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'Fountain of Honour'? The Role of Crown in the Iraq War [final]

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ABSTRACT [152 words]

This article investigates the Crown within the British constitution and gauges its influence upon the decision to deploy troops in Iraq. It considers the functioning of parliamentary checks upon the Prime Ministerial war prerogative in the Iraq decision, specifically the parliamentary debate and vote on *March 18, 2003. It identifies how the premiership's colonisation of the Crown enabled Mr Blair to* obtain parliamentary approval for warfare despite extensive opposition to the deployment. The appearance of strengthening parliamentary involvement in warfare decisions was largely undercut by, amongst other factors, a cluster of prime ministerial Crown-based prerogatives. Ultimately, the Iraq affair demonstrates that the Crown is not a quaint constitutional abstraction but has real influence on issues of the utmost importance. The notion of monarch remains a subtle but powerful influence in the British prime ministerial war power legally, structurally and culturally, and parliamentary checks in this context may be thus institutionally limited.

LONGER ABSTRACT [319 words]

This article investigates the monarchic concept of Crown within the British constitution and gauges its influence upon the decision to deploy troops in Iraq in March 2003. It considers the functioning of parliamentary checks upon the Prime Ministerial war prerogative in the Iraq decision, and specifically investigates the extent to which Crown-based powers may have enabled such checks to be counteracted.

The article starts by discussing the close interrelationship between the office of Prime Minister and the monarch-based legal structure of the Crown which it has gradually colonised over centuries. Recognition of this symbiosis between Crown and premiership is vital to an understanding of modern British prime ministerial power, and how such power was utilised in the Iraq affair. Next it considers *the prime ministerial war prerogative and the key constitutional 'convention' which played a central* role in the Iraq deployment, namely that Parliament should support warfare. The parliamentary debate and substantive vote on March 18, 2003 (and subsequent reform proposals) have been widely viewed as a welcome strengthening of Parliament as a crucial check in such decisions. Yet this view of the Iraq affair as a pyrrhic victory is que*stionable. This article identifies how the premiership's* colonisation of the Crown enabled Mr Blair to exercise the war prerogative despite extensive opposition to the Iraq deployment. It argues that the appearance of strengthening parliamentary involvement in warfare decisions was largely undercut by, amongst other factors, a cluster of prime ministerial Crown-based prerogatives. These prerogatives enabled Mr Blair to manoeuvre the parliamentary vote, and therefore undermined its efficacy as a meaningful check.

Ultimately, the Iraq affair demonstrates that the Crown is not just a quaint constitutional abstraction but has real influence on issues of the utmost importance. The notion of monarch remains a subtle but powerful influence in the British prime ministerial war power legally, structurally and culturally, and parliamentary checks in this context may be thus institutionally limited.

'Fountain of Honour'? The Role of Crown in the Iraq War

The decision to deploy British troops in Iraq in March 2003 was the most contentious of Tony Blair's premiership. It generated a wealth of opposition including the largest political demonstration in British history[1] and various legal challenges,[2] as well as eliciting no less than three separate inquiries chaired by Lords Hutton,[3] Butler[4] and, most recently, Sir John Chilcot.[5] As more information concerning the Iraq affair has gradually come to light, it is apparent that it yields some illuminating insights as a case study in constitutional subversion. To date, much of the domestic constitutional interest in the Iraq affair has primarily hinged upon Mr Blair's marginalisation of collective cabinet responsibility, particularly shared decision-making, in the lead up to the Iraq deployment,[6] though attention has also been paid to the war power itself[7] and the office of Attorney-General.[8]

Though such matters clearly played key roles in the Iraq deployment, this article sheds light upon an additional, alternative dimension to the affair. It considers the Iraq deployment through the prism of 'the Crown', that monarchic concept at the apex of the British constitution described by Bagehot as 'the fountain of honour'[9] in more deferential times. Though the Crown is generally viewed as merely an arcane constitutional abstraction, in reality it played a key role in facilitating the initiation of military action in Iraq. This article starts by briefly establishing the long-standing close interaction between Monarch and premier, a relationship which remains the foundation of modern prime ministerial power. Next it considers the Crown-based prime ministerial war prerogative and discusses the recent strengthening of the key constitutional check that Parliament should support any such military action. Finally, it specifically examines the Iraq debate and vote in Parliament on March 18th,

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[1] Between 750,000-1,000,000 people joined an anti-war protest in London on 15th February, the largest demonstration in British history: 'Million' march against Iraq war', BBC Online (London: February 16, 2003) <http://news.bbc.co.uk/1/hi/uk/2765041.stm> accessed June 15, 2013.

[2] For example see: R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister and others [2002] EWHC 2777 (Admin), [2002] All ER (D) 245 (Dec); R (on the application of Gentle and another) v Prime Minister and others [2006] EWCA Civ 1689, [2007] Q.B. 689 (CA); R (on the application of Gentle and another) v Prime Minister and others [2008] UKHL 20, [2008] 1 A.C. 1356.

[3] Lord Hutton, Report of the Inquiry into the Circumstances Surrounding the Death of Dr. David Kelly C.M.G., (January 2004, HC 247), accessible via <http://www.the-hutton-inquiry.org.uk/content/report/index.htm> accessed June 15, 2013.

[4] Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898).

[5] The Iraq Inquiry, led by Sir John Chilcot is expected to report its findings at an unspecified date in due course; <http://www.iraqinquiry.org.uk/> accessed June 15, 2013.

[6] For example see: P. Hennessy, Informality and Circumscription: The Blair Style of Government in War and Peace, Political Quarterly, 2005, Vol. 76(1), 3; Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898) paras 609-611; House of Commons Foreign Affairs Committee, Ninth Report, The Decision to go to War in Iraq (2002-03 HC 813-I) para.146.

[7] House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's* Role and Responsibility (2005-06 HL 236-I); House of Commons Public Administration Select Committee, Fourth Report, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (2003-04 HC 422); D Jenkins, Constitutional Reform Goes to War: Some Lessons from the United States [2007] P.L. 258.

[8] House of Constitutional Affairs Committee, Fifth Report, Constitutional Role of the Attorney General (2006-7 HC 306); House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93).

[9] W. Bagehot, The English Constitution (London: Collins, 1963) p.66.

2003 and identifies how Crown-based prerogatives may have undermined this as a meaningful check on warfare.

[1] The Enduring Symbiosis of Monarchy and Premiership

The office of British Prime Minister entitles its holder to what has been called a 'formidable battery'[10] of personal powers, nearly all of which are exercised by virtue of the ancient prerogative which emanates from the Crown. The office has emerged by fortune rather than design, a 'product of indigenous dynamics'[11] whose origins can be traced back over centuries. Perhaps for this reason, there had never been an official definition of the prime ministerial role until publication of the Cabinet Manual in 2011.[12] A comprehensive historical account of the premiership is beyond the scope of this article but a very brief overview of key events provides a valuable indication of the overall trajectory that led to the present-day premier-Monarch relationship.

The Glorious Revolution in 1688 and Bill of Rights represents an early indirect contribution towards the prime ministerial position because it essentially emasculated monarchical power by placing Parliament above the King and in charge of the national purse strings.[13] Two subsequent key contributors to the development of the premiership were Walpole and Pitt, both of whom enjoyed relative political predominance, albeit based upon their respective leadership styles rather than formal institutional power. In 1721 Sir Robert Walpole came to hold the position of First Minister within Cabinet and is commonly acknowledged as the 'first prototype of the modern Prime Minister',[14] though the title 'Prime Minister' was not attached to the office at this stage. Walpole's power arose from his revolutionary approach which emphasised a firmer trinity of Cabinet unity, strong leadership and parliamentary support.[15] William Pitt (the Younger) held office between 1783 and 1801 and was responsible for the continuing increase in Cabinet unity[16] and an upsurge in the dominance of the Prime Minister in relation to his Cabinet colleagues.[17] Additionally, communications between the King and ministers were channelled through Pitt, a role that his modern counterparts continue to this day.[18] These factors led ultimately to a "substitution of the authority of the Prime Minister for that of the King", the latter of whom according to Keir

[10] T. Benn, Arguments for Democracy (London: Penguin 1982) p.26.

[11] M. Foley, The British Presidency (Manchester: Manchester University Press 2000) p.26.

[12] The Cabinet Office, The Cabinet Manual (1st edition, October 2011).

[13] E. Wicks, The Evolution of a Constitution (Oxford: Hart Publishing 2006) Ch.1.

[14] P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) p.22. Walpole's premiership is viewed by Wicks as one of eight key moments in British constitutional history: Elizabeth Wicks, The Evolution of a Constitution (Hart Publishing 2006) Ch. 3.

[15] "The Whig administration of Sir Robert Walpole sets the precedent for party ministries and thenceforward, though there are occasional aberrations, the bonds of party are drawn tighter." F. W. Maitland, The Constitutional History of England (Cambridge: Cambridge University Press 1931) p.395.

[16] Cabinet became a tighter machine, discussions now "confined to persons actually holding office and in agreement with the views of their colleagues." D. L. Keir, The Constitutional History of Modern Britain since 1485, 9th edn (London: Adam & Charles Black, 1975) p.382.

[17] Carter writes that during this time "*it was the Prime Minister's authority vis*-à-vis his ministerial colleagues which expanded most noticeably, not his independence of the King." B. Carter, The Office of Prime Minister (London: Faber & Faber 1956) p.29.

