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When Parliaments Go to War
US War Powers in Comparative Perspective

Eric Langland

This essay compares the constitutional processes in Germany, the United Kingdom, and the United States for deploying the armed forces. It highlights two important advantages for US lawmakers to consider from the experiences in the United Kingdom and Germany. First, the recent British vote to use military force against ISIS in Syria illustrated the importance of a public debate – even if such a debate and parliamentary vote are not required by law under the British constitution. Second, the German vote demonstrates how the legislature can shape a military mission and leave the government on a strong legal footing for deploying the military. The United States would benefit if its legislators heeded both examples.

The terrorist attacks in Paris on November 13, 2015 added new urgency to the discussion about defeating the Islamic State (ISIS). French President Francois Hollande described the attacks as an "act of war" and sought assistance from its allies against ISIS in Syria through bilateral meetings and by invoking article 42.7 of the Lisbon Treaty – the mutual assistance clause.[1] Heads of state were quick to pledge support, and the discussion soon turned to whether those pledges would be backed by their legislatures. Specifically, would British Prime Minister David Cameron, after being rebuked by parliament in 2013 for air strikes against the regime of Bashar al-Assad, ask parliament for the authority to strike ISIS in Syria? Would German Chancellor Angela Merkel, aware of her country's discomfort with foreign military engagements, request permission from the Bundestag to provide military support to the growing coalition against ISIS? And last, would US President Barack Obama, for a second time, ask Congress for a resolution authorizing force specifically against ISIS?

In each case, France's allies came to its aid, albeit in different ways. In Germany and the United Kingdom, the Bundestag and House of Commons quickly passed legislation authorizing a military operation against ISIS in Syria. In the United States, however, where the military was already striking ISIS in Syria, a different story unfolded. In a December speech to the nation, President Obama urged Congress to pass new legislation authorizing the use of force against ISIS. Congress balked, and its leaders signaled that no such legislation would be brought to a vote with President Obama in the White House.[2] As a result, the president continues to rely on a broad interpretation of his constitutional authority as commander-in-chief and a strained interpretation of past legislation authorizing force in the previous wars in Afghanistan and Iraq for the current military campaign in Syria.

This state of affairs is bad for two reasons. First, the president is operating under questionable legal authority. The wars in Iraq and Afghanistan are too distinct from the one against ISIS for the current military campaign to fall under those previous authorizations of military force, and the campaign is estimated to be too long and extensive to fall under what prior presidents have claimed as the commander-in-chief's constitutional powers. This not only casts doubt on the legality of the current operations but

also creates an unhealthy precedent for future presidents to interpret their war powers expansively. Second, a legislative mandate serves as a clear demonstration of public support. The American people are likely to support military action against terrorism but will not be eager to back another nation-building exercise. Properly debating the war against ISIS in Congress would allow for the proper restraints to be placed on the operation in terms of scope and time frame. In short, legislation authorizing the use of force against ISIS, like those passed in the UK and Germany, would demonstrate popular support and provide Congress with a critical opportunity to shape military policy.

To be sure, there are important differences in the systems of government – parliamentarian versus presidential. Prime ministers are elected by the legislatures and enjoy a legislative majority that presidents are not guaranteed. Nonetheless, all three democracies seek a strong legal underpinning and popular support when it comes to the use of military force.

This essay outlines the constitutional processes in each country for deploying the armed forces and highlights two important advantages from the experiences of 2015 in the United Kingdom and Germany for US lawmakers to consider. First, the British vote to use military force illustrated the importance of a public debate, even if such a debate and vote are not required by law under the British constitution. Second, the German vote demonstrates how the legislature can shape the military mission and leave the government on a strong legal footing for deploying the military. US democracy would benefit if its lawmakers heeded both examples.

The United Kingdom

Perhaps the most closely watched response to President Hollande's call for support was that of Prime Minister David Cameron. In 2013 he had urged parliament to authorize air strikes against Bashar al-Assad's regime in Syria in response to Assad's use of chemical weapons. Stunningly, he was rejected.[3] For the first time since 1782 a prime minister had lost a vote to deploy the military.[4] But the vote was notable for another reason: nowhere in Britain's unwritten constitutional tradition is the prime minister in fact required to seek parliament's approval before authorizing military deployment.[5] According to the Royal Prerogative, the prime minister has the sole authority to deploy British forces abroad.[6] Historically, prime ministers have taken an unpredictable approach to bringing such votes before parliament, weighing the political risks and rewards.[7] Yet in the context of his 2013 defeat over chemical weapons, the decision to bring the December 2015 vote to parliament was seen by some as ushering a new political covenant into British politics.[8] On December 2, the House of Commons voted 397 to 223 to authorize military action against ISIS in Syria.[9] Within hours, Royal Air Force Tornado jets stationed in Cyprus struck targets in eastern Syria under ISIS control.

