TAMING THE DOGS OF WAR: WHY PARLIAMENT SHOULD AUTHORISE MAJOR DEPLOYMENTS

Parliament and the courts could spare Australia from ill-advised military action, argues **Sukrit Sabhlok**

> The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments.
>
> — *Lord Parmoor*[1]

The 2003 invasion of Iraq generated controversy because of the means by which the conflict was initiated. Instead of seeking permission from Parliament, the Howard government deployed military personnel to Iraq of its own volition. Though the government was not strictly speaking breaking the law, minor parties and some academic commentators began to question whether politicians should be able to make momentous foreign policy commitments without parliamentary approval.[2]

Constitutional lawyers have supported some form of parliamentary oversight over the decision to go to war. Some, such as Professor George Williams, have favoured a joint sitting of both houses of Parliament.[3] Others have advocated a simple majority vote taken in each house individually. The aim ultimately is to institute procedural checks and balances.

Certainly, there is no legal obstacle to Parliament seizing control of the Executive's war power if it chooses. In 2008, the Greens introduced legislation transferring the war power from the Executive to the Parliament, whose vote would be a prerequisite for specified overseas military deployments.[4]

Should the Executive be stripped of its power to initiate hostilities? The temptation for governments to wage war has been a perennial issue through the ages; greater parliamentary scrutiny would at least partly remedy this problem. The Upper House—where minor parties are more influential—could serve as a potent check on warmongering. Had a parliamentary authorisation requirement been in place in the lead up to the war in Iraq, Australian troops would not have been sent there because the Senate was opposed to it.

In an ideal world, Parliament would wield the war power because it is less secretive than the Executive and considers a diverse range of views. The rationale for war ought to be thoroughly debated and examined by the most representative institution of government. This

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makes it more likely that Australians will be spared the consequences of ill-informed decisions.

Regulating the war power

This essay will examine the arguments for and against regulating war power in the context of the Greens' bill. The Greens, whose anti-war views are in line with strong elements of liberal thinking,[5] have for years been trying to rein in the Executive by requiring the approval of both Houses of Parliament for the deployment of Australian defence forces overseas. Their 2008 bill continues in this tradition.

Though their proposal requires the Executive to gain Parliament's approval, it also permits the Governor-General (in effect, the Prime Minister) to disregard the requirement whenever he deems a 'state of emergency' to exist. A proclamation of an emergency necessitating action outside the approval process must be placed before Parliament within two days, otherwise it is of no effect and expires after seven days. The bill also expressly excludes specified Australian Defence Force (ADF) activities from falling within its scope.[6]

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But the Senate Foreign Affairs, Defence and Trade Legislation Committee was not impressed, concluding that the bill was unacceptably radical. Although the committee rejected the bill, it also noted its in-principle agreement:

> The committee is not in any way against the involvement of both Houses of Parliament in open and public debates about the deployment of Australian service personnel to warlike operations or potential hostilities. It agrees with the views of most submitters that the Australian people, through their elected representatives, have a right to be informed and heard on these important matters.[7]

This is typical of much debate in this area. Opponents grudgingly accept that the principle behind war powers reform is sound, but take issue with the details. In the long run, this gridlock can be solved through consultation with stakeholders. By arriving at a compromise, defence chiefs, government departments, and other interested parties should be able to devise a workable piece of legislation.

The senate committee also raised three main objections. First, it claimed that the bill did not define terms with sufficient precision. Second, the bill ignored problems associated with releasing classified information. And third, the bill could hamper the military's ability to quickly deploy combat personnel.

On the first point, the committee felt that the wording of the bill was not precise enough to take account of exigencies. It contended that the list of exempted activities was not comprehensive, and raised concerns that non-warlike activities could inadvertently be brought under the bill.

There is an easy way around this criticism: change the bill to make it reflect its true purpose of increasing parliamentary involvement in *major* conflicts, while leaving minor, routine and covert matters to Executive discretion. The bill should not regulate small-scale defence force functions, nor should it regulate any other government agency apart from the ADF. Activities such as official visits, attendance at conferences, rescuing or extracting Australian citizens from threatening situations overseas, combined exercises with the forces of other countries, and anti-piracy operations should not be brought under the bill's provisions.

The best means of ensuring that only desired ADF activities are covered by the bill is to set a trigger for a 'major conflict.' For example, parliamentary authorisation would be required only when at least 200 ADF personnel are to

be deployed abroad. Activities of a covert nature, or any deployment fewer than 200 (e.g. 199), would not be affected.

Let's apply this principle to two concrete cases. Would Parliament have had to authorise war against North Vietnam if proposed reforms were in place then? Our participation in the Vietnam conflict began as an advisory detachment and then later was supplemented with combat forces. In this situation, Parliament should have interfered in the initial advisory build-up *only if* it exceeded the 200 personnel threshold. As we now know, in Vietnam, a large number of combat troops were sent to the subsequent war, and these would definitely have had to be authorised.