[18] The Prime Minister "acts as medium of communication between Cabinet and Crown". *Halsbury's* Laws of England (LexisNexis online), vol.8(2) (2011 reissue), para.412. See also The Cabinet Office, The Cabinet Manual (1st edition, October 2011), paras 3.4-3.5.

was "was slowly, but quite unmistakably, losing effective leadership of his own government."[19]

The nineteenth century saw further consolidation of prime ministerial office. The Reform Acts of 1832[20] and 1867 extended voting rights and indirectly contributed to the prime ministerial role. The acts whittled down the King's prerogative power of patronage, diluting his influence in both Parliament[21] and Cabinet.[22] As a result, Cabinet was now increasingly reliant upon a majority following in Parliament which required strong leadership and party loyalty. To obtain and preserve electoral support the Liberal and Conservative parties inevitably became stronger, centralised organisations. The ties of party loyalty became tighter, impacting heavily upon the independence of M.P.s.[23] Because government was more able to rely on a solid base of support it came to exert de facto control over Parliament rather than vice versa.[24] Events of the twentieth century, particularly two World Wars, bolstered the prime ministerial role yet further. Additionally, this was the first century in which the office was recognised formally[25] and statutorily.[26] Significantly, the proliferation of the mass media, particularly in the latter half of the twentieth century, inevitably shaped the office of Prime Minister by further increasing the focus upon party leaders and fostering a political culture of individualised leadership which Foley has termed 'leadership stretch'.[27] Such tendencies became particularly prominent in the incumbencies of Margaret Thatcher[28] and Tony Blair.[29]

Ultimately the office of Prime Minister is a result of the cumulative effect of myriad influencing factors and forces interacting over centuries. Many of the modifications have emerged organically and imperceptibly. But the overall trajectory follows the waning of monarchical authority and inversely proportionate bolstering of the prime ministerial role, reflecting the fact that "*the powers of the prime minister … have been wrestled away from the* Throne."[30] The office of Prime Minister covertly evolved on the underside of monarchy,

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[19] D. L. Keir, The Constitutional History of Modern Britain since 1485, 9th edn, (London: Adam & Charles Black 1975) p.383.

[20] For an interesting account of the passage of the 1832 Act see E. Wicks, The Evolution of a Constitution (Oxford: Hart Publishing 2006) Ch. 4.

[21] I. Jennings, Cabinet Government (Cambridge: Cambridge University Press 1965 3rd edn) p.406.

[22] D. L. Keir, The Constitutional History of Modern Britain since 1485, 9th edn (London: Adam & Charles Black 1975 9th edn) p.405.

[23] "Party discipline within Parliament became more rigid as the battles grew keener and the issues tended to resolve themselves into holding or gaining power." J. Mackintosh, The British Cabinet (London: Stevens & Sons 1977 3rd edn) p.203.

[24] "Ever tougher whipping and tautened parliamentary procedure were reducing the behavioural scope of the individual member, and the power to initiate legislation was moving steadily away from Parliament and into the executive." P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) p.41.

[25] *Halsbury's* states that the first reference to the prime ministerial office was on 2nd December 1905 when a Royal Warrant was placed in the London Gazette: "The warrant is noticeable as containing an official recognition of the office of Prime Minister." The only earlier reference seems to be when Lord Beaconsfield signed the Treaty of Berlin describing himself as Prime Minister. *Halsbury's* Laws of England (LexisNexis online), vol.8(2) (2011 reissue) para.395, fn.1.

[26] The Chequers Estate Act 1917.

[27] M. Foley, The British Presidency (Manchester: Manchester University Press 2000) Ch. 7, pp.340-341. See also: M. Foley in House of Commons Political and Constitutional Reform Committee, Role and Powers of the Prime Minister, Written Evidence (July 7, 2011) pp.67-74.

[28] M. Foley, The British Presidency (Manchester: Manchester University Press 2000) Ch.3; P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) pp.425-6.

[29] M. Foley, The British Presidency (Manchester: Manchester University Press 2000) Ch. 9; P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) pp.488-9.

[30] T. Benn, Arguments for Democracy (London: Penguin 1982) p.20.

colonising the latter's Crown powers and fusing itself to that institution in the process. Because of this, the relationship between premier and the Crown remains fundamental to constitutional understandings of modern prime ministerial power.

Prime Minister and the Crown

The Crown occupies the apex of the British constitution, forming the legal source of executive prerogative power and Parliament's sovereignty.[31] Despite its pivotal role it is a multi-faceted concept with no single clear interpretation,[32] and it has been taken to mean Monarch,[33] government[34] or state.[35] Yet each of these meanings reflects traces of early British constitutional history when an individual Monarch was absolute and the source of all authority. Indeed it still takes material form by vesting its powers in an individual Monarch at law.[36] Thus, the legal framework around which modern British government power is structured is an autocratic, pyramidal formation with one individual, the Monarch, at its centre. Nevertheless appearances of significant monarchical power at law are misleading as modern Monarchs do not enjoy the unbridled political command of their predecessors. Instead, the Monarch, in her politically constrained position as personification of the Crown, is effectively a conduit between Crown powers and the individual politicians who in reality now use them.

The disparity between the Crown at law and constitutional practice occurring within it is widely acknowledged in mainstream constitutional thought. The Crown has been termed a 'legal fiction',[37] 'a convenient abstraction'[38] and 'a convenient cover for ignorance'.[39] The presence of this disparity is also acknowledged in caselaw such as Town Investments and Bancoult (No.2).[40] For example in the former, Lord Diplock accused the legal vocabulary of 'the Crown' of failing to keep pace with constitutional evolution and suggested that a clear line should be drawn between the Crown and government in reality.[41] As the preceding historical summary shows, de facto ownership of Crown prerogative power has trickled down to elected government ministers, whilst de jure ownership has remained with Monarch. But though the Crown's executive powers have been colonised by government ministers their legal structure and form have remained intact and unaltered. Thus one is left with what Loughlin, in a more general sense, has described as "a gulf between substance and form in

[31] *Halsbury's* states: "the Crown may not exercise primary legislative powers except with the consent of Parliament." *Halsbury's Laws of England* (LexisNexis online), vol.8(2) (2011 reissue) para.15. See also: R. Brazier, A British Republic, C.L.J. 61(2), July 2002, 351-385, 366.

[32] *Halsbury's Laws of England* provides no less than three potential meanings: (1) monarch, (2) government, or (3) officers or ministers acting in their 'official capacity'. *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.353. See also: Town Investments Ltd v Department of the Environment [1978] A.C. 359 (HL), 393 (Lord Morris).

[33] W. Wade, "Crown, Ministers and Officials: Legal Status and Liability" in M. Sunkin & S. Payne (eds), The Nature of the Crown, A Legal and Political Analysis (Oxford: Oxford University Press 1999) p.24.

[34] *Halsbury's Laws of England* (LexisNexis online), vol.8(2) (2011 reissue) para.354. See also: Town Investments Ltd v Department of the Environment [1978] A.C. 359 HL, 398 (Lord Simon).

[35] This is not formally acknowledged as a free-standing meaning of the term though 'the Crown' represents the UK state at international level and foreign affairs are conducted in its name: *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.801.

[36] Town Investments Ltd v Department of the Environment [1978] A.C. 359 (HL), p.397.

[37] Town Investments Ltd v Department of the Environment [1978] A.C. 359 (HL), 381 (Lord Diplock).

[38] C. Munro, Studies in Constitutional Law 2nd edn (London: Butterworths 1999) p.255.

[39] F. W. Maitland, The Constitutional History of England (Cambridge: Cambridge University Press 1931) p.418.

[40] R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWCA Civ 498, [2008] QB 365 (CA) at [114] (Clarke M.R.); [32] (Sedley L.J.).

[41] Town Investments Ltd v Department of the Environment [1978] A.C. 359 (HL), pp.380-1. See also: British Broadcasting Corporation v Johns [1965] Ch 32, 79 (Lord Diplock).

our institutions of government".[42] This is because the formal, archaic terms used to label arrangements at the constitutional apex have remained intact, despite being superseded by political developments that have transformed the political workings of government in practical terms; the law views the Monarch as embodiment of the Crown as directing ministers whereas in political reality ministers (supported by a parliamentary majority) are in the dominant position.

The ministerial advice convention arguably acts to mitigate this cleavage between modern political practice and the static Crown-based legal framework rooted in earlier centuries. The requirement that the Monarch exercise prerogative powers upon ministerial advice is a 'paramount' convention[43] which plays an integral constitutional role despite its apparent non-legal status. It limits the hereditary Monarch's political role and transfers substantive decisions to democratically elected ministers, particularly the Prime Minister whose foremost function is listed by Hennessy as 'managing the relationship between the Government and the Monarch'.[44] The ministerial advice convention enables the Prime Minister to access many of the Monarch's powers in the legal edifice including, vitally, those which were particularly relevant in the Iraq affair, namely: to declare war, to appoint and dismiss ministers, to request a dissolution of Parliament and to defend the realm. The Prime Minister is impotent in law but enjoys de facto access to these monarchic prerogatives by virtue of this convention. Thus exercising prerogatives necessitates a reciprocal relationship between the legally strong Monarch and politically powerful premier; a relationship which leads Hennessy to describe Britain as a 'double headed nation'.[45] The Monarch appears legally omnipotent but politically impotent, whilst the Prime Minister is legally powerless but enjoys a position of political leadership, though its strength may fluctuate according to political fortunes and party loyalty. Thus the premier and Monarch need one another; the prerogative powers must be exercised by a process of symbiosis. The relationship is inescapably reciprocal; the Prime Minister requires the Monarch as a legitimate outlet to exercise Crown powers and the Monarch is incapacitated without prime ministerial advice and direction. In this sense the premiership remains inherently fused to the Monarch and controls many aspects of the Monarch's role in the legal edifice.

Ultimately it is apparent that at law the Prime Minister's position has continued many characteristics of the monarchic predecessor it sought to replace and better.[46] Because the office of Prime Minister gradually gleaned its powers away from the Monarch it never established its own independent legal foundations and is resultantly parasitic on monarchy. The Crown thus plays an integral role in the office of Prime Minister and its powers; legally, structurally and culturally a premier's powers are inextricably linked to Monarch as embodiment of the Crown. Furthermore, this relationship goes beyond mere historic or theoretical interest. Part three of this article demonstrates that in the lead up to the Iraq war the existing arrangements enabled Mr Blair to exploit a beneficial collection of once-monarchic powers which remained obscure and fundamentally unchanged from their medieval nature and form.

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[42] M. Loughlin, "The State, the Crown and Law" in M. Sunkin & S. Payne (eds), The Nature of the Crown, A Legal and Political Analysis (Oxford: Oxford University Press 1999) p.47.

[43] *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.21.

[44] P. Hennessy in House of Commons Political and Constitutional Reform Committee, Role and Powers of the Prime Minister, Written Evidence (July 7, 2011) 10-14.