The British constitutional process

The UK is unique among its allies in that there is no law requiring the legislature to play a role in the war-making process – whether it be authorizing force beforehand or approving force afterward. But prime ministers often do seek parliamentary approval, as Tony Blair did with Iraq in 2003 and David Cameron did with Libya in 2011.[10] In other cases, such as the campaigns in Afghanistan in 2001, Kosovo in 1999, the Gulf War in 1991, and the Falklands War in 1982, the prime minister did not seek approval from parliament.[11]

Despite Blair's and Cameron's recent overtures to parliament, prime ministers have been reluctant to endorse a formal mechanism to require prior parliamentary approval. Several legislative proposals from the House of Lords and House of Commons have been considered to require prior parliamentary approval, but none have earned the support of the government.[12] In British politics, consent of the Queen, who is advised by the government on such matters, is required to grant approval before a bill that challenges the Royal Prerogative can be debated and voted.[13] Nonetheless, the British constitution is largely based on custom, and the 2015 vote to strike ISIS in Syria can be interpreted as another step toward creating a precedent of prior parliamentary approval.

Custom aside, Cameron's decision was based on political, not legal, considerations. Parliament was provided with two weeks' notice, and on the day of the vote it debated for ten hours. After initial claims that Labour would vote as a party, leader Jeffrey Corbyn permitted Labour MPs to vote freely. Divisions arose between the minority leader and his party's foreign policy spokesman, Hilary Benn, who gave an impassioned speech calling on his fellow members to stand once again against fascism. MPs opposed to the strikes questioned the effectiveness of an air campaign and expressed concern about civilian casualties. Divisions also arose within the Tory government, but ultimately the measure passed with a strong majority.[14]

This parliamentary debate exposed divisions within the UK on a foreign policy issue – an event governments strive to avoid in order to maintain the appearance of unity, decisiveness, and effectiveness on the world stage.

It had the advantage, however, of forcing lawmakers and their constituents to consider difficult questions about how to fight terrorism, contemplate the possibility of civilian casualties, and provide support to allies, in addition to furthering a broader discussion about the UK's role in the world. Not all of these questions were answered, but British forces can now operate in Syria knowing they do so with popular support.

Germany

Germany's response to the Paris attacks provided yet another sign of its growing importance as a European and world leader. Chancellor Merkel pledged military support to President Hollande, and three weeks later the Bundestag voted to approve a military package, including Tornado reconnaissance aircraft, refueling aircraft, and a naval frigate with 1,200 non-combat troops to assist the French aircraft carrier.[15] The Merkel government also agreed to send 650 peacekeepers to Mali in order to relieve some pressure on the 1,500-strong French presence there, and to increase the number of German military personnel training Kurdish forces.[16]

Unlike the British system, German law *requires* the Bundestag to approve military operations before the chancellor can deploy forces.[17] Political support for a military deployment is therefore measured from the initial stages, and the mission is tailored to reflect the level of support. In fact, no German chancellor has ever lost a vote in parliament to authorize military action.[18] Foreign Minister Frank Walter-Steinmeier captured this approach in remarks after the Paris attacks: "We are doing what is militarily necessary, what we can do best, *and what we can back politically*."[19] In a nation that seeks absolute moral clarity on issues of foreign military engagements, it is difficult to overstate the importance of political and legal certainty before sending its troops abroad.

The German constitutional process

Germany is an outlier among large NATO countries in its constitutional procedure for authorizing military deployments. Its distinguishing feature is *parliamentary priority*, a concept which precludes the chancellor from unilaterally deploying the military without prior approval from the Bundestag.[20] Under the system, the chancellor submits a specific proposal to the Bundestag outlining the number of troops, duration, and scope of deployment.[21] If the proposal passes with a majority vote, the Bundeswehr can deploy under those conditions.

