Abstract

Conventionally, the exercise of British foreign policy matters has been reserved for the executive. However, recent conflicts involving Britain suggest that this traditional position is undergoing a fundamental transformation in order to enhance democracy and accountability by augmenting the role of Parliament in conflict decisions. This revolution ultimately stems from the necessity to renew trust and confidence in Britain’s democratic institutions and to ensure that there is sufficient oversight and scrutiny of governmental decisions. The purpose of this analysis is to highlight that the present position in the United Kingdom regarding Parliament’s role in decisions to pursue military action is wholly unclear. By analysing the development of the legislature’s role and the emergence of a constitutional convention the current inadequacies will be exposed and various suggestions for reform will be offered.

Keywords: British Constitutional Law, the Royal Prerogative, Constitutional Conventions, Armed Forces, War Powers, Military Action, International Accountability

1. Introduction

How odd – perhaps bizarre – it is that the approval of both Houses of Parliament is required for pieces of technical, and often trivial, subordinate legislation, whereas it is not needed at all before men and women can be committed to the possibility of disfigurement or death.¹

Currently the deployment of British Armed Forces (HM Forces) to an armed conflict is certified by the Royal Prerogative, which is exercised by the executive on behalf of the Crown. These powers have evolved in the British Constitution over hundreds of years; however, the prerogative power for war making has survived predominantly unharmed into the twenty-first century.² In recent years the debate has been amplified due to conflicts in Iraq and Syria, which have highlighted the increasing role of the House of Commons in constraining the Government on major issues of

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¹ Rodney Brazier, Constitutional Reform (2nd edn, OUP 1999) 123.
foreign policy. Consequently, there are justifiable concerns that the balance between legislative and executive power over the armed forces may not be configured in such a way as to ensure the highest conceivable level of democracy, accountability and transparency in decision-making.\(^3\) Clearly, given the huge implications, it is critical that decisions to go to war be subjected to rigorous scrutiny and review.\(^4\) Unquestionably, when it comes to an issue that is of such fundamental importance to the nation, to the greatest extent possible approval should be sought from the people’s representatives in the Commons. The flow of power from British citizens to the Government should be balanced by the ability of Parliament to hold the Government to effective account.\(^5\) Consequently there is a growing feeling within the constitutional system that Parliament must have a role in deployment decisions.\(^6\) In Britain’s modern democracy it is now evident that resistance to the assertion of the role of Parliament is crumbling.\(^7\) However, it is apparent that this ‘democratisation’ of war could have far-reaching consequences. Therefore, it is vital that parliamentary involvement does not imperil the necessity to, above all, protect national interests. Admittedly, this issue is complex, with no rapid or straightforward solution. Clearly, there are strong differences of opinion amongst politicians and the public at large, thus a resolution must be approached cautiously and astutely. Nonetheless, this must not detract from the urgent need for clarity regarding the role of Parliament in decisions to commit British forces.

This analysis will critically examine the development of the relationship between the Government and the House of Commons in determining whether HM Forces should be deployed overseas. Its main objective is to convey that regardless of arguments in its favour, the unfettered use of the Royal Prerogative to go to war is no longer politically tolerable. It is clear that despite claims of an emerging constitutional convention, the current role of Parliament is unclear and clarification is urgently required. Different reformation proposals will be assessed in order to satisfy calls for democracy in war-powers (the power to declare war) while preserving the aptitude of the executive to take the country to war if this

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\(^4\) Nigel White, Democracy Goes to War: British Military Deployments under International Law (OUP 2009) 269.


\(^7\) HC Deb 15 May 2007, vol 460, col 512.
commitment is necessary. It will be recommended that a parliamentary resolution is preferable to allow Parliament’s role to become a more permanent fixture in the British Constitution.

2. The Conventional Position

The British Constitution is unusual due to its ‘uncodified’ nature. Unlike the vast majority of countries there is no single consolidated document portraying the balance between the divisions of the state and their legal powers and limits. The British Constitution has instead evolved over centuries and represents an accumulation of legislation, judicial precedent, treaties and conventions. A further historic source of the constitution is what some see as the ‘democratically unsatisfactory anomaly’ known as the Royal Prerogative. This chapter will discuss the conventional position regarding the decision to deploy the armed Forces by assessing the Royal Prerogative and the traditional role of Government and Parliament.

A. The Royal Prerogative

The Royal Prerogative is a notoriously difficult concept to define. Nevertheless, Dicey explains the term as ‘the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.’ However, despite complications in defining this term, the most perplexing characteristic is unquestionably that its exercise does not require the approval of Parliament.

9 The main prerogative powers include regulating the civil service, making treaties, declaring war, deploying the armed forces and granting pardons, see Lucinda Maer and Oonagh Gay, The Royal Prerogative (House of Commons Library, 2009) (SN/PC/0386) 4.
14 Ibid 6.
executive powers. The legal authority for conducting defence of the realm rests with the latter. This is said to be the most significant of the prerogative powers.

Under the Royal Prerogative, which derives from the Bill of Rights 1689, the Government on behalf of the Crown can make decisions pertaining to defence and the armed forces. This long-standing constitutional convention means that the executive has liberty of action in this field; Parliament has no formal, legally established role. The nature of the war prerogative ensures that the Government’s freedom to act is not constrained, which makes it possible, in theory, vicariously to pursue national interests. Consequently, for centuries, the executive has been able to exercise authority in the name of the Monarch without consulting the British population and their representatives.

The inherently undemocratic nature of the prerogative has led to it repeatedly being described by the judiciary as ‘the clanking of mediaeval chains of the ghosts of the past.’ The exercise of prerogative powers is inconsistent with Britain’s central constitutional values: parliamentary supremacy and the rule of law. Firstly, ‘while parliamentary approval is not generally needed before action is taken, ministers are responsible to Parliament for their policies and decisions.’ Secondly, decisions by the Government to use the armed forces are not reviewable by the courts and therefore bypass normal methods of democratic control. Consequently, there is an urgent need to re-evaluate the balance between the demands of democratic accountability in the modern era and the effective prosecution of war.

B. The Traditional Relationship between the Government and Parliament

Strictly speaking, the Government is accountable to Parliament. Every year, Parliament must vote either in favour of or against the level of defence expenditure, and every five years, it must renew the legal basis for the existence of the armed
forces and the system of military law through the passage of an Armed Forces Bill.\textsuperscript{23} At first glance, these measures satisfy the prerequisite set out in Article VI of the Bill of Rights, that ‘the raising or keeping of a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.’\textsuperscript{24} However, in practice, Parliament’s powers lack substance and effect. In theory prerogative power could allow the Government to send armed forces into conflict without parliamentary debate, or, pivotally, without their consent.\textsuperscript{25}

Nevertheless, the power to deploy the armed forces is not absolute. Despite the fact that there is no formal process for involving Parliament, it has always been the Government’s practice, unless requirements of secrecy or security dictate otherwise, to keep Parliament regularly informed of the existence and progress of overseas engagements.\textsuperscript{26} As Brazier observes: ‘Governments naturally encouraged Parliamentary reticence.’\textsuperscript{27} In fact, the Commons Library Parliamentary Information List indicates that over two-hundred statements or debates on defence matters have taken place in the House since December 1982.\textsuperscript{28} This ‘informative’ as opposed to ‘consultative’ nature is evident when analysing various historical precedents. The Second World War represents this traditional position whereby Parliament is kept informed but the Government controls the depth and presentation of information. When war against Germany was declared in 1939, Neville Chamberlain openly told the House that they were ‘not in possession of all the information which we have.’\textsuperscript{29} Thus, there were numerous debates and statements on the war but use of the Royal Prerogative remained distinctly unfettered and unquestioned.

The reality of applying the prerogative in foreign affairs is exhibited by the settlement of the Falklands in 1982.\textsuperscript{30} Margaret Thatcher, during a Commons discussion over the conflict, reaffirmed that ‘it is the inherent jurisdiction of the Government’ to reach these decisions.\textsuperscript{31} The leader of the opposition, Neil Kinnock, claimed ‘the House of Commons has the right to make a judgment.’\textsuperscript{32} However, Mrs Thatcher asserted that ‘the Government has this responsibility, will shoulder that responsibility before this house and defend their decision.’\textsuperscript{33} Thus, the Government confined Parliament’s involvement to fourteen statements and a further five statements.