To take another example, the Australian government deployed 1,400 ADF personnel as part of its nation-building efforts in the Solomon Islands in 2003.[8] Although not all were combat troops (some offered technical advice to the government), the deployment should have been authorised by Parliament because it numerically exceeded the preferred threshold for a 'major conflict.'

So much for definitional issues. The committee also said it was unrealistic to present classified military information to every Member of Parliament to enable an informed decision on whether to approve a war:

> Much of the information under consideration would be classified, for example risks to personnel, Defence or AFP assets, their strength and location, their force readiness, as well as the level of commitment and capabilities of likely allies, and the compatibility and complementarity of their forces. Clearly much of this information could not be disclosed and, if so, would have the potential to compromise the safety and security of any proposed operation or adversely affect diplomatic relations with potential allies.[9]

This criticism reflects a fundamental misunderstanding of what supporters of war powers reform are asking for. They are not advocating a *perfectly* informed decision. As the Greens' dissenting report notes:

> An argument made by opponents of the Bill is repeated in the Committee's report implying that a parliamentary debate necessarily involves the disclosure of classified military and strategic information. Proponents of this argument miss the point that it is not a military decision to go to war, it is a political decision. This Bill calls for the government of the day to make the case as to why peaceful diplomatic efforts are exhausted and force is the only option. This is a political debate, not a military one. Arguments, clear goals, a risk and cost benefit analysis are envisaged, not the disclosure of classified military information about the placement of military assets or personnel that would compromise the country's security.[10]

The decision to wage war does not require detailed operational information.

In other words, the decision to wage war does not require detailed operational information because it is fundamentally a strategic choice made at a high and abstract level of policy. In the case of Iraq, the Australian government informed the public that Saddam Hussein was a threat to national security at a theoretical level, and the public was asked to trust intelligence reports whose accuracy they had no way of verifying. This reform does not propose to do away with such secrecy.

The resolution to go to war would be made by Parliament using publicly available information because that is all that is needed in most cases. Parliament would be asked to vote on whether it trusts the Executive to honestly interpret the intelligence at its disposal,

just as the public is currently asked to do. In extreme circumstances, the Executive may want to release information to the Leader of the Opposition after receiving assurances of confidentiality. A secret session of Parliament could be held, with records being released in (say) one year. There are numerous ways to overcome the committee's concerns, but in general, Parliament would not need to peruse classified material.

Lastly, the committee was concerned that the proposed legislation would detract from operational efficiency and flexibility in military operations. The Solomon Islands intervention was cited as an example where prompt and decisive action was needed, and where a parliamentary approval process would have disadvantaged Australia's strategic position.

Again, this criticism is off the mark. First of all, why is speed considered to be an unambiguously good thing? Parliament's slow deliberation can be viewed not a liability, but as a strength because it leads to more considered decision-making. Second, emergencies requiring quick action are already covered by the bill. The bill not only allows for such emergencies, but generously places discretion with the Executive to decide *when* a state of emergency applies. Third, there is little cause for alarm since major wars are usually planned well in advance, leaving sufficient time for an approval process.

Parliament's slow deliberation leads to more considered decision-making.

Military threats do not materialise out of thin air; there is typically a build-up. Pressure for regime change in Iraq began in 1998 at the behest of President Bill Clinton when the American Congress passed the *Iraq Liberation Act*, and the war only started in 2003 under President George W. Bush. That left a good five years for the Australian government to consider its options. The Solomons intervention too required planning, and there was ample time for a parliamentary approval process.

There is no basis for the committee's fears, since the bill as written allows flexibility for the Executive to ignore the authorisation requirement provided it reports back to Parliament within two days. This provides enough leeway for quick action in those rare cases where planning is not possible.

Enforcing a War Powers Act

Suppose the Greens' proposed legislation becomes law in Australia. Then what? Should a failure by the Executive to gain authorisation for a major war be actionable in the courts? What if government ignores the legislation, or as is more likely, exploits grey areas?

The House of Lords Committee, in considering similar reform in the United Kingdom, has argued that the courts should not have the final say in such situations. According to the committee, the Executive should not be subject to public law remedies for waging a war not authorised by Parliament.[11] I am inclined to disagree. Although foreign affairs is an area that has traditionally been seen as too political for legal intervention, there is nothing inherently unjusticiable about this area. The real issue is whether the particular question before the court is justiciable; some things are, and others are not.

