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Power/Knowledge Dynamics in the Attorney General's Iraq War Advice

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Abstract [209 words]

This article draws upon the Chilcot Report to undertake a Foucauldian-influenced critique of the processes surrounding the creation of the Attorney General's (AG) Iraq war advice. It argues that four significant power/knowledge dynamics acted to construct the AG's clear statement that military action was internationally lawful. First, Blair-era lapses in record-keeping and related ministerial disputes concerning the bureaucratic apparatus of writing acted to limit the available knowledge of Iraq-era events. Second, the Blairite practice of highly selective sharing and management of information within government acted to foster knowledge asymmetries, making challenge or resistance more difficult. Third, belatedly providing the AG with a highly partisan background knowledge ultimately informed his legal interpretation by tailoring the crucial informational context in which he drafted his advice. Fourth, the AG's credibility and legal expertise were strategically traded upon to enhance the presentation of his legal statement to Cabinet, Parliament and the public. These four practices acted cumulatively to produce a legal knowledge that instigated war and have remained influential in post-Iraq military actions, thus supporting Foucault's thesis that power and knowledge are reciprocal. Ultimately, this analysis reveals the that the definitive, clear legal 'green light' authored by the singular, independent AG was a reifying liberal-constitutional fiction that Number 10 simultaneously undermined and exploited.

Introduction

So it goes. This article investigates the circumstances surrounding the Attorney-General (AG) Lord Peter Goldsmith's controversial legal advice in the lead-up to the UK's military action in Iraq in March 2003. Though well-known, the factual background is worth briefly recounting. The engagement of UK troops was dependent on whether the action complied with international law, and the Attorney General, as legal adviser to the Crown,[1] was the lead government lawyer charged with advising on this issue. According to constitutional convention, the AG had the final word on the issue of international legality; his was the authoritative statement of law that held precedence over other views.[2] Between 2002 and early 2003, Lord Goldsmith was consistently of the view that military action in Iraq was *not* permitted by international law, and viewed warfare without a second United Nations Security Council resolution (UNSCR) as unlawful as late as 30th January, just 7 weeks before the invasion. Yet by 17th March 2003, just two days before military engagement, he provided a brief, clear statement[3] confirming that military action *would* be internationally lawful on the basis of UNSCR 1441[4] alone, without the need for a second resolution.[5] That contentious

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[1] Select Committee on the Constitution, 'Reform of the Office of Attorney General', HL (2007-8) 93 [4]-[5]. See also: Constitutional Affairs Committee, 'Constitutional Role of the Attorney General', HC (2006-7) 306, [11], [68].

[2] *The Report of the Iraq Inquiry* (chair: Sir John Chilcot) July 2016, volumes 1-12 <http://www.iraqinquiry.org.uk/the-report/> vol 5(5) [797]. See, e.g.: Jack Straw, Oral evidence to Iraq Inquiry (8 February 2010) 23, <http://www.iraqinquiry.org.uk/media/95266/2010-02-08-Transcript-Straw-S2.pdf>. See also: Jack Straw, Witness statement to Iraq Inquiry (February 2010) [3], <http://www.iraqinquiry.org.uk/media/96018/2010-02-XX-Statement-Straw-2.pdf>; Sir Michael Wood, Oral evidence to Iraq Inquiry (26 January 2010) 35, 65, <http://www.iraqinquiry.org.uk/media/95218/2010-01-26-Transcript-Wood-S1.pdf>.

[3] *Hansard* HL vol 646, col: WA2-WA3 (17 March 2003).

[4] *United Nations Security Council Resolution 1441* ((8 November 2002) UN Doc S/RES/1441)

[5] This was because UNSCR 1441 had declared Iraq to be in 'material breach' of its obligations to disarm under the 1990 UNSCR 678, and had thus 'revived' this earlier resolution authorising force against Iraq. The AG's statement claimed: '*[A]ll that Resolution 1441 requires is reporting to and discussion*

legal text has been subject to a great deal of scrutiny by international lawyers.[6] Instead, this article examines the domestic constitutional context in which Lord Goldsmith's 'u-turn' occurred. In doing so it draws upon material obtained (and indeed produced) by the Iraq Inquiry.[7]

This article employs a Foucauldian analysis of the 2016 Chilcot Report and evidence, demonstrating that power/knowledge dynamics acted to ultimately *construct* the AG's clear statement that military action was lawful.[8] In doing so, the article yields two new insights. First, it undermines the liberal-constitutional fiction of the singular, autonomous legal author of a definitive, independent legal text. This reifying fiction was simultaneously undermined *and* exploited by Number 10 to manage the wider political climate of scepticism and uncertainty in the lead-up to military action. Second, this article demonstrates how the AG's 'u-turn' represents a salient 'case study' supporting Foucault's thesis that power and knowledge are reciprocal:

> "*The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.*"[9]

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by the security council of Iraq's failures, but not an express decision to authorise force'. Hansard (n 3) para 9.

[6] Vaughan Lowe, 'The Iraq Crisis: What now? (2003) 52(4) ICLQ 859, 865-869; Lord Steyn, 'The Legality of the Invasion of Iraq' (2010) 1 E.H.R.L.R. 1-7; Rabinder Singh QC, 'Why War is Illegal' (The Times Online, 14 March 2003) <https://www.thetimes.co.uk/article/why-war-is-illegal-fcm3f0ppl6c>; Ulf Bernitz et al, 'War Would be Illegal' (The Guardian Online, 7 March 2003) <https://www.theguardian.com/politics/2003/mar/07/highereducation.iraq>; Philippe Sands QC, *Lawless World: Making & Breaking Global Rules* (Penguin, 2006).

[7] John Chilcot, Official Iraq Inquiry website <http://www.iraqinquiry.org.uk/the-inquiry/>

[8] This investigation builds upon the author's earlier Iraq war research which identified a recurring relationship between political power and control of knowledge across parliamentary and judicial contexts: Rebecca Moosavian, *Judges & High Prerogative: The Enduring Influence of Expertise and Legal Purity* [2012] Public Law, 724; Rebecca Moosavian, *'Fountain of Honour'? The Role of Crown in the Iraq War* [2013] Kings Law Journal, Vol 24(3) 289. See, more recently: Veronika Fikfak & Hayley Hooper, *Parliament's Secret War* (Hart, 2018).

[9] Michel Foucault, *Power/Knowledge, Selected Interviews and Other Writings* (Longman 1980) 52. See also: Michel Foucault, *Power, Essential Works of Foucault 1954-1984, Volume 3* (Penguin, 2002) 32.

Such power/knowledge dynamics arguably pervaded the Iraq affair more widely. For example, its instigation of no fewer than four inquiries[10] illustrates Foucault's 'will to truth' schema in action,[11] and, indeed, the Iraq 'project' itself was arguably motivated by deep-rooted Orientalist tendencies.[12] As such, the Iraq war – but the AG's legal 'u-turn' in particular – offers an ideal case study in which to investigate 'the politics of truth'.[13]

This article identifies and analyses four power/knowledge dynamics that acted to ultimately *produce* the AG's clear statement that military action was internationally lawful. As Parts 1-4 demonstrate, Lord Goldsmith was at the very least subjected to subtle, covert, yet highly effective power/knowledge-based techniques that played a significant role in managing him and his legal advice. The first dynamic, 'the politics of writing', concerned highly revealing evasions regarding bureaucratic record-taking which acted to limit what key actors (and later, the inquiry) could know about Iraq-era events. The second dynamic concerned the 'fostering of knowledge asymmetries' by systematically withholding information and/or excluding individuals from groups or discussions. This minimised opportunities for dissent and/or resistance, affording crucial power-based advantages for Number 10. Third, the dynamic of 'tailoring the knowledge context' entailed the provision of highly partisan background knowledge as a form of influence; this had a direct effect in producing the 'green light' text in Lord Goldsmith's name. The fourth dynamic, 'trading on expertise', involved exploiting an apparently unequivocal and authoritative text by Lord Goldsmith, *the* lead government

[10] See also: Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr. David Kelly C.M.G.*, (January 2004, HC 247); Report of a Committee of Privy Counsellors (chair: Lord Butler), *Review of Intelligence on Weapons of Mass Destruction*, (July 2004, HC 898); *Report of the Baha Mousa Inquiry* (chair: Sir William Gage) Vol 1 (September 2011, HC1452-I).

[11] Michel Foucault, *The Discourse on Language, in The Archaeology of Knowledge & the Discourse of Language* (Pantheon, 1972) 218-220. This relentless drive, even compulsion, for 'the truth' informs the very nature of inquires such as Chilcot's. In this context the inquiry represents a 'truth mechanism' acting to re-assert the 'the facts', albeit one that is an expression of state power: Foucault, Power (n 9) 32-52; Foucault Power/Knowledge (n 9) 93.

[12] In a leading example of power/knowledge critique, Said applied Foucauldian analysis to illustrate the power/knowledge dynamics inherent in European constructions of the Middle East. Edward Said, *Orientalism* (Penguin 2003).

[13] Foucault, Power (n 9) 131, 13.

lawyer, for significant political advantage on a highly divisive issue. These four power/knowledge dynamics, examined in turn in Parts 1-4, were directly implicated in Chilcot's conclusions that the '*circumstances in which it was ultimately decided that there was a legal basis for UK participation [in Iraq] were far from satisfactory*.'[14] As Part 5 argues, these engrained power/knowledge inequalities continue to exert an influence in post-Iraq military action decisions, posing ongoing challenges to the maintenance of meaningful checks and balances on matters of warfare.

[1] The Politics of Writing: Fixation & Evasion

Tony Blair's preference for 'bi-laterals', private one-to-one meetings with ministers,[15] and for tight-knit, informal group decision-making outside of Cabinet is viewed as a key feature of his premiership.[16] This tendency towards greater informality within Cabinet was confirmed by the Butler Report,[17] and related lapses in Blair-era record keeping have also been noted. [18] In the Iraq affair, this lack of minuting was related to the fact that many decisions were taken outside formal Cabinet mechanisms. Though record-keeping may appear to be a process-driven concern of bureaucrats, the Iraq affair reveals it to be a contested and politically significant activity. Conventions governing the recording of Cabinet minutes confirmed that '*the first purpose of a minute was to set out the conclusions reached so that those who have to take action* ***know precisely what to do***'.[19]

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[14] Chilcot Report (n 2) vol 6(7) [384]. See also: House of Commons Liaison Committee, *Oral Evidence: Follow up to the Chilcot Report*, HC 689 (2 Nov 2016) Q72, Q77.

[15] Christopher Foster, 'Cabinet Government in the Twentieth Century', MLR (2004) 67(5) 753-771, 768-9; David Blunkett, *The Blunkett Tapes, My Life in the Bear Pit* (Bloomsbury, London, 2006) 11.

[16] Anthony Seldon, *Blair* (Free Press, London, 2005) 695-6. Ministers also indicate that Cabinet was not seen by Blair as a decision-making forum: Clare Short, *An Honourable Deception? New Labour, Iraq, and the Misuse of Power* (Free Press, London, 2005) 70; Robin Cook, *The Point of Departure, Diaries from the Front Bench* (Pocket Books, London, 2004) 115.

[17] Butler Report (n 10).

[18] Deficiencies in the Blair government's record-keeping pre-dated the Iraq affair: Foster (n 15) 765-6, 769; Blunkett (n 15) 22-3; Cook (n 16) 138.

[19] 'Guide to Minute Taking' (Cabinet Office, June 2001) quoted in Chilcot Report (n 2) vol 1(2) p 289.

Chilcot identified numerous discussions on crucial Iraq-related matters between 2001-2003 that occurred outside of Cabinet and went unrecorded. For example, Blair held regular telephone discussions about Iraq over weekends that were not routinely minuted.[20] The report identified other fundamental lapses in recording, with *no* official record of discussion taken in nine important meetings about crucial aspects of developing Iraq policy, and one where no clear conclusions were recorded.[21] Six of these unrecorded discussions involved Lord Goldsmith's legal advice.[22] Additionally, Chilcot noted persistent minuting failures regarding Iraq-related meetings of the COBR(R) committee throughout this period.[23]

[1.1] The Politics of Writing & the AG's Advice

Despite these tendencies against recording, many ministerial actions were indeed captured. Additionally, vital struggles between senior ministers and Lord Goldsmith (and other lawyers) occurred around the apparatus of writing. Writing occupies an important role in Foucault's understanding of power/knowledge. Combined with disciplinary techniques of observation and examination it enables the production of a body of knowledge about the observed individual.[24] Foucault claimed that the act of writing is

> '*a power that insidiously objectifies those on whom it is applied; to form a body of knowledge about these individuals*'.[25]

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[20] Though a weekly note was provided to Blair's inner circle. Alastair Campbell, Oral evidence to Iraq Inquiry (12 January 2010) 9-12, <http://www.iraqinquiry.org.uk/media/95142/2010-01-12-Transcript-Campbell-S1-am.pdf>. See also: Jonathan Powell, Oral Evidence (18 January 2010) 7-10, <http://www.iraqinquiry.org.uk/media/95166/2010-01-18-Transcript-Powell-S1.pdf>.

[21] These unrecorded meetings were, in chronological order: **(1)** 30 January 2002; Chilcot Report (n 2) vol 3(3.6) [815]-[816], [818]. **(2)** 19 February 2002; vol 1(3.2) [62]-[64]. **(3)** 2 April 2002; vol 1(3.2) [533], [535]. **(4)** 23 July 2002; vol 2(3.3) [337]-[340], [342], [361]. **(5)** 14 October 2002; vol 2(3.4) [481]-[488]. **(6)** 7 November 2002; vol 2(3.5) [803]-[809], [811]. **(7)** 19 December 2002; vol 5(5) [153]. **(8)** 27 February 2003; vol 5(5) [451]-[453], [463]. **(9)** 11 March 2003; vol 5(5) [589]-[599]. **(10)** 12 March 2003; vol 3(3.8) [269]-[273].

[22] Meetings (4)-(9) listed above (n 21).

[23] Chilcot Report (n 2) vol 1(2) [211]-[212], [217]-[219].

[24] Michel Foucault, *Discipline & Punish, The Birth of the Prison* (London: Penguin,1991). 189, ch 4.1.

[25] *ibid* 220, 231, 191-2.

Writing enables the recording or fixing of information about the individual, and the communication and accumulation of such knowledge, thus amounting to an exercise of power over them.[26]

The documents obtained by the inquiry captured information about individual political actors as they undertook their functions, revealing various stand-offs between lawyers and ministers from March 2002. For example, Sir Michael Wood, Head FCO Lawyer who consistently viewed military action in Iraq as internationally unlawful, wrote to senior colleagues expressing concerns and reiterating his advice on four separate occasions in 2002.[27] He also wrote to Jack Straw three times in similar terms;[28] the final exchange, in January 2003, resulted in the AG's 'timely and justified' intervention on Wood's behalf.[29]

Select incidents involving Lord Goldsmith and the politics of writing over this period are of particular significance. Records indicate that the AG was repeatedly, expressly deterred from providing his written advice on the legal position. For example, the AG sent a minute confirming his legal advice on 30th July 2002,[30] stating '*I didn't want there to be any doubt that, in my view, the Prime Minister could not have the view that he could agree with Bush*' to undertake military action without going to UN.[31] Due to concerns about leaks, Number 10 asked for this minute to have a highly restricted circulation and, later, for the few existing copies to be destroyed with the AG's agreement.[32] The AG conceded '*I don't, frankly, think*

[26] The fixation provided by the apparatus of writing opens up the possibility of 'the constitution of the individual as a describable, analysable object'. *ibid* 189-90. See also: Tom Keenan, 'The 'Paradox' of Knowledge and Power: Reading Foucault on a Bias' (1987) Political Theory Vol 15(1), 5-37, 13; Gary Gutting, French Philosophy in the Twentieth Century (Cambridge 2001) 281.
[27] Chilcot Report (n 2) vol 2(3.3) [85]-[86]; vol 2(3.4) [123]-[127]; vol 2(3.5) [594]-[597],[613]-[617].
[28] *ibid* vol 1(3.2) [482]-[487]; vol 2(3.4) [225]-[230]. See also: (n 29) below.
[29] *ibid* vol 5(5) [341]-[357], [359]-[366], [373]-[377], [382].
[30] Iraq Inquiry, Declassified Documents, Attorney General Minute to Prime Minister (30 July 2002).
[31] Lord Goldsmith, Oral evidence to Iraq Inquiry (27 January 2010) 23, <http://www.iraqinquiry.org.uk/media/235686/2010-01-27-Transcript-Goldsmith-s1.pdf>
[32] Chilcot Report (n 2) vol 2(3.3) [485]-[493], [495].

it [the advice] was terribly welcome.'[33]

The AG was expressly asked to *not* provide written advice on four further occasions: in October 2002, twice in December 2002[34] and January 2003. The October and January incidents are particularly interesting because the AG defied such instructions. In October, during the negotiations for UNSCR 1441, Lord Goldsmith expressed concerns in a telephone conversation with Straw, reminding him that the draft resolution as it stood did *not* authorise force.[35] Goldsmith stressed his wish '*to ensure that his advice was clearly on the record*',[36] but Straw persuaded him to wait and speak to the Prime Minister first. Following the subsequent meeting with Blair, the AG sent a letter reiterating his legal view.[37] This prompted a phone call to the AG from Jonathan Powell, Blair's Chief of Staff. Powell's (declassified) handwritten note of the conversation states:

> '*I spoke to the AG to make it clear we do not expect records of meetings from other departments, especially from people not even at the meeting.* ***We produce records should they be needed***.'[38]

[33] Goldsmith transcript (n 31) 24. Blair denied that it was unwelcome: Tony Blair, Oral evidence to Iraq Inquiry (29 January 2010) 147-148, 232 <http://www.iraqinquiry.org.uk/media/229766/2010-01-29-transcript-blair-s1.pdf >

[34] Iraq Inquiry, Declassified Documents, Letter from Michael Wood to Catherine Adams (9 December 2002) para 3; Iraq Inquiry, Declassified Documents, David Brummell minute of meeting at No 10 (19 December 2002) para 10(c); Sir Michael Wood, witness statement to Iraq Inquiry (15 March 2011) 19-20 <http://www.iraqinquiry.org.uk/media/96182/2011-03-15-Statement-Wood-3.pdf>; Lord Goldsmith, Witness statement to Iraq Inquiry (4 January 2011) [2.3] <http://www.iraqinquiry.org.uk/media/96134/2011-01-04-Statement-Goldsmith.pdf> [1.12], [4.2]; Chilcot Report (n 2) vol 3(3.6) [241]-[242]; vol 5(5) [97], [99], [142].

[35] There is striking variation in the way the AG-Straw telephone conversation was recorded by the AGO and the briefer, sanitised FCO minute: Iraq Inquiry, Declassified Documents, AGO note of the Goldsmith-Straw telecom (21 October 2002); Iraq Inquiry, Declassified Documents, FCO note of Goldsmith-Straw telecom (18 October 2002). See also: Chilcot Report (n 2) vol 2(3.5) [462]-[463], [469]-[470], [630]-[633], [636]; Goldsmith witness statement (n 34) [2.3].

[36] Chilcot Report (n 2) vol 2(3.4) [623]-[624], [638]-[640]. See also: Iraq Inquiry, Declassified AGO note of the Goldsmith-Straw telecom (n 35); Goldsmith witness statement (n 34) [2.7]-[2.8].

[37] Chilcot Report (n 2) vol 2(3.4) [658]-[659], [667]-[671]. See also: Iraq Inquiry, Declassified Documents, David Brummell letter to Sir David Manning (23 October 2002).

[38] Emphasis added. Chilcot Report (n 2) vol 2(3.4) [672]. See also: Iraq Inquiry, Declassified Documents, Jonathan Powell file note (25 October 2002).

The AG later wrote of this event, '*if I had not recorded my advice through the means of the letter ...* ***I would have ensured the same result was achieved by other means***'.[39] This telling incident is a clear indication that Goldsmith and Powell fully appreciated the political significance of recording events as a part of the exercise and engendering of power. Indeed the AG claims that following this incident, he was no longer actively consulted in the UNSCR negotiations and was 'discouraged' from providing advice.[40]

On 14th January 2003 the AG provided a 6-page draft advice to the Prime Minister.[41] It confirmed that, as matters stood, military action was *not* authorised by UNSCR 1441.[42] Just two weeks later, on 30 January, the AG provided written advice for a second time despite being explicitly told by Number 10 *not* to do so.[43] This letter reiterated the negative view expressed in the AG's draft advice.[44] A handwritten comment on this letter by Blair's Private Secretary, Matthew Rycroft, reads:

'*Tony. I specifically said we did not need further advice this week.*
Matthew'

A further comment by Blair reads:

'*I just don't understand this*.'[45]

These comments indicate that this advice was unwelcome, particularly in light of a planned meeting with President Bush at the White House the following day (31st January). The AG

[39] Emphasis added. Goldsmith witness statement (n 34) [3.3]-[3.5], [3.8]. See also: Chilcot Report (n 2) vol 2(3.5) [982].
[40] Goldsmith witness statement (n 34) [1.3], [4.2]. See also a further incident on 11 November 2002: Chilcot Report (n 2) vol 5(5) [5]-[6] [8]-[11]; Iraq Inquiry, Declassified Documents, AGO note of Goldsmith/Powell telecom (11 November 2002) para 2-3.
[41] Iraq Inquiry, Declassified Documents, Lord Goldsmith minute (draft advice) to Prime Minister (14 January 2003); Chilcot Report (n 2) vol 5(5) [166].
[42] Chilcot Report (n 2) vol 3(3.6) [515]-[517]; vol 5(5) [167]-[170], [184], [190], [194].
[43] *ibid* vol 3(3.6) [860]-[861]; vol 5(5) [285]-[286], [289]-[290].
[44] Iraq Inquiry, Declassified Documents, Goldsmith minute to Prime Minister (30 January 2003); *ibid* vol 5(5) [293]-[296].
[45] Declassified Goldsmith minute to Prime Minister (n 44); Chilcot Report (n 2) vol 5(5) [298]-[299].

claimed he wrote this later letter to confirm his position remained unchanged in advance of that meeting.[46]

The political implications of the act of recording were later acknowledged by Chilcot, who claimed one broad lesson from his report was that it is '*vital for serious decisions and the reasons behind them to be recorded in the public archive*'.[47] Yet this part demonstrates that the apparatus of writing was a site of vital struggles, and the 2002 to January 2003 period witnessed highly significant instances of ministerial attempts to evade recording, particularly with regard to the AG's provision of legal advice. The repeated efforts to deter the AG from advising, and irritation at the lawyerly tendency to fix events or positions in writing indicate that actors had an acute awareness of the political significance of recording as a potential power over them; one that was to be avoided if possible. Once such records exist they can provide material that enables political actors to be later subjected to the hierarchical observation and examination of the inquiry. The AG as lawyer wanted advice, discussions and meetings set out in writing. Such records provided a source of protection and a form of leverage or power, even though they purportedly had no formal or technical legal effect at that stage.[48]

Blair's premiership style, which actively impeded official record-taking, held strategic power advantages that became pertinent in the lead-up to the Iraq war. Sustained deficiencies in the minuting of discussions acted to impoverish knowledge of Iraq-era activities in two ways. First, at the time it resulted in a dearth of records that could inform key actors, including Cabinet ministers, of what was discussed or decided. Second, the significant amount of activity occurring 'off-record' placed it beyond the reach of the later Chilcot Inquiry, a forum

[46] Goldsmith transcript (n 31) 90; Chilcot Report (n 2) vol 5(5) [300].
[47] House of Commons Liaison Committee (n 14) Q40, Q50, Q104.
[48] Tony Blair, Oral evidence to the Iraq Inquiry (21 January 2011) 65-69 <http://www.iraqinquiry.org.uk/media/230337/2011-01-21-Transcript-Blair-S1.pdf>; Chilcot Report (n 2) vol 5(5) [223], [334]-[339].

that inevitably entailed the exclusion of what was *not* recorded, or *not* said from the officially sanctioned, definitive 'true' narrative of the final Report. *Quod non est in actis non est in mundo*.[49] But there were also limits to the extent individuals were able to elude writing as a mode of domination, and many actions were nevertheless recorded to be later offered up to the gaze of the inquiry. Paradoxically, repeated instructions to the AG *not* to set out his views or advice in writing were themselves captured in writing, raising the question of whether some form of fixation was inescapable.

[2] Fostering Knowledge Asymmetries

A second practice linked to Blair's preference for informal, bi-lateral decision-making outside Cabinet was the highly selective sharing and management of knowledge. A fostering of knowledge asymmetries occurred via two related methods: first, the limited provision of papers or crucial information to Cabinet ministers, and second, excluding individuals from certain groups or discussions where knowledge was shared or produced. Both practices were highly Foucauldian in their use of apparently minor, detailed techniques at an individual, localised level (albeit within the state),[50] and their subtle, productive effect, which limited what key actors, including Lord Goldsmith, knew about certain crucial issues.

[49] *What is not kept in records does not exist*. For further discussion see: Cornelia Vismann, *Files, Law & Media Technology* (Stanford University Press, 2008); Michael Lynch & David Bogen, *The Spectacle of History, Speech Text & Memory at the Iran-contra Hearings* (Duke University Press, 1996), ch 2-3.

[50] Foucault's focus was on hidden power-relations at particular ground-level contexts (e.g. prisons). Yet despite his call to '*cut off the king's head*' in political theory, he did not deny the importance of state power. For Foucault, power circulates everywhere, so localised practices and resistances do not only occur at the 'extremities' but also across state institutions at all levels. Foucault, Power/Knowledge (n 9) 96-99, 102, 139-41; Foucault, Power (n 9) 60, 117, 122-123, 324; Michel Foucault, *The Will to Knowledge, The History of Sexuality, Vol 1*, (Penguin 1998) 93.

As with issues of minuting, lapses in the circulation of advance papers to Cabinet was a noted feature of Blair's premiership.[51] In Chilcot evidence two Iraq-era Cabinet Secretaries suggested that practices of information-control and exclusion were an integral characteristic of the Blair government, and the Iraq era represented business as usual rather than an aberration. Lord Wilson claimed that the Blair government was concerned to avoid the problems of divided Labour governments of the 1970s, '*So control over the meeting and **who is there** and **who writes the minutes matters**.*'[52] Wilson's successor, Lord Turnbull suggested '*this is not a bad habit they slip into. This was, in a sense, the [New Labour] operating manual.*'[53]

Chilcot provided a substantial body of evidence that in the lead up to military action failures in information-sharing and practices of exclusion were pervasive. Various witnesses claimed that important information was not shared with key actors, particularly Cabinet Ministers.[54] For example, a crucial March 2002 paper setting out various options for dealing with Iraq was not shared with or discussed by Cabinet, despite the fact that it was created to help ministers decide policy.[55] On three further occasions in mid-2002 Blair did not disclose to Cabinet claims he had made to the US regarding UK military assistance.[56] Later, in September, Cabinet was not informed of (or invited to discuss) the ongoing challenges in agreeing the text

[51] Butler Report (n 10) [609]-[611]. Peter Hennessy, *The Prime Minister, The Office and its Holders Since 1945* (Penguin, London, 2001) 481-2.

[52] Emphasis added. Lord Wilson, Oral evidence to Iraq Inquiry (25 January 2011) 87 <http://www.iraqinquiry.org.uk/media/95446/2011-01-25-Transcript-Wilson-S1.pdf>.

[53] Author's addition. Lord Turnbull, Oral evidence to Iraq Inquiry (25 January 2011) 10-12, 36-7 <http://www.iraqinquiry.org.uk/media/234680/2011-01-25-transcript-turnbull-s2.pdf>.

[54] Clare Short, Oral evidence to Iraq Inquiry (2 February 2010) 9-10, 23, 29. <http://www.iraqinquiry.org.uk/media/95246/2010-02-02-Transcript-Short-S1.pdf>. See also: Wilson transcript (n 52) 80, 90; Turnbull transcript (n 53) 8, 39-40.

[55] Chilcot Report (n 2) vol 1(3.2) [257]-[259], [306], [329], [338].

[56] *ibid* vol 1(3.2) [654], [658] (April 2002); vol 2(3.3) [95]-[115], [128]-[136] (June 2002); vol 2(3.3) [415]-[434], [443]-[445], [514]-[523], [533] (July 2002).

of UNSCR 1441.[57] Further instances of information management in relation to Cabinet in January[58] and March[59] 2003 became more striking, and their implications more acute.

The inquiry revealed that the second practice of bi-lateral meetings and selective exclusions was also prevalent in the lead-up to war. Such tendencies led to the exclusion of outspoken minister Clare Short,[60] but also, on occasion, key ministers such as Straw and Hoon.[61] Lord Turnbull explained that Cabinet structures were bypassed and decisions were made in other ways:

> '*How many serious arguments did they have in Cabinet? The answer ... is very few. ... [T]he arguments took place elsewhere. ... [Decisions did not really get made in an] overt ... face-to-face [way]*'[62]

Chilcot confirmed that Blair made most pre-deployment decisions either bi-laterally or with Straw, Hoon, Number 10 aides, select senior defence and intelligence staff; Cabinet played a very limited role in the substantive discussion, analysis and development of Iraq policy.[63]

These two related strategies - information control and exclusion - had a specific effect in relation to the AG's advice. Between 2002 and 2003 he was marginalised during the UNSCR 1441 negotiations and not included in Cabinet. As this part demonstrates, vital knowledge (and power) asymmetries benefitting Number 10 resulted.

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[57] *ibid* vol 2(3.4) [151]-[152].
[58] *ibid* vol 3(3.6) [566]-[567] (January 2003).
[59] *ibid* vol 3(3.7) [961], [1034], [745], [823] (6 March 2003); vol 3(3.8) [410], [412]-[416], [419], [423]; vol 5(5) [650], [664], [667] (13 March 2003). See also: vol 6(7) [430]; House of Commons Liaison Committee (n 14) Q49.
[60] Short transcript (n 54) 7-8; Chilcot Report (n 2) vol 3(3.8) [173].
[61] Chilcot Report (n 2) vol 1(3.2) [427]-[428]; vol 3(3.7) [596]-[598]; vol 2(3.4) [584].
[62] Author's addition. Lord Turnbull, Oral evidence to Iraq Inquiry (13 January 2010) 55, 57-8 <http://www.iraqinquiry.org.uk/media/229403/2010-01-13-transcript-turnbull-s2.pdf>; Wilson transcript (n 52).
[63] Chilcot Report (n 2) vol 6(7) [402], [408], [412], [419], [413].

[2.1] The AG's Marginalisation from UNSCR Negotiations

A significant instance of the AG's marginalisation was during the UNSCR 1441 negotiating process in September to October 2002. As early as March 2002 Lord Goldsmith had asked to be included in developing Iraq policy, suggesting that it '*would not be helpful … if [he was] presented at the last moment with a request for a 'yes' or 'no' answer*.'[64] The AG made four further similar requests in July,[65] September [66] and twice in October 2002.[67] Yet though Lord Goldsmith was provided with updates about the ongoing negotiations and declared himself satisfied with these arrangements,[68] the information provided was limited. Though he received general telegram updates on negotiations, he was not within the 'restricted' group that got all telegrams, including the most critical discussions.[69] The AG later identified this as the first of three reasons for his limited involvement in UNSCR 1441. The failures in information-sharing went both ways, and the UK's UN negotiators were not made aware of the legal concerns of FCO lawyers and the AG.[70]

In addition to receiving limited information, Lord Goldsmith was excluded from the discussions about the resolution-in-progress. The AG claimed he was 'not being sufficiently involved' at ministerial level.[71] In evidence he added:

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[64] It would be almost a year to the day until he provided his final advice. *ibid* vol 1(3.2) [347], [342]-[349].
[65] *ibid* vol 2(3.3) [185]-[186].
[66] *ibid* vol 2(3.4) [129]-[133].
[67] *ibid* vol 2(3.5) [641], [669], [956], [960]-[961]. See also: Goldsmith witness statement (n 34) [1.10].
[68] Wood transcript (n 2) 9-11; Goldsmith transcript (n 31) 36; David Brummell, Legal Secretary to the Law Officers, Oral evidence to Iraq Inquiry (26 January 2010) 8-10 <http://www.iraqinquiry.org.uk/media/95210/2010-01-26-Transcript-Brummell-S2.pdf>; Chilcot Report (n 2) vol 2(3.4) [244]-[246].
[69] Chilcot Report (n 2) vol 2(3.5) [941], [946]-[948], [952]; Goldsmith witness statement (n 34) [1.9].
[70] Chilcot Report (n 2) vol 2(3.4) [645]; vol 2(3.5) [1000]-[1001], [1026], [1029], [1032], [1035]-[1037], [1039]-[1040], [1042], [1044]-[1045], [1055]-[1056], [1072].
[71] *ibid* vol 2(3.5) [960]-[961], [936]-[937]; Goldsmith witness statement (n 34) [1.10].

> *'I wasn't included in meetings in a sense at all. I don't know what meetings were taking place between the Prime Minister and others. I was involved ... simply on my own [with my officials].*[72]

The AG's exclusion also took the form of not being asked to provide advice on the developing resolution. There was some involvement of the AG's office in the initial stages of the draft resolution in early and late September. But from this point, the AG's advice was not sought.[73] Some subsequent drafts of the resolution in progress were copied to Goldsmith's office for information, but these did not come with requests to advise, which he later admitted 'was slightly unsatisfactory.'[74] In testimony he explained that '*it didn't seem to be the practice*' for AGs to advise on draft resolutions, and conceded that in hindsight he could have been more involved in the detail.[75] The AG repeatedly expressed concerns about his level of involvement, leading to a discussion with Blair on 22 October. However, Chilcot noted that by this time, '*Key decisions on the resolution had already been taken and the draft was at an advanced stage*.'[76] Ultimately, the report found that during the UNSCR 1441 negotiations, the AG's advice should have been sought and shared with key Ministers and officials in order to have an 'agreed, collective understanding of the legal effect of the resolution'.[77]

[2.2] The AG's Marginalisation from Cabinet

The Chilcot Report also indicated that Lord Goldsmith was marginalised from Cabinet, and that his views were consistently kept from senior Cabinet ministers. Though he only attended Cabinet twice prior to the invasion (in January and March 2003), Lord Goldsmith denied that he was ever explicitly excluded, stating it simply was not the practice for the AG to attend.

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[72] Goldsmith transcript (n 31) 28.
[73] Chilcot Report (n 2) vol 2(3.5) [933], [938], [963].
[74] *ibid* vol 2(3.5) [942].
[75] Goldsmith transcript (n 31) 36-37, 104-1-5. The AG's claim that it didn't seem to be the practice for AGs to advise on draft resolutions is contradicted by Cathy Adams (Legal Counsellor, Legal Secretariat to the Law Officers) and Ian McLeod (Legal Counsellor to the UK's Mission to the UN): *ibid* vol 2(3.5) [949]-[952].
[76] Chilcot Report (n 2) vol 2(3.5) [957]-[959].
[77] *ibid* vol 2(3.5) [987]-[988].

However, he conceded that more involvement over the first half of 2002 would have been better. Furthermore, he claimed

> *'I think, **at a later stage, my view prevailed** that, as Attorney General, I ought to be present at Cabinet so that I could hear what was taking place, and therefore be in a much better position to advise'*.[78]

This statement indicates that the AG's involvement in Cabinet, as with the legal advice discussed in Part 1, was something he had to push for. Related to this, Lord Goldsmith's advice was repeatedly kept from Cabinet ministers. For example, in a November 2002 Cabinet meeting Jack Straw outlined the newly passed UNSCR 1441, explaining that a key feature of the text was that no second resolution was needed. Though this did not reflect the legal advice of the AG or the FCO,[79] without access to this information ministers were unable to appraise such claims.

The AG's exclusion from Cabinet continued until 16th January 2003, when he attended it two days after providing negative draft advice. However, oddly, his advice was not shared with senior ministers, who were unaware of its existence or content, a point FCO lawyer Elizabeth Wilmshurst deemed unusual and surprising.[80] Blair did not ask the AG to speak at the meeting and there was no Cabinet discussion of his advice. Chilcot claimed that as a result, '*Cabinet Ministers, including those whose responsibilities were directly engaged, were not informed of the doubts expressed in Lord Goldsmith's draft advice*'.[81] Chilcot was critical of such failures, claiming that Goldsmith's advice should have at least been shared with Jack Straw, Defence

[78] Emphasis added. Goldsmith transcript (n 31) 101-103.
[79] Chilcot Report (n 2) vol 3(3.6) [15], [17], [19]; vol 5(5) [40]-[44].
[80] *ibid* vol 5(5) [232], [234], [238], [383], [910]; vol 3(3.6) [565]; Elizabeth Wilmshurst, Oral evidence to the Iraq Inquiry (26 January 2010) 33 <http://www.iraqinquiry.org.uk/media/95214/2010-01-26-Transcript-Wilmshurst-S3.pdf>.
[81] Chilcot Report (n 2) vol 5(5) [231], [236], [911].

Secretary Geoff Hoon and the Cabinet Secretary.[82] These knowledge-management tendencies continued into March and indeed right up to the start of military action:

> '*Until 7 March 2003, Mr Blair and Mr Powell asked that Lord Goldsmith's [legal] views ... should be* ***tightly held and not shared*** *with Ministerial colleagues without No 10's permission*.'[83]

The second technique of fostering knowledge asymmetries contributed to the construction of the AG's 'green light' statement. Number 10 cultivated these asymmetries by tightly controlling the circulation of information and/or excluding individuals, including the AG, from meetings or groups where knowledge was shared or produced. These seemingly anonymous Foucauldian techniques were far more effective than issuing commands or orders.[84] They exerted a subtle influence on political actors by managing who was able to know what, discreetly impoverishing the knowledge context in which they operated. The tendency towards bi-laterals and exclusion was particularly advantageous to the inner circle who enjoyed crucial informational advantages as a result. Knowledge asymmetries translated into power asymmetries vis-à-vis individual ministers, enabling conflict to be effectively managed. Lord Turnbull astutely observed that such practices enabled a higher degree of control over the outcome of meetings. Speaking of the informal groups that Blair used, Turnbull noted,

> '*you choose who you want to be there. You have greater control over the papers that go through and greater control over the membership and* ***thereby you control the degree of challenge***.[85]

Foucault's account of power entails possibilities for individual resistance.[86] But though there remained possibilities for resistance - as the actions of Goldsmith, Short and those who later

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[82] *ibid* vol 5(5) [233]-[235], [238], [913].
[83] *ibid* vol 5(5) [908]-[909], [914].
[84] Foucault, Power (n 9) 120-1.
[85] Emphasis added. Turnbull transcript (n 53) 21, 22, 36.
[86] Foucault, Power (n 9) 324.

resigned demonstrated - such resistance was more difficult without the information to effectively understand and question policy. Furthermore, individual resistance was more easily dissipated bi-laterally than in a collective forum where doubts could be articulated and shared. The conduct of the Iraq-era Cabinet thus demonstrates how simple and apparently minor adjustments to chairmanship practices can take effect on individuals to subtly engender compliance or passivity, with - as Part 4.1 also shows - significant and wide-ranging effects upon decisions of war.

[3] Tailoring the Knowledge Context: The U-Turn

In the weeks between early February and 13th March 2003 the AG changed his legal advice to confirm that military action in Iraq *would* be lawful in the absence of a second UNSC resolution. This u-turn took two broad stages, during which the power/knowledge dynamics discussed in Parts 1-2 continued to operate. But a third dynamic played a central role here; the provision of highly partisan background information acted to shape the knowledge context in which the AG produced his legal opinion.

[3.1] Phase One: Qualified Advice & the 'Amber Light'

Discernible shifts in Lord Goldsmith's legal view were recorded on 12[87] and 27 February[88] 2003. But on 7th March the AG finally provided formal written advice to the Prime Minister upon request. This lengthy, complex advice provided qualified approval of military action in the absence of a second resolution. It confirmed that '*the language of resolution 1441 leaves*

[87] Iraq Inquiry, Declassified Documents, Attorney General Interpretation of Resolution 1441, revised draft advice (12 February 2003).
[88] Chilcot Report (n 2) vol 3(3.7) [819]-[822]; vol 5(5) [451]-[452], [454]-[456]; vol 3(3.6) [822].

the position unclear and … Arguments can be made on both sides', but that a reasonable case for the 'revival' of UNSCR 678[89] could be made. However, '*hard evidence of [Iraqi] non-compliance*' with weapons inspections was needed, and Goldsmith cautioned that '*you will need to consider extremely carefully whether the evidence … is sufficiently compelling*'.[90] The Attorney General later claimed that this view was the 'green light' for military action,[91] but its cautious and heavily caveated position is more akin to amber or amber/green. In any event, this advice was only shared with Hoon, Straw, John Reid (Minister without Portfolio) and the Chiefs of Staff.[92] Four related forms of highly partisan background knowledge led to the AG's change of view.

First, the AG was finally provided with extensive material regarding the negotiating history of UNSCR 1441 along with his formal instructions on 9th December.[93] The AG maintained that he needed this supporting documentation to provide a definitive legal view and worked through this material over the course of January 2003.[94] The AG claimed that Jack Straw was 'anxious' that he should have a full understanding of the negotiating history and Goldsmith asked to be briefed on this so he could form a 'definitive' legal view.[95] The FCO put together extensive telegrams from the negotiations for the AG, and upon later questioning Straw assumed this would have included records documenting disagreements with the French about the meaning of UNSCR 1441.[96] Yet there were problematic gaps in this material; no documents corroborated the UK/US allegations that the French had privately recognised that there was no need for a second resolution. The AG acknowledged that he had to take the word of US negotiators on this point.[97]

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[89] *United Nations Security Council Resolution 678* ((29 November 1990) UN Doc S/RES/678)
[90] Attorney General Iraq Advice (7 March 2003) <http://downingstreetmemo.com/docs/goldsmithlegal.pdf> [26], [28]-[29].
[91] Goldsmith transcript (n 31) 70. Chilcot Report (n 2) vol 5(5) [468].
[92] Chilcot Report (n 2) vol 5(5) [927]-[928]; vol 3(3.8) [418].
[93] *ibid* vol 5(5) [37]-[39], [97]. Declassified letter from Wood to Adams (n 34) para 4.
[94] Chilcot Report (n 2) vol 5(5) [38]; Brummell transcript (n 68) 13.
[95] Goldsmith transcript (n 31) 56.
[96] Straw transcript (n 2) 35-6.
[97] Goldsmith transcript (n 31) 111-113 (but see also: 128-9). See also: Straw transcript (n 2) 45-6; Chilcot Report (n 2) vol 5(5) [477]-[478].

A second factor influencing the AG's shift was his meeting with UNSCR 1441's principal UK UN negotiator, Sir Jeremy Greenstock, on 23rd January.[98] The AG explained that the meeting was to obtain Greenstock's views, though he felt no obligation to comply with them.[99] This was followed by a letter from the AG's office to Number 10 which confirmed that the AG's view had not changed.[100] In evidence the AG claimed that Greenstock '*made some good points and he had made some headway with me, but, frankly, there was still some work for me to do and* ***he hadn't got me there****, if you like,* ***yet.***[101]

A third influence was a detailed letter from Straw to the AG in early February 2003.[102] Elsewhere Straw had emphasised his intense knowledge of UNSCR 1441's negotiating history,[103] and he stressed this at the start of his letter:

> '*I would be very grateful if you would carefully consider my comments below before coming to a final conclusion … As you will be aware,* ***I was immersed in the line-by-line negotiations of the Resolution****, much of which was conducted capital to capital with P5 Foreign Ministers*.' [104]

This represents a further example of Straw emphasising his superior knowledge of the negotiating background of UNSCR 1441, and using it to imply his greater insight into the UK's legal position than the lawyers.[105]

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[98] Chilcot Report (n 2) vol 5(5) [248]-[267], [469]-[472].
[99] Goldsmith transcript (n 31) 75-6.
[100] Iraq Inquiry, Declassified Documents, Cathy Adams AGO letter to David Manning, Iraq' (28 January 2003).
[101] Emphasis added. Goldsmith transcript (n 31) 89.
[102] Iraq Inquiry, Declassified Documents, Jack Straw letter to Attorney General re: Second Resolution (6 February 2003). See also: Straw transcript (n 2) 30; Chilcot Report (n 2) vol 5(5) [396], [406]-[415], [469].
[103] Straw transcript (n 2) 8-9; Chilcot Report (n 2) vol 5(5) [387].
[104] Declassified Straw letter to Attorney General (n 102) 1. Chilcot took issue with Straw's interpretation of events in this letter: Chilcot Report (n 2) vol 5(5) [397]-[400], [407].
[105] See also: Declassified Straw letter to Attorney General (n 102) 1; Straw transcript (n 2) 8-9; Jack Straw, Witness statement to Iraq Inquiry - memorandum (January 2010) [50] <http://www.iraqinquiry.org.uk/media/194013/2010-01-xx-statement-straw-1.pdf>; Jack Straw, Witness statement to Iraq Inquiry – supplementary memorandum [18]

The fourth factor leading to the 'amber/green' advice was the AG's trip to Washington D.C. to speak to American UNSC negotiators on 10th February.[106] According to the AG, this option had arisen in discussions with Powell and Greenstock, and he welcomed the prospect, thinking it would be helpful. The AG claimed the US actors spoke with 'absolutely one voice' on the issue of whether a second resolution was needed; they were very clear that they had not conceded the US 'red line', the right to undertake military action without a further resolution.[107]

The AG's first crucial shift, articulated in his 'amber/green' 7th March advice, was a product of power/knowledge dynamics. Though there exists no recorded evidence of direct pressure,[108] select 'inner circle' actors closely allied to Number 10 exercised a high degree of control over the crucial informational context in which the AG produced his advice in two related ways. First, in the course of work they necessarily 'produced' the additional material outlined in this part. Foucault viewed knowledge as man-made and generated by power relations, contradicting the Enlightenment-based view that pre-existing objective truths await discovery. For Foucault '*truth isn't outside power*' but '*is a thing of this world*'.[109] The collective 'man-made' information regarding UNSCR 1441 - the telegrams, letters and views of Straw, Greenwood and the Americans - constituted a knowledge which is routinely generated in the course of exercising power (e.g. diplomacy, the conduct of state foreign affairs).[110] Yet, such knowledge was inherently partisan because, as Chilcot fleetingly acknowledged, such records will inevitably reflect the perspectives of their authors and the

<http://www.iraqinquiry.org.uk/media/96018/2010-02-XX-Statement-Straw-2.pdf>. See also: Straw's disagreement with FCO lawyer Sir Michael Wood outlined at Part 1.1.

[106] Chilcot Report (n 2) vol 5(5) [422], [469].

[107] Goldsmith transcript (n 31) 109-112; Chilcot Report (n 2) vol 5(5) [474]-[476].

[108] Such allegations were denied by various witnesses, including Lord Goldsmith: Goldsmith transcript (n 31) 189-91, 200-201; Brummell transcript (n 68) 24-25; Tony Blair, Witness statement to Iraq Inquiry (14 January 2010) 11, <http://www.iraqinquiry.org.uk/media/229924/2011-01-14-statement-blair.pdf>; Chilcot Report, *ibid* [711]-[712], [734], [736].

[109] Foucault, Power (n 9) 6-8, 12-15, 32, 131.

[110] This knowledge is frequently treated by courts as the factual basis upon which judgments are based in foreign affairs and defence matters: Judges & High Prerogative (n 13).

wider culture in which they operate.[111] Second, the 'inner circle' exercised discretion over the particular selection of material to be provided to the AG, and the timing of its disclosure; this was a carefully curated and timed provision of knowledge. For example, why were only the US/UK views of background negotiations deemed relevant to the AG's advice?[112] And if the background knowledge of UNSCR 1441 negotiations was so fundamental to forming the legal advice, why was the AG not privy to such information at the time? Blair conceded in testimony that Goldsmith should have been involved in UNSC resolution negotiations much sooner.[113] Yet other witnesses, such as Short[114] and Lord Turnbull,[115] see this as an effective strategy rather than a misjudgement or oversight. Cumulatively, these matters created a situation in which the AG's knowledge of background material regarding UNSCR 1441 was limited, and his standing vis-à-vis Number 10 was thus diminished to a relationship of dependency.

These knowledge-based advantages engendered power in that they directly influenced the AG's change of advice to support the Prime Minister's preferred outcome. However, this shift occurred 'outside' of the legal text, via the weighting process that AG undertook in the process of constructing his advice. The most significant factor informing Lord Goldsmith's shift was his acceptance that affording significant weight to the knowledge of private negotiating background was necessary to provide a proper legal interpretation. Yet the AG nevertheless conceded that its evidential status would be 'very uncertain'.[116] Additionally, this approach directly contradicted Goldsmith's earlier January draft advice which attached negligible weight to background negotiations,[117] as well as Wood's December instructions which

[111] Chilcot Report (n 2) vol 1, [48]-[50]. More generally, see: Lynch & Bogen (n 49).
[112] When asked why he did not ask the French for their understanding of negotiations the AG claimed that he could not have done that as there was a major diplomatic stand-off between the US and France. Straw claimed that if the AG had asked to talk to the French for their view then it would have been facilitated: Goldsmith transcript (n 31) 115; Straw transcript (n 2) 31.
[113] Blair transcript (n 48) 61-62.
[114] Short transcript (n 54) 26.
[115] Turnbull transcript (n 53) 23.
[116] Attorney General 7 March advice (n 90) [23]; Chilcot Report (n 2) vol 5(5) [546].
[117] Declassified Goldsmith draft advice (n 41); Chilcot Report (n 2) vol 5(5) [181].

cautioned upon the reliance of such material.[118] Ultimately, the 7th March advice was a direct consequence of highly significant yet unarticulated decisions taken outside of, and prior to, that text. The crucial pre-interpretive choices included, for example: whether negotiating background was relevant; if so, the weighting of such material; and which UNSC members' views should be considered. These decisions determined the substantive content of the advice, yet were strongly influenced by actors who asserted their superior knowledge of this negotiating background and the AG's relative lack of it[119] (until, of course, they chose to supply him with it). This led the AG's view to change from its previous 'red light' position, thus highlighting the *productive* nature of power – its ability to construct (legal) knowledge by working *through* individuals, stimulating them to *do* things.[120] The operation of this productive, knowledge-forming power continued in phase two of Lord Goldsmith's u-turn.

[3.2] Phase Two: The 'Green Light' Clear Statement

On 17th March 2003 the AG published a brief, conclusive statement of his advice to Cabinet and Parliament. It decisively asserted that military action in Iraq was authorised by international law, and the caveats of his 7th March advice, drafted just 10 days earlier, were absent. One factor was crucial in this second fundamental phase of the AG's u-turn: the needs of the UK military and civil service. Without a clear statement that military action was lawful troops would be potentially liable for crimes in international law, and therefore they could not be engaged without this.

A 5th March letter from the Ministry of Defence (MoD) to Cabinet Secretary Lord Turnbull stressed that Chief of Defence Staff, Lord Michael Boyce, required clear, explicit legal

[118] Declassified letter from Wood to Adams (n 34) [10]; Chilcot Report, (n 2) vol 5(5) [109].
[119] Blair witness statement (n 108) 6, 8, 10. See also: (n 105).
[120] Emphasis added. Foucault, Power (n 9) 120.

authorisation and that a ministerial meeting with the AG's engagement was needed.[121] On 11th March a meeting was held at Number 10 with Lord Goldsmith, the Prime Minister, Deputy Prime Minister John Prescott, Hoon and Boyce. Boyce claimed that he needed a short, clear paragraph from the AG confirming the lawfulness of the action.[122] In evidence the AG stated that this was *the* major factor leading to his decisive view.[123] But the need for the protection of a decisive legal statement extended beyond the military to the wider civil service and ministers; the very funding of war relied upon it.[124] The AG's legal view undertook a further shift in response. His 7th March text had advised according to the standard used on previous occasions,[125] namely that a 'reasonable case' on the lawfulness of military action could be made. But, he claimed,

> '*I quickly saw that actually this [reasonable case approach] wasn't satisfactory from their point of view.* ***They deserved more, our troops deserved more, our civil servants*** *who might be on the line* ***deserved more, than my saying there was a reasonable case.*** *So, therefore, it was important for me to come down clearly on one side ... or the other, which is what I proceeded to do.*'[126]

The AG claimed that, in hindsight, the reasonable case approach had been overly cautious and the 'better view' now was that military action was lawful.[127] On the 13th March the AG confirmed to his official, David Brummell, that he had come to a clear view that military action was lawful and the latter made a note of this development, though not the reasons for

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[121] Iraq Inquiry, Declassified Documents, Kevin Tebbit (MoD) letter to Andrew Turnbull (5 March 2003).

[122] Chilcot Report (n 2) vol 3(3.8) [170]-[171]; vol 5(5) [603]-[605], [614]. This meeting was followed up the next day with a letter from MoD lawyer, Martin Hemming: Iraq Inquiry, Declassified Documents, Martin Hemming (MoD) letter to David Brummell (AGO) on the position of CDS' (12 March 2003).

[123] Goldsmith transcript (n 31) 183-4; Chilcot Report (n 2) vol 5(5) [701], [704].

[124] Turnbull transcript (n 62) 41-2. Turnbull was recorded as having raised this at the meeting of 11th March: Iraq Inquiry, Declassified Documents, Matthew Rycroft (Number 10) minute to Simon McDonald (FCO) re Iraq; legal and military aspects (11 March 2003). See also: Chilcot Report (n 2) vol 3(3.8) [170]-[171]; vol 5(5), [614]-[616]; Goldsmith transcript (n 31) 184.

[125] Chilcot Report (n 2) vol 5(5) [558]-[566], [571].

[126] Emphasis added. Goldsmith transcript (n 31) 171; *ibid* vol 5(5) [705]-[706].

[127] Goldsmith transcript (n 31) 172, 185; Goldsmith witness statement (n 34) [6.5].

it.[128] Lord Goldsmith outlined this conclusive view in various meetings that day, including one with Jack Straw.[129] The AG's view was confirmed in a letter sent to the MoD the next day that briefly and categorically asserted that military action in Iraq was authorised by international law.[130]

Lord Goldsmith denied that his clear statement entailed strengthening the legal position in response to political expediency despite the absence of any significant international or legal developments that might have justified such a change. Instead, he claimed, in this second phase he was simply asked to answer a different question:

> '*I regard … ['is military action lawful?'] as a different question and you then have to … answer it [one way or the other]*'[131]

But the AG's assertion that he was merely answering a different question supports rather than counters the claim that he did not 'firm up' his advice; the two are not mutually exclusive. Declaring military action lawful *per se* entails a higher standard than claiming there is a reasonable case for it. The 'new' question framed the issues in a different way and entailed a high-stakes binary choice; either a clear 'yes' or 'no' was needed. Answering the new question that set out a higher standard in the affirmative inevitably resulted in a text that was, *on the face of it*, stronger. Firming up the legal view, or rather its appearance, was both a direct *reason for* and a direct *result of* asking this new, different question. In the process, ambiguities and subtleties in Goldsmith's earlier advice were effaced.

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[128] Iraq Inquiry, Declassified Documents, David Brummell (AGO) note about a discussion with the AG on the legal basis for the use of force in Iraq (13 March 2003). Chilcot Report (n 2) vol 5(5) [685]-[695].

[129] Iraq Inquiry, Declassified Documents, Simon McDonald (FCO) note of meeting between Straw and Goldsmith on 13 March 2003 (17 March 2003).

[130] The letter, to the Ministry of Defence contained the single line: '*the Attorney General is satisfied that the proposed military action by the UK would be in accordance with national and international law*.' Iraq Inquiry, Declassified Documents, David Brummell (AGO) letter to Martin Hemming (MoD) on Iraq and the position of CDS (14 March 2003).

[131] Goldsmith transcript (n 31) 172-3, 215; Chilcot Report (n 2) vol 5(5) [707]-[708].

As with the first phase of Lord Goldsmith's shift discussed at Part 3.1, this second shift was directly instigated by 'man-made' knowledge – the need for a clear statement – which was generated, but not provided to the AG until a highly strategically-timed late stage.[132] In evidence the AG conceded

> '*I would have liked to have* ***known [earlier]*** *... that what the armed services and Civil Service expect was not what had been by precedent given in the past, that they wanted more, they wanted an unequivocal answer.* ***Had I known that****, then I would have approached the question differently*'.[133]

Yet Boyce later claimed that he had raised his need for 'black and white legal advice' with Blair in January 2003.[134] This phase shows yet again how carefully managed advantages regarding access to and production of knowledge engendered power advantages over an AG who apparently did not know this crucial information. This ultimately facilitated, in turn, the production of the clear legal statement military action hinged upon.

'Inner circle' knowledge played another crucial role in the AG's firmed up statement. This concrete statement entailed the difficulty of *who* was to determine that Iraq was in 'material breach' of UNSCR 1441. The AG's previous advice in November 2002[135] and January 2003[136] stated that this issue must be assessed by the UNSC. In the absence of such an assessment the AG's legal position necessitated reliance on the judgment of the Prime Minister[137] and Number 10 accordingly confirmed '*the Prime Minister's unequivocal view*

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[132] Wilmshurst transcript (n 80) 26-7.
[133] Goldsmith transcript (n 31) 173.
[134] Michael Boyce, Oral evidence to Iraq Inquiry (3 December 2009) 88 <http://www.iraqinquiry.org.uk/media/94810/2009-12-03-Transcript-Tebbit-Boyce-S1.pdf>; Chilcot Report (n 2) vol 5(5) [703].
[135] Chilcot Report (n 2) vol 5(5) [14]-[15],[24],[27],[30].
[136] In his 14 January 2003 'draft advice' the AG advised that the UNSC would assess material breach: (n 41).
[137] Chilcot Report (n 2) vol 3(3.8) [575]-[576]; vol 5(5) [743]-[744], [934]. The AG later claimed that he was not in a position to make a judgment on material breach, that he depended on facts from his 'client', and the Prime Minister had access to this information: vol 5(5) [750]; Goldsmith transcript (n 31) 203.

that Iraq is in further material breach of its obligations'.[138] Chilcot deemed this statement 'perfunctory' and was highly critical on three grounds; first, the matter had not been considered by senior ministers; second, Blair's view was not informed by advice on the evidence; and third, the specific grounds for Blair's view were 'unclear'[139]

Despite the AG's denial, this interpretation entailed the 'client' confirming his own facts.[140] It silently excluded the complex, nuanced United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) reports, authoritative knowledge produced by the UN, as well as alternative interpretations of those facts. And it correspondingly elevated Blair's categorical statement of fact – *his* view, *his* claimed knowledge, *his* word - to a legally central position. It effectively substituted the Prime Minister's singular, cursory, uncorroborated determination for that of the UNSC; in this way his 'perfunctory' and highly contested factual view – knowledge - was afforded a status, a power arguably beyond that which the accepted rules of international legal discourse allowed. Yet this formed an essential keystone in the clear legal statement that was essential for the war power to be exercised and military action to commence.

Ultimately, this part has demonstrated that when finally drafting his advice the AG was inundated with tactically-timed highly partisan background knowledge, particularly regarding UNSCR 1441 negotiations and the military need for a clear statement of law, both of which powerfully influenced his legal view. This construction of the knowledge context in which the AG formulated his advice led to the clear statement of law published on 17th March. Yet the AG's shift depended not just on this information, but on his acceptance of highly debatable rules or practices of legal discourse, e.g. that select views of UNSCR 1441 background negotiations should be attributed great weight in his interpretation, or that 'our troops' desert'

[138] Chilcot Report (n 2) vol 3(3.8) [577]; vol 5(5) [745]-[746], [935].
[139] *ibid* vol 3(3.8) [578], [579], [938]; vol 5(5) [764], [936], [939]; vol 6(7) [388].
[140] Goldsmith transcript (n 31) 168-9.

solely justified asking a new, more exacting legal question *and* answering it in the affirmative. These were contentious, previously unarticulated decisions over which the inner circle exercised a high degree influence; though taken *outside* the text, such decisions directly shaped the 'green light' text itself. In this way, power created (legal) knowledge by controlling and framing the limits and unspoken pre-interpretive decisions by which that knowledge was created. Yet this control over the conditions in which the text was produced effectively led to the same outcome as control over the content itself as it facilitated the production of legal knowledge that validated the preferred aims of select senior ministers, and the Prime Minister in particular.

[4] Trading on Expertise: Presenting the 'Green Light'

At the final stage of disseminating the AG's clear legal statement to Cabinet, Parliament and the wider public, a fourth power/knowledge dynamic was operative; that of trading upon expertise and 'orthodoxy of source' to enhance presentation of the clear statement that military action was internationally lawful. Once the Lord Goldsmith's clear view had been reached, arrangements were made to produce the text that would form the basis of the UK government's position. Over the weekend of 15-16th March 2003 the AG worked with a team of lawyers to draft the brief, caveat-free statement[141] that was put before Cabinet and Parliament.[142]

[4.1] Presentation to Cabinet and Parliament

[141] Chilcot Report (n 2) vol 5(5) [795]-[800].
[142] (n 3)

On 17th March 2003 the AG attended Cabinet to present his conclusive statement and address any ministerial questions. The meeting agreed to ask the House of Commons to approve military action.[143] Like the military and civil service, Cabinet needed a clear legal statement.[144] Yet ministers were not provided with the AG's fuller, qualified 7th March advice, the conflicting legal arguments, or information regarding Blair's determination of the 'material breach' issue. Though Straw, Hoon and Reid had seen Goldsmith's fuller advice, other ministers remained unaware of it, including Short and Chancellor Gordon Brown 'whose responsibilities were directly engaged.'[145]

The AG had intended to explain his fuller, finely balanced advice to Cabinet, but was discouraged from doing so. In a meeting between Blair and Goldsmith on 11th March the latter suggested that Cabinet should be given the full legal picture ('the reality') whilst Blair had emphasised 'the need to avoid a detailed discussion [of this] in Cabinet'.[146] Neither Blair nor Goldsmith could recall the details of this conversation.[147] Then again, on 13th March Jack Straw discouraged the AG from explaining to Cabinet that the issues were 'finely balanced'.[148] The AG claimed that this was not his recollection of the conversation,[149] though Straw defended his comments by reiterating the military need for a clear answer, explaining that everyone knew the legal arguments were finely balanced and stressing the risks of Cabinet leaks.[150] Ministerial views varied on whether Goldsmith's full advice should have been provided; Gordon Brown and Environment, Food and Rural Affairs Secretary Margaret Beckett indicated it would not have changed their views.[151] But Chief Secretary to the

[143] Chilcot Report (n 2) vol 5(5) [825].
[144] Turnbull transcript (n 62) 68; Blair transcript (n 33) 234; Straw transcript (n 2) 59, 62; Geoffrey Hoon, Oral evidence to Iraq Inquiry (19 January 2010) 67-8, 70-1 <http://www.iraqinquiry.org.uk/media/232462/2010-01-19-transcript-hoon-s1.pdf>.
[145] Chilcot Report (n 2) vol 3(3.8) [813], [814]; vol 5(5) [587]-[588], [948]-[949].
[146] Alastair Campbell's diaries quoted *ibid* vol 5(5) [602]; [598].
[147] *ibid* vol 5(5) [600]-[601]; Goldsmith witness statement (n 34) [7.1].
[148] Declassified FCO note of Straw-Goldsmith meeting (n 129). See also: Chilcot Report (n 2) vol 5(5) [727]-[728].
[149] Goldsmith transcript (n 31) 212-3; Chilcot Report (n 2) vol 5(5) [600].
[150] Straw transcript (n 2) 62.
[151] Chilcot Report (n 2) vol 5(5) [861], [875].

Treasury, Paul Boateng, suggested it 'would have been helpful', and Clare Short claimed that excluding the full advice was misleading and resulted in her decision not to resign.[152] In any event, Chilcot concluded that Cabinet ministers should have been provided with the AG's full advice in writing.[153]

Though Lord Goldsmith attended Cabinet to answer questions about his advice, ministers read his statement but, unusually, did not ask any questions about it and no detailed discussion ensued.[154] The AG was not asked why his legal view had changed by any of the three ministers who were aware of his earlier opinion. In short, Chilcot found '*There was little appetite to question Lord Goldsmith about his advice*'.[155] The reasons for such apathy are unclear. One major factor seems to be ministers' understandings that the AG's role at the meeting was simply to confirm whether or not military action was legal.[156] Ministerial witnesses indicated that they were not inclined to open up the legal question or look behind the advice; they needed a 'yes' or 'no'.[157] Defenders also suggested that legality was only one aspect of the decision to endorse war, and that its moral and political aspects were issues that required more Cabinet attention,[158] though this overlooks the fact that engaging in military action contrary to international law raises profound moral and political questions *per se*. But Lord Turnbull provided a further explanation; by this time – which was the *first* occasion the Cabinet was asked to take a decision on war – its options were extremely limited. Ministers '*were pretty*

[152] *ibid* vol 5(5) [843] [877]; vol 3(3.8) p 552; Short transcript (n 54) 31-3.
[153] vol 5(5) [954]-[957]; vol 3(3.8) [819]-[820]; vol 6(7) [423]. See also: House of Commons Liaison Committee (n 14) Q72.
[154] Straw 2010 transcript (n 2) 62-3; Goldsmith transcript (n 31) 216-7; Chilcot Report (n 2) vol 5(5) [840]. Though there is a difference of opinion about whether Clare Short raised any queries: [844]-[851].
[155] Chilcot Report (n 2) vol 5(5) [951]-[952]; vol 3(3.8) [817]-[818]
[156] *ibid* vol 3(3.8) [816], [950]. Lord Turnbull also held this view: vol 5(5) [859].
[157] *ibid* vol 5(5) [860] (Hoon); [861] (Beckett); [863] (Reid); [867] (Straw); [871]-[873] (Brown); [878] (Blair).
[158] *ibid* vol 5(5) [860] (Hoon); [871] (Brown); [879] (Blair).

much imprisoned. ... I don't think they did have any choice'.[159] Chilcot later claimed that ministers were not '*obstructed **in an active sense***', but were too 'passive'.[160]

On 17th March Jack Straw introduced the AG's written answer to Parliament.[161] Additionally, an FCO paper detailing Iraq's failures to comply with UN obligations was sent to all MPs, though Chilcot noted that its claims were based on UK interpretations of intelligence and were subject to limitations.[162] On 18th March the UK Parliament held an historic substantive debate and vote on whether to authorise military action in Iraq. Members of Parliament voted on a motion in support of military action, with 412 M.P.s voting in favour, and 149 voting against. The author's earlier research indicated that the AG's decisive view that such action was lawful was an influential factor in this debate.[163]

[4.2] Power/Knowledge Issues

The presentation of the AG's final statement entailed numerous power/knowledge dynamics, including those outlined in Parts 2-3. Lord Goldsmith's fuller advice remained unknown to both Cabinet and Parliament and this was a vital knowledge asymmetry upon which both bodies made their decisions to support war. Additionally, both bodies were supplied with a highly partisan, closely managed, government-produced legal knowledge – the brief legal statement – upon which they based their decision. But the fourth power/knowledge tactic of trading on expertise was particularly crucial at this final stage where the AG's legal knowledge and the associated status of his speech were strategically exploited.

[159] Turnbull transcript (n 53) 38-39.
[160] House of Commons Liaison Committee (n 14) Q92, Q93.
[161] Chilcot Report (n 2) vol 5(5) [888], [897].
[162] *ibid* vol 3(3.8) [582], [601], [602]-[603].
[163] Fountain of Honour (n 8) 301-5, 312.

Foucault identified exclusions that organise various discourses, including limitations on *who* has the privileged right to speak on a particular subject.[164] Elsewhere, he noted an Enlightenment-era shift in which knowledge came to be gauged by 'orthodoxy of source', i.e. assessed primarily according to its 'official' or authoritative origins.[165] Regarding the domestic legality of military action, *who* spoke was a central issue; the AG was *the* individual lawyer assigned this privileged position. His legal view (knowledge) enjoyed a definitive status with considerable power implications. The AG's written answer was presented to Cabinet, Parliament and the public, as a definitive, isolated statement of legal knowledge from *the* constitutionally authoritative source. Government lawyers later claimed in evidence that its presentation was unorthodox, leading Chilcot to conclude that: '*The decision that Lord Goldsmith would take the lead in explaining the Government's legal position to Parliament, rather than the Prime Minister or responsible Secretary of State providing that explanation, was unusual.*'[166] Yet there were clear power benefits to ensuring the AG was perceived as having specific ownership of the legal statement, and conveniently distancing ministers such as Blair, Straw and Hoon from it. The international legality of the war was the subject of intense debate and uncertainty, and in the days leading up to Lord Goldsmith's statement there were media and parliamentary calls for the AG's advice to be published.[167] Number 10 politically benefitted from the AG's authoritative, expert standing and his constitutional status as the final arbiter of legality; the presentation of the written answer exploited this 'orthodoxy of source' and fostered a (temporary) edifice of legal certainty which had profound power effects in Parliament[168] and Cabinet.[169] The circumstances surrounding the AG's legal advice

[164] Foucault (n 11) 224-5. See also: Edward Said, 'Opponents, Audiences, Constituencies, and Community', *Critical Inquiry* (1982), vol 9(1), 1-26, 2, 7-8.
[165] "*The problem is now: Who is speaking, are they qualified to speak, at what level is the statement situated, what set can it be fitted into, and how and to what extent does it conform to other forms and other typologies of knowledge.*" Michel Foucault, *Society Must be Defended* (Penguin 2004) 183-184.
[166] Chilcot Report (n 2) vol 5(5) [800], [811], [943]-[944].
[167] *ibid* vol 5(5) [671]-[684]; [813].
[168] Fountain of Honour (n 8) 301-5, 312.
[169] Short transcript (n 54) 24, 33.

provide a textbook example of power producing (legal) knowledge, and then in turn exploiting this knowledge to engender power by constructing support for war.

But, the Chilcot evidence begs Foucault's questions: who *was* speaking? What *was* the 'status' of this crucial statement that military action in Iraq was internationally lawful?[170] Despite providing a temporary edifice of certainty, both the identity of the AG as speaker and the status of his clear legal statement were ambiguous. The statement's core purpose was to explain the case for military action strongly, unambiguously and clearly.[171] It was making a legal argument, engaged in advocacy.[172] Chilcot deemed the text '**a statement** of the government's legal position'; this was *not* 'advice'. But even as an argument, Chilcot deemed the written answer fundamentally lacking because it did not explain a key legal point on which it rested, namely '*the legal basis of the conclusion that Iraq had failed to take 'the final opportunity' to comply with its disarmament obligations offered by resolution 1441*.'[173] Cathy Adams also claimed the 17th March text was not the AG's 'advice', but simply an 'argument' based on his advice; thus using Goldsmith to present this was 'a mistake'.[174] It also went against wishes that the AG had expressed just days earlier, on 11th March, that he '*did not want [Blair] to present [his fuller legal opinion] too positively. ... he wished he could be clearer in his advice, but in reality it was nuanced*.'[175]

Presenting' the legal position thus, entailed a highly strategic framing of the text; partisan argument was implicitly presented as authoritative, independent advice. This presentation was facilitated by the AG's official dual role as a government minister *and* legal adviser to the Crown. The latter responsibility is non-ministerial and required the AG to act independently

[170] Foucault (n 165) 184, 183.
[171] Chilcot Report (n 2) vol 5(5) [717], [726], [799].
[172] Wood transcript (n 2) 60.
[173] Chilcot Report (n 2) vol 3(3.8) [812].
[174] *ibid* vol 5(5) [810].
[175] Alastair Campbell diaries quoted *ibid* vol 5(5) [602].

of the Government;[176] it is in this central 'legal adviser' role that the public, ministers and MPs looked to the AG to provide an independent, definitive view. The Bar Council subsequently found that the AG was acting as a minister at this point,[177] yet this party political role was not at the time articulated and instead his 'legal adviser' role was implicitly exploited. In short, the AG was speaking as a minister stating an argument, though he was implicitly presented and understood by his audience as an independent adviser setting out his independent legal advice. This raises interesting questions about the status of this final clear statement vis-à-vis the AG's other writings, particularly his detailed 7th March advice.[178] In particular, it seems that the final statement ultimately had formal legal effect, rather than the earlier, fuller advice upon which it was based; troops were engaged on the basis of the former rather than the latter (which had been deemed insufficiently certain). Thus, the presentation of the written answer traded on AG's impartial role and his legal expertise, both of which enjoyed a credibility and independent standing that were inconsistent with the aims and content of the text presented. In this sense Lord Goldsmith exemplified one of Foucault's 'specific intellectuals' whose powers can 'irrevocably destroy life' in the service of the state.[179]

[5] Post-Iraq Power/Knowledge Dynamics

Though it represents a critical high watermark of power/knowledge exploitation - and constitutional subversion - the Iraq case study examined here is not an aberration; such dynamics remain endemic in the constitution. Though there is less publicly available information about central government workings behind the scenes of post-Iraq military actions,

[176] Select Committee on the Constitution (n 1) [8]-[9]; Select Committee on the Constitution, 'Waging War: Parliament's Role and Responsibility', HL (2005-06) 236-I [34].
[177] Clare Dyer, 'Attorney General Spared Trial by Bar' (The Guardian Online, 14 July 2005) <https://www.theguardian.com/politics/2005/jul/14/uk.iraq>.
[178] For an interesting questioning of what constitutes a 'work' (or in the AG's case *the* work) see: M Foucault, 'What is an Author?' in Paul Rabinow (ed) *The Foucault Reader* (Pantheon, 1984) 101-120, 103-104.
[179] Foucault, Power/Knowledge (n 9) 126-9.

a brief survey shows similar power/knowledge tactics at play, albeit to a lesser degree. Practices such as the selective sharing of information and tailoring of informational contexts in which actors appraise issues of warfare continue,[180] and the tactic of trading on legal expertise has been routinely employed to varying degrees. For example, there were notable echoes of Iraq in the decision to undertake military engagement in Libya in 2011. Here, the Foreign Affairs Select Committee found shortcomings in decision-making by the National Security Council (NSC) which had been formed to oversee defence strategy and to address problems with informality and minuting in the Iraq affair. Though the select committee deemed the NSC 'a clear improvement' on the earlier informal Iraq-era processes, it highlighted limitations of this group established and chaired by Prime Minister David Cameron. It noted Cameron's 'decisive role', particularly when summing up the NSC position in favour of military intervention in Libya despite the concerns of senior intelligence and military chiefs present.[181] It concluded that '*the NSC mechanism failed to* ***capture*** *[well-founded concerns] and bring them to* ***the attention of the Cabinet*** *when it ratified the NSC's decisions*.'[182] Such findings indicate that enhancing formality and recording mechanisms in decision-making cannot automatically address power/knowledge disparities (e.g. between Prime Minister and Cabinet). Rather, writing inevitably remains a site of political struggle, and the crucial issue continues to be control over the official minute or summary of a meeting, e.g. the terms in which it is recorded and, of course, what is *not* captured.

A further similarity between the Iraq and 2011 Libyan actions was the government's publication of a brief summary of the legal position.[183] According to Murray and O'Donoghue,

[180] In the context of Parliament, see Fikfak & Hooper (n 8) chapter 4.

[181] Those with doubts included Chief of the Secret Intelligence Service and Chief of Defence Staff. House of Commons Foreign Affairs Committee, *Libya: Examination of Intervention and Collapse and the UK's Future Policy Options*, HC 119 (Sept 2016) [59]-[66].

[182] Emphasis added. *ibid* [63].

[183] 'UK Government's Legal Note on Libya' (BBC Online, 21 March 2011) <https://www.bbc.co.uk/news/uk-politics-12810050>. This text was published in advance of the parliamentary debate and vote which supported military action by 557 votes to 13: *Hansard* HC vol 525 cols 700-806 (21 March 2011).

'*Parliament's access to little more than fragmentary legal advice would become a recurring feature of subsequent intervention debates*.'[184] On three further occasions government – specifically, the Prime Minister's Office - provided Parliament with incomplete, 'fragmentary' information about the often-contested legal basis for military intervention. The first, in the August 2013 parliamentary vote on engagement in Syria,[185] was later criticised by Sands due to its direct parallels with the presentation of the text in the Iraq affair; both were brief single-page summaries of the 'best possible' case for war, yet were incorrectly presented by prime ministers as 'advice'. Sands concluded that '*In both cases I think the House was misled*',[186] though it should also be noted that the government was – exceptionally – defeated in the 2013 Syria vote.[187] The UK government also published legal summaries in September 2014, when it participated in air strikes against ISIS at the Iraqi government's request,[188] and in April 2018 when it took part in air strikes to disarm the Assad regime in Syria.[189] Parliament supported both interventions.[190]

The provision of brief legal summaries has been justified on the basis that the AG's full advice to government is confidential as a matter of constitutional convention and the possibility of publication would inhibit the candidness of advice given.[191] But the power/knowledge analysis undertaken in this article nevertheless highlights two problems with this trend of providing legal 'summaries'. First, the specific status and purpose of the legal texts presented

[184] Colin Murray & Aoife O'Donoghue, 'Towards Unilateralism? House of Commons Oversight of the Use of Force' I.C.L.Q. [2016] vol 65(2), 305-341, 328.
[185] 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position' (Prime Minister's Office, 29 August 2013).
[186] Philippe Sands QC. Political and Constitutional Reform Committee, 'Parliament's Role in Conflict Decisions: An Update', Oral Evidence, HC 649 (17 October 2013) Q2-Q4.
[187] Parliament narrowly opposed military action by 285 votes to 272: *Hansard* HC vol 566 cols 1425-1556 (29 August 2013).
[188] 'Summary of the Government Legal Position on Military Action in Iraq Against ISIL' (Prime Minister's Office, 25 September 2014.
[189] 'Syria Action – UK Government Legal Position' (Prime Minister's Office, 14 April 2018).
[190] In September 2014 Parliament supported military action by 524 votes to 43: *Hansard* HC vol 585 cols 1255-1366 (26 September 2014). In April 2018 Parliament supported military action by 314 votes to 36: Hansard HC vol 639 cols 39-154 (16 April 2018).
[191] See, e.g.: Attorney General Jeremy Wright. Justice Committee, 'The Work of the Attorney General', Oral Evidence, HC 409 (15 September 2015) Q29, Q32, Q33, Q36. See also: 'Ministerial Code' (Cabinet Office, January 2018) [2.12].

to parliaments debating military action remain ambiguous[192] and therefore exploitable.[193] In particular, upon which text is military action ultimately authorised? Does, and indeed should, a government's summary of the 'best' legal case have any domestic 'legal' status? Under the current system MPs debating crucial warfare issues under information asymmetries must somehow be alert to whether a government summary may distort or misrepresent more complex, qualified advice[194] that parliament has neither access to, nor the expertise to assess. In these circumstances, such texts are of limited assistance and should be treated as any other partisan government argument.

Second, even if the distinction between a brief legal summary and the AG's independent, full advice is clear to all actors, it will be generally understood that the former is founded upon and bears some similarity to the latter. In this sense, even a legal summary indirectly trades upon the status of an AG role that is inherently susceptible to political influence. Recent AG, Jeremy Wright appeared to defend the role on this basis, agreeing that it must be ministerial as its position 'at the intersection of law and politics' enables the AG to give government the advice it 'needs'.[195] Yet this dual dimension of the AG's role that aids government convenience also necessarily makes it subject to power/knowledge inequalities and subtle, wider tactics of ministerial influence. While power/knowledge dynamics are an inherent, pervasive feature of all contemporary political systems, the Iraq case study reveals their remarkable capacity to aid the construction of a legal text the Prime Minister 'needed'. The subsequent practice of routinely publishing legal summaries remains problematic, particularly when viewed in the light of the UK government's strategic shifting of the primary justificatory forum for military action away from the international UNSC to a domestic Parliament over

[192] AG Jeremy Wright has acknowledged the difference in status of both, claiming '*They may be similar, but they are not exactly the same.*' *ibid* Q30.
[193] Fikfak & Hooper (n 8) 60.
[194] Justice Committee Oral Evidence (n 191) Q40-Q42. See also: Political and Constitutional Reform Committee Oral Evidence (n 186) Q4.
[195] Justice Committee Oral Evidence (n 191) Q10

which it has more control.[196] In such circumstances, the AG's legal advice becomes a – arguably *the* - crucial check on lawfulness. These post-Iraq examples further demonstrate the systemic challenges of maintaining meaningful checks and balances in warfare matters where power/knowledge disparities are entrenched.

Conclusion

Ultimately, as in the case of the discredited intelligence dossier (with which it bears marked parallels)[197] the AG's Iraq war legal advice lends weight to Foucault's claim that '*If we truly wish to know knowledge, ... to apprehend it at its root, its manufacture, we must not look to philosophers but to politicians*".[198] The Chilcot evidence demonstrated that four related dynamics, all of which entailed the reciprocal relationship between power and knowledge, operated cumulatively to construct the legal 'green light' that the Iraq invasion depended upon. Chilcot revealed in stark detail that the path to war was highly precarious, and Blair's maintenance of fragile political support rested entirely on an array of finely calibrated circles of who knew what, and (vitally) when. Furthermore, available evidence indicates that the four power/knowledge dynamics discussed here have continued to operate in post-Iraq military actions, where the Prime Minister still enjoys privileged access to and management of information vis-à-vis Cabinet and Parliament, as well as the benefit of ostensibly legal texts summarising international law that shape domestic debate on warfare. This surely represents a serious ongoing challenge to constitutional integrity and effective decision-making in matters of warfare.

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[196] Murray & O'Donoghue (n 184) 332. See also: Fikfak & Hooper (n 8) 58.

[197] '*Intelligence and assessments were used to prepare material to be used to support Government statements in a way which conveyed certainty without acknowledging the limitations of the intelligence*.' Chilcot Report (n 2) vol 6(7) [322].

[198] Foucault, Power (n 9) 12.

Though constitutional discourse entails the fiction of '*the solid and fundamental unit of the author and the work*',[199] the Chilcot material indicates that in one sense, the Iraq 'green light' text was not simply the sole product of the individual AG with his 'single pen'.[200] Instead, a range of power influences – e.g. the tactically-timed drip-feed of carefully curated surrounding knowledge, the silent adjustment of pre-interpretive approaches on the margins of legal discourse - took effect through the AG to construct the text published in his name. In this way, intangible power coalesced into the legal 'authoritarian monologue'[201] upon which the Iraq deployment hinged, via the conduit of an AG who, despite initial attempts at resistance, was transformed in the process. Ultimately, power/knowledge dynamics produced not just 'words that maketh murder' but also the leading lawyer who, it seems, came to believe in and later defend them.[202] More generally, Lord Goldsmith's Iraq u-turn highlights a disparity between (on the one hand) the liberal-constitutional model of the AG as autonomous, independent legal adviser upholding the rule of law,[203] and (on the other hand) ongoing complex, subtle, political micro-practices that inevitably take effect on the office-holder and work against or undercut this formal fiction.

Yet, despite Foucault's denial that power is located in the possession of specific individuals, Chilcot's findings do implicate the Prime Minister and his team in the unsatisfactory processes that led to the AG's Iraq legal advice. In later comments to a select committee, Chilcot noted Blair's personal dominance in Cabinet and agreed that the concentration of power in modern prime ministers bears resemblance to Louis XIV's claim 'I am the state'.[204] So whilst the King may no longer be above the law, the Iraq war shows that his modern successor - the

[199] Foucault (n 178) 101, 107-8, 118-119.
[200] Campbell transcript (n 20) 79. Campbell referred to 'the person who … had the single pen' when describing the role of John Scarlett, Head of Joint Intelligence Committee, in the production of the intelligence dossier presented in September 2002.
[201] Peter Goodrich, 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language' (1984) 4 OJLS, 90, 99.
[202] Goldsmith transcript (n 31) 245-6.
[203] 'Ministerial Code' (Cabinet Office, October 2011) [6.4]. This passage does not feature in the 2018 Code.
[204] House of Commons Liaison Committee (n 14) Q47, Q97.

Prime Minister[205] - can nonetheless exploit power/knowledge dynamics to influence an AG's legal text to which he is subject. Furthermore, post-Iraq military actions highlight the Prime Minister's enduring privileged position in this area. In this context at least, it seems that the king's head remains firmly intact.[206] So it goes.

[205] Fountain of Honour (n 8) 290-4.
[206] Foucault, Power/Knowledge (n 9) 139-40.