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  \item\textsuperscript{24} The Bill of Rights 1689, art VI.
  \item\textsuperscript{26} ibid.
  \item\textsuperscript{27} Philip Towle, Going to War: British Debates from Wilberforce to Blair (Palgrave Macmillan 2009) 130.
  \item\textsuperscript{28} House of Commons Library, House of Commons Debates on Deployment of Armed Forces (SN/PC/3254).
  \item\textsuperscript{29} HC Deb 3 September 1939, vol 351, col 291.
  \item\textsuperscript{30} Nigel D White, ‘International Law, the United Kingdom and Decisions to Deploy Troops Overseas’ (2010) 59 ICLQ 814, 815.
  \item\textsuperscript{31} HC Deb 11 May 1982, vol 23, col 597.
  \item\textsuperscript{32} ibid.
  \item\textsuperscript{33} ibid col 598.
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adjournment debates before Argentinian surrender, yet none resulted in a hostile vote. In fact, subsequent instances reveal that there has been no parliamentary approval in: the Suez crisis; the Gulf War; the deployment of the RAF in Bosnia during the 1990s by the Major Government; the persistent air strikes against targets in Serbia and Kosovo by the Blair Government and the long campaign in Afghanistan. Therefore, it is clear that the use of the Royal Prerogative to take Britain to war was not challenged in any meaningful sense up to and including the Afghanistan Conflict in 2001 since there was ‘no vote on any matter of substance.’

Evidently, the manner in which the Commons oversees governmental decisions can vary, either by the involvement of select committees, parliamentary questions and debates (in both Houses), or, on some occasions, a vote. But the Government, in exercising its own political judgment, decides the extent of Parliament’s involvement; its course of action is not dictated by legal requirements. Thus, it is at the discretion of the Prime Minister to seek approval for his policy in an international crisis should he desire. Each individual case is different and therefore there are variations concerning whether Parliament should be involved or not. Nevertheless, to many, this concept of the Prime Minister and the Cabinet taking the country to ‘war’ on the basis of powers inherited from medieval monarchs is criticised. The lack of parliamentary involvement in these instances may be accurately identified as an absence of democratic accountability over the most important decision a government can make.

3. Changing Expectations

There are several imperative factors, which over recent decades have influenced the debate over Parliament’s role in war-powers. As a result, the democratically elected legislature and the country as a whole are increasingly unwilling to leave use-of-force decisions solely to the executive. This chapter analyses the changing nature of
military operations, the increasing role of international accountability and the effect these changes have had on the developing role of Parliament in scrutinising governmental decisions.

A. The Changing Nature of Military Operations

In recent years there has been a crucial change in the nature of conflict in which Britain is involved and it is apparent that a new kind of ‘war’ is developing, primarily since the majority of recent conflicts concern either ‘failed states’ or anti-terrorism operations. Straightforward invasions have become less common, the last being the invasion of Iraq in 2003. Nigel Inkster observes: ‘inter-state warfare has rather gone out of fashion (...) however, we are seeing a lot of internal intra-state disputes.’ Consequently, there is increasing difficulty in drawing clear distinctions between military and diplomatic engagements in foreign crises. This has been further complicated by the emergence of new, unconventional security threats such as international terrorism.

Additionally, the role of the media in shaping public opinion as regards waging war is now impacting upon the advancement of conflicts. An emerging characteristic of this ‘new war’ is that the media now more powerfully mediates the relationship between citizens and their political institutions. Shaw suggests that the nature of Western warfare changed after the Vietnam War since it became clear that it is necessary to legitimise a military intervention in the eyes of the public in order for it to succeed. However, contrary to Shaw’s claim, it can be observed that most people in Britain have become more sensitive to civilian and military casualties, not least because of the ‘ubiquity of television cameras which can show the destructive

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41 House of Lords Constitution Committee, Constitutional Arrangements for the Use of Armed Force (HL Paper 46, 24 July 2013) 5


43 House of Lords Constitution Committee, Constitutional Arrangements for the Use of Armed Force (HL Paper 46, 24 July 2013) 16

44 The techniques of warfare have also evolved particularly in relation to technological enhancement in surveillance, intelligence-gathering, and cyber-warfare. See House of Lords Constitution Committee, Constitutional Arrangements for the Use of Armed Force (HL Paper 46, 24 July 2013) 16


effect of war.\footnote{Philip Towle, \textit{Going to War: British Debates from Wilberforce to Blair} (Palgrave Macmillan 2009) 130.} People are able more intimately to follow British involvement in conflict and observe the realities of life at war for soldiers and the effect on enemy territory. The international community justifiably has an extremely low tolerance for casualties in military missions that are essentially humanitarian – that is, for missions in which clear national interests do not appear to be at stake.\footnote{John Mueller, ‘Force, Legitimacy, Success, and Iraq’ in D Armstrong, T Farrell and B Maiguashca (eds), \textit{Force and Legitimacy in World Politics} (CUP 2005) 116.} This is evident in considering the differences in support for ‘wars of necessity’ and ‘wars of choice’.\footnote{For an in depth discussion of these terms see House of Lords Select Committee on the Constitution, \textit{Waging War: Parliament’s Role and Responsibility} (HL Paper 235 – I, 27 July 2006) 12 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.}

Furthermore, the role of relatives of soldiers who have been killed has been heightened since many have taken to questioning publicly the lawfulness of past deployments. Baroness Hale concluded that this is not a significant factor in enhancing the role of Parliament because ‘the lawfulness of war is an issue between states, not between individuals or between individuals and the state.’\footnote{R (Gentle) v The Prime Minister [2008] UKHL 20, [2008] 1 AC 1356 [57] (Baroness Hale).} Nevertheless, these declarations can affect the public’s view of a decision to wage war and reduce its credibility.\footnote{For example, this was evident in the Iraq War in 2003 since many believed that countless lives were lost unnecessarily. See Philip Towle, \textit{Going to War: British Debates from Wilberforce to Blair} (Palgrave Macmillan 2009) 165.} In recent years the need for involvement in humanitarian concerns and human rights abuses has emerged as a standard justification for overseas intervention. But while these incidences may be genuine, the media’s reporting tends to be ‘unbalanced, often misleading and occasionally fabricated.’\footnote{Patrick Cockburn, ‘The Nature of War Has Changed, Which is Bleak News for Syria’s Minorities’ \textit{The Independent} (London, 1 March 2014) <www.independent.co.uk/voices/comment/the-nature-of-war-has-changed-which-is-bleak-news-for-syrias-minorities-9162694.html> accessed 11 November 2014.}

Moreover, due to the legal implications of declaring war, and notwithstanding the questionable legality of such a move in the first place, most states have moved away from using the term ‘war’ and prefer instead terms like ‘armed conflict’ and ‘hostilities’.\footnote{Claire Taylor and Richard Kelly, \textit{Parliamentary Approval for Deploying the Armed Forces: An Introduction to the Issues} (House of Commons Library, Research Paper 08/88, December 2008) 15.} Though ‘war’ is still used colloquially and many conflicts are described as ‘wars’ for the sake of convenience,\footnote{Useful distinctions of war can be found at Yoram Dinstein, \textit{War, Aggression and Self-Defence} (3rd edn, CUP 2001) 3; Paul Bowers, \textit{Parliament and the Use of Force} (The House of Commons Library, SN/IA/1218, 25 February 2003) 5.} war, by definition, is between two countries. Ultimately, recent conflicts are less interstate and more intrastate. The UK has made no declaration of war since Siam in 1942, and it is unlikely that it will ever make another.\footnote{House of Lords Select Committee on the Constitution, \textit{Waging War: Parliament’s Role and Responsibility} (HL Paper 235 – I, 27 July 2006) 7 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 17 November 2015.} Developments in international law since
1945 may well have made the declaration of war redundant as a recognised international legal mechanism.

