

PARLIAMENTARY APPROVAL FOR MAKING WAR

SUBMISSION TO THE CONSTITUTION COMMITTEE, HOUSE OF LORDS

**FROM DEMOCRATIC AUDIT, HUMAN RIGHTS CENTRE,
UNIVERSITY OF ESSEX**

Summary

Prerogative powers in general should be placed on a statutory basis, but as a matter of priority the United Kingdom requires an Act making Parliament the source of authority for the deployment of the armed forces and for their hostile engagement abroad. The UK is exceptional in that it has no formal procedures for involving the legislature in war-making and the argument that a convention could remedy the position is ill-conceived.

The international model most often cited for consideration is the US 1973 War Powers Resolution. A UK equivalent should take into account the weaknesses we cite in the US version. Other nations, such as Sweden, offer alternative arrangements.

We advocate a two-tier system for parliamentary approval of troop deployments allowing for non-combat and “potential or actual” combat situations. The latter would require statutory arrangements for formal approval, detailed reporting and regular renewal of the parliamentary mandate. We take into account the need for possible emergency action by the executive.

Parliamentary involvement in war-making is compatible with the North Atlantic Treaty, which allows for the “constitutional processes” of member states. The government must be obliged to satisfy Parliament that troops placed under the operational control of another state will respect domestic and international law.

The Attorney General’s legal advice on any potential conflict should be published in full. Parliament should be able to supplement that advice, either through establishing its own legal officer, or having the power to commission an opinion.

The courts would naturally have the power to ensure that a government conforms to future war powers legislation and international law. An Act of Parliament would regulate the courts’ use of such power and bring making war within the democratic process in a way that is not possible while it remains a matter of executive discretion under the Royal Prerogative.

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Democratic Audit has just participated in a joint study of the relationship between the executive and Parliament in making UK foreign policy. We found that the extensive use of the Royal Prerogative over a wide range of external policies, including the deployment of armed forces abroad, makes for negligible and spasmodic parliamentary scrutiny of the executive's foreign policy-making and in effect also rules out judicial scrutiny.¹ The broad, and necessarily retrospective, doctrine of ministerial responsibility to Parliament is too vulnerable to executive power to be an effective check on executive use of the prerogative.

1. **What alternatives are there to the use of royal prerogative powers in the deployment of armed forces?**

It is said that the processes by which the UK joined in the invasion and occupation of Iraq have established a convention that the executive must now seek parliamentary approval before engaging in hostile action abroad. For various reasons, we believe that this view is mistaken. What seems to be certain, anyway, is that the executive does not accept that such a convention would require a vote on a substantive motion approving military action abroad (see the Prime Minister's comments to the Commons Liaison Committee, February 2005). Conventions are also notoriously elastic and the rules on going to war in a democratic state require clarity. We recommend that prerogative powers in general should be placed on a statutory basis, and agree with the Public Administration Select Committee that those relating to making war and treaties require urgent attention.² The legislature should be the source of authority for the deployment of the armed forces and for their hostile engagement abroad. This is not only a democratic issue. Good policy-making depends on effective parliamentary scrutiny and wide public debate.

2. **Can models, drawn from the practice of other democratic States, provide useful comparisons?**

The UK is once again "exceptional" among democratic states in that it has no formal procedures for involving the legislature in war-making. In our view, Sweden provides the most useful European model. Its "Instrument of Government" applies to all foreign troop deployments – not just declarations of war or involvement in battle. Military deployments and engagements in action are subject to various requirements including consent from the *Riksdag* (Parliament) and compliance with domestic

¹ *Not in Our Name*, by Simon Burall, Brendan Donnelly and Stuart Weir, is to be published by Methuen (Politico's) in January 2006. This is a joint study by Democratic Audit, the Federal Trust and One World Trust.

² *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Public Administration Select Committee, HC 422, 16 March 2004.

statute and international agreements. There is provision for emergencies and self-defence.³

The model which is most often cited for consideration is the US *1973 War Powers Resolution* (commonly, but incorrectly, known as the “War Powers Act”).⁴ Under the US Constitution, Congress is responsible for declarations of war while the President is Commander in Chief of the Armed Forces. Presidents however have been able to participate in *de facto* warfare stopping short of a full declaration of war. The War Powers Resolution was Congress’s response to such presidential activity, especially in Vietnam, and it requires prior consultation with Congress, wherever possible, where “the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities” is likely. We regard this ‘commonsense’ formula as preferable to an attempt to create a precise legal definition. The Resolution requires a detailed report within 48 hours of military action, with follow-up reports at least every six months. If Congress does not authorise the action, then troops should be withdrawn within 60 days or may be withdrawn at any time through concurrent Congressional resolution.

