# *Who takes us to War? A Constitutional Question*

***Thomas Dixon****

*At times in this nation's short existence, war has been a fact of such transcendent and dominating character as to take precedence over every other fact of life. During those calamitous periods, the defence power becomes the pivot of the Constitution because it is the bulwark of the State. Its limits are bounded only by the requirements of self-preservation.*[1]

*The decision to commit a country to armed conflict is the most grave and potentially catastrophic one a government can make. War exacts an enormous cost on a nation's citizens, its finances, its resources and possibly its very existence.*[2]

*More than 17 million people were killed during World War I, including 7 million civilians and some 20 million wounded. An estimated 80 million people perished in World War II with a civilian death toll in the region of 55 million. That conflict ended with the dropping of two nuclear bombs over cities in Japan, killing hundreds of thousands of civilians.*

*It is not just the overwhelmingly high cost of life and limb that is exacted in wartime. The Australian Government allocated $36.4 billion in the 2018/2019 budget to defence spending, while at the same time $24 billion was assigned to Medicare. The U.S. will spend $738 billion on defence in 2020. This is not a new phenomenon. In 1788, while the fledgling colony in New South Wales was still in its first year, the British government dedicated 31% of its total expenditure to military spending.*[3]

*Despite the enormous tolls of the epochal wars of the last century, Australia has continued to participate in hostilities abroad. From Korea to Vietnam to the Gulf Wars and Afghanistan, Australians both inflict and suffer casualties through military commitments to international conflicts. Domestically, the invocation of "national security concerns" has become the touchstone for the extreme use of war powers, including mass detention in times of war and detention without trial in times of relative peace.*[4]

*A modern re-conceptualisation of traditional defence concerns has seen war powers utilised beyond military threats to anything from humanitarian relief, covert operations, border security and even economic considerations. On 21 August 2019, the Prime Minister announced that the government had committed Australian military forces to "uphold" the right of safe passage of maritime trade through the Strait of Hormuz. The reason given by the PM was "to ensure we maintain free flow of commerce and freedom of navigation which is essential to our security and to our economy".*

*This Paper will address the constitutional basis upon which the government arrives at these momentous decisions to commit the country to armed conflict.*

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[1] *Farey v Burvett* (1916) 21 CLR 433 at p.453 (Isaacs J).

[2] Joseph Schumpeter *The Sociology of Imperialism* (World Publishing, 1955 ed.) at p.68.

[3] Peter Paret *Understanding War: Essays on Clausewitz and the History of Military Power* (Princeton University Press, 1992) at p.13.

[4] *Lloyd v Wallach* [1915] HCA 60; (1915) 20 CLR 299; *Little v The Commonwealth* [1947] HCA 24; (1947) 75 CLR 94; and *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307.

"*For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other*".[5]

## *Introduction*

In ancient times, the decision to go to war was taken after extensive public debate in governing councils. In the Sumerian *Epic of Gilgamesh*, the arrival of heralds from Agga of Kish informed Gilgamesh in Erech of the *casus belli*. Before he could respond, however, Gilgamesh had to go before a Council of Elders and a Council of Men. He could not convince the Council of Elders to declare war. However, after a debate, the Council of Men decided upon war.[6]

Livy described the Roman involvement in war as commencing when envoys (fetials or *legati*) arrived at the frontier and made demands for satisfaction. If, after 33 days, negotiations failed then war was then declared conditionally. Upon return to Rome, the question of war and peace was put to the vote.[7] If the vote was in the affirmative, then a fetial would return and hurl a spear into the enemy territory signifying that war had been officially declared.[8]

Honoré Bonet was a writer on the art of chivalry and the rules of war in the Middle Ages. In *The Tree of Battles* (1387)[9], Bonet stated that "A general war is declared after great council, and decreed by the law". Christine de Pizan, in *The Book of Feats of Arms and of Chivalry* (1434)[10], explained that the purpose of assembling a "great council of wise men" was to ensure the loyalty of the Prince's people by involving them in the decision to go to war.

The ancient precedents which recognised war-making as an inherently legislative function came to be ignored with the advent of technological change. Once it was discovered that the bronze used in cathedral bells could replace the heavy wrought iron used in cannon, the means of war-making was transformed, and along with it, the nature of statecraft. In 1494, Charles VIII invaded the Italian peninsula with siege trains of mobile cannon and soon reduced the city-states before him into submission. Walls, towers and motes were rendered obsolete overnight. The French marched down to Naples "as if on parade".[11] This caused the Italian princes to form a joint security pact to oppose the French[12], and in doing spawned fundamental political change across the continent – namely, the creation of the modern State.

From this period, Maccchiaveli witnessed mercenary leaders changing alliances without warning, leading to the demise of many governments. His experiences led him to write of the interdependence of legal and strategic organisation: "as there cannot be good laws where the state is not well armed, it follows that where they are well armed they have good laws".[13] The legitimacy of a State depended upon power, and power flowed from the barrel of a gun.

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[5] Thomas Paine "Common Sense" (January 1776).
[6] William J. Hamblin *Warfare in the Ancient Near East to 1600 BC* (Routledge, New York, 2006), Chapter 2.
[7] Of the centuriate *comitia*: Frank Frost Abbott, A History and Description of Roman Political Institutions (Elibron Classics, 2006) at pp.160-161 (but the prosecution of the war itself was left to the chief-magistrates in the Republican period).
[8] Titus Livius (Livy), *The History of Rome*, (Trans. A. de Selincourt) Book I-32; *cf* Thomas Wiedemann "The Fetiales: A Reconsideration" *The Classical Quarterly* Vol. 36, No. 2 (1986), pp.478-490.
[9] *L'arbre des Batailles.*
[10] *Livre des fais d'armes et de Chevalerie*.
[11] Philip Bobbitt "The Shield of Achilles" (Alfred A. Knopf, New York, 2002) at pp.80, 96.
[12] The League of Venice.
[13] Niccolò Machiavelli, *The Prince* (1532), chapter 12.

The question was, who was to wield it? As the medieval *curiae regis* of the feudal kingdoms of Western Europe began to transform into Parliaments and Estates General, sovereigns began to claim a divine right to exercise absolute power over their subjects.

In England, Charles I went to war with his Parliament. The English Civil War (1642–1651) resulted in the loss of 10% of the English population, and far higher figure in Ireland.[14] Thomas Hobbes did not live through the civil wars in England - he had fled his homeland and became a tutor to the exiled Prince of Wales, Charles II. He argued in his epic, *Leviathan*, that the atavistic laws of nature lead mankind into perpetual state of war. The fear of the consequences of war in turn leads to the formation of a political community oriented around security concerns, and demands the appointment of an *absolute* sovereign government responsible for the protection of the commonwealth.[15]

In 1654, Louis XIV, was crowned at Reims. The next year, when *Parlement* attempted to criticise the King's edicts, he appeared suddenly before them and made his celebrated declaration: "*L'état, c'est moi*".[16] Louis XIV did not share power. He never summoned the Estates General or the *Parlement*.[17] When Richelieu's successor, Cardinal Mazarin, died in 1661, Louis did not replace him, choosing instead to be his own Prime Minister.[18]

Meanwhile, the Glorious Revolution of 1688 in England had seen off James II. The Convention Parliament drew up the Declaration of Right to address abuses suffered under absolute monarchy. It was presented to William and Mary on 12 February 1689 by way of an invitation to become joint sovereigns of England under a new system of constitutional monarchy. Upon hearing its terms read aloud, William said "We thankfully accept what you have offered us". They were proclaimed king and queen later that day.[19]

Charles-Louis de Secondat, Baron de Montesquieu was born in France in the reign of Louis XIV, the Sun King. His first-hand experiences of absolute monarchy and the developments across the Channel heavily influenced his writings on political science. Contrary to Hobbes' appeals to a Leviathan with absolute power to achieve lasting peace, Montesquieu's focus was on despotism, and his solution to it was to keep power in separate hands: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty".[20] His work heavily influenced the thoughts of the Founding Fathers of the U.S. Constitution.[21]

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[14] Charles Carlton, *Going to the Wars: The Experience of the British Civil Wars* (Taylor & Francis, 2002) pp.211-214.