Clearly, there are difficulties regarding where the line should be drawn with parliamentary scrutiny. This was demonstrated in the recent debate over UK military involvement in Syria.\(^57\) The changing nature of war has thus brought many challenges for the relationship between Parliament and Government since recent conflicts have been inherently controversial and complicated.

### B. Changing International Accountability

Since British constitutional law has provided little by way of legal constraint on the prerogative powers of the Government to deploy military forces, the focus has been on international law to restrict executive decisions and therefore hold them to account.\(^58\) Pivotal, the majority of recent interventions involving the commitment of the British armed forces have been in collaboration with other states or as part of the UK’s commitment to multi-national institutions such as the UN, EU, and NATO.\(^59\)

International law regulates interstate relations to the benefit of all states and provides a ‘discourse on the legitimacy of using force.’\(^60\) However, methods of enforcement are somewhat limited, because Britain possesses the power to veto the proposals of the most effective international organ – the United Nations Security Council (UNSC).\(^61\) Interestingly, the use of force was prohibited under Article 2(4) of the UN Charter\(^62\) due to the millions of lives lost during the World Wars of the twentieth century. The only exceptions permitted are the use of force in self-defence\(^63\) and when authorized by the UNSC for the purposes of protecting

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57 The conflict in Syria will be discussed in depth later in this article.
62 ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ See Charter of the United Nations (24 October 1945) art 2(4).
63 Article 51 of the UN Charter recognizes ‘the inherent right of individual or collective self-defence.’ The right of self-defence is subject to the two key principles of customary law on the use of force: necessity and proportionality. See Charter of the United Nations, art 51.
international peace and security. There have been attempts by states in recent years to expand the right of self-defence to using force in response to terrorist attacks and anticipatory self-defence. However, these are in fact only attempts and therefore not considered to be international law.

At an individual level, states may unintentionally be driven by countervailing self-interests to violate international law – arguably the US-led war against Iraq is an example of this since many in the US and UK polities falsified the threat from Iraq’s weapons of mass destruction programmes. However, this war was undertaken not only in violation of international law but in defiance of global opinion. Never before in history had there been such outcry from across the world to stave off an impending war, but it was to no avail. America and Britain proceeded without UN authority and without any real threat, resulting in a violation of international law.

In October 2002, President George Bush warned the UN that failure to act against the Saddam Hussein regime would lead the organization ‘to betray its founding and prove irrelevant to the problems of our time.’ He severely criticized the UNSC for not ‘living up to its responsibilities.’ In doing so Mr Bush was clearly testing the power and application of international law. Sadly the realities of proceeding without UN authority became apparent in the late recognition that the UN was the only legitimate institution able to ‘broker a viable alternative to permanent military occupation.’ This disdain for international law demonstrated by using force without UNSC authorisation has galvanised international opposition to the US role in world affairs and has made it more difficult for the country to persuade other states to follow its lead.

Perhaps if the UK Government and the US had abided by international law initially the Iraq War would never have occurred. Richard Falk appropriately

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64 Chapter VII provides that the UNSC may authorise the use of force to protect or restore individual peace and security. See Charter of the United Nations, ch VII; David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (CUP 2007) 117.
66 ibid.
67 ibid 147.
69 ibid 3.
73 ibid 2.
75 The dreadful experience of the Vietnam War would also never have occurred if the US had revelled in international support. See Richard A Falk, *The Costs of War: International Law, the UN, and World Order after Iraq* (Routledge 2008) 3.
maintains that ‘contrary to popular belief, respecting the restraints of international law better serves the national interest’ of states.\textsuperscript{76} Evidently, one of the key lessons of the Iraq War has been the revalidation of the UN seal of approval and recognition of the legitimacy it provides to actions consistent with its charter and agreed upon by member states through its organs. By receiving a UN resolution, a government appeals to international law to bolster the legitimacy of its military interventions and provide justification to both the wider public and the international community of its decision to deploy troops. The government can proceed in the knowledge that it has international backing, which provides considerable support should decisions prove erroneous. This renewed appreciation for international advocacy and accountability has paved the way for meaningful reform between the British Government and the Commons. Britain has been forced to consider its domestic accountability mechanisms.

While international law has an influence on debates in British politics, it is not always a decisive factor in preventing the final decision to go to war. Critically, serious doubts over the legality of operations have not deterred past governments from making such decisions as in Suez or Iraq, nor have they ‘prevented Parliament from supporting, or at least not undermining those decisions.’\textsuperscript{77} There are current proposals for international legal advice to be put before Parliament during discussions over proposed interventions.\textsuperscript{78} It is therefore anticipated that Parliament will be better placed to challenge governmental actions. It is evident that Parliament is now less willing to go into an intervention without support from international bodies, in order to provide legitimacy and verify the legality of deployments. Therefore, participation in the international institutions created in the twentieth century has drawn attention to Britain’s national constitutional system and has arguably contributed to the assertion of the role of Parliament as a check on the executive’s military powers.\textsuperscript{79} Increased control of the executive, both at a national and international level,\textsuperscript{80} seems appropriate to hold the Government effectively to account in decisions which may ultimately result in the death of men and women. By using international law as a key reference point, it is apparent that Parliament is adopting a far more critical response to decisions to go to war.\textsuperscript{81}

\textsuperscript{76} ibid 17.
\textsuperscript{77} Nigel White, Democracy Goes to War: British Military Deployments under International Law (OUP 2009) 279.
\textsuperscript{81} Nigel D White, Democracy Goes to War: British Military Deployments under International Law (OUP 2009) 280.
C. The Changing Relationship between Government and Parliament

The relationship between Parliament and Government is fundamental to each political system. Philip Norton states: ‘Parliaments provide the means by which the measures and actions of government are debated and scrutinised on behalf of citizens,’ thus providing a system for the concerns of voters, whether as individuals or as groups, to be expressed. Therefore, in theory, the Prime Minister and the Cabinet have authority to decide upon military decisions, with accountability to Parliament through common techniques of oversight, as well as possessing ultimate control due to its ability to bring down a government by a vote of no confidence, and through monetary control. However, it is questionable whether these rules are sufficiently robust when it comes to decisions about military force. As a result, there are demands on Parliament to assert its authority fully over conflict decisions in Britain’s liberal democracy. Admittedly, constitutional theorists and parliamentarians have questioned the Royal Prerogative for many years, but the Syria vote, the Iraq War and subsequent arguments over the legality of military intervention are regarded as having contributed significantly to raising the political profile of the issue.

i. The Iraq War

In 2003 the Government entered ‘uncharted constitutional waters’ when it allowed three full-scale parliamentary debates resulting in a substantive vote, for the first time before an operation began. This vote on military engagement in Iraq represents a dynamic adjustment in Parliament’s role and the British Constitution. But what was different about the run-up to the Iraq War in comparison with other conflicts? Why did Mr Blair consent to giving the Commons a vote on the matter? Crucially, the conflict was different because there was no consensus about the validity of Western involvement, or even the legal justification for such a war. Unlike previous conflicts, the Iraq War was highly contentious. The Second World War, Korean War, Falklands War, and First Gulf War, as well as military action in places

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82 Philip Norton, Parliaments and Governments in Contemporary Western Europe, vol 1 (Routledge 2013) 1.
83 It is developed constitutional practice that in the event of a no confidence motion a government will resign. The issue of confidence motions will be discussed in section 6 of this paper. For further information see Richard Kelly, Confidence Motions (Parliament and Constitution Centre, House of Commons Library, 13 May 2013).
84 Changes have also been made in the Government’s institutional arrangements in order to create an internal accountability mechanism. The National Security Council was created in 2010 and reflects a cross-departmental approach in an attempt to build confidence in the Government’s decisions in the areas of security and defence. For more information see Joe Devanny and Josh Harris, The National Security Council: National Security at the Centre of Government (Institute for Government 2014) <www.instituteforgovernment.org.uk/sites/default/files/publications/NSC%20final%202.pdf> accessed 17 November 2015.
87 The outcome of the vote was 412 in favour of action and 149 against. See HC Deb 18 March 2003, vol 401, col 907.
such as Bosnia, Sierra Leone, Kosovo and even to an extent Northern Ireland, enjoyed a significant degree of parliamentary and public consensus about their necessity.\(^{88}\) The nation supported executive use of the Royal Prerogative and thus it was perfectly reasonable for the Prime Minister to make use of it. However, Mr Blair adopted an interventionist strategy and it can be argued that he acted purely on the basis of political expediency after success in Kosovo.\(^{89}\) According to Philip Towle: ‘The worst thing about Mr Blair’s missions—pretty-impossible is that they have become coated with a patina of national pride. They seek to blend past glories with present imperatives.’\(^{90}\)

Mr Blair acted on impulse and the philosophy that ‘it is better to intervene and try to make a difference than stay out and cope with the consequences at a later time.’\(^{91}\) While Mr Blair was not advocating removal of the Royal Prerogative, he was acknowledging demands for greater democratic involvement in war making. However it is clear that prime ministerial use of the prerogative depends on the nation trusting their leader to use it accurately and justly. Perhaps Mr Blair’s unprecedented vote on Iraq was a symptom of the national collapse in confidence in his regime.\(^{92}\) Fundamentally, parliamentary support for Iraq was clouded by uncertainty surrounding the adequacy of the intelligence information released to the Commons before the vote.\(^{93}\) At the time of submission of this paper the long-overdue Chilcot Commission\(^{94}\) is failing to publish its results.\(^{95}\) Undeniably, the Iraq War resulted in an immense loss of confidence in the executive since Parliament consented on the basis of false assertions\(^{96}\) that there were weapons of mass


\(^{89}\) For more information on the nature of the war in Kosovo see ibid 153-56.


\(^{93}\) A report by the Foreign Affairs Committee sought to establish whether accurate and complete information was presented to Parliament in the period leading up to the military action, particularly in respect of weapons of mass destruction. This issue of information released to Parliament will be discussed in greater depth in the concluding chapter of this paper. See House of Commons Foreign Affairs Committee, *The Decision to Go to War in Iraq* (HC 813–1, 3 July 2003) <www.globalsecurity.org/intell/library/reports/2003/iraq_uk-hc-813.pdf> accessed 17 November 2015; ‘The decision to go to war in Iraq’ *The Guardian* (London, 8 July 2003) <www.theguardian.com/media/2003/jul/08/Iraqandthemedia.politicsandiraq> accessed 17th January 2015.

\(^{94}\) The Chilcot Commission was set up in June 2009 to investigate the causes of and justifications for the Iraq War. See HC Deb 15 June 2009, vol 494, col 23.


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destruction present in Iraq. Parliament is now sceptical of the actions of the Government and is requiring more extensive evidence before sanctioning force.

The controversy over the invasion of Iraq, which perhaps more than anything has motivated calls for reform, demonstrates just how nationally divisive such decisions can be. A general consensus has emerged across the political spectrum that there is a desperate need for war-powers to be subject to greater parliamentary scrutiny.

ii. The Significance of the Vote on Syria

The decision to convene Parliament over Syria and its use of chemical weapons on 29 August 2013 represents a watershed moment for the broader debate on Parliament’s role in conflict situations. Prime-Minister David Cameron proposed that a ‘strong humanitarian response is required’ and that ‘this may, if necessary, require military action.’ This vote was the first time the long-established constitutional principle of the Prime Minister making the ultimate decision regarding waging war had been truly breached. Mr Cameron, whether deliberately or inadvertently, significantly strengthened the position of Parliament. However, the vote on Syria was different from the vote on Iraq in one key respect: Mr Blair treated the vote in 2003 as tantamount to a vote of no confidence in his leadership, whereas Mr Cameron made no suggestion that he would resign if he lacked the support to carry out his planned attack on the Assad regime.

Nonetheless, the House rejected the motion by 332 to 220. This victory in the House ‘represents a constitutional landmark’ because it was the first time that the Government had been defeated since the late eighteenth century and was publicly forced to reverse its policy. The Commons revealed that it ‘now has real teeth and that it is not afraid to use them.’ David Cameron displayed in the most

97 ibid.
100 ibid.
102 HC Deb 29 August 2013, vol 556, col 1547.
104 Claire Mills, Parliamentary Approval for Deploying the Armed Forces: An Update (House of Commons Library, SN05908, 13 October 2014) 9.
dramatic way that the legislature would make the ultimate decision, which represents a direct challenge to the Royal Prerogative. On losing he claimed that the Government had got the message that the House did not support military action and would ‘act accordingly.’ Whether one agrees with this decision and the outcome or not, the vote was a reassertion of parliamentary supremacy: a strong message to the executive that in the United Kingdom ultimate power resides with Parliament and not the Prime Minister.

4. Has a Constitutional Convention Emerged?

Subsequent to the above, it has been suggested that a constitutional convention has been created requiring prior parliamentary approval for any future military action, thus limiting the prerogative power. In theory, these ‘unwritten maxims of the constitution’ exist to regulate the conduct of those holding public office. Several well respected governing bodies, alongside the Government itself, have recognised the existence of conventions. However, conventions arise out of continued practice, and therefore it is never certain at what point the practice becomes, or ceases to be, a convention. As Aileen McHarg suggests, ‘conventions develop; they are not made.’ This chapter will examine the development of a ‘constitutional convention’. By analysing the evolution of Parliament’s role, it

106 HC Deb 29 August 2013, vol 556, col 1428.
becomes evident that the substance of the ‘convention’ is vague, suggesting that alternative reform measures may be more suitable in order to bring clarity.

A. The Emergence of a Constitutional Convention

It is useful at this point to apply Jennings’s tripartite test to establish if a convention exists. Firstly, what are the precedents?114 Next, did the actors in the precedents believe that they were bound by a rule?115 And finally, is there a reason for the rule?116 Applying this test, there is a clear ‘reason for the rule’. Gavin Philipson sums up this reason well: ‘To allow the Commons to perform its constitutional role as a check upon the executive, ensuring democratic scrutiny of a vitally important decision.’117 Marshall’s view of conventions as the ‘critical morality’, as opposed to the ‘positive morality’, of the constitution implies that it is the third part of Jennings’ test, which is the *sine qua non* of a convention.118 Therefore, as Jennings states ‘a single precedent with a good reason may be enough to establish the rule.’119 The simple fact is that constitutional actors have treated the vote in 2003 as the foundational precedent.

However, despite the well-established and accepted status120 of this test there are complications. The second criterion seems to imply as Jeremy Waldron proposes, that these are ‘rules that pull themselves up by their own bootstraps’ since ‘if they weren’t accepted by those they bind, they wouldn’t be rules at all.’121 It is arduous to argue that governmental players believe themselves to be completely bound by the rule. Therefore, a test which discusses the ‘precedents’ and the specific beliefs of the actors in those precedents is too narrow an enquiry. Notwithstanding this, it is difficult to see how it is possible for actors in the initial case to have considered themselves to be bound by a rule, which was not then existent.122 As a result, it is

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115 ibid.
116 ibid.
118 For a more detailed discussion of ‘positive morality’ and ‘critical morality,’ see Peter Russell, ‘Constitutional Conventions: The Rules and Forms of Political Accountability’ (1986) 36(2) University of Toronto Press 221, 223. The idea of conventions as the ‘critical morality’ of the constitution means they are conceived as ‘the rules that the political actors ought to feel obliged by, if they have considered the precedents and reasons correctly’. See TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 60.
120 This test has been accepted worldwide as discussed in the following article, with reference to the Canadian Supreme Court, see Peter Russell, ‘Constitutional Conventions: The Rules and Forms of Political Accountability’ (1986) 36(2) University of Toronto Press 221.
plausible to conclude that Jennings’ second principle is to be disregarded in relation to the first precedent.

Additionally, it appears confusion exists regarding what constitutes the birth of a constitutional convention. Malcolm Rifkind proposes that where a constitutional lawyer or theorist uses the word ‘convention’ he or she is using it in a ‘very careful, prescribed and detailed sense’, but when used by a politician in the middle of a crisis the term ‘does not necessarily (...) [have] precisely the same significance.’ 123 Therefore, perhaps these declarations of a newly established convention constitute a ‘premature conclusion’,124 especially since some key military decisions have been taken without ‘sufficient’ political oversight. In 2006 ministers took little interest in the placement of British forces in Helmand, a province in Afghanistan, and were not consulted when troops moved into northern areas, radically altering the nature of the operation.125 Perhaps the impact of the Iraq War on the subsequent development of Parliament’s role has been exaggerated.

