House of Commons

Political and Constitutional Reform Committee

Parliament's role in conflict decisions

Eighth Report of Session 2010–12

Report, together with formal minutes, oral and written evidence

Ordered by the House of Commons to be printed 10 May 2011

HC 923
Published on 17 May 2011
by authority of the House of Commons
London: The Stationery Office Limited
£8.50

The Political and Constitutional Reform Committee

The Political and Constitutional Reform Committee is appointed by the House of Commons to consider political and constitutional reform.

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The Committee's powers are set out in House of Commons Standing Orders, principally in Temporary Standing Order (Political and Constitutional Reform Committee). These are available on the Internet via http://www.publications.parliament.uk/pa/cm/cmstords.htm.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/pcrc. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Steven Mark (Clerk), Lydia Menzies (Second Clerk), Hannah Stewart (Legal Specialist), Lorna Horton (Inquiry Manager), Emma Sawyer (Senior Committee Assistant), Annabel Goddard (Committee Assistant), Keith Pryke (Committee Support Assistant) and Rebecca Jones (Media Officer).

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Summary

On 31st March 2011 we took evidence from academic legal experts on the role of Parliament in decisions to commit British forces to armed conflict abroad. This is an area in which considerable work was carried out before the 2010 general election, by both the Government of the day and select committees, but without any concrete result. This Report calls on the current Government urgently to bring forward a text for parliamentary decision, as a first step to bringing greater clarity to this key area of constitutional decision-making.

Report: Parliament's role in conflict decisions

Earlier work

1. Since the decision to commit British forces to Iraq in 2003, the role of Parliament in conflict decisions has been the subject of much scrutiny, notably in

- *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, a Report of 2004 from the Public Administration Select Committee,[1] and
- *Waging war: Parliament's role and responsibility*, a Report of 2006 from the House of Lords Constitution Committee.[2]

2. The previous Government proposed a draft detailed parliamentary resolution on war powers in a Green Paper in 2007 and a White Paper in 2008,[3] but the House did not have an opportunity to consider such a motion before the general election in May 2010. The Green and White Papers were scrutinised by the two Committees mentioned above, as well as by the specially convened Joint Committee on the draft Constitutional Renewal Bill.[4]

The current Government's position

3. Following the general election of May 2010 and our creation as a new Committee, we asked the new coalition Government for their position on this issue. The Cabinet Secretary, Sir Gus O Donnell, wrote to us early in March 2011, stating that

> the Government believes that it is apparent that since the events leading up to the deployment of troops in Iraq, a convention exists that Parliament will be given the opportunity to debate the decision to commit troops to armed conflict and, except in emergency situations, that debate would take place before they are committed.[5]

In our Report on the constitutional implications of the Cabinet Manual, we commented on the "surprising" omission from the draft Manual of the convention referred to by the Cabinet Secretary, and announced our intention to "inquire separately into whether the Government's understanding of the existing convention is correct and complete—and whether it goes far enough to ensure appropriate parliamentary involvement in any future

1 Select Committee on Public Administration, Fourth Report of Session 2003–04, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC 422

2 House of Lords Constitution Committee, Fifteenth Report of Session 2005–06, *Waging war: Parliament's role and responsibility*, HL 236

3 *The governance of Britain: war powers and treaties: limiting executive powers*, October 2007, Cm 7239; *The Governance of Britain—Constitutional Renewal*, March 2008, Cm 7342-I

4 Select Committee on Public Administration, Tenth Report of Session 2007–08, *Constitutional Renewal: Draft Bill and White Paper*, HC 499, paras 71–80; Report of the Joint Committee on the Draft Constitutional Renewal Bill, Session 2007–08, HC 551-I, Chapter 7; Memorandum to the Joint Committee from the House of Lords Constitution Committee, HC 551-II (2007–08), Ev 71, paras 18–20

5 Written evidence to the Committee's inquiry into the role and powers of the Prime Minister, Session 2010–12, not yet printed, online at http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpolcon/writev/842/m11.htm

decisions to go to war".[6] **We recommend that the Cabinet Manual should include a clear reference to Parliament's current role in decisions to commit forces to armed conflict abroad.**

4. The issue soon became topical once again in the context of military action in Libya under the aegis of United Nations Security Council Resolution 1973. During the debate in the House on this issue, which took place shortly after forces had been committed, the Foreign Secretary, Rt Hon William Hague MP, stated that "we will enshrine in law for the future the necessity of consulting Parliament on military action".[7]

Our view

5. It was in this context that we heard on 31st March 2011 from three academic legal experts, Dr David Jenkins, Associate Professor at the University of Copenhagen School of Law, Sebastian Payne, Lecturer in Constitutional and Administrative Law at the University of Kent, and Nigel White, Professor of Public International Law at the University of Nottingham. While we await with interest the Government's response to our recommendation that the current convention on parliamentary involvement in conflict decisions "as the Executive understands it" should be included in the revised Cabinet Manual,[8] our witnesses did not share the Cabinet Secretary's view that a convention on parliamentary involvement in conflict decisions could be said to exist.[9]

6. **There is an urgent need for greater clarity on Parliament's role in decisions to commit British forces to armed conflict abroad. We therefore recommend that the Government should as a first step bring forward a draft detailed parliamentary resolution, for consultation with us among others, and for debate and decision by the end of 2011. Much work in this direction has already been completed, and the process for decision should be relatively swift.**

7. **We also welcome the Foreign Secretary's commitment to enshrine Parliament's role in law. This is, however, likely to be a longer-term project, to be considered in depth after a parliamentary resolution has been agreed, or if this route fails to bear fruit.** We note that concerns have been raised about the feasibility of a statutory solution, not least by the Lords Constitution Committee and by the previous Government, which found that a purely statutory option had "considerable risks and difficulties inherent in it",[10] "while not ruling out legislation in the future".[11] Others, including two of our three witnesses, favour a statutory solution,[12] and in countries in which a such a solution is in place, including the United States, these risks and difficulties do not seem to have been realised in practice. **We will monitor progress in this area closely, and await the Government's proposals with interest.**

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6 Political and Constitutional Reform Committee, Sixth Report of Session 2010-12, *Constitutional implications of the Cabinet Manual*, HC 734, para 61

7 HC Deb, 21 March 2011, col 799

8 HC 734 (2010–12), para 61

9 Q38

10 Cm 7239, para 108

11 Cm 7342-I, para 215

12 Q 38

Conclusions and recommendations

1. We recommend that the Cabinet Manual should include a clear reference to Parliament's current role in decisions to commit forces to armed conflict abroad. (Paragraph 3)

2. There is an urgent need for greater clarity on Parliament's role in decisions to commit British forces to armed conflict abroad. We therefore recommend that the Government should as a first step bring forward a draft detailed parliamentary resolution, for consultation with us among others, and for debate and decision by the end of 2011. Much work in this direction has already been completed, and the process for decision should be relatively swift. (Paragraph 6)

3. We also welcome the Foreign Secretary's commitment to enshrine Parliament's role in law. This is, however, likely to be a longer-term project, to be considered in depth after a parliamentary resolution has been agreed, or if this route fails to bear fruit. We will monitor progress in this area closely, and await the Government's proposals with interest. (Paragraph 7)

Formal Minutes

Tuesday 10 May 2011

Members present:

Mr Graham Allen, in the Chair

Fabian Hamilton	Mr Andrew Turner
Mrs Eleanor Laing	Stephen Williams

Draft Report (*Parliament's role in conflict decisions*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 7 read and agreed to.

Summary agreed to.

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

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

Written evidence was ordered to be reported to the House for printing with the Report (previously reported and ordered to be published on 31 March).

[Adjourned till Thursday 12 May at 9.45 a.m.

Witnesses

Thursday 31 March 2011

List of printed written evidence

List of Reports from the Committee during the current Parliament

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

Session 2010–12

First Report	Parliamentary Voting System and Constituencies Bill	HC 422
Second Report	Fixed-term Parliaments Bill	HC 436 (Cm 7951)
Third Report	Parliamentary Voting System and Constituencies Bill	HC 437 (Cm 7997)
Fourth Report	Lessons from the process of Government formation after the 2010 General Election	HC 528 (HC 866)
Fifth Report	Voting by convicted prisoners: Summary of evidence	HC 776
Sixth Report	Constitutional implications of the Cabinet Manual	HC 734
Seventh Report	Seminar on the House of Lords: Outcomes	HC 961
Eighth Report	Parliament's role in conflict decisions	HC 923

Oral evidence

Taken before the Political and Constitutional Reform Committee

on Thursday 31 March 2011

Members present:

Mr Graham Allen, in the Chair

Sheila Gilmore
Simon Hart
Mrs Eleanor Laing
Mr Andrew Turner
Stephen Williams

Examination of Witnesses

Witnesses: **Dr David Jenkins**, Associate Professor of Law, University of Copenhagen, **Sebastian Payne**, Lecturer in Constitutional and Administrative Law, University of Kent, and **Professor Nigel White**, Professor of Public International Law, University of Nottingham, gave evidence.

Q1 Chair: Welcome. You know what we are doing this morning, and it is an area of interest at the moment: Parliament's role in conflict decisions, you could call it in general. Very timely. It is also something that stays with us, even when there are no hostilities in any particular part of the world. So, this is not a reaction to any immediate event, this is part of a long, ongoing review from a very new Committee—we are the newest Select Committee in the House—but one of the issues that the Members wanted to talk about, and to make some positive proposals about, was Parliament's role in hostilities.

It may be helpful, Nigel, David, Sebastian, if you wanted to, to make some opening remarks to set the scene. We have your evidence and your papers, which are extremely helpful and interesting, but would you like to say a few words to start it off, Sebastian?

Sebastian Payne: I would be glad to do so. Thank you very much for asking me to come and speak. Clearly, the issue of constitutional change has been much in the mind of Parliamentary Select Committees since 2003, although it has been a matter of concern for some academics for longer. The Public Administration Select Committee that you gave evidence to, the House of Lords Select Committee and the Joint Committee, have all addressed the question of prerogatives, specifically the War Powers and, as you know, proposed—well, certainly, the House of Lords Committee—a convention embodied in a resolution.

I think it is important to consider that these changes are part of a broader movement to give Parliament a stronger voice, and that that movement requires significant political and legal change so that, whatever is put into place with regard to the change to War Powers, has to be seen in that context: to make Parliament effective many things have to be done at the political level and at the legal level.

I would also say that we are clearly in a period of constitutional change in the last 30 years, that the expected norms of constitutional life of 50, 60 years ago are in a state of flux and that any change that is made, in relation to War Powers, should be seen in that broader context. In fact, I think the Committee would be wise to keep their eye on that broader structural change so that, if there is a resolution embodied in a Standing Order, that allows for the possibility of learning how best to raise Parliament's influence in this very tricky area. There may be significant problems with an Act of Parliament because, in a sense, it creates the impression that "This is it", and of course it cannot be the final word until the broader structural issues are visited.

Dr David Jenkins: Thank you very much for the invitation. First, of course I would draw your attention to the memorandum that I submitted, which summarises my remarks, and I will very briefly summarise the main points that I put forward in that written submission. As I draw attention to with that memorandum, one must of course keep in mind that beneath all of this is an intention of balancing constitutional values of efficient military decision-making with democratic accountability. That is nothing new. Of course that is well worn territory. I only emphasise that to make sure that we keep that well in mind, so that we don't lose sight of the forest for the trees. That is giving too much legal detail as to exactly how to balance any future relationship between Parliament and Government and war-making. As I also point out, any solution—whatever form it might take—needs to keep sight of these values and emphasise constitutional principles rather than getting too involved in lengthy legal rule making. In any case, I don't believe there is going to be any perfect solution. There is no perfect balance between these values of efficiency and accountability. One is always going to have to be preferred. Whichever value we prefer then will lend itself to the decision as to which institution—that is the Government or the Parliament—will have the upper hand in war-making. So there is always going to be an institutional trade-off and a value trade-off. As we see in the United States, I suspect that we would find that political practice will always tend to give an initiative to the Government. We have to keep that in mind so that the focus then, on whatever solution, needs to be ensuring accountability processes.

