

HOUSE OF LORDS

Select Committee on the Constitution

3rd Report of Session 2006–07

**Waging war:
Parliament's role
and responsibility
Follow-up**

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Waging war: Parliament's role and responsibility: Follow-up

Introduction

1. On 27 July 2006 we published a report on *Waging War: Parliament's Role and Responsibility* (HL Paper 236-I and II), which considered the different options for increasing Parliament's role in the deployment of armed force.
2. The report concluded that "the exercise of the Royal Prerogative by the Government to deploy armed force overseas is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy. Parliament's ability to challenge the executive must be protected and strengthened" (p 41). With this in mind, we further recommended that "there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict" (p 42).
3. More specifically, we recommended (p 43) that the convention should encompass the following characteristics:
 - (a) Government should seek Parliamentary approval (for example, in the House of Commons, by the laying of a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;
 - (b) In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;
 - (c) If, for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days of its commencement or as soon as it is feasible, at which point the process in (a) should be followed;
 - (d) The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly should seek a renewal of the approval.

The Government's Response

4. The Government's response to our report was published as a Command Paper (Cm 6923) on 7 November 2006 and is reproduced in Appendix 1. The document thus appeared more than three months after our report was published, in spite of assurances that it would be delivered by the time the House returned from the summer recess on 9 October. This is clearly against the spirit of the commitment given by the Leader of the House, in a letter to the Chairman of the Science and Technology Committee, that "the Government will aim, from now on, to respond to all ... House of Lords Select Committee reports within two months". We accept that the letter also noted that "where a report is complex or technical in its nature, the response

may on occasion require a little longer” but, whilst the issue of war-making powers is indeed a complex one, the brevity and paucity of the Government’s response renders such an excuse unconvincing.

5. The Government’s response was indeed inadequate. Given the seriousness of the subject matter and the scope of our findings, we were surprised that it consisted of a mere one-and-a-half pages of comment. This contrasts with the Government responses to our previous major reports, which numbered 16 pages, 10 pages and nine pages.¹ Whilst such a cursory response might be acceptable if it genuinely engaged with our arguments and recommendations, this document failed to address the majority of points made by the Committee and by 46 witnesses and organisations in 243 pages of evidence. Indeed, the response largely points back to comments and assertions already made by the Government (not least in evidence during the inquiry) and the Prime Minister, and fails to provide a comprehensive or stand-alone outline of the Government’s position in reply to our final carefully deliberated report.
6. The response states that “the Government is not presently persuaded of the case for ... establishing a new convention determining the role of Parliament in the deployment of the armed forces”, arguing that “it must be the Government which takes the decision” because “that is one of the key responsibilities for which it has been elected”. This underplays the fact that Parliament was also elected—indeed, the executive draws its strength and legitimacy from a democratic Parliament—and does not address our conclusion that “Parliament’s ability to challenge the executive must be protected and strengthened”. It is not sufficient simply to assert, as the Government do, that “adequate mechanisms for intense parliamentary scrutiny of executive actions are already in place”. Moreover, when we voiced our discontent about the response during an oral evidence session with the Lord Chancellor on 22 November 2006, he declined to throw any further light on the Government’s position and told us “I am not sure that there is much more that we can do”.²
7. Furthermore, the Government do not seem convinced of their own position, noting that “the matter needs to be kept under review” and adding that they are keeping their policies “under review”. Indeed, there is more than a suspicion that disagreement on this matter at the highest levels of government is responsible for what is essentially a “fudged” response to our report. As we noted at the time, the comments by the Prime Minister and the Lord Chancellor on this matter seem at odds with the Chancellor of the Exchequer’s comment in January 2006 that “a case now exists for a further restriction of executive power and a detailed consideration of the role of Parliament in the declaration of peace and war”.³ The Leader of the House of Commons took a similar position to that of the Chancellor, noting that “the parliamentary votes on military action against Iraq not only showed Parliament at its best, but also set a clear precedent for the future”.⁴

¹ Responses to the following reports respectively: Sixth Report of Session 2003–04, *The Regulatory State: Ensuring its Accountability* (HL 68); Fourteenth Report of Session 2003–04, *Parliament and the Legislative Process* (HL 173); and Second Report of Session 2002–03, *Devolution: Inter-Institutional Relations in the United Kingdom* (HL 28).

² The transcript can be found at <http://www.parliament.uk/hlconstitution>.

³ See http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2006/press_03_06.cfm.

⁴ Speech to the Hansard Society, 11 July 2006.