[15] preferably monarchical: Thomas Hobbes, *Leviathan*, Chapter XVIII, ss.6, 9-11.

[16] "The State, is me".

[17] In France, the Estates General did not assemble between 1614 and 1789.

[18] at the age of 23; Philip Bobbitt, *The Shield of Achilles* (Alfred A. Knopf, New York, 2002) at pp.122-123.

[19] At their coronation on 11 April 1689, William and Mary swore to govern according to "the statutes in Parliament agreed on": *Coronation Oath Act 1688* 1 Will & Mar, c 6.

[20] Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (T. Nugent (Trans), J. V. Prichard (Ed); 1748) Book 11, section 6; Montesquieu was critical of the assumptions underpinning Hobbes' thesis, describing them as "far from being well founded": Book I.

[21] The Federalists cited Montesquieu most frequently in their works, followed by Blackstone and then Locke: Donald S. Lutz, *A Preface to American Political Theory*, (University Press of Kansas, 1992): at p.123; and the tables of relative influence at pp.135-139.

As will be seen, in terms of both theory and practice, the allocation of war powers amongst the arms of government is often a function of mutable fortunes.[22] Where constitutional forethought has sought to formally allocate responsibility for committing a nation to war, practical realities have often intervened and changed the calculus of governmental co-ordination (and *vice versa*).

***Philosophical Underpinnings***

A declaration of war is a juridical act that transforms country's legal relations with other countries and with its own citizens. For example, in times of war, it is unlawful for a person to have any commercial relations with an enemy.[23]

Grotius conceptualised a declaration of war as a legal condition. A formal declaration of war appeared to be a necessary (or reliable) means of transforming the brute existence of armed conflict into a condition governed and regulated by rules of law.[24]

According to Hugo Grotius, declarations of war were necessary so that it could be established with certainty that war was being waged, not by any private initiative, but by the seal of sovereignty.[25]

The modern idea of sovereignty is usually traced to Thomas Hobbs. For Hobbes, sovereignty involved internal control over all domestic institutions, and an external sovereignty against other national powers.[26] British constitutional theory from the 17th Century identified the executive as possessing exclusive power over war-making through the exercise of paradigm "kingly powers" known as the royal prerogative. The power to deploy and command the militia was described by Charles I (in 1641) as "the just power prerogative which God and the laws of this kingdom have placed in him for the defence of his people".[27]

John Locke did not identify the declaration of war as one of the King's prerogatives. The prerogative, according to Locke, was heavily qualified by the contingent legitimacy of the authority of the state over the individual. The prerogative, said Locke, "can be nothing, but the people permitting their rulers, to do several things of their own free choice" and acquiescing in it where it is done for the public good.[28]

Locke had theories on the royal prerogative but had relatively little to say about specific institutions or problems of constitution design. In his *Second Treatise on Civil Government* (1690), Locke identified three functions of government: legislative, executive and "federative". The last of these powers embraced "the power of war and peace, leagues and alliances, and all

[22] The vagaries of fortune is the theme underpinning much of Dr Cameron Moore's rare but excellent work on Australian Defence powers: Cameron Moore, *Crown and Sword* (ANU Press, 2017) at p.13.
[23] *Esposito v Bowden* (1857) 7 El & Bl 763 at p.781 ("The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence").
[24] Charles A. Lofgren, "War-Making Under the Constitution: The Original Understanding" 81 *Yale LJ*. 672 (1972) at pp.690-691 referring to the immunity attaching to participants as one such legal condition.
[25] Hugo Grotius, *The Rights of War and Peace* (1625) (Liberty Fund; Richard Tuck, Ed.) Book III, Chapter iii, section IX at p.1265.
[26] Nicholas Aroney, "The *Constitution* of a Federal Commonwealth: The Making and Meaning of the Australian *Constitution*" (Cambridge University Press, 2009) at p.32.
[27] Rosara Joseph "The War Prerogative" (Oxford University Press, 2013) at p.16.
[28] This is the essence of Locke's "social contract": John Locke *Two Treatises of Government* (Orion Publishing; M. Goldie, Ed.) s.164-165 at pp.199-200.

the transactions with all persons and communities without the Commonwealth".[29]: To Locke, the federative (or foreign policy) power was "always almost united" with the Executive, and any effort to separate them would invite "disorder and ruin".[30]

Chitty's monograph on prerogative power, written in 1820, was of seminal influence on the understanding of prerogative power. Chitty was of the view that "the King possesses .. the exclusive right to make war or peace, either within or out of his dominions; and the constitution leaves it to the King's discretion to grant or refuse a capitulation or truce to an enemy".[31] The war making prerogative extended to a right to "require the personal service of every man able to bear arms, in case of a sudden invasion or formidable insurrection". However, "except on such emergencies, and at ordinary times, his Majesty has no legal power to force any one to enlist in his armies".[32]

Blackstone had argued, from the reason assigned by Grotius, that in order to make a war completely effectual, it was necessary "that it be publicly declared, and duly proclaimed by the King's authority".[33] Blackstone was of the view that the King had "the sole prerogative of making war and peace", however it was a power conditioned to some extent by parliamentary sovereignty. The "check of parliamentary impeachment" was, according to Blackstone, "sufficient to restrain ministers of the crown from wanton or injurious exertion of this great prerogative".[34] The royal prerogative was "wisely placed in a single hand by the British constitution, for the sake on unanimity, strength and despatch".[35]

Dicey said of this account of Blackstone's that "It has but one fault; the statements it contains are the direct opposite of the truth. The executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the King but the chairman of the committee, known as the Prime Minister".[36]

F.W. Maitland said "Without the consent of parliament [the monarch] can direct the invasion of a foreign country. Of course, parliament has a certain check on this power. [But] practically a ministry has a great deal of power as regards foreign affairs, and might even force a reluctant nation into a war from which it would be impossible to withdraw. This is really a great matter".[37]

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[29] John Locke *Two Treatises of Government* (Orion Publishing; M. Goldie, Ed.) s.146 at pp.189-190.
[30] John Locke *Two Treatises of Government* (Orion Publishing; M. Goldie, Ed.) s.147-148 at p.190.
[31] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (General Books) at p.18.
[32] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (General Books) at p.20; an exception was persons who come within the description of seamen, wherein the King may, even in time of peace, compel them to re-enter the navy by forcibly impressing them.
[33] William Blackstone, *Commentaries on the Laws of England* (1765) (The Lawbook Exchange, 1922) Book I, Chapter 7, pp.258.
[34] William Blackstone, *Commentaries on the Laws of England* (1765) (The Lawbook Exchange, 1922) Book I, Chapter 7, pp.257.
[35] William Blackstone, *Commentaries on the Laws of England* (1765) (The Lawbook Exchange, 1922) Book I, Chapter 7, pp.250.
[36] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1895), (Liberty Fund, 1982) at *cxxx*.
[37] FW Maitland The Constitutional History of England: A course of lectures delivered by FW Maitland (Cambridge University Press, 1919) pp.423-4.

Whig thinkers justified the vesting of the responsibility for war and foreign policy in the Cabinet was that it enabled scrutiny and accountability by the governed through regular elections and the supremacy of Parliament.[38]

Today, the orthodox constitutional position regarding the war and foreign policy powers remains largely unchanged as from the statements made in the Nineteenth Century. The Crown wages war and makes peace, deploys the armed forces, directs the conduct of war, and conducts foreign relations. These are the exclusive powers of the Crown, and Parliament has no formal constitutional role in their exercise.[39]

For the American Framers, the Lockean notion of the social contract and the Blackstonian doctrine of parliamentary sovereignty enabled them to re-conceptualise integrative federal systems that avoided the ascription of sovereignty to any particular political community. Thus, the powers to declare war and to initiate hostilities short of war were formally assigned to Congress. The power to command and control the military forces once war had been declared was assigned to the President.