The last thing I would say is that of all the proposals that have been on the table, as I point out in the memorandum, at this point I think that the earlier draft Bill, which was proposed some time ago by the Commons Public Administration Select Committee, is

quite a good solution. It is very simple. It lays out the constitutional principles. It is not overly legalistic yet it will have some legal bite, in the sense that the fact that it is a statute will, I would suspect, put more pressure on the Government to comply and embolden Parliament to hold Government to account for its particular decisions. I don't think that there would be very much danger of too much judicial involvement because these would fundamentally be political questions that—even though embodied in statute as legal rules—would in most cases be resolved in political processes between Parliament and Government, as they should be, but with more emphasis on parliamentary control. Thank you.

Q2 Chair: Can I just pick you up on one thing, David, if I may, which is a reading of the situation where there is a written constitution in the United States and there is a constant tension between the three parts of the separation of powers. Would it be true to say that there is never a settled solution to anything? That as time goes by, as politics intervenes, as personality intervenes, institutions strengthen or wane, that all you are doing is setting a framework, you are never fully defining a steady state; that there is always room for manoeuvre and interaction and negotiation, even when something is codified as it might be if it were to be in a Parliamentary Standing Order or a Cabinet Manual?

Dr David Jenkins: I think that is a very good characterisation of the situation in the United States. I think the American situation represents a point where legal principles and political practices start to blur very much because, of course, the constitution sets down very hard-edged legal rules that can fall to the courts to be enforced. However, in matters of high policy, such as war-making, as I point out in some of my written work, the courts very much stay out because they don't feel functionally competent to get involved. Nevertheless that possibility exists in some extreme circumstances. This leaves it then to Congress and the President to fight over this division of War Powers because it is a very open-textured framework. So, in this sense, the constitutional rules are more like constitutional principles and the way that they are resolved, I don't think in too many ways are different from political dynamics in the United Kingdom because of course, as Congress has a power to declare war, the President has the initiative to make operational decisions and strategic military decisions. We see this debate currently in the United States, in which the President has committed American military forces to Libya and Congress again finds itself in a reactive role to try to hold the President to account. What we do know is that that constitutional framework makes it very clear there must be some co-operation between Congress and the President. Even if the President has initiative, even if the President can wield his political prestige or influence to have the upper hand in military decision-making, he cannot get by without consulting very closely with leaders in Congress and is always subject to some sort of either post approval or, more likely, the possibility of some congressional censure in the event that that consultation falls through.

Q3 Chair: I am sure Members will come back to those points. Nigel—I should point out that, although Nigel is from Nottingham, there has unfortunately been no collusion between us. This is the first time I have met Nigel, but hopefully not the last. Nigel, welcome.

Professor Nigel White: Thank you very much for the invitation and the opportunity to speak on these very important matters. I will just give you a few of my own views on the general issue of parliamentary involvement in conflict decisions.

My view is that, with British military forces being used much more frequently, the arguments in favour of military efficiency, of effective prosecution of the war, which hitherto have perhaps dominated the debate, I think must be tempered by greater democratic accountability. Bearing in mind, as we all know—and I hesitate to talk in more detail about it—that prerogative powers were forged for monarchs who, despite having untrammelled sovereign power on paper, quite often struggled to raise significant forces. Those powers have passed to Ministers of the Crown who have at their disposal highly trained and effective armed forces, which can be deployed relatively quickly.

You could argue that efficiency in Executive deployment and use of armed forces has increased. It is not to say that democratic accountability hasn't increased but maybe the balance has not been achieved. We do have increased parliamentary discussion and debate. If you look at the debates over Kosovo, Iraq, Afghanistan, and currently on Libya, we have significant parliamentary involvement, discussion, debate, consultation, but the decision to go to war is still a prerogative one in the hands of the Executive and sometimes can be just a small part of that body. The agenda is definitely fully controlled by the Executive.

This debate has all happened before, particularly under the last Government. One objection in that debate to giving Parliament more power to approve decisions to go to war, for instance, was that it ceases then to become a mechanism of accountability for Executive action. Rather it becomes part of the decision. I thought about that argument and I would respond that, in my opinion, democratic accountability does not come after the event. It can do but it doesn't have to. Indeed, for such important decisions as going to war, arguably, it should come much earlier, before forces are irreversibly committed. So, in seeking to persuade Parliament to support a decision to go to war, the Executive is still being scrutinised by Parliament. It is still accountable to Parliament but at a much earlier and more relevant stage.

Q4 Chair: Nigel, I think I would like you to be a little clearer about previous hostilities and the role of Parliament, in the sense—you may or may not agree with this statement—that bringing a debate to Parliament, let alone a debate and a decision to Parliament, was extremely hard won by the Legislature. It was a grace and favour. It was a gift from the Executive. There was no backup to get a decision or a debate put in front of the House. Obviously the Iraq war was a classic example. It took

a great deal of effort before the Government finally conceded that there should even be a debate. Would you agree with that? It could be interpreted that there is an evolution towards a much better relationship between the Executive and the Legislature on this thing, whereas I suspect it certainly felt like trench warfare on every occasion, rather than a trend line towards a more democratic outcome.

Professor Nigel White: Yes. I would probably agree with that. I don't think there is a constitutional convention or unwritten law that Parliament should be consulted about conflict decisions. As you say, there is simply a very uneven trend of Parliament asserting itself towards greater consultation, greater debate. If you look at recent practice it is very inconsistent as to what that amounts to because, as I said, the Executive controls the agenda. So sometimes it is a matter of information for Parliament, sometimes there is debate and consultation, as with the NATO use of force in Kosovo in 1999. There was no substantive vote on that occasion. It dragged towards a vote in Iraq in 2003, a couple of days before the deployment of force when arguably that was a little late in challenging that decision, in a sense.

There has been plenty of debate on Afghanistan but no substantive vote, as far as I can see. Then we have Libya where there was a Security Council resolution, then a debate, then the deployment of force, and then a Floor debate and a vote, all in the space of a week, which again illustrates a different pattern of relationship between Executive and Parliament. Again, that shows there is no consistent pattern of behaviour, never mind any evolving rules or unwritten constitutional conventions.

Q5 Chair: Sebastian, do you want to come in on that?

Sebastian Payne: Yes. Mr Chairman, I know on the 21st March you said in the debate on Libya that we are not making a decision—referring to the House—but the decision has been made and, as you have said now, that effectively the debate is by grace of the Government. I think we have moved further than that. Whether there is a convention I know is an issue you wish to pursue today, but in terms of a change of mood I think clearly we are further on than it all being up to the Government.

It is true that Tony Blair rejected the House of Lords Select Committee's advice in a manner that infuriated the House of Lords Constitution Committee, as is evident from their response. Since then we have had the Brown Government that committed itself to widespread constitutional reform and, although it didn't get to complete it, did put forward a draft resolution, which, imperfect though it was, was evidence of a serious attempt to grapple with the issue.

In the debate on 21 March William Hague said, "We will also enshrine in law for the future the necessity of consulting Parliament on military action". Now, if they deliver on that, then that shows the debate has moved forward. I thought about that. I thought it was rather strange, in a sense, because one would imagine the last thing that David Cameron would want to do is enshrine this in law. I know that William Hague and the Lord Chancellor were supporters of Clare Short's Bill on War Powers, so I thought maybe that reflected William Hague's longstanding support for constitutional change and indeed to put it on to a statutory basis, but the actual words imply that the Government has decided this. Whether that happens is another matter, but the statement is: we will enshrine in law the necessity for consulting Parliament. So I think things have definitely moved on.

Q6 Chair: I think we would welcome the Government bringing forward something along those lines. However, we are practical, pragmatic politicians around this table and the bird in the bush, possibly two or three years away, is not as valuable as the Cabinet Manual and Parliamentary Standing Order in the hand, which we can achieve possibly more speedily, but we are happy to be greedy providing we get the first two, I think. We would need to look at the third.

Sebastian Payne: Could I just reply to that, if I may, which is: that I don't analyse it in that way. I don't think that a resolution in a Standing Order is second best to an Act of Parliament. I think it is preferable. That is the reason I made my opening remarks because there are important changes that need to be made to the constitution. I know that you have pursued this matter, in your writing and your evidence to Committees and your public statements, and if Parliament is to be more effective then those changes will have to be made.

Now if we are in a period of flux constitutionally, and I suggest we are, it is not necessarily the most effective thing to have an Act when there is a learning curve as to how best to deal with these matters. If you look at the detail of draft resolution in the debates there is clearly a problem about the degree of discretion of the Prime Minister, and how much discretion he retains to act. I think that that needs to be thought through carefully.

Q7 Chair: Of course, yes. As we have established with Dr Jenkins, once you have something in a Cabinet Manual, a Parliamentary resolution, a statute or even a constitution that is only the beginning of the story; of interaction rather than the end of the story.

Sebastian Payne: Could I just respond briefly. I would like to put my cards on the table, which is: I am in favour of a written constitution but I am also pragmatic. I realise that there is not a constitutional moment for that now, but I think that conditions my thinking on the best way forward.

Q8 Simon Hart: Can I go back to explore one point, which I didn't fully understand. There seems to me to be a discussion going on about what is legally required, what is legally appropriate. Of course, from our point of view, and presumably that of the Prime Minister, there is also the consideration of what is politically required and what is appropriate in the circumstances. If we can relate that to the situation in Libya at the moment, my confusion is this: that if we are going to try and enshrine some of these thoughts within the constitution, Cabinet Manual, statute,

whichever aspect you consider appropriate, how do we enable changing circumstances on the battlefield to be accounted for?

For example, at the moment we are talking about a no fly zone over Libya, which for all intents and purposes is a reasonably easy concept to define and to articulate to the public. As we are witnessing things are changing, which might require us to alter our activities and strategy on the ground. At what stage in the evolution of a war situation would we need to go back to Parliament, or indeed back to the law, in order to reaffirm our position as the circumstances change? I think in all of the conflicts we have talked about, where we started is a very different place from where we ended up, and had we had different opportunities during the course of that process to reconsult Parliament then the outcome may have been different. I probably haven't put that very clearly, but you see what I am getting at?

Sebastian Payne: You did put that clearly and I understand this is about the mission escalating. The House of Lords Select Committee was very concerned when it proposed its convention that there should be two stages: when the Government comes to the House of Commons they must indicate the scale and likely duration of the deployment, and that there should be an obligation to report back. Now, if the Government is required to indicate what the scale of the operation is then I think it follows that, were it to drastically change, there would be an obligation on them to seek fresh approval.

I think you can do that in two ways. This is not a question of hindering the military capability but that you embody in a resolution specifics about the purpose of the mission: the scale of it, the likely duration and, of course, the people who are working with the allies as well, and if that changes then Government should come back to the House.

Professor Nigel White: I would agree with Sebastian on that. I think any resolution or piece of legislation should require Parliament to be regularly kept abreast of developments. That is part of the consultation. Any significant change in the nature of the deployment or rules of engagement or use of force should require further parliamentary approval.

To give you an example of, say, a peacekeeping operation that is deployed under traditional rules of engagement just to defend itself from attack. If a peacekeeping force with a British contingent is mandated under traditional rules of engagement that normally means just defending the contingent or the equipment, but then the mandate might change, as the circumstances change, to include protection of safe havens. I would have thought that would be something that would need further parliamentary scrutiny, because it is changing the very nature of the force from a traditional peacekeeping force—civilians in uniform, in effect—to being possibly a combat operation, which is fundamentally changing the nature of it.

In the case of Libya, if coalition forces want to interpret resolution 1973 to include aspects of regime change or deployment of ground troops, I would have thought that would be something that would have to come back to Parliament.

