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Is There a General Trend in Constitutional Democracies Toward Parliamentary Control Over War-and-Peace Decisions?

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to ensure that Congress exercised its power to ensure that the country as a whole supported involvement in major hostilities, rather than repeating what had happened in Vietnam.

But that is simply by way of personal background. Let me ask each of our speakers to turn to the issue of peace operations and the war powers in whatever fashion he or she sees fit. Let me stress that I have a very broad interpretation of the title of this particular set of presentations. If we limited ourselves to peace operations in the sense of Chapter VI of the UN Charter and traditional peacekeeping operations, our panel would be very limited indeed. Professor Damrosch's excellent survey of the literature and the issues in last October's *University of Miami Law Review*[1] points toward consideration not just of peacekeeping operations, but of the use of force generally, including covert action and the rest. So as far as I am concerned, both in these brief presentations and in the period of questions and comments from the floor afterwards, we will have an opportunity to range as widely in this entire area as anyone on the panel and anyone in the audience may wish.

Is There a General Trend in Constitutional Democracies Toward Parliamentary Control Over War-and-Peace Decisions?

*By Lori Fisler Damrosch**

My hypothesis is that there is a general trend toward subordinating war powers to constitutional control, and that this trend includes a subtrend toward greater parliamentary control over the decision to introduce troops into situations of actual or potential hostilities. UN peace operations present one variant of a recurring problem for constitutional democracies, as do collective security and collective enforcement operations under the auspices of the United Nations or a regional body such as the North Atlantic Treaty Organization (NATO).

All constitutional democracies have had to grapple with the fundamental problem of determining when national military power should be committed to situations of actual or potential conflict: the body of experiences of the established democracies reflects a common core of commitment to constitutional accountability. The techniques of accountability vary: some are embodied in written constitutions and other formal instruments while others are unwritten or informal; some entail greater and others lesser degrees of legislative supervision; some are before-the-fact and others after-the-fact; some do and some do not include control through constitutional courts or other judicial bodies. For all their differences, however, constitutional democracies share certain basic values and a common interest in transplanting those values to other polities.

I began formulating this hypothesis as a research problem during the Persian Gulf conflict of 1990–1991. In January 1991, the U.S. Congress conducted a historic debate that resulted in enactment of legislation authorizing the President to use military force against Iraq, in accordance with resolutions of the UN Security Council.[1] Less well known in this country are the corresponding deliberations in democratic parliaments in many other countries, producing parallel votes in support of the multinational military action on or about January 15, 1991 in London, Paris, Ottawa, Rome, Canberra and elsewhere. To what extent did these parliamentary actions merely reflect a rubber-stamp of decisions

[1] Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?* 50 U. Miami L. Rev. 181 (1995).

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[1] Authorization for Use of Military Force in Iraq Resolution, Pub. L. No. 102–1, 105 Stat. 3 (1991).

already put into operation by the national executive, or to what extent did they reflect at least the potential for legislative control over military decisions?

My preliminary step in this research has been to identify a group of countries whose experiences with constitutional control merit study in greater or lesser depth. I targeted a core group of about twenty countries, consisting of the *well-established* constitutional democracies, which have operated under constitutional rule for most or all of the post–World War II period. In brief, these include the familiar Anglo-American and Western European democracies, *excluding* those that do not have approximately a continuous half-century of *uninterrupted* constitutional governance. Outside the North Atlantic region, I also include Australia, New Zealand, India and Japan. (Israel, an important military power that is also a constitutional democracy, and Costa Rica, an essentially demilitarized state, will not figure in this paper because they are not contributing troops to multilateral peace operations.)

Outside this core group of twenty countries are a variety of countries whose experiences with continuous constitutional democracy are shorter than half a century but nonetheless significant for our purposes. In this next concentric ring belong what Samuel Huntington calls the "third wave" of democratization and redemocratization,[2] which began with Portugal, Spain and Greece in 1974–1975 and has now expanded to include most of Eastern Europe, much of Latin America and the Caribbean, and a few countries of Africa and Asia. Many of these "third wave" democracies are important contributors to peace operations: the subject of the interaction between their internal democratization and their external military activities within the United Nations or regional frameworks deserves greater attention.

This comparative study of constitutional aspects of participation in collective security arrangements shows that constitutional democratic states have attached a high value to preserving the principle of constitutional control over military action within any multilateral framework, whether the United Nations, NATO or otherwise. Taking as points of comparison the Gulf crisis of 1990–1991 and the UN Protection Force and NATO Implementation Force in former Yugoslavia, a trend in favor of parliamentary control over such decisions can be discerned.