However, it is puzzling, as recognised by many influential writers on the subject (for example, Dicey), that though conventions have no formal legal enforcement, they are nevertheless followed.126 The Lords Constitution Committee argues that: ‘Whilst a convention is not justiciable, it is regarded by all relevant parties as binding. Constitutional conventions may therefore be regarded as practices, which are politically binding, (...) but not legally binding.’127

Essentially, conventions will be obeyed because of political difficulties which may follow if they are disobeyed. Many political leaders now justifiably argue that it would be impossible for the Government to make a decision to enter a conflict without Parliament’s vote. Nick Clegg proposes that this situation is now ‘unimaginable.’ 128 The conflict in Libya during 2011129 was pivotal, as the Government granted a debate because it believed it was required to do so under the

129 This action was approved by a vote of 557 to 13. See HC Deb, 21 March 2011, vol 525, col 802.
existing convention.130 Thus, the vote over Libya satisfied all three of the criteria in the Jennings test, conveying progression towards a basic convention, though it is important to acknowledge that the debate was retrospective. Consequently, as Jennings claims, conventions ‘provide the flesh which clothes the dry bones of the law.’131 This implies that conventions allow decision-makers easily to keep in touch with societal progressions. In most cases conventions can be easily amended to reflect different circumstances faced by decision-makers in the twenty-first century by the birth of a new precedent.

Parliament was likewise recalled in September 2014 for approval to bomb the Islamic State;132 does Britain now have a clear convention, albeit a recent one? It would appear that ideally before a commitment to take military action the Government should secure a parliamentary debate and abide to some extent by the decision of the House. Yet Parliament’s approval of action against the Islamic State in Iraq demonstrates that MPs, in the light of Syria, are not completely averse to the use of force as a foreign policy tool.133 The Government acknowledged this convention in 2011134 and it has henceforth been included in the Cabinet’s Manual.135 It states that the convention should be observed apart from in emergencies where such action would not be feasible or appropriate.136 If the political actors have considered the precedents and reasons correctly they ought to feel obligated to comply with the convention.137 However, the substance of the new convention is open to debate due to differences in past precedents and the Government’s choice not to enforce the dictum in certain circumstances.

B. Is the Current Position Satisfactory?

Undeniably, there has been a ‘seismic shift in the British constitution’; an evolution that has crept up quietly but which ultimately serves to constrain the executive and

132 This action was approved by a vote of 524 to 43. See HC Deb 26 September 2014 vol 585 col 1360.
136 ibid.
empower Parliament. Critically, the nature of a convention means that the maxim can be brought to an end simply if political players choose not to enforce it, or no longer believe it exists. A future Parliament may yet decide to give up its new prerogative, as due to the conventional nature of the power, it is not enshrined in law. As a result, it is evident that ‘most constitutional conventions are putty in the hands of the executive,’ since the Prime Minister is still free to act without involving Parliament. Fundamentally, the executive has a strong interest in maintaining its freedom to act; they will not want to let go of unfettered power. Joshua Rozenburg furthers this argument: ‘If presidents and prime ministers are sure they are acting in the best interests of those who elected them, they will still be free to act. What emerged (…) is, after all, just a convention.’

Evidently a pattern is developing – but is Britain out of its depth? Has this all happened too fast and without any real thought for the constitutional consequences? Gray and Lomas affirm this view and fear ‘the Iraq and Syria votes mean that this particular genie is well out of the bottle.’ Accordingly, Peter Harris believes ‘the seeds sown in 2003 have long since sprouted and now seem poised to take root as a fixture of the British constitutional system.’ Despite it being most likely that the political players did not intend to create a convention, they are now bound by it. Conventions cannot be enforced in the courts but these precedents are difficult to ignore. As discussed earlier, Tony Blair brought the original vote more ‘as a matter of political necessity than out of a sense of constitutional obligations.’ Yet there are

141 HL Deb 1 May 2007, vol 691, col 983.
144 Peter Harris, ‘The Implications of the Syria Vote: How Britain Goes to War (or Not)’ (OpenDemocracy, 11 September 2013) <www.opendemocracy.net/ourkingdom/peter-harris/implications-of-syria-vote-how-britain-goes-to-war-or-not> accessed 18 November 2015.
145 For example, the Queen must give her assent to a bill that is passed by both Houses of Parliament. However, if the Queen refused, there would be a gross violation of usage, but the matter is not recognised under English Law and therefore could not be brought before judges to enforce it. Dicey discusses this in depth. See Albert V Dicey, Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1961) 440.
many examples of the executive bypassing Parliament in the past without petulance. In 1995 the RAF joined an almost forgotten air campaign that brought the civil war in Bosnia to an end.147 Many are unfamiliar with this event but in fact the RAF carried out 144 air-strikes and at the time no complaints regarding the lack of parliamentary involvement were made.149

Perhaps the Royal Prerogative has been set aside without any reasonable thought concerning its replacement. Unquestionably, this is not the correct basis for immense constitutional reform. As Mark Lomas proposes, ‘We need to quickly come up with an equally workable, robust, and durable alternative mechanism.’150 It is critical that an urgent solution be provided in order to alleviate the national emasculation which has ensued.

On the other hand, in an idiosyncratic way the British Constitution has quietly delivered. The uncodified and complicated constitution has shown that it is also an organic and pragmatic creature.151 One may argue that the imperfections of the constitution itself are often mitigated by its ability to evolve and adapt to changes in society. In Britain, a democratic state that emphasises executive accountability to Parliament, constitutional obligations exist based neither on legislation nor on judicial decisions. These rules may continue in force long after the original reasons for them are forgotten.152 While in some respects such a system may have its benefits, further clarification and strengthening is needed to define Parliament’s role, firstly to uphold the House’s original resolution against the Government’s equivocation, and secondly to ensure that decisions to commit troops abroad will be subject to parliamentary scrutiny in the House.153

It cannot be denied that the previous system is now not operational and very urgently needs fixing or replacing. However, until Parliament’s role is clarified and definitive steps are taken, Britain’s reputation will remain uncertain and the respect of her allies will quickly turn to contempt as her inability to lead or take decisive action becomes ever more apparent.


148 ibid.


5. The Necessity for Parliamentary Involvement

The accountability of those in authoritative positions is a fundamental element of democracy. Nonetheless, it is a highly complex concept, with many elusive and even contradictory meanings. Nigel White defines the term as the means by which ‘those in power and making decisions should have to account for those decisions to their peers, and to the electorate.’ With regard to war-powers in Britain, increased parliamentary participation is a critical factor in the ongoing struggle to address the unequal balance of power between an overly dominant executive and a weak Parliament in order to make Government truly accountable.

Ultimately, if Parliament demonstrates its support for an engagement, there will be little for a Prime Minister to lose by allowing the vote. By permitting its involvement he or she stands to gain both substantive and perceived legitimacy, and a significant degree of political cover if the decision proves erroneous. For example, Jack Straw advises: ‘I dread to think what the situation would have been (...) if we had not put the decision to go to war in Iraq to the House.’ However, parliamentary approval not only enhances legitimacy, but also in the long run will restore trust and confidence in politics. The last decade has been notable not merely for its controversial wars but for the exposure of inherent failures in major British state institutions, which have damaged Britain’s political reputation and have left the public somewhat disheartened and less willing to trust the information it is given. Evidently, there is now a public appetite fully to investigate policies rather

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155 Nigel D White, Democracy Goes to War: British Military Deployments under International Law (OUP 2009) 269.
157 For the purposes of this analysis the primary focus will be on increasing the participation of the elected legislative body in British politics: the House of Commons. However, it is acknowledged that there is an existing debate over the role of the House of Lords in conflict decisions. For further information see House of Lords Select Committee on the Constitution, Waging War: Parliament’s Role and Responsibility (HL Paper 235 – I, 27 July 2006) 38 <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.
161 The financial crisis exposed immense shortcomings in government regulation of a powerful and emphatic banking sector. The parliamentary expenses scandal likewise portrayed a critically important national institution in a way that the country found wholly unacceptable. See James De
than assume what politicians say is completely accurate. Mr Cameron suggests ‘restoring trust in politics means restoring trust in Parliament – and one way to do that is to enhance the role of Parliament in scrutinising the Government’s decisions.’