8. These sentiments appear to be shared across the political divide. The Leader of the Opposition, David Cameron MP, has said that “giving Parliament a greater role in the exercise of these [prerogative] powers would be an important and tangible way of making government more accountable”, asking “shouldn’t there be a formal process for Parliamentary approval?”⁵ Similarly, the Liberal Democrat leader Sir Menzies Campbell has argued for “a war powers act to require parliamentary approval for a declaration of war”.⁶
9. Irrespective of the response we received, we consider that a cross-party political consensus appears to be emerging that the current arrangements are unsustainable. Accordingly, we are optimistic that our recommendations will be revisited in the very near future. We hope that this vitally important constitutional issue will then be addressed in a more satisfactory manner and we look forward to playing our part in that debate.

⁵ See http://www.conservatives.com/tile.do?def=news.story.page&obj_id=127681.

⁶ See <http://www.mingcampbell.org.uk/2006/05/06/we-need-to-give-power-back-to-the-people/>.

APPENDIX 1: GOVERNMENT RESPONSE TO THE HOUSE OF LORDS CONSTITUTION COMMITTEE'S REPORT. FIFTEENTH REPORT OF SESSION 2005–06—"WAGING WAR: PARLIAMENT'S ROLE AND RESPONSIBILITY" (CM 6923)

1. The Government is grateful to the Committee for the work that it has undertaken in its inquiry on the use of the royal prerogative powers by Government to deploy the United Kingdom's armed forces abroad. It recognises the continued interest in this subject and acknowledges the importance of the recommendations that the Committee has proposed.

2. The Committee was appointed to "examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution". Within this remit it has examined various options in relation to the means by which Parliament's ability to challenge the executive would continue to be protected and strengthened.

3. The scope the Committee's inquiry was set out in its report of 28 July "*Waging War: Parliament's Role and Responsibility*". The Committee's report deals broadly with three options:

- Legislation to create statutory constraints on the prerogative powers
- A Joint Parliamentary Committee to oversee the armed forces
- A new convention determining the role Parliament should play in making decisions to deploy forces outside the UK

The Government's position

4. The Prime Minister made clear at the Liaison Committee on 7 February 2006 "The fact of the matter is that I cannot conceive of a situation in which a Government ... is going to go to war—except in circumstances where militarily for the security of the country it needs to act immediately—without a full parliamentary debate". The Government is not presently persuaded of the case for going beyond that to establishing a new convention determining the role of Parliament in the deployment of the armed forces. The existing legal and constitutional convention is that it must be the Government which takes the decision in accordance with its own assessment of the position. That is one of the key responsibilities for which it has been elected. But the matter needs to be kept under review.

Existing constraints on the exercise of prerogative powers

5. The ability of the executive to take decisions flexibly and quickly using prerogative powers remains an important cornerstone of our democracy. However, it is important to note that when exercising these powers, Ministers remain accountable to Parliament. Whilst, the Government could in theory deploy the armed forces overseas without the support of Parliament, it would be almost impossible to identify a set of circumstances, which would allow the Government to act without parliamentary support. Ministers are and will continue to be accountable to Parliament for all of their decisions. Adequate mechanisms for intense parliamentary scrutiny of executive actions are already in place, these include the vote of censure or no-confidence, adjournment debates, debates on a motion, parliamentary questions, ministerial correspondence and scrutiny by select committee.

6. For example, Parliament has been scrutinising the UK's deployment of armed forces in Afghanistan. The Secretary of State for Defence made two statements on the deployment in January 2006, there have been 168 Parliamentary Questions and there have been four debates. The House of Commons Defence Committee has also been conducting an inquiry into Afghanistan. In relation to the conflict in Iraq there have been 13 debates in both Houses and 30 Ministerial statements.

7. The Government does not maintain that the prerogative powers should not be subject to review and investigation. For instance in 2004 the Government accepted the Public Administration Select Committee's (PASC) conclusions that in many respects the prerogative is a historical anachronism and there may be individual circumstances when it is desirable to replace it with statute or conventions on parliamentary scrutiny. Examples of this include the Interpretation of the Communications Act 1985, The Security Service Act 1989 and the Intelligence Services Act 1994. But, as the Government explained during the evidence gathering session in March 2006, it believes on balance that the flexible approach offered by the present arrangements remains at the moment the right one.

8. The Government recognises that this subject will continue to be of wide public interest and acknowledges that the report of the Lords Constitution Committee "Waging War: Parliament's role and responsibility" is a significant contribution to the public debate. The Government will of course continue to listen to views about the deployment of the armed forces and keeps its policies under review.