Many of the participants in the multinational Gulf coalition led by the United States were and are constitutional democracies. A snapshot of actions in their respective capitals in January 1991 shows a striking pattern of parliamentary approvals of the decisions to commit military support to the collective effort, including the following notable events:

(1) On January 12, 1991, the U.S. Senate (by vote of 52 to 47) and the House of Representatives (by vote of 250 to 183) approved the Authorization for Use of Military Force in Iraq Resolution;
(2) At almost exactly the same time, the Dutch Parliament took action in support of Dutch involvement in the multinational coalition, having been recalled from recess for the purpose of debate and decision on Dutch participation in the military phase;
(3) On January 17, the French National Assembly voted in support of the government's commitment to the multinational military effort, as did the Italian Parliament;
(4) In the United Kingdom, Parliament took a critical procedural vote on January 15 (on a motion to adjourn proffered by the opposition), and approved a formal endorsement expressing "full support for British forces in the Gulf" on January 21 (which passed by a vote of 563 to 34);
(5) The Canadian Parliament acted on January 22;
(6) The Australian Parliament acted on January 23; and

[2] SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

(7) Greece, Turkey and Spain—countries in the next ring of concentric circles—all acted to secure important parliamentary approvals on or about January 17–18.

Two conceivable explanations of this pattern of parliamentary approvals are not persuasive. The first is that these were nothing more than political signals aimed at Saddam Hussein, in order to induce him to terminate his occupation of Kuwait short of a military confrontation. That, of course, was the hope embodied in Security Council Resolution 678 of November 29, 1990, which authorized the use of "all necessary means" if Iraq had not withdrawn from Kuwait by January 15, 1991. It was also the motivation of many of those who voted in the U.S. Congress on January 12, 1991, in the hope that if Saddam Hussein understood that the U.S. Congress and American people did indeed back President Bush in his determination to use force as a last resort, the Iraqis would comply with the Security Council's decisions and avoid the military confrontation. But although this interpretation provides a political explanation for the vote in the U.S. Congress, and perhaps for the Dutch vote and a handful of others that might have preceded the January 15 deadline, it does not account for the preponderance of the parliamentary deliberations and votes that took place after the die had been cast and the air war had already begun. Our search for the significance of this pattern of votes thus cannot stop with the political message being sent to Saddam Hussein.

A second less-than-persuasive explanation is that because the bulk of the votes emanate from countries operating under a parliamentary form of government, the national executives could simply summon up the necessary votes for a pro forma ratification of decisions that had already been made. Thus the signal-sending here would be to domestic political audiences, with little significance from the point of view of national constitutional law and thus even less significance for a comparative constitutional inquiry. The greater the complexities of the constitutional systems of the countries in this group, the less satisfactory is this explanation: it reflects a simplistic stereotype of parliamentary government rather than the actual workings of constitutionalism in sophisticated democratic systems. For example, since parliaments have not only ratified executive decisions but in some cases have attached significant conditions, the rubber-stamp explanation cannot be sufficient.

We may now turn the clock forward five years from the Gulf conflict to the issue preoccupying us today: parliamentary involvement in decisions to participate first in the UN Protection Force in former Yugoslavia (UNPROFOR) and more recently in the NATO Implementation Force in Bosnia (IFOR). The pattern is just as striking. Putting aside the exceedingly complicated situation in the United States, we find significant parliamentary actions elsewhere.

Within a few days before or after the formal signing in Paris of the Agreement negotiated in Dayton, that is between December 12 to 15, 1995, formal parliamentary action approving national participation in the NATO IFOR was taken in at least the following countries in my core group (and there may be others): Austria, Denmark, Finland, Italy, the Netherlands and Sweden. Some of those are NATO members but others (Austria, Finland and Sweden) are not, although they have been frequent contributors to UN peace operations. Finland, for example, had to change a law that previously allowed for Finnish participation in operations of the United Nations or the Organization for Security and Co-operation in Europe but not in NATO.

Looking back a bit further, these parliamentary actions in some cases constituted a new phase in decisions previously taken to commit troops to the predecessor UN operations in former Yugoslavia. This was true, for example, of Denmark, Norway and Sweden, among others, where prior parliamentary approvals had been obtained in 1992, 1993, 1994 or 1995 (up through late summer) for participation in UNPROFOR.

Some of these parliamentary actions in connection with IFOR entailed either explicit

or implicit conditions on the authorization to send troops to IFOR. In the Netherlands, for example, in view of concern on the part of members of Parliament concerning the duration of the deployment and the implications for Dutch forces if the United States, the United Kingdom or France were to pull out, the foreign minister gave assurances that all participants had signed up only for one year and also addressed the question of linkage to British participation (since the Dutch contingent would be in a joint unit in the British sector).

Special note should also be taken of the approval of the German federal parliament (Bundestag) for German participation in IFOR. A key vote was taken on December 6, 1995 for the dispatch of four thousand German troops in support of IFOR. On February 6, 1996 the Bundestag approved expansion of German participation.