Mr Cameron’s argument is justifiable and confirms the importance of Parliament’s role in exercising prospective oversight of the executive’s decision-making.

However, it is apparent that there are commentators, albeit a minority, who are fundamentally opposed to Parliament having a role in the deployment of troops. Michael Gove states:

I have an unfashionable view, which is that the legislature shouldn’t fetter the actions of the executive unnecessarily when it comes to matters of life and death and necessary military action. I think there is a change in the way MPs see their role.

Gove suggests that, in essence, the executive is appointed to make these decisions and the Commons will scrutinise their choices if appropriate. Clearly, as Lord Hurd proposes, ‘[w]e should only go into major conflict with a very strong measure of authority behind the Government’s decision.’ Undoubtedly problems arise where Parliament appears not to support a proposed intervention since there is a risk that conflict decisions could become embroiled in ‘politicisation’. Roger Green argues that ‘National unity is always of paramount importance’ and that ‘there is no place for attempts at party political advantage.’ The Government and the country as a whole were publically humiliated when rebel Conservative and Liberal Democrat MPs, together with the Labour Party, removed their support for the Prime Minister’s motion over Syria, which then conveyed a complete lack of agreement on Britain’s next steps. This has landed Britain in unprecedented territory and has arguably undermined the credibility of the country to its allies. However it must be remembered that ‘even the most presidential of Prime Ministers do not govern in a

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162 The Iraq experience also suggests that it may become normal for detailed inquiries to be conducted into all major British deployments, albeit after their conclusion. See ibid 33.


political vacuum.’ The Royal Prerogative cannot be characterised as some sort of ‘personal uninhibited mandate’ – this is a hugely simplistic observation. The prerogative avoids the risk of an otherwise perfectly legitimate military action being thwarted by the opposition seeking party political advantage or by pacifists.

The role of the Prime Minister is consistently to act in the nation’s best interests and this must not be hindered. It can be claimed that given the gravity of their decisions, Prime Ministers should not be forced to deal with the consequences of a lost vote. James Gray supports this view: ‘Parliamentary votes on war should only be used for propaganda and morale purposes.’ Thus, the parliamentary view ought to be obtained and respected, but division should never be used truly to decide whether or not to go to war. Healthy discussion, and some disagreement, in Parliament reinforces the role of democracy, since if there is major disparity in public opinion then this should be reflected in Parliament.

However, this apparent ‘democratisation’ of war could have longstanding and far-reaching constitutional, diplomatic and military consequences. Alistair Burt firmly believes that the Government should take executive action and then inform Parliament; if it disagrees then the issue of a vote of no confidence arises. He presents a realistic view: ‘I don’t think you can handle foreign affairs by having to convince 326 people each time you need to take a difficult decision.’ Is it really appropriate to delegate this decision to 650 MPs? David Blair proclaims that if parliamentary approval is vital, ‘at best, our decision-making in a time of crisis would be delayed. At worst, it could be paralyzed.’ Clearly the efficiency of a deployment must not be curtailed by the need to seek approval from Parliament. Britain’s response to an international crisis would be slowed down and complicated

168 James Gray and Mark Lomas, Who Takes Britain to War? (The History Press 2014) 83 (emphasis added).
170 ibid 28.
173 ibid.
which could ultimately serve to reduce its influence in the world. 

Nonetheless, it is of paramount importance that the armed forces know the nation is supporting them. Lord Guthrie suggests that the questions asked by troops in the field of conflicts are, ‘Is Parliament, the Government behind us?’ Evidently, Parliament’s approval will help improve the morale of the armed forces, principally if Parliament’s view is overwhelmingly supportive. Therefore, as the House of Lords’ Select Committee states, the prerogative ‘is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy.’

Jack Straw supports this proposal: ‘The Royal Prerogative has no place in modern western democracy (...) it has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable.’

Despite progress over the last decade the formal position of Parliament in conflict decisions remains ambiguous. It is evident that the current position is inadequate, but politicians and theorists seem perplexed as to the best way to bring about reformation. The emerging convention does not provide a sufficient degree of certainty that the Commons will be consulted in the decision to deploy the armed forces overseas.

Both the Lords Constitution Committee Paper and the Government’s White Paper considered war-powers in other jurisdictions. However, while

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175 For reasons of relevance and space this article will not assess the effect delay could have on engaging in military action. However, Malcolm Rifkind discusses how formalisation could affect Britain’s commitment to international institutions such as NATO and the United Nations. See Law in Action, ‘Can the PM Go to War?’ (BBC Radio 4, 23 October 2014) <www.bbc.co.uk/programmes/b04lj28r> accessed 18 November 2015.

176 In reality both Houses benefit enormously from the specific expertise of members who have held positions in a wide variety of valuable areas such as senior civil service positions, senior positions in the military and in foreign and diplomatic services. For further information see HL Deb 28 Nov 2013 vol 749 col 1618.


comparisons are useful in reconsidering the war prerogative, they must always be analysed cautiously in the light of Britain’s uncodified constitution and the doctrine of parliamentary supremacy. Each country has its own unique political history and level of military sophistication, though, in broad terms, it is clear that the role of legislatures in conflict decisions is increasing at an international level.

In 2001 the member states of the Western European Union unanimously called for greater democratic accountability and scrutiny in the deployment of the armed forces. In comparison with other European countries, the UK Parliament has consistently been regarded as a legislature with extraordinarily weak powers with respect to ‘circumscribing the war-making capabilities of the executive.’ Dieterich, Hummel and Marschall’s survey of parliamentary ‘war-powers’ places the UK among four other democracies in which such powers were found to be weak. Moreover, a clear majority, 15 out of 25 democracies surveyed, have either ‘strong’ or ‘very strong’ parliamentary war-powers. This systematic comparison of parliamentary control provisions across states enables conclusions to be drawn regarding the development of control procedures internationally. It is clear that Britain should follow the international trend towards increasing democracy by reforming war-powers and bringing the country into line with arrangements in other nations.


187 ibid.

6. The Formalisation of Parliament’s Role in Military Action

As has been previously observed, it is a ‘cardinal principle’ of the constitution that ministers are responsible to Parliament. Consequently the time has come to respond to calls for war-powers to be more profoundly anchored in the consent of the legislature. However, there are clear difficulties in invoking a straightforward and effective solution since the issue is ‘a great deal more complex than once thought.’

Two main options for reform exist. Firstly, and most radically, the prerogative could be abolished and substituted with a statute, which would set out the procedure to be followed whereby the legislature may authorise the use of force in specific circumstances. In considering all of the arguments the second option is the more plausible and realistic – to ensure the recent convention is ‘firmed up’ by way of a House of Commons resolution. This final chapter will assess the possible future of war-powers by examining the various options for reform and will stress the importance of establishing a parliamentary resolution.

A. Is Formalisation the Way Forward?

The main political parties and more fundamentalist reformers favour formalising Parliament’s role in legislation, urging ‘the total surrender of the power to decide to the will of the House of Commons.’ Nick Clegg believes that the role of Parliament should be ‘as strengthened and as fixed as possible.’ Arguably legislation would provide transparency and clarity to Parliament’s role, thus ensuring that the Government could not bypass the parliamentary process without good cause. Jack

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Straw suggests that it should no longer ‘be a matter of grace and favour by the Prime Minister as to whether the House is asked for its view.’\textsuperscript{197} Evidently, the necessary balance of power between the legislature and the executive is yet to be reached.\textsuperscript{198} Government goodwill is not enough and a substantive vote should be a more permanent fixture rather than an act of ‘generosity’ if the Government desires.\textsuperscript{199} Consequently, in 2011, the Foreign Secretary committed ‘to enshrine in law for the future the necessity of consulting Parliament on military action.’\textsuperscript{200} Since then the Government has justifiably shown no appetite for pursuing this endeavour, and successive governments and parliamentary committees have opposed this proposal\textsuperscript{201} due to a number of serious overriding weaknesses.

One of the primary issues with enacting legislation is the risk of rendering deployment decisions justiciable, through judicial review.\textsuperscript{202} By reforming the war prerogative, the judiciary may find itself in the unprecedented and awkward position of carrying what should be the legislature’s burden of holding the executive to account. The courts are ill-suited for this role. Parliament, on the other hand, provides the proper stage and must embrace full political responsibility. The Government is clearly sensitive about this prospect since, if parliamentary approval were specified in primary legislation, the domestic courts might be able to rule on the lawfulness of a deployment. The legality of a deployment overseas is a matter which should be resolved between Parliament and Government without interference from the judiciary.\textsuperscript{203} However, the courts have shown increased willingness to contribute as demonstrated in the recent case of \textit{Smith v Ministry of Defence}.\textsuperscript{204} While it is accepted that the courts would only be involved where there was a serious

\textsuperscript{197} ibid 17.
\textsuperscript{198} HC Deb 15 May 2007, vol 460, col 503.
\textsuperscript{200} HC Deb 21 March 2011, vol 525, col 799.
\textsuperscript{202} This is discussed at length in House of Lords Constitution Committee, \textit{Constitutional Arrangements for the Use of Armed Force} (HL Paper 46, 24 July 2013) 18 <\texttt{www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/46/46.pdf}> accessed 18 November 2015.
\textsuperscript{203} Due to the policy and strategic issues Lord Reid proposes, questions about the instigation of war are non-justiciable ones that are best left to political processes within the executive and legislative branches. See \textit{Chandler v Director of Public Prosecutions} [1964] AC 763, 791 (Lord Reid); \textit{Campaign for Nuclear Disarmament v Prime Minister} [2002] EWHC 2759 (QB); House of Commons Political and Constitutional Reform Committee, \textit{Parliament’s Role in Conflict Decisions: A Way Forward} (HC 892, 20 March 2014) 15 <\texttt{www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/892/892.pdf}> accessed 18 November 2015.
\textsuperscript{204} The Supreme Court held that certain actions and decisions of military personnel could give rise to liability under human rights legislation and the common law of negligence. The GCHQ case also departed from the time-honoured approach whereby the courts would not question the exercise of the prerogative but would determine its existence and definable limits. See \textit{Council of Civil Service Unions & Others v Minister for the Civil Service} [1985] AC 374; \textit{Smith v Ministry of Defence} [2013] UKSC 41, [2014] AC 52.
failure by the Government to abide by the statute, this susceptibility to challenge could still have severe adverse effects, particularly on the morale and operational independence of the armed forces, since they would continually need to have regard for the ‘judge over their shoulder.’

Additionally, with formalisation there comes difficulty in creating solid, workable definitions due to the complexities of precisely defining what is an ‘armed conflict’ as they can vary greatly in nature and scope. Essentially, it is not possible to pre-empt all eventualities and the country must respond to individual circumstances. Ironically, it is conceivable that the result of formalisation could be further uncertainty due to the difficulties in identifying those deployments to which legislation would apply. If attempts were made truly to understand military capabilities in the West, and as a nation Britain considered what a legitimate use of force is, then perhaps credible steps could be made towards establishing a method of deciding when and how its use is justified.

Hence, it is clear that the constitutional and legal implications of legislating require detailed and expert assessment. The enactment of legislation is dubious

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205 ‘It is of paramount importance that the work that the armed forces do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong.’ See Smith v Ministry of Defence [2013] UKSC 41, [2014] AC 52 [100] (Lord Hope). See also the Joint Committee on the Draft Constitutional Renewal Bill, Draft Constitutional Renewal Bill (Vol 1, HL Paper 166-1/HC Paper 551-1, 31 July 2008) 88; Thomas Tugendhat and Laura Croft, The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power (Policy Exchange 2013) 4 <www.policyexchange.org.uk/images/publications/the%20fog%20of%20law.pdf> accessed 18 November 2015.

206 It has been argued that the most straightforward attitude would be for the term to have the same meaning as it does in international humanitarian law, under the situations laid out in the Geneva Convention of 1949. See International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention, 12 August 1949); Secretary of State for Justice and Lord Chancellor, The Governance of Britain: War Powers and Treaties: Limiting Executive Powers (Cm 7239, October 2007) 25 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/243164/7239.pdf> 18 November 2015.

207 There is also currently no explanation of what constitutes an emergency for the purposes of an exception under legislation or resolution. Clearly in certain exceptional circumstances it will not be possible to consult the Commons before making a conflict decision. In these instances retrospective approval is appropriate. For an in depth study on the issue of retrospectivity see Joint Committee on the Draft Constitutional Renewal Bill, Draft Constitutional Renewal Bill (Vol 1, HL Paper 166-1/HC Paper 551-1, 31 July 2008) 92 <www.publications.parliament.uk/pa/ld200708/ldselect/ldconst/236/236i.pdf> accessed 18 November 2015.

208 This matter is discussed at length in James Gray and Mark Lomas, Who Takes Britain to War? (The History Press 2014) 66.

due to the degree of political and military flexibility available with the current convention. While the uncertainty of conventions is widely criticised, this flexibility can be an advantage since it allows for continuous political development. Thus, it is apparent that the crux of the argument is that ‘the relative advantages of certainty versus flexibility will depend on the context.’ Each situation must be evaluated and assessed on its own merits. Such wide discretion offered by convention remains necessary in order to provide flexibility where an emergency arises.

Ultimately the establishment of a parliamentary resolution would both end uncertainty as to the existence of a convention and also clarify to an extent its terms, since such perplexities must be resolved. This would ensure that the Government of-the-day could not unilaterally alter the mechanism as a way of evading the constraints imposed by the convention, thus resolving a key negative feature of conventions: the body bound by them is frequently responsible for outlining their content and therefore can dilute the developed practice. Conventions can be fragile and tenuous, with Lord Hennessy identifying how ‘they can crumble at the touch of a powerful, insensitive and determined executive.’ A comprehensive resolution will effectively formalise Parliament’s role whilst being sufficiently flexible to permit improvements to be made. It appears to be an equitable compromise between flexibility and accountability, hence avoiding the risk of blurring the separation of powers by sanctioning judicial review of conflict decisions.

Recently the Government has shown resistance to implementing legislation and instead has supported a detailed Commons resolution to certify the participation of Parliament. Nonetheless, despite the Coalition Government’s...
commitment to introduce a war-powers resolution, this has not yet materialised.\textsuperscript{218} A draft resolution has not been published since 2008.\textsuperscript{219} However, this draft was of the ‘most timid and executive friendly nature.’\textsuperscript{220} It is severely watered-down since maximum flexibility is given to the Prime Minister to decide the timing prior to approval being sought and requires no retrospective approval where there is an emergency or where the deployment is secret.\textsuperscript{221} The Democratic Audit proposes that the degree of flexibility the Government seeks to retain is ‘precisely the flexibility that has discredited politics in this country in recent years.’\textsuperscript{222} Clearly, while a degree of discretion is needed to ensure flexibility in decisions, limits must apply. The Prime Minister should not have the power to decide the timing of the debate. The resolution must be amended to require that Parliament be consulted ‘as soon as reasonably practicable’ after a policy has been formulated favouring military action.\textsuperscript{223}

Moreover, in the drafting of a new resolution, it must be a prerequisite that the Prime Minister provide as comprehensive an account as possible of the evidence justifying the use of force. It is of paramount importance that ministers give accurate and truthful information to Parliament.\textsuperscript{224} Information must not be presented in a biased or idiosyncratic way, leading MPs to support a conflict they would not tolerate if more information were presented (though admittedly, this is complicated


\textsuperscript{219} Lord Chancellor and Secretary of State for Justice, \textit{The Governance of Britain- Constitutional Renewal} (Cm 7342-I, March 2008) 53-56.


\textsuperscript{221} Nigel White, \textit{Democracy Goes to War: British Military Deployments under International Law} (OUP 2009) 282.


by national security risks associated with consulting the legislature in the public eye). James Gray elaborates on this argument: ‘It is not possible without compromising security to release precise details and fresh information that is daily coming in.’ By discussing information in Parliament ‘an element of surprise for the armed forces’ would be removed and intelligence could be compromised. As a result, a third option for reform has been considered: the establishment of a Parliamentary Joint Select Committee to oversee the armed forces. Kenneth Clark appropriately suggests that this proposal is ‘very attractive.’ Where information vindicating the use of force raises security issues it could be shared on a confidential basis with the committee who can then report on whether the proposed action is justified. This would provide reassurance that an independent endorsement of information is secured and would certify that Parliament is not voting on the basis of false assertions.

Lord MacLennan cautiously suggests that perhaps it is unwise to reach a final conclusion about these matters until the Chilcot Inquiry has been released since this publication will hopefully reveal something about the inner workings of the decision making process that is not currently known. Unquestionably, a failure to rectify these flaws apparent in the draft resolution will render the reformation attempt useless in increasing Parliament’s ability to control the Government and will only serve as ‘a mask over the undemocratic nature of the prerogative.’ However, it seems that no further action will be taken in the short-term due to the recent change in Government. The Government’s legislative programme is overcrowded, and parliamentary time and money is subject to strong competing priorities, but

228 ibid 31.
229 Perhaps, the Intelligence and Security Committee established by the Intelligence Services Act 1994 could take on this role since they already have access to sensitive information. The committee is made up of members of the Commons and Lords, with none permitted to be a Minister of the Crown. For more information see the Intelligence Services Act 1994, s 10; Gavin Philipson, “Historic” Commons’ Syria Vote: The Constitutional Significance (Part II) – The Way Forward” (UK Constitutional Law Association, 29 November 2013) <http://ukconstitutionallaw.org/2013/11/29/gavin-philipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/> accessed 18 November 2015.
231 HC Deb 28 November 2013, vol 571, col 1611.
uncertainty in the present situation cannot be allowed to remain – there is a
desperate need for clarity.

B. Is Formalisation Necessary?

Nevertheless, whilst the Crown may retain the prerogative to take the nation to war, in theory, the Government is accountable to Parliament and is consequently accountable for any war it engages in. Therefore, Parliament is capable of checking the executive without any formal constitutional reform due to the Government’s need to retain the confidence of the Commons. If the Prime Minister and the Cabinet took Britain into ‘some absurd war that did not have popular support, or did not have the support of this House, the Government would fail without question.’

Perhaps then, as David Jenkins suggests, what is needed with regard to reform is ‘neither a limiting statute nor questionable attempts to ‘make’ a new convention,’ but a more fundamental evaluation of the political ‘unwillingness’ of MPs under the current party system to exercise parliamentary legislative supremacy and hold the executive to account for its military endeavours. The reality is that Parliament has generally refrained from interfering with military decisions made under the prerogative. It is expected that this situation will continue even if war-powers are put on a statutory footing or continue to be subject to conventional arrangements.

Consequently, whatever reform measures, if any, Parliament and Government choose to pursue with regard to the war prerogative, the question over control is essentially political rather than strictly legal. Essentially, it is evident that the impetus for legislation is driven by political motivations; it seems more about ‘a political statement about where decisions are taken, rather than to correct deficiencies in the legal or military process.’ The question could be posed as to whether this a plausible reason to implement such extensive constitutional change. What is certain is that no amount of auxiliary limitations or mechanisms of enforcement can totally counteract Parliament and, to some extent, the courts’ unwillingness to hold the executive to account. This stance permeates the American example. In 2004 the select committee considered evidence claiming that

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233 A vote of no confidence was last successfully used in 1979, when the minority Government led by James Callaghan was defeated in a motion by Margaret Thatcher: ‘This House has no confidence in Her Majesty’s Government.’ See HC Deb 28 March 1979 vol 965 col 589.


236 ibid.

237 House of Lords Constitution Committee, Constitutional Arrangements for the Use of Armed Force (HL Paper 46, 24 July 2013) 22

238 House of Commons Public Administration Select Committee, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (HC 422, 4 March 2004) 9
legislation similar to the US War Powers Resolution should be implemented in the UK. Ultimately, the Act is controversial because Presidents have consistently branded it an unreasonable limitation on their power since they are required to report to Congress within 48 hours of military forces being deployed into hostilities. However, in reality, even the introduction of the constitutionally entrenched declare war clause has not prevented the President from using his war powers unilaterally, relegating Congress to performing a negative rather than affirmative role in waging war.

In an extreme situation where legislative support was deficient and the Government continued to insist on its military policy, the Prime Minister could lose the confidence of a majority in the Commons, resulting in the fall of the Government. Though, in practice, the Prime Minister could force authorisation if politically expedient by implementing the whip system, the real threat to the Prime Minister and Government lies with rebellious MPs who may disobey the system and vote of their own accord. Whilst reconciling the need for accountability to Parliament with the size and sophistication of the bureaucratic executive machine is difficult, it is fundamental to Britain’s liberal democracy. The British Government’s effective control of the Commons primarily by a party majority particularly exacerbates challenges in controlling executive war-powers. Given the grave importance of proper parliamentary accountability, it is time that Parliament started to control its own destiny. However, for Parliament to have any meaningful role, both Government ministers and members of Parliament must mutually commit themselves to institutional co-operation, rather than dominance or deference.

245 Since this paper is a discussion primarily of the legal issues involved in reforming the Royal Prerogative, and the issue of party politics is primarily political, there will be no debate or solutions offered in this area. For a detailed discussion on the effect of party politics generally see: Anthony Staddon, ‘Holding the Executive to Account? The Accountability Function of the UK Parliament’ (2007) 8 <http://siteresources.worldbank.org/PSGLP/Resources/HoldingtheExecuTheAccountabilityFunctionoftheUKParliament.pdf> accessed 18 November 2015; Wilfred Swenden and Bart Maddens, Territorial Party Politics in Western Europe (Palgrave-Macmillan 2009).
7. Conclusion

In conclusion, despite the desperate need for parliamentary involvement in decisions to deploy HM Forces, the specific role of the House of Commons remains unclear. This analysis has demonstrated the difficulties in implementing a straightforward and effective solution regarding the developing role of Parliament since there are considerable benefits and weaknesses on both sides. Ultimately the argument boils down to a preference for either the executive or the legislature as the eminent decision-maker, as each branch possesses characteristics that promote efficiency and accountability. Irrefutably certain matters must be left to the executive, and the decision to go to war is one of them. However, there is extensive scepticism surrounding the wisdom of governmental decisions and this has resulted in reluctance to leave security policy solely in the executive’s hands.

The emergence of a convention extending parliamentary participation, despite its hasty birth, must be applauded, trusted and respected. Yet, it is evident that this convention is vague and its terms must be clarified. Given the complications with legislation, Britain’s next steps must be more cautious and there are legitimate reasons for enacting a parliamentary resolution. While in Britain’s democracy the Government must remain the key decision-maker on matters relating to foreign and defence policy, Parliament must embrace its role as the watchdog of their actions. Britain will be a more accountable nation and thus its actions will be even more effective if Parliament’s authorisation is given, despite the fact that the Prime Minister must retain the authority to carry out the action without Parliament’s authorisation.

The Prime Minister acts within the complex web that is the uncodified British Constitution. He or she must secure the support of the nation and its representatives, since if any leader sought to take the country to war without at least the tacit consent of Parliament, his position would quickly become untenable. Therefore, it is clear that the direction of constitutional reform of the Crown’s war prerogative unquestionably depends upon active civic cognizance by politicians, judges and most importantly the British electorate. Additionally, it is vital that the question of who takes Britain to war not be considered narrowly or in isolation, but that it be evaluated as one aspect of the greater necessity for constitutional reform.

It would appear that the success of the Royal Prerogative in the future may well depend on the Prime Minister’s strength of personality, the level of trust he generates and ultimately his oratory skills to persuade both the Commons and the nation to support his endeavours. It is owed to soldiers both past and present who have risked or sacrificed their lives in the course of Britain’s long history to enhance democracy and ensure future military engagements are anchored in the support of their elected representatives.