



## **THE INTERPRETATION OF THE COMMANDER IN CHIEF CLAUSE IN THE AMERICAN CONSTITUTION IN COMPARISON WITH THE RECENT TRANSFORMATION OF THE PREROGATIVE POWER TO DEPLOY TROOPS IN THE UNWRITTEN BRITISH CONSTITUTION\***

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### **1. Introduction.**

**T**he article provides a comparative analysis concerning the war powers of the Executive Branch in the British and in the American experiences; the aim is to understand if the evolution of the constitutional war powers in the United Kingdom could influence the debate on the interpretation of the war powers in the US Constitution. More specifically, the issue concerns the recent constitutional convention that seems to have introduced in the unwritten British Constitution the Parliament's power of prior approval of the decision to send troops into conflict situations and the possible impact that this important innovation may have on the controversial interpretation of the war powers in the American Constitution. There is, in fact, a

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profound historical-constitutional link connecting these two legal systems and their parallel evolution.

The second section describes how the British configuration of the war powers has historically influenced the American model. The third section explains how, despite the profound differences existing between these two legal systems, the nature of the constitutional war powers of the British Executive has been in substance for a long time similar to the interpretation and application of the war powers of the US President as Commander in Chief; until the beginning of the new millennium, in fact, both in the UK and in the United States the war powers have evolved on parallel lines as a discretionary power of the Executive. This framework, as explained in the fourth section, has changed since the UK Cabinet Manual of 2011 recognized the existence of a new convention of the Constitution according to which every significant military action of the UK now seems to be subjected to a previous debate in Parliament (while in the United States, though the matter of the constitutional war powers is still controversial, the strict interpretation of the War Powers Clause established in favor of the Congress prevails). The fifth section tries to suggest some arguments to explain why the evolution of the constitutional war powers and the strengthening of the Parliament's role in the UK could influence the debate on the interpretation of the war powers in the US Constitution, in the sense of suggesting a reconsideration of the Congress role. This relates to the more general issue of the influence that foreign law and comparative law can exert on the evolution of the constitutional systems.

## ***2. From the Commander in Chief in the Kingdom of Great Britain to the Commander in Chief in the Philadelphia Constitution. The Influence of the British Model in the Configuration of the Power to Deploy Troops Overseas as a Royal Prerogative Power.***

In the model of separation of powers proposed by Locke, the «federative power» was intended as a unit mass including all the functions connected to the external relations, included the power of war and peace:

«This [federative power], therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases.»<sup>1</sup>

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<sup>1</sup> J. Locke, "Two Treatises of government", in *The Works of John Locke*, vol. II, at 199, sec. 146 (1714).

Although the federative power was conceptually distinct from the executive power and, like the latter, should be in theory subordinate to the will of the legislative power,<sup>2</sup> the need to ensure an effective unitary action of the Kingdom in the external relations as well as in the protection of national security, justified the decision-making supremacy of the King in this field. So the same Locke came to admit that it was difficult to separate the executive from the federative power. The latter, in fact, had not to be harnessed in the static nature of the legislation and, therefore, had to be entirely exercised by the holder of the executive power with a large discretion and with the only limit of the duty to pursue the national interest:

«These two powers, executive and federative, though they be really distinct in themselves [...], yet they are always almost united. And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive, and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good.»<sup>3</sup>

Even Sir William Blackstone, in his *Commentaries of the Law of England*, assigned to the sole responsibility of the King all the functions relating to the management of foreign affairs, including the prerogative of «making war and peace»:

«Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right [...] of making war or peace.»<sup>4</sup>

The same Blackstone clarifies that, among the incisive royal prerogatives in foreign affairs, the title of supreme commander of the armed forces must be included: «The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom.»<sup>5</sup>

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<sup>2</sup> *Id.*, at 201, sec. 153.

<sup>3</sup> *Id.*, at 199, sec. 147. In this regard, R.H. Cox, *Locke On War and Peace* 124 (1960), is right to say that the federative power indeed represented a fusion of the legislative power and the executive power in the conduct of foreign affairs.

<sup>4</sup> W. Blackstone, *Commentaries of the Law of England* 240 (1765-1769, vol. I).

<sup>5</sup> *Id.*, at 254.

It is a very consolidated prerogative of the Executive, that the historian Frederic William Maitland dates back to the English monarch in the fifteenth century, calling it «commander of his armies and his fleets».<sup>6</sup>

Ultimately, in the Kingdom of Great Britain of eighteenth century, the only forms of parliamentary control on the war powers consisted in the *impeachment* of the King's ministers and in other instruments of indirect interference in the exercise of the royal prerogatives, such as the so-called *power of the purse* and the power to annually approve the maintenance of a standing army of the King. Conversely, at the time in which the *Framers* drew up the text of the Philadelphia Constitution, the King of Great Britain boasted the position, substantive and not formal, of *Commander in Chief*, position accompanied by the prerogatives to declare war and to deploy troops overseas.

Of course, the British model represented a fundamental reference point for the American constituents, especially with reference to the powers of the Executive in matters of defense and foreign affairs. Moreover, Blackstone's Commentaries, published in Oxford between 1765 and 1769, were well known to the *Framers*.

Prominent scholars, like Corwin, assert that, in relation to the prerogative powers of the Executive, the figure of the President of the United States is largely comparable to that of George III:

«what the Framers had in mind was [...] the 'balanced constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative'. Sir Henry Maine's dictum that 'the American Constitution is the British Constitution with the monarchy left out' is, from the point of view of 1789, almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also of course the hereditary feature.»<sup>7</sup>

The statement is probably excessive, given that the majority of the Framers disliked both the unitary conception of federative power and the notion of *prerogative power*;<sup>8</sup> moreover, the power to declare

<sup>6</sup> F.W. Maitland, *The Constitutional History of England* 197 (1931).

<sup>7</sup> E.S. Corwin, *The President: Office and Powers, 1787-1957*, 14ff. (1957). On the basis of this perspective, Corwin supported the view of the substantial absence of (legal) limits to the decision-making power of the President in foreign affairs; see E.S. Corwin, *The President's Control of Foreign Relations* (1917).

<sup>8</sup> As it is observed by E. Keynes, *Undeclared War: Twilight zone of Constitutional Power* 25 (1991), «the term "executive power" represents a repudiation of the theory of prerogative or inherent, extraconstitutional power to preserve the nation against external threat».

war, typical royal prerogative in the British system, was delivered to the legislative branch by the US Constitution<sup>9</sup>.

Nevertheless, the reflection of Corwin and of many other scholars after him is certainly correct with regard to the configuration of the constitutional role of *Commander in Chief*, at least with reference to the power to deploy and command troops<sup>10</sup>.

Alexander Hamilton, speaking about the *Commander in Chief* in the 69<sup>th</sup> essay of the *Federalist*, states that this important presidential quality implies the same authority due to the King of Great Britain, even if only with specific reference to the implications of the supreme command of the armed forces and to the conduct of the war.

«The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.»<sup>11</sup>

The war power of the US President as *Commander in Chief* is therefore much lesser than that of the British monarch, since the Framers operated a “deconstruction” of the federative power and of the war powers, redistributing them between the executive branch and the legislative branch. So, in order to balance the important presidential function of Commander in Chief, the Article I, Section 8, Clause 11, gives the Congress the crucial power to declare war, while the subsequent clauses (up to clause 16) enumerate other significant war powers of the Congress<sup>12</sup>. Therefore,

<sup>9</sup> In the US Constitution also the war powers are distributed between legislative branch and executive branch, according to the system of checks and balances that produces, in the American system, «separated institutions sharing powers» (R.E. Neustadt, *Presidential Power: The Politics of Leadership*, 33, 1960).

<sup>10</sup> For comments on the role and powers of the Commander in Chief, see B.L. Beirne, “George vs. George vs. George: Commander-in-Chief Power” (2007) 26 *YALE LAW & POLICY REVIEW* 265; C. Fairman, “The President as Commander-in-Chief” (1949) 11 *THE JOURNAL OF POLITICS* 145; N.A. Graebner, “The President as Commander in Chief: A Study in Power” (1993) 57 *THE JOURNAL OF MILITARY HISTORY* 111; R.G. Hoxie, “The Office of Commander in Chief: An Historical and Projective View” (1976) 6 *PRESIDENTIAL STUDIES QUARTERLY* 10.

<sup>11</sup> A. Hamilton, alias Publius, *The Real Character of the Executive, The Federalist Papers*, n. 69, in *The New York Packet*, 14 March 1788.

<sup>12</sup> «The Congress shall have power [...] (11) To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; (12) To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; (13) To provide and maintain a navy; (14) To make rules for the government and regulation of the land and naval forces; (15) To provide for calling forth

Keynes' description of the way in which the principle of separation of powers and that of their balance interact in the specific matter of the constitutional war powers, seems very compelling:

«while the separation of the war powers [...] creates the conditions for struggle between Congress and the President, balanced government would promote the cooperation necessary to formulate and execute effective national-security policies.»<sup>13</sup>

However, once these necessary clarifications are made, the power to deploy troops remains firmly in the hands of the President as *Commander in Chief*.

The *Framers* were aware that a sudden attack against the United States by a foreign power would have required an immediate reaction in defense of national security; such a reaction could not realistically wait for a decision by the two houses of Congress, especially when it was not in session. For this reason it was necessary to find a balance aimed at preserving both the power of the Congress to authorize a war and the power of the President, in his capacity as «single chief magistrate» of the Executive, to effectively defend the American nation from external threats. Hence the difference between the wording of the *WPC* and that of Article IX of the 1778 Confederation Articles, which attributed to the continental Congress «the sole and exclusive right and power of determining on peace and war».<sup>14</sup>

The proponents of a strong executive may indeed affirm that the use of military force in time of peace, which is subject to the international law principle of self-defense, not only was very common throughout the history of the United States of America, but it was not uncommon even at the time when the Constitution was written.<sup>15</sup> It should be assumed that, according to the original meaning of the normative text, the *WPC* deliberately does not deal with military actions undertaken in peacetime; this is why the decision to engage or not the Congress in an act of prior approval is a political choice fully referred to the discretion of the President. In fact, if the constituents had really wanted to give Congress the power to decide the beginning of a war, they would have used the same wording of Article IX of the 1778 Confederation Articles, or that of Article I, section 10, of

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the militia to execute the laws of the union, suppress insurrections and repel invasions; (16) To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; [...]» (U.S. Const. Art. I, § 8). In particular, regarding the power of the purse in military affairs, see P. Raven-Hansen & W.C. Banks, «Pulling the Purse Strings of the Commander in Chief» (1994) 80 VIRGINIA LAW REVIEW 833.

<sup>13</sup> Keynes, *supra* note 8, at 10.

<sup>14</sup> See J. Yoo, *The Powers Of War And Peace: The Constitution And Foreign Affairs After 9/11*, 148 (2005).

<sup>15</sup> E.V. Rostow, «Once More unto the Breach: the War Powers Resolution Revisited» 21 VALPARAISO LAW REVIEW 5-6.

the Constitution, which expressly lays down, for each member state, a power of authorization granted to the respective Congress and covering all forms of use of military force. According to John Yoo, the fact that the Constitution does not use the same wording with regard to the federal Congress simply denotes that this body lacks that power.<sup>16</sup> So the powers of the US President are much higher than those attributed to the President of the continental Congress by the Confederation Articles<sup>17</sup>.

### ***3. The Parallel Evolution of the Constitutional Power of Political Command of the Armed Forces in the British Unwritten Constitution and in the American Living Constitution.***

Within western democracies, the gradual increase of the decision-making supremacy of the Executives in this sensitive area of law has been an almost unstoppable phenomenon for most of the twentieth century. This is due to many factors, both internal to the States' legal systems (for example, the evolution of a democracy in a "majoritarian" sense) and external (for example, the transformation of the concept of war in the international law).

Giuseppe De Vergottini, for example, believes that even the membership of a State to NATO could indirectly increase the weight of the executive at the expense of the parliamentary body:

«At a first assessment, we note both the general weakening of the parliaments of the States involved in the choices of the Atlantic Alliance's leading power, and a preferential role of the governments as to the choices that remain in the control of the States involved in the conflict, with a considerable reduction of the role of parliaments».<sup>18</sup>

Our purpose however is not to provide a complete survey of the different factors that have produced the increase of the war powers of the executives in democratic States, but rather to conduct a comparative analysis of the "parallel" transformation of war powers in the British unwritten Constitution and in the American living Constitution.

If we compare these two models of form of government, the analysis of the application practices shows that both in the Westminster style parliamentary system and in the American presidential

<sup>16</sup> See Yoo, *supra* note 14, at 146-147.

<sup>17</sup> However, as it is observed by Keynes, *supra* note 8, at 37, the «power to grant letters of marque and reprisal» attributed to the Congress by Article I, section 8, clause 11, shows «that the Framers intended to vest limited as well as general war-making power in Congress rather than the President». In conformity, see C.A. Lofgren, "War-Making Under the Constitution: The Original Understanding" (1972) 81 YALE L. J. 672, 695-697; W.M. Treanor, "Fame the Founding and the Power to Declare War" (1997) 82 CORNELL L. REV. 695, 709.

<sup>18</sup> G. De Vergottini, "Nuovi profili della guerra e rapporti parlamento-governo" (2002) 3 RIVISTA DI STUDI POLITICI INTERNAZIONALI 381.

system the decision to use the armed forces in situations of real or potential conflict has appeared in principle as an autonomous decision of the Executive Summit, as holder of the supreme civilian command of the armed forces.

Despite the structural differences existing between the two considered legal systems, throughout the second half of the twentieth century the role of political command of the armed forces exerted by the British Prime Minister did not deviate much from that of the «commander in chief» in the American experience. There is indeed a striking similarity between them with regard to the fact that the power to use military force still descends from a basically similar prerogative.

The existence of the confidence relationship and therefore of the accountability of the Government before Parliament is not in itself a factor capable of limiting the prerogative in question; and, consequently, it is not capable of substantially diversifying the war powers of the British prime minister from those of the American president. Actually, if we look at the British practice, we can easily see that, in the presence of single-party majority governments, the political continuity between the Government and the parliamentary majority has often made the decision-making power of the Prime Minister even more autonomous than that of the Commander in Chief in the American presidential system, especially in cases when so-called divided government occurs. The institutional separation between executive branch and legislative branch indeed allows the Congress to exercise a more effective control on the military power, especially with regard to military budgeting. In the United Kingdom the power to deploy and to use the armed forces overseas has retained its original nature of prerogative power, passing from the Crown to the Government.<sup>19</sup> Despite the profound transformation undergone by the British government system following the definitive establishment of the parliamentary model, the prerogative in question has kept almost intact its original configuration, i.e. that of a discretionary «executive power», as such not subject to parliamentary approval.<sup>20</sup>

This reading seems to have an implicit confirmation in Bruce Ackerman's theses. Ackerman believes that the imbalance in favor of the Executive, typical of the American presidential system, is a consequence of the separation of powers outlined in the Constitution. He therefore indicates the «constrained parliamentarism» as a generally more balanced model, because it provides a Government which is devoid of a direct popular legitimacy and therefore subject to the Parliament.

<sup>19</sup> «The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the 'prerogative' [...]. The 'prerogative' appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crowns», A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 424 (10th ed. 1959).

<sup>20</sup> W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, 323 (14th ed. 2007), R. Joseph, *The War Prerogative: History, Reform, and Constitutional Design* (2013).

But, in making this argument, Ackerman specifies that the British model is not to be followed because it does not have the virtuous characteristics of constrained parliamentarism.<sup>21</sup>

Moreover, we must consider that the British Prime Minister can boast, along with the continued leadership of the parliamentary majority party, also a kind of direct investiture by the electorate.<sup>22</sup>

It is no coincidence that the direct election of the Government's Head represents for Ackerman one of the factors that produce, in the American Constitution, the imbalance in favor of the Executive branch.

The described leadership of the Prime Minister has reached the acme in the first phase of Blair administration, when the decision-making practice was characterized by a greater informality of the decision-making processes and by a lesser involvement of the Cabinet.<sup>23</sup> The situation has undergone a change just after the entrance of the UK in the Iraq conflict in 2003, when Blair's elected dictatorship began to decline. After the 2005 elections there was a return to a broader collegiality in decision-making processes of the Executive, through the enhancement of the Cabinet, and a strengthening of the weight of the House of Commons.

Nevertheless, until the modification of the conventional framework reported by the Cabinet Manual in 2011, the constitutional conventions relating to the military actions guaranteed to the Parliament only the right to be informed of a military action; moreover, this communication could also be subsequent to the beginning of the intervention. The conduct of a full parliamentary debate, as well as the eventual vote of approval of a motion on the decision to send the troops by the lower House, depended instead on a discretionary choice of the Government. The methods by which the House of Commons could express its support to the decision to use military force were different: in some cases the lower House voted just mere unamendable procedural motions; in other cases it voted an amendable substantive motion. While other constitutional experiences use to resort to a real legislative act (as happens in the United States, where the Congress can approve a statutory authorization compliant with the War Powers Resolution), in the United Kingdom the prior parliamentary consent has been granted, in the rare cases occurred from the Second World War until today, through the approval of a non-legislative act of political direction. More specifically, the House of Commons approved a substantive amendable motion presented by the Government.

<sup>21</sup> B. Ackerman, "The New Separation of Powers" (2000) 113 HARVARD LAW REVIEW.

<sup>22</sup> «A Prime Minister has the invaluable political authority of being the choice (directly or indirectly) of the electorate, an advantage which neither his party nor any other Minister can claim», R. Brazier, *Constitutional Practice. The Foundations of British Government*, 75 (3rd ed. 1999).

<sup>23</sup> A. Seldon, "The Cabinet System", in *The British Constitution* (V. Bogdanor ed., 2003) at 129-133 describes the change that covered the Cabinet system under the Ministry Blair between 1998 and 2002. However, V.P. Hennessy, "From Blair to Brown: The Condition of British Government" (2007) 78 THE POLITICAL QUARTERLY 344.

Instead, it must be excluded that the approval of a mere procedural motion, which sometimes has been used in the British practice, could comply with the substantive requirements of a full parliamentary approval.

Before the Cabinet Manual there had been substantive votes prior to the decision to use British troops only on two occasions, namely in the conflict in Korea in 1950 and in the conflict in Iraq in 2003. In the latter case, Prime Minister Blair had allowed the House of Commons to express its view with a substantive vote just before the beginning of hostilities. The decision to involve the Parliament was mainly due to the opposition expressed by the public opinion with respect to a military intervention that was very controversial both in terms of its political reasons and with regard to its legal basis. However, in the case of the Falklands conflict of 1982 and in the case of the Kosovo conflict of 1998-1999 there was no vote of the House of Commons. During the Gulf War of 1991, the Parliament had indeed approved the deployment of the troops through a substantive vote, but only after hostilities had already begun a few days earlier, whereas before the military intervention the lower House had voted only procedural motions. In the case of the War in Afghanistan of 2001 there had been several debates in the House of Commons, but no vote for the prior authorization or the subsequent approval of sending troops. On the occasion of the armed intervention in Libya in 2011, although the Prime Minister had made his statement on March 18<sup>th</sup> (that is, the day before the beginning of hostilities), the subsequent parliamentary debate ended with the approval of a substantive motion to support the military action only on March 21<sup>st</sup>, i.e. after the military action of the United Kingdom had already begun.

In conclusion, before the Constitutional Convention now reported in paragraph 5.38 of the Cabinet Manual emerged, the British Prime Minister and his Government could take any significant military action without having to involve Parliament in advance.

A very similar argument can be made today for the United States, although the situation changes radically both with regard to the regulation of relationships between Government and Parliament and with regard to the forms in which the Congress can be involved in the decision to send military troops in conflict situations. The statutory authorization of the Congress is usually given using the same instrument that was formerly used for the approval of the declaration of war, i.e. the *Joint Resolution*, which has the nature of *public law*. Moreover, the involvement of the Congress in the decision-making process is facilitated by the existence of specific procedures disciplined by the *War Powers Resolution* of 1973<sup>24</sup>. However, apart from these important differences, the nature of the

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<sup>24</sup> The WPR is a public law of 1973 which aimed to restore the constitutional balances deriving from the *war powers clause* (U.S. Const. Art. I, § 8, cl. 11) by strengthening the role of the Congress towards the prerogative of the Commander in Chief and, above all, by imposing the rule of the prior authorization of the Congress, derogable only in certain circumstances.

decision-making power of the President as *Commander in Chief*, with particular regard to the decision to start an armed conflict, is broadly equivalent to that of the British Premier and his Government. In this case as well, in fact, the application practice shows that the Executive can undertake a military action without prior authorization of Congress.

The issue of the presidential war powers and of the scope of the WPC was debated since the early years of the US Constitution effectiveness<sup>25</sup>. The first controversy broke out during the drafting of the Constitution, when the expression «make war» present in the first version of the WPC was replaced with the expression «declare war»<sup>26</sup>. Subsequently, George Washington's declaration of neutrality provided the opportunity for the so-called Helvidius-Pacificus Debate, in which Hamilton formulated the Vesting Clause Thesis.<sup>27</sup>

Then the “Quasi-War” with France proved, on the one hand, that hostilities could also be undertaken in the absence of a formal declaration of war, but also, on the other hand, that the involvement of the Congress was still necessary outside of the situations in which there was a need for urgent defense<sup>28</sup>. So, even in case of military conflicts limited, partial or otherwise not qualifiable as war in the formal sense, Congress seemed then to boast a power of prior authorization, so much so that the quasi-war with France was preceded by two acts of prior authorization of the Congress, the *Protection of the Commerce and Coasts of the United States Act* of May 28<sup>th</sup>, 1798 and the *Protection of the Commerce of the United States Act* of July 9<sup>th</sup>, 1798.

This interpretation seems to be confirmed by the content of the famous ruling *Bas v. Tingy* of 1800, which in fact postulates the existence of a wide power of approval of the Congress, especially in the case of undeclared wars.<sup>29</sup>

<sup>25</sup> The literature on the matter is vast. See, for example, J.J. Abt, *Who Has the Right to Make War? The Constitutional Crisis* (1970); J.K. Javits, *Who Makes War: The President Versus Congress* (1973); E. Keynes, *Undeclared War*, *supra* note 8; J.F. Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War* (1992). See also D.J. Barron & M.S. Lederman, “The Commander in Chief at the Lowest EBB: Framing the Problem, Doctrine, and Original Understanding” (2008) 121 HARVARD LAW REVIEW 689.

<sup>26</sup> See M. Farrand (edited by), *The Records of the Federal Convention*, 314-319 (1911).

<sup>27</sup> See M.J. Frisch (edited by), *The Pacificus-Helvidius Debate. Toward the Completion of the American Founding* (2007). Hamilton proposed on that occasion a broad interpretation of the *Vesting Clause* relating to the Executive opposed to a strict interpretation of the *Vesting Clause* relating to the Legislative, conceiving the former as a kind of residual clause. Considerations to which Madison replied promptly, stating that in the Constitution the Legislature has «an integral and preeminent part» of the powers to declare war, conclude peace and form alliances. Scholars are split in assessing the effectiveness of Madison's response. The weaknesses are highlighted, for example, by E.S. Corwin, *The President's Control*, *supra* note 7, at 28; A.M. Schlesinger (jr.), *The Imperial Presidency*, 20 (1973); A.D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins*, 114ff. (1976). A contrary opinion is expressed by L.W. Levy, *Original Intent and the Framers' Constitution*, 52 (1988); L. Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, 527 (1995).

<sup>28</sup> See A. DeConde, *The Quasi-War: Politics and Diplomacy of the Undeclared War with France, 1797-1801* (1966).

<sup>29</sup> *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800). In that ruling, the judge Bushrod Washington distinguished between declared - or *general*, or *perfect* - wars and *limited* or *imperfect* wars, recognizing to Congress the power to

However, the subsequent evolution of war powers went in the opposite direction. The formal war declarations of the United States have been eleven, referring to five conflicts (i.e.: the War against Britain in 1812, the War against Mexico in 1846, the War against Spain in 1898; the First World War and the Second World War), while the cases in which the United States has resorted to the use of military force in conflict situations are over two hundred.<sup>30</sup> In many of these cases, including the most recent, Congress was not involved in the decision-making process at the beginning of the conflict.

During the Civil War, the federal courts have repeatedly held that, if a military emergency occurs and Congress is not in session, the President has broad discretion in assessing the seriousness of the emergency and in taking, for defensive purposes, all the measures deemed necessary, regardless of the presence or absence of a formal declaration of war.<sup>31</sup> Clearly, however, outside of these defensive needs, the President has no authority to start a war on his own, be it declared or undeclared (as in the case of the Civil War, in which a formal declaration of war was precluded by the very nature of the conflict). Despite the criticism of a part of the American scholars, the picture that emerges from the reading of the most significant judicial opinions from that period seems to conform to the original intent of the constituents.

The fact remains that the interpretation given by President Lincoln, during the Civil War, to the constitutional function of Commander in Chief was crucial to determine the concrete implications in terms of application practice. Lincoln did not refuse to obey the laws of the Congress, but he strenuously defended the independence of the Executive in conducting war, exercising the role of Commander in Chief in an extraordinarily incisive way, and thus influencing the presidential conduct up until today.<sup>32</sup>

One century after the Civil War, the Vietnam War provided another important opportunity for the consolidation of the presidential power; it was indeed the first and most important external undeclared war in American history (the previous Korean War had in fact begun before the

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authorize the wars of the first type and to authorize and regulate those of the second type. So, as clarifies the *concurring opinion* of judge Chase, the power of the Congress is even greater in the field of undeclared wars. This has led the scholars to assert that the courts at that time attributed to Congress the authority to start a war; *see, e.g.*, Fisher Louis, *Presidential War Power* 274 (2004).

<sup>30</sup> See J.K. Elsea & M.C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, Report RL31133 of 18 April 2014.

<sup>31</sup> *The Parkhill*, 18 F. Cas. 1187, 1196-1197 (D.C. E.D. Pa. 1961) (No. 10, 755a); *The Hiawatha*, 12 F. Cas. 95 (D.C. S.D. N.Y. 1861) (No. 6, 451); *The Crenshaw*, 6 F. Cas. 803 (C.C. S.D. N.Y. 1861) (No. 3, 384); *The Amy Warwick*, 1 F. Cas. 815 (D.C. D. Mass. 1862) (No. 344); *The Prize Cases*, 68 U.S. (2 Black) 635 (1863); *Hanger v. Habbott*, 73 U.S. (6 Wall.) 532 (1868); *Ley v. Stewart*, 78 U.S. (11 Wall.) 244 (1871); *The Protector*, 79 U.S. (12 Wall.) 700 (1872); *Matthews v. McStea*, 91 U.S. 7, 9 (1875).

<sup>32</sup> See J. Yoo, "Lincoln at War" (2013) 38 VERMONT LAW REVIEW 10-11. For a defense of the constitutional legality of Lincoln's action, *see* D. Farber, *Lincoln's Constitution*, 194ff. (2003).

conclusion of the peace treaty with Japan in 1951, so President Truman had acted under the aegis of the war laws still in force). In the case of the Vietnam War, which took place in peacetime under Wilson's administration, the introduction of US armed forces in the conflict had still been preceded by an explicit authorization of Congress (the *Southeast Asia Resolution* or *Gulf of Tonkin Resolution* of 1964),<sup>33</sup> approved by a *joint resolution*, i.e. with the same authorization act of a legislative nature (*statutory authorization*) previously used to approve the declaration of war.

A clash between Congress and President took place in occasion of the (unauthorized) extension of hostilities to Cambodia and, later, because of the substantial rejection of President Nixon to order the immediate withdrawal of troops following the approval, in 1971, of a measure with which Congress explicitly revoked the previous authorization of 1964.<sup>34</sup>

The federal courts of appeal and even the US Supreme Court, despite some vain attempt by the district courts to intervene on this matter with merit pronouncements,<sup>35</sup> applied rather rigidly the «political question doctrine», so that even today the assessment of the events in question is controversial.<sup>36</sup>

The growing prominence of the US President in the decisions relating to the use of the armed forces remains effectively unchallenged even after 1973, the year in which the controversy related to the Vietnam War led Congress to enact the *War Powers Resolution* (WPR).<sup>37</sup> This federal public law, which had to be reapproved by a qualified majority to overcome the presidential veto opposed by Richard Nixon, aims to limit the President's power to introduce the US armed forces in situations of conflict, subjecting it to strict procedures of authorization, consultation and reporting to the advantage of the legislative branch. It expresses the principle for which, in the absence of precise national emergency, the President can decide to use the armed forces only after a declaration of war or a «specific statutory authorization». In the event that the President has ordered the

<sup>33</sup> PL 88-408, 78 Stat. 384 (1964).

<sup>34</sup> This was the *Foreign Military Sales Act Extension*, PL 91-672, 84 Stat. 2053 (1971).

<sup>35</sup> *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Calif. 1970), rev'd 464 F. 2d 178 (9th Cir. 1972); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D. N.Y.), rev'd 484 F. 2d 1307 (2nd Cir.), order stayed 414 U.S. 1321, cert. denied 416 U.S. 936 (1973).

<sup>36</sup> In explaining the presence of *nonjusticiable political questions* the federal judges have still left some useful interpretive trail. Some judgments have stated for example that the act of authorization of the Congress must be substantial and unequivocal, and that it cannot be implicitly inferred from the granting of budget appropriations or other forms of implicit approval. See to that effect *Mitchell v. Laird*, 488 F. 2d 611, 614, 615 (D.C. Cir. 1973). But, *contra*, see *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D. N.Y. 1972) e *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass.), aff'd 502 F. 2d 1158 (1st Cir. 1973). On the position of the Supreme Court and on the role of the Courts in deciding whether the President has overstepped his power in conducting warfare, see J. Lobel, "The Commander in Chief and the Courts" (2007) 37 PRESIDENTIAL STUDIES QUARTERLY 49; E. Timbers, "The Supreme Court and the President as Commander in Chief" (1986) 16 PRESIDENTIAL STUDIES QUARTERLY 224.

<sup>37</sup> PL 93-148, 87 Stat. 555 (1973).

deployment of troops without a declaration of war or a statutory authorization, Congress can order the immediate withdrawal of troops by approving a special *concurrent resolution*. Even if it is not possible to cite here the numerous issues concerning the interpretation and application of the WPR,<sup>38</sup> it is useful to recall that the main provisions of the law in question have been considered by many as damaging to the constitutional prerogatives of the Commander in Chief, the limitation of which could only descend from a special amendment to the US Constitution.<sup>39</sup> In addition the WPR, after having established in principle the need for a prior authorization of the Congress, provides a complex procedure that actually allows the President to act independently for 60 days (extendable to other 30 days in presence of certain requirements), without having obtained the aforementioned authorization.

As for the most significant aspect, concerning the decision to use military force, the WPR does not seem to have had any significant impact on the process of erosion of the original implications of the *War Powers Clause*. Overall, the joint resolutions for the authorization to use military force approved after the last formal declaration of war of the United States (1942) are seven. Of these seven, three are previous to the WPR of 1973 and four are subsequent. But since 1973 the US military interventions abroad have been many more than those authorized by the Congress, like what happened in the period from 1942 to 1973; moreover, among the four bicameral resolutions of authorization approved after the entry into force of the WPR, the first (in 1983) was subsequent to the deployment of the armed forces because it referred to the continuation of the mission in Lebanon decided by President Reagan in 1982 without a prior authorization of Congress. The three remaining resolutions approved in accordance with WPR, which actually contain a prior authorization to use force, concern the first conflict in Iraq (in 1991, under the administration of George H.W. Bush), the conflict in Afghanistan (in 2001, under the administration of George W. Bush) and the second conflict in Iraq (in 2003, again under the administration of George W. Bush)<sup>40</sup>. There were not, however, statutory authorizations in several other cases of military

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<sup>38</sup> The literature on the matter is vast. See, for example, P.M. Holt, *The War Powers Resolution: the Role of Congress in U.S. Armed Intervention* (1978); R.D. Clark et al., *The War Powers Resolution: Balance of War Powers in the Eighties* (1985); E.V. Rostow, *Once More unto the Breach*, *supra* note 15; R.F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991); V. Fuccillo, "I poteri di guerra negli Stati Uniti d'America" (1985) 1 *Nuovi studi politici* 57.

<sup>39</sup> As observed by Rostow, *supra* note 15, at 1-2, the WPR, in the opinion of its many detractors, is based on a misunderstanding of the constituents' intentions, as the rebalancing of powers it aims to restore actually has never failed.

<sup>40</sup> For an analysis of the expansive conception of the Commander in Chief Clause under the Bush administration, see D.G. Adler, "The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism" (2006) 36 *PRESIDENTIAL STUDIES QUARTERLY* 525.

interventions after 1973, such as those in Grenada, Panama, Sierra Leone, Somalia, Haiti, Kosovo, Libya and, most recently, against the so-called Islamic State in Syria and Iraq.

None of the attempts so far undertaken by the members of Congress to make judicially establish the supposed violation of the WPR and of the WPC has had until now a favorable outcome (suffice it to mention, among the recent cases, *Campbell v. Clinton* in 2000 or *Kucinich et al. v. Obama* in 2011).<sup>41</sup> This seems to prove that the WPR, despite having involved some important procedural consequences, has not substantially changed the attitude of the Government in relation to the decision to introduce the armed forces in situations of conflict, decision that the practice seems by now to configure as an autonomous choice of the Commander in Chief.

It is true that prior requests for statutory authorization have become more frequent after 2000 and that in 2013, with reference to the Syrian civil war and the US opposition to the government of Damascus, prior authorization of Congress was required in relation to a hypothetical armed intervention that would not have involved an actual invasion with ground troops.<sup>42</sup> Nevertheless, in 2014, with regard to the latest military intervention against the self-declared Islamic State, President Obama began the military action without involving Congress, considering it already authorized by the two previous statutory authorizations granted to his predecessor in 2001 (P.L. 107-40) and in 2002 (P.L. 107-243). Only on 11 February 2015, as hostilities persisted, he decided to require a specific authorization act of Congress, which, however, was never granted because of the irreconcilable disputes with the Republican majority as to the content of the measure to be taken<sup>43</sup>.

It can therefore be said that today the involvement of Congress in the decision to send the armed forces in conflict situations depends entirely on the discretion of the President. The need of the White House to obtain the coverage of the legislative branch is especially felt, for example, if the circumstances of the incipient armed intervention are such as to suggest: a significant number of deaths (as a result of sending ground troops); the long-term of the military commitment and its consequent economic burden; doubts of legitimacy under international law; the uncertainty of the

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<sup>41</sup> This is not true however for the case *Doe v. Bush*, 240 F. Supp. 2d 95 (D. Mass.), *aff'd* 322 F. 3d 109 (1<sup>st</sup> Cir. 2003). In fact, on that occasion there had been an explicit authorization of the Congress, as observed by Judge Lynch in the appeal.

<sup>42</sup> It was the request of «*Authorization for Use of United States Armed Forces in connection with the conflict in Syria*» sent by President Obama to the Speaker of the House of Representatives and to the President of the Senate in the form of draft legislation in August 2013. The procedure was later suspended because in the meantime, at the international level, a political settlement of the dispute on chemical weapons in Syria was defining, then ended with the resolution of the United Nations Security Council n. 2118 of September 27<sup>th</sup>, 2013 (S/RES/2118, 27 September 2013).

<sup>43</sup> For an analysis of the action of President Obama as Commander in Chief, see G.F. Ferrari, «Il rapporto tra Presidenza e Congresso durante la Presidenza Obama» (2016) 7 LO STATO 241.

final outcome. Hence the opportunity to obtain a formal authorization by the Congress for a political decision that could prove to be unpopular over time and that could be used by the opponents of the President during the election campaign.<sup>44</sup>

In conclusion, although it is not possible to explore here the many reasons, both legal-hermeneutical and political, that have gradually led to the expansion of the role of the Commander in Chief, it can nevertheless be held that the evolution process described above seems to have resulted in an actual system of war powers that is very far from the balanced design that American constituents had originally outlined.<sup>45</sup>

#### ***4. The Genesis of the New Constitutional Convention that Limits the Prerogative Power of the British Government to Send Troops in Conflict Situations to the Advantage of the Parliament.***

At the time of the *Framers*, in the Kingdom of Great Britain the declaration of war was (and still is, formally, in the United Kingdom) an exclusive prerogative of the Crown (therefore, nowadays, of the Government). But some forms of parliamentary control were established in time through constitutional conventions (long before the latest and most incisive Convention reported by par. 5.38 of the *Cabinet Manual*). Even Dicey recalls the convention under which it would be «highly unconstitutional» the declaration of war pronounced by the Crown or its ministers against the will of the House of Commons.<sup>46</sup>

It seems therefore not entirely acceptable the statement that «Under the Royal prerogative powers, the Government can declare war [...] without the backing or consent of Parliament», with which a report of the House of Lords of 2006 begins.<sup>47</sup> If it is true that, in the Kingdom of Great Britain and then in the United Kingdom, the declaration of war, as a *royal prerogative power*, has never required a formal authorization of the Parliament, it is however inexact to claim that the Crown and its ministers could decide the war without the substantial support of Parliament. It must however be added that, in practice, the will of the House of Commons regarding the declaration of war could be verified also in a very mild form, as indeed happened even during the Second

<sup>44</sup> See the study of the practice conducted by J. Nzelibe, “A Positive Theory of the War-Powers Constitution” (2006) 3 IOWA LAW REVIEW 993ff.

<sup>45</sup> B. Ackerman, “The New Separation of Powers” (2000) 3 HARVARD LAW REVIEW 633ff., leads the underlying reasons for the growing political and military supremacy of the President to the structure of the separation of powers in the US Constitution. In this regard, see also B. Ackerman, *The Decline and Fall of the American Republic* (2010).

<sup>46</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 421 (10th ed. 1959).

<sup>47</sup> HL, Select Committee on the Constitution, *Waging War: Parliament’s Role and Responsibility, Fifteenth Report of Session 2005-06*, 27 July 2006, at 5.

World War: «When the UK declared war against Germany in 1939 this was reported to the House in what Hansard of the day termed a “Prime Minister’s Announcement”. A motion was made prior to Neville Chamberlain’s announcement, but this was procedural and related to the manner in which certain emergency legislation was to be considered».<sup>48</sup>

That said, the power of the British Parliament to intervene in the decision to start an armed conflict has always depended on the discretionary decision of the Prime Minister and the Government, being executive prerogatives.

In recent years, the situation described so far changed radically. With the new millennium, in fact, the perception of the problem of the role played by national parliaments in the field of military actions has grown. It is no coincidence that in 2000 was established, on the initiative of the Swiss Confederation, the *Geneva Centre for the Democratic Control of Armed Forces (DCAF)*. The *policy papers* published by the DCAF have revealed the presence of a democratic deficit with regard to the decision to use military force precisely with reference to the marginalization of Parliaments in this decision-making field.<sup>49</sup>

Moreover, the beginning of the XXI Century was marked by the serious terrorist attacks carried out by Islamic extremists on American soil<sup>50</sup>, by the elaboration of the preventive war doctrine and, above all, by a new wave of military interventions, starting with the massive operations in Afghanistan (2001) and in Iraq (2003). The attention to the problem of the “parliamentarisation”

<sup>48</sup> P. Bowers, *Parliament and the use of force*, Library of the House of Commons, *Standard note* SN/IA/1218, 25 February 2003, at 5.

<sup>49</sup> See H. Born & H. Hänggi, *The “Double Democratic Deficit”: Parliamentary Accountability and the Use of Force under International Auspices* (2004); S. Dieterich et al., *Strengthening Parliamentary “War Powers” in Europe: Lessons from 25 National Parliaments*, DCAF, *Policy Paper* No. 27/2008.

<sup>50</sup> The problematic legal questions prompted by the war on terrorism have produced a lively debate over the original understanding of the President’s war powers. For recent contributions to the debate, see, e.g., B. Ackerman & O. Hathaway, “Limited War and the Constitution: Iraq and the Crisis of Presidential Legality” (2011) 109 MICH. L. REV. 447, 478-82; D.J. Barron & M.S. Lederman, “The Commander in Chief at the Lowest EBB: Framing the Problem, Doctrine, and Original Understanding” (2008) 121 HARV. L. REV. 689, 767-800; R.J. Delahunty & J. Yoo, “Making War” (2007) 93 CORNELL L. REV. 123, 138; S.M. Griffin, “The National Security Constitution and the Bush Administration” (2011) 120 YALE L.J. ONLINE 367. This debate reproduces the well-known dichotomy between congressionalists and presidentialists. For the former, see, e.g., L. Fisher, *Presidential War Power* 8-10 (2d ed. 2004); A.M. Schlesinger, Jr., *The Imperial Presidency* 3-5 (ed. 2004); for the latter, see, e.g., J. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, 96-100 (2005).

Moreover, the terrorist attack of 11 September 2001 has triggered, starting from the United States and then in all Western countries and international organizations, a season of “emergency legislation”. See, e.g., B. Ackerman, *Before the next Attack: Preserving Civil liberties in Age of Terrorism* (2006); J. Beckman, *Comparative legal approaches to Homeland Security and anti-terrorism* (2007); D. Cole, “Enemy Aliens” (2002) 54 STAN. L. REV. 953; V. Baldini, *Sicurezza e libertà nello Stato di diritto in trasformazione* (2004); A. Benazzo, *L'emergenza nel conflitto fra libertà e sicurezza* (2004); P. Bonetti, *Terrorismo, emergenza e costituzioni democratiche* (2006); J. Fitzpatrick, “Jurisdiction of Military Commissions and the Ambiguous War on Terrorism” (2002) 96 AM. J. INT. L. 345; D. Golose, “United States: The Bush administration’s “war on terrorism” in the Supreme Court” (2005) 3 INT. J. CONST. L. 128.

of the so-called undeclared wars has therefore grown both among qualified observers and in the public opinion.

This historical context has undoubtedly favored the enhancement of the Parliament's role in the decision-making processes in question. Thus, in the UK, the *Cabinet Manual* of 2011 recognized the existence of a new convention that, at least in the light of its first practical application (the *Syria vote* of 2013 and the *ISIL vote* of 2014), seems to have imposed the rule, albeit not "justiciable", of the prior involvement of the House of Commons in the decision-making process concerning the use of military force in conflict situations. So the *full debate* and the *substantive vote* of the lower House today seem to have become necessary steps to undertake any significant military action, with the exception of emergency cases<sup>51</sup>.

The difficult emergence of this new Convention deserves a more detailed report.

A first attempt to remedy the weakness of the British Parliament with regard to the exercise of the power to send troops in conflict situations goes back to January 1999, when, following the military operation *Desert Fox* of December 1998, the member of the House of Commons Tam Dalyell presented a *private members' bill* entitled «Bill to require the prior approval, by a simple majority of the House of Commons, of military action by United Kingdom forces against Iraq».<sup>52</sup>

The bill, which in any case had little chance of being approved, never reached the second reading because, as it was later clarified, the *Queen's consent* was denied.<sup>53</sup> Despite the failure of this parliamentary initiative, on the occasion of the intervention in Iraq in 2003 Prime Minister Tony Blair took the matter to the Parliament, thus allowing the House of Commons to vote a *substantive motion* before sending troops, fact that did not happen since the conflict in Korea in 1950. Although the vote had taken place only a few hours before the beginning of the mission and although the decision to involve the Parliament was imposed especially by reasons of political convenience, this event determined a turning point in the perception of the problem of the insufficient involvement of Parliament in the exercise of the prerogative in question.<sup>54</sup>

<sup>51</sup> See P. Lagassé, "Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control" (2017) 70 PARLIAMENTARY AFFAIRS 280-300; G. Phillipson, *Parliament's Role in the Use of Military Action after the Syria Vote*, presentation at The Constitution Unit, University College London (2014); J. Strong, "Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq" (2015) 17 BRITISH JOURNAL OF POLITICS AND INTERNATIONAL RELATIONS 604-622.

<sup>52</sup> *Hansard HC vol 324 cols 146-148*, 26 January 1999.

<sup>53</sup> See R. Booth, *Secret papers show extent of senior royals' veto over bills*, The Guardian, January 15, 2013, at 2; R. Booth, *Ministers accused of exploiting royal veto to block embarrassing legislation*, The Guardian, January 16, 2013, at 4. On the power of *Consent*, see R. Brazier, "Legislating about the Monarchy" (2007) 66 CAMBRIDGE LAW JOURNAL 95-97. See also HC, Political and Constitutional Reform Committee, *The impact of Queen's and Prince's Consent on the legislative process, Eleventh Report of Session 2013-14*, 26 March 2014.

<sup>54</sup> See N.D. White, "International law, the United Kingdom and decisions to deploy troops overseas" (2010) 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 814, 822.

After the intervention in Iraq, there was a multiplication of the requests to introduce the rule according to which the Parliament, each time it was possible, should have the opportunity to express itself in advance on the decision to use military force.

The first two major contributions to the reform path in the field of military actions are the reports offered by the *Select Committee on Public Administration* of the House of Commons in 2004 and by the *Select Committee on the Constitution* of the House of Lords in 2006, which agreed on the need to ensure, as far as possible, the prior vote of the Parliament.

The report of 16 March 2004 of the *Select Committee on Public Administration* of the House of Commons is significantly entitled «Taming the Prerogative: Strengthening Ministerial Accountability to Parliament». In this report, as regards military actions, it is observed: «Several witnesses considered the power to go to war to be the most significant of the prerogative powers. Despite recent experience of parliamentary involvement in decisions on military action, they believed Parliament's influence should be increased».<sup>55</sup>

Some of the witnesses mentioned in the report advocated a legislative regulation of the matter along the lines of what had happened in the United States with the approval of the *War Powers Act*, while others were rather favorable to the introduction of a more flexible instrument. The report also referred the proposal of draft bill suggested by the distinguished Professor Rodney Brazier and called for the introduction of a legislative solution in order to avoid that the decision to involve the Parliament was left to the Government's discretion.<sup>56</sup>

After two failed attempts in 2005 to supplant the executive's prerogative with a conditional statutory authority, in July 2006 the *Select Committee on the Constitution* of the House of Lords published a very rich report concerning, in particular, the question at issue: «Waging War: Parliament's Role and Responsibility».<sup>57</sup> The document described the implications of military conflicts and reported in systematic order the different opinions and arguments both for and against a more significant involvement of Parliament in the decision to undertake an armed conflict. Overall, the following fundamental points emerged: the need to ensure a strengthening of the

<sup>55</sup> House of Commons, Select Committee on Public Administration, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, Fourth Report of Session 2003-04, 4 March 2004, at 9-10.

<sup>56</sup> «In particular, we believe that any decision to engage in armed conflict should be approved by Parliament, if not before military action then as soon as possible afterwards. In these most serious of cases, the decision whether or not to consult Parliament should never be dependent on the generosity or good will of government. A mere convention is not enough when lives are at stake. The increasing frequency of conflict in recent years is proof of the importance of ensuring that, when the country takes military action, Parliament supports the government in its decision» (HC, Select Committee on Public Administration, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, *supra* note 55, at 16-17).

<sup>57</sup> House of Lords, Select Committee on the Constitution, *Waging War: Parliament's Role and Responsibility*, 15<sup>th</sup> Report of Session 2005-2006, 27 July 2006.

Parliament's role in the decision-making process; the need to ensure an adequate level of information from the Government to the parliamentary bodies; the need to preserve the freedom of action of the Government in emergency situations. The *Select Committee on the Constitution* also assessed which could be the most appropriate way to introduce a strengthening of the role of the Parliament, considering two possible alternatives: the instrument of the law (hence a strict discipline) or the instrument of the parliamentary convention (more elastic and more adaptable to different situations). In its conclusions, the Committee recognized the need to change the size of the prerogative power relating to the deployment of troops overseas right through a convention that would guarantee the effective involvement of the Parliament (with the primacy of the House of Commons will) in the respective decision-making process. The *Select Committee on the Constitution* formulated a proposal of convention to introduce the principle of the prior approval of the House of Commons with respect to the Government's decision to send troops.<sup>58</sup>

In 2008, under the aegis of Brown Government, the Minister of Justice Jack Straw published a *white paper* entitled «The Governance of Britain – Draft Constitutional Renewal Bill», which dealt also with the question of the role of the Parliament in the decision to introduce the armed forces in conflict situations.<sup>59</sup>

The end of the legislature interrupted the reform process, but the debate was resumed immediately after the inconclusive election of 2010, which gave rise to a hung parliament and to the formation of the coalition Government between Liberal Democrats and Conservatives guided by the Prime Minister David Cameron.

The turning point came in 2011, with the approval of the final version of the Cabinet Manual, which recognized the existence of a Convention developed in Parliament about its involvement in the decision-making processes in matters of military actions.

The Cabinet Manual is a text containing the rules on the functioning of the Government (a «*guide to laws, conventions and rules on the operation of governments*»<sup>60</sup>), inspired by the analogous experience of New Zealand's Cabinet Manual. The Cabinet Manual was the focus of a broad discussion among those who claimed that it simply indicates and clarifies the existing conventions and those who, on the contrary, denounced the risk that the document could be potentially innovative of the

<sup>58</sup> *Id.*, at 41-43.

<sup>59</sup> See UK Ministry of Justice, *The Governance of Britain – Draft Constitutional Renewal Bill*, Command Paper 7342 (March 2008), Annex A; UK Ministry of Justice, *The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report*, 15 815 (October 2009); statement by Minister of Justice to the House of Commons on 20 July 2009 (section: The Government have already announced that it would ensure that the Commons will have a pivotal position in determining whether the United Kingdom goes to war, by means of a war powers resolution), Hansard HC vol 496 105 WS 820 July 2009.

<sup>60</sup> THE CABINET MANUAL. A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT, 1st ed. October 2011, www.gov.uk.

constitutional framework and feared that its adoption would end up leading to the advent of a written Constitution<sup>61</sup>. In the introductory notes of the Manual, Prime Minister Cameron clarifies that the Country boasts a «rich constitution developed through history and practice», with respect to which the Cabinet Manual makes a faithful recognition of the rules in force in order to provide a valid guide for the conduct of the Cabinet and of the ministers<sup>62</sup>. Also in the preface by Sir Gus O'Donnel it is noted that «the Cabinet Manual records rules and practices, but is not intended to be the source of any rule»<sup>63</sup>.

Its drafting started in 2009 by Prime Minister Gordon Brown and the first version in the form of *draft* was published in 2010, before the general election which then produced a *hung parliament*. In the draft of the Cabinet Manual in reality there was no mention of the new Convention, which instead is only mentioned in the final text of the first edition. The introduction of the Convention in the final version of the Manual is due precisely to the pressure that the Parliament itself (especially through the *Political and Constitutional Reform Committee* of the House of Commons) was able to exert on Cameron Government.<sup>64</sup>

In particular, the sections 5.36, 5.37 and 5.38 of the Manual, that deal with the military action, point out that since the Second World War the Government has followed the practice of informing the House of Commons about any significant military action through a declaration made before or after its beginning, declaration in some cases followed by a debate on a motion.

The Manual, however, notes (in paragraph 5.37) that in the two most recent examples of military actions, concerning Iraq and Libya, a «*substantive debate*» was held in Parliament which anticipated the decision of the intervention. In particular, with regard to the intervention in Libya, before the military action (started on March 19<sup>th</sup>) the Prime Minister made a statement on 18<sup>th</sup> March 2011 which was followed by a Government motion discussed in Parliament on March 21<sup>st</sup> and then approved by a vote («[the House] supports Her Majesty's Government [...] in the taking of all necessary measures to protect civilians and civilian populated areas»)<sup>65</sup>. Moving from these two precedents the Manual notes (in paragraph 5.38) the existence of a Convention developed in

<sup>61</sup> See G. Caravale, «England does not love coalitions? Referendum, elezioni e bilancio del primo anno di governo di coalizione nel Regno Unito» (2011) 10 FEDERALISMI.IT 16-20.

<sup>62</sup> THE CABINET MANUAL. A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT, at iii, www.gov.uk.

<sup>63</sup> THE CABINET MANUAL. A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT, at iv, www.gov.uk.

<sup>64</sup> House of Commons, Political and Constitutional Reform Committee, *Constitutional implications of the Cabinet Manual, Sixth Report of Session 2010-2011*, 29 March 2011, at 19-20.

<sup>65</sup> THE CABINET MANUAL. A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT, 1st ed. October 2011, at 44, www.gov.uk.

Parliament, according to which the House of Commons should have the opportunity to discuss in advance the question of sending troops, with the exception of the emergency situations.<sup>66</sup>

The Cabinet Manual wording is ambiguous, because it speaks only of a prior *debate* but not necessarily of a prior *vote* (actually, in the case of Libya, the vote on the motion had taken place on March 21<sup>st</sup>, two days after the start of hostilities). Nevertheless, it seems that it must be recognized that, unless there is an emergency situation, the House of Commons should be able not only to debate on a military action, but also to express itself by a vote before the military action takes place. The first application practice seems to confirm this interpretation of the Convention, at least if we consider what happened on the occasion of the *Syria vote* of 2013.

After the massacre in Ghouta on 21<sup>st</sup> August 2013, the President of the United States, the President of the French Republic and the British Prime Minister, believing that the responsibility of that tragic event should be attributed to the Syrian Government of Bashar al Assad, seemed to have the intention to initiate without delay a missile attack against Syrian strategic objectives, even without the support of the UN and the NATO. Following pressure from a group of members of Parliament,<sup>67</sup> on August 27<sup>th</sup> the Prime Minister had occasion to clarify his thinking, ensuring that there would be the involvement of the House of Commons. Premier Cameron, while giving prominence to the arguments in support of a military response against the Syrian regime, declared that a decision in this regard had not yet been taken and that the natural location to adequately discuss the issue could only be the Parliament.<sup>68</sup>

The Parliament was called up for the afternoon of August 29<sup>th</sup>, when the Prime Minister carried out his statement to the House of Commons, to which immediately followed the parliamentary debate. The discussion and the vote of the House of Commons concerned two opposing texts, that is, on the one hand, the *government motion*<sup>69</sup> filed on August 28<sup>th</sup> and supported by the

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<sup>66</sup> It seems useful to quote the full text of paragraph 5.38: «In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate» (THE CABINET MANUAL. A GUIDE TO LAWS, CONVENTIONS AND RULES ON THE OPERATION OF GOVERNMENT, at 44, www.gov.uk).

<sup>67</sup> On August 26<sup>th</sup>, 74 Members of Parliament from different political extraction signed an *Early Day Motion* to claim the power of Parliament to express its views on the opportunity of a UK military action; see *House of Commons, Early day motion* 450, 29 August 2013, www.parliament.uk.

<sup>68</sup> *Prime Minister's Office, Syria: transcript of PM's interview*, 27 August 2013, www.gov.uk.

<sup>69</sup> «Agrees that a strong humanitarian response is required from the international community and that this may, if necessary, require military action that is legal, proportionate and focused on saving lives by preventing and deterring further use of Syria's chemical weapons» (House of Commons, *Votes and Proceedings, Motion in the name of the Prime Minister relating to Syria and the Use of Chemical Weapons*, 28 August 2013, www.parliament.uk).

Conservative-Liberal coalition, and, on the other hand, the *manuscript amendment*<sup>70</sup> to the motion itself, presented by Labour in the morning of August 29<sup>th</sup>.

The differences between the text of the motion and the amendment were greatly reduced from the information that the Prime Minister made during his oral intervention, with the clear intention to minimize the distances between the different political positions and thus to promote the greater convergence of the House of Commons on the government motion. For these reasons, during the debate Cameron guaranteed that, even in the event of approval of the government motion, the military action would be initiated only after the acquisition of the results of the investigations ordered by the UN; he also assured that, in any case, any decision to start a military action would not be taken except after a new vote of the House of Commons.<sup>71</sup>

Despite the efforts of the Prime Minister, the political differences remained intact. The outcome of the vote was the rejection both of the *opposition amendment* and of the *government motion*. Unperturbed by the serious defeat, Prime Minister Cameron declared that he would certainly have respected the will of the Parliament: «I strongly believe in the need for a tough response to the use of chemical weapons but I also believe in respecting the will of this House of Commons [...]. It is clear to me that the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that and the Government will act accordingly».<sup>72</sup> In the following days, the Prime Minister and his Government gave faithfully implementation to the decision taken by the House of Commons, confirming unequivocally that the Government considered itself bound by the expression of will of the Parliament.<sup>73</sup> The possibility of a military action against Syria was later definitively set aside even by the United States and France, thanks to a solution reached through the diplomatic channel and sealed in the Resolution of the United Nations Security Council n. 2118 of 27<sup>th</sup> September 2013.<sup>74</sup>

In the case of the intervention in Iraq in September 2014, the Parliament was instead called to approve the use of the armed forces of the United Kingdom as part of a broad coalition founded

<sup>70</sup> The amendment to the motion presented by the opposition aimed to postpone the military action of the United Kingdom, subjecting it to a number of strict conditions; see House of Commons, *Votes and Proceedings, Manuscript amendment (Motion No. 2)*, 29 August 2013, [www.parliament.uk](http://www.parliament.uk).

<sup>71</sup> The Prime Minister declared: «If Members agree to the motion I have set down, no action can be taken until we have heard from the UN weapons inspectors, until there has been further action at the United Nations and until there is another vote in this House. Those are the conditions that we—the British Government, the British Parliament—are setting and it is absolutely right that we do so» (House of Commons, *Official Report, Parliamentary Debates (Hansard), Thursday 29 August 2013, Vol. 566 No 40, Column 1428*).

<sup>72</sup> See R. Winnett, *Syria crisis. No to war, blow to Cameron*, August 29, 2013, [www.telegraph.co.uk](http://www.telegraph.co.uk).

<sup>73</sup> «[The] government had accepted the clear view of the House against British military action [...]» (*Prime Minister's Office, Prime Minister's phone call with President Obama*, August 30, 2013, [www.gov.uk](http://www.gov.uk)). See also *Prime Minister's Office, Press briefing: morning 2 September 2013*, September 2, 2013, [www.gov.uk](http://www.gov.uk).

<sup>74</sup> S/RES/2118, 27 September 2013, [www.un.org](http://www.un.org).

to counter the ISIL expansion in Iraq and Syria. This time the House of Commons approved by a large majority the motion presented by the Prime Minister.<sup>75</sup> The Premier's decision to obtain the prior approval of Parliament was nevertheless very significant because the waiting for parliamentary authorization resulted in the exclusion of the United Kingdom from the first phase of the military operations of the anti-ISIL coalition, initiated independently by France and the United States.

In the end, if the described evolution process was confirmed also in the future<sup>76</sup>, we would be faced with a matter of primary constitutional significance in at least three respects.

First, the new conventional rule might lead to a profound transformation of the essential characteristics of one of the most important prerogative powers of the Executive, to the point that even today it is reasonable to wonder whether it still retains the characteristics of a discretionary executive power. However, we must remember that the *Constitution Committee* of the House of Lords, in the report of 24<sup>th</sup> July 2013 entitled «Constitutional arrangements for the use of armed forces», continues to affirm that the power to deploy the armed forces remains a royal prerogative power, «exercised in practice by the Prime Minister and the Cabinet».<sup>77</sup> Although the report in question is preceding to the two cases of practical application in which the principle of the prior vote of the House of Commons with respect to military actions has found wide success, the content of the document nevertheless requires to evaluate very carefully the possible constitutional implications of the innovation at issue. This consideration is strengthened by the latest report of the *Political and Constitutional Reform Committee* of the House of Commons, entitled «Parliament's role in conflict decisions: a way forward». The report, which dates back to 27<sup>th</sup> March 2014 and therefore after the Syria vote, reiterates clearly that the power to send troops is a prerogative power exercised conventionally by the Prime Minister.<sup>78</sup>

<sup>75</sup> HC, *Votes and Proceedings, Motion in the name of the Prime Minister relating to Iraq: Coalition against ISIL*, 26 September 2014, [www.parliament.uk](http://www.parliament.uk).

<sup>76</sup> In February 2015 the defence secretary Michael Fallon acknowledged that the convention is a «well established convention»; see C. Mills, *Parliamentary Approval for Military Action*, House of Commons Library, Briefing Paper 7166, 1 (2015), at 30-32.

<sup>77</sup> HL, *Constitution Committee, Constitutional arrangements for the use of armed forces, Second Report of Session 2013-14*, 24 July 2013, at 5. For a comment on this report, see G. Caravale, «Debolezza dei partiti tradizionali e nuovo vigore del Parlamento» (2013) 2 NOMOS 3-4.

<sup>78</sup> «The legal authority to commit armed forces to conflict abroad is provided by a prerogative power exercised by Ministers (and conventionally by the Prime Minister) on behalf of the Sovereign. There is no statutory requirement to involve Parliament in the use of this power, but in recent years a convention has developed that the House of Commons should have the opportunity to hold a debate on conflict decisions» (HC, *Political and Constitutional Reform Committee, Parliament's role in conflict decisions: a way forward, Twelfth Report of Session 2013-14*, 27 March 2014, at 4-5). The report also stresses the need to clarify, through a timely parliamentary resolution, the procedure that the Government should follow to get the approval of the House of Commons, while with regard to the long-term it advocates a legislative amendment aimed at ensuring a stronger role of the Parliament.

From another standpoint, the Convention in question could have a significant impact on the functioning of the parliamentary form of government. It is known that the current dynamics of the British system of government, in the presence of a coalition government and of a hung Parliament, have undermined the premiership model which was established under the permanent dominion of the single party Governments.

Under a third profile, lastly, in the UK it seems to have been temporarily reconstituted the balance of war powers that had failed, in the second half of the twentieth century, with the metamorphosis of the wars and the disuse of the declaration of war. In fact, the described Convention seems to have restored - at least for now - the centrality of the Parliament in a matter dominated for too long, here as in the United States, by the executive decision-making supremacy. The prior approval vote of the Parliament, when the factual circumstances make it possible, not only responds to the obvious needs of pluralist democracy and of transparency, but it also allows a greater and more widespread control both on the legal basis of an armed intervention and on its political opportunity.

##### ***5. The Possible Influence of the Evolution of UK Constitutional War Powers on the Interpretation of War Powers in the US Constitution.***

In conclusion, the question is: could the evolution of the constitutional war powers in the United Kingdom influence the debate on the interpretation of the war powers in the US Constitution, in the sense of suggesting a reconsideration of the Congress role?

On this point three arguments can be developed, which seem to lead to an affirmative answer.

The first argument is connected to the fact that the US Constitution was born from the European doctrines of separation of powers and from the observation of the English constitutional tradition. Both the American and the English traditions, although in a different manner, have evolved on parallel lines and have contributed to stabilize over time the principles and values of Western constitutionalism. The British model represented a fundamental reference point for the American constituents, especially with reference to the powers of the Executive in matters of defense and foreign affairs. Prominent scholars have affirmed that, in relation to the prerogative powers of the Executive, the figure of the President of the United States is largely comparable to that of the English monarch.<sup>79</sup> Alexander Hamilton himself, describing in “The Federalist” the powers of the Commander in Chief, makes explicit reference to the military prerogatives of the British Monarch in the eighteenth century, except for the power to declare war, that the US Constitution gives

<sup>79</sup> See, e.g., E.S. Corwin, *The President: Office and Powers, 1787-1957*, at 14 (1957).

instead to Congress.<sup>80</sup> So for a long time, and until the beginning of the new millennium, the discretionary powers of the American President and of the British Prime Minister in relation to the decision to use the armed force in contexts of conflict have been very similar.

The second argument refers to the *Living Constitution* theory, whereby prominent American scholars explain how the constitutional changes take place also through the interactions between political institutions and courts, or as a result of major changes within society.<sup>81</sup> From this point of view, does a request exist in the United States, maybe supported by public opinion, which is able to guide the development of the so-called Living Constitution?

With the new millennium the general perception of the problem of the role played by national Parliaments in the field of military actions has grown. The beginning of the XXI Century was marked by the serious terrorist attacks carried out on American soil, by the elaboration of the preventive war doctrine and by a new wave of military interventions, starting from the massive operations in Afghanistan and Iraq. The attention to the problem of Parliaments' involvement in these new ("undeclared") wars has therefore grown a lot both among qualified observers and in the public opinion. This historical context has undoubtedly favored the enhancement of the Parliament's role in the decision-making processes in question. The most evident example is the United Kingdom, with the new Convention reported by the Cabinet Manual of 2011. Some indicators show that the British public opinion endorses the fact that the Government does not decide autonomously the beginning of a conflict, but previously appeals to the Parliament. The phenomenon is not isolated and does not concern only the British parliamentary system. The transformation taking place in the United Kingdom is a response to a need felt in all the major European democracies, namely that to increase the role of Parliament in the decision to send the national armed forces in conflict situations. In Europe, the gradual establishment of this instance took place in various forms (in Germany through the jurisprudence of the Constitutional Court; in France with the Constitutional Law no. 2008-724; in Italy with ordinary laws in 1997 and in 2016; in the United Kingdom, precisely, with a new Convention of the Constitution). Therefore it is not unlikely that even in the United States a transformation may occur in the practical application of the *War Powers Resolution* of 1973 capable of leading to a progressive increase of the decision-making power of Congress (considering that there already have been, in recent years, some signals to that effect).

<sup>80</sup> A. Hamilton, *The Real Character of the Executive*, *The Federalist Papers*, n. 69, THE NEW YORK PACKET, 14 March 1788.

<sup>81</sup> See, e.g., B. Ackerman, *We the people, Volume 1: Foundations* (1991) and *Volume 2: Transformations*, (1998); B. Ackerman, "The Living Constitution" (2007) 120 HARVARD LAW REVIEW; J. M. Balkin, "Framework Originalism and the Living Constitution" (2009) 103 NORTHWESTERN UNIVERSITY LAW REVIEW.

The third argument concerns the role that comparative law has in the constitutional interpretation: to what extent can foreign law be a useful element of consideration in the interpretation of the matters in question?

In the western area, the progressive consolidation of a common cultural area, the connections in the historical and constitutional developments in the Euro-Atlantic area and the common bond of international standards on rights have facilitated the opening to foreign law and the comparison at all levels.<sup>82</sup> On an academic level, scholars widely study and use foreign law and comparative law. On a constitutional level, the use of comparison for the development of new constitutional texts is undoubtedly recognized.<sup>83</sup> On a legislative level, each legislator is free to deepen the regulations of other legal systems and to carry out comparative analysis; the comparison is indeed made easier by the introduction of ever closer relationships between Parliaments of different geopolitical areas and by the exchange of information.<sup>84</sup> Particularly interesting was the work of the *Law Commissions* established in different Anglo-Saxon Countries, as well as that of the *National Conference of State Legislatures* in the United States.<sup>85</sup> Recent studies have also revealed that the comparative method falls within the law interpretative techniques which are increasingly used by the courts and in particular by the Constitutional Courts.<sup>86</sup> Also the judges of the US Supreme Court, in several cases concerning quite relevant legal issues, have resorted to the comparison with other legal systems in order to reach the decision, citing foreign law in support of a judgment's motivation. However it must be highlighted that, while academic scholars have wide discretion in comparing legal systems and institutions from across very different cultural and legal traditions, those exercising public functions, such as legislators and judges, can make use of comparison only between legal systems sharing a common legal tradition. With reference to the American system, the comparison must therefore look at the Western legal systems, and, among these, at the common law systems, first of all precisely the United Kingdom.

For all the mentioned reasons, it seems possible to argue that the strengthening of Parliament's role in the decision to send the national armed forces in conflict situations, which is taking place in Europe and in particular in the UK, can act as a key to dissolve the unsolved problems concerning the interpretation of the Commander in Chief Clause and of the War Powers Clause.

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<sup>82</sup> See G. De Vergottini, "Tradizioni costituzionali e vincoli alla comparazione" (2015) 4 DIRITTO PUBBLICO COMPARATO ED EUROPEO 953-986.

<sup>83</sup> According to A. Weber, *Europäische Verfassungsvergleichung*, 6ff. (2010), the comparison is an indispensable element of the constituent power.

<sup>84</sup> See De Vergottini, *supra* note 82.

<sup>85</sup> See L. Scaffardi & E. Weston, "The Use of Comparative Law in the Legislative Process at Westminster", in *Comparative Law in Legislative Drafting. The Increasing Importance of Dialogue amongst Parliaments* (N. Lupo & L. Scaffardi eds., 2014).

<sup>86</sup> See De Vergottini, *supra* note 82.