Because Germany's constitution is silent on the matter of war powers, the concept of parliamentary priority owes its current existence to the Federal Constitutional Court.[22] Unlike courts in the US and UK, which avoid disputes between the executive and legislature over war powers, Germany's highest court has issued a number of determinative rulings that form the current rules for deploying the military. Foremost among them was the court's first decision pertaining to the Airborne Warning and Control System (The AWACS I Case, July 12, 1994), in which the court first examined whether membership in treaty organizations like the United Nations or NATO could provide a legal basis for the government to deploy forces outside the context of self-defense. In AWACS I, the parliamentary opposition challenged the government's non-defensive operations in Kosovo, Somalia, and Bosnia. The court held that Article 24(2) of the German constitution, which permitted membership in collective defense organizations, provided legal grounds to deploy the military in order to uphold its international obligations. However, the court further held that the principle of parliamentary priority still existed and that the Bundestag must give its approval before the military is deployed.[23]

The Constitutional Court retreated slightly from its ruling in the years following AWACS I and deferred to the chancellor's authority to deploy the Bundeswehr for operations it deemed "routine."[24] In 2008 the court reined in the government's latitude to determine which deployments were routine and reaffirmed the principle of parliamentary priority with the AWACS II Case. In AWACS II, the opposition challenged the decision of Chancellor Gerhard Schröder's government to deploy the Bundeswehr in an AWACS operation monitoring Turkish airspace after the invasion of Iraq. The government argued that the deployment was routine and for defensive purposes and therefore did not require a vote. The court sided with the opposition and held that, while the government has the ability to participate in the strategic direction of NATO, and even in decision making concerning specific deployments, the decision of when to deploy the Bundeswehr is only permissible with parliament's approval.[25]

The Parliamentary Participation Act (PPA) of 2005 codified the ruling in AWACS I, and the court's decision in AWACS II closed a large loophole. The PPA provides a guideline for the government to draft proposals and outlines the rare exceptions where the chancellor can deploy forces without parliament's approval.[26] The result is a system that may appear cumbersome from the outside, but a recent commission convened to review and recommend changes to the PPA found otherwise.[27] Chaired by former Defense Minister Volker Rühe, the commission found that parliament was able to take decisions expeditiously, usually within two weeks of the government's proposal,

and to pass authorizations with broad support that went beyond the majority groups forming the government. And that is precisely what happened with the December 2015 vote to provide military assistance to the coalition fighting ISIS in Syria. Only eight days after Chancellor Merkel submitted the proposal to the Bundestag, it voted 445 to 146 in favor of assisting the coalition in Syria.[28]

The United States

Three weeks after the attacks in Paris, President Obama urged Congress to pass legislation authorizing the use of force against ISIS. This would, he claimed, "demonstrate that the American people are united, and committed to this fight."[29] Obama's statement reflected a commonly held belief among American presidents: that the power to commit military forces abroad resides with the president and that any act of Congress is simply a symbolic demonstration of popular support. The idea of asking for support but not for approval is becoming a trend in the politics of American war powers.[30] In 2013, Obama sought an Authorization for the Use of Force (AUMF) from Congress to strike Bashar al-Assad's regime after its use of chemical weapons. Like Cameron in Britain, he was rebuffed. The Republican majority in the House of Representatives opposed the legislation, and the AUMF was never brought to the floor for a vote in either chamber. The president ultimately backed away from striking Assad regime targets. In early 2015, however, he sought another AUMF specifically for ISIS. Again he was rejected by the Republican-dominated Congress. Despite these setbacks, the president continued to authorize force against ISIS in Syria, Iraq, and Libya drawing on his inherent constitutional powers as well as the two previous AUMFs for the wars in Afghanistan and Iraq.[31] Two days after the attack in Paris, American jets continued airstrikes against ISIS in Syria, destroying large components of the ISIS oil network.

The American constitutional process

Article I of the US Constitution gives Congress the authority to declare war and raise and support the armed forces.[32] Article II provides that the president serves as commander-in-chief.[33] In the post-WWII era, declarations of war became outmoded, and presidents relied on their constitutional powers or congressional mandates to deploy the military.[34] Then, in 1973, frustrated with the war in Vietnam, Congress passed the War Powers Resolution (WPR) over President Richard Nixon's veto.[35] The WPR requires the president to deploy the military pursuant only to a declaration of war, specific statutory authorization, or a national emergency.[36] An exception exists, however: the president can deploy troops without congressional approval for sixty to ninety days, after which the president must seek congressional approval to continue the military operation.[37]

In practice, the WPR has largely driven the legislative and executive branches of government further apart on the matter of war powers. Most presidents have rejected it as an unconstitutional infringement on the executive's Article II powers.[38] President Obama holds the view that in cases other than where Congress has specifically opposed military action, or where the nature, scope, and duration of operations would constitute a war, the executive has the authority under Article II to protect important national interests, including preserving regional stability, and supporting the UN Security Council's credibility and effectiveness.[39] Military actions like airstrikes in Libya or Syria do not meet these criteria. The Supreme Court has avoided the debate by citing different judicial doctrines, most notably the "political question" doctrine, a practice of deferring certain questions that the court sees as more fundamentally political than legal.[40]

Since the WPR became law, presidents have often avoided confrontation with Congress by keeping military deployments under the sixty-day mark.[41] On other occasions, such as in Serbia and Kosovo, presidents have deployed the military without congressional approval on long-term, large-scale military operations under either UN or NATO banners.[42] In the latter cases, Congress was ineffective in challenging the executive's authority because it was unable to assemble a majority of legislators to pass a bill opposing the military action.[43]

The terrorist attacks against the United States on September 11, 2001 produced perhaps the greatest degree of consensus between the executive and legislative branches in the WPR era. Within three days of the attack, a draft AUMF passed Congress, and on September 18, the president signed it into law.[44] The measure was unique in that, unlike previous AUMFs that limited military action to specific states or regions, it provided blanket authorization for the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[45] One year later, President George W. Bush sent another draft AUMF to Congress authorizing military force against Saddam Hussein's regime in Iraq. Congress passed an AUMF for Iraq that authorized the president to "defend the national security of the United States against the continuing threat posed by Iraq; and enforce all relevant United Nations Security Council resolutions regarding Iraq."[46]

More than a decade later, in pursuing the war against ISIS, President Obama first relied on his inherent powers as commander-in-chief under Article II of the constitution to conduct military operations. However, in September 2014 the president began claiming legal authority to strike ISIS targets in Syria under the 2001 and 2002 AUMFs for Afghanistan and Iraq. He cited ideological and organizational ties between Al Qaeda and ISIS to draw a connection to the AUMF for Afghanistan. And he interpreted the AUMF for Iraq broadly as permitting the commander-in-chief to defend threats to Iraq, meaning those coming from extraterritorial actors, in addition to threats coming from within.[47]

Both interpretations have attracted considerable criticism. Direct links between Al Qaeda and ISIS are difficult to establish, as Al Qaeda has publicly disavowed ISIS.[48] Reliance on the 2002 AUMF for Iraq is another logical stretch, as US troops were officially withdrawn from the country in 2011, full sovereignty was obstensibly re-established, and the country democratically elected a government.[49] Under the president's reading of both AUMFs, it is difficult to conceive of any Islamic militant group – or any group posing a threat to Iraq – that would not fall under those legislative authorizations.

From a constitutional standpoint, the president's expansive interpretation of his constitutional powers and of the scope of the Iraq and Afghanistan AUMFs will set precedents for future executives to follow. With continued deference from the Supreme Court and passivity from Congress, these precedents will serve to greatly enhance the president's war powers. Legal questions concerning the executive's authority will persist. Politically, a democratic deficit has emerged. By failing to debate the war against ISIS, important questions about commitment, time, cost, and scope are left unanswered. In comparison to its allies, the US democratic process for going to war possesses neither the political backing of the British system nor the legal backing of the German one.

Conclusion

A crisis can call attention to a government's strengths or expose its weaknesses. The November 2015 terrorist attacks in Paris underlined the relatively smooth political processes by which the United Kingdom and Germany deploy their military forces. The constitutional process by which the US deploys its forces, however, is broken. The combination of congressional inaction and dilittante executive interpretations of existing authorities have left the US military operating in Syria with neither a clear political mandate nor a legal one.

The US Congress should take a cue from Great Britain and bring to a vote an Authorization for the Use of Force in Syria. Only this will impart appropriate legitimacy to military action there against ISIS. Multiple drafts from members of Congress and the president already exist. Furthermore, the president should look to Germany as an example for how to incorporate the legislature early in the decision-making process and to achieve a resolution that stands up to legal scrutiny. The fight against ISIS will produce a high number of casualties. Democracy and rule of law in the US should not be among them.

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Notes

1 According to the Lisbon Treaty's mutual assistance clause, if a member of the EU is the victim of "armed aggression on its territory" other member states have an "obligation" to provide "aid and assistance by all the means in their power."
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21 Act Governing Parliamentary Participation in Decisions on the Deployment of Armed Forces Abroad (Parliamentary Participation Act), Section 3, Paragraph 2.
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