The Resolution has not in practice strengthened Congressional control over the President’s war-making powers. Prior consultation is a vague concept, stopping well short of prior authorisation, which we recommend for the UK. Congress has proved reluctant to use the powers at its disposal, for instance failing to enforce the 60-day rule after President Reagan’s deployment of troops in the Lebanon in 1982. Successive presidents have denied the constitutionality of the Resolution since it was passed over President Nixon’s veto. If Parliament is to play a greater role in decisions over war-making, MPs must be willing to use the powers given to them; and a major constitutional realignment such as this in the UK would have to win widespread acceptance.

There is also a need to legislate for specific, clearly circumscribed mandates for military action; otherwise the purpose of such legislation can be nullified by open-ended authorisations. For example, in the aftermath of 11 September 2001, a joint resolution in Congress allowed the President to “use all necessary and appropriate force against those, nations, organizations, or persons” he deemed culpable, in order to stop future international terrorist acts. In October 2002 the President was given the go-ahead to act “as he determines to be necessary” to defend national security against Iraq and enforce relevant UN Security Council resolutions. We believe that under UK legislation such wide executive discretion should never be granted. Regular, affirmative renewals of authority and clear parameters should apply in all cases.

³ See *How to Go to War: A Handbook for Democratic Leaders*, by Andrew Blick, Methuen 2005: 61-66.

⁴ *War Powers Resolution of 1973*, Public Law 93-148, 93rd Congress, H. J. Res. 542, 7 November 1973. See also *The War Powers Resolution: After Thirty Years*, by Richard F. Grimmett, Congressional Research Service, Library of Congress, 11 March 2004; and *War Powers Resolution: Presidential Compliance*, also by Grimmett, Congressional Research Service, Library of Congress, 14 November 2004.

3. Should Parliament have a role in the decision to deploy armed forces?

Yes. Parliament's exclusion from formal involvement in such decisions is unacceptable from a democratic standpoint and reduces the level of scrutiny of executive activity, making bad policy-formation more likely.

4. If Parliament should have a role what form should this take?

(a) Should Parliamentary approval be required for any deployment of British forces abroad, whether or not into conflict situations?

Yes. Legislation on the deployment of troops could introduce a two-tier system. An Act could require the executive to present an annual report to Parliament, setting out total deployments in both hostile and non-hostile circumstances. This report should be separate from the present MoD annual report and could be debated by the plenary of both Houses and formally approved by a vote of the Commons (after scrutiny by the appropriate committees).

Parliament would also be asked to approve individually all troop deployments falling into two categories - non-conflict deployments involving more than a fixed number of troops; and deployments into "potential or actual" combat situations. In both cases the executive would be required to submit a report specifying the purpose of an operation, its likely duration and cost, provision for civilian and troop safety, and so on.

Special conditions should be attached to deployments in "potential or actual" combat situations. The executive should be required to inform Parliament as fully and precisely as possible without prejudicing the success of an operation or the safety of British service personnel. There should be no provision for open-ended authorisations of the kind that have sapped Congress's role in the United States. A statement of compatibility with international law and human rights obligations would be required. There could be an accompanying collective endorsement of the operation, issued under the names of all Cabinet members who were present when the action was agreed. Depending in part on future arrangements for the House of Lords, such deployments could be debated by a plenary assembly of both Houses, but would require the specific approval of the House of Commons.

Legislation should be drafted to "catch" all significant military action and deployment and not simply major engagements. For example, the process of going to war against Iraq in 2003 was subject to public and parliamentary debate and approval. But hostile action against Iraq began earlier with the "spikes" of US and UK air raids under cover of enforcing the established protection zones over Iraq. These strikes and their purpose were concealed from Parliament. Further the plans and deployment of UK forces for hostile action against Iraq began long before the final parliamentary vote. If Parliament is in recess at the time of potential or actual combat, the executive should be required by statute to recall Parliament. (Non-combat deployments would not require the same urgent attention.) The government should be required to report regularly to Parliament and renew its mandate for action on the basis of this periodic report (say, every 60 days). If Parliament refused renewal, troops would have to be

withdrawn immediately, subject to their safety and that of non-combatants in the area. If the government wished to alter its mandate, it would require specific parliamentary approval, either within or separately from the periodic renewal. There might also be provision for a resolution of the Commons or both Houses forcing the withdrawal of troops at any time.

Given the executive's reluctance to recall Parliament on previous occasions, it would be wise also to give Parliament its own power of recall, as recommended by the Hansard Society Commission on Parliamentary Scrutiny⁵ and the joint Democratic Audit/Federal Trust/One World Trust report.⁶ It would also be important to give Parliament its own legal counsel to complement the advice that the executive receives through the Attorney-General; and also to strengthen Parliament's ability to scrutinise the government's foreign policies, possibly through a new parliamentary scrutiny agency and/or new select committee arrangements. A joint committee of both Houses could be set up with a watching brief over foreign policy as a whole, but with a remit to identify potentially hostile military actions and the power to trigger parliamentary debates when it judges the government has engaged in operations that may end in conflict. It should be able to exercise plenary powers when emergency circumstances make a full parliamentary gathering impossible (similar arrangements exist in Germany). It could also take on a more positive remit, for instance recommending military action for humanitarian purposes.