[45] P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) Ch.3.

[46] "The prime minister is able to use the government to bring forward the policies which he or she *favours; and to stop those to which he or she is opposed. ... To this extent the conduct of government* business can be said to reflect a personal and autocratic rather than a collective and democratic spirit." T. Benn, Arguments for Democracy (London: Penguin 1982) p.29.

[2] The War Prerogative & Parliament

In Britain prerogative powers remain integral to the modern office of Prime Minister, enabling an incumbent premier to undertake a range of functions including appointing ministers, chairing Cabinet and other activities necessary to the conduct of government.[47] The prerogative power to declare war is one key prime ministerial power which has traditionally fallen within the wider prerogative to conduct foreign affairs.

Foreign affairs is a vital area of prime ministerial involvement; since 1945 foreign policy and defence have formed an essential part of the British premier's role.[48] This relative predominance in the foreign affairs field was illustrated throughout the Blair premiership which displayed a strong international dimension, particularly following the September 11 attacks.[49] The foreign affairs prerogative enables the Prime Minister and his Foreign Secretary to undertake a variety of activities necessary to conduct business with other sovereign states on behalf of the country, including entering international treaties and conducting diplomacy.[50] The power to declare war and peace has long been categorised within this broader prerogative.[51] However, because warfare entails the active engagement of the armed forces, often for defensive purposes, the war prerogative also inevitably involves a degree of overlap with the prerogative to defend the realm, though this latter prerogative is specifically concerned with matters such as military appointments, organisation and the day-to-day conduct of military operations.[52] Interestingly, a 2009 government review of prerogatives categorised declaring war alongside other defence-related powers,[53] rather than within foreign affairs. So though instigating war is a specific, self-contained prerogative,[54] it occupies the blurred intersection between foreign affairs and defence.

Though the specific prerogative power to declare war lies in fact with the Prime Minister,[55] it lies with the Monarch at law. "War is an intensely prime ministerial activity"[56] and this is arguably attributable to the symbiosis between premier and Monarch discussed above. As a Crown prerogative the conduct of war was once the preserve of the King. Lord Reid stated in Burmah:

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[47] *Halsbury's Laws of England* (LexisNexis online), vol.8(2) (2011 reissue) para.398; The Cabinet Office, The Cabinet Manual (1st edition, October 2011), paras 3.4-3.6; P. Hennessy in House of Commons Political and Constitutional Reform Committee, Role and Powers of the Prime Minister, Written Evidence (July 7, 2011) 10-14.

[48] P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) pp.91-98.

[49] A. Seldon, Blair (London: Free Press 2005) pp.498-507; D. Blunkett, The Blunkett Tapes, My Life in the Bear Pit (London: Bloomsbury 2006) pp.311, 316, 320.

[50] For a list of specific foreign affairs-related powers see Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), Annex, p.31.

[51] For example in 2003 the House of Commons Foreign Affairs Select Committee investigated the decision to go to war in Iraq: Ninth Report, The Decision to go to War in Iraq (2002-03 HC 813-I). See also: *Halsbury's* Laws of England (LexisNexis online), vol.8(2) (2011 reissue) para.801.

[52] For a list of specific defence-related powers see Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), Appendix, 32. See also: *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.885.

[53] Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), Annex, 32.

[54] Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), para.45.

[55] House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's* Role and Responsibility (2005-06 HL 236-I), para.12.

[56] P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) p.103.

> "The reason for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control."[57]

Though this passage was delivered in the context of military destruction of oil fields to prevent their use by the advancing enemy in World War II, it nevertheless illustrates an interesting mind-set. It implicitly assumes the superiority of a somewhat autocratic, patriarchal leadership culture of the sort exemplified by monarchy, and arguably continued in modern government. Additionally, it depicts the consequences of greater supervisory checks and wider collective involvement in warfare decisions in stark terms. As Lord Reid indicates, modern government's conduct of war remains rooted in notions of monarchy and its associated culture. This association has been criticised by Gladstone who has stated of the war power, "Like all prerogative powers, this one harks back to the medieval notion of the Crown as absolute sovereign."[58] Similarly Lord Lester has criticised such medieval prerogatives as anomalous.[59]

Any declaration of war will be made by the government of the day via prerogative, though the format of such a declaration is not prescribed.[60] Interestingly, despite appearances to the contrary, Britain has not been in a state of war in law since World War II[61] and its last formal declaration was made in 1942.[62] In Amin Collins J distinguished between the term "war" in everyday usage and as a technical concept, and confirmed that a legal state of war did not formally exist in relation to events in Iraq.[63] Furthermore a recent House of Lords committee stated that a future formal declaration of war is 'unlikely' due to developments in international law.[64] The prerogative power to declare war must therefore be taken to encompass its modern equivalent; the power to engage in military operations despite the fact that they may not be legally classified as 'war'. Indeed, a 2009 government review of prerogatives re-labelled the power as the "right to **make** war or peace or institute hostilities **falling short of war**"[65] which more closely corresponds to modern day realities.

Constitutional checks upon the war prerogative have been traditionally limited. A longstanding seam of caselaw indicates clear judicial reluctance to engage with such matters viewed as beyond the judicial role and expertise.[66] However, the war prerogative may be regulated by Parliament in four respects. First, Parliament can enact legislation which is

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[57] Burmah Oil Company v Lord Advocate [1965] A.C. 75 (HL) 100.

[58] D. Gladstone in House of Commons Public Administration Select Committee, Fourth Report, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (2003-04 HC 422), Ev 4.

[59] House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's* Role and Responsibility (2005-06 HL 236-I), Minutes of Evidence, Q3.

[60] War can be commenced by either a formal declaration or by commencement of hostilities; *Halsbury's Laws of* England (LexisNexis online), vol.3 (2011 5th edn) para.8.

[61] Amin v Brown [2005] EWHC 1670 Ch, [2005] All ER (D) 380 (Jul).

[62] The declaration was made against Siam (now Thailand); House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and Responsibility* (2005-06 HL 236-I), para.10.

[63] Amin v Brown [2005] EWHC 1670 Ch, [2005] All ER (D) 380 (Jul) at [17], [25], [28], [46]. See also: House of Lords Select Committee on the Constitution, Fifteenth Report, Waging War: *Parliament's Role and Responsibility* (2005-06 HL 236-I), paras 9-10.

[64] House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's* Role and Responsibility (2005-06 HL 236-I), para.10.

[65] Emphasis added. Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), Appendix, 32.

[66] R Moosavian, Judges and High Prerogative: The Enduring Influence of Expertise and Legal Purity P.L. Oct [2012] 723.

superior to prerogative and may thus restrict or replace prerogative.[67] Second, Parliament can scrutinise governmental exercise of prerogative via the convention of ministerial accountability.[68] In practice, the efficacy of this constitutional check may often be diluted because it will be exercised retrospectively and reliant upon accurate information regarding government activity. This, combined with the nebulous nature of the ministerial accountability convention,[69] means that "the political accountability of ministers and civil servants to Parliament when they exercise [prerogative] powers without parliamentary authority is weak."[70] Two further parliamentary checks are specific to the war prerogative. Parliament acts as political check on the premier's war power in a third sense because it must approve the financing of any military action on an annual basis.[71] However the strength of this check is undercut by the reality that a government which enjoys a parliamentary majority will rarely, if ever, encounter problems passing such a bill, particularly once military action is underway. Finally, though parliamentary endorsement of warfare is not a legal requirement, its support for deployment (either express or tacit) has been generally viewed as politically valuable and "In practice, Parliament has very frequently been consulted, or its approbation sought".[72] This fourth parliamentary check upon the war prerogative was crucial in the Iraq affair and thus warrants further detailed consideration.

Parliamentary approval: an emerging convention?

Despite the political importance of parliamentary support for military action, whether such support is required as a matter of constitutional convention was a marginal question until the Iraq affair raised its profile. Conventions are the non-legal, generally unwritten norms that regulate the British constitution, defined by Marshall and Moodie as:

> "certain rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts, ... *nor by the presiding officers in the Houses of* Parliament."[73]

This became a live issue during the Iraq affair arguably because public hostility to military action increased the need for the perceived legitimacy that parliamentary support could provide. Various questions thus arose regarding the precise role of Parliament in approving warfare, not simply regarding the conventional status or bindingness of this check, but also its precise terms. For example, was a Commons vote on the issue necessary? Furthermore, was a full debate on a substantive motion required, or would Tony Blair's initial preference - a less onerous, less risky adjournment debate - suffice?[74]

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[67] R. v Secretary of State for the Home Department, ex parte Fire Brigades Union and others [1995] 2 A.C. 513 (HL) 564 (Lord Mustill).

[68] The Cabinet Office, Ministerial Code (May 2010), paras 1.2(b)-(c).

[69] For example, Lord Wilson has conceded that the ministerial accountability convention "has never really been as clear-cut as one would like for as long as anyone can remember." Lord Wilson of Dinton, "The Robustness of Conventions in a Time of Modernisation and Change" [2004] P.L. 407, 419.

[70] A. Lester & M. Weait, "The Use of Ministerial Powers without Parliamentary Authority: the Ram Doctrine" [2003] P.L. 415, 426.

[71] House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's* Role and Responsibility (2005-06 HL 236-I), para. 14.

[72] *Halsbury's Laws of England,* (LexisNexis online, 2010), vol.61 (2011 5th edn) para.27. See also: R. Cook, The Point of Departure, Diaries from the Front Bench (London: Pocket Books 2004) pp.187-8.

[73] G. Marshall & G. Moodie, Some Problems of the Constitution, 5th edn (London: Hutchinson 1971) pp.23-4.

[74] R. Cook, The Point of Departure, Diaries from the Front Bench (London: Pocket Books 2004) pp.186-8.

