

Beating *the* Retreat

**The Government's Flight from
Constitutional Reform**

A Democratic Audit Report

*With contributions from
Lord Morgan, Lord Tyler,
Andrew Tyrie MP and
Sir George Young, Bt, MP*



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Foreword

On the publication of the *Constitutional Renewal* Draft Bill and White Paper in March 2008, Democratic Audit submitted written evidence to the parliamentary Joint Committee that was established to scrutinise the Draft Bill in advance. I was also asked to give oral evidence. The Committee has followed some of our recommendations in its final report; others were included only as minority views at the back of the document. But more significantly, it seemed to us that the Committee failed to do justice to a wealth of written and oral evidence; and that there was a significant cross-party and shifting group of members who dissented from the majority view. There was in effect an unwritten “minority report”.

Democratic Audit commissioned this pamphlet in order to give a wider airing to the range of evidence that was laid in front of the Committee, and to the arguments and conclusions of the members who dissented on important issues. The establishment of this pre-legislative joint committee also represented a landmark in parliamentary and legislative procedure, since it examined issues beyond the parameters of the proposed law, considering part of the White Paper accompanying it and the broader constitutional context. We wished to provide a degree of immediate analysis of its work. We are most grateful to the members of the Committee who have agreed to participate in this document.

Professor Stuart Weir,
Democratic Audit
Human Rights Centre,
University of Essex

About the authors

PROFESSOR LORD MORGAN FBA was Fellow and Tutor, The Queen's College, Oxford 1966 – 89 and Vice-Chancellor, University of Wales, 1989 – 95. He has written 29 works of history including on post-1918 and post-1945 Britain, the labour movement, modern Wales, Lloyd George, James Callaghan and Michael Foot. He became a Labour Peer in 2000.

LORD TYLER is Constitutional Affairs spokesman for the Liberal Democrats in the House of Lords. He represented Cornish constituencies for some 14 years, retiring in 2005 after serving as Chief Whip and Shadow Leader of the Commons. With Robin Cook, Ken Clarke, Tony Wright and George Young he produced a report and draft bill for the reform of the Lords, most of whose proposals are now incorporated in the 2008 cross-party White Paper.

ANDREW TYRIE has been Conservative Member of Parliament for Chichester since 1997, and was Shadow Paymaster General between 2003 and 2005. He has written extensively on constitutional affairs, including *Mr. Blair's Poodle: an Agenda for Reviving the House of Commons* (Centre for Policy Studies, 2000) and *Mr Blair's Poodle goes to War: The House of Commons, Congress and Iraq* (Centre for Policy Studies, 2004).

RT HON. SIR GEORGE YOUNG is Conservative MP for North West Hampshire. First elected to Parliament for the Ealing Acton constituency in 1974, he served in Cabinet under John Major and, in 1998, became Shadow Leader

of the House of Commons under William Hague. In 2000, Sir George resigned from the Shadow Cabinet to allow his name to go forward as a candidate for Speaker of the House of Commons.

DEMOCRATIC AUDIT is a research organisation, attached to the Human Rights Centre at the University of Essex, that carries out research into the quality of democracy and the protection of human rights in the UK. The Audit is sustained by a network of scholars, lawyers, journalists and others who contribute to its work and advise its director. Its achievements are widely recognised. The Audit's robust methodology for auditing and assessing democracy has won international acclaim. It is widely copied across the world, having been employed in 21 nations by governments, international bodies such as the UNDP and the Open Society Institute, universities and research institutes. Essex works with the intra-governmental body, International IDEA, to promote its further use around the world. Democratic Audit has published three major successive democratic audits of the UK, using the methodology, and many path-breaking reports on specific aspects of the UK's political life from a clearly defined democratic perspective. Its work has had considerable impact. Authoritative and varied observers from Lord Scarman, Professor Ronald Dworkin and Tony Wright MP to Anthony Sampson, Lord Tyler, Sir David Omand and Lord Lloyd of Berwick have praised the quality of its work.

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Introduction

We served as members of the Joint Committee on the Draft Constitutional Renewal Bill that reported its findings on the Draft Bill in July. As parliamentarians with a long-standing interest in constitutional reform, we had been encouraged by the government's recognition a year earlier in the Green Paper, *The Governance of Britain*, of the need to "forge a new relationship between government and citizen, and begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the people with more power."

However, the proposals that have emerged since then, culminating in the *Constitutional Renewal* White Paper and Draft Bill, have failed to live up to the promise that the Green Paper held out. One of the Green Paper's objectives was "to rebalance power between Parliament and the Government, and give Parliament more ability to hold the government to account". Much of the Draft Bill was concerned with measures to bring about such a shift in power, but we fear these shifts in responsibility, as set out in the Draft Bill, retain an undue degree of discretion in government's hands. As several witnesses to the Committee told us, there was too much "wiggle room". Prerogative powers especially make it difficult for Parliament to hold the government fully to account and we regret the partial nature of the reforms to such powers that the Draft Bill contains.

We recognise that the Draft Bill contains a number of valuable elements and that it is but a first step in the wider programme of intended reforms that were outlined in the

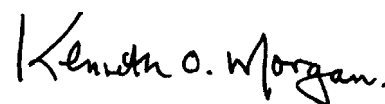
Green Paper. Nevertheless, the six issues that the Draft Bill addresses do not add up to a coherent package of measures. We agree with the Lords Constitution Committee that while a single bill may be the most convenient vehicle for implementing those aspects of the Green Paper programme that require primary legislation, the conglomeration of disparate topics may be subjected to less effective scrutiny in Parliament than the separate parts require.

The title of the Draft Bill is a misnomer. The former Lord Chancellor, Lord Falconer, described it to the Committee as "a sort of 'Constitutional Retreat Bill'". A number of other witnesses suggested that a more appropriate title might be "Miscellaneous Provisions". Crucially, in no way does the Draft Bill live up to the title of "Constitutional Renewal".

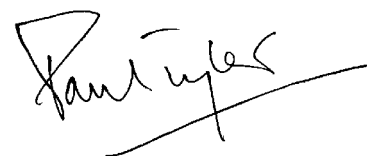
Better ways forward are on offer, as we learned as members of the Joint Committee. We took evidence from a wide range of witnesses, many of whom had proposals as to how the Draft Bill and White Paper could be improved. In certain instances the Joint Committee took on board the criticisms it heard and included them in the final report; on other occasions some who sat on it – including ourselves – felt obliged to support minority statements. We do not hold a common view on every aspect of the government's package of measures nor on alternatives to them.

But we are all convinced that the wealth of evidence that we heard, the criticisms, (usually) faint praise and alternative suggestions, should be made clearly available before parliamentary and public scrutiny

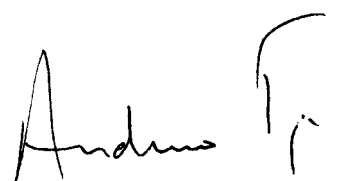
of the actual bill that is to be placed before Parliament. Our contribution to this pamphlet is intended to make that goal more achievable.



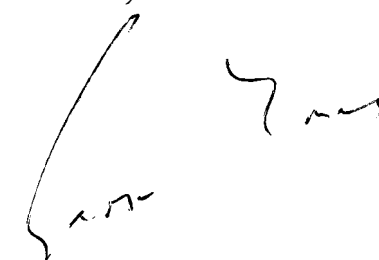
Kenneth O. Morgan (Lord Morgan)



Paul Tyler (Lord Tyler)



Andrew Tyrie MP



Sir George Young Bt, MP

The Attorney General and Prosecutions



Commentary by Andrew Tyrie MP

The Attorney must be given more independence from government if the post-holder is to remain its chief legal adviser

JUSTICE, written evidence to the Joint Committee

Both the Justice and the Constitutional Affairs Select Committee were unanimous in their conclusions that the current constitutional position of the Attorney General is unsustainable. The current arrangement, whereby an Attorney General is asked simultaneously to give independent legal advice to the government of the day, while being dependent on the Prime Minister for his appointment to a political position, can only lead to further embarrassment and loss of public confidence in the office of the Attorney General in the future.

The Joint Committee's decision to revisit the evidence on this and other issues, only recently examined by various parliamentary select committees,

was itself curious. In the case of the role of the Attorney General it was curious in the extreme. On this, the Joint Committee not only had before it reports, coming to unambiguous conclusions, from both the Commons Justice and Constitutional Affairs Committees, it also called largely the same people before it. Not surprisingly, they gave the same evidence. The fact that those who gave evidence in support of the status quo were almost entirely composed of former Attorney Generals (a point which led one member of the Joint Committee to describe their performance as akin to that of a Trades Union) should have given the Joint Committee pause. There was more than a whiff of establishmentitis about the Joint

Committee's conclusions and it is not, therefore, surprising that a minority report should have been necessary.

The minority report's conclusions, and those of this report, reflect those of the Commons Committees and I support them. On two crucial issues the recommendations of those select committees, on which I serve, could not have been clearer. Paragraph 56 of the original report said: "The Attorney General's responsibility for prosecutions has emerged as one of the most problematic aspects of his or her role. Allegations of political bias, whether justified or not, are almost inevitable given the Attorney General's seemingly contradictory positions as an independent head of prosecutions, his or her status as a party political Prime Ministerial appointment, and his or her political role in the formulation and delivery of criminal justice policy. This situation is not sustainable." Paragraph 72 said: "We see no reason why the official exercising the role of legal adviser to the Government should be a political appointee or a member of the governing party. Both in perception and reality, it would improve the independence and public confidence in the impartial nature and authority of the provision of legal advice if it were not the responsibility of someone in political life."

I couldn't put it better myself.

The role of Attorney General is a constitutionally anomalous one, with disturbing implications both for the integrity of the judicial system and public faith in it. The current arrangement – whereby the senior "independent" legal adviser to the government is a majority party

politician sitting in Parliament, appointed by the Prime Minister and attending Cabinet – places the office of Attorney General in disrepute. The Attorney's advice remains confidential unless the government exceptionally chooses to publish it and he or she remains responsible for the supervision of the prosecuting services. But rather than address these issues, the government's proposals contained in *Constitutional Renewal*¹ would serve to make the problem worse, through making explicit the right of the Attorney General to intervene in cases with "implications for national security".² If they are enacted in the forthcoming Constitutional Renewal Act, these changes may give legal legitimacy to the very actions of the Attorney General's which have recently provoked concern.

At first it had seemed that the government would take this opportunity to take bold action. The Prime Minister declared in his first statement to the House of Commons, "The role of Attorney General which combines legal and ministerial functions needs to change." The primary colours in those bold words faded to a murky grey by the time of the White Paper and Draft Bill, since the current proposals entirely evade the inappropriate combination of the two roles.

It is not surprising therefore that the most substantial disagreement within the Committee was over the approach it should recommend on the future of the Attorney General and the various functions he or she performs. Debate in Committee took place against a backdrop of successive episodes of concern, from the controversy surrounding the Attorney's advice on the legality of the invasion of Iraq to the halting of the investigation into corruption

in the 'Al-Yamamah' Saudi arms deal. Cumulatively such episodes have damaged the office of Attorney General, irrespective of its holder. These issues are bound to rear their heads again. Events will create more difficulties since ignoring the anomalies of the Attorney's present role altogether is a recipe for further controversies to emerge. Future governments will doubtless need to take legal advice on controversial decisions, just as future prosecutions will doubtless affect government policy. If the actions of the Attorney General in respect to these issues are to gain and retain public confidence, his or her role will need to change radically.

The Joint Committee faced two alternative paths. The first, endorsed by two Select committees of the House of Commons, was to separate the legal and political functions of the role in order to ensure genuine independence in the former and transparent partisanship in the latter. The other approach, which the majority endorsed, is that of the Government: broadly to leave things as they are and to codify powers which had hitherto been supported only by convention.

Lord Tyler convened a cross-party group of MPs and Peers on the Joint Committee to revise the entire chapter on the Attorney's role, changing the recommendations to reflect those of the Constitutional Affairs Select Committee and its successor, the Justice Committee. They argued that the considered, unanimous judgement of the MPs – on committees with a Government majority – should not be dismissed so easily. The alternative proposed (which is available as a minute at the back of the Joint Committee's report) used largely the same evidence to arrive at quite different conclusions.

The minority group made six major proposals on the future role of the Attorney General:

- Separating the political and legal functions of the Attorney General
- Publishing the Attorney's legal advice where it is referred to in support of a political case being put forward by the government
- Preventing the Attorney from sitting in either House of Parliament
- Excluding the Attorney from Cabinet meetings, except when legal advice is required
- Ending the Attorney's role in formulating criminal justice policy
- Transferring responsibility for interventions in individual cases on grounds of national security to justice ministers.

The majority on the Joint Committee, in endorsing the government's approach, signed up to the analysis of former Attorneys General, that their role as a partisan member of the executive as well as "independent" legal adviser to it was vital to ensure that the rule of law is upheld.³ Yet it is in that key area that the Attorney General's role has come under most scrutiny.

The Attorney's role is intricately connected with the issue of war powers (see page 14-16). The provision of advice to the government over the legality of deploying troops in Iraq was crucial to the decision on whether or not to support the government – and became the hook on which much opposition to the war, and the government's conduct of it, hung. As Peter Riddell argued in evidence to the Joint Committee, "The key issue after Iraq was not whether Parliament votes or not...[it] is the provision of information."⁴

In that vein, the minority group sought to reinforce and re-state the

³ See Lord Goldsmith QC, *Government and the Rule of Law in the Modern Age*, Speech delivered to the LSE Law Department, 22 February 2006.

⁴ Joint Committee on Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, Vol II, HL 166-II, HC 551-II, Q5, p. 21.

¹ See: *Constitutional Renewal White Paper*, Cm 7342 – I, pp16-27.

² Hansard, House of Commons Debates, 3 July 2007, col. 815.

principle that the Attorney's role is not to hold the government line but to uphold the rule of law. His or her advice should therefore be made public whenever it is used to support a political case for action (or inaction) of one kind or another. It is no longer acceptable for ministers to ask Parliament and the public to take their judgements on trust. No jury would accept a defence predicated on a legal case they were not allowed to hear, and neither will the rigorous court of public opinion.



● **Democratic Audit options for change**

- 1. The post of senior legal adviser to the government should be held by an impartial official and kept entirely separate from party politics.
- 2. Further consideration should be given to means of safeguarding the independence of the prosecuting services with respect to national security considerations.
- 3. There should be made clear specific conditions under which the advice provided by the senior legal adviser to the government (and other Law Officers) must be made publicly available – for instance, over war-making.



Courts and Tribunals



Commentary by
Andrew Tyrie MP

I think it is far too soon to look at the work of the [Judicial Appointments] Commission and decide that change is needed. It has not been given a chance to bed down

Frances Gibb, Legal Editor, *The Times*, oral evidence to the Joint Committee

It appears that the whole of the Joint Committee seemed unimpressed by the Government's argument that further changes in the way in which judicial appointments are made were required. It is a curious irony that ministers could take decades to bring forward some well-digested proposals – for example, to put the independence of the Civil Service on a statutory basis – while attempting to tinker with legislation which was only three years old.

We were unimpressed with the need for this section of the Draft Bill. Nobody argued convincingly for its

urgency. We were left with the impression that it had been thrown into the legislative pot to thicken out the rather meagre gruel we had on offer. Even the Lord Chancellor, Jack Straw, sounded less than

enthusiastic – simply observing that he only had a limited opportunity to bring forward bills – and his predecessor, Lord Falconer, was caustically dismissive.

Whatever one's views about the need for a Judicial Appointments Commission – and I was never one of its strongest enthusiasts – the argument that this new body needs more time to bed down seems unanswerable.

The judiciary has been subject to substantial change over recent years, including the decision taken, without consultation, as part of a Cabinet re-shuffle in June 2003, to abolish – or at least try to abolish – the role of Lord Chancellor and establish an Independent Supreme Court. Whatever the motivation for the alterations, the *Constitutional Renewal* paper neither allows a breathing space for new practices to bed down, nor clarifies the existing muddle.

Here the Draft Bill has succeeded, as in so many cases, in pleasing neither reformers nor defenders of the status quo. For those who advocate an independent process of judicial appointments, it is unambitious; for those who advocate accountability in the process, via a Minister, or via Parliament, the Draft Bill unnecessarily alters the recently-negotiated arrangements in the Constitutional Reform Act 2005. The latter had altered fundamentally the role of Lord Chancellor, allowing for a new Supreme Court (separate from the House of Lords) and creating an independent Speaker of the House of Lords, freeing the office of Lord Chancellor to be properly a role for a creature of the Government: a minister. Indeed, the present Lord Chancellor, Jack Straw MP, is a member of the House of Commons and also sits in Cabinet as Secretary of State for Justice. His role in judicial appointments was revised by the 2005 Act to ensure that he merely confirms, rejects or asks for a review of decisions arrived at by the new Judicial Appointments Commission (JAC). His recommendation was then “forwarded” to the Prime Minister –

who has no right to interfere with it – for nomination to the Queen.

The former Lord Chancellor, Lord Falconer of Thoroton, defended the 2005 Act robustly in evidence to the Committee saying it was “very significant. [It] took away from one individual, the Lord Chancellor, the power to appoint judges and placed them in a Judicial Appointments Commission...But in giving the power to somebody else, you did need to ensure that there was proper parliamentary accountability because I think there should be accountability about how you appoint judges.”⁵ Falconer further argued that there had been a detailed, prolonged process, involving discussions with judges, and a “unique” select committee in the House of Lords (a source, at the time, of considerable irritation to the government) to arrive at the present arrangement. He lamented, “I am genuinely disturbed by what seemed to me to be either pointless or damaging proposals in relation to what was a well crafted and well worked out new process for appointing judges.”⁶

Falconer also labelled the Draft Bill’s proposals as a “rag-bag”, noting that they would remove the Lord Chancellor from all but 21 of the judicial appointments in which his office was involved in the year from 1 April 2007 to 31 March 2008 (from a total of 458), yet would bestow a new power on the Lord Chancellor to give directions of an unspecified nature to the JAC. The Joint Committee duly opposed the introduction of these new powers, arguing they would “have the potential seriously to undermine the independence of the appointments process.”⁷

The Law Society put forward a case for further independence of

the judiciary from the executive, and in that respect some of what the Draft Bill proposes could be welcome, since the Prime Minister is formally removed from the process of appointments, and the Lord Chancellor is removed from all appointments below High Court level. However, submissions to the government consultation on this issue did reflect a desire to see “accountability” as an additional criterion when appointing judges. As such, the Committee concurred with Lord Falconer’s analysis in the first instance that it was too soon to uproot a carefully negotiated settlement. In the longer term, the Committee tended towards maintaining accountability in the system rather than further augmenting the structures in place to make it independent.

● **No key votes in the Joint Committee**



● **Democratic Audit options for change**



● **Courts and Tribunals**

- 1. The recent and profound changes to the governance of the legal system must be given time and space to bed down. The government ought to remove many of draft Bill’s proposals not related to ensuring greater independence of the judiciary, at least for the time being.
- 2. Consider the inclusion of new criteria for the appointment of judges, including “accountability”.

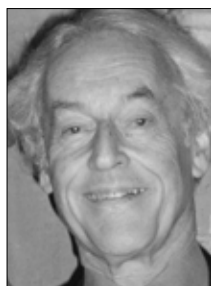


5 HL 166 – II, HC 551 – II, Q169, p. 105.

6 Ibid, Q169, p. 105.

7 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, Vol I, HL 166-I, HC 551-I, p. 47 (para 159).

War Powers



Commentary
by Kenneth O.
Morgan

The point about putting this [oversight of the war powers] on a statutory basis is that you do make it justiciable and you do therefore have some kind of control over process which we do not have at the moment...I am afraid that the proposals in the White Paper and the Bill leave far too much wriggle room for government to evade any kind of proper accountability

Professor Stuart Weir, oral evidence to the Joint Committee

Secrecy has been one of the banes of the unwritten, informal British constitution, a barrier against free democratic inquiry and, perhaps, social change. The Labour government, admirably radical in its constitutional programme, proposed in its Green Paper to challenge this secrecy by significantly reducing one of its major causes, the arcane tradition of the Royal Prerogative. However, both in relation to the power to make war and to conduct treaties with other countries, the expressed aspirations are not yet fulfilled.

On the decision to go to war, the discussion was side-tracked by two arguments. It was argued, notably by military chiefs, that making war-making dependent on statutory approval would endanger British military personnel and even make them liable for criminal action in the courts. This was amply shown to be a complete red herring: Jack Straw himself dismissed it and showed that an

immunity clause could easily cover the point. It was also claimed that the discussion over war powers was unduly coloured by the invasion of Iraq. This is a curious argument since

the very impact of the Iraq invasion on our foreign relations and internal security in itself underlined both the need for a military operation overseas to have unambiguous political backing from Parliament and people, and the dangers that flow if it this does not happen.

It is a disappointment that the Draft Bill proposes a parliamentary resolution rather than statutory sanction over war powers. This makes parliamentary control over deployment of our military forces permissive rather than mandatory, and too easily circumvented. Professor Tomkins and Elizabeth Wilmshurst, amongst others, argued powerfully that only the force of statute would provide the necessary authority and certainty. It would introduce for the first time in our history a legal oversight of the use of our troops and the rationale for it. It would also provide the only genuine yardstick for a democracy in determining whether such action was truly in the people's name.

In any case, whether by statute or the weaker approach of a permissive parliamentary resolution, what the Draft Bill proposes would in practice make too little difference. It would be too easy for governments to obscure any true debate; the view of military chiefs that Parliament would not be sufficiently informed to form a judgement would thus be self-fulfilling. It is not right that there would be no clear test to determine whether we were engaged in a conflict situation or not. After all, formal declaration of war last occurred in 1942 (against Siam) and an immense variety of military actions do occur, including covert operations by special forces. It is not right that power to

decide what information should be provided to Parliament should be left solely to a necessarily committed Prime Minister. We have already seen the weaknesses of this in recent episodes such as Sierra Leone or 'no-fly zones' in Iraq. It is not right that Parliament would have no significant way to determine whether 'mission creep' was taking place, as in the Americans' conduct of war in Vietnam or perhaps in Afghanistan at the present time. It is clearly not right, after all the disinformation which accompanied the invasion of Iraq ("45 minutes"), that the fullest statement of legal principle should not be provided by the Attorney General or perhaps others. It is not right that Parliament should be unable to offer retrospective judgement on armed actions that had taken place, or that it should not automatically be recalled if activity is proposed during a parliamentary recess. At the moment, the government is, most commendably, addressing a key aspect of the democratic deficit, but with changes that may prove more cosmetic than real. The Royal Prerogative would survive in different guise. The kind of public disillusion caused by the intervention in Iraq could re-emerge, and our armed forces, most unfairly, continue to operate in a climate of unaccountability, suspicion and moral doubt.

The government's power to commit troops to armed conflict without a formal requirement for parliamentary consent, rests on its operation of the Royal Prerogative, a wide ranging set of non-statutory powers which are a relic of monarchical rule. The *Governance of Britain* Green Paper described the use of these powers as no "longer appropriate in a modern democracy" and proposed that "in general the prerogative powers should be put onto a statutory basis and brought

under stronger parliamentary scrutiny and control."⁸ However, the *Constitutional Renewal* White Paper proposed that parliamentary oversight of war-making should not be established by statute, but left to rely on the weaker foundation of convention.

The Committee was bombarded with evidence from an extraordinary collection of ex-military men, ranging from those who had directed operations in the Falklands war to the former commander of forces in the 2003 Iraq war. They took a diverse range of views from Lord Bramall (Chief of the Defence Staff, Falklands) who considered there was a need for "prior and manifest assent of Parliament" for troops to be sent to war, to Lord Craig of Radley (Chief of the Defence Staff, Gulf War I) who said he would "balk at the concept of the Prime Minister saying, 'May I do this, oh Parliament, oh Commons?' and the Commons saying, 'Yes, get on with it', or, 'No, we do not like it. We think you ought to do something else'."

Though the government has talked the Bramall talk, it has substantially tacked towards the Radley walk in this respect. The *Governance of Britain* Green Paper said "On an issue of such fundamental importance to the nation, the Government should seek the approval of the representatives of the people in the House of Commons for significant, non-routine deployments of the Armed Forces into armed conflict." Yet ministers have plumped for a resolution of Parliament to entrench a convention that the House of Commons should be consulted, rather than an Act of Parliament that stipulates it must be. On this key issue the Joint Committee split.

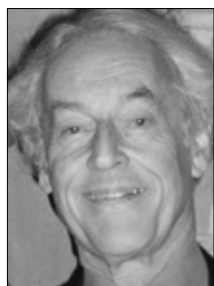
⁸ *Governance of Britain*, Cm7170, July 2007, pp15; 17.

Despite considerable evidence that a statutory solution could still provide for flexibility and responsiveness, the Committee concurred with the government that a "detailed resolution approach [was] a well-balanced and effective way of proceeding." The majority of the Committee were convinced by the argument that individual troops could be put at risk of legal action merely for following orders, even though the Bill proposed in the government's own consultation paper would have ensured they enjoyed specific immunity from prosecution. Even the Lord Chancellor conceded that this difficulty could easily and expressly be obviated by way of an immunity clause in the Bill.⁹

The Committee's report itself should be read as laymen's reaction to very weighty evidence. Members were left in a quandary, since their report should at least reflect the balance of the evidence they received, yet a considerable portion of it – on this issue in particular – derived very much from the views of the military ex-experts. Members were left to marshal the contributions of a veteran of the Falklands conflict – which received almost unanimous support – along with that of the Chief of the Defence Staff during the more recent Iraq war, which was very controversial partly because of the way the executive used its discretion to manipulate the parliamentary votes that were held. Unsurprisingly, the latter was more cautious about seeking parliamentary assent. The Committee could have concluded that controversy was all the more reason for seeking consent, but deferred instead to the "expertise" of those who said that the need to gain consent from Parliament might undermine the confidence of those engaged in the military campaign.

⁹ HL 166-II, HC 551-II, Q744-5, pp329-30.

Ratification of Treaties



Commentary
by Kenneth O.
Morgan

The power to examine and ratify international treaties was fundamental for critics of the secrecy underlying British foreign policy. It was a central theme for the Union of Democratic Control [UDC] during and just after the first world war, campaigning against the 'secret treaties' which they believed had led to war and concealed annexationist war aims. One major critic was the son of Queen Victoria's private secretary, Arthur Ponsonby, an establishment figure who moved into the Labour Party, and it was he, as under-secretary in Ramsay MacDonald's first Labour government

Gladstone, as in so many areas, got it right, when he said the role of Parliament is not to run the country but it is to hold to account those who do, and I think on treaty-making we have singularly and emphatically failed to live up to that democratic promise

Graham Allen MP, oral evidence to the Joint Committee

in 1924 who devised the present practice, the so-called 'Ponsonby Rules' by which treaties have to be left on the table of both Houses for 21 sitting days.

Treaties are another of the key aspects of the antiquated and undemocratic Royal Prerogative, which so shackles the rights of free citizens. It

is admirable that the government, under a Prime Minister with a keener concern for constitutional renewal than any of his predecessors, should seek to remedy it. It is clear that the Ponsonby Rules are totally ineffective as a parliamentary control mechanism. It is excellent that the Draft Bill proposes to give the ratification of treaties statutory

force. The question is whether what is proposed will actually make any real difference, or whether, as Elizabeth Wilmshurst suggested, the changes are largely presentational.

It is vital that the new provisions should enable Parliament actually and routinely to have proper informed debates on overseas commitments, along with the preliminary discussions of them, and that parliamentary judgement should be exercised in a way that it never was under the Ponsonby Rules. It is good that the disapproval of the House of Commons should lead to a treaty not being ratified, but it is important that disapproval should be followed not by evasion but by an automatic and rapid recourse to resubmission. It is less good, perhaps, that the Lords is given so shadowy a role in approving treaties, and the expertise of that body could be more directly deployed. There is need also for far greater clarity of definition of the "exceptional circumstances" under which governments may avoid presenting treaties to Parliament at all. Here as elsewhere the Draft Bill gives governments far too much "wriggle room" and the recalibration of relations between legislative and executive which is the government's avowed aim is not given crystal-clear effect. The very rarity of parliamentary debate about policy towards Afghanistan, which has the potential to become another Anglo-American Vietnam, indicates how the "exceptional" can too easily become the norm.

The most important aspects of all, however, concern issues of definition. What is a "treaty" anyway? Only a limited number of international agreements take the form of official

treaties, even including routine environmental and humanitarian matters. There are also, often far more ominous for our security, many informal undertakings between heads of government, memoranda of agreement and understanding, and private bilateral deals over defence. Anglo-American defence arrangements, from schemes for nuclear collaboration in the Attlee years to recent agreements over Trident with the US in 2006, are central to our security as a nation, yet were never properly debated by Parliament. In another field, the formal extradition treaty with the United States was signed without public debate or even knowledge. So the UDC's "secret diplomacy" remains alive and well. It is vital, if the parliamentary supervision of treaties is to mean anything, for a robust Joint Committee, with the Lords well represented, to be set up, to determine the specific international agreements that parliament should scrutinize and approve. A permissive mandating requirement over examining the background to them should be attached to its terms of reference. If these changes to the Draft Bill are undertaken then the dreams and hopes of Arthur Ponsonby and the UDC may find some fulfilment, ninety years on.

The role of Parliament in overseeing the conclusion of international agreements attracts far less political and public attention than the question of its oversight of war powers. Yet treaties are a very important part of the business of government, impacting upon the very engagement in armed combat and peacekeeping duties to other policy areas from trade to aid; and the power to ratify them, like the ability to go to war, is exercised under the Royal Prerogative, without the formal remit of Parliament.

In his statement to the Commons of 3 July 2007, the Prime Minister

promised "to put onto a statutory footing Parliament's right to ratify new international treaties." But the proposal in the Draft Bill is flawed, and if not accompanied by significant changes of practice, the power it purports to create will not become a reality.

The Draft Bill puts the "Ponsonby Rule" on a statutory footing, providing for a formal scrutiny process for Parliament to oversee the ratification of international treaties. The Draft Bill proposes that where the House of Commons objects, treaties should not be ratified; and that where the House of Lords objects, treaties could still be ratified after an explanatory statement had simply been laid before Parliament. Section 22 of the Draft Bill also provides for an "exceptional procedure" that could allow ministers to ratify treaties without a parliamentary process where they thought it necessary (another of the government's attempts to secure "wriggle room").

There is considerable scope for improvement in the proposals. Simply translating Ponsonby into statute is insufficient, since this Rule does not in practice lead to Parliament debating treaties, let alone voting on them. Many in the House of Lords will certainly object to setting a precedent that the second chamber could only say, "We'd rather you didn't" as opposed to "No". The Joint Committee on Conventions has only quite recently thrown out government proposals to circumscribe the power of the Lords in a similar fashion with respect to secondary legislation. The eminent academic on constitutional affairs, Lord Norton of Louth, referred to such proposals as "atrocious".¹⁰

Since treaties are legally binding, Peers are likely to take a similar view. However, remarkably the Joint Committee agreed with "the

10 Joint Committee on Conventions, *Conventions of the UK Parliament*, HL 265 – II, HC 1212 – II, Q339, Ev. 133, 31 October 2006.

Government's proposals in terms of the relative effects of a negative vote in the Commons and the Lords...at least while the Lords retains its current composition." Given that it is now ostensibly government policy to reform the composition of the Lords, it would be unsatisfactory to make new parliamentary processes contingent on the old composition of the House. The Foreign Affairs Select Committee notes in its evidence that there is a "capacity problem" for Parliament as a whole in processing treaties. The Joint Committee on the Draft Bill recommends a further committee of MPs and Peers be constituted to sift treaties. To abate the "capacity problem", it may be worth considering giving the Lords the initiative in this area, to ensure that the Commons can come to a view based on the more detailed scrutiny the second chamber would be able to afford treaties – however it is composed now or in the future.

The Joint Committee gave further leeway to the government, assenting, with limited reservations, to its proposals for an "exceptional circumstances" process and accepted the government's definition of treaties, which can exclude legally binding documents such as Memoranda of Agreement and, particularly, Memoranda of Understanding.¹¹ These documents' exclusion is a weakness of the present Ponsonby Rule that will not be dealt with by the Draft Bill, even though such agreements can, as the Foreign Affairs Select Committee says, be "more important in their effects than most treaties." Indeed, the highly controversial arrangements

11 The former is certainly legally binding, though the UK government has questioned the strength of the latter. See J. McNeill, 'International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding', *The American Journal of International Law*, Vol. 88, No. 4 (Oct. 1994), pp. 821-826.

between the USA and Great Britain with respect to the Ballistic Missile Early Warning Station at Fylingdales are governed by just such an agreement.¹²



● **Democratic Audit options**
● **for change**

- 1. The government must remove the current provision in the Draft Bill that will allow ministers to bypass parliamentary procedures and accountability in unspecified circumstances.
- 2. The government and Parliament must reform the parliamentary committee system and parliamentary procedures to make a reality of any new statutory powers that are granted to Parliament.
- 3. It is not satisfactory for government to give Parliament a “take it or leave it” choice over international treaties and agreements. Parliament should play a role in negotiations leading to international agreements.
- 4. Consideration must be given to means of involving Parliament in all international agreements, not merely those falling under the definition of a treaty as presently applied.



12 Hansard, House of Commons Debates, 2 April 2008, col. 937W.

The Impartiality of the Civil Service



Commentary by Sir George Young Bt, MP

I think you can have too many special advisers. The special advisers I have always preferred are those you hire because they know things rather than because they believe things

Professor Peter Hennessy, oral evidence to the Joint Committee

The story goes that Winston S. Churchill once pushed an ornate dessert away, declaring that “this pudding has no theme”.

That is how the Joint Committee felt about the Draft Bill which the government served up in the summer.

We had real doubts about the value of Parliament being invited to eat and digest it in its current form.

The only section that many of us felt confident of introducing in the session that has just begun was the section on the Civil Service.

This has been promised in the government’s manifestos, been drafted

and endorsed by the Public Administration Select Committee, been welcomed by the good and the great, and has received broad all-party support.

The Civil Service clauses that generated the most debate were those on special advisers.

There was common

ground that special advisers are a Good Thing, and a useful distinction was made between political advisers and experts.

However, in the interests of securing a consensus, the Committee ducked the question of capping the number of special advisers. Too many special advisers adversely affect the terms of trade between ministers and civil servants. If a Cabinet minister surrounds himself with special advisers, through whom he communicates with his civil servants, that dilutes and devalues the

contribution made by a professional and independent Civil Service.

The unrestrained growth of special advisers can have a damaging effect on the morale and effectiveness of the Civil Service, leading to its creeping politicisation.

The change in pace since 1997 was demonstrated when, in the first twelve months after taking office, many of the senior civil servants from the Government Information Service were removed and their communications role taken over by political appointees. Instead of information about the activities of government being a public good, available to all, key stories were fed to those likely to portray information sympathetically, and withheld from those likely to be more critical. Although there has been a less abrasive style since the departure of Alastair Campbell in 2003, the risk of a return to the politicisation of news remains.

The Civil Service clauses in the Draft Bill provide an opportunity for an unequivocal statement that will put this issue to rest. A maximum of two special advisers per department, with ten at No 10, would re-assert the commitment to an independent Civil Service, retaining its collective memory and serving impartially governments of different persuasions. It would arrest the dangerous trend that began ten years ago and oblige government to come to Parliament to change the law, if it wanted to change the basis on which we are governed.

The reforming Northcote-Trevelyan report proposed a Civil Service Act to safeguard the neutrality of the Service in 1854. Given this long gestation period, and the recent detailed attention that the Public Administration Select Committee and the Committee on Standards in Public Life have given to the matter, it is perhaps disappointing that the provisions contained in *Constitutional Renewal* are still not fully satisfactory.

The Draft Bill incorporates what is effectively a Civil Service Bill into Part 5. Such legislation has been promised by successive governments but never delivered. Thus the Constitutional Renewal Bill appears to be a real opportunity – finally – to put the Civil Service on a statutory footing, to clarify the relationship between ministers and civil servants and, more specifically, that of the role and numbers of special advisers. The very nature of government has changed since Labour came to power, with ministers tending to seek advice not from career officials or experts but from party loyalists. As Peter Hennessy put it in evidence to the committee, “the special advisers I have always preferred are those you hire because they know things rather than because they believe things.”¹³

The present government first brought forward draft legislation on this subject in 2004, on the recommendation of the Committee on Standards in Public Life’s *Ninth Report* in 2003. Like the 2004 Draft Civil Service Bill, Part 5 of the Draft Constitutional Renewal Bill failed to put any cap on the number of special advisers; indeed, as the Committee on Standards in Public Life pointed out, the latter Draft Constitutional Renewal Bill’s provisions were even more disappointing than those of the earlier one.¹⁴ The original Draft Civil

Service Bill made provision for the conditions on which special advisers were appointed to “incorporate” some conditions approved by the Prime Minister (in his or her guise as Minister for the Civil Service). The new Draft Constitutional Renewal Bill instead suggests that *all* the terms on which special advisers are appointed should be approved by the Prime Minister.¹⁵

In addition, the Draft Constitutional Renewal Bill would, unlike the 2004 Draft Civil Service Bill, codify the present arrangements in relation to ministers and civil servants by embodying a statutory power for the former to hire and fire the latter. Indeed, the Clause 4(4) of the 2004 Draft Civil Service Bill expressly said that “nothing in this section confers (a) the power to recruit, appoint, discipline or dismiss civil servants, or (b) any other power for the day-to-day management of civil servants.”

The equivalent Clause 27 of the Draft Constitutional Renewal Bill confers precisely those powers on the Prime Minister. The Committee heard substantial evidence that this measure would severely undermine the neutrality of the Civil Service, and the Public Administration Select Committee reported that it “does not seem to be in keeping with the Government’s commitment to a civil service recruited on merit and able to serve administrations of different political persuasions.”

Key votes in the Joint Committee

Though the original draft of the Joint Committee’s report recommended that a cap be placed on the number of special advisers, members resiled from pressing the point in the final report. Fiona Mactaggart MP attempted to have references to a limit excised altogether, and was defeated (since six members

voted with her, and six against). A former Cabinet Secretary, Lord Armstrong of Ilminster, moved two amendments that ratcheted down the commitment from an overall cap to more flexible departmental “limits”. The Committee resolved that only ministers running whole departments (those in Cabinet) should be entitled to special advisers, and that there should be a limit for each minister. These conclusions seemed to eschew concerns that government could simply be re-organised to create more secretaries of state, and thereby more advisers. The Prime Minister could, for example, decide that the Minister for Housing – who presently attends Cabinet but is not a member of it – should become the Secretary of State for Housing in a new Department for Housing.



Democratic Audit options for change

1. The decision to place the Civil Service on a statutory footing is a significant reform. However, the government should consider introducing a separate Civil Service Bill rather than doing so as part of the Constitutional Renewal Bill – though not at the cost of further delay.
2. The Civil Service Commission should be given the right to initiate inquiries, rather than, as envisaged at present, only reacting to complaints or needing the agreement of the government to carry them out.
3. Parliament must be given the power to control the number of special advisers, either the overall figure or the particular number allotted per minister; and ministers should be required to produce to Parliament evidence of the qualifications of special advisers for the particular tasks they will be performing.

¹³ HL 166 – II, HC 551 – II, Q418, p. 201.

¹⁴ Memorandum by Committee on Standards in Public Life (Ev 20), HL 166- II, HC 551 – I, p. 190.

¹⁵ See, respectively, Clause 16 of the Draft Civil Service Bill and Clause 38 of the Draft Constitutional Renewal Bill.

Protests around Parliament



Overall
Commentary by
Paul Tyler

The whole purpose behind a Constitutional Renewal Bill must be to re-engage people with the process of government and to encourage participation in our democracy, not to isolate Parliament from the voice of the people and legitimate protest

Countryside Alliance, written evidence to the Joint Committee

Democracy can be untidy. Freedom of speech can be noisy. But faced with threats to our liberties and challenges to our liberal democracy – not least from terrorism – we cannot afford to let them be undermined. Hence the dilemma caused by the persistent protestors in Parliament Square.

On balance, I welcome the fact that they recognise this is the appropriate location for any attempt to exert influence in a Parliamentary democracy, rather than opposite the gates to 10 Downing Street, or even in Trafalgar Square. Our vote in March 2003, however misled by Tony Blair's

misinformation and however grudgingly arranged, restored some semblance of central significance to the House of Commons, even if the public tended to side with those (like me) who voted against the Iraq invasion rather than with the majority.

However, like other members of the Joint Committee

and those who gave evidence to us, I expected the intended pedestrianisation of the Square to give practical expression to the recognition of this role. Indeed, I suggested that we might seek to replicate or relocate "Speakers Corner" here at the same time, to emphasise the need for parliamentarians to listen as well as lead. Unfortunately, since the

Committee reported, Boris Johnson has sunk this proposal, for reasons of his own, and we are left with no consensus on what to do.

This section of the Draft Constitutional Renewal Bill was always a curiously discordant ingredient, bearing no relationship to the government's stated motive of strengthening Parliament's scrutiny of the executive's proposals and actions. Repeal of Sections 132 to 138 of the Serious Organised Crime and Police Act is clearly urgent since this new law was always a sledgehammer to crack a nut. It is far from clear whether any replacement is necessary.

In the meantime those MPs who want to tidy up the Square, and regularise those who demonstrate there, might care to speak very firmly to their friend the Mayor of London!

The right to protest is fundamental to any democracy, and the ability to do so at the site of the nation's legislature is practically and symbolically important. Clearly, the entitlements of demonstrators and participants in rallies have to be balanced with broader security and social considerations, from the safety of MPs, Peers and officials to the prevention of nuisance. But it would be unacceptable for parliamentarians to use their privileged position to pursue sectional interests in this area, and inhibit the right of protest for reasons of personal convenience.

Since the Joint Committee reported, the circumstances under which it took evidence have changed considerably as members had thought that Parliament Square was in due course to undergo a major pedestrianisation programme. Yet

Beating the Retreat



Overall
Commentary by
Paul Tyler

I do not know... whether or not any of these proposals actually make a difference to the current position... in relation to the things that I know about this is a sort of Constitutional Retreat Bill! To call it a Constitutional Renewal Bill in my view is a little bit over-claiming

Lord Falconer of Thoroton, former Lord Chancellor and Secretary of State for Constitutional Affairs, oral evidence to the Joint Committee

Gordon Brown came to power promising a new constitutional settlement.

In his first statement as Prime Minister he displayed a hitherto unsuspected (but very welcome) enthusiasm for a better balance of power between the executive and Parliament. After the arid lack of constitutional progress during the later Blair years, optimism renewed amongst reformers in all parties.

Yet in the months that followed the process from Statement to Green Paper to White Paper to Draft Bill eroded those bold intentions. Far from a settlement which would

“hold power more accountable” and “enhance the rights of the citizen”, what has emerged does little to achieve either aim, and in some instances goes backwards, entrenching powers instead of curbing them. There was, perhaps, writing on the wall since the Prime Minister committed only to “surrender or limit” his

prerogative powers. As it turns out, “limit” can mean codify; that is rather than rely on an implicit power, the Prime Minister seeks to make it explicit in the Draft Bill, as in the case of the Attorney General’s functions in relation to national security and in that of Clause 27 of the provisions on the Civil Service.

Those of us who sat on the Joint Committee tasked with scrutinising the Draft Bill waded through hours of evidence both from those who would rather have had a Bill that took constitutional reform forward not back (to coin a phrase), and from a litany of military and Establishment ex-experts who considered that everything had been done rather well in their day, and arrangements should be left as they are. We were given, in any event, just ten weeks to examine proposals on matters as diverse as how noise is measured in Parliament Square and what a “conflict decision” is when the government decides to send our troops into action.

Stuart Weir and the Democratic Audit submitted what was perhaps the most revealing – and the most damning – evidence of all, setting out lucidly the potential originally envisaged in the *Governance of Britain* Green Paper, published immediately after Brown’s ascendancy, and the poverty of ambition in the final proposals embodied in the White Paper and Draft Bill. The table they produced tracing the evolution or otherwise of the Green Paper proposals is included, updated, in Appendix One of this report (see pp 28-31).

Disappointingly, the Joint Committee proved exceedingly cautious as a majority of its membership (presumably handpicked for that purpose) took a much softer line with the government’s proposals. Its report defers to the expertise and experience of those who have always done things the way they are done now over the analysis of those who have suggested ways

in which things might be done better. The Committee failed even to hold the government to its original stated intentions as contained in the *Governance of Britain* Green Paper. In effect in key areas the majority of the committee perpetuated a repeated process of “non-consultation”. Consultations had already been held over such issues as the status of the Attorney General and war powers. Much strong evidence for change was received (backed up by the findings of parliamentary committees) – but ignored by the government. The Joint Committee took evidence once more on the same questions, and like the government, chose not to pay heed to many of the answers received. The role of the Committee could have been to act as a check upon the executive, with a view to bringing the legislation in line with the balance of argument. Instead, in many cases, it served to support the government in driving its agenda home and ignoring considered expert views.

At times the exchanges between Committee members and the more illustrious witnesses seemed so incestuous as to be constitutionally unhealthy – a dialogue between colleagues in the same Establishment. The mechanism by which participants are chosen for such committees – and evidence is invited – seems to give disproportionate emphasis to the status quo, and those who have a vested interest in it. It is, for example, surely unreasonable to expect former holders of a government office to do anything other than defend its integrity, and their operation of it.

Had *The Governance of Britain* policy process fulfilled the Prime Minister’s promise to produce “a new constitutional settlement – a settlement that entrusts Parliament and the people with more power”, those of us who have contributed

to this booklet would have been delighted. Tinkering with the Royal Prerogative is not an adequate alternative to fundamentally rebalancing the relationship between the executive and legislature.

For example, in a parliamentary democracy it is surely essential to re-emphasise that the government owes its legitimacy to the support of a majority in the House of Commons. Should not an incoming Prime Minister only be confirmed when he or she, their ministers and their legislative programme, have been specifically endorsed by a vote of the House of Commons? Kissing hands at the Palace is no substitute for the approval of our elected Parliament. The USA delays its presidential takeover for months: a few days here could be well spent.

Should not newly appointed secretaries of state be interrogated by the appropriate departmental select committee? Would not this be a better way to exercise parliamentary scrutiny and accountability than – as the government has suggested – merely asking these committees to question other appointees, who are themselves accountable to ministers?

It is surely time, too, that the machinery of government itself ceased to be a press officers’ plaything. Ever since the Tony Blair’s now infamous attempt to abolish the role of Lord Chancellor by telling the wires it had been consigned to the dustbin of history, we know the folly of an approach that says new departments can be created, and old ones abolished, all at the personal whim of an individual Prime Minister. There must now be a role for Parliament in the determination of such changes, not least since the creation of new departments always visits considerable costs on the taxpayer, and often appears to be more about presentation than it is about making government more effective.

In Chapter 8 of the Joint

Committee Report, we persuaded our colleagues to include almost unprecedented misgivings about the limited scope of the draft Bill. The Committee agreed unanimously that

because of the disparate nature of the proposals in the Draft Bill, it is difficult to discern the principles underpinning it...It is clear that further work is needed before the Bill will be ready for introduction in the next session. We call on the Government to take note of our conclusions and to reconsider the form in which the bill should be presented.

The Committee also urged Jack Straw to broaden the scope of the forthcoming Bill:

The long title as it stands is insufficiently broad to cover all of the issues we have addressed in our inquiry...Changing the approach to the long title would enable Parliament to consider wider issues of constitutional reform during the passage of the Bill, without obliging the Government to introduce provisions to do so.

Pre-legislative scrutiny by a specially appointed committee of MPs and Peers is still a relatively new and rare mechanism to build wider consultation and greater in-depth examination into the parliamentary process. In that light, the government should take especial care to respond positively to its recommendations.

If this Draft Bill was meant to drag the Royal Prerogative into the 21st century, by making it subject to proper democratic accountability, it has certainly failed to do so, even on the comparatively few prerogative powers that it deals with. Since the government cannot even enumerate the powers it holds under the Royal Prerogative, why not make clear those it needs, and ask Parliament specifically to confer them? The general and reasonable principle that

Appendix One

Whatever Happened to the Constitutional Reform Agenda

The *Governance of Britain* programme: proposals and progress

<i>Proposal</i>	<i>Significant document/s and formal procedures</i>	<i>Comments</i>
The Four Goals		
'To invigorate our democracy, with people proud to participate in decision-making at every level'	<i>The Governance of Britain</i> , Green Paper, Cm 7170, July 2007	This is a key aim if the government is to restore public confidence in our democracy, but there is no sign that the government will seek to deal with the formidable social and economic obstacles to fuller participation.
'To clarify the role of government, both central and local'	<i>Governance</i> Green Paper	Proposals in the Draft Bill do clarify some issues, but the insistence on retaining ministerial discretion continues to leave wide areas of ambiguity that can be exploited by the executive.
'To rebalance power between Parliament and the Government, and give Parliament more ability to hold the Government to account'	<i>Governance</i> Green Paper	A vital reform, but the <i>Governance</i> proposals to strengthen Parliament are more apparent than real. On almost every issue, the emphasis on discretion again vitiates a necessary and long overdue goal.
'To work with the British people to achieve a stronger sense of what it means to be British, and to launch an inclusive debate on the future of the country's constitution'	<i>Governance</i> Green Paper	This has so far been a top-down, confused and confusing process. A Green Paper on Rights, Responsibilities and Values is to be published in advance of a Citizens' Summit that is to formulate the British statement of values, but the process has been long delayed or possibly postponed.
Limiting executive powers:		
War powers	<i>Constitutional Renewal</i> , Ministry of Justice, Cm 7342, March 2008 (following consultation paper)	The intention to give Parliament the final say on the use of armed force will be set out in a Commons Resolution, and not in statute; and the government will retain significant 'opt-outs'. Once it has approved military action, Parliament will have no control over possible 'mission creep'. Legislation is not ruled out for the future.
Treaty ratification	<i>Constitutional Renewal</i> (following consultation paper)	The Commons to be given statutory power to veto treaty ratification. But this is a 'take it or leave it' retrospective power, with no role for Parliament in the negotiating process. It is not yet clear how Parliament will be able to make effective use of the power and whether a 'sifting' process will be set up.
Dissolutions of Parliament	<i>Governance</i> Green Paper	Giving Parliament a vote prior to a Prime Minister's request to the monarch for a dissolution is a symbolic gesture that will make hardly any difference to the balance of power between Parliament and the executive. It begs the question whether it remains appropriate for the monarch to retain the personal prerogative power to grant (or withhold) consent for a dissolution.
Giving the House of Commons the ability to request a recall of Parliament	<i>Governance</i> Green Paper; Modernisation Committee inquiry being held	The bar is set too high, demanding a request from a majority of MPs who will be widely dispersed during a recess; and then leaving the final decision which should rest with MPs to the discretion of the Speaker.
Civil Service Bill	<i>Constitutional Renewal</i>	A valuable measure that will put the civil service and Civil Service Commissioners on a statutory footing and enshrine key values. However, the Civil Service Commission will not have the power to hold inquiries into compliance with the <i>Civil Service Code</i> on its own initiative; and tensions around the position of special advisers are unresolved
Wider review of the Royal Prerogative	<i>Governance</i> Green Paper; <i>Constitutional Renewal</i> ; a consultation paper is to be published following an internal government 'scoping exercise' on executive prerogative powers.	All Royal Prerogative powers should either be placed on a statutory basis or terminated. It is right (as the Public Administration Select Committee advised in its authoritative report; HC 422, 2004) to prioritise war powers, treaties and passports; but it is essential to move fast towards full public consultation on the whole process. It is a mistake to rule out reform to the personal prerogatives of the monarch, especially with regard to the choice of a Prime Minister that ought to be the prerogative of the House of Commons.
Reform of the role of the Attorney General	<i>Constitutional Renewal</i> ; consultation paper	The proposals do not fulfil the government's original intention to remove the tensions inherent in a government minister acting as senior legal adviser and supervising the prosecuting authorities. While providing some safeguards, the Attorney General will continue to serve as the government legal adviser and is given an explicit power to halt prosecutions and investigations on undefined national security grounds. The AG will report annually to Parliament and swear to respect the rule of law.

Distancing the executive from judicial appointments	<i>Constitutional Renewal</i> ; consultation paper	It is right to exclude the Lord Chancellor and Prime Minister from the processes of appointing senior judges. However the Judicial Appointments Commission will find it very difficult in practice to broaden the composition of the judiciary and needs to be governed by wider criteria for appointments, including a commitment to diversity.
Ecclesiastical appointments	<i>Constitutional Renewal</i> ; Archbishops' consultation paper and report approved by General Synod	It is proper to remove the Prime Minister's active role in making appointments; but there is a failure to address the broader issues of its privileged status over other faith communities and its proper place within a largely secular society.
Distancing ministers from the granting of honours	<i>The Governance of Britain</i> ; Sir Hayden Phillips, Cabinet Office, 2004 HHHhasdf	Continuing commitment by Prime Minister and ministers not to alter recommendations for honours. But the whole process is too opaque and exclusive to command public confidence.
Parliamentary oversight and executive accountability:		
A parliamentary role in key public appointments	<i>Governance Green Paper</i> ; Commons Liaison Committee, <i>Pre-appointment hearings by select committees</i> , HC384, 2007-8 (response to government list of posts); ; government response, HC594 2007-8	The proposal for select committee pre-appointment hearings and pre-commencement hearings for 'market sensitive' posts is potentially a valuable development. The government is seeking to control which appointments Parliament can oversee.
Parliamentary scrutiny of the National Security Strategy; reform of the Intelligence and Scrutiny Committee	<i>Governance Green Paper</i> ; <i>Constitutional Renewal</i> ; <i>The National Security Strategy of the United Kingdom</i> , Cm 7291, March 2008	It would be consistent with the government's aim of strengthening Parliament if oversight of the strategy were given to a parliamentary select committee, perhaps a joint committee of both Houses, rather than left with a committee of prime-ministerial appointees, albeit chosen from within Parliament and from parliamentary nominees.
Draft legislative programme in advance of the Queen's Speech	<i>The Government's Draft Legislative Programme</i> , Office of the Leader of the House of Commons, Cm 7175, July 2007; Modernisation Committee, <i>Scrutiny of draft legislative programme</i> , January 2008	A good proposal. The government produced a draft legislative programme in July 2007 that the Commons debated on 25 July 2007. However the timing came shortly before the ten-week summer recess and select committees did not take advantage of the opportunity to examine the proposals. If the proposal is to work effectively, committees must find ways of working in the recess.
Annual debates on departmental objectives and plans	<i>Governance Green Paper</i> ; Modernisation Committee inquiry underway	Potentially a valuable idea, especially if the debates can be linked to the work of select committees and committee and parliamentary input into Public Service Agreements (PSAs) (see also below).
Greater transparency for government expenditure	Commons Treasury Committee, <i>Comprehensive Spending Review 2007</i> , HC 279 2006-7; Liaison Committee, <i>Parliament and Government Finance: Recreating Financial Scrutiny</i> , HC 426 2007-8; government and National Audit Office responses, HC1108 2007-8	Simpler reports at the three stages in the expenditure process – plans, estimates and out-turns – would assist greatly in improving Parliament's performance in scrutiny and oversight of government expenditure. We also recommend that Parliament's role could be further strengthened if select committees were involved in the drafting of PSAs across the spectrum of government.
Parliamentary oversight of the Office for National Statistics (now the UK Statistics Authority)	<i>Governance Green Paper</i> ; Statistics and Registration Service Act 2007; Public Administration Select Committee inquiry underway	A good ongoing reform. The independence of official statistics with parliamentary scrutiny is an important component of a modern democracy. The Treasury Committee took evidence from the nominee for chair of the new body and its report was debated in the House on 25 July 2007.
Reform of the National Audit Office and office of Comptroller & Auditor General	<i>Constitutional Renewal</i> ; Commons Public Accounts Commission, <i>Corporate Governance of National Audit Office</i> , HC 402, 2007-8	The broadly positive proposals of the Tiner review, most notably the creation of a board to oversee the NAO, are to be included in the Constitutional Renewal Bill. It is unfortunate that the government has been unable to include them in the draft bill.
The introduction of regional ministers and regional select committees	<i>Governance Green Paper</i> ; Liaison Committee, <i>The work of committees in 2007</i> , HC 427, 2007-8; Select Committee on the Modernisation of the House of Commons, <i>Regional Accountability</i> , HC 282 2007-8; government response, CM 7376 2008	Regional ministers have been appointed; and in November 2008 the Commons voted to set up Regional Select Committees, but rejected the idea of local authority councillors taking part in them. We believe that England requires an elected tier of regional government; meanwhile there is an urgent need to improve democratic oversight of the largely unaccountable mechanisms for regional governance.
Changes to the Ministerial Code	<i>Governance Green Paper</i> ; <i>Ministerial Code</i> , Cabinet Office, July 2007	An independent adviser on ministerial interests is in post and ministers are expected to accept the business appointment rules. But the Code continues to be issued under prerogative powers and is the creature of the Prime Minister and Cabinet Secretary. They devise the rules and are ultimately responsible for their enforcement. There is no provision for parliamentary oversight.
'Reinvigorating' democracy:		
House of Lords reform	<i>The House of Lords: Reform</i> , Cm 7027, 2007; <i>An Elected Second Chamber: Further reform of the House of Lords</i> , Cm 7438, 2008	The Government White Paper published in July 2008, based on discussions between representatives of both Houses, all three major parties and of crossbenchers and bishops, made specific proposals to implement the clear will of the House of Commons as expressed in a series of votes in March 2007. However, Jack Straw has indicated that he does not anticipate any legislation before the next General Election, at which it is hoped that all parties will include a specific commitment to reform – along the lines of the White Paper – in their manifestos.