A comparative look at America provides instances where the courts have been willing to intervene. American war powers expert Louis Fisher observes that until the Vietnam War, the doctrine that foreign affairs is an unjusticiable question best left to politicians was not uncritically accepted by American courts.[12] Fisher writes:

> A close examination of judicial rulings reveals that the automatic association of war power with the political question category is overboard. Not only have courts decided war powers issues, they sometimes spoke against the authority of the President to venture in war making activities against the express will or the silence of Congress.[13]

David Jenkins' excellent article 'Judicial Review Under a British War Powers Act' is perhaps more relevant to the Australian context. In Jenkins' view:

> Judicial interpretation and enforcement of a war powers act would carry out the will of the elected Parliament and thus would be just as democratically legitimate as any other statutorily based judicial review. Indeed it would arguably be even more legitimate than the judicial review of prerogative actions, as it would be premised upon an act of Parliament.[14]

In rejecting judicial review, the House of Lords Committee failed to appreciate two important counter-arguments. First, judicial review acts as a deterrent by enabling affected individuals to obtain declaratory relief.[15] This is invaluable in upholding the rule of law. Second, the Greens' proposal—or an adaptation of it—would not involve the judiciary in detailed analysis of Executive action.

For those worried about courts second-guessing the Executive on whether a particular deployment was wise policy, it should be noted that the focus of any judicial review would be upon ensuring the *procedural* requirements established by the Act are carried out. Such limited oversight should be eminently within the domain of the courts. As Jenkins writes, 'a statutory reform of the war prerogative … would not necessarily lead to undue judicial involvement in matters of war.'[16]

Currently, the war power is wielded unilaterally by the Prime Minister and the cabinet. If the power were transferred to Parliament in strictly defined circumstances, then one can expect that scrutiny of the decision to go to war would become an interaction between the courts, Parliament and the Executive, with each branch playing a distinct role. The Executive would present its case for going to war, the Parliament would weigh up the merits, and the courts would declare whether the approval process had been followed. How is this radical?

Conclusions

Is there really a need for war powers reform? After all, can't Parliament simply cut funding for a war and control the Executive in that way? No, because Parliament rarely works up the political courage to cut funding once a war has begun. Requiring authorisation of the initial deployment, as argued for in this essay, is a good way to fill in the accountability gap. Parliamentary authorisation serves an important symbolic purpose too. It alerts the nation that an act of major importance is being undertaken. Parliament's involvement increases the odds of a majority of citizens having their views respected.

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Of course, democracy—as libertarian scholar Hans-Hermann Hoppe reminds us—is far from perfect.[17] Even wars that have been approved by Parliament may end up being unjust and evil. Transferring the power to make war from the Executive to the Parliament would not be a cure-all, but it would at least reduce the ability of a secretive group to thrust Australia into its most vital moment.

Endnotes

1 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 568.

2 Constitutionally, the position is as follows. Section 51(vi) authorises Parliament to pass laws for the national defence. However, the Executive has prerogative powers under sections 61 and 68 that enable it to decide when to go to war without parliamentary approval, unless Parliament chooses to regulate or extinguish the prerogative power. For a full discussion, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (fourth edition, 2006), 533.

3 George Williams, 'The Power to Go to War: Australia in Iraq,' *Public Law Review* 15 (2004), 8.

4 The *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No.2]*, which would have amended section 50C of the *Defence Act 1903* (Cth).

5 For more on liberalism's anti-war tradition, see Ludwig von Mises, *Liberalism: The Classical Tradition* (Indianapolis: Liberty Fund, 2005), 76.

6 Section 11 of the bill, above, provides the following exemptions:

For the purpose of this section, service beyond the territorial limits of Australia does not include service by members of the Defence Force:

(a) pursuant to their temporary attachment as provided by section 116B; or

(b) as part of an Australian diplomatic or consular mission; or

(c) on an Australian vessel or aircraft not engaged in hostilities or in operations during which hostilities are likely to occur; or

(d) for the purpose of their education or training; or

(e) for purposes related to the procurement of equipment or stores.

7 Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Report on the *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2]* (2010), 28.

8 Nautilus Institute Australia, 'ADF Elements in Solomon Islands.'

9 Foreign Affairs, Defence and Trade Legislation Committee, as above, 13.

10 Foreign Affairs, Defence and Trade Legislation Committee (Dissenting Report), as above, 31.

11 House of Lords Select Committee on the Constitution, 'Waging War: Parliament's Role and Responsibility.'

12 Louis Fisher and Nada Sabbah, *Is War a Political Question?* (2001), 45.

13 As above, ix.

14 David Jenkins, 'Judicial Review Under a British War Powers Act,' *Vanderbilt Journal of Transnational Law* 43 (2010), 621.

15 A declaration is a legal remedy that does not require the Executive to do anything, but simply lets it be known that the law has been breached. Typically, governments voluntarily comply with declarations.

16 David Jenkins, as above, 623.

17 Hans-Hermann Hoppe, *Democracy: The God That Failed* (2003).