Ultimately a Commons debate on a substantive motion to determine whether troops should be deployed took place on March 18th, 2003.[75] Both the motion supporting war and an amendment tabled by opponents, which asserted 'the case for war against Iraq [was] not yet established', were subject to prolonged, intensive discussion. The opposing amendment was voted down by a comfortable majority of 396 to 217,[76] and the motion in support of war was then passed by 412 votes to 149 votes against.[77] Despite this outcome Robin Cook, who had resigned his Cabinet position of Leader of the House in protest at the war, viewed the vote as a pyrrhic victory. He claimed that it established Parliament's right to formally vote on warfare in the future:

> "Irrespective of the outcome, the very fact that a vote took place at all was a major advance. For the first time in the history of Parliament, the Commons formally took the decision to commit Britain to conflict. Now that the Commons has established its right to vote on the commitment of British troops to action, no future government will find it easy to take away again."[78]

Commentators such as Feldman,[79] Tomkins[80] and Cowley and Stewart[81] agree that the Iraq vote represented an instance of parliamentary strength. Such views were shared by some leading ministers in the Blair Cabinet who also saw the Iraq vote as constitutionally significant. For example, in 2006 Jack Straw claimed that the vote 'set a clear precedent for the future',[82] and in 2005 Gordon Brown stated of Iraq:

> "Now that there has been a vote on these issues so clearly and in such controversial circumstances, I think it is unlikely, except in the most exceptional circumstances a government would choose not to have a vote in Parliament."[83]

Though Mr Brown did not make express reference to constitutional convention in this passage, he stressed the importance of a parliamentary vote (bar exceptional circumstances) in unequivocal terms. This emerging consensus was corroborated by a decisive development in May 2007 when the House of Commons debated and passed a resolution, supported by government, that

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[75] Hansard HC Vol.401, col.824, (March 18, 2003). See also: Hansard HC Vol.400, cols 265-367 (February 26, 2003).

[76] Hansard HC Vol.401, cols 902-906, (March 18, 2003).

[77] Hansard HC Vol.401, cols 907-911, (March 18, 2003)

[78] R. Cook, The Point of Departure, Diaries from the Front Bench (London: Pocket Books 2004) p.190. However a 2007 government consultation paper contradicted Cook's claim that the substantive vote on Iraq was the first such vote in the history of Parliament: "The second Iraq war was the first occasion **since Korea in July 1950** where the House of Commons was invited to hold a vote on a substantive motion before armed forces were engaged." Emphasis added. Ministry of Justice, The Governance of Britain, War Powers and Treaties: Limiting Executive Powers, Cm.7239 (2007), para.31.

[79] Feldman has claimed: "It is just possible that, following the parliamentary debates that preceded the second Gulf War in 2003, there is now a constitutional convention that no military invasion of another country will be initiated without parliamentary approval". D. Feldman, "None, One or Several? Perspectives on the UK's Constitution(s)", C.L.J. 64(2), July 2005, 329-351, 341.

[80] A. Tomkins, Our Republican Constitution (Oxford: Hart Publishing 2005) p.129.

[81] P. Cowley & M. Stuart, "Parliament: More Bleak House than Great Expectations" (2004) Parl. Aff. Vol 57, No 2, 301-314, 312.

[82] Emphasis added. Quoted in House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and Responsibility* (2005-06 HL 236-I), para.98.

[83] Quoted in House of Lords Select Committee on the Constitution, Fifteenth Report, Waging War: *Parliament's Role and Responsibility* (2005-06 HL 236-I), para.87.

> "This House welcomes the precedents set by the Government in 2002 and 2003 in seeking and obtaining the approval of the House for its decisions in respect of military action against Iraq; is of the view that it is inconceivable that any Government would in practice depart from this precedent."[84]

It furthermore 'call[ed] upon government ... to come forward with more detailed [reform] proposals for Parliament to consider.' This resolution represented the most explicit Blair-era recognition that parliamentary approval is a pre-requisite to military action.

Proposed reforms aiming to formalise and galvanise Parliament's involvement in the war power germinated in the last three years of Mr Blair's premiership when the war power was investigated by two select committees,[85] and was the subject of three private members' bills.[86] Activity continued during Gordon Brown's term in office, and 2007-8 witnessed the publication of various command papers[87] culminating in a white paper and draft bill on constitutional renewal[88] which proposed non-statutory reform of the war power by convention or parliamentary resolution.[89] Yet despite the momentum gathered, measures to reform the war prerogative failed to progress further.

The issue of parliamentary involvement in warfare re-emerged to prominence due to the UK's involvement in Libya in 2011. In Commons questions in the lead-up to the conflict the Leader of the House twice referred to prior parliamentary debate of military action as a 'convention' that the government intended to observe.[90] In the same month the Cabinet Secretary, Sir Gus O Donnell, wrote to a select committee confirming that

> "*the Government believes that since ...the deployment of troops in Iraq, a* **convention** exists that Parliament will be given the opportunity to debate the decision to commit troops to armed conflict".[91]

Significantly, a full parliamentary debate and vote on a substantive motion supporting engagement in Libya was held, reinforcing the Iraq vote as a constitutional precedent. Though this did not occur until March 21st, two days after the actual order to engage, military action was overwhelmingly approved.[92] Towards the end of the debate Foreign Secretary William Hague stated "*We will ... enshrine in law for the future the necess*ity of consulting

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[84] Hansard HC Vol.460, col.582 (May 15, 2007).

[85] House of Commons Public Administration Select Committee, Fourth Report, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (2003-04 HC 422); House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and* Responsibility (2005-06 HL 236-I).

[86] Full details are set out in House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and Responsibility* (2005-06 HL 236-I), para.80.

[87] Ministry of Justice, The Governance of Britain, Cm.7170 (2007). Mr Brown's accompanying parliamentary speech proposed that the war prerogative was one particular area that warranted reform: Hansard HC Vol.462, cols.815-6 (July 3, 2007). Ministry of Justice, The Governance of Britain, War Powers and Treaties: Limiting Executive Powers, Cm.7239 (2007).

[88] Ministry of Justice, The Governance of Britain – Constitutional Renewal, Cm.7342-I & II (2008).

[89] Ministry of Justice, The Governance of Britain – Constitutional Renewal, Cm.7342-II (2008) para.215 and Annex A, 53.

[90] Hansard HC Vol.524, col.1066 (March 10, 2011).

[91] Emphasis added. House of Commons Political and Constitutional Reform Committee, Eighth Report, *Parliament's Role in Conflict Decisions* (2010-12 HC 923), para. 3. See also the letter from the Minister for Political and Constitutional Reform featured in House of Commons Political and Constitutional Reform Committee, Twelfth Report, *Parliament's Role in Conflict Decisions* – further Government Response (2010-12 HC 1673), 3.

[92] 557 M.P.s voted in support of the military action and 13 voted against; Hansard HC Vol.525, cols 699-802 (March 21, 2011).

Parliament on military action".[93] Two months later the Political and Constitutional Reform select committee recommended that government re-instigate Brown-era war power reform proposals.[94] This resulted in relevant amendments to the new Cabinet Manual,[95] but no parliamentary resolution to date.[96] Such recent activity indicates that war prerogative reform is likely to be an ongoing issue as long as UK foreign policy includes instances of military engagement overseas.

In summary, the post-Iraq period witnessed a crystallisation of the view that the war prerogative needed reform, though the proliferation of parliamentary activity has not yet yielded any formal changes to this area. But even in the absence of such reform the evidence does tilt towards an emerging consensus, by no means unanimous,[97] that a convention requiring express parliamentary approval for deployment does now exist. In any event there was ultimately a shift towards more concrete parliamentary involvement regarding warfare decisions. Parliamentary involvement in war has traditionally been politically expedient. However, by moving towards more express statements of the position and potentially extending approval to require a substantive vote, the nature of parliamentary involvement arguably changed. Parliament emerged as a stronger potential check on the prime ministerial war prerogative and this trend constituted a key development during the Iraq affair and the period that followed it.

Yet despite the apparent strengthening of parliamentary checks on the war power yielded by the Iraq affair, the March 2003 vote ultimately approved military action and thus endorsed the Prime Minister's preferred exercise of the war power. This outcome, particularly in light of strong opposition that prevailed at the time, arguably indicates that the practical significance of the Iraq vote may have been limited and that Parliament's increased involvement should not be overstated. Instead, the efficacy of this strengthening check on the war prerogative should be viewed in light of three vital constitutional realities. First, the executive can control Parliament by virtue of its party majority in the Commons; this was particularly the case in the first two terms of the Blair government that enjoyed comfortable majorities.[98] Second, under existing constitutional arrangements there will always be a need for individual leadership in warfare and the Prime Minister remains the one individual with direct access to the war power because he has the exclusive capacity to advise the Monarch regarding use of the war power at law. This point is recognised by Mr Blair who has written of Iraq; "here is the difference between everyone else and the final decision-taker. Everyone else can debate and assume; only one person decides."[99] Finally, and most significant for the purposes of this article, Parliament's efficacy as a check in the Iraq vote was discreetly

[93] Hansard HC Vol.525, col.799 (March 21, 2011).

[94] The committee specifically advised government to 'bring forward a draft detailed parliamentary resolution for consultation' and include the 'convention' in the Cabinet Manual; House of Commons Political and Constitutional Reform Committee, Eighth Report, *Parliament's Role in Conflict* Decisions (2010-12 HC 923), paras 3, 6. See also: House of Commons Political and Constitutional Reform Committee, Ninth Report, *Parliament's Role in Conflict Decisions: Government* Response to *the Committee's Eight*h Report of Session 2010-12 (2010-12 HC 1477).

[95] The Cabinet Office, The Cabinet Manual (1st edition, October 2011), paras 5.36-5.38.

[96] This led the select committee to claim that 'progress is overdue' on this matter. House of Commons Political and Constitutional Reform Committee, Twelfth Report, *Parliament's Role in Conflict* Decisions – further Government Response (2010-12 HC 1673), para.7.

[97] For example, N. White and D. Jenkins do not think such a convention exists and S. Payne thinks that it may do: House of Commons Political and Constitutional Reform Committee, Eighth Report, *Parliament's Role in Conflict Decisions* (2010-12 HC 923), Ev 15-16, Q38.

[98] In the 1997 election the Labour Party won 417 seats in the House of Commons (a 'landslide' majority of 179). In the 2001 election Labour won 413 seats (maintaining a very comfortable majority of 165). In 2005 the government won 356 seats and saw the Commons majority reduced to 67.

[99] T. Blair, A Journey (London: Arrow Books 2011) p.405.

undermined by countervailing constitutional features, specifically clusters of Crown-based prime ministerial prerogatives which, exercised cumulatively, steered the Iraq vote in favour of deployment. The precise mechanics of this process are discussed in the third and final part of this article.

[3] Gauging the Influence of Crown-based Prerogatives upon the Iraq Vote

Despite their ancient roots prerogative powers continue to be integral to modern British Prime Ministers. As Part one established, the office provides its incumbent with de facto access to a range of prerogative powers necessary to undertake the role, including for example Cabinet chairmanship, patronage and (until the Constitutional Reform and Governance Act 2010) authority over the civil service. However, three specific prime ministerial prerogatives impacted upon parliamentary involvement in the Iraq deployment decision: first, the power to appoint ministers; second, to request a dissolution of Parliament; and third, to defend the realm. It is to the influence of these three powers upon the Iraq vote that discussion now turns.

Power to Appoint Cabinet Ministers

Constitutionally, it is the Monarch's proper role to appoint ministers, yet convention dictates that she must exercise this prerogative according to the Prime Minister's recommendations.[100] Therefore, indirectly, this prerogative allows a Prime Minister almost complete control over the personnel of his Cabinet. It allows the office holder the technical capacity to appoint and dismiss Cabinet ministers at will, reflecting "the legal position that Ministers are appointed and hold office at the pleasure of the Crown."[101] In a wider context, the power of government appointments ensures the Prime Minister solid House of Commons support of at least 95 of his ministers[102] who are obliged to support government policy by virtue of the convention of collective responsibility.[103] Despite practical and political restraints upon it, the premier's power to appoint and dismiss Cabinet ministers clearly affords a position of relative predominance vis-a-vis his party in Parliament and individual Cabinet ministers, though the strength of this hegemony will vary according to political climates and alliances. Key ministers in the Iraq affair included the Foreign Secretary Jack Straw, Defence Secretary Geoff Hoon and, vitally, the Attorney General, Lord Goldsmith. All three ministers had been appointed by Mr Blair and played significant roles in the decision to undertake military action.

Mr Blair appointed Lord Peter Goldsmith to the post of Attorney General in 2001. The Attorney General is a government minister,[104] though his role can be divided into two categories of duty: legal and ministerial.[105] The office has 'traditionally been at the junction

[100] *Halsbury's Laws of England* (LexisNexis online), vol.8(2) (2011 reissue) para.21.
[101] R. Brazier, Ministers of the Crown (Oxford: Clarendon Press 1997) p.205.
[102] The House of Commons Disqualification Act 1975, ss.2(1)-(2) indirectly prevents the appointment of more than 95 ministers by providing that if the number of ministers exceeds this threshold the excess shall not be entitled to vote in the Commons.
[103] The Cabinet Office, Ministerial Code (May 2010), paras 2.1, 2.3.
[104] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), paras 8-9.
[105] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), para.22.

of law and politics in England and Wales'[106] and a Commons select committee identified resulting 'tensions' in this dual role.[107] One of the Attorney-General's primary official duties is legal adviser to the Crown;[108] this formal role in the Iraq affair required Lord Goldsmith to specifically advise government regarding the international lawfulness of military action. This responsibility is 'non-ministerial', is 'not subject to collective responsibility' and requires the Attorney-General to 'act independently of the Government.'[109] However in evidence to a House of Lords committee, Jowell questioned whether such independence on the part of an Attorney is possible when his role as a member of government is at least partly political,[110] a particularly salient question in the context of Iraq.

United Nations Security Council (UNSC) authorisation was required for an internationally lawful UK-US deployment in Iraq. There were conflicting views amongst member states as to whether UNSC Resolution 1441,[111] passed in November 2002, provided such authorisation. UK attempts to obtain UN support for a second resolution explicitly authorising military action were ultimately unsuccessful[112] and the lack of a second UN resolution caused domestic problems for Mr Blair. At a meeting on February 28th, 2003 the Attorney-General initially provided advice to the Prime Minister regarding the legality of undertaking military action without a second UN resolution, advice later confirmed in a formal minute on March, 7th.[113] The Attorney-General's initial advice on this issue was qualified and reticent about military action, concluding that "there would be no justification for the use of force against Iraq on the grounds of self-defence against an imminent threat."[114] Though Lord Goldsmith accepted that 'a reasonable case' could be made that military action would be authorised without a second resolution, he made a vital qualification to this point. The qualification was this; that proceeding without a second resolution and relying solely on UNSC Resolutions 678[115] and 1441

> "will only be sustainable if there are strong factual grounds for concluding that Iraq has failed to take the final opportunity [to comply]. In other words, we would need to be able to demonstrate hard evidence of non-compliance and non-co-operation."[116]

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[106] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), para.1.

[107] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), para.55.

[108] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), paras 4-5. See also: House of Constitutional Affairs Committee, Fifth Report, Constitutional Role of the Attorney General (2006-7 HC 306), paras 11, 68.

[109] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), para.9.

[110] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), paras 32-33. Elsewhere, Jowell expresses support for an independent, non-party Attorney General: Public Administration Select Committee, Tenth Report, Constitutional Renewal: Draft Bill and White Paper (2007-08 HC 499), para.83.

[111] United Nations Security Council Resolution 1441 ((November 8, 2002) UN Doc S/RES/1441).

[112] A. Seldon, Blair 591-3 (London: Free Press 2005) pp.591-3; D. Coates & J. Kreiger, *Blair's War* (Cambridge: Policy Press 2004) pp.40-1; J. Kampfner, *Blair's Wars* (London: Free Press 2004) pp.286-7.

[113] Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898), para.378.

[114] Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898), para.374.

[115] United Nations Security Council Resolution 678 ((November 29, 1990) UN Doc S/RES/678).

[116] R (on the application of Gentle and another) v Prime Minister and others [2006] EWCA Civ 1689, [2007] QB 689 (CA) at [16]. The Attorney General's advice continued: "you will need to consider carefully whether the evidence of non-cooperation and non-compliance by Iraq is sufficiently compelling to justify the conclusion that Iraq has failed to take its final opportunity."

This initially private advice was later publicised in the Butler Report.[117]

On March 11th, the Chief of Defence Staff, Admiral Sir Michael Boyce, indicated to the Prime Minister that the international lawfulness of any military action must be clearly confirmed before he could order forces to take action.[118] Vitally the Attorney General later changed his opinion regarding the international legality of military action. On March 17th, days after his initially sceptical advice, the Attorney-General produced advice indicating an alternative legal view.[119] His new advice (drafted by Professor Christopher Greenwood)[120] contained none of its earlier qualifications and claimed that 'the authority to use force under [earlier UNSC] resolution 678 has revived and so continues today'.[121] Mr Blair's memoirs do obliquely acknowledge Lord Goldsmith's change of advice, but do not provide a detailed, specific explanation for it.[122] This new 'advice' was provided to Cabinet,[123] the Information Tribunal later commenting that "it may have been that members of Cabinet without a legal background were incline*d to rely on the Attorney's [shorter and more certain] advice*."[124] Vitally, it was also Lord Goldsmith's amended advice upon which Parliament voted to approve war on March 18th.

Lord Goldsmith's u-turn in legal advice has proved controversial and, in the words of the House of Lords Constitutional Select Committee, "*the differences [in advice] … gave rise* to speculation that the Attorney had been placed under political pressure to temper his *opinion to align it with the government's intentions*."[125] It is therefore arguable that the Prime Minister's de facto prerogative power to appoint the Attorney General as a minister of his government may have played a discernible role in enabling him to secure the deployment of troops in Iraq (which was entirely reliant upon a clear statement of legality). Mr Blair may

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[117] Though the government initially opposed the release of this information; Peter Hennessy, Informality and Circumscription: The Blair Style of Government in War and Peace, Political Quarterly, 2005, Vol. 76(1), p.3, 8.

[118] R (on the application of Gentle and another) v Prime Minister and others [2008] UKHL 20, [2008] 1 A.C. 1356 at [46]. See also A. Seldon, Blair (London: Free Press, 2005), p.596. A failure to obtain such confirmation would leave British troops potentially liable for war crimes.

[119] Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898), Annex D, p.182. It seems that there were diverging views on this issue in government: C. Short, An Honourable Deception? New Labour, Iraq, and the Misuse of Power (London: Free Press 2005) p.174; P. Sands QC, Lawless World (London: Penguin 2006) pp.194-5.

[120] Vitally Robin Cook writes: "It was not the Attorney General himself who drafted the new advice, as he invited a professor of international law to write the opinion for him. What made this procedure all the more curious is that the professor he chose, Christopher Greenwood, **was one of a small minority of experts in international law who believed that an invasion would be legal without a further resolution** and had already gone public with that view in The Times." Emphasis added. The Point of Departure, Diaries from the Front Bench (London: Pocket Books 2004) p.344.

[121] Report of a Committee of Privy Counsellors (chair: Lord Butler), Review of Intelligence on Weapons of Mass Destruction, (July 2004, HC 898), Annex D, 182. For a detailed critique of the Attorney General's second advice see: P. Sands QC, Lawless World (London: Penguin 2006) pp.184-201; Lord Alexander QC, "The Pax Americana and the Law", Justice website (London: October 14, 2003) <http://www.justice.org.uk/data/files/resources/164/Iraq-the-pax-Americana-and-the-law.pdf> accessed June 15, 2013.

[122] T. Blair, A Journey (London: Arrow Books 2011) pp.421-3, 432.

[123] Cabinet Office & Dr. Christopher Lamb v Information Commissioner, EA/2008/0024 & 0029 (27/01/2009) at [21]-[23].

[124] Cabinet Office and Dr. Christopher Lamb v Information Commissioner, EA/2008/0024 & 0029 (27/01/2009) at [85].

[125] House of Lords Select Committee on the Constitution, Seventh Report, Reform of the Office of Attorney General (2007-8 HL 93), para.14.

have been able to exert influence or persuasion to ensure that Lord Goldsmith produced legal advice in support of his preferred exercise of the war prerogative.

The controversy surrounding the Attorney General's advice in the Iraq decision has been cited as one event which has highlighted inadequacies in the post.[126] Reforms to the office were proposed in the post-Blair era,[127] though statutory measures were ultimately abandoned and non-legal reforms to the office were modest.[128] Proposed reforms to the war prerogative also entailed discussion of changes to the A-G role and whether his legal advice regarding warfare should be routinely published.[129] That such attention has focussed upon reform of this area supports the proposition that this was a material factor which enabled the Iraq deployment.

Power to Request a Dissolution of Parliament

Until the Fixed-Term Parliaments Act 2011 (FTPA) placed the dissolution of Parliament on a statutory footing[130] it was a monarchic prerogative power. Through his power to advise the Monarch to dissolve Parliament, a Prime Minister was previously able to determine the date of general elections, subject only to the statutory requirement that the maximum duration of Parliament was five years.[131] The new Act removes this discretion, fixing at five yearly intervals both general elections[132]and the accompanying prior parliamentary dissolution.[133] At the time of the Iraq vote the power to advise a dissolution under prerogative belonged to the Prime Minister solely.[134] The chief advantage of this power was that it allowed a Prime Minister to instigate a general election at a time most advantageous to his party. The dissolution decision was thus inevitably made predominantly on party political grounds which prompted calls for its reform,[135] though ironically the insecurities of coalition government ultimately proved a stronger impetus to change.

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[126] House of Constitutional Affairs Committee, Fifth Report, Constitutional Role of the Attorney General (2006-7 HC 306), para.35.

[127] Ministry of Justice, The Governance of Britain – Constitutional Renewal, Cm.7342-I (2008), Part 2; Cm.7342-II (2008) paras 51-142.

[128] Hansard HC Vol.496, col.106WS (July 20, 2009); Attorney General, *The Government's Response* to the Justice Committee Report on the Draft Constitutional Renewal Bill (Provisions Relating to the Attorney General) Cm.7689.

[129] The House of Lords constitutional select committee considered whether future reform to the war prerogative should include provision to ensure publication of the A-G's advice. The committee identified problems with such a measure, e.g. that knowledge of future publication of Attorney General's advice may lead to it being diluted or less candid; House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and Res*ponsibility (2005-06 HL 236-I)) paras 29, 71. See also: Ministry of Justice, The Governance of Britain – Constitutional Renewal, Cm.7342-II (2008), paras 66-69.

[130] Fixed-Term Parliaments Act 2011, s.3.

[131] Parliament Act 1911, s.7 (repealed by the Fixed-Term Parliaments Act 2011).

[132] Fixed-Term Parliaments Act, s.1.

[133] Fixed Term Parliaments Act, s.3(1).

[134] The power had formerly rested with the Cabinet, though since 1918 it had been exercised by the Prime Minister only. Depicted by I. Jennings, Cabinet Government (Cambridge: Cambridge University Press 1965 3rd edn) pp.418-9; J. Mackintosh, The British Cabinet (London: Stevens & Sons 1977 3rd edn) p.453; H. Laski, Reflections on the Constitution (Manchester: Manchester University Press 1997) p.102.

[135] The July 2007 green paper proposed that advance commons approval for dissolution should be sought: Ministry of Justice, The Governance of Britain, Cm.7170 (2007), para. 35. See also: Robert Blackburn, The Prerogative Power of Dissolution of Parliament: Law, Practice and Reform [2009] P.L. 766. In 2010 a select committee viewed this prime ministerial power as 'questionable': House of Commons Political and Constitutional Reform Committee, Second Report, Fixed-Term Parliaments Bill (2010-11 HC 436), para.1.

Interestingly, the prerogative power to advise a dissolution also came to act as a method of prime ministerial restraint over his own parliamentary party or in Blackburn's terms, as "a sort of penal power that a Prime Minister has over his colleagues by threatening a Dissolution if *they don't support him*."[136] Its function as a disciplinary mechanism stemmed from its interaction with the constitutional convention that a Prime Minister will resign if he loses a vote of confidence in the Commons,[137] thus potentially instigating the dissolution of Parliament and resulting general election. The process would start with the House of Commons debating and voting upon a motion of no confidence. Yet what constitutes a no confidence 'motion' is not clear-cut; [138] it can take various forms, for example a vote upon key legislation which enacts part of a government's manifesto, a Budget or another fundamental issue.

If the government or Prime Minister lost such a vote of confidence this would result in one of two outcomes. Historic precedent indicates it was most probable that a dissolution of Parliament would be advised:

> "There have only been three successful votes of no confidence since the start of the 20th century. On the last two occasions, the government announced the dissolution of Parliament on the following day (October 1924 and March 1979)."[139]

Alternatively, the losing premier or government could resign, but if a new government commanding majority support in Parliament could not be formed then dissolution would follow in any event. Either way, government loss of a no confidence vote would very likely lead to a general election. In this way the dissolution device could be used as a potential last-resort sanction against party dissent because the threat of dissolution at an inopportune moment with the resulting potential to lose their parliamentary seats would often compel backbenchers to follow the government line. Labour Prime Minister Clement Atlee stated that though the power was rarely resorted to, it was 'essential' to party discipline.[140] However, the threat of its use also entailed an inherent risk for the premier who chose to resort to it.

In light of the Blair government's large Commons majorities, particularly in its first two terms, there was little recourse to the dissolution power other than for scheduled general elections. This was because government could draw upon support from a large pool of Labour M.P.s to pass its legislative programme. But the dissolution device was a material factor in the Commons debate regarding Iraq. According to his memoirs, Mr Blair was keenly aware that without a second UNSC resolution he could lose the vote and have to

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[136] House of Commons Political and Constitutional Reform Committee, Second Report, Fixed-Term Parliaments Bill (2010-11 HC 436), Ev 16, Q80.

[137] The convention that applied at the time of the Iraq vote was included in an early pre-FTPA version of the Draft Cabinet Manual in the following terms: "A Government or Prime Minister who cannot command the confidence of the House of Commons is required by constitutional convention to resign or, where it is appropriate to do so instead, may seek a dissolution of Parliament." Cited by Hazell in House of Commons Political and Constitutional Reform Committee, Second Report, Fixed-Term Parliaments Bill (2010-11 HC 436) Ev 25. The final version of The Cabinet Manual sets out the modified position under the FTPA; The Cabinet Office, The Cabinet Manual (1st edition, October 2011), para.2.31.

[138] Former Clerk of the House of Commons, Dr M Jack in House of Commons Political and Constitutional Reform Committee, Second Report, Fixed-Term Parliaments Bill (2010-11 HC 436), Ev 5, Q17.

[139] R. Hazell in House of Commons Political and Constitutional Reform Committee, Second Report, Fixed-Term Parliaments Bill (2010-11 HC 436), Ev 26.

[140] W. Andrews, Some Thoughts on the Power of Dissolution (1959-60) Parl. Aff. vol 13, 286, 286.

resign.[141] Though this was not a formal confidence vote per se, the effect of the premier's pre-vote claim that he would resign in the event of losing[142] was almost identical in practical terms; defeat in that vote would have obliged Mr Blair to either fulfil his threat or almost certainly face a 'no confidence' motion. His memoirs explain the risk in the following terms:

> "I would need Tory votes to be sure of winning [the Iraq vote] in the House of *Commons. ... So I knew* **I** would win the [Iraq] vote itself. But – and it was a *big 'but'* – the Tories were, perfectly justifiably, making it clear that if there *was a 'no confidence' motion following the vote on the conflict, then they* would side with the rebels. In that case, I would be out. Therefore I had to win well, and in a way that deterred my own side taking their opposition as far *as agreeing [to] vote against government on a 'no confidence' motion.*"[143]

In this sense, like a formal confidence vote, Mr Blair's resignation threat acted to unite party interests against the political fallout of a general election that would very probably occur in the event of a negative vote against deployment. Labour M.P.s voting on whether to approve military action in Iraq did so in the knowledge that failure to provide such approval would result in the resignation of Mr Blair and his government or, failing this, the passing of a motion of no confidence against them. Either outcome would very probably result in the dissolution of Parliament and a general election whilst the Labour Party was in disarray. Evidence from the March 18th debate indicates that the potentially fatal effect of such an outcome was arguably a factor influencing the debate and vote.

The Iraq debate was not conducted along strict party lines and the deployment was supported by many Conservative M.P.s. A number of Labour members including Malcolm Savidge,[144] John McDonnell[145], Barry Gardiner[146] and Lindsay Hoyle[147] made speeches emphasising that the deployment vote should transcend party and career interests. Nevertheless, the Blair government conducted extensive background negotiations to build up Commons support prior to the vote[148] and references to its utilisation of the Whip system were made by Malcolm Savidge[149] and John McDonnell in the debate. The latter stated:

> "The Prime Minister said that he wants people to vote not out of loyalty but on the basis of understanding and supporting the argument. I respect him for that. I would respect him even more if he gave us a free vote instead of a three-line Whip, and if the Whips were called off from trying to persuade *people in their normal manner."*[150]

Other references to the impact of the Iraq vote on the future of the Labour government were made in the debate. Labour M.P. Bill Tynan (supporting the amendment against government)

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[141] T. Blair, A Journey (London: Arrow Books 2011) pp. 412, 428-9. See also 'The Iraq War' (3 part documentary series) (London: BBC, May 2013) episode 1, at 48-51 minutes.

[142] A. Seldon, Blair (London: Free Press 2005) pp.597-8; D. Coates & J. Krieger, *Blair's War* (Cambridge: Polity Press 2004) p.61.

[143] Emphasis added. T. Blair, A Journey (London: Arrow Books 2011) p.429.

[144] (Voting against government). Hansard HC, Vol.401, col.817 (March 18, 2003).

[145] (Voting against government). Hansard HC, Vol.401, col.875 (March 18, 2003).

[146] (Voting with government in support of military action). Hansard HC, Vol.401, col.822 (March 18, 2003).

[147] (Voting with government in support of military action). Hansard HC, Vol.401, col.885 (March 18, 2003). See also the comments of Conservative M.P. John Randall at col.828.

[148] Anthony Seldon, Blair 595-6 (Free Press 2005); John Kampfner, Blair's Wars 306-7 (Free Press 2004); 'The Iraq War' (3 part documentary series) (London: BBC, May 2013) episode 1, at 48-51 minutes.

[149] Hansard HC, Vol.401, col.817 (March 18, 2003) (Malcolm Savidge M.P.). See also: cols.828, 875.

[150] Hansard HC, Vol.401, col.875 (March 18, 2003).

acknowledged that this was an issue upon which the Prime Minister could be 'displaced'.[151] Similarly Labour M.P. Peter Pike (supporting the amendment) expressed concern that a vote against deployment would damage the Prime Minister, government and party.[152] Elsewhere Conservative M.P. Sir Patrick Cormack (supporting deployment) asked Labour M.P. Tony Banks (voting against) the following question:

> "Does he accept that the logical consequence of his vote this evening, whether or not he regards it as a rebel vote, would be the defeat of his Prime Minister?"[153]

This evidence from the Iraq debate indicates that express references to the potentially fatal impact upon the Labour Party of failure to approve warfare were made at various points. Additionally, Cowley and Stuart claim this issue was laboured in background negotiations with Labour M.P.s prior to the vote.[154] This suggests that the threat of dissolution was present as an influencing factor, though it did not occupy a major explicit role in the debate. Nevertheless the silent, underlying role of the dissolution device upon the Labour M.P.s cannot be discounted. It remains arguable that Mr Blair's threat to resign and instigate the 'no confidence-dissolution-election' process constituted a further factor in favour of his preferred exercise of the war power. By enabling the Prime Minister to mobilise support for war, it acted as another device which curtailed the vigour of countervailing parliamentary checks upon the power. Dissolution was a power that the premier could previously threaten to use in order to unite party interests in extraordinary circumstances and thus it could assist him to obtain approval for controversial or politically unpopular measures. Despite the ongoing disagreements within the Labour party regarding military action in Iraq, the threat of an impending general election increased the stakes and was influential in bringing dissenting or reluctant factions into line.

The Blair-era dissolution prerogative should be viewed in light of subsequent reforms introduced by the FTPA. Though it has abolished the Monarch's dissolution prerogative (and thus the premier's control over it) the Act leaves the general mechanics of a no confidence-triggered dissolution largely unaltered.[155] So the essential features of the dissolution device, traditionally founded upon autocratic leadership and the ancient Crown-based framework, remain intact. A prime ministerial threat of resignation, of the sort made by Mr Blair prior to the Iraq vote, would play out in a very similar way under the FTPA and thus the potential influence of the dissolution device on a parliamentary warfare decision continues. There are clearly important reasons for keeping this device intact, for example ensuring that a government discredited on a vital issue does not remain in power. However, the executive-favoured inclination of the device in warfare decisions, which due to their importance are supposed to transcend party and partisanship, should be acknowledged and arguably afforded further attention.

The Defence Prerogative

The power to engage in military action under the foreign affairs prerogative can be distinguished from the actual day-to-day conduct of military action which is governed by

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[151] Hansard HC, Vol.401, col.867 (March 18, 2003).
[152] Hansard HC, Vol.401, col.889 (March 18, 2003).
[153] Hansard HC, Vol.401, col.881 (March 18, 2003).
[154] P. Cowley & M. Stuart, Parliament: More Bleak House than Great Expectations (2004) Parl. Aff. Vol 57, No 2, 301-314, 307-8.
[155] Section 2 expressly provides for an 'early' parliamentary general election to be initiated where the House of Commons passes a motion of no confidence in government, though only where an alternative government cannot be founded within 14 days. Fixed-Term Parliaments Act, ss.2(3)-(4). In such circumstances the premier retains the right to advise the Monarch of the election date (s. 2(7)) and the prior parliamentary dissolution date is fixed in relation to that.

statute and the general prerogative to defend the realm.[156] The prerogative to defend the Queen's realm, frequently cited as the Crown's foremost duty,[157] puts the Prime Minister and his Defence Secretary in control of the nation's military forces. Halsbury's states that:

> "The supreme government and command of all forces by sea, land and air, and of all defence establishments is vested in the Crown by prerogative right at common law and by statute."[158]

The prerogative authorises decisions about military appointments, the grouping and disposal of military units and matters regarding the organisation, personnel and maintenance of military forces.[159] Parliamentary limitations on the defence prerogative include the annual approval of defence budgets by Armed Forces Acts as well as the general scrutiny of a parliamentary select committee.[160]

At the time of the parliamentary vote to approve military action in Iraq British troops had already been deployed and were waiting for the order to enter the country. Thus the initial conduct of military action can be divided into two distinct stages: first the preparatory action of deploying troops in readiness for potential combat where necessary, and secondly the order to actively engage in combat. This second stage, the order to commence warfare, is specifically authorised the 'war' prerogative. However, the former preparatory action would be authorised by the defence prerogative which covers operational matters.

The prior mobilisation of UK troops in the Iraq affair was by no means an unusual or unlawful use of prerogative. The Defence Secretary justified this advance deployment on two grounds: first, the scale of the proposed military action required prior marshalling of troops,[161] and second, the clear threat of force was necessary to afford the UK and US leverage in ongoing negotiations with the Iraqi regime.[162] Parliamentary approval was not required for this initial preparatory deployment, though general statements were made to Parliament in January 2003 outlining the ongoing arrangements.[163] Yet vitally, it is arguable that this exercise of the defence prerogative to arrange troops at the Iraqi border (combined with the timing of the vote)[164] had a discernible impact upon the parliamentary debate because it increased pressure on M.P.s to approve military action. Evidence from the March 18th debate indicates support for this proposition.

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[156] *Halsbury's Laws of* England (LexisNexis online), vol.3 (2011 5th edn) para.301. A 2009 government report on prerogative powers stated: "Manifestations of the prerogative in relation to the armed forces re closely interwoven with statutory provisions." Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), para. 52. See also: paras 46-47.

[157] R (on the application of Marchiori) v The Environment Agency [2001] EWCA Civ 03, [2002] All ER (D) 220 (Jan) (CA) at [38].

[158] *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.886.

[159] *Halsbury's Laws of* England (LexisNexis online), vol.8(2) (2011 reissue) para.885. See also: Ministry of Justice, The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report, (October 2009), Annex, 32.

[160] The House of Commons Defence Committee is "*appointed to examine ... th*e expenditure, administration and policy of the Ministry of Defence". Information available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/role/> accessed June 15, 2013.

[161] Hansard HC Vol.398, col.34 (January 20, 2003).

[162] Hansard HC Vol.397, col.23 (January 7, 2003); Hansard HC Vol.398, col.35 (January 20, 2003).

[163] The following statements regarding Iraq preparations were made by Defence Secretary Geoff Hoon: Hansard HC Vol.397, cols.23-25 (January 7, 2003); Hansard HC Vol.398, cols.34-35 (January 20, 2003); Hansard HC Vol.397, col.24WS (January 14, 2003).

[164] Brown-era reforms to the war prerogative favoured the Prime Minister retaining discretion over the timing of a vote and this was supported by the Joint Committee on the Draft Constitutional Renewal Bill; Draft Constitutional Renewal Bill (2007-08 HC 166-I, HL551-I), para.332.

In the debate Liberal Democrat M.P. Michael Moore argued that the presence of troops waiting on the Iraqi border should not influence a vote in favour of war.[165] Yet other members' statements suggest that this was indeed a factor, and references to the fact that the army was awaiting orders were made by a number of M.P.s over the course of the debate.[166] The speeches of four M.P.s who supported the war particularly demonstrate the influence of the prior deployment of troops. Conservative M.P. Sir Patrick Cormack specifically raised the impact on servicemen and women of the failure to obtain a yes vote.[167] Labour M.P. Hugh Bayley also mentioned this as a reason favouring war.[168] The preparatory deployment featured more prominently in the speech of Labour M.P. Donald Anderson who encapsulated the heightened stakes in the following terms:

> "We are faced with this problem as we seek to come to a decision: should we now stand down our troops, and should we fundamentally change our strategy? In theory, we could indeed fold our tents and glide away, forgetting about the fact that there are men and women representing our country on the borders of Kuwait and Iraq. ... To withdraw at this stage would be unthinkable. ... We cannot easily turn back without undermining our own credibility and the authority of the United Nations."[169]

A final example is provided by Conservative M.P. John Maples who in similar terms summarised the consequences of a no-vote thus:

> "If on the verge of battle ... [our troops] were withdrawn, that would destroy the credibility of British foreign and security policy for a generation. ... We would damage immensely, if not terminally, our alliance with the United States."[170]

On the basis of this evidence it appears that an influential factor in the debate was the potential international damage to the UK's reputation and interests if troops on the Iraqi border were incapacitated by a negative parliamentary vote and forced to return to their bases. In this sense it appears that ministerial exercise of the defence prerogative to arrange troops in readiness for action did facilitate the premier's preferred exercise of the war prerogative to engage in warfare (whether this was intentional or not). Exercising the defence prerogative in this way, combined with the timing of the vote, constituted a further factor pressurising M.P.s to vote in favour of war.[171] This factor was one of a number which undermined the potential strength of the parliamentary vote to act as an effective check on Mr Blair's war power.

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[165] (Voted against government). Hansard HC, Vol.401, col.831 (March 18, 2003).

[166] Hansard HC, Vol.401, (March 18, 2003). See: col.825 (Sir George Young M.P.); col.828 (John Randall M.P.); col.861 (Ian Paisley M.P.); col.866 (Michael Jack M.P.); cols.849-50 (John Burnett M.P.).

[167] Hansard HC, Vol.401, col.885 (March 18, 2003).

[168] "We now face only two alternatives – to commit those troops in the very near future to the enforcement of the UN resolutions or to pull them out of the theatre. If we pull them out, Iraq will i*mmediately end what limited compliance it has shown with the UN's requirements. We cannot keep* those forces on stand-by in tents in the desert and bobbing up and down in ships on the Indian ocean for a further 120 days". Hansard HC, Vol.401, col.841 (March 18, 2003).

[169] Hansard HC, Vol.401, col.829 (March 18, 2003).

[170] Hansard HC, Vol.401, cols.839-40 (March 18, 2003).