Chair: Could I just ask David come in?

Simon Hart: Yes, of course, I will come back to that point.

Dr David Jenkins: This is obviously a very important point. Again, I think it shows that one must be careful in whatever reform measure one might choose to adopt. As I indicated earlier, I think a statute is the best way forward, that things not be too detailed in the processes by which these conflict decisions are resolved between Parliament and the Government, for this very reason: that we want to have an Executive that can make very swift, efficient operational decisions and perhaps even become involved in some kind of military operations, without parliamentary approval, such as, say, a peacekeeping mission or some sort of low intensity conflict. We might be okay with that. However, we have the situation when a peacekeeping mission, or some other sort of conflict, can escalate and then how do we decide that? That I think is a question that must be determined between the Legislature and the Executive themselves, which means the process is important; that the Legislature has its own independent tools to make the judgement as to when some sort of approval should be given.

A very good example is in the conflict in Somalia, when the first President Bush got American military forces involved in Somalia in a humanitarian mission and did not claim any need, and did not receive any express congressional approval to do so because it was a humanitarian mission. As it began to escalate and look more like something of an armed conflict, for which Congress should give some sort of approval, then we see these inter-branch conflicts beginning to arise. Of course that is something the constitution does not deal with and is left for political decision.

Indeed, Congress came back and passed a resolution that was signed by then President Clinton, after he took office, to cut off funding for any further military involvement in Somalia. The President then found that he was required—and he did do so—to withdraw military forces from Somalia before the deadline ran out for the expiration of funding.

The point is, in such a situation like that, you maintain flexibility in which an Executive can become involved and control the situation, but without too many legal rules. You have the principle that the legislative branch must be very much involved and, when that conflict reaches a certain intensity to be resolved politically—obviously, perhaps messily with some kind of conflict—then the Legislature has independent means at its disposal to take the initiative.

In the context of the United Kingdom reform, any kind of rigid procedure that says the Government must go back to the Parliament is going to make these interpretative difficulties as to when a low intensity conflict becomes something that is controlled by statute. It is going to intensify those definitional conflicts. It is also going to give more of an out to the Executive to try to define its role under the statute, or outside of the statute. So, what is more important to deal with a situation like that, I would suggest, is a statute that has some kind of mechanism, such as reporting or anything else, that gives Parliament the initiative in some situations to come back, independent from or even against the position of the

Government, to take effective motions of censure against the Government; whether it be to cut off funding; whether it be to express a disapproval of continuing military actions, or place some other sort of limitations after the fact. That is how I think you politically control that sort of conflict escalation.

Q9 Simon Hart: One quick follow up question. I absolutely agree with that. I think it rightly needs to be in shades of grey, doesn't it? I think that is what you are saying.

Dr David Jenkins: Very much.

Q10 Simon Hart: In the context of Libya, because this was an interesting aspect of the debate earlier this week—I think it was—was the fact that it was quite clear from an early stage that a no fly zone that can simply be maintained as a result of aircraft activity is wholly unrealistic. That, without a doubt, there will be some ground activity, which has to go on in order to support the airborne activity. Whether that is ensuring that the aircraft is safe, whether it is search and rescue operations, whether it is some other ground activity that ensures that the principal objective can be reached, those seem to me to be areas that—it is probably quite right—were not highlighted in too much detail in the debate in Parliament. It would be entirely wrong for us as a Legislature, surely, to insist upon all of that information being made available upfront or indeed as the activity unfolds. I am essentially saying I think I agree with you, but if you could quickly answer whether you think this is applying or will apply as far as Libya is concerned, that would be an interesting point.

Dr David Jenkins: I think the situation in Libya is a perfect example of that. As I alluded to previously, we see these debates already kicking into high gear in the United States, in which the President of the United States, after consulting congressional leaders—to what degree we are not really sure—ordered military forces to engage in Libya, with the idea that this was a limited conflict, a low intensity conflict. There were to be no ground troops put into action. So now there is a zone of constitutional twilight here as to what kind of authorisation the President would need from Congress. Maybe he doesn't need any at all, but he has to keep them engaged because of this danger, from the Executive point of view, that he will need it later on.

What is also very interesting is that under the War Powers Act 1973, which puts reporting requirements on the President, President Obama did make a statement complying with the War Powers Act, officially informing both houses of Congress of his military actions. That means he is now statutorily obliged to continue feeding them information and, at some point, gain some kind of expression of their approval or authorisation to continue with this military action in Iraq. So it is very grey but the point is that, even though it is very grey, both branches, Executive and the Legislative branch, are speaking to one another, the Legislative branch is being fed information and is demanding information and can require it, if need be, in order to keep itself engaged. So at some future point, if the conflict in Libya escalates, Congress has the independent power to censure the President and take control of the situation. So it leaves the initiative with the President but it leaves the background, the ultimate control to Congress.

Sebastian Payne: If I could return to Mr Hart's original point about the operation changing and what is the role of the House of Commons. If you look at the convention that the House of Lords Select Committee proposed, they deal with that very neatly and I think their points 2 and 4 are beautifully drafted. It is true that these interpretative difficulties will occur, but they will not occur any less because they are in an Act of Parliament. Of course, if they are in an Act of Parliament it is those interpretative difficulties that may well draw in the courts. That is one problem.

On your point about shades of grey, I am not sure I agree with you if we are talking about the drafting of it. If by "shades of grey" you mean the Prime Minister needs discretion and that there are different scenarios that will require different things, that is true and I would agree with that. However, if by "shades of grey" you mean that the Act of Parliament is so broadly drafted that it doesn't give any guidance, then I think that is useless. Indeed, I wonder what the Government has in mind when they talk about putting into statute the requirement to consult, because if they are referring to the hybrid option that the last Government considered, which is a very broadly worded obligation and then the detail is potentially dealt with somewhere else, that does not seem to me to add very much to the whole issue.

Q11 Chair: Nigel, you are content, or do you want to—

Professor Nigel White: The principles I would suggest for a resolution, or an Act of Parliament, would be to create a framework within which political discretion is exercised. By and large I think that is what constitutional law is about and it is finding the balance between the framework being too loose—it allows too much discretion—and too tight to hinder operational effectiveness. There is always that balance in these situations of emergency of getting that balance right. The exact drafting of this would require quite careful consideration. There are plenty of older examples to go back to but I think some of them—as Sebastian pointed out—the framework is not clear enough to control that discretion sufficiently, in my opinion.

Q12 Mrs Laing: I apologise if this is going over some of the same ground, but from a slightly different aspect. To get it on the record, can I ask each of you please: what is the difference between enshrining a principle in law, in statute, and letting it develop as a convention?

Sebastian Payne: In essence, the convention is an understanding, a non-binding rule in legal terms, but nonetheless a rule that is believed to be binding within the political sphere. So it is not that it has no force but it is not embodied in law. I think what one has to be careful of is: when we talk about convention, convention delivered in what manner? So a

convention that the Prime Minister is picked from the majority party is an understanding binding on the monarch. In this scenario what we are talking about is a convention. One of the parts of the discussion is a convention that is enshrined in a resolution or, more specifically, a Standing Order of the House or, indeed, in fact probably both Houses. So, albeit Standing Orders, as you know, historically emerge from resolutions, I understand they are considered more compelling. That is the difference. I don't think it is a convention or a statute full stop. I think the debate has moved on quite properly. Of course the House of Lords, who looked at it most carefully, suggested there should be a resolution although they do talk about a convention. So a change of view is a convention. It has to be binding. There must be some principle involved as well. It is not just a habit. How is it going to work in the procedure of each House? Then you have to move to a resolution or potentially Standing Orders.

Q13 Mrs Laing: Is that why you said earlier that you consider that a Standing Order would be superior to an Act of Parliament in this particular circumstance?

Sebastian Payne: The reason I said that is because I think there are other elements that have to change. There is a broad movement to make Select Committees more effective. Clearly Parliament has gained more control, has more influence, more depth of discussion since the 1979 reforms. One could debate—but I won't attempt to—as to why that has happened but it seems entirely desirable. There has been discussion, and I would agree with that, about this continuous sort of interplay between the Executive and Parliament in terms of policy formation. So there have to be broader cultural changes within the activities of the House and the Executive. I would hesitate to enshrine in law something that is essentially a dynamic process that is going on, which is the growth of the power of the House of Commons as against the Executive.

I know that it doesn't just happen and people have to keep pushing for it, as indeed many distinguished parliamentarians have done and are doing, but that is why I think an Act of Parliament is problematic because they will fix it now, and also it makes it look as if the only issue is War Powers. Of course, that is one issue but how do you deliver more effective parliamentary input: that requires a lot of changes.

Q14 Mrs Laing: Would it be right to say that you put a high value on the flexibility of the development of convention, through Standing Orders and so on, a higher value on that than the rigidity that would occur by entrenchment in law?

Sebastian Payne: Yes. I think, put simply, that would reflect my view; plus the problem, a serious problem, about the role of the courts because—

Mrs Laing: I am coming on to that, yes.

Sebastian Payne: I will wait until you ask that. Would you like me to address that now or should I—

Mrs Laing: Yes, please, and then we can have opinions from everyone else; is that all right, Mr Chairman?

Chair: Yes.

Sebastian Payne: If you are happy for me to carry on I will. Some people have suggested that if you have an Act of Parliament on War Powers there is no problem at all about the courts being involved. It is easily dealt with. Other people do not agree, and I am one of the people who do not agree that the courts could be kept out of it. I think Lord Falconer suggested that in front of the Joint Committee on Constitutional Reform.

It is not because I think the courts necessarily want to meddle in questions of high policy in relation to war, but if you look at the supervisory jurisdiction of the High Court what they do is: one, interpret the scope of legislation; two, see if it has been properly followed. I don't see how you can rule that out from happening, plus the growth of judicial review in general. If you look at the House of Lords case of Attorney General v Jackson, the Hunting Act case, who would have thought that an Act of Parliament itself would be challenged all the way up to the House of Lords as to whether it was an Act of Parliament. The courts had no option but to consider it. They could not say, "Well, this is absolutely not within our domain".

So I think it is very problematic to assume that an Act of Parliament could easily exclude the courts. I don't think it could. There could be an ouster clause to try but we know that the history of judicial review is that the courts do not accept or are most reluctant to accept ouster clauses, and they say, "Well, we can still look at it on a point of law".

Interestingly, if you look at Sir Michael Wood's written evidence to the House of Lords Select Committee he advances a similar approach. Many people have thought that and, as someone who has spent a lot of time looking at judicial review over the years, I don't think one should be sanguine that the courts would not intervene.

Chair: David, any response to those questions?

Dr David Jenkins: Conventions are very powerful things in the binding obligation to be placed on political actions even though, strictly speaking, they are not legally enforceable rules. Of course this presupposes that there is that widespread understanding, among all actors in the political system, that they must abide by the convention and that there could be very serious consequences if that convention is violated. For the sake of argument, if we were to assume that there is now or a convention could be made that Parliament must be consulted before the Government can commit the nation to military action, the question then is: what are the consequences for a future Government that would ignore it, either blatantly or with some other claim of good cause? What is the censure?

This leads back to wider questions, and again perhaps to even much broader, thornier questions of constitutional reform as a whole: what independent tools does the Parliament have to—so to speak, in a way—punish the Executive if it would violate that convention to get its approval to go to war? That is a very difficult question.

That leads us to ask whether there is a convention, either now or whether one can simply be made, that the Government must consult Parliament before committing military forces to an armed conflict. I am

not a British public lawyer so I will defer to other people's views, but from what I know I wouldn't think that we could say clearly a convention now exists, although some have done that. I think it is also very problematic to say that a convention can be created in very short order. Typically, these are practices that percolate over quite a period of time. Now, maybe this kind of convention could at some point be said to crystallise and come into play. Then it might indeed be a very effective mechanism to keep the Government accountable, to limit its unilateral discretion to commit armed forces to military conflict. That is very speculative and it is very problematic to rely upon at this point. I think there should therefore be something with more legal bite. That is why I think a statute would be a good way forward.

The interesting thing about statute is that not all legal rules are the same, especially a statute that is more openly worded, that sets more of a framework for co-operation between the Government and Parliament and leaves things up to political resolution. There are many advantages to that: one is that it retains the political flexibility for the Executive, as I have said before, to take the initiative and for conflicts to be resolved as they should be politically between the Executive and Parliament. Then you might ask, "Well then, what good is a legally binding statute if it is not going to do any more than that?" I think it does do more than that, in that this is the point where constitutional principles and legal rules start to become a little fuzzy and merge into one another. By enshrining these principles in a hard statute it sends a very clear message that, under the constitution, there must be some kind of meaningful and effective consultation between Parliament and the Government. However it might work out, however it may come in practice to resolve itself, however that institutional political advantage might shift over time between the Parliament and the Government, nevertheless, under law and constitutionally, there must be meaningful and effective co-operation. This means that the Government cannot simply slight Parliament, go off on its own way unilaterally and not engage with the Parliament at every step of the way, because if it does ignore those principles, those broadly worded legal rules, there could be some very real consequences.

Q15 Chair: I just want to move along, if I may. David, are you coming to a conclusion?

Dr David Jenkins: Yes. That is just to the role of the courts. That is to say that this does then open up the possibility of judicial review. I don't think that is a danger. As I put in my memorandum, as the American example shows, American courts, even under the constitution, will not involve themselves in these questions. I don't think there is any reason to think that British courts would as well, when you look at British jurisprudence, except in possibly the most extreme circumstances where you have a conflict between the Government and Parliament.

The point of the Lords in the Jackson case is very much that the courts will stay out of these questions but they will reserve a power to get involved if there is some constitutional crisis in which you need the courts to act as some kind of safety valve. That is the bite, the legal bite that a statute can give to allocating more powers between Parliament and the Government. There are non-binding obligations, and in some extreme circumstances bite for the courts to get involved to defuse a constitutional crisis, which would be very unlikely, nevertheless the safety valve is there.

Chair: Before Nigel comes in, can I refocus on what we are trying to fix by having these debates and this evidence taken; it is the fact that the directly elected Legislature has no rights to be involved in the declaration or continuance of hostilities by Her Majesty's Government. That absence is evident, for example, most obviously where we have lost hundreds of lives in Afghanistan, and have had a mission that has moved from the destruction of Al Qaeda bases into a much longer term occupation and continuance of hostilities without the by-your-leave of the Legislature in any shape or form. That argument can be repeated on Iraq and a number of other places, so it is bringing the Executive and the Legislature into some sort of acceptable relationship that we all understand and can back up, which doesn't currently exist. That seems to me the problem and what you are very helpfully doing today, if I may say so, is mechanics almost. It is very helpful the way this discussion has gone.

It is finding a way to do that to the satisfaction of both the Legislature and the Executive. If one side wins this argument I think we have all lost. I think what we need is to have something that colleagues around the table can say, "This suits the purpose of both the Executive who need to act swiftly very often, and the Legislature who need to exercise their rights to hold the Executive to account". That was helpful to bring everybody to the kernel of what we are trying to do. Nigel.

Professor Nigel White: I would agree that, as I said, the current recent practice, over the past decades, has not been consistent enough to indicate the emergence of any convention. Parliament is involved but in so many different ways depending on the crisis, and so I can't see that distilling into any sort of convention that you could call a framework within which these decisions are to be made.

If we want to close that accountability gap, I think the choice is between a resolution, a non-statutory instrument, and an Act of Parliament. I have mixed feelings. I think a War Powers resolution would be the easier and safer option, but I still think it would close the gap in accountability, depending on the willingness of Parliament to scrutinise, but I think that would be the same under either a non-binding War Powers resolution or under an Act of Parliament.

You could encapsulate some of these rules that we are talking about or suggesting in an Act of Parliament. That certainly would formally close the accountability gap to a large extent, but I think it does bring in the possibility of judicial review. It might put the courts in a very awkward position of being asked to review decisions to deploy troops or to use force before the outbreak of hostilities. We did see that possibility when CND brought a case in 2002 challenging the legality of the conflict before it happened. I think that

then is the recipe for a constitutional problem, a crisis of sorts.

Q16 Chair: Isn't it a resolution for constitutional crisis?
Professor Nigel White: Sorry?
Chair: Isn't it a resolution rather than creation of?
Professor Nigel White: Yes, it could be.

Q17 Chair: What did the courts do in that circumstance?
Professor Nigel White: In that case they took the traditional line of courts saying, "That is nothing to do with us", basically.

Q18 Chair: On the Hunt case they said Parliament had been right and it was—
Sebastian Payne: But, Mr Allen, they had to analyse whether the 1949 Parliament Act was in fact a legitimate Act, as they did in the judgment, and indeed therefore the Hunting Act. It wasn't that they—
Chair: They found that it was legitimate.
Sebastian Payne: They did.

Q19 Chair: So they found in both cases the exercise of power by the State, which a citizen can challenge at any point, had been done properly and appropriately. Why are we frightened of that?
Sebastian Payne: The question that was put is: will an Act of Parliament lead to the involvement of the courts? The issue of whether that is a problem or not is another matter, but as to whether it will happen is a question we are considering.

Q20 Chair: I think we are considering, or you are moving as to consider, whether it is appropriate that the courts decide whether laws are being implemented in a lawful way, and that is their role. I don't feel that we should be afraid of that. It is a tremendous asset for a citizen or an institution to be able to test that. I think we found that in almost every case the courts have said, "That is fine, you have it right. Go ahead". What a safety valve that is, isn't that appropriate?
Sebastian Payne: It depends what is in the Act relating to War Powers.
Chair: Legislate effectively and then you have no fear from the courts, I would have thought.
Sorry, Eleanor, I am being very disrespectful. Nigel, if you finish your point and then I will come back to Eleanor.
Professor Nigel White: I think there is a danger that the courts will be drawn in but, as David points out, they could still show that traditional reluctance to get involved unless the discretion has clearly been abused, unless the provisions of the War Powers Act, if it came into being, had been abused by the Executive. That is the sort of thing. It would have to be a serious breach of the law for them to get involved. They do show a traditional reluctance to question issues between states in foreign relations. That is something that they tend to stay clear of. There may be a case where discretion is exercised to an abusive extent, but the courts will have a role if there is a piece of legislation.

Q21 Mrs Laing: Just going on from that; that was very helpful, thank you very much. There are certain matters that you have all addressed there, which I think it is important to get on the public record. Can I turn for a moment to practicalities? Is anyone suggesting that there should be a rigid rule that military action should not be taken until Parliament has had a debate and voted upon a resolution in that respect?
Chair: I think you can answer that fairly quickly, Sebastian.
Sebastian Payne: I think a resolution or indeed were it to be an Act it is perfectly acceptable to require parliamentary approval prior to deployment, with some exceptions.
Dr David Jenkins: I completely agree.
Chair: Nigel, a similar response?
Professor Nigel White: I would want to identify those exceptions, though.

Q22 Mrs Laing: To explore that for a moment, because we are in such a situation right now that, had you come before us a couple of weeks ago, then we would not have this very real example. The fact is that, on 17 March, military action was taken in Libya by British troops acting on a UN resolution, which was made late on the evening of 17 March. For the record, we are talking exactly two weeks ago today, so we are absolutely current on this. Military action was taken late on the evening of 17 March, overnight. The Prime Minister came to Parliament, on Friday, 18 March, and made a statement but there was no debate and no vote at that point. Parliament could have been recalled on Saturday, 19 March, but for practical reasons the Prime Minister could not have been there because he went to Paris to meet other leaders to take the matter forward in the international forum. That I would argue is absolutely correct. Therefore Parliament debated this matter on Monday, 21 March, and the vote in Parliament took place at 10.00 pm, on Monday, 21 March, exactly four days after the military action had commenced.
That is a circumstance in which it was essential—I would argue, and I think most people agree with this—because the town of Benghazi was suffering. It is impossible to explain how much they would have suffered between 17 March and 21 March if action had not been taken. The Libyan people appear to be agreeing with that. In those circumstances, if we went forward with formalising the relationship between Parliament and the Executive, in the respect that we are discussing, how would you deal with that emergency situation? Quite different from Iraq where it wasn't an emergency situation, where four days or even four weeks would have made very little difference. We are talking here about where four days would have made enormous difference. How do we deal with that?
Professor Nigel White: In any piece of legislation or resolution I would have two clear exceptions, maybe others, but these would be at the heart, where necessity is at the heart of the exception: the necessity of self-defence if the UK is under attack or one of our allies is under attack, that we don't have any choice but to act. That is recognised in international law; that

is our right, but also increasingly recognised is humanitarian necessity. If there is no alternative and there is a clear legal basis, as there is with the Security Council resolution, then I think those are the two instances where parliamentary approval can be retrospective.

Q23 Chair: We have done a lot of work on this in both Houses. Nigel, do you feel the 2008 draft resolution covers all this and covers Eleanor's point adequately? That seems to be the most up-to-date.
Professor Nigel White: I would have to look at it again, but it doesn't talk that specifically about the exceptions. It talks about secret operations, I remember—I can't remember what the other phrase was—but they are quite wide. The second one that I can't recall—

Q24 Chair: That would be a basis for the sort of exceptions that Eleanor rightly points out the Executive would need to have?
Professor Nigel White: Yes.
Dr David Jenkins: As for the resolution option, I don't think it deals with that situation adequately. There must be some kind of provision to allow the Government to take necessary military action if there is not time to gain prior approval by Parliament. I think we are all agreed on that. That is just a fact of life that needs to be dealt with somehow, either if it is openly textured to then leave it to some sort of implicit post deployment approval, or whether or not there are specific provisions. I feel the problem with the specific provisions of the resolution is that they don't provide enough accountability. The exceptions are far too broad and can be invoked far too freely, at the discretion of the Prime Minister, without then any necessary requirement or process for post deployment approval. So it allows that option, as written, while giving in principle the necessary discretion to the Government to act without prior approval.
As written it gives the Government a very easy way to avoid an approval process altogether, simply by invoking one of the exceptions, security or necessity, and then laying a report before the House. In some security situations, even the laying of the report before the House after deployment is not required. So that particular form of post deployment authorisation I feel is way too broad.
Chair: Sebastian, briefly.
Sebastian Payne: Briefly, it is true that the draft resolution would cover this because it was an emergency provision, which would cover this scenario. It should also be noted that—
Chair: Sorry, Sebastian, the draft resolution from the UN or the one I referred to being drafted by the House?
Sebastian Payne: The *Governance of Britain White Paper* covers it, which is what I understood was the issue.
Chair: Exactly.
Sebastian Payne: The drafting of that does have an emergency provision—I agree with David's point about too many let-out clauses for the Government—we can come on to that if the Committee wants to, but I should remind the Committee, and I am sure you will recall, that that wasn't even the last intended draft of the Government. If you look at the House of Lords Select Committee's update on this, they chased up the Government as to what had happened to the draft resolution and Jack Straw, the Lord Chancellor, stated that work on the draft resolution had proved to be complicated but was continuing. In other words, if the Labour Government had won the election, and had pursued their agenda, the draft resolution we are looking at was clearly not what they intended to bring in because they were working on it.
Chair: One gets the impression the current Government are much more serious about moving relatively speedily on this matter to a mutually acceptable conclusion; that is certainly the mood music we are getting on the Committee.

Q25 Stephen Williams: Can I go back to this gradation of hostilities, because what I am looking for is: what is a definition of war? We have had several examples mentioned; the conflicts we have been involved in or the Americans have been involved in, like Somalia or Kosovo. We could mention Sierra Leone. The Chairman has mentioned Afghanistan. Phrases like: "deployment of force", "commencement of hostilities" have been mentioned as well, but Prime Minister Cameron has not had a 3 September 1939 moment. He has not said, "This nation is at war with Libya" and I don't think we are at war with Libya in any sense. Do we not have to define what war is in order to decide what we are giving approval for?
Sebastian Payne: I don't think so, because that was the point of the extensive debate. That is such a problematic question in terms of actual practice—and Nigel White will be able to add to this—because of the nature of war and the absence of declarations of war, and for all the complications that you are no doubt thinking of, the wording has moved on to "deployment of troops" to avoid that very vexed issue. One could revisit it. I would not say it was resolved but it was dealt with in a different way by using a different term.
Chair: Perhaps even using "hostilities" or "conflict" gets around that, I don't know, because there is experience in America too, isn't there, about definition.

Q26 Stephen Williams: Chairman, there must be something about gradation. You mentioned Afghanistan yourself. I wasn't a Member of Parliament in 2001, so I am not entirely sure what happened. The mission there was done on the back of a UN resolution to track down Bin Laden but it has quite clearly evolved. I am not quite sure how we would even define what we are doing in Afghanistan. We are clearly not at war with Afghanistan because we are there with the connivance of their Government in Kabul. Surely there has to be some definitions as to what you are authorising and what subsequent authorisation, or fresh authorisation, if something new takes place. Vietnam would be an example where President Kennedy sent in advisors and then, by the time you get to the end of the Johnson regime, you have carnage taking place. I am not sure that the US ever declared war on North Vietnam.

Professor Nigel White: I would argue against having a definition linked to the concept of war. Indeed, war in international law is no longer used or recognised as a legal concept. It is in a few national legal systems still but not in international law. We talk about armed conflict existing, and that is a factual situation when we start to apply international humanitarian law, the laws of armed conflict. This is not what this resolution is about. I saw earlier versions of a resolution that use the "armed conflict" phrase as the trigger, but then you would get all sorts of legal debates and there is a lot of international jurisprudence about what exactly is an armed conflict. I would argue to stay away from that.

I agree there has to be some sort of threshold to identify, but I think it should be quite a practical and factual one rather than a legal one. I say that as an international lawyer who has spent a lot of time studying this and it doesn't get you very far. It is all right as a court looking at it in retrospect, deciding whether an armed conflict has happened or not, but looking at a situation as it is evolving it is not possible to do that very easily.

I would suggest using different phrases: conflict situation, post conflict situation, crisis situation, simply where significant deployments occur and hostilities are likely. I would keep it quite general.

Dr David Jenkins: I would agree with that absolutely. The problem of definition is an intractable one. If you will excuse my using the phrase: you are damned if you do and you are damned if you don't. If you define it too much then you certainly give more room for legalising the argument for either Parliament or the Government to try to escape their obligations, or to put too much pressure to bear on the other. As well as, even though I don't think it is a great one, it nevertheless raises more concerns about drawing in the courts if the definition is far too detailed. Obviously if there is no signal there at all and it is completely left undefined, you have the problem of ambiguity leading to conflict. So I think there is no real solution to that.

My best recommendation would be either to leave it undefined and simply left to the political processes between Government and Parliament or to give it a very light, a very softly textured definition, such as simply maybe "armed conflict" under international law, which is debateable as well. Simply to give a very soft signal that there is a point of escalation beyond which the reform measure would kick in and that consultation with Parliament would be required, so a definition that would perhaps give that sort of signal.

Q27 Stephen Williams: You mentioned law—you are all lawyers, so it is not surprising—but aren't we primarily concerned these days with international law as much as anything? Essentially, we are discussing the sovereignty of this Parliament or any other Parliament to make a decision about the deployment of its own force. However, are we not now, when we make those decisions, concerned with whether legitimacy doesn't come from the decisions that we make as elected politicians but whether that legitimacy can be taken in the light of international law? If the United Nations had not voted on 17 March, and the Arab League hadn't endorsed it as well, then perhaps we wouldn't have gone ahead.

Of course, we are now in the curious position here where the Deputy Prime Minister, the Leader of my party, thinks our involvement in the Iraq war was illegal, and he has used that phrase while he has held his current office. So isn't it international law that is more important now rather than whether a Parliament endorses the actions of an Executive, as long as that Executive has conformed to international law?

Professor Nigel White: I would agree. I think that would mean for me that the legal advice coming from the Attorney General should be clear and laid before Parliament, because it is so important, so that Parliament can make a fully informed decision about supporting deployment of troops or not. I think that was obviously a problem in the case of Iraq where different versions of the advice eventually emerged after the event, but the advice given to Parliament immediately before the deployment and use of force was that it was lawful, when most international lawyers in the country would have disagreed with that. I think if you look at Libya, the weakness I see with the Libyan situation, is there is a clear international legal basis, as you say here, resolution 1973. The advice again wasn't clearly given to Parliament, as far as I can see—you may well tell me I'm wrong on this—the full version of the legal advice wasn't given at the time of the debate and vote; maybe it was, I couldn't quite gather that from the debates I have looked at it.

In any case that advice doesn't seem to anticipate a lot of these problems that are now emerging, about the interpretation of 1973, which, if everybody read 1973—and I read the debates on 18 March and also on 21 March—a lot of Members of Parliament had identified a lot of the legal problems with reading the resolution. So I would have expected that to form part of the legal advice as well. Because, as you rightly point out, international law is—as I think one of the earlier Select Committee reports said—the most substantive body of law applicable to these situations. Even if you introduced an Act of Parliament that would be introducing constitutional law, a War Powers Act, it would mainly be about process. It wouldn't be about the substance of the law: what you are allowed to do and what you are not allowed to do as a Government deploying troops.

Chair: Questions of legality, also legitimacy and international law covers the first but not the latter. That is where the Legislature should have a key role.

Professor Nigel White: Yes.

Chair: David, anything to add?

Dr David Jenkins: I think it would be very difficult and very inadvisable to peg any definition on armed conflict, war, whatever, to international legality for the use of force. I say I think that is a very bad idea for three reasons: one is it could inadvertently give stronger pressures upon the Government to—for want of a better word—fudge its legal advice, its arguments and its justifications for war. We already know that can be a problem as it is, even though that is a political question not a legal one. Secondly, if we are talking about a statutory reform measure that would

do such a thing, that is the instance when I think the danger of inappropriate judicial intervention becomes acute and most dangerous, with reference back to the CND case. Third, there may be those situations where we want to leave the Government, even Parliament, the option perhaps to authorise an armed conflict that might not be strictly speaking in accordance with international law, say, a humanitarian mission. A humanitarian military intervention might, for whatever reason, sit uneasily under current international law, yet we want to maintain that flexibility to undertake, say, the moral imperative in such a case. So I think it would be very inadvisable to peg any definition on conflict of war, whatever, to the international law.

Chair: Nigel, come back briefly.

Professor Nigel White: I wouldn't disagree with that. I don't think we disagree. I would say though that, for instance in the case of Kosovo, the Foreign Affairs Select Committee after the event came up with that finding that the NATO bombing was probably unlawful under international law but it was legitimate. I think that is the sort of decision that Parliament can make within the flexibility of international law. There is a lot of debate about what is allowed in humanitarian crises under international law, and it is constantly evolving. I think Libya is part of that evolution towards more of a doctrine of protection; there is this responsibility to protect doctrine that is being developed within the UN, for instance.

So I think it is changing, but Parliament can make those judgments only if it is given clear legal advice, and that legal advice might say to them, "Well, there are problems here with illegality but you have wider issues to consider as well". To me that would better be encapsulated in a War Powers resolution, so that Members of Parliament weren't looking over their shoulders worried about possible court action, or court review, of these actions. Because they are weighing up not only the legality of the operation, which is very important as current debates show, but also all these other issues, including—as you say, quite rightly—the legitimacy.

Chair: As the Iraq war approached I attempted to get legal advice independently for Parliament itself, and could not do that as a Member of the Legislature, which obviously left us open to possible actions on war crimes, and so on. That is a diversion and I will ask Stephen to come back.

Can I just add one other thing, which is: it is a political role to make a decision and to take a view on international developments, which sometimes goes beyond the niceties of resolutions and legalities. It is about political judgement and certainly there were many people who objected to the Iraq war, who did so because it appeared to be very bad British foreign policy rather than it didn't pass the test of this UN resolution, or the discovery of nuclear weapons or this particular dossier. It was more fundamental in policy terms than that. Sebastian, and then we will come back to Stephen.

Sebastian Payne: I would like to unite points that you have all made as Members of the Committee. I agree with you, it is a matter of political judgement. It is clearly the case that international law is important but I think we also have to connect this with Mrs Laing's point, looking at Libya and the sequence of events.

Part of the importance of international law is how it will play out in political coalition terms, internationally. I think it is going to be very important in terms of the nuts and bolts of what is drafted, be it a resolution or an Act of Parliament. In the *Strategic Defence Review*, the Government says that they foresee all likely conflicts to be fought with allies. Whether the prediction turns out to be accurate is another matter, but it is likely that many, if not all, of Britain's international actions will be in coalition and they take time.

What we saw in the Libya case was an exercise of coalition building and I think that, in terms of the point you were making about political judgment, that is where this question of debate and vote, are they tied together, or the sequence, or how I put it more broadly that there has got to be this interplay between the House and the Executive. It is quite tricky to get right, I understand, but I think the actual specifics of military action have to be borne in mind, and the fact that coalition building will be part and parcel of it will have to be thought about in terms of what is drafted.

Q28 Stephen Williams: Chairman, to come back to a comment you made, about your attempt in 2003 to get legal advice for the House of Commons, as opposed to what you had been offered by Downing Street and the Foreign Office at the time. David, for understandable reasons, has mentioned America several times because of the Executive branch and the Legislative branch, we are obviously a parliamentary system. Are there examples, the three of you can think of, where a parliamentary system—the European democracy, for instance—has such a constraint upon the actions of its Executive? Could Chancellor Merkel declare war without the approval of the Bundestag or Sarkozy without the approval of the National Assembly?

Chair: Does anyone have an answer to that? David, you look as though you might have.

Dr David Jenkins: As far as the German example, I just know enough that—and I will say no more than this—under German law the army is a parliamentary army. For historical reasons, there are very strict constitutional controls on the Government's ability to unilaterally utilise the armed forces without parliamentary approval.

Secondly, when you mention examples in parliamentary systems, of course not all parliamentary systems are the same. I think we need that specific reference to parliamentary traditions in the Westminster model. As far as that goes, none come to my mind that has these controls. In Canada, in Australia and in New Zealand, the deployment of military forces, the formal declaration of war, remain prerogative powers. At least in Canada, there are other potential controls at the outer boundaries, for example judicial review of the prerogative based upon the GCHQ precedent. You have the Canadian Charter of Rights, an entrenched constitutional Bill of Rights, that in some circumstances might put some outer limit on the prerogative War Powers, but there is no war power statute, no constitutional controls that would

require prior parliamentary approval in Canada, Australia and New Zealand.

Sebastian Payne: Certainly the German Constitutional Court, maybe Nigel would like to mention that?

Professor Nigel White: Yes, they have had several cases involving challenges to the decisions to deploy troops. The Kosovo conflict and Afghanistan have all been challenged before the German Constitutional Court. In one case the German Constitutional Court did find some illegality there, but if you look at the practice there, again in most cases it is found that the German Government has acted within the constitution and it is quite a strict constitution. Germany and Japan have the most restrictive framework and—

Q29 Stephen Williams: You could argue those are very special cases. In fact, I think British lawyers wrote large parts of the German constitutional settlement, ironically, but never applied—

Professor Nigel White: Yes.

Stephen Williams:—to our own country, but you can't think of any examples anywhere else where this power exists?

Professor Nigel White: There is a review, a useful review of parliamentary War Powers around the world. I happen to have it in my bag. I am not the author so I am not trying to sell it to you, and I am not involved in it. It is the Geneva Centre for the Democratic Control of Armed Forces. They have done a survey of all Governments and reviewed this. It is a mixed bag. At the moment, as David has pointed out, we are probably at the prerogative end of the scale. The framework is pretty loose. At the other end of the scale it is Germany and Japan, but if you flick through this most countries are somewhere in the middle. They have conventions, or resolutions, or they have some sort of framework in place to set up this interplay between the two branches of Government.

Chair: Perhaps we need it more than others because of our use of armed power around the world. On the assumption that the next 10 years is like the last and there will be five more conflicts that Members of Parliament will need to have a view on, so it would be nice to have a structure perhaps where we could express that, as of right, rather than by convention.

Q30 Stephen Williams: My last question. I suspect from what you have just said that the answer to this may be "no", but can you think of any examples where a Legislature has restrained the power of the Executive and stopped conflicts, either before it got traction or stopped in its tracks?

Dr David Jenkins: A parliamentary system?

Stephen Williams: Yes. Any sort of check on the Executive power, whether it is of a president or a monarch, whatever, in recent times. Has anyone been stopped from entering into a war or having entered into a war, have they been pulled back?

Dr David Jenkins: In the United States I can think of two clear examples since the Second World War. The first was in 1974, near the end of the Vietnam War after President Nixon had enlarged the war into Cambodia. Some time previously Congress had withdrawn the Tonkin Gulf resolution but it continued in other ways to authorise the war. At that point in 1974 it passed a resolution cutting off funding on a particular date, and this went up through the courts and the courts refused to touch it until that expiration date had passed. Despite Nixon's objections, just before the expiration date for funding, he ordered a stop to all military actions in Cambodia.

The second was the example I mentioned to you before in Somalia when the Congress put a very clear date for withdrawal of military forces from Somalia, otherwise the financial tap would be cut off. The President had no choice but to withdraw all military forces from Somalia before the end of that date.

It doesn't happen often and it usually happens with control of finances. Nevertheless, in the United States it has happened twice before. In parliamentary systems in recent times, I can't think of an example off the top of my head.

Q31 Chair: Presumably, there are deterrent effects and the Executive don't even contemplate an adventure because there would be the possibility of due process not finding in their favour, so they don't even bother to go that way, probably, in many cases. Hard to know.

One quick one before I call Andrew, which is: gentlemen, you probably write your learned articles and your textbooks, in the next year or so will they be revised to mention the Cabinet Manual? Of course, it has only recently has been put into the public domain and we were told is the sort of car owner's manual for the Executive and the use of Executive power. So far no one has mentioned at any length using the Cabinet Manual in the same way as we might use a resolution of the House for the Executive to limit its own war-making or hostility-creating power by, firstly, having a reference at some point to the Legislative branch; do you think the Cabinet Manual could have that role as a belt and braces for the resolution of the House?

Sebastian Payne: It certainly could be supplementary but it could only be in addition to a resolution, Standing Order, or an Act of Parliament. It is quite interesting to look at the analysis of the problems of parliamentary procedure that the Clerk of the House of Commons, Dr Jack, identified in his written evidence to the Joint Committee on Constitutional Renewal. There is so much work that needs to be done to get it right that clearly, whatever the Cabinet Manual might say, it could only be an addition. Of course one of the problems is the relationship between the two Houses. We haven't talked about that, but that is a serious issue. Of course the position is dynamic—well, I hesitate to say "dynamic"—the position is possibly going to change and, whatever the change might be, that will have implications in terms of decision-making and War Powers as well.

Q32 Chair: David and Nigel, the Cabinet Secretary came here. I don't know whether you can say the body language was helpful towards an amendment to the Cabinet Manual. I don't want to put words in his mouth or his body any further than that, but it looked as though he would be helpful in trying to conjure

something up in the Cabinet Manual. Would that be helpful in what we are trying to do here?

Dr David Jenkins: I would only say that I wouldn't put any reliance upon any provisions that, in the first instance, have the Government police itself. So while any such provisions could only be helpful, depending upon what their content is, that can only be supplementary to any further controls. The Government must be policed. It must be subject to effective and decisive oversight by Parliament in the last instance.

Professor Nigel White: I would agree with David. I think it would be a start and a recognition that a framework is necessary. My own view is it would not be robust enough to set up a framework that would close that accountability gap significantly for me.

Chair: Coming from an institution that isn't particularly dynamic, a start is often a very progressive thing from our point of view.

Q33 Mr Turner: One of the rules about where the next one will be is, it isn't where it was expected. I am concerned that the law will be built on by judges, which we don't foresee, and that means that we would be better not to have a law but just to have a convention; do you agree?

Dr David Jenkins: We might possibly disagree on this. In fact, I am sure we probably will. I think one has to distinguish the possibilities of judicial involvement that one is talking about. The possibility of some judicial review involvement I don't think is an unwelcome one. To the contrary, it is a welcome one. The question is: how will the courts use their power? How does Parliament use its power? How does the Government use its power? We have to trust the courts to some degree and I think the jurisprudence shows, in review of the prerogative—like the American courts under the constitution and the War Powers Act—that judges understand it is not their place democratically. It is not within the functions of the courts to become involved in these kinds of War Powers questions, except in the most unusual of circumstances, but now that position already exists. So I don't think there could be... A well-crafted statute, I don't think, would give any more realistic possibility of undue judicial involvement in these questions than what already exists under prerogative. Pursuant to GCHQ we have seen the CND case; we have seen the Gentle case; the Jones case, in which these questions come up before the courts. That comes back to my initial point: are we concerned about inappropriate judicial interference or are we worried about any judicial review whatsoever?

Now I think to say that the courts should have no role whatsoever, no possibility of review, is a very dangerous one in a constitution that is built upon the pillar of the rule of law, along with parliamentary sovereignty. I don't think it is the state of affairs under the current constitution if we look at those cases in which the courts will review prerogative Powers of War but abstain because of lack of judiciability, and in light of the view of Jackson, where the courts even pushed further possible use of review but only in the most extreme of circumstances. To the contrary, I think it is very important to have that possibility of engagement of the courts, trusting in established jurisprudence and the judge's own view of the role that they will not meddle in these affairs.

Q34 Mr Turner: That is the problem exactly. That they will meddle. That is the problem, in my view; do you not agree?

Dr David Jenkins: In that case there may be a very serious disagreement on the proper role of the courts under the system. I don't think the possibility of judicial involvement is great, but I don't think that possibility is a problem at all. I think it is to be welcomed because a functional separation of powers is not only between the Executive and the Legislative branches but between the courts, who are constitutionally entrusted to uphold the rule of law. There might be, however unlikely, some cases which could bring them in to War Powers questions. It is very unlikely but that is, as I suggested earlier, a relief valve in those unusual but potentially critical constitutional situations, where the courts must somehow weigh in to relieve a tension between the Parliament and the Government. That is not going to happen often but it is an important role, and it is one that I think already exists and cannot be ignored. It is part of the overall framework for democratic accountability in the constitution. Even though judges aren't elected nevertheless they have a democratic mandate to uphold the rule of law.

Sebastian Payne: I share Mr Turner's concern about the role of the courts in the short term but I certainly wouldn't characterise the courts' intervention as meddling. I think there is a rather unfortunate tendency, of some politicians and the press, to characterise the courts as attempting to make policy. As you know, the courts have no choice but to address questions of legality. That only arises if there is an Act of Parliament. I think my concern with an Act of Parliament is that there are constitutional fundamentals to be addressed. That is implicit in Mr Chairman's comments, half an hour or so ago, which maybe we will have time to return to, and, indeed, your evidence to the Public Administration Select Committee where you said that the Executive and the media are the most powerful and that the Legislature and the courts come a poor second. If that is the case, and certainly there are good reasons to think that is the case, we need to think about questions of institutional competence: who should take what decision? That is what is being rethought now about Parliament.

Of course in the issue of War Powers it is slightly unrepresentative, because it is an area of high policy where I would suggest the Government does need powers of high discretion. So there is a lot to be thought through. I agree with you in part but not with your characterisation of the role of the courts. I also agree with Mr Chairman's point that the role of the courts is to be welcomed, but it is to be welcomed after properly crafted constitutional legislation. That would be my core point in relation to the Act.

Professor Nigel White: I sit on the fence on this one a bit. I think that I can see a process moving from Cabinet Manual to a formalised convention in the form of a War Powers resolution, and perhaps if that

is up and running—down the line an Act of Parliament—to me that would be a natural process. I do think perhaps there is too great a fear of courts meddling in decisions of high policy, because at the moment the courts review prerogative powers in other areas. They have chosen, in a sense, to stay out of these issues to a large extent.

If you look at the case law, the Rose Gentle case, the Law Lords weren't prepared to look at the decisions about the legality of the ongoing conflict in Iraq but they did make some comments. They tried to balance the needs of the plaintiff against the needs of the Government. I think the courts can be trusted, in some ways, to realise that these are very delicate issues that they are getting involved in.

Indeed, if you take the extreme example of a strong constitutional framework, as in Germany, when the German Constitutional Court reviews decisions, it concentrates its fire on whether the constitutional laws themselves have been complied with. It doesn't concern itself with whether international law has been complied with. So even in that well developed constitutional system, in terms of War Powers, the courts have that very careful approach. I think an Act would be possible and it wouldn't necessarily lead to lots of litigation.

Q35 Mr Turner: Something which seems to me to have made a difference since this new Government is that now we have a Backbench Committee, which can put things forward, even though the Government may not wish to Whereas before that election that was not the case. Indeed, I think it was almost impossible to get something certainly voted upon and probably even debated. Is it not better to say there is a contrary view that can move in if the Government isn't doing what it wants?

Professor Nigel White: That would be in the form of a convention.

Mr Turner: No, a Backbench Committee that—

Professor Nigel White: Okay, process.

Sebastian Payne: I would certainly endorse that. I think that Professor Griffith's famous article, *The Political Constitution*, addresses that point. That the thing to do is to put Parliament right rather than try and legalise or juridify all these issues. There has been a perceptible trend of "pass the buck to the courts". The whole campaign to make Parliament more effective is within the political sphere and I endorse that. That is why Mr Chairman talks about political judgements; not merely political judgements, political issues and political rather than legal institutions. I would strongly endorse that point of view.

Dr David Jenkins: I think this is the very point where the reform of the war prerogative situation raises other questions of constitutional reform. One could make the case that there is no need to reform the war prerogative at all, if you have a Parliament that is independent and can effectively hold Ministers to account for exercise of prerogative powers. There is the case to say that the prerogative has an undemocratic pedigree and, therefore, should be put in a statutory framework. I think that is a very different argument than function, because I think even statutory War Powers would functionally operate about the same as the prerogative. For focusing on function then, the question is on the accountability that they have before Parliament. This goes to those wider questions of just how independent is Parliament from ministerial influence? Of course there has been much criticism that perhaps it isn't far enough. Again, this raises other serious constitutional issues about how to reinvigorate Parliament as a body to exercise that kind of effective independent control over Government decisions.

Professor Nigel White: I don't think that sort of development by itself would be sufficient. Going back to my earlier points, I think the gap in accountability is significant here. As a first step, you would need to create a framework within which a better balance between Parliament and the Executive can be achieved. If you don't have that framework, in the form of a resolution or an Act of Parliament, then where would the underlying rationale for change come from, for the rationale for calling the Executive to account, unless there is some basis for it; unless there is something that Parliament can point to and say, "Look, we have the right to do that"?

If it is simply against the background of politics or discretion then the Executive can turn around and say, "Well, you can't do it in these cases because we have prerogative powers". I don't think the processes address the fundamental problem of the lack of a framework, a legal framework, in the loose sense.

Chair: Another problem we face is, having created the Backbench Committee—I thoroughly endorse what Andrew said, it is a tremendous breakthrough—it is a tiny valve for this enormous radioactive vessel of MPs' drive to hold Government to account, squirting through this tiny little valve. It is only a small number of days, unfortunately, and there is massive pressure from Members of Parliament, all of us, trying to get things into that little space and the vast bulk of our agenda is still dictated to us on a daily basis by the Executive. That is a parliamentarian's view for you rather than a question. Simon, a quick question, and then Sheila to finish.

Q36 Simon Hart: It is a very quick one, going back to something the Chairman said earlier on about the ability for individual members of the public, or indeed pressure groups, to judicially challenge Acts of Parliament as a final resting place. Whether you necessarily agree that that is a good facility, I am not quite sure, but my point is simply that it is a safety valve. Wherever I seem to go, I can never escape from the Jackson case. I thought by coming here I might be able to, but no. Knowing the cost of it, it was my responsibility to raise some money for it. But that facility is a safety valve. It is an important safety valve for individuals, and it is not much of a one if it is unaffordable. I thought the opportunity of having lawyers in the room might be too good to miss because that particular case cost several million pounds to get to where it did, and there aren't very many people who would be in a position to do that. If it is important to have this valve, as we say it is, then surely it must be sensible to have it at an affordable rate.

Chair: Simon, should we inform people that you were—was it—the Director of the CLA?
Simon Hart: I was the Chief Executive of the Countryside Alliance at the time.
Chair: Chief Executive, I am sorry.
Simon Hart: John Jackson was the Chairman and, indeed, the Chairman of Mishcon de Reya at the same time.
Chair: So I don't know whether his question was tinged with pain or—
Simon Hart: It was; I have only just finished writing the cheques.
Chair: Very briefly, gentlemen, because I want Sheila to come in, any response to that?
Sebastian Payne: Lord Woolf was very vexed by the cost of litigation, hence the Woolf reforms. It is an endemic problem. Litigation is very expensive. Yes, access to justice is clearly a vital part. It is more than a good facility; it is a vital part to the rule of law. So, yes, it should be affordable.
Dr David Jenkins: I think one is always going to be vexed by the cost of litigation. It is expensive. It would be best not to have to foot the bill—any client knows that—and it is inefficient, but I think that inefficiency and cost is just the price that one must have to pay.
Simon Hart: The problem we have had, of course, is the Government is a big beast to take on, and a voter versus the Government, there is only ever going to be one winner in court. They just squeeze you until you go mad.

Q37 Sheila Gilmore: First of all, apologies for not being here earlier, another Committee commitment, which is typical here. Maybe that is just keeping us busy, we don't do enough. One of the practical things about framing, whether it is trying to codify a convention or having a resolution, is the problem of what happens if there is thought to be information that might be in some way damaging to the action which is happening. So I think there are a couple of questions I would have. One is: who would decide what information should be available, because you can have innumerable debates but without information you are casting around in the dark, so who makes that decision? Who should decide on the timing of a debate and vote?
Sebastian Payne: This issue was addressed in the House of Lords Select Committee. Information is clearly vital, and that was part of what I said when I gave evidence to the House of Lords Committee. The Iraq war is a story in part about what information was available, and when and how it was presented. So, if Parliament is going to be effective, it has to have advice, have legal advice, and it has to have accurate information. I know there is a problem about information being secret or intelligence information, but the Executive will have to learn, or should learn—whether it will or not is another matter—but should learn to engage Parliament more with policy decisions. It is a wish list perhaps, but I take the thrust of your question to be: Parliament needs information to make informed judgements, and I agree with that. The timing: that was a problem with the draft resolution as presented. It gave too much control to the Prime Minster as to timing. That has to be tightened up otherwise the Prime Minister can wriggle out of any inconvenient commitment.
Dr David Jenkins: As with the timing issue, I completely agree about the powers of the Prime Minister to control the timing of a motion under the earlier proposed resolution. Whenever a solution is come by I think it is vital that Parliament has the ability to set its own agenda on these issues. It cannot be controlled by the Government on such an important question of oversight. As to the control of information, this is an intractable problem because, along with the Executive's capabilities for efficient decision-making—for vigorous decisiveness—it also must be able to exercise discretion.
Requiring the Government to release information is going to be very problematic, so I would think probably the two main options would be: one, either institute some sort of apparatus so that Parliament can take its independent legal advice on such issues when it comes to questions of legality; I don't know what current parliamentary practices are, but some kind of mechanisms that ensure that the Government consults with other leaders inside of Parliament. In a parliamentary system where the leaders in Parliament are the Government this is very much a problem. So the question is then: how do you break through that wall of Cabinet to, with discretion, let some of this information out? The American situation is very easy because the President can consult with senior leaders in Congress who are not a part of the Government, so you have a trusted circle. That is a problem I think that needs to be worked out in the parliamentary context, but that is one way to deal with that very touchy issue of information control and discussion.
Professor Nigel White: I would largely agree with both Sebastian and David on this. I think the problem with the earlier resolution, as it came out, was that the Prime Minister had too much control over timing issues, release of information issues, but I do see that there are problems here, security and safety issues, of British forces. I would say independent legal advice is a very good idea. The ability to get that; that somehow some balance needs to be achieved between the Prime Minister's control of information and the Cabinet's control of information, some of that small body of Parliament needs to have a role in determining crucial issues of when information can be released, otherwise we are formalising prerogative powers still; we are not really changing them.

Q38 Chair: Gentlemen, I am going to ask you four very quick questions and it is a "yes" or "no", I am afraid. You may want to scribble them down as I ask them, which is: is there an effective convention now about hostilities? Is it your view that it would be helped by a reference in a Cabinet Manual? Thirdly, is it your view that this could be helped by an effective Standing Order in the House of Commons? Finally, do you support putting this ultimately into statute law? I am doing this to pull together some of the discussions we have had today and it might be helpful for Members. It is not a parliamentary trick but it is trying to focus where we are, if that is helpful. You

don't have to answer. We won't lock you up if you don't answer. Nigel, you are first in my eye line.
Professor Nigel White: No, there is no convention.
Chair: One "no".
Professor Nigel White: And three "yeses"
Dr David Jenkins: Three "nos" and a "yes". "No" to everything, except a "yes" for the statutory option.
Sebastian Payne: The first one; there may be but it is too early to say. So, no, you cannot identify whether there is an effective convention because of the nature of conventions. Things are changing, so we are in a situation of emergence. Second, reference to a Cabinet Manual; yes, that would of course be helpful. An effective Standing Order? Definitely. You need that otherwise the House will not get a grip on this matter. A statute? For all the reasons I have given, I don't think it is helpful. There is, in a sense, bigger business to be done and an Act of Parliament at this stage will stand in the way; I favour a resolution embodied in a Standing Order, plus you have to work out the role of the House of Lords as well.

Chair: Gentlemen, I would like to thank you for coming this morning but also to say, without trying to flatter you, this is one of the most impressive sessions we have had in terms of moving our thinking forward. We are at a perfect moment now to influence the process, perhaps in a way that Parliament hasn't been able to do, certainly, in my time in the House. I think there is clearly flexibility now from the Government, as part of Mr Hague's statement indicated. The Cabinet Secretary seems open to suggestions on this field. Unusually, I can probably say to you—not least because of your contributions this morning—you may well be in a position, in a relatively short time, to see some fruits of the interaction you have had today with a part of Parliament; myself and my colleagues certainly wish that is the case. Thank you all for your contribution today and watch this space. Thank you very much indeed.

Written evidence submitted by Dr David Jenkins

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Framing the debate

1. Currently, the U.K. Government (at the direction of the Prime Minister) declares war, deploys military forces, or otherwise commits the nation to armed conflicts abroad pursuant to the Crown's prerogative, the legal exercise of which requires no approval by Parliament. This war prerogative permits maximum efficiency in military decision-making. Such efficiency comes at potentially great cost to democratic accountability, due to the lack of required parliamentary consultation or approval for military actions.

2. Parliamentary committees have previously taken considerable evidence and agreed reports on the desirability of and options for requiring parliamentary approval for the deployment of military forces to an armed conflict. There is general consensus across the political spectrum for reform of some kind. Nonetheless, considerable differences remain as to the best means of reform. While the House of Lords Select Committee on the Constitution favoured a new convention of parliamentary approval,[1] the previous Government proposed a detailed House of Commons resolution.[2] Both this Committee and the Government rejected earlier calls by the House of Commons Public Administration Select Committee for statutory controls.[3] However, after William Hague's statements before the House of Commons on 21 March 2011,[4] a legally-binding, statutory option seems again to be a possibility.

3. These differences of opinion suggest that any chosen reform measure will reflect a value preference for either efficiency or accountability in the decision to commit military forces to armed conflict. While both values are important, there is no perfect balance to be found and there is necessarily a trade-off between the two. Institutionally, this means that any meaningful reform of the existing war prerogative will require some sacrifice of Government discretion and thus efficiency in military decisions, currently at or very near a permissible constitutional maximum. On the other hand, as a deliberative body, Parliament's institutional advantages for increasing democratic accountability place natural and realistic limits on its ability to make efficient military decisions. As has been widely agreed, any parliamentary role must not intrude on operational decisions.

4. The institutional division of war powers between the Government and Parliament will reflect the underlying tension between competing efficiency and accountability concerns. In practical terms, either the Government or Parliament will have the upper-hand in the decision to deploy military forces to an armed conflict. Any reform measure should be flexible, however, so that these institutional and value relationships can gradually shift or adjust as necessary over time.

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1 House of Lords, Select Committee on the Constitution, Fifteenth Report, *Waging war: Parliament's role and responsibility* (2005–06 HL 236).
2 *The Governance of Britain—Draft Constitutional Renewal Bill*, Command Paper 7342 (March 2008).
3 House of Commons, Public Administration Select Committee, Fourth Report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, (2003–04 HC 422).
4 *Hansard* (H.C.), 21 March 2011, Column 799.

Cautions and Predictions

5. American law and political practice highlight the relationships between efficiency and accountability values and institutional division of war powers. The U.S. Constitution of 1787 rests in Congress the power to declare war,[5] while designating the President as Commander in Chief.[6] Congress' *War Powers Act* of 1973[7] purports to place further limitations on the power of the Commander in Chief unilaterally to commit military forces to an armed conflict. Notwithstanding these constitutional and statutory restrictions, in practice the President now enjoys wide discretion to deploy military forces to an armed conflict without prior, express congressional approval.[8]

6. Nevertheless, Presidents can only exercise this discretion with expectations of congressional support in some form. Historically, direct confrontations between Congress and the President have been rare and have been politically resolved.[9] U.S. Federal courts almost always refuse to adjudicate legal challenges to presidential or congressional exercises of war powers, dismissing them for lack of standing or ripeness, or characterising them as non-justiciable political questions in all but exceptional circumstances.[10]

7. American experience therefore suggests four propositions to consider in the debates over reform of the war prerogative:

(1) As the interminable American debates show, no reform measure is likely to quiet controversy entirely and will quite possibly lead to some degree of future conflict between Government and Parliament. Interpretive arguments, historical developments, and political pressures will affect actual practices and reflect shifting preferences between efficiency and accountability over time;

(2) The great reluctance of U.S. courts to adjudicate war powers disputes shows that the risk of "legalising" complex political decisions about war-making might be much less than feared (or hoped, depending on point-of-view). American and British judges employ broadly similar notions of justiciability and deference in national security matters, so that U.K. courts might be just as reluctant to review legal challenges brought under a statute or any other reform measure (thus following their current approach under the prerogative);[11]

(3) Like the U.S. President, the U.K. Government is likely to retain the institutional initiative to deploy military forces to an armed conflict, even if parliamentary approval is required. The Government's institutional advantages for efficiency and the United Kingdom's foreign policy interests will tend to impel this development;

(4) Reasonable executive-legislative conflicts in military affairs are not *per se* problematic and might even be desirable from an accountability perspective. Any conflicts between the Government and Parliament will probably be resolved through political compromises, even where the procedures for parliamentary consultation and approval could otherwise be characterised as legally binding. However, such conflicts might have uncertain implications in the context of the U.K.'s parliamentary system, based as it is on ministerial responsibility.

8. A workable reform measure will thus ensure meaningful institutional cooperation, while allowing flexibility in how the Government and Parliament resolve questions over military deployments. It will generally redistribute war powers between those two institutions, so as to change constitutional expectations about how the United Kingdom becomes involved in an armed conflict. The Government will have to respect these boundaries, expectations, and processes in order to court and maintain Parliament's approval for or acquiescence in military decisions. Finally, an effective reform measure will also strengthen Parliament's independence and ability to scrutinise or even confront the Government's military policies, free from undue Government influence.

Conclusions and Recommendations

9. The House of Lords Select Committee on the Constitution recommended a new convention that Parliament must approve deployment of military forces to an armed conflict.[12] This idea is problematic, as conventions most usually derive their constitutional force through consistent and obligatory political observance over

[5] U.S. Constitution, art. I, s. 8.

[6] *Ibid.*, art. II, s. 2.

[7] Pub. L. No. 93–148, 87 Stat. 555 (7 Nov. 1973), codified at 50 U.S.C. ss.1541–1548 (2000).

[8] See Louis Henkin, *Foreign Affairs and the United States Constitution*, 2d ed. (Oxford: Clarendon Press, 1996) at 97–101.

[9] *Ibid.*

[10] See *Campbell* v. *Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (individual congressmen have no standing to sue over the President's alleged violation of the *War Powers Act*), and *Orlando* v. *Laird*, 443 F.2d 1039 (2d Cir. 1971) (courts will not question the means by which Congress approves military action).

[11] See *Council of Civil Service Unions v Minister for the Civil Service*, [1985] A.C. 374 (H.L.) [*G.C.H.Q.*] (the prerogative is subject to judicial review, but many exercises of it will be non-justiciable), and *R. (on application of Campaign for Nuclear Disarmament) v The Prime Minister*, [2002] All E.R. (D) 245 (Q.B.) [*C.N.D.*] (court refused to declare a possible invasion of Iraq to be a violation of international law). See also *R. v Jones*, [2007] 1 A.C. 136 (H.L.), and *R. (on application of Gentle*) *v The Prime Minister*, [2008] 1 A.C. 1356 (H.L.).

[12] House of Lords, Select Committee on the Constitution, Fifteenth Report, *Waging war: Parliament's role and responsibility* (2005–06 HL 236), v. 1, paras. 108–110.

time.[13] In absence of a long-standing political practice and in view of disagreements over reform in this area, it is difficult to identify an existing convention requiring parliamentary approval before the Government can commit military forces to armed conflict. For the same reasons, a convention likely cannot be agreed upon by Parliament and the Government of the day, in order to effect constitutional reforms. The requirements for parliamentary consultation and approval would be uncertain and open to dispute, while a future Government might simply renounce the convention, if politically expedient.

10. The previous Government instead preferred adoption of a detailed House of Commons resolution, requiring Parliament's approval before deployment of military forces into an armed conflict.[14] However, the draft resolution allows considerable exceptions to this rule, where the Prime Minister finds special emergency or security conditions to exist. There is no requirement for parliamentary approval of deployments in these circumstances. The Prime Minister also decides the timing and terms of a proposed force authorisation, and he or she could easily manipulate the resolution's procedures in order to avoid Parliament's effective scrutiny or confrontation of Government military policy. Because of the Prime Minster's control of the approval process under the proposed resolution, even a duly-passed force authorisation might give only the pretence of increased democratic accountability.

11. The House of Commons Public Administration Select Committee endorsed legislation to increase the democratic accountability of prerogative powers generally, including the Government's use of the armed forces.[15] In proposing their own recommendations, the House of Lords Select Committee on the Constitution and the Government both rejected the statutory option as too problematic and raising too much risk of inappropriate judicial intervention in military matters. However, sections 5–7 of Prof. Rodney Brazier's draft *Ministers of the Crown (Executive Powers) Bill*, agreed by the Public Administration Select Committee, have much to recommend them as a model for future statutory reform, for the following reasons:

(1) Sections 5–7 of the draft bill simply and elegantly grant Parliament the power to approve the deployment of military forces to an armed conflict. Such clarity and brevity emphasize the constitutional obligations of the Government and Parliament, while allowing flexibility in the development of the approval process. Legalistic and complicated rules should be avoided in this way, as they might obfuscate the constitutional principles involved, "legalise" essentially political questions, and lead to more, not less risk of litigation. However, although attractive in principle, the draft bill's seven-day period for the Government to secure retrospective approval for deployments should be carefully re-considered, as a statutory time-table might prove too rigid or impracticably short;

(2) Section 5(1) defines "armed conflict" according to international humanitarian law, so that parliamentary approval will only be necessary for those conflicts reaching a certain level of intensity. The Government would not need approval for minor military operations or to deploy military forces as a show of strength in aid of diplomacy; such actions would remain prerogative ones. There is still room for political disagreements as to whether an apprehended or escalating conflict would trigger the statute, but this definitional problem is unavoidable with any reform measure. In any case, this question is political one, which courts would almost certainly find to be non-justiciable except in the most unusual of circumstances;

(3) Section 6 grants Parliament the power to declare war, a power somewhat different from an authorization to deploy military forces to an armed conflict. Although formal declarations of war have fallen out of use, they have special legal effects under international and domestic law. The power to declare war should therefore be retained, but clearly lodged in Parliament. Otherwise, the Government could arguably declare war under the prerogative in an attempt to avoid a statutory process for parliamentary consultation and approval. On a different note, section 7 requires a ministerial statement to Parliament, whenever military forces are deployed at home in aid of civilian law enforcement or domestic security. While the Government can make such a deployment at its discretion, this provision recognizes that such action should receive special parliamentary attention;

(4) Sections 5 and 6 mandate that both the House of Commons and the House of Lords approve the deployment of military forces to an armed conflict. There has been understandable reticence to have an affirmative vote in the upper house, due to concerns about that chamber's democratic credentials. However, full inclusion of the House of Lords in the approval process is advisable for two reasons. First, there will then be no reason to reconsider the role of that house in the event of its further reform. Second, its full participation can counteract any undue political pressure that the Government might place on its supporting majority in the House of Commons. By requiring bicameral approval, sections 5 and 6 would force the Government to build a broader political consensus for military actions. Such consensus would increase democratic accountability through the approval process, despite the arguable democratic deficit within the House of Lords itself.

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[13] See Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 8–12, Joseph Jaconelli, "The nature of constitutional convention" (1999) *Legal Studies*, v. 19, p. 24, at 39–42, and Aileen McHarg, "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) *Modern Law Review*, v. 71, p. 853, at 857–863.

[14] *The Governance of Britain—Draft Constitutional Renewal Bill*, Command Paper 7342 (March 2008), vol. 1, para. 215 and Annex A.

[15] House of Commons, Public Administration Select Committee, Fourth Report, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, (2003–04 HC 422), paras. 56–57, 60 and Appendix 1.

12. In light of the issues and concerns highlighted in this memorandum, I would suggest further consideration of a war powers statute along the lines of sections 5–7 of the draft bill endorsed by the Public Administration Select Committee. These provisions broadly redistribute war powers between the executive and legislative branches, increase democratic accountability while preserving command efficiency, and are flexible enough to allow political manoeuvring and compromise in response to future circumstances.

13. Statutory provisions such as these would be legally binding, thereby pressuring the Government to comply and strengthening Parliament's role in the consultation and approval process. Because they concern high political questions and procedures within Parliament, however, they are most probably non-justiciable except in the most unlikely and unusual of circumstances (*eg*, an intractable constitutional impasse between the Government and Parliament, but where the Government has not yet lost the confidence of the House of Commons). The possibility of inappropriate judicial intervention is remote enough to calm worries over judicial meddling, yet potent enough to dissuade the Government from slighting Parliament or evading the statutory approval process.

14. Any reform measure should perhaps also include simple, clear mechanisms calculated to increase the independence of Parliament and enhance its procedures for effectively scrutinising and confronting Government military policies. Past suggestions along these lines have included a greater oversight role for committees, mandatory Government statements about operational details, or periodic parliamentary reviews of or votes on continuing military engagements. Above all, however, both Houses of Parliament should have the ability to scrutinise, debate, and vote on Government military policies—and so possibly oppose them, set conditions on them, or withdraw a previous force authorisation—without the need for a Government-sponsored motion and free of its procedural control. This should be the case from the outset of the approval process and continue throughout the duration of an armed conflict.

28 March 2011

Written evidence submitted by Sebastian Payne, University of Kent

PRELIMINARY POINTS

Has a convention now been established requiring the approval of the House of Commons?

Bearing in mind the consensus across the political spectrum that Parliament should have a greater role with regard to war powers there is clearly a change of expectations on the part of this Government and indeed the last Government as to what is appropriate.

What appears to be emerging is the expectation that the House of Commons will be consulted and that there will be a division but not necessarily prior to the deployment decision.

This could be seen as a three stage process:

1. Government makes an informal assessment of the mood of the House.
2. On the basis that there is believed to be substantial support the Government makes a statement as to what it is planning to do or indeed has decided to do.
3. A debate and division is held.

This new approach implies that it would be difficult to sustain operations without a fairly early formal approval of the House.

In the case of Libya, the Government took the decision to act and then made a statement on the 18 March 2011, deployed the armed forces on the 19 March and held a full debate and division on the 21 March 2011.

Both Parliament and the Government have to confront a paradox:

Parliament's influence is maximised by an early debate and division on the plans to deploy troops but there may be sound reasons why the Government in some scenarios needs to act prior to approval from the House.

Early consultation allows the House to extract clarification from the Government as to the purpose of the operation, troop numbers, allies to be involved, duration of operation and international mandate. But at an early stage it may be impossible for the Government to give answers to all those questions as is evident from the Libyan scenario with the Government having to engage in persuasion and coalition building with international allies.

A vote after the deployment has occurred weakens the influence of the House as those who vote against an existing deployment can be accused of undermining the morale of the armed forces. Nonetheless Governments may need to act prior to a vote.

What are the circumstances in which forces could reasonably be committed before a debate and vote in the House of Commons, as happened recently in the case of Libya?

The Libyan deployment presents an example of an occasion which justifies acting prior to a vote. The justification is to avert an imminent humanitarian disaster.

Other examples would be where immediate action is needed to defend the United Kingdom or its overseas territories.

Conceptually, one needs to separate the debate question from the 'debate and vote'. There may be circumstances that allow for an early debate to inform the House and for the House to influence the Government. A vote may not be appropriate at the early stage because the Government is still developing its policy and engaged in negotiation with its allies and trying to pressure the enemy. Indeed strong support from the House may act as a warning to the enemy and influence the shape of events.

Is a detailed parliamentary resolution needed to clarify Parliament's role, as proposed by the last Government, or should the role of Parliament in conflict decisions be enshrined in law, as the current Foreign Secretary has suggested?

A detailed resolution is highly desirable. The last Government produced a detailed draft resolution that covered many of the issues of concern. That resolution needs refining to enhance the role of Parliament.

A convention embodied in a resolution will allow the House and the Government the opportunity to develop an appropriate modus operandi. There is still much that needs to be changed to allow Parliament to effectively influence the policy cycle. There needs to be a re-thinking of the boundaries between the executive and the legislature part of which should include the Government seeking input from the House at an earlier stage of policy formation. Parliament is extending its authority and influence through Select Committees. Indeed the demand for more influence over war powers is testimony to the growth of Parliamentary influence on the executive. It is too early to crystallise these arrangements in legislation which will bring with it the risk of judicial review of government action.

28 March 2011

ISBN 978-0-215-55958-6

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PEFC
PEFC/16-33-622

Printed in the United Kingdom by The Stationery Office Limited
05/2011 011426 19585