The Australian Framers borrowed heavily from the U.S. blueprint[40], whilst retaining the Westminster principles of representative and responsible government.[41] This successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism is one of the Framers' most striking achievements.[42]

However, unlike the American Constitution, the Commonwealth facsimile is silent on who may declare war and commit the country's forces to armed conflict. The answer as to why this is so lies with an appreciation of the Framers' view of Australian sovereignty, or lack of it. The power of the parliament to make laws on the topic of "defence" was, at the time of Federation, intended to be a domestic one. Matters of foreign policy such as war-making which directly concerned the Empire were understood to be beyond its scope.

### *Methodology*

A strong argument can be advanced that no meaningful notion of democracy could possibly exclude questions of war powers from parliamentary control.[43]

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[38] Rosara Joseph, *The War Prerogative* (Oxford University Press, 2013) at pp.19, 33.
[39] Rosara Joseph, *The War Prerogative* (Oxford University Press, 2013) at p.111.
[40] *Baxter v Commissioners of Taxation (NSW)* [1907] HCA 76; (1907) 4 CLR 1087; *D'Emden v Pedder* (1904) 1 CLR 91 at p.113 (the Australian Constitution was "undistinguishable in substance" from the American one, it should receive "like interpretation", and the Court should follow American precedent if "unable otherwise (to) come to a clear conclusion"); Sir Owen Dixon observed that the Framers were not capable of escaping their "fascination" with the American model: Owen Dixon, "The law and the Constitution" in "Jesting Pilate – and other papers and addresses" (Sweet & Maxwell Ltd, London, 1965) at p.44.
[41] *Brown v Tasmania* [2017] HCA 43; (2017) 261 CLR 328 at [88] (Kiefel CJ, Bell & Keane JJ).
[42] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 at p.275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
[43] Immanuel Kant *Perpetual Peace. A Philosophical Sketch* (1795), in H. Reiss (ed.), Kant's Political Writings, (Cambridge University Press, 1970) at p.100; Wolfgang Wagner, Dirk Peters & Cosima Glahn "Parliamentary War Powers Around the World, 1989–2004" *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper* – No. 22 at p.11 (Among the 49 countries surveyed, 21 had institutionalised parliamentary *ex ante* veto rights).

Yet pragmatic concerns ranging from executive flexibility to the danger of minority party veto have seen writers such as Machiavelli, Locke, Montesquieu and de Tocqueville grapple with the notion that the executive should bear the sole responsibility for deploying armed forces.[44]

In the *Australian Communist Party v* Commonwealth, Dixon J warned that:

> "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power"[45]

Pragmatism and political expediency are also pervasive driving forces for (informal) constitutional change.[46] Justice Jackson of the U.S. Supreme Court once warned that if the Court did not temper its doctrinaire logic with a little practical wisdom, it will convert the U.S. Constitution into a "suicide pact".[47]

Those words were particularly apt in a debate about war powers where existential threats to the nation often demand that the constitutional boundaries between the branches of government be determined according to the inherent necessities of the hour.[48]

At the outbreak of the American Civil War, following the attack on Fort Sumter on 12 April 1861, President Lincoln imposed a blockade on southern ports. This was, of itself, an act of war. In his message to a special session of Congress, Lincoln defended his actions by reference to the existential threat that was presented: "it was with the deepest regret that the Executive found the duty of employing the war power, in defense of the Government, forced upon him. He could but perform this duty or surrender the existence of the Government…".[49] Congress ratified Lincoln's actions.

As is the case in both the UK and the USA, modern practice in Australia has established a working system in the area of war powers that does not require *ex ante* parliamentary approval before the Executive can initiate armed conflict. Why is this so?

To answer that question, one needs to reconcile the various modalities of constitutional interpretation that directly bear on the issue. Formalist reasoning that resorts to history, text and structure will inevitably lead to a conclusion that the Commonwealth Constitution as drafted was never intended to be a source of power to take the country to war.

Functionalist reasoning, however, suggests that the Constitution's original design is obsolete and not apt to govern modern warfare.[50] In its stead, the system of modern practice that has

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[44] John Locke "Second Treatise of Government" at s.160 ("therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe").
[45] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at p.187; see also *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at pp.122–3, [352]-[353] (Hayne & Kiefel JJ); at p.193, [552] (Heydon J); William Blackstone, *Commentaries on the laws of England* (Lawbook Exchange, 2004) Book 1, Chap. 7 at p.240 ("The enormous weight of the prerogative, if left to itself, (as in arbitrary government it is) spreads havoc and destruction among all the inferior movements").
[46] Bruce Ackerman *We The People: Transformations* (Belknap Press, 1998) at pp.28, 416.
[47] *Terminiello v. City of Chicago*, 69 S. Ct. 894, 912, 937 (1949) (Jackson, J., dissenting).
[48] *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928).
[49] Abraham Lincoln's 4th of July, 1861 Message to Congress.
[50] John C. Yoo, "The Powers of War and Peace" (University of Chicago Press, 2005) at p.10 advancing a similar argument in respect of the U.S. Constitution.

emerged bears little relation to the intent of the Framers, and leaves the Australian Defence Force without a clear constitutional source of authority under which to act.

At Federation, the Commonwealth government understood that the locus of war making powers resided with what is now considered to be a foreign power, the United Kingdom.[51] Since 1942, the legal power to declare war has been treated as forming part of the royal prerogative to be exercised solely by the Governor-General on advice from the Government's Ministers. However, that power was conveyed to the Governor-General by way of an instrument from the King because it was not considered to be a part of the executive power conferred at Federation.

By 2003, the Prime Minister committed Australian forces to the invasion of Iraq without any involvement of the Governor-General.

This is a critical failing, yet there has been a paucity of debate in this country over the legitimacy of decisions that have committed the country to conflicts ranging from world wars to armed humanitarian interventions. Legitimacy is a constitutional idea that is sensitive to strategic events.

This paper traces the strategic events that have shaped the allocation of war powers between the legislative and executive branches of government.

[51] *Sue v Hill* [1999] HCA 30; 199 CLR 462 at [99] (Gleeson CJ, Gummow & Hayne JJ).

## Part 1 – War Powers in the United Kingdom

### *Introduction*

In 1337, Edward III asserted his right to the French throne. His declaration led to the Hundred Years War. The ensuing wars proved ruinously expensive. Edward, in the course of a showdown with his administration, sacked his Chancellor and the Treasurer, and ordered tax receipts to be paid directly into an Emergency Treasury Fund. Parliament was called in March 1341 and days of debate followed. Edward eventually backed off on his tax demands.[52]

The stand-off had a lasting effect. Tax collectors were thereafter made directly accountable to Parliament. The Great Ministers of State, including the Chancellor, were henceforth to be sworn into office in Parliament. The price of Edward III's funds to support his war with France was permanent recognition of a defiant and separate body of parliamentary Commons.[53] This institution would have scrutiny of the system of tax collection and of the exercise of power by the officers of the Crown.[54]

Thus the previous *ad hoc* system of levies on commodities and forced loans was replaced with a parliamentary direct tax on wool (England's chief export at the time) which helped fund an army that won historic victories at Crécy in 1346, the capture of Calais in 1347 and the destruction of the French at Poitiers in 1356.[55]

The pendulum swung during the Tudor period. There was a considerable centralisation of power and administration.[56] Government under Elizabeth I was carried on principally under the Royal Prerogative, and Parliament operated within a severely restricted sphere of competence. The Queen, as advised by her Privy Council, could modify the law simply by proclamation. Thus, in April 1587, the Queen ordered Sir Francis Drake to take a force of ships to "impeach the purpose of the Spanish Fleet" by whatever means necessary.[57]

In the Seventeenth Century, a doctrine had emerged in the time of the Stuart Kings which denied Parliament the right to touch the royal prerogative.[58] Statesmen such as Bacon believed the "prerogative" was superior to the ordinary law of the land. It followed from this doctrine that the Crown could suspend the operation of statutes, or grant dispensation from obedience to them.[59] This was a time where divine right of kings was being actively asserted over parliament.