Enhancing the role of backbench MPs	Commons Modernisation Committee, <i>Revitalising the Chamber</i> , HC 337, 2006-7	The real key to enhancing the role of backbench MPs within a more effective House would be to require all backbench MPs to participate in a strengthened and expanded select committee system, which could then feed in to the work of the Chamber
The UK Parliament and devolution	<i>Governance</i> Green Paper; cross-border and cross party review of the Scotland Act 1998	The government is committed to maintaining the Union as it “represents our values and gives them expression in the world” (hence in part the “British values” exercise which is not concerned only with integration of new immigrants). The minority SNP administration in the Scottish Parliament is committed to a referendum on Scottish independence in Scotland by 2010 and has launched a National Conversation on the future of Scotland. In response the Scottish Labour party has called for an early referendum; and the pro-union parties have jointly instigated the ‘Calman Commission’ on the future of devolution. In Wales the All Wales Convention is supposed to be deciding when to hold a referendum on the Assembly getting equal powers with Scotland. In England, there are calls for an English Parliament which have not had much purchase.
Parliamentary elections	<i>Governance</i> Green Paper; <i>Review of Voting Systems: The experience of voting systems in the UK since 1997</i> , Cm 7304, 2008	Reform of the disproportional system for elections to the House of Commons seems likely to remain in the long grass, though there have recently been suggestions that ministers are considering the Alternative Vote as an alternative. AV would mean that all MPs were elected on a majority of the local vote, but is more or equally disproportional in its effects.
Making Parliament more representative and extending women-only shortlists for parliamentary candidates beyond 2015	<i>Governance</i> Green Paper; <i>Discrimination Law Review: A Framework for Fairness</i> , consultation paper, Department for Communities and Local Government, June 2007.	A Speaker’s Conference will consider weekend voting, lowering the voting age to 16, registration reforms and the representation of women and ethnic minorities in the House of Commons. Moving election days to the weekend is a long-overdue reform. There may be measures in the new Equality Bill to extend the right of political parties to have women-only short lists beyond 2015. The gross inequality between men and women in Parliament will not be overturned by purely partial and discretionary measures that do not bind political parties.
Petitioning Parliament	<i>The Governance of Britain – petitions: the Government’s response to the Procedure Committee’s first report, session 2006-07, on public petitions and early day motions</i> , Office of the Leader of the House of Commons, Cm 7193, 26 July 2007	The current rules for petitions are designed to discourage them. The government has agreed the cautious proposals made in the Procedure Committee report (April 2008) that in no way match the arrangements for petitions that the Scottish Parliament has adopted and could form a progressive template for reform at Westminster and make a contribution to bringing Parliament and people together. The Procedure Committee has now produced a similarly cautious report on e-petitions (HC136).
Protests around Parliament	<i>Constitutional Renewal</i>	The government will repeal the restrictive measures that prohibit protests around Parliament in the Serious Organised Crime and Police Act 2005. But Parliament is to be given the right to make its own regulations which could risk putting the convenience of members ahead of the human rights of assembly and protest. The decisions should rest with the Metropolitan Police.
Reforming public consultation procedure	<i>Revised Code of Practice on Consultation</i> , July 2008; <i>A National Framework for Greater Citizen Engagement</i> , Ministry of Justice, July 2008	Inclusive, open public consultation is vital to meaningful democratic decision-making. However over issues such as nuclear power the government has failed to live up to its own principles. No specific body for the independent oversight of consultation exists
Right of charities to campaign	<i>The Governance of Britain</i> ; House of Commons Public Administration Select Committee inquiry ongoing, see: HC 1156 – I.	It is important that charities should be allowed to campaign more effectively for the purposes for which they were established as long as they do so impartially and objectively. The Charity Commission applies very restrictive rules, based largely on a blunt prohibition on suggesting or proposing changes in the law in the UK (or elsewhere).
Devolving powers to “local communities”	<i>Strong and Prosperous Communities: The Local Government White Paper</i> , DCLG, Cm 6939, October 2006; <i>An Action Plan for Community Empowerment: Building on Success</i> , October 2007; <i>Communities in control: real people, real power</i> , Cm 7427, July 2008.	The government has published proposals for greater community involvement in the work of local authorities, introducing community ‘calls for action’ rights, making use of citizens’ juries and similar mechanisms for consultation and balloting on spending decisions. Researches into the efforts of local, health and other authorities to involve the public have demonstrated how difficult it is to achieve genuine and representative participation.
A Concordat between local and central government	<i>Governance of Britain</i>	Concordat negotiated and published in December 2007. The Local Government Association regards it as a first, though small, step in an ongoing process of devolution of policy-making to local authorities
The state and the citizen:		
A Single Equality Act	<i>Framework for a Fairer Future: Equality Bill</i> , Cm 7431, June 2008	A vital reform to ensure the rights of all members of society are given equal weight; also necessary for the effectiveness of the Equality and Human Rights Commission

A "common bond" for all citizens	Lord Goldsmith QC, <i>Citizenship: Our Common Bond</i> , March 2008	Lord Goldsmith's report on citizenship seems to be concerned more with exclusion than inclusion. Any common bond for citizens must be based on an inclusive definition of citizenship and should leave proper space and dignity for residents of the UK who are not citizens. The rule of law and human rights provisions should apply to every resident regardless of their citizenship status
A "British statement of values"	<i>The Governance of Britain</i>	No significant progress. The only discernible move has been to give government buildings the right to fly the Union flag whenever they wish.
A British Bill of Rights and Duties	<i>The Governance of Britain</i> ; Michael Wills, 'Kick-starting a national debate on a Bill of Rights and Responsibilities', speech to Department of Political Science, University College, London, 5 March 2008; Parliamentary Joint Committee on Human Rights, <i>A Bill of Rights for the UK?</i> , HL 165-I, HC 150 – I, 2007-8.	No significant progress. A Green Paper is long overdue. JUSTICE has published a thorough examination of the possibilities; the Joint Committee on Human Rights has produced a report on the prospects as well.
A Concordat between the executive and Parliament	<i>The Governance of Britain</i>	No significant progress. Would be a "soft" alternative to proposal below
A written constitution	<i>The Governance of Britain</i> ; Jack Straw, "Modernising the Magna Carta", speech to George Washington University, Washington, DC, 13 February 2008	No significant progress. Would be a "hard" alternative to proposal above

Appendix Two

The Joint Parliamentary Committee on the Draft Constitutional Renewal Bill

- **Alistair Carmichael MP** (Lib Dem)
- **Christopher Chope MP** (Conservative)
- **Michael Jabez Foster MP** (Chairman) (Labour)
- **Mark Lazarowicz MP** (Labour)
- **Martin Linton MP** (Labour)
- **Ian Lucas MP** (Labour)
- **Fiona Mactaggart MP** (Labour)
- **Virendra Sharma MP** (Labour)
- **Emily Thornberry MP** (Labour)
- **Andrew Tyrie MP** (Conservative)
- **Sir George Young Bt, MP** (Conservative)
- **Lord Armstrong of Iminster** (Crossbench)
- **Lord Campbell of Alloway** (Conservative)
- **Lord Fraser of Carmyllie** (Conservative)
- **Baroness Gibson of Market Rasen** (Labour)
- **Lord Hart of Chilton** (Labour)
- **Lord MacLennan of Rogart** (Lib Dem)
- **Lord Morgan** (Labour)
- **Lord Norton of Louth** (Conservative)
- **Lord Plant of Highfield** (Labour)
- **Lord Tyler** (Lib Dem)
- **Lord Williamson of Horton** (Crossbench)

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