Major internal troop deployments of the past – including into potentially hostile circumstances in Northern Ireland – have been of great significance and controversy. Domestic operations of the future, for instance in relation to a terrorist threat, may be too. But directing the disposition of the armed forces *within* the UK is also a prerogative power. A clear, formal parliamentary role, mirroring that for foreign deployment, is therefore essential.

(b) Should Parliamentary approval be required before British forces engage in actual use of force? Is retrospective approval ever sufficient?

Government will always plead the need for discretionary powers to take urgent executive action over democratic accountability. Recent history suggests that occasions on which urgent action is necessary are very rare. But as in Sweden, it is possible to specify the circumstances in which a government is not required to seek prior parliamentary approval – for instance, rapid responses to surprise attacks – or it is not prudent to do so – say, hostage rescue missions. But the presumption should be that government would seek approval whenever possible; and reports would have to be presented to Parliament within a specified period (say, within 48 hours) for retrospective judgment and approval. MPs could then disavow or halt the operation.

⁵ *The Challenge for Parliament: Making Government Accountable*, Hansard Society Commission on Parliamentary Scrutiny (chairman, Lord Newton of Braintree), Vacher Dod Publishing, 2001.

⁶ See note 1.

5. Is there a need for different approaches regarding deployment of UK armed forces:

- (a) required under existing international treaties;**
- (b) taken in pursuance of UN Security Council authorisation;**
- (c) as part of UN peace-keeping action;**
- (d) placed under the operational control of the UN or a third State?**

(a) No. The UK is party to the North Atlantic Treaty, a mutual defence pact. It may be argued that the commitment is incomplete if its fulfilment is subject to parliamentary approval. But the Treaty provides for signatories to execute its provisions “in accordance with their respective constitutional processes.”⁷ Thus a statutory duty on government to obtain parliamentary approval for military action is compatible with NATO membership. The War Powers Resolution has certainly not inhibited US participation in NATO. As well as the US most NATO members have greater constraints than the UK upon the war-making powers of the executive – including monarchies such as Holland and Sweden. Furthermore, the UK is unusual amongst NATO member states in having no formal role for Parliament in treaty-making – a fact which compromises the democratic legitimacy of UK participation in NATO still further. For instance, the Dutch Constitution states that “The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament.”

(b & c) No. Such actions would by their very nature comply with international law, but it would still be proper to seek democratic approval in the UK and to comply with any statutory requirement to that end. Major military actions of the past in pursuit of UNSC resolutions include the Korean and the first Gulf wars; participation in these would ideally have been subject to a government report and a parliamentary vote.

Moreover, as discussed above, the *de facto* campaign to remove Saddam Hussein arguably began in 2002 – under the guise of ongoing action to enforce UNSC resolutions. The detailed reporting we envisage could have exposed the use of this tactic and required parliamentary authorisation.

The United States UN Participation Act allows for deployments of up to 1,000 non-combatant troops without specific Congressional authorisation. A similar provision may be included in the relevant UK Act, but in principle such deployments should be subject to parliamentary approval, especially as the distinction between peacekeeping and engagement in conflict may not be clear.

(d) Any commitment to placing troops under the operational control of another state must be subject to full parliamentary approval. Government should be required to satisfy Parliament that any military action under the operational control of another state would remain within the bounds of international legality.

⁷ *North Atlantic Treaty*, Article 11.

6. **Should the Government be required, or expected, to explain the legal justification for any decision to deploy UK armed forces to use force outside the UK, including providing the evidence upon which the legal justification is based?**

Yes. Government should be required to publish in full the Attorney-General's advice. Parliament should also either have its own legal counsel or the power to commission its own legal opinion.

7. **Should the courts have jurisdiction to rule upon the decision to use force and/or the legality of the manner in which force is used. If so, should that jurisdiction be limited by considerations of justiciability of any of the issues involved?**

Yes. Two weaknesses in the US War Powers Resolution are that there is no effective mechanism for judicial review nor an explicit reference to the need to comply with international law. Placing the power to go to war on a statutory basis would make judicial review clearly possible in a way it has not been for the use of prerogative powers. War powers legislation should oblige the government to comply with international law. We recognise that this requirement would reduce a British government's flexibility in action, and perhaps especially with regard to humanitarian intervention. The UK government should therefore continue to support the UN's attempts to create a legal framework for such interventions and so develop customary international law.

As to the question of justiciability some might argue that it is not appropriate for courts to intrude into areas of political decision-making. We believe that it would be entirely proper and possible for a court to decide whether a government was acting within statutory regulation of its power, or was in compliance with international law, without inhibiting the application of political judgement by ministers.

Dr Andrew Blick

Professor Paul Hunt

Professor Stuart Weir

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