[171] This view is also shared by Lord Anderson of Swansea. In a 2008 Lords debate on the war power Lord Anderson highlighted the shortcomings of the Iraq parliamentary vote in the following terms; "The case study of Iraq is not helpful. When Parliament did have a substantive vote, the war drums were already beating, there was a certain momentum and our forces, along with coalition forces, were already at the border". Hansard HL Vol.621, col.750 (January 31, 2008).

Conclusion

It is apparent that the Crown is not just a curious abstraction hovering above the working constitution, but may have real, practical influence on present-day issues of the utmost importance. This article demonstrates its current significance in two related respects. First, in general, the Crown continues to form the legal foundation of modern prime ministerial power. The Crown, and its associated notions of monarch, thus remains a subtle but powerful influence in the prime ministerial war power legally, structurally and culturally. The inherent symbiosis between premier and Crown has led war to become 'an intensely prime ministerial activity'[172] where once it was an intensely monarchical activity.

Second, the modern significance of the Crown is specifically demonstrated in the Iraq affair; it shows that the Crown-based legal framework played an underlying but vital role in enabling the engagement of troops in March 2003. Its effects were indirect, even covert, but tangible nonetheless. Evidence suggests there was a clear shift towards more concrete parliamentary involvement in the exercise of the war prerogative up to, and particularly following, the Iraq decision. But, as that decision shows, the effectiveness of this newly strengthened parliamentary check may be undercut by countervailing constitutional features including the party majority enjoyed by government, the Whip system and, significantly, a cluster of prime ministerial prerogatives that stem from the office's colonisation of the Crown. Cumulatively these prerogatives enabled Mr Blair to exert an influence over the parliamentary Iraq vote and therefore weighted the process in favour of deployment. The Prime Minister's de facto power to appoint government ministers, including the Attorney General, was a material factor that facilitated Mr Blair's preferred use of the war prerogative regarding Iraq; his position in relation to the Attorney at the very least appears to have played a discernible role in enabling him to secure the legal advice essential for deployment. Furthermore, Mr Blair utilised the right to advise a dissolution of Parliament as a disciplinary device over his party in the Iraq vote which acted to heighten the stakes for Labour M.P.s. Finally, a further factor assisting Mr Blair to obtain parliamentary approval for engagement in Iraq was the exercise of the defence prerogative to deploy troops on the Iraqi border in advance in readiness for combat. Evidence from the parliamentary debate indicates that such exercise of both the dissolution and defence powers were further factors increasing pressure on M.P.s to vote in favour of war. In this sense, the Prime Minister's colonisation of Crown powers aided Mr Blair's exercise of the war prerogative despite the doubt and strength of opposition to deployment. It did this by providing the premier with a range of powers that enabled political resistance to be tamed or evaded and the parliamentary vote to be influenced. In doing so, it correspondingly undermined the vote as a substantive check on the war power.

Beyond the Iraq affair, it seems likely that the Crown's potential influence in this area will prevail in the foreseeable future. Despite its importance to modern prime ministerial power and warfare decisions, the Crown itself is largely neglected as an issue ripe for reform. This is partly because it is generally viewed as an abstract concept removed from the practical realities of modern government. Additionally, it has come to be supplemented by legal-constitutional concepts (such as conventions and parliamentary sovereignty) which arguably act as reassuring facades, or in Ward's terms 'myths'.[173] These allow the academic

[172] P. Hennessy, The Prime Minister, The Office and its Holders Since 1945 (London: Penguin 2001) p.103.

[173] As Ward has stated of the prerogative of mercy, "There is something very wrong in a system of justice which reduces human life to the whims of a jurisprudence that is rooted in the relics of a medieval constitutional fantasy." I. Ward, The English Constitution, Myths and Realities (Oxford:

community to congratulate the democratic and accountable aspects of the British constitution whilst marginalising the autocratic, monarchical legal structures which may discreetly act to negate or undermine the apparently progressive features of the constitution. In a parliamentary context the Crown has been similarly ignored. The post-Iraq era has witnessed an array of actual or proposed reforms, with select committee cross-hairs focussed upon areas including the war power and wider prerogative, the role of Attorney-General and even the prime ministerial office itself.[174] So the constitutional failures of the Iraq affair have generated some modest, incremental adjustments in response to specific problems. But vitally, such attention has not extended to the Crown itself. Piecemeal reforms that leave the Crown untouched, unquestioned and its essential mechanics intact may ultimately prove less than meaningful because its potential to facilitate undue prime ministerial influence over Parliament's scrutiny of his own warfare decision remains.

Ultimately one must question whether the continuing influence of the medieval, authoritarian Crown is justifiable in, or compatible with, a modern democratic polity. The Iraq vote demonstrates that a Prime Minister, using the Crown-based powers of monarchs of old, can manoeuvre a vital parliamentary vote, arguably stripping the vote of some of its meaning and justifying the later concerns of the House of Lords Constitutional Select Committee.[175] These prerogatives were all longstanding constitutional features that had been utilised by premiers in the past. However, the specific combination in which they operated and their cumulative effect in the Iraq decision was arguably unique and unprecedented. In this respect, the Iraq affair arguably highlights a 'democratic deficit'[176] regarding warfare decisions at national level. Evidence shows that the decision was made in disregard of the views of the British populace by a small isolated elite and with limited input or meaningful scrutiny from Cabinet or Parliament. The following claim by Gladstone encapsulates the position cogently:

> "*If it secures no other British national interest, the Iraq 'war' has awo*ken millions of British subjects to their powerlessness in the face of [Lord *Roskill's] ghosts [of the past]*."[177]

In light of the influence of the Crown in this area, it is arguable that criticisms that recent Prime Ministers, including Mr Blair, have acted presidentially, dominantly or exercised their powers against the spirit of the constitution are erroneous. On the contrary, using power in this way is entirely consistent with the structure and culture of the British constitution which, in this context, remains monarchical, autocratic and based on a central individual

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Hart Publishing 2004) p.65. Ward's statement appears even more relevant to the prerogative to conduct military action.

[174] House of Commons Political and Constitutional Reform Committee, Role and Powers of the Prime Minister, Oral Evidence (2013 HC 975 i and ii). House of Commons Political and Constitutional Reform Committee, Role and Powers of the Prime Minister, Written Evidence (July 7, 2011).

[175] "It could be said that the ability of the United Kingdom governments to use the royal prerogative power to engage in conflict is paradoxically less democratic than when the Monarch exercised the power personally." House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and Responsibility* (2005-06 HL 236-I), para.40.

[176] Geneva Centre for Democratic Control of the Armed Forces quoted in House of Lords Select Committee on the Constitution, Fifteenth Report, *Waging War: Parliament's Role and* Responsibility (2005-06 HL 236-I), para.17.

[177] D. Gladstone, House of Commons Public Administration Select Committee, Fourth Report, Taming the Prerogative: Strengthening Ministerial Accountability to Parliament (2003-04 HC 422), Ev2. This quote is a reference to Lord Roskill's terminology in his judgment in Council of Civil Service Unions & Others v Minister for Civil Service [1985] AC 374, HL.

figurehead.[178] What Bagehot termed the 'dignified' window dressing of Monarchy[179] cannot and should not detract from the failings of this arrangement as demonstrated in the Iraq affair.

Postscript

Parliamentary involvement in warfare decisions returned to the fore in late August 2013 when Parliament was recalled to debate and vote on military action in Syria in response to the use of chemical weapons against civilians. A government motion authorising engagement 'in principle'[180] was unexpectedly and narrowly defeated by 285 to 272 votes.[181]

The Syria vote provides a further precedent contributing to the potential parliamentary approval convention discussed in Part 2. Numerous M.P.s in the debate viewed it as an instance of parliamentary strength,[182] and the Prime Minister explicitly stated that 'this House *... will decide what steps we next take*'[183]

The Syria vote was constitutionally curious because it involved an exceptional defeat of the Prime Minister's foreign military policy, and prevented Mr Cameron from exercising the war prerogative as he preferred.[184] However, this anomaly is not inconsistent with the thesis advanced here and three related points must be noted. First, as leader of a coalition government the Prime Minister was unable to employ the confidence device because without a firm party majority in Parliament it carried a very high risk of losing. Second, the exercise of prerogative powers outlined in Part 3 is generally dependent upon the political strength of government, and so their potential varies with political climates. The government was in a weaker political position in the Syria debate for a number of reasons. For example, the debate was held prematurely before UN weapons inspectors had completed their work, and before the UNSC had considered the matter;[185] there were widespread concerns about operational uncertainties, mission creep etc.; and, ultimately, a general lack of public support for such action. Finally, and ironically, the Iraq war loomed as an oft-recurring cautionary tale throughout the debate, indicating that its political-historical influence may be more profound than its constitutional one.

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[178] For example, Morgan asks whether Blair's personal ascendancy (in first term of his premiership) was a temporary phenomenon, "Or is there something more rooted in our constitutional history that *has seen the premiership ... become so*mething different, perhaps presidential, almost papal, in the circumstances of modern politics and modern technology?" K. Morgan, "New Labour and the New Premiership" in D. Butler, V. Bogdanor & R. Summers (eds), The Law, Politics & the Constitution, Essays in Honour of Geoffrey Marshall (Oxford: Oxford University Press 1999) p.35. The answer to this must be in the affirmative; his office is derived from monarchy and displays important structural similarities to Kings of the past.

[179] W. Bagehot, The English Constitution (London: Collins 1963) p.66.

[180] Hansard HC, Vol.566, col.1425 (August 29, 2013). The motion set out certain requirements and limitations to any proposed military action.

[181] Hansard HC, Vol.566, col.1551 (August 29, 2013). A Labour amendment to the motion was rejected by 332 to 220 votes (at col.1547).

[182] Hansard HC, Vol.566, col.1491 (August 29, 2013) (Douglas Carswell M.P.); col.1521 (Sir Edward Leigh M.P.); col.1535 (Sarah Wollaston M.P.).

[183] Hansard HC, Vol.566, col.1428 (August 29, 2013).

[184] Following the debate and vote the Prime Minister said '*I ... believe in respecting the will of this* House of Commons' and 'the Government will act accordingly'. Hansard HC, Vol.566, col.1555-6 (August 29, 2013).

[185] This key point distinguished the Syria vote from the Libya vote (discussed in Part 2) where military action was approved by the Commons.