The Thirty Years War began on the Continent in 1618 when a German prince, Frederick V the Elector of the Palatine, was invited to take the throne of Protestant Bohemia in place of the Catholic Habsburg's choice, Archduke Ferdinand. Frederick V was a Protestant, and the son-in-law of James I of England. James advised him not to accept the throne. When the Elector ignored this advice, he was attacked and driven out of Bohemia by the Holy Roman Emperor, Ferdinand. The war escalated as the Protestants of the Dutch Republic and Scandinavia entered

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[52] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.100.
[53] Jeffrey Goldsworthy *The Sovereignty of Parliament* (Clarendon Press, 1999) at p.29.
[54] Brien Hallett "The Lost Art of Declaring War" *The University of Illinois Press*, 1998 at p.71.
[55] F.W. Maitland *The Constitutional History of England* (Cambridge University Press; 1919) at p.180.
[56] F.W. Maitland *The Constitutional History of England* (Cambridge University Press; 1919) at p.186; James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at pp.102-103.
[57] Namely, to engage the Spanish Armada: Gray & Lomas at p.105; *cf* Jeffrey Goldsworthy *The Sovereignty of Parliament* (Clarendon Press, 1999) at p.57.
[58] J.P. Kenyon *The Stuart Constitution 1603-1688* (Cambridge UP, Second Ed.) at pp.48, 52.
[59] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) at p.20.

in support of the German Princes, while the Spanish Habsburgs supported their Austrian allies. Although nominally Catholic, France took the opportunity to challenge Habsburg power by helping the Protestants.

As the largest Protestant power in Europe, England could not stand by in the face of Catholic aggression. James I summoned Parliament to vote for the supply necessary to deploy forces to the German Palatinate. The Commons asked certain questions of the King, including the identification of the enemy and questions about the direction of foreign policy. James' reply was to rebuke the Speaker for allowing debate on a matter within the royal prerogative.[60]

In response to James I's rebuke of the Speaker, the Commons produced a "Protestation" on 18 December 1621 in which they asserted "The ancient and undoubted birth right and inheritance of the subjects of England" as including the right to debate in parliament affairs "concerning the King, State, and the Defence of the Realm".[61]

James I's reaction was to prorogue and then dissolve Parliament. However, after three years he summoned a new Parliament in February 1624. In his speech from the throne at Parliament's opening, he undertook to give Parliament full details of his negotiations and to listen to Parliament's advice.[62]

When James I died, his son, his son, Charles I, ascended the throne. He fervently believed in the divine right of Kings. Charles I's solution to Parliament's encroachment into his Royal Prerogative was to rule as far as he was able to without reliance on parliamentary revenues. Thus, no Parliament sat between 1629 to 1640.

The cost of this was to avoid any significant military commitments during this period. England was, as a result, at peace with both Spain and France and resisted all pressure from England's Protestant majority to become involved in the 30 Years' War that was raging on the Continent.[63]

Charles I's fatal error was, however, to declare war against the country of his birth, Scotland, in 1639 over the imposition of the Anglican Prayer Book (The Bishops' War).[64]

After the Presbyterian Scots refused to adopt the Church of England's hierarchy and the Book of Common Prayer, Charles I summoned Parliament in order to obtain revenues to finance a second invasion. However, Parliament presented a long list of grievances and so Charles I, shortly thereafter, dismissed it.[65] Following an unsuccessful second campaign, Charles I was forced to summon Parliament again to raise additional taxes.[66]

The "Long Parliament" was elected and sat for the first time on 3 November 1640. It once again delivered a list of grievances as a condition for voting for any additional taxes. It was opposed to the King's actions and passed the *Triennial Act* requiring Parliament to be recalled

[60] J.P. Kenyon *The Stuart Constitution 1603-1688* (Cambridge UP, Second Ed.) at pp.39-45; Robert Zaller "Interest of State: James I and the Palatinate" *Albion: A Quarterly Journal Concerned with British Studies* Vol. 6, No. 2 (Summer, 1974), pp.144-175.
[61] J.P. Kenyon *The Stuart Constitution 1603-1688* (Cambridge UP, Second Ed.) at pp.42-43.
[62] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at pp.54-55.
[63] At p.108.
[64] The initial campaign ended with the "Pacification of Berwick".
[65] Hence its name, the "Short Parliament".
[66] To pay for an indemnity in accordance with the Treaty of Ripon.

at least once every three years. This led to the commencement of the English Civil Wars. Parliament declared war against the King in 1660.

The advent of the Commonwealth was final proof of the power of Parliament to exert control over the war-making powers of a monarch. Parliament was restored (after the Rump Parliament was dissolved by Oliver Cromwell in 1653); however, the power to declare war remained a royal prerogative.[67]

The Glorious Revolution in 1688 saw the abdication of James II and the accession of William III jointly with his Wife, Mary II. The Crown was offered both Houses of Parliament to William and Mary on the basis that they accept a "Declaration of Rights" which identified various restrictions on the Royal Prerogative. This was accepted and signed into law in 1689 as the *Bill of Rights*.[68] The *Bill of Rights* represented a major and irrevocable step in the balancing of powers between the Crown and Parliament.

The cornerstone of parliamentary democracy is the inability of the executive government to dispense its servants from obedience to the laws made by parliament.[69] James II was the last king to exercise the prerogative dispensing power. The *Bill of Rights of 1688* then provided that: "The pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parliamente is illegall".[70] Thus the notion of parliamentary supremacy was born.

The nadir of the absolute power of the Crown was finally fixed under the *Act of Settlement* of 1701.[71] As Mary II died childless and William III did not remarry, and Mary II's younger sister, Queen Anne, had no surviving heirs, urgent measures were required to safeguard the Protestant succession. The *Act of Settlement* of 1701 provided that the Crown of England pass to the Electress of Hanover and her Protestant Successors; that is, the former dependents of the realm on dynastic legitimacy based on the will of a single person now lay in the hands of Parliament. Thus the King occupies the throne under a Parliamentary title; his claim to reign depends upon and is the result of a statute.

The long title of the *Act of Settlement* was "An Act for the further Limitation of the Crown". The *Act of Settlement* relevantly provided that: "in the case of the Crown an imperial dignity of this Realm shall hereafter come to any person, not being a native of this Kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of Parliament."[72]

The intent of this provision was to prevent the Electors of Hanover using British soldiers to fight their private dynastic wars on the Continent. But, according to its terms, it represented potentially significant inroads into the extent of the Royal Prerogative for making war. However, ever since George II, no English Monarchs have been foreign born.

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[67] J.P. Kenyon *The Stuart Constitution 1603-1688* (Cambridge UP, Second Ed.) at p.340, 349.
[68] *Bill of Rights 1688* 1 Will and Mar Sess 2, c 2.
[69] *A v Hayden* (1984) 156 CLR 532 at p.580 (Brennan J).
[70] Section XII.
[71] 12 & 13 William III, c. 2.
[72] Justin Gleeson & Celia Winnett, "The Rule of Law and the Crown" in Martin Hinton & John M. Williams (eds), *The Crown* (University of Adelaide Press, 2018), at p.132.

The *Acts of Union* of 1707 also affords a remarkable example of the exertion of parliamentary authority. But there is no single statute which is more significant, either as to the theory or as to the practical working of the *Constitution* than the *Septennial Act.*[73] In 1716, the duration of Parliament was, under an Act of 1694, limited to 3 years. However, the King and Ministry were convinced that an election would be either controlled or disrupted by the Jacobites. Parliament was then convinced by the Ministry to pass the *Septennial Act* by which the legal duration of Parliament was extended form 3-7 years.[74] Such an Act, in countries with written Constitutions and strong judicial review, would likely be held invalid.

