Written evidence from the Society of Conservative Lawyers (UMF 17)

Public Administration and Constitutional Affairs Committee
The Role of Parliament in the UK Constitution: Authorising the Use of Military Force inquiry

1. Introduction

1.1. The information and arguments contained in this submission are taken from the Society of Conservative Lawyers paper, dated November 2018: "An Executive decision: prior Parliamentary approval is not and should not be required for the Government to deploy the Armed Forces in a conflict situation". The paper was authored by Sir Oliver Heald QC MP, Victoria Prentis MP, Sir Henry Bellingham MP, Bob Neill MP, Sir Christopher Chope MP, Robert Courts MP, and Oliver Jackson. The full paper is available on the Society's website: http://www.conservativelawyers.com.

1.2. The Society of Conservative Lawyers is an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in this submission are not necessarily held by all members of the Society or by the Conservative Party.

2. Executive Summary

2.1. The power to deploy the UK's Armed Forces in situations of armed conflict lies with the Royal Prerogative. There is no constitutional convention that prior Parliamentary approval is required before such a conflict deployment, neither should there be. Conventions cannot be spoken into being. To exist, a convention requires a political practice to become so entrenched over a sustained period of time that to deviate from that practice would be constitutionally unacceptable. This has not happened.

2.2. The absence of such a convention is both sensible and desirable. Parliament exists to hold the Government to account, not to make the decisions of the Executive. If Parliament were to approve military action that subsequently proved controversial then Ministers could avoid accountability by shifting blame onto MPs. Parliament is also unable to see the classified intelligence briefings and legal advice upon which Government bases military decisions.

2.3. A convention would limit the UK Armed Forces' operational effectiveness in situations where the priority is to strike without warning. Success in military operations relies on secrecy, security and surprise. Undermining these elements could cost members of the Armed Forces their lives. Advocates for a convention recognise this concern but propose an 'emergency caveat' whereby if a national interest is

threatened or a humanitarian disaster looming prior Parliamentary approval need not be sought. Yet this weakens their own argument in favour of a convention; it is hard to imagine a situation where military force would be deployed not in response to a threat to a national interest or to prevent a humanitarian disaster.

2.4. Requiring a Parliamentary vote also raises the spectre of the Government being defeated and politically unable to fulfil the UK's international treaty obligations, such as those under NATO's Article V. Commentators that would go even further and propose to set Parliament's role on a statutory footing face the additional problem that legislation is justiciable. Casualties of war could chase the Executive and the Armed Forces through the courts, seeking judicial review of decisions of high policy.

2.5. The power to deploy military force in a conflict situation should remain with the prerogative. Where there is a slow build-up to a conflict, the Government will and should keep Parliament informed and be responsive to the views expressed by all parties. However, as happened when Prime Minister May ordered air strikes in Syria in April 2018, the conflict deployment itself should be made by the Prime Minister in Cabinet, advised by her National Security Council and briefed by her Intelligence and Military Services.

2.6. She should subsequently report to Parliament as soon as possible and keep the House informed of any further developments. This model maintains the Armed Forces' operational effectiveness while allowing MPs to fulfil their constitutional role of scrutinising Government decisions and holding the Executive to account.

3. To what extent is the deployment military force a necessary responsibility and function of Government?

3.1. The Society's paper assumed that the deployment of military force was a necessary responsibility and function of Government. The question was not addressed further.

4. What are the conventions governing the deployment of military force?

4.1. There is no universally accepted definition of a constitutional convention. It is generally understood to be a practice which is politically, but not legally, binding on all involved (House of Lords Constitution Committee, Pre-emption of Parliament, HL165, Session 2012-13). Joshua Rozenberg QC defines a convention as "an unenforceable rule that is respected because people choose to do so." (Joshua Rozenberg QC, https://www.lawgazette.co.uk/analysis/comment-and-opinion/lost-prerogative/5043798.fullarticle, The Law Society Gazette, 6 October 2014.) Such conventions can be said to form the bedrock of the UK's constitution: it is a convention that the Prime Minister is a Member of Parliament, that the House of Lords will not oppose legislation that formed part of the elected Government's

manifesto, and that the Monarch will sign Bills passed by both Houses. Conventions are non-justiciable. As explained by the UK Supreme Court in Miller v Secretary of State for Exiting the EU [2017] UKSC 5 at para 146:

4.2. "Judges therefore are neither the parents nor the guardians of conventions; they are merely observers. As such, they can recognise the operation of a convention in the context of deciding a legal question (as in the Page 48 Crossman diaries case - Attorney General v Jonathan Cape Ltd [1976] 1 QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has stated, "the validity of conventions cannot be the subject of proceedings in a court of law" - (1975) 91 LQR 218, 228."

4.3. Given that conventions are typically not grounded in statute and have no legal authority, the question then is how do they come to exist? Dr James Strong of the London School of Economics has argued that: "As a conventional power [a convention] is nowhere enshrined in law; it exists for as long as politicians think it exists." (Dr James Strong, The accidental prerogative: why Parliament now decides on war, Political Studies Association Blog) Dr David Jenkins of the University of Copenhagen School of Law explains further: "Conventions most usually derive their constitutional force through consistent and obligatory political observance over a period of time." (Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions, HC 923, Session 2010-12, Written Evidence submitted by Dr David Jenkins) Thus conventions cannot be spoken into being or summoned up as a tool for politicians to wield in the everyday turbulence of politics. A convention arises when a practice becomes so entrenched that to deviate from that practice would be constitutionally unacceptable.

4.4. With this in mind, the present position (as will be explained in greater detail in the answer to question 5) can be summarized as follows. Prior to the 21st century there was no convention that the Government required prior Parliamentary approval before committing military forces to action. Blair's administration was the first to seek Parliamentary approval for the 2003 invasion of Iraq, but this was a historical aberration precipitated by the febrile political atmosphere of the time and swiftly reversed by subsequent conflict decisions concerning troop pushes in Afghanistan. Cameron's administration prematurely asserted the existence of a convention while undermining that assertion through its engagements in Libya. While the continued reliance on the emergency caveat pays lip-service to the existence of the convention in theory, Prime Minister May's air strikes in Syria challenge the existence of the convention in practice.

4.5. To argue in favour of a constitutionally binding convention would be to misread the political contexts within which conflict deployments are made. In reality, the Government of the day decides on a case-by-case basis whether the political

exigencies of the time require their position be shored up by an appeal to a wider polity: Parliament.

5. How has the use of the royal prerogative to authorise military force changed over time?

5.1. For the duration of the nineteenth and twentieth centuries it was uncontroversial that the power to decide conflict developments rested with the Royal Prerogative. The UK formally declared war on Russia on 31 March 1854, commencing the Crimean War, through a 'Queen's Message'. This was read on the floor of the House of Commons by the Speaker and formally supported by Prime Minister Lord John Russell (HC Deb 31 March 1854, c198). The UK entered the First World War at 11pm on 4 August 1914 through the King, who held a Council to sign the declaration of war (Manchester Guardian, England declares war on Germany, 5 August 1914). The UK's entry into the Second World War on 3 September 1939 was reported to the House in a Prime Minister's Announcement (HC Deb 3 September 1939, c291). No formal Parliamentary vote was held either before or after any of these conflict deployments.

5.2. Throughout the latter half of the twentieth century it became increasingly common for Parliament to debate military action after the commitment of forces. On 28 June 1950, Prime Minister Clement Attlee issued a statement announcing the decision to make British forces available to the United States in support of South Korea. A debate was held on 5 July 1950, where a motion in support of "the action taken by His Majesty's Government" was agreed without division (HC Deb 5 July 1950, c485). At the outset of the Suez Crisis, Prime Minister Antony Eden announced to the House on 2 August 1956 that "Her Majesty's Government have thought it necessary…to take certain precautionary measures of a military nature. Their object is to strengthen our position in the Eastern Mediterranean and our ability to deal with any situation that may arise". (HC Deb 2 August 1956, c1606). A subsequent vote on 13 September 1956 on a motion endorsing the Government's approach to resolve the crisis was passed, though it made no mention of deploying British forces to the region (Division No. 279, 13 September 1956).

5.3. The dispatch of a naval task force to the Falklands in April 1982 was announced to the House by Prime Minister Margaret Thatcher on a motion to adjourn (HC Deb 3 April 1982, c633). No vote followed the debate. The commencement of hostilities in the 1991 Gulf War was announced by a statement by Prime Minister John Major and also subsequently debated on a motion to adjourn (HC Deb 17 January 1991, c979). UK military activities in Kosovo were announced the next day on a motion to adjourn. There was no debate on a substantive motion that would have allowed Parliament to record its view on the Government's policy over Kosovo (HC Deb 25 March, 1999, c619).

5.4. Thus, any potential argument that prior Parliamentary approval used to be required to commit UK forces overseas is incorrect. Rather, Parliament recognised the Executive's power to make such foreign policy decisions and instead performed its traditional role of scrutinising that policy and holding the Government to account throughout and after the duration of the conflict. This brief history reveals the development of a gradual trend that the decision to deploy military forces was made and announced by Government on the floor of the House and then debated by MPs through a motion to adjourn.

6. Is the royal prerogative still the appropriate mechanism for deploying military force?

6.1. Yes, it is. The following section argues that a convention should not exist and that the procedure adopted by Prime Minister May in her intervention in Syria, under the Royal Prerogative, is to be preferred. It presents three arguments as to why a convention should not exist.

6.2. First, a convention would undermine the democratic accountability of Parliament. Secondly, there are abiding problems with finding workable definitions for terms such as 'emergency' or 'conflict'. Thirdly, it would hinder the operational effectiveness and flexibility of the UK's military forces as well as endanger the UK's commitment to its binding international treaty obligations.

6.3. A convention would hinder Government accountability

6.4. Those in favour of a convention argue that Parliament is the only body that can provide the necessary democratic legitimacy for a decision as important as a conflict deployment. There are three key practical difficulties with this argument. The first difficulty was best put by Jesse Norman MP (HC debate 26 September 2014). He argued that if Parliament authorises military action in advance:

> "[i]t gives up part of its power of scrutiny; it binds Members in their own minds, rather than allowing them the opportunity to assess each Government decision on its own merits and circumstances. Instead of being forced to explain and justify their actions, Ministers can always take final refuge in saying, "Well, you authorised it." Thus, far from strengthening Parliament, it weakens it and the Government: it weakens the dynamic tension between the two sides from which proper accountability and effective policy must derive."

6.5. This caution is well deserved. In the continuing fallout and controversy following the Iraq war MPs who voted in favour of the war in 2003 have found it difficult to subject that conflict deployment to proper scrutiny or criticism for fear of accusations of hypocrisy. There is little reason to believe this situation would not be replicated in

the case of a future controversial conflict decision that had been approved by Parliament.

6.6. Secondly, members of the House of Commons are less well informed than Ministers: "We [MPs] do not have the same access to officials and advisers; we are not privy to diplomatic traffic or secret intelligence; and we are not briefed by, and may not demand briefings from, our armed forces." (Jesse Norman MP HC debate 26 September 2014) The risks of MPs making decisions without being aware of all the intelligence were laid bare by the continuing controversy over the decision to invade Iraq in 2003. Again, there is no reason to think that this would be a one-off. In the event of an unpopular war that they voted for MPs would be lambasted by their critics and constituents for a decision they made without the right information, on which they had not been expertly briefed, and that they would then be unable to scrutinise properly. Rather than voting on the basis of the limited information provided to Parliament prior to a conflict decision, it is clearly preferable that the House avail itself of a more detailed briefing after the event that wouldn't compromise the operation and which would provide more effective grounds for a critical vote.

6.7. Thirdly, it is also unclear what legal documents would be disclosed to Parliament. The Attorney General's advice on such matters often contains elements that are secret and could compromise British interests if widely known (Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions: A Way Forward: Oral Evidence, 17 October 2013, Q.18). Moreover, as pointed out by Baroness Falkner: "What has been happening, certainly with the recent legal advice, is you are just getting one side of the argument [...] if they [the government] are not prepared to put forward both sides of the argument then Parliament must seek advice on what the other side of the argument is." (Political and Constitutional Reform Committee, Oral Evidence, 17 October 2013, Q.20) Even if practically possible, and it is far from clear how Parliament would acquire its own legal advice if the information that legal advice is to be based on is secret, this would be highly controversial and lead to the "ridiculous scenario of people waving their different [legal] opinions at each other in parliament." (Q.18). This would hardly increase democratic accountability or trust in politics.

6.8. A convention would limit military flexibility and operational effectiveness

6.9. Requiring Parliamentary approval before deploying military force would also neuter the flexibility and operational effectiveness of the armed forces. Lord Guthrie, the former Chief of the Defence Staff, called the proposal "very dangerous indeed" and further stated that: "In an ideal world is would be nice to have a debate in Parliament saying that Parliament approves a war. But we don't live in an ideal world…" The Daily Telegraph reported in 2013 that a number of former Generals had submitted to the Government that requiring prior Parliamentary approval would "remove an

element of surprise for the Armed Forces and could compromise intelligence." ("War footing Commons veto 'dangerous' as doubts cast over plans", The Daily Telegraph, 4 January 2013)

6.10. It is easy to see the force in this argument. Holding a Parliamentary debate and vote prior to a military deployment advertises that deployment to potential adversaries. Even a debate carefully designed to avoid disclosing any valuable intelligence would still give the UK's adversary time to prepare countermeasures, actively endangering the lives of members of the UK's Armed Forces. It In its July 2006 report the Lords Constitution Committee summarized the main concerns relating to operational effectiveness:

"Several witnesses regarded operational efficiency to be the key benefit of the present deployment arrangements, and one which could be undermined by greater parliamentary involvement in the process. Field Marshal Lord Vincent of Coleshill said that the success of many military operations relies on the need to maintain "secrecy, security and surprise". Admiral Lord Boyce summarised his concern:

"... all my experience over conducting or being involved with the conduct of several wars over the last five or six years or so is that those allies who go through the parliamentary process are frankly in my view not as operationally effective as those who do not ... I cannot see any advantage whatsoever in shedding the current practice of going to war from an operator's point of view. I believe it would make us operationally far less effective and we would probably start to lose."

6.11. General Sir Rupert Smith also considered that an open debate about whether or not to deploy Armed Forces could risk compromising their effectiveness, which he considered to be greatly enhanced by the opponent's current expectation that "we will fight to win and that the popular will at home is more or less disaster-proof". Lord Boyce told us that an open debate in Parliament on deployments could undermine six key aspects of Armed Forces operations:

- escalating the conflict through rhetoric;
- skewing decisions through access to only limited information (since a great deal of intelligence cannot be revealed in public);
- compromising operational security by publicly discussing too much detail prior to action;
- impairing flexibility of operational response if parliamentary approval is required for every change of the situation on the ground;
- undermining clarity about the timetable for preparation, if it is contingent on a parliamentary debate or vote;
- removing the ability of United Kingdom Forces to have "strategic poise" by giving the opponent early notice of intent."(House of Lords Select Committee on

the Constitution, Waging War: Parliament's Role and Responsibility, HL Paper 236-I, Session 2005-06.)

6.12. In evidence to the Political and Constitutional Reform Committee in October 2013, Lord Wallace, Lords Spokesperson for the Cabinet Office, summed up the complexity of the issue: "This Government, like its predecessor, has discovered as it goes into it that this is a great deal more complex than one thought… questions of urgency and secrecy come in" (Political and Constitutional Reform Committee, Oral Evidence, HC 649, 24 October 2013)

6.13. Lord Wallace's reference to secrecy raises a second facet to this argument. It is not hard to imagine a situation where the Government is privy to secret intelligence that, though not an emergency situation, demands a military response. If the Government had to come before Parliament before making the required conflict deployment it would likely result in the disclosure of this secret intelligence, potentially endangering the lives of British and allies' intelligence operatives. Yet if the Government did not come to Parliament and not seek a military response then the UK's national interests could be at risk.

6.14. Were a convention to exist there would be an expectation that the House would be given access to intelligence briefings, in order to make an informed decision. Yet not all MPs are cleared to receive intelligence briefings, and were this to be a requirement it is unlikely that they would all receive such clearance.[1] As Prime Minister Cameron explained at length in the debate on military action in Syria in April 2018:

"The Government make use of a wide range of sources of information, both those in the public domain and secret intelligence… [and discusses] that intelligence and assessment with senior security and military officials, the National Security Council and Cabinet. In the post-Iraq era, it is natural for people to ask questions about the evidence base for our military actions, including when we cite intelligence. They want to see all the information themselves. But we have an obligation to protect the safety and security of our sources. We must maintain secrecy if our intelligence is to be effective now and in the future. We have obligations to our partners to protect the intelligence they share with us, just as they protect intelligence we share with them, and we have to be judicious even in explaining the types of intelligence we use in any given case, or risk giving our adversaries vital clues about where our information comes from.

The Government have access to all that information, but Parliament does not and cannot. This is not a question of whether we take Parliament into our confidence. It is a question of whether we take our adversaries into our confidence by sharing that material in a public forum. Officials have briefed Opposition leaders on Privy Council terms, and I have set out to the House elements underpinning our assessment, but our

intelligence and assessment cannot be shared in full with Parliament. It is my responsibility to decide the way forward based on all the intelligence and information available to Government. I should make the decision as Prime Minister with the support of the Cabinet, and Parliament should hold me to account for that decision." (HC Deb 17 April 2018, c206)

6.15. Thirdly, what of military operations that arise as the result of a pre-existing, legally binding treaty obligation, such as NATO's Article V? Should these also require Parliamentary approval? It is important to be mindful of the possible international, and diplomatic, implications of a parliamentary vote that was not supportive of an engagement arising out of such a treaty obligation. It would call into question the credibility of the UK's use of force, damage international relations and threaten the security and morale of the UK armed forces.

6.16. It is unclear how to define crucial terms such as conflict, emergency, and mission creep

6.17. One of the most pressing problems is of how to define the terms of any convention. What constitutes an armed conflict, or an emergency? How would a convention deal with the escalation of a military operation, commonly known as 'mission creep'? These questions will be briefly addressed in turn.

6.18. First, there is no consensus of opinion on how to define armed conflict. Does engaging unmanned air systems count as armed conflict? What about cyberattacks? Even when considering only conventional weaponry the spectrum of operations is now so diverse that any binding definition is unfeasible. In April 2017 British military personnel were deployed in more than 30 operations in over 20 countries (PQ71590, Peacekeeping operations, 26 April 2017). Those operations ranged from counter-piracy, training and humanitarian assistance to air policing, peacekeeping and stabilisation operations. In early 2018 British military forces were conducting offensive air strikes against ISIS in Iraq and Syria; were deployed as part of NATO's enhanced forward presence in Eastern Europe; and were contributing either military personnel or experts to eight UN peacekeeping missions (UN Troop and Police Contributions, February 2018) and several NATO and EU missions respectively (Including peacekeeping, counter-piracy, training and air policing operations. PQ71590, Peacekeeping operations, 26 April 2017). In the words of Lord Stirrup, former Chief of the Defence Staff: "…inevitably there would be grey areas where it will be extremely difficult and a matter of political judgement." (Lords Constitution Committee, The Constitutional Arrangements for the Use of Armed Force: Oral Evidence, 5 June 2013, Q.32) A binding constitutional convention should not be based on day-to-day political judgement.

6.19. Secondly, while it is accepted that any convention should contain an emergency caveat, there is no consensus on what the definition of an emergency

should be. It has been suggested that the convention need not apply if a critical national interest is threatened – but this begs the question of what a threat to a critical national interest is. The MOD publication UK Defence Doctrine states:

"In view of the UK's widespread interests and investments, as well as its critical dependence on a stable, secure international environment for trade, it is likely that threats to international security would also represent a threat to our national interests […] in certain situations the interests at stake may only be indirectly pertinent to the national interest, in a narrow sense, but it may be judged expedient to intervene on humanitarian, compassionate or moral grounds." (United Kingdom Defence Doctrine, fifth edition, JPD 0-01, 19 December 2014)

6.20. Such a broad definition of national interest leaves the Government with considerable discretion as to Parliament's role. As Baroness Jay noted in November 2013, in a debate over whether to put seeking Parliamentary approval prior to a conflict decision on statutory footing:

"Any Government would also want to preserve flexibility to take defensive action or deploy force in an emergency. It is likely that any formalised process would leave a wide margin of discretion to the Prime Minister about when and where to see Parliament's approval, and there might in the end be so many exemptions that the formal process itself became only theoretical."

6.21. Thirdly, there is no consensus on how a convention would deal with or define mission creep. All military operations carry the inherent risk that the dynamics of the security situation will change, requiring a shift in the tempo and intensity of operations. A peacekeeping operation has the potential, for example, to quickly shift into peace enforcement, as occurred in Somalia in 1993-94, while in 2001 British forces were initially deployed to Afghanistan in a post-conflict and regional reconstruction role. They were soon engaged in offensive operations at a much greater scale. In an interview on the Today programme in December 2007 Lord Guthrie suggested: "what we do is slide into war, you cannot avoid that. An apparently benign peacekeeping mission could turn into fighting." ("Former defence chiefs oppose role for MPs in war decisions", The Guardian, 28 December 2007) Unforeseen changes to an operation can require an immediate military response. The need to seek parliamentary approval could undermine operational effectiveness and limit the UK's capacity for action in a mission creep situation.

7. Since 2003, how has the involvement of Parliament in authorising the use of military force affected the conventions governing its deployment?

7.1. Since 2003 the UK Government has committed or attempted to commit armed forces to military action on a number of different occasions. Four of these are examined in the Society's paper: the war in Afghanistan and Iraq; the Coalition's conflict

deployment in Libya; the Coalition's conflict decisions in Iraq and Syria; and the May administration's conflict decision in Syria.

7.2. War in Afghanistan and Iraq

7.2.1. In 2003, the Labour government announced that the Parliament would be given a vote on the deployment of British forces to Iraq. The motion on 18 March 2003 that the House "…supports the decision of Her Majesty's Government that the United Kingdom should use all means necessary to ensure the disarmament of Iraq's weapons of mass destruction…" was agreed on division by 412 to 149 (HC Deb. 18 March 2003 c911). This was the first Parliamentary vote granting prior approval to a UK conflict deployment. As such it has been regarded by advocates of a formal role for Parliament as setting a precedent for any future decisions on military action.

7.2.2. However, the conflict in Afghanistan was never subject to a substantive Government vote. As per the model developed in the twentieth century, the UK's conflict deployment in Afghanistan was announced by Prime Minister Tony Blair in a statement on 7 October 2001 and debated soon afterwards on a motion to adjourn (Tony Blair's statement, 7 October 2001). Further deployments of British military forces to Afghanistan, including the 9,500-strong troop push to southern province of Helmand from 2006, were also announced to Parliament through Ministerial Statements. There has never been a Parliamentary vote on a Government tabled motion on the deployment of British forces in Afghanistan, prior or otherwise (Claire Mills, 'Parliamentary Approval for military action', House of Commons library briefing paper CBP – 7166, 8 May 2018).

7.2.3. These two examples demonstrate the contrasting approaches adopted by Prime Minister Blair's administration. Iraq stands as the anomaly in 150 years of constitutional tradition. The decision to engage in Afghanistan followed the procedural trend established throughout the nineteenth and especially twentieth century; the decision was made by the Prime Minister, under the Royal Prerogative, and then scrutinised in the House under a motion to adjourn. Iraq did not ground a new constitutional convention. If it did then that convention was immediately breached by the Afghanistan conflict deployments carried out under the same administration.

7.2.4. The decision to seek Parliamentary approval before the Iraq conflict decision is best understood as the administration seeking approval from a wider polity to bolster its position before making a desperately unpopular decision. Such a calculation, sprung from the political exigencies of the time, cannot found a convention constitutionally binding on future Governments.

7.3. The Coalition administration's conflict deployment in Libya

7.3.1. Advocates for a convention, having considered Iraq as a formal precedent, subsequently point to developments during Prime Minister David Cameron's Coalition administration as further evidence that a convention does exist. In March 2011 the Cabinet Secretary Gus O'Donnell stated that "the Government believes that it is apparent that since the events leading up to the deployment of troops in Iraq, a convention exists that parliament will be given the opportunity to debate the decision to commit troops to armed conflict and, except in emergency situations, that debate would take place before they are committed" (Written Evidence submitted to the Political and Constitutional Reform Committee Inquiry into The Role and Powers of the Prime Minister, Session 2010-12.) Also in March 2011, the then Leader of the House, Sir George Young, stated on the floor of the House that the Government would observe the convention except when there was an emergency (HC Deb 10 March 2011, c1066).

7.3.2. In 2011, the Coalition Government suggested that a convention had emerged that the Executive would allow Parliament a prior opportunity to vote on any conflict deployment of the Armed Forces, except in an emergency. Subsequent developments, not least the defeat of a Government motion to deploy military force in Syria in 2013, have led some analysts to suggest that any future conflict deployment of the Armed Forces would be impossible without recourse to Parliament (Claire Mills, 'Parliamentary Approval for military action', House of Commons library briefing paper CBP – 7166, 8 May 2018). The legal authority to decide to commit the UK's Armed Forces rests with the Royal Prerogative. It is undisputed that the deployment of the UK Armed Forces in a non-combat role, such as peacekeeping or humanitarian capacity, is exempt from the alleged convention. What has been suggested is that a convention now exists that no decision on a conflict deployment will be made without prior Parliamentary approval.

7.3.3. It is unclear how the Coalition administration reached this conclusion. Between the Iraq vote in 2003 and the Government's observations in March 2011 there had been no debate or vote on any deployment of the Armed Forces. The progress of the Afghanistan military campaign had been announced to Parliament through a series of Written Ministerial statements. A convention cannot be summoned up by statement. Its constitutional authority arises out of the entrenchment of political procedure.

7.3.4. This procedure tells another story. The Coalition administration's conflict deployment in Libya on 18 March 2011, a week after Sir George Young's and Sir Gus O'Donnell's statements, was not subject to any prior parliamentary debate or vote. A subsequent debate on 21 March 2011 on a Government motion

supporting the military action was passed on division three days after UK forces were deployed.

7.3.5. The academic community is unanimous that the military deployment in Libya cannot ground a convention. Professor Gavin Phillipson at Durham University stated it was "not a fully satisfactory precedent" (Gavin Phillipson, Historic Commons Syria vote: the constitutional significance, UK Constitutional Law Group, 19 September 2013.) Supported by Dr David Jenkins of the University of Copenhagen, Dr James Strong of the London School of Economics, and Sebastian Payne of the University of Kent, Professor Nigel White of the University of Nottingham explained to the Political and Constitutional Reform Committee:

"There has been plenty of debate on Afghanistan but no substantive vote as far as I can see. Then we have Libya where there was a Security Council resolution, then a debate, then the deployment of force, and then a Floor debate and a vote, all in the space of a week, which again illustrates a different pattern of relationship between the Executive and Parliament… that shows there is no consistent pattern of behaviour, never mind any evolving rules or unwritten constitutional conventions." (Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions, HC 923, Session 2010-12, Q.4)

7.4. <u>The Coalition's conflict decisions in Iraq and Syria</u>

7.4.1. On 29 August 2013, the House was recalled to debate and vote on taking military action against Syria following the use of chemical weapons by the Assad regime. The motion was defeated by 285 votes to 272 (Division No.70, 2013 – 14 Session). It was the first defeat for a Government in retaliation to military action since 1782. Prime Minister Cameron promised to respect the will of the House and cancelled the planned military intervention in Syria.

7.4.2. In the aftermath of this defeat some commentators suggested that future significant military action would now be unthinkable without recourse to Parliament. Professor Malcolm Chambers suggested that: "The UK Parliament and public are no longer prepared to give their Government the benefit of the doubt on military operations, and the Government will be constrained in what it can do in future as a result." (Parliament's decision on Syria: pulling your punches, RUSI Analysis, 30 August 2013).

7.4.3. The Government's 2013 defeat over military action in Syria and its commitment to adhere to the will of the House forms the main precedent for advocates for a convention. On 26 September 2014 the House was recalled to discuss the Government's motion that the UK become involved in air strikes against ISIS in Iraq. The motion explicitly ruled out deploying UK troops in

ground combat operations and did not endorse UK air strikes in Syria (House of Commons Votes and Proceedings, 26 September 2014). In his opening statement the Prime Minister referred to the convention on prior Parliamentary approval:

"I think the convention that has grown up in recent years that the House of Commons is properly consulted and there is a proper vote is a good convention. It is particularly apt when there is—as there is today—a proposal for, as it were, premeditated military action. I think it is important to reserve the right that if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, you could act immediately and explain to the House of Commons afterwards." (HC Deb 26 September 2014, c1265)

7.4.4. In the aftermath of the terrorist attacks in Paris on 13 November 2015 the UN Security Council passed a compromise resolution calling for states to take 'all necessary measures' against ISIS. Prior parliamentary approval was sought, with Parliament voting in favour of the Government motion to extend military action, specifically air strikes, into Syria on 2 December 2015 by 397 to 223 votes (HC Deb 26 November 2015).

7.5. <u>Do the actions of the Coalition administration prove the existence of a convention?</u>

7.5.1. Members of the Coalition administration were united in declaring that a convention did exist. In the three votes held prior to military engagements in Iraq and Syria the Government also demonstrated over a two-year period that it valued Parliamentary approval and would adhere to the will of the House. Yet it is ambitious to argue that this self-imposed policy was concrete enough to ground a convention with binding constitutional force. There are five arguments in particular to support the conclusion that the Coalition administration did not successfully conjure up a constitutional convention.

7.5.2. First, the Government's actions in Libya were inconsistent with its words. Prior parliamentary approval was not sought. If a convention must arise from consistent observance of a practice or procedure then that consistency was lacking in the early years of the administration.

7.5.3. Secondly, and more importantly, in his statements supporting the existence of a convention, Cameron consistently defended the right of the Government to act without prior approval in an emergency: "I think it is important to reserve the right that if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, you could act immediately and explain to the House of Commons afterwards." (HC Deb 26 September 2014, c1265) This position was reiterated by the Foreign Office soon afterwards: "As the Prime Minister said on Monday in the House, the Government … will need the freedom to act in the case of an urgent threat to the security of the

United Kingdom or of an impending humanitarian disaster, and to come to the House as soon as possible after such action." (HC Deb 12 September 2014, c1193)

7.5.4. This emergency caveat, allowing the Government to sidestep the restrictions of the convention in the case of an urgent threat to a national interest or an impending humanitarian disaster, is illuminating. It an exemption clause that undermines the entire existence of the convention. It is hard to think of a situation where the UK would take military action if there was not a critical national interest at stake or an impending humanitarian disaster. Indeed, it is common sense that in such situations the Government would act immediately and tell Parliament afterwards. The emergency caveat thus covered most scenarios for conflict decisions.

7.5.5. If this is so, why pretend that there is a convention at all? There is little point in summoning one into existence only to render it immediately toothless. It is simpler and more honest to recognise that the Government requires the flexibility to act in the nation's best interests and that the power to do so is provided for under the Royal Prerogative. By arguing for an emergency caveat, advocates for a convention render it devoid of content and non-existent.

7.5.6. Thirdly, the reason the Coalition administration did support a convention, even with the emergency caveat attached, is that due to the lack of a single-party majority in the House the Government was required to seek approval from a wider polity for politically contentious decisions. It is no surprise that the Coalition Government of 2010-2015, having to balance the two coalition partners' competing policy and ideological positions, sought to resolve those differences through an appeal to Parliament. This was Cameron's very argument at his opening of the 2013 debate on Syrian air strikes: "In drawing up my motion I want to unite as much of the country and of this House as possible. I think it is right, on these vital issues of national and international importance, to seek the greatest possible consensus. That is the right thing for the Government to do and we will continue to do it..." (HC Deb 13 August 2013, c1428). Had the Syrian air strikes been politically uncontroversial, and had the Conservatives not been required to rely on votes from their more pacifist Liberal Democrat partners, it seems unlikely the Government would have felt the need to seek prior approval from Parliament.

7.5.7. Fourthly, it is notable that the deployments for which the Government sought Parliamentary approval were in Iraq and Syria, not its earlier engagement in Libya. Any decision to engage militarily in the Middle East would be controversial until "the shadows of Iraq [in 2003] and Afghanistan have faded much farther from the national consciousness" (Parliament's decision on Syria: pulling your punches, RUSI Analysis, 30 August 2013). Such considerations, a

product of the British zeitgeist concerning Blair's wars in Iraq and Afghanistan, cannot form the foundation of a binding constitutional convention.

7.5.8. Fifthly, given that constitutional conventions require continued political observance over a sustained period of time to establish their authority, it is difficult to argue that a single two-year period can weigh in the balance against over 150 years of British constitutional tradition.

7.5.9. The overall approach of the Cameron administration is summarized by the Chair of the Political and Constitutional Reform Committee, Graham Allen, in response to the recall of Parliament on 26 September 2014. Addressing the opportunity for the Commons to debate and vote on military action in Iraq, and suggesting that the process for consulting Parliament on such matters should be clarified, he admitted that despite the Government's words "there is still no clear process in place for how Parliament is consulted on the use of armed force." (Political and Constitutional Reform Select Committee, Press Release, 26 September 2014)

7.6. <u>The May Administration's conflict decision in Syria</u>

7.6.1. In response to the latest use of chemical weapons by the Syrian regime against its own civilians on 14 April 2018 the UK, in concert with the United States and France, conducted a series of air strikes intended to degrade the Syrian Government's chemical weapons capabilities. The military action was undertaken by the UK without prior recourse to Parliament. The Government stated that: "It was necessary to strike with speed so we could allow our Armed Forces to act decisively, maintain the vital security of their operations, and protect the security and interests of the UK."(Downing Street press release, Syria action – background, 15 April 2018) Labour and the SNP were fiercely critical, arguing that as the intervention was premeditated Parliament should have been consulted. A subsequent debate was held on 16 April 2018 but no retrospective vote approving military action was forthcoming. Three points flow from this. All support the conclusion that the constitutional convention does not exist.

7.6.2. First, the Prime Minister did not seek Parliamentary approval before a pre-meditated military action and faced minimal negative consequences. One would think that, were a constitutional convention broken, the protagonist would face some repercussions. There would be a national outcry if a political party chose someone as Prime Minister who was not a Member of Parliament, for example. Similarly, a Monarch who chose not to sign a Bill into law that had passed both Houses of Parliament would potentially be forced to abdicate.[2]

7.6.3. Secondly, supporters of a convention point to the emergency caveat. Prime Minister May was adhering to the convention, it is said, because this military intervention was in response to a humanitarian crisis. But this just goes to show how broad and nebulous the emergency caveat is, echoing the arguments made at paragraphs 30 and 31 above.

7.6.4. Thirdly, it is worth asking why, unlike previous actions of the Coalition administration in Iraq and Syria, there was no need for the Government to seek prior approval from Parliament. The answer is that the conflict decision in this instance was not as politically controversial. Chemical weapons are an international 'red line', outlawed globally, and so their use demanded an immediate international response. This was all the more important given the perceived weakness of the Obama administration to enforce its own chemical weapons red lines in 2013 (Derek Chollet, Obama's red line revisited, Politico Magazine, 19 July 2016).

7.7. Summary of answer to question 5: there is no convention

7.8. To repeat the answer given to question 2: Prior to the 21st century there was no convention that the Government required prior Parliamentary approval before committing military forces to action. Blair's administration was the first to seek Parliamentary approval for the 2003 invasion of Iraq, but this was a historical aberration precipitated by the febrile political atmosphere of the time and swiftly reversed by subsequent conflict decisions concerning troop pushes in Afghanistan. Cameron's administration prematurely asserted the existence of a convention while undermining that assertion through its engagements in Libya. While the continued reliance on the emergency caveat pays lip-service to the existence of the convention in theory, Prime Minister May's air strikes in Syria challenge the existence of the convention in practice.

7.9. To argue in favour of a constitutionally binding convention would be to misread the political contexts within which conflict deployments are made. In reality, the Government of the day decides on a case-by-case basis whether the political exigencies of the time require their position be shored up by an appeal to a wider polity: Parliament.

8. What role, if any, should Parliament have in the authorisation of military force?

8.1. The preferable procedure for authorising the use of military force is that followed by Prime Minister May in ordering air strikes in Syria in April 2018. The conflict deployment should be made by the Prime Minister, advised by her National Security council and briefed by her intelligence and military services, under the Royal Prerogative. She should then announce that deployment on the floor of the House as

soon as possible to allow Parliament the opportunity to scrutinize the exercise of Executive power on a motion to adjourn.

8.2. One final issue is worth mentioning. There have been calls since the Iraq conflict for Parliament's role to be placed on statutory footing. This would make it a legal requirement, not simply a convention, for the Government to seek prior Parliamentary approval before deploying military force. This suggestion faces a further obstacle. Specifying Parliament's role in primary legislation allows the domestic courts the potential to rule on the lawfulness of a deployment decision through a process known as judicial review. In the judicial review process the courts compare the actions of an executive body, including the Prime Minister, to that body's powers as laid out by Parliament and assess whether the Executive acted within those powers.

8.3. Thus, in Smith v Ministry of Defence (2013) UKSC 41 the Supreme Court held that it is possible for certain actions and the decisions of service personnel on the ground, as well as certain planning and procurement decisions, to give rise to liability under the common law of negligence, as well as under human rights law. It is agreed by analysts of all stripes that it would be highly undesirable for areas of high policy such as foreign affairs and conflict decisions to become justiciable.

8.4. For this reason, the current approach of the judiciary to areas of foreign policy such as conflict deployment is to treat them as outside the remit of the courts. Per Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service (1984) UKHL 9:

"National security is the responsibility of the executive government; what action is needed to protect the interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

8.5. It is unknown how the attitudes of the courts could change when faced with legislation purporting to limit the reach of executive power. As Sebastian Payne explains:

"It is not because I think the courts necessarily want to meddle in questions of high policy in relation to war, but if you look at the supervisory jurisdiction of the High Court what they do is: one, interpret the scope of legislation; two, see if it has been properly followed. I don't see how you can rule that out from happening." (Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions, HC 923, Session 2010-12, Q,14)

8.6. Lord Wallace agreed: "Legislation and judicial review go together and the government has become much more sensitive about judicial review of military action…" (Political and Constitutional Reform Committee, Parliament's Role in Conflict Decisions: A Way Forward: Oral Evidence, 24 October 2013, Q.23) Judicial review is an incrementally-expanding element of the UK constitution, and it is hard to see how it could be excluded from any attempt to place Parliament's role in making conflict decisions on a statutory footing. It is not only highly undesirable that a convention exist, but even more undesirable that it should be placed on a statutory footing.

8.7. In conclusion, to exist, a convention requires a practice to become so entrenched over a sustained period of time that to deviate from that practice would be constitutionally unacceptable. This has not happened. A convention should not exist because it would obstruct Government accountability, hinder the UK Armed Forces' operational effectiveness, face insurmountable definitional problems, and potentially, if legislated for, bring decisions of high policy into the remit of judicial review.

9. What can the UK learn from international comparators?

9.1. The Society's paper did not address international comparators.

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