engaged in armed conflict, peace-keeping or other roles. In other words, the committee could enable Parliament and the public to conceive of proposals for war – or military deployment – and judge them in a more dispassionate process. The committee would enable Parliament to dispose, rather than just react.

13. There are various ways in which a more deliberative process could be made effective. For example, the government could be required to submit reports in advance to the committee, as well as the appropriate departmental committees, of any actions that might lead to armed conflict. Transparency should be the norm, but the committee could receive official evidence on a confidential basis (on the model of such bodies as the Newton Committee and Intelligence and Security Committee). Ideally, the committee should have access to a parliamentary legal counsel and be supported by a newly formed External Policy Branch of the parliamentary Scrutiny Unit. In an emergency it could possess the power to recall Parliament if it was in recess. If Parliament was unable to convene, it could exercise the powers of the plenary, to ensure the continuation of some form of scrutiny of executive activity (such an arrangement is provided for by the German constitution, in the form of the ‘Joint Committee’). We also think that the Constitution Committee should consider the whole question of Supply in respect of military deployments – and whether the executive should be required to obtain parliamentary approval for the financing of specific operations.

14. We have noted concerns on the part of Committee members that parliamentary control of executive action that would or could result in armed hostilities might inhibit the executive’s flexibility of action; or that, alternatively, a measure to cater for the need for flexibility might simply give any government room to “drive a coach and horses” through the requirement to seek parliamentary approval for action. Were a government to exploit provisions for emergency action, Parliament and the public would be alert to any abuse and the possibility of judicial review would remain open – in a way that it is not presently while the power to go to war remains a matter for the executive under the prerogative. Though such remedy might not prevent the immediate act it would act as a deterrent to such behaviour. Members have also expressed concerns about the difficulty of drafting a statute precisely enough to cope with the very different (and changing) circumstances in which a government might wish to deploy troops. We believe that relevant laws in Germany, Sweden and elsewhere provide sufficient evidence that such issues can be satisfactorily resolved. The key to drafting suitable and robust legislation is clarity in advance. And that clarity must needs be based on the overriding principles that military action abroad can be undertaken only with parliamentary sanction and must conform with international law.

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ⁱ Constitution Committee, *Reviewing the Constitution: terms of reference and method of working*, First Report, Session 2001-02, HL Paper 11, 11 July 2001

ⁱⁱ Constitution Committee, *Changing the Constitution: the process of constitutional Change*, Fourth Report, Session 2001-02, HL Paper 69, 23 January 2002

ⁱⁱⁱ See Beetham, D, et al, *The IDEA Handbook for Democracy Assessment*, The International Institute for Democracy and Electoral Assistance/Kluwer Law International, 2002

^{iv} Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report, Session 2003-04, HC 422, 4 March 2004

^v Burall, S., et al (eds.), *Not in Our Name: Democracy and Foreign Policy in the UK*, Politico's, 2006. Copies of the book were made available to Committee members.

^{vi} The Power Commission, see <http://powerinquiry.org/home/php>