The vote of the Bundestag fulfilled a constitutional requirement that had been elaborated by the German Federal Constitutional Court in its noteworthy decision of July 1994 articulating the conditions under which German troops could participate in peace operations.[3] The 1994 judicial decision arose out of the divisions within the German polity on the extent to which it would be constitutionally permissible for Germany to participate in the multinational peacekeeping (or peace enforcement) operations in former Yugoslavia and Somalia, in view of constitutional restrictions on the use of German armed forces embodied in Germany's post–World War II constitution. The substance of the decision allows Germany to assume a significant place in certain collective efforts, subject to the requirement that the Bundestag affirmatively authorizes German involvement—in principle in advance. This requirement of parliamentary approval is a specific application in the military sphere of the "democracy principle" of German constitutional law, which the Court had already elaborated in previous decisions as requiring parliamentary endorsement of certain international commitments. The German Court's decision, followed by the recent parliamentary approvals, provide further support for the hypothesis of a worldwide trend toward subordinating executive war power to constitutional control through legislative authorization.

Implications for the United States

What are the implications of these patterns of parliamentary approval outside the United States for the allocation of authority over peace operations (as between the U.S. President and Congress)? Does it matter that European parliaments have gone through a formal process of deliberation and vote for contingents as small as a few hundred troops, when the issue for the United States is the authority of the U.S. commander in chief to take decisions affecting one-half-million troops in the case of the Persian Gulf, or twenty- to thirty-thousand troops in the case of IFOR?

Perhaps one could conclude that these developments outside the United States have little or no significance for the corresponding question within the United States. Perhaps some would agree with Justice Scalia (in the juvenile death penalty cases[4]) that the only relevance of practice outside the United States concerns its potential significance in interpreting a practice that is already settled and uniform within the United States, in order to determine whether such regularity was merely a coincidence or was required by constitutional principles implicit in any system of ordered liberty. Justice Scalia's view was that even if the rest of the world followed a particular pattern, but if practice within the United States was different, then even the uniform view of the rest of the world ought not to cause even a state of the United States, let alone the President of the United States, to alter its position on a point of constitutional law.

Practice outside the United States is not consistent yet, but certain trends can be dis-

[3] Judgment of July 12, 1994, 90 BVERFGE 286 (Ger.).

[4] Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988).

cerned. Nor has the time yet come for perceiving the growth of an international custom requiring any particular form of internal constitutional control over war power. But in that connection, at least as a matter of "soft law"—for example in the Copenhagen Document of the Conference on Security and Co-operation in Europe[5]—the principle of civilian control over the military was already articulated as a commitment of the participating states more than five years ago; compliance with that principle will be a precondition for the expansion of NATO, as well as other processes to integrate the former East European and Soviet bloc into the West. Perhaps a few years from now the notion of obligations on the international plane for states to confirm their military commitments through parliamentary approval will seem no more of a stretch than the "emerging right to democratic governance," which has become increasingly accepted since that phrase was coined just a few years ago.[6]

We need to pay attention to these trends for a variety of reasons, including:

- The advantages for the legitimacy and credibility of national commitments to peace operations on both the international and the domestic planes, when national parliaments have approved the decision to participate;
- The advantages for the strengthening of a culture of civilian and constitutional control over military forces in democratizing polities—for if the well-established democracies are dismissive about the values of constitutional checks over executive commanders, then our preaching to the polities in transition may seem somewhat hypocritical;
- The disadvantage, to be sure, that seeking parliamentary endorsement not only takes time but also runs the risk of disapproval or the attachment of conditions—but this disadvantage may be outweighed over the long term by the benefits to legitimacy and credibility previously mentioned; and
- Finally, an appreciation that the principle of shared decision making can be fulfilled through a variety of forms, with standing legislation, advance delegations, and regularized consultation through specialized committees being among the variations available to constitutional democracies.

Remarks by Richard Debobes*

I find myself in the unenviable position of having to comment on a resolution to which Ambassador Woolsey contributed, and of trying to clarify the parliamentary situation in the United States with respect to war powers. As Professor Damrosch has indicated, this situation is not quite as clear as it may be in other countries. I think there is a consensus within the U.S. Congress that the War Powers Resolution has not accomplished its purpose—which was to ensure that the collective judgment of both the Congress and the President would apply to decisions about the use of force. Unfortunately, with the notable exception of situations that everyone would agree amounted to "war"—intense conflicts that involve large losses of life—the Resolution has generally been ignored, and has become largely irrelevant on Capitol Hill. Additionally, the U.S. judiciary has essentially bowed out of war powers issues, and federal judges are generally loathe to get involved in what they essentially consider a political issue.

Let us turn to our recent experience with war powers issues. As Professor Damrosch mentioned, Desert Storm—which I suppose could be called a peace operation, or more precisely a peace enforcement operation under Chapter VII of the UN Charter—was the

[5] *Reprinted in* 29 ILM 1305 (1990).

[6] *See*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 81 (1992).

*Senate Armed Services Committee.