The Bill of Rights also provided that "the raising or keeping of a standing Army within the kingdom in time of Peace unless it be with consent of parliament is against the law".[75] There was at one time a belief that a standing army would be fatal to English freedom. However, shortly after the Glorious Revolution in 1689, it became apparent that the existence of a body of paid soldiers was necessary to defend the nation.[76]

***England's Involvement in Wars***

The locus of sovereign authority was not settled in favour of the Parliament until the constitutional struggles of the 17th Century, culminating in the *Bill of Rights* and the *Act of Settlement.*[77] The statutes bolstered the primacy of Parliament by removing the Crown's unilateral capacity to levy money or to raise a standing army in peacetime, and required parliament to sit frequently. However, once again, the Royal Prerogative to declare war survived this constitutional upheaval.[78]

English law does not recognise the concept of the State. The Crown acts as a proxy for it. The concept of the Crown as the State, however, does not reflect reality. The Queen does not command or direct the Ministers. Rather, under the theory of a constitutional Monarchy, it is the advice of Ministers that dictates how the Monarch will act in her or his public capacity.[79]

It is from this point in time, post the Glorious Revolution, that the emergence of the concept of Cabinet occurs in British history. As will be seen, the Cabinet has had varying levels of involvement in decisions to commit the country to war.

***The American Revolutionary War***

In November 1781, when the Prime Minister, Lord North, was informed of General Cornwallis' surrender at Yorktown in October 1871, he was reported to have exclaimed: "Oh God, it's all over" and thereafter sought to resign.

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[73] 1 George I st. 2 c. 38.
[74] The Albert Venn Dicey, "Introduction to the Study of the Law of the *Constitution*" (Liberty Fund, Indianapolis, 1982) at pp.6-7.
[75] This ideal found expression in Article 1 of the US Constitution which provides that the power of U.S. Congress "to raise and support Armies" is conditioned by a provision that no appropriation of money for that use shall be for a period longer than two years: Article I, Sec. 8, ss.12 of the U.S. Constitution.
[76] Albert Venn Dicey, "Introduction to the Study of the Law of the *Constitution*" (Liberty Fund, Indianapolis, 1982) at p.190.
[77] Justin Gleeson & Celia Winnett, "The Rule of Law and the Crown" in Martin Hinton and John M. Williams (eds), *The Crown* (University of Adelaide Press, 2018), at p.131.
[78] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at pp.112-113.
[79] John M. Williams, "The Crown, its Nature and Role" in Martin Hinton and John M. Williams (eds), *The Crown* (University of Adelaide Press, 2018), at p.4.

King George III would not, however, accept his resignation or the notion of any peace with the American Colonies. Thus, the war continued for a time in the face of parliamentary opposition.

In January 1782, a motion to effectively cease the war on the American Continent was defeated in the House of Commons (220:178).[80] In February 1782, despite a British Naval victory over the French in the West Indies, a motion for immediate surrender was defeated by a single vote, but was then passed a week later.

North again tendered his resignation but the King once again did not accept it. Following a motion of censure against him on 15 March 1782, North finally managed to have the King accept his resignation. In his resignation letter to the King, North said "Your Majesty is well apprised that in this country a Prince on the throne cannot with prudence oppose the deliberate resolution of the House of Commons".[81]

This experience represented another step in the development of parliamentary oversight of the war-making process. However, the experience of 1782 is not a precedent for parliamentary control of the royal prerogative to go to war by way of veto powers. Rather, the balance is struck between the ability of the Executive to commit the country to war, and parliament's ability to approve or disapprove the government's action by subsequent debates and votes.

***The Crimea***

In 1853, when Russia went to war with the Ottoman Empire, France and then Britain declared war on Russia on 27 and 28 March 1854, respectively. The Prime Minister, Lord Aberdeen, made the formal declaration of war by means of the Royal Prerogative in the traditional way. A formal ultimatum was delivered to the Czar, who declined to answer it. These events were reported to Parliament by means of a Royal Message from Queen Victoria, read to the Parliament.

After reports of mismanagement in the Crimea, John Arthur Roebuck introduced a Motion for the appointment of a Select Committee to enquire into the conduct of the war on 28 January 1855. The Motion was carried by a large majority (305:148). Lord Aberdeen treated this as a vote of no confidence in his government and resigned. Lord Palmerston became Prime Minister at aged 71.

This was said to be a text-book example of the balance between the Royal Prerogative to take the country to war, and Parliament's control over its continuation and conduct.[82]

***World War I***

Archduke Franz Ferdinand of Austria-Hungary had been assassinated at Sarajevo on 28 June 1914. The Treaty of London of 1839 between the European Powers contained a Guarantee of Neutrality in respect of the Kingdom of Belgium. After the Germans became involved on Austria's side, and the French on Russia's side, Germany declared war on France on 3 August

[80]James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.119.
[81] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.119.
[82] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at pp.128-129.

1914. Germany then initiated the Schlieffen Plan, which involved its Northern Army Corps marching into Belgium; and thereby violating its neutrality.[83]

On 3 August 1914, the Foreign Secretary, Edward Grey, told the House of Commons that the Government had decided to support France. He stated that the House was free to support or reject this position. By that stage, however, the Royal Navy and Army had been mobilised to protect the French Coast and shipping. The fact that the information was placed before the House of Commons was to ensure that the Government had sufficient support. It was not understood as giving Parliament an *ex ante* right of veto over any subsequent declaration of war.[84]

The British Cabinet resolved to honour its treaty obligations to Belgium, and made promises of support to the French; however, that was the extent of Cabinet's direct involvement in the decision.

The House of Commons was recalled on the afternoon of Monday, 3 August, to hear the Foreign Secretary make a detailed statement. There was then a debate, which was notable for the absence of the Prime Minister and his Cabinet (after the Foreign Secretary's short statement). The Foreign Secretary (Grey) in consultation with the Prime Minister (Asquith) (but nobody else) sent an ultimatum to Germany to halt its invasion of Belgium by 11:00 pm on 4 August 1914.

King George V convened a meeting of some members of the Privy Council at Buckingham Palace. No member of the Cabinet was present. The King signed the Proclamation of War, effective from 11:00 pm on 4 August 1914.

It is clear that the Parliament had no say in the declaration. Two days later, on 6 August 1914, the House of Commons had the opportunity to debate and approve a vote on supply. It voted an immediate credit of £100 million to finance the prosecution of the war. The Governments of the Dominions were not consulted or informed in advance.

Thus, by conventions developed by medieval monarchs, upwards of 400 million people were summarily committed to a cataclysmic war.[85]

***World War II***

Essentially the same powers were invoked when the United Kingdom declared war on Germany on 3 September 1939. The Germans crossed the Polish border on 1 September 1939. The Prime Minister, Neville Chamberlain, went before the House of Commons and spoke of demanding that Hitler "agree" to withdraw his troops (as opposed to actually doing so). The Acting Labour leader, Arthur Greenwood, told Chamberlain that, without a declaration of war, it would be "impossible to hold the House".[86]

The ultimatum was delivered at 9:00 am on 3 September 1939 and expired at 11:00 am. The Prime Minister thereafter formally announced the declaration of war on the radio at 11:15 am

[83] Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.123.
[84] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.129.
[85] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.135.
[86] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.136.

from 10 Downing Street. He referred to Germany's failure to respond to the ultimatum by 11:00 am and said that "Consequently, this country is at war with Germany".

That afternoon, the Prime Minister made an announcement to Parliament. He told the House that its members were "not in possession of all the information which we have" and advised that a state of war with Germany was in existence. The opposition voiced its support; however, said that they would be scrutinising the Government's action with care. No vote on the "announcement" occurred.

Thus, the declaration of war which resulted in the loss of some 80 million lives over the next six years was made as a purely executive act by means of the Royal Prerogative.[87]

On Monday, 8 December 1941, whilst President Roosevelt was delivering his "A Date Which Will Live in Infamy" speech requesting a congressional declaration of War against Japan for its invasion of Pearl Harbour, Prime Minister Winston Churchill addressed Parliament. Churchill stated:

> "As soon as I heard last night that Japan had attacked the United States, I felt it necessary that Parliament should be immediately summoned. It is indispensable to our system of government that Parliament should play a full part in all the important acts of State, and at all crucial moments in the conduct of war."[88]

However, Churchill did not call upon Parliament to make a declaration of war as that had already been done. The Prime Minister reported to the Floor of Parliament that "The Cabinet, which met at 12:30 today, therefore authorised an immediate declaration of war upon Japan".[89]

***Korean War 1950***

On 28 June 1950, Prime Minister Clement Attlee informed the House of Commons that the Government had "decided to support the United States action in Korea". No debate occurred until 5 July 1950, when the Prime Minister moved a resolution in support of the Government's action. The Motion was eventually passed.[90]

***Falklands War 1982***

On 2 April 1982, Margaret Thatcher informed the House of Commons that the Falklands Islands had been invaded by Argentine Forces on the previous day and that the Government was taking action in response. The Prime Minister made reference to the Government's "inherent jurisdiction" to make such decisions.[91]

***Gulf War 1991***

On 2 August 1990, Iraq invaded Kuwait. A series of United Nations Resolutions followed, demanding the immediate withdrawal of all Iraqi troops and imposing sanctions on Iraq. UN Resolution 678 gave Iraq an ultimatum to withdraw from Kuwait by 15 January 1991. It

[87] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at p.102.
[88] Brien Hallett *The Lost Art of Declaring War* (The University of Illinois Press, 1998) at p.28.
[89] Brien Hallett *The Lost Art of Declaring War* (The University of Illinois Press, 1998) at p.28.
[90] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at p.103.
[91] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at p.104.

authorised Member States to use "all necessary means to uphold and implement "the earlier resolution demanding the withdrawal"[92]. This was a clear authorisation to use military force.

Prime Minister John Major announced the military intervention on 17 January 1991.

The bombing campaign commenced on 17 January 1991 and Allied Forces crossed the Kuwaiti border on 24 February 1991.

No parliamentary debate was held until 21 January when a Motion was passed to express the full support for the British Forces in the Gulf, on the basis that they were enforcing United Nations resolutions.

As was the case in Korea, the authority to go to war was founded on the UN Resolution. There was no formal declaration of war by the UK Government. However, as was the case in WWI, the Prime Minister made a detailed statement prior to the expiry of the UN deadline and there was a subsequent adjournment debate by the House. Four days after the commencement of the bombing campaign, the House moved the motion expressing its full support for the British Forces in the Gulf.[93]

The Opposition tabled an amendment to "minimise civilian casualties wherever possible". The Government accepted the Opposition amendment and the resolution was carried with near unanimity (563:34).

***Gulf War 2***

On 25 November 2002, the UK Government entered into unchartered constitutional territory when it conceded the first of three full-scale parliamentary debates on the issue of the Second Gulf War – before the start of combat operations.[94]

A vote took place on a motion of support for United Nations Security Council Resolution 1441 and referred to giving Iraq its "final opportunity to comply with its disarmament obligations".

An amendment was then sought to remove the wording which constituted a threat and instead insert the words that the House "finds the case for military action against Iraq as yet unproven". This amendment was approved by a total of 199 Members of the House but was nonetheless defeated by a combined Labour and Conservative majority of 184. This was as close as the UK has ever come to allowing Parliament *ex ante* authority to veto the Royal Prerogative to commence a war.

A subsequent motion saw some 217 Members effectively vote against war. Thus, there was a significant consensus against what the Prime Minister was seeking to do. Polls at the time suggested that 75% of the people were opposed to a war in Iraq[95]. These debates and votes were substantially at odds with the constitutional practice up until that point in time.

The interplay between the Executive and Parliament up until that point in time had involved recognition of the existence of a Royal Prerogative to go to war, and that Parliament at least

[92] Resolution 660.
[93] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at pp.151-152.
[94] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.38.
[95] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.41.

had a right to be informed; and possibly consulted in respect of these matters. The reality is that a Prime Minister could not commit the nation to war without at least some involvement of Parliament in this way, either immediately before or immediately after the commencement of hostility.

***The Chilcot Report***

The Inquiry into the role of the British Government in the 2003 invasion of Iraq was released in July 2016.[96] The Chilcot Inquiry had then established under the Labour Government of Prime Minister Gordon Brown, which ruled out any finding on the legality of the invasion. Chilcot summarised the central finding of the Report as:

> "We have concluded that the UK chose to join the invasion of Iraq before the peaceful options for disarmament had been exhausted. Military action at that time was not a last resort."

The Report found that Prime Minister Tony Blair decided to commit to war, knowing that President Bush "decided at the end of 2001 to pursue a policy of regime change in Iraq"[97]; that is, there was a false pretext involved and the British Government was aware of this. Parliament, however, was permitted to vote on the invasion and it overwhelmingly did so on 18 March 2003.

On 24 September 2002, Prime Minister Blair delivered a statement to the House of Commons in which he stated that Saddam Hussein's "WMD Programme is active, detailed and growing". The statement referred to chemical and biological weapons and Iraq's capability of deploying WMD within 45 minutes of an order being given. Chilcot found that none of these claims accurately reflected the available intelligence.

In a phone conversation between Prime Minister Blair and President Bush on 3 December 2001, Blair said to Bush that "It would be excellent to get rid of Saddam. But there needed to be a clever strategy for doing this".[98]

On 28 July 2002, Prime Minister Blair sent a note to President Bush that started "I will be with you, whatever".[99]

Blair's "clever strategy" was detailed in a memo to President Bush dated 4 December 2001 in which Blair wrote of a "strategy for regime change that builds over time", involving "softening up first" via demanding the return of weapons inspectors, implying that military action would follow if Saddam were to fail to comply. Blair emphasised the need to "bring people towards us, undermine Saddam, without so alarming people about the immediacy of action that we frighten the horses".[100]

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[96] "The Chilcot Report".
[97] Chilcot Report (2016) at p.6 (Executive Summary); and Vol 4 at p.118.
[98] Chilcot Report (2016) Vol 1 at pp.367-368.
[99] Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.58.
[100] Chilcot Report (2016) at section 3.1; Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at pp.60-61.

The Chilcot Report is replete with analyses that point towards the underlying Geo-strategic factors that drove the decision to invade Iraq, including regime change and access to the country's oilfields.[101]

***Libya***

During the course of the Arab Spring when the Gaddafi regime was being ousted in Libya, the UK Government did not debate the issue until three days after the deployment began. Prime Minister David Cameron claimed at the time that there was no opportunity for consultation with the Commons before military action because of the urgency of avoiding the slaughter of civilians.[102]

***Syria***

The relationship between Parliament and the Executive in respect of the Royal War Prerogative was fundamentally altered in 2013 with respect to Syria.

Prime Minister David Cameron recalled Parliament from its Summer Recess for the specific purpose of agreeing to a limited American-led military strike against President Assad's Regime. President Obama had concluded that Assad had crossed a "red line" by using chemical weapons against his own people. Obama sought the support of Britain and France.

Cameron agreed in principle. However, he had previously made a commitment that he would never take the country to war without the explicit approval of the House of Commons. As the leader of the Opposition, he made a speech in 2006 in which he said: "I believe the time has come to take a look at those powers exercised by Ministers under the Royal Prerogative".

He had established a "Democracy Task Force" to look into the matter. It reported, on 6 June 2007, that:

> "We believe that it is no longer acceptable for decisions of war and peace to be a matter solely for the Royal Prerogative. The Democracy Task Force, therefore, recommends that a Parliamentary Convention should be established that Parliamentary Assent – for example, the laying of a resolution of the House of Commons – should be required in a timely fashion before the commitment of any troops …"[103]

Until the evening of 29 August 2013, the question of war had never before been the subject of a formal parliamentary vote of approval. But by that stage, military assets had already been deployed to Cyprus, with the presumption that military action was imminent.

Labour had indicated that it would support Government action. Accordingly, things seemed fairly straightforward in approaching the vote. But Labour later indicated it would not support military action against Syria. At that stage it must have been apparent that the Government was in serious danger of losing any vote; and thereby creating a new precedent, allowing Parliament a veto on the Government's decision to go to war.

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[101] Chilcot Report (2016) section 3.1.
[102] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at p.106; Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019).
[103] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.18.

The Government then introduced a watered-down motion, which formally stated that the House deplores the use of chemical weapons in Syria on 21 August 2013, by the Assad Regime, which records hundreds of deaths and thousands of injuries of Syrian civilians.

The Motion appeared fairly non-controversial, as it merely stated the objection to the use of chemical weapons and did not commit the Government to any course of action at all. Despite this, the Opposition introduced its own counter-motion which appeared to water down the Government's motion even further but, essentially, achieved the same things.

When it came to a vote, the Conservatives voted against the Labour counter-motion, and then Labour and certain Conservative rebels voted down the Government motion.

It followed that no motion at all was accepted in respect of the Syrian question. Mr Ed Miliband, Leader of the Opposition, rose in the Parliament at 10:31 pm and asked:

> "Will the Prime Minister confirm to the House that, given the will of the House that has been expressed tonight, he will not use the Royal Prerogative to order the UK to be part of military action before there has been another vote in the House of Commons?"

The Prime Minister gave that assurance.[104]

Prior to this vote, since the time Prime Minister, Lord North, resigned in 1782, following the American Revolutionary War, Prime Ministers have taken the country to war more or less unilaterally, using the Royal Prerogative and without seeking a substantive vote from the Commons on the matter.[105] It was not until Iraq in 2003 that Ministers first allowed a substantive vote on going to war; and even then it was a vote, the outcome of which was essentially predetermined because it was permitted only a matter of days before the actual outbreak of hostilities.

***Subsequent Deployments in Syria***

Following the debacle of the Cameron government's back down on Syria, no vote was permitted in 2018 when Prime Minister Theresa May ordered British Forces to join in an attack on Syria involving the deployment of Cruise Missiles into Syrian military bases.

Prime Minister May claimed that the decision was legal, following reports that the Syrian Government had used chemical weapons against its civilians. However, Article 51 of the United Nations Charter provides that self-defence is the only justification for military aggression; and Article 2(4) outlaws armed conflict except in the case of United Nations authorisation.[106]

Following the missile strikes, the Prime Minister's office released a "Policy Paper" in which it was asserted that the Syrian regime had been killing its own people for 7 years, including

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[104] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at p.23.
[105] The Boer War; the First and Second World Wars; Korea; Suez; The Falklands; the Balkans; the Gulf War; and even Afghanistan all took place without any formal approval by Parliament.
[106] Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.109.

through the use of chemical weapons and that the "UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering".[107]

***Parliament's ability to condition the War Prerogative***

***De Keyser***

In *Attorney-General v De Keyser's Royal Hotel Ltd*[108], the House of Lords approved an expansive view of the prerogative; however, it was one fettered by the will of Parliament.

The case concerned the requisitioning of a hotel during the WWI for use as the headquarters of the Royal Flying Corps. After the war, a dispute arose over the compensation to be paid to the Hotel owners. There was a statutory scheme for requisitioning, which included a right to compensation, but the Attorney-General argued that the Crown was in any event entitled to requisition the hotel under prerogative powers, in which case compensation was discretionary and payable *ex gratia*.

That argument was rejected by the House of Lords. Lord Dunedin stated that "if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules".[109] The logic was that the Crown is a party to every Act of Parliament, and so when the Act deals with something which could be effected by the prerogative, the Crown assents to the prerogative being curtailed.

The case thus established that, to the extent that a matter has been regulated by Parliament, the Crown cannot regulate it differently under the prerogative.[110]

***Miller***

In *Miller*, a majority of the Supreme Court (8:3) held that the British Government could not unilaterally withdraw from the treaty regime underpinning the UK's membership of the European Union without the approval of Parliament.[111]

In circumstances where an Act of Parliament rendered European law a direct source of domestic legal rights, the Executive's prerogative power to make and unmake treaties did not extend to that treaty regime "in the absence of domestic sanction in appropriate statutory form".[112]

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[107] Michael Head & Kristian Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.110-111.
[108] [1920] AC 508.
[109] at p.526.
[110] See also [1920] AC 508 at p.539 (Atkinson LJ; when a statute "expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent, that the Crown can only do the particular thing under and in accordance with the statutory provision, and that its prerogative power to do that thing is in abeyance").
[111] *(On the Application of Miller and Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583 ("*Miller*").
[112] *Miller* [2017] UKSC 5 at [86] ((Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption & Lord Hodge JJSC).

The majority noted that "It is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable Ministers to change statute law or common law".[113]

***Attempts at ousting the War Prerogative***

In 1999, an attempt was made via a Private Member's Bill to require prior parliamentary approval before air strikes could be conducted in Iraq. However, the Queen, acting on advice from the Blair Government, refused to grant consent to allow the Private Member's Bill to be debated in Parliament. As a result, it was dropped.[114]

It was the Government's position that the Queen's consent was required before any debate could take place because the Bill had the potential to affect the Royal prerogative.[115]

The *Civil Contingencies Act 2004* (UK) empowers "her Majesty" via an Order in Council to issue Emergency Regulations in any event that "threatens serious damage to human welfare" including war or terrorism. The Regulations enable the Defence Council "to authorise the deployment of her Majesty's Armed Forces". The powers can be engaged whenever her Majesty in Council is "satisfied" that an emergency has occurred, or is about to occur. The Emergency Regulations can suspend, modify or override any other Act of Parliament with the sole exception being the *Human Rights Act 1998.*[116]

During debate in the House of Commons concerning the *Civil Contingencies Act 2004*, the Government rejected proposals to clarify the Military's role by means of legislation.

A House of Lords Report in 2013 into the constitutional arrangements for the use of Armed Force regarded Parliament's function as being to confer legitimacy on any decision to go to war.[117] However, having heard evidence from ex-Military Chiefs, the Report concluded that there were too many risks associated with formalising Parliament's role in the decision-making process. Instead, it referred to an "existing convention" that, save in exceptional circumstances, the House of Commons is given the opportunity to debate and vote on the deployment of Forces overseas.[118]

***Proposed War Powers Act***

The UK Government abandoned plans to introduce a *War Powers Act* in 2016 that would have required the Government to seek parliamentary approval *before* deploying troops into combat.[119]

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[113] *Miller* [2017] UKSC 5 at [50]-[51] (Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption & Lord Hodge JJSC).
[114] *Military Action Against Iraq (Parliamentary Approval) Bill 1999*.
[115] *House of Commons Debates*, 23 July 1999, Vol 335, Col 1546; Another Private Member's Bill was proposed to require an *ex ante* parliamentary approval for deployments: *Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill 2005-2006*.
[116] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.240.
[117] House of Lords Constitution Committee "Second Report of Session 2013-14: Constitutional Arrangements for the Use of Armed Force – Report" (HL Paper 46, July 2013, London: HMSO) at [14]-[15].
[118] House of Lords Constitution Committee "Second Report of Session 2013-14: Constitutional Arrangements for the Use of Armed Force – Report" (HL Paper 46, July 2013, London: HMSO) at [14].
[119] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.132.

The problems identified with giving Parliament a greater role in the decision-making process were principally that:

(i) the Prime Minister was able to determine the nature of any information provided to the Parliament;
(ii) there was no mechanism for the recall of Parliament if deployment was deemed necessary whilst Parliament was adjourned or dissolved; and
(iii) it was generally accepted that the Executive Government should have total discretion as to the timing of when the Government would seek parliamentary approval.

It remains the case that the power to deploy British military forces is determined by the Royal prerogative which, as history demonstrates, is often exercised by the Prime Minister - acting alone.[120]

***The Concept of Non-Justiciability***

Until *Council of Civil Service Unions v Minister for the Civil Service*[121] the Courts disclaimed jurisdiction to examine the manner of exercise of prerogative power. Now, Courts claim such jurisdiction but continue to treat the exercise of the war prerogative as beyond their purview.

In *China Navigation v Attorney-General* [1932] 2 KB 197, the Court of Appeal confirmed that the prerogative was the source of the Government's power over the government, command and deployment of the armed forces. It had been argued that the Army had become a purely statutory body after 1689 and that the Crown's prerogative to raise and deploy an Army no longer existed. The Court rejected the argument.

*GCHQ*, however, open the prerogative powers to judicial review on the same basis as the Court reviews statutory powers.[122] Lord Scarman stated that: "The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter".[123] Thus, the Courts possess jurisdiction to review all exercises of Government power; however, the subject matter may make the issue non-justiciable. Certain executive functions were classified as matters of "high policy", including the power of making war and deploying armed forces.[124] Lord Diplock stated that the defence of the realm was the responsibility of the Executive and not the Courts of Justice.[125]

Thus, the Courts have identified the exercise of the war prerogative as unsuitable for judicial consideration, for reasons of institutional competence and legitimacy.[126]

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[120] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at pp.240-241.
[121] [1985] AC 374 ("*GCHQ*").
[122] eg, illegality, irrationality and procedural impropriety: Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at pp.124-143.
[123] At p.407; *Director of Public Prosecutions (SA) v B* [1998] HCA 45; 194 CLR 566 at [62] (Kirby J).
[124] *GCHQ* at p.398 (Fraser LJ); p.418 (Roskill LJ).
[125] At p.412.
[126] In the *Case of the King's prerogative in Saltpetre* (1606) 12 Co Rep 12, the court noted that there was a power to enter private property for the purposes of making defences in time of peril; In the case of *Burmah Oil Company (Burma Trading) Ltd v The Lord Advocate* [1965] AC 75, the House of Lords held that the prerogative permitted the Army to destroy private property to prevent it from falling into the hands of an advancing enemy.

In *Gentle, Regina v The Prime Minister*[127], the mothers of two servicemen who had died in Iraq sought judicial review of the Prime Minister's decision to enter the war. Lord Hope stated that the issue of legality was a matter of political judgment.[128]

In *Abbasi*, the Court of Appeal considered whether there was scope for judicial review of a refusal to render diplomatic assistance to a British National imprisoned in Guantanamo Bay.[129] The Court held that the decision of whether or not to make diplomatic representations was at the discretion of the Secretary of State, who must be free to give full weight to foreign policy considerations (which were non-justiciable).

In *Rahmatullah*[130], a Pakistani National who had been taken into custody by British Forces before being transferred to US Forces in accordance with a Memorandum of Understanding between the two countries sought to secure his release by way of a writ of *habeas corpus*. The Government argued that the requirement that it seek Rhamatullah's return was an inappropriate intrusion into the affairs of State. The majority rejected this submission. They held that the Government was required to test whether it had the control over Rhamatullah's custody to exercise that control over it, or else to explain why it was not possible to do so.[131]

***Conclusion to Part 1***

Some writers have argued that English constitutional arrangements and practices have been shaped by purely pragmatic political concerns, governed by a reliance on hard-headed empiricism, which means one need only pay attention to what is required in the necessities of the situation. Sir Stephen Sedley has asserted that the English constitution is empty of normative content:

> "our constitutional law, historically at least, is merely descriptive: it offers an account of how the country has come to be governed; and, importantly, in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence".[132]

This thesis that political theories and normative values have played little or no role in the English constitution is confirmed by the seminal events in English history.

The execution of Charles I coincided with the apogee of absolute monarchy and kingly powers. Similarly, the *realpolitik* underpinning the "Glorious Revolution" of 1688 drove the restructure of the relationship between the Monarchy and the Parliament. Coeval with the Glorious Revolution, a new convention arose wherein a Cabinet of select members of Parliament began to administer the monarch's powers, including in respect of major decisions on war and foreign

[127] [2008] 1 AC 1356.
[128] At [24].
[129] *R* (On the application of *Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.
[130] *Secretary of State for Foreign and Commonwealth Affairs v Rhamatullah* [2012] UKSC 48.
[131] *Secretary of State for Foreign and Commonwealth Affairs v Rhamatullah* [2012] UKSC 48 at 60.
[132] Sir Stephen Sedley *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) at p.64. Cambridge University Press 'The Sound of Silence: constitutional law without a constitution' (1994) 110 *Law Quarterly Review* 270 at 270.

policy. Thus, despite the increasing democratisation of the Commons, the frequency of parliamentary debates in respect of foreign policy declined significantly.[133]

In 2007, after replacing Tony Blair, Prime Minister Gordon Brown promised to limit the Royal prerogative under which the Prime Minister could unilaterally declare war. This was based on the establishment of a convention under Tony Blair in which he secured parliamentary approval of the invasion of Iraq.

However, since 2011, British Military Forces have conducted operations in Libya, Syria, Mali and Yemen without any parliamentary vote.[134] In 2013, Prime Minister David Cameron moved for a resolution to authorise and legitimise his government's military operations in Syria. The Motion was defeated. Following those events, the then Foreign Office Minister With Responsibility for the Middle East, Alistair Burt, described the consequences of the backdown as "a constitutional mess". He stated:

> "I think the Government needs to take executive action in foreign affairs. It informs Parliament. If Parliament does not ultimately go for it, then the issue becomes a vote of confidence issue. I don't think you can handle foreign affairs by having to try to convince 326 people [a majority of MPs] each time you need to take a difficult decision. You do it and if they don't like it, they can vote you out and they can have a General Election."[135]

It followed that no vote was permitted in 2018 when Prime Minister Theresa May ordered British Forces to join in an attack on Syria, involving the deployment of Cruise Missiles into Syrian military bases.[136]

Thus, it remains the case that in the United Kingdom, notwithstanding the notion of parliamentary democracy, governments of the day formally exercise war powers via the anachronistic but sweeping prerogatives of the Crown.[137] The question remains, who exercises that power?

A 2009 Report by the Ministry of Justice into a review of the Crown's prerogative powers concluded that: "Her Majesty's Armed Forces are deployed under the Royal Prerogative, exercising practice by the Prime Minister and the Cabinet"[138]. This was recognised by the House of Lords in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 wherein Lord Reid said: "There is no doubt that control of the Armed Forces has been left to the prerogative ... subject to the power of parliament to withhold supply and refuse to continue legislation essential for the maintenance of a standing army".[139]

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[133] Rosara Joseph *The War Prerogative* (Oxford University Press 2013) at p.78; Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.43.
[134] The Libyan intervention in 2011 was approved by Parliament retrospectively; the 2013 intervention in Mali involving some 400 military personnel to support French Forces was said to be in response to an emergency and thus no debate or vote was held.
[135] James Gray & Mark Lomas *Who Takes Britain to War?* (The History Press, 2014) at pp.25-26.
[136] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.109.
[137] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.115.
[138] Ministry of Justice, "*The Governance of Britain: Review of the Executive Royal Prerogative Powers – Final Report*", October 2009 (London: HMSO).
[139] At p.100.

In the Chilcot Report, however, it is clear that there is no defined procedure as to how these powers are exercised in practise. Chilcot stated that:

> "Most decisions on Iraq pre-conflict were taken either bilaterally between Mr Blair and the relevant Secretary of State or in meetings between Mr Blair, Mr Straw [Foreign Secretary] and Mr Hoon [US Defence Secretary] ... Some of those meetings were minuted; some were not."[140]

In the face of criticism, Prime Minister David Cameron established the National Security Council in 2010. Its permanent members were the Prime Minister, Deputy Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Foreign and Commonwