

## Submission

### ***Inquiry into international armed conflict decision-making*** **Joint Standing Committee on Foreign Affairs, Defence, and Trade** **Parliament of Australia**

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## Summary

- Canada's military deployment votes offers lessons for Australia.
- The Canadian practice of holding optional votes has largely served the political interests of the government of the day.
- A statutory displacement of the royal prerogative must weigh greater parliamentary control against government flexibility and executive accountability.
- A constitutional convention to consult Parliament is difficult to cement and can be diluted by a determined executive, as the convention in the United Kingdom shows.
- Military deployments should be accompanied by greater scrutiny of mission objectives, costs, and the legal foundations.

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This submission address three issues pertaining to parliamentary deployment votes. First, I will examine when these votes have been held in Canada and what rationale was given for when they were held or not held. Second, I will examine lessons learned from the Canadian practice of holding these votes. Third, I will outline the pros and cons of military deployment votes, drawing Canadian and British experiences, and discuss an additional mechanism to increase parliamentary scrutiny of military operations.

#### 1) Canadian military deployment votes, 2006-2022

Canadian governments have sought parliamentary support for select military deployments since 1939. When Canada entered the Second World War, Parliament was asked to approve legislation supporting a Canadian contribution before the King was advised to declare war on behalf of Canada, seven days after war had been declared for the United Kingdom. This vote was held to demonstrate Canada's autonomy from the United Kingdom and to promote national unity between English and French Canadians.

After the Second World War, military deployment votes were not held with any consistency. The Canadian government asserted its discretionary authority under the royal prerogative to deploy armed forces to Korea in 1950. Certain peace operations were brought before the House of Commons, however. A vote was held for Canada's participation in the Persian Gulf War, but it took place after units were already on route. Between 1993-2005, no military deployments votes were held, despite Canada deploying combat forces to Kosovo and Afghanistan.

The recent practice of holding regular military deployment votes began under the Conservative government of Prime Minister Stephen Harper. One of his first acts as Prime Minister was to bring a vote for a two-year extension of Canada's mission to Kandahar, Afghanistan before the Commons in 2006. However, since he was governing during a hung parliament, Prime Minister Harper noted that we would extend the mission by one year, regardless of the result. In the end, the mission was supported by the Commons, with the opposition Liberal Party splitting their votes for and against. Prime Minister Harper brought a further extension of the Kandahar mission before the Commons in 2008. In this case, the opposition Liberals stayed united and voted in support of the extension. Following the 2008 vote, parliamentary debate over Canada's combat mission in Afghanistan declined significantly, since both major parties had endorsed the mission.<sup>1</sup> A vote was held for Canada's contribution to the Libya campaign in 2011, garnering support from the two largest opposition parties. A vote was not held when Canada shifted its mission in Afghanistan to Kabul in 2011, a decision that was supported by the opposition Liberals.<sup>2</sup>

In August 2014, the Harper government deployed forces on an 'advise and assist' mission to Iraq for the battle against ISIS without holding a vote. The defence minister at the time, Jason Kenney, noted that the executive's prerogative to act without the Commons remained intact. When the government deployed fighter aircraft as part of the mission in October 2014, however, a vote was then held, since the mission now had a clear combat component. Under Prime Minister Justin Trudeau's Liberal government, a vote was held to withdraw Canada's fighter aircraft from the ISIS campaign in March 2016. The Trudeau government, though, did not hold votes for Canada's non-combat deployments to Latvia, Ukraine, and Mali.

The Harper government's rationale for holding military deployment votes focused on democratic legitimacy and the importance of multi-party support for combat operations. Yet the Harper government was prepared to deploy forces without consulting the Commons when missions involved training or advising. During the advise and assist mission in Iraq, however, this became controversial owing to the fact that Canadian forces were involved in a limited number of engagements. The Trudeau government has offered similar rationales when it held a vote.

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<sup>1</sup> Philippe Lagassé and Patrick A. Mello, "The unintended consequences of parliamentary involvement: Elite collusion and Afghanistan deployments in Canada and Germany," *British Journal of Politics and International Relations*, vol. 20, no. 1 (2018).

<sup>2</sup> For a discussion of these votes, see Norman Hillmer and Philippe Lagassé, "Parliament will decide: An interplay of principle and politics," *International Journal*, vol. 71, no. 2 (2016).

An analysis of all Canadian military deployment votes conducted by myself and Justin Massie examined each vote since 1939 and concluded that the risk associated with combat was the factor that was most likely to lead to a vote in the Commons. Other factors included a desire to share blame for the mission between the government and the Commons, with the executive laundering its responsibility through the legislature. The votes held to extend Canada's mission in Kandahar, Afghanistan, for instance, are best explained by an effort to launder responsibility through the legislature in an attempt to blur or dilute executive accountability.<sup>3</sup>

## 2) Lessons learned from Canada

Canada's approach to military deployment votes relies on the willingness of the executive to consult parliamentarians. Although there have been efforts to place the power to deploy the military outside of North America on a statutory footing, each attempt has failed. Nor can Canada be said to have developed a constitutional convention such that the Commons must be consulted when the executive wishes to send forces aboard. There are too many precedents demonstrating that the government retains full discretion in this area and there is no clear agreement amongst Canada's political parties about the necessity of holding these votes. Instead, the most that can be said is that recent Canadian governments have made it a practice to hold these votes, particularly when a mission involves combat. Unlike a constitutional convention, this practice cannot be considered binding, and its parameters and rationales are fluid. The decision to hold a military deployment vote is therefore best understood as an act of political prudence when the government seeks legislative support for a controversial mission, or political gamesmanship when the executive seeks to divide the opposition or blur accountability for its decision.<sup>4</sup>

The Canadian experience demonstrates that parliamentary involvement in military deployment decisions may wax and wane in the absence of a statutory requirement to consult Parliament. A constitutional convention, moreover, takes a good deal of time to solidify, and as the British case demonstrates, convention can be undone or weakened relatively easily.<sup>5</sup> The Canadian practice of holding votes effectively relies on the political concerns of the government of the day. Votes will be held when the government believes it would benefit from holding them, but not when votes are not seen to have any impact on the governing party's political standing.

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<sup>3</sup> Philippe Lagassé and Justin Massie, "Parliamentarising War: Explaining Legislative Votes on Canadian Military Deployments," forthcoming paper.

<sup>4</sup> Philippe Lagassé, "Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control," *Parliamentary Affairs*, vol. 70, no. 2 (2017).

<sup>5</sup> James Strong, "Did Theresa May kill the War Powers Convention? Comparing Parliamentary Debates on UK intervention in Syria in 2013 and 2018," *Parliamentary Affairs*, vol. 75, no. 2 (2022).

### 3) Pros and cons of military deployment votes

The Canadian and British experiences suggest that a statutory displacement of the royal prerogative is the only long-term means of guaranteeing that Parliament is consulted before the armed forces are deployed. Yet this approach comes with risks. A statutory framework would need to be broad enough to ensure that the executive can respond to crises, emergencies, and direct threats to Australia and the Australian national interest. If these considerations are not included in a statutory framework, the ability of the Australian government to defend the Commonwealth could be jeopardized, as would the government's capacity to advance Australian foreign policy objectives.

A statutory framework could require a vote after a certain period of time to allow the executive to act with dispatch. This approach would be similar to the American and French requirements to secure the approval of the legislature after a set period of time. However, as the American and French cases suggest, it is politically difficult for the legislature to exercise this power once forces have been committed. Indeed, in parliamentary systems, one could argue that withdrawing confidence in the government would be the proper course of action if the legislature believes that the executive has improperly deployed the military.

Australia could draw on the British experience and attempt to establish a constitutional convention requiring the government to consult Parliament. A constitutional convention has the advantage of being more flexible than a statutory framework. A convention preserves the adaptability and discretion of the royal prerogative, while establishing a constitutional expectation that the executive secure the support of the legislature, either before or shortly after a deployment has begun. The British experience, however, demonstrates that the contours of a constitutional convention in this area are difficult to establish and subject to redefinition and narrowing by the executive.<sup>6</sup> Likewise, the Canadian experience highlights that transforming a political prudent practice into a convention is not easy and can be undone by a government that is determined to preserve the executive's discretion.

The Canadian case further highlights problems with holding votes. Military deployment votes can be used to divide opposition parties and weaken accountability. They can be used by the government to launder the constitutional responsibility of ministers through the legislature, confusing voters about who is accountable for a military deployment. Indeed, this blurring of accountability can even occur when the legislature votes against a deployment. As the 2013 British vote on airstrikes against the Syrian regime demonstrates, a negative vote can mean that the government is prevented from acting, while no one is individually answerable for the legislature's decision not to act. In these cases, the responsibility for not acting cannot be ascribed to any one political actor, which reduces accountability for the decision.

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<sup>6</sup> Strong, "Did Theresa May kill the War Powers Convention?"

#### 4) Additional accountability measures

Whether the Australian Parliament is asked to vote on military deployments or not, the committee should consider additional accountability mechanisms as well. The government should be encouraged to table an overview of mission objections, rules of engagement, anticipated costs, and the legal basis for operations when the Australia Defence Force is deployed internationally. This information would provide for a more informed debate and would allow committees to assess whether the deployment accords with the original intent over time. A take note debate on the mission and this information should occur whether there is a vote or not. Having this information in hand would provide the houses of Parliament, or a delegated committee, with more tools to assess the mission's success, costs, and legal foundations.<sup>7</sup>

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<sup>7</sup> Philippe Lagassé, "Improving parliamentary scrutiny of defence," *Canadian Military Journal*, vol. 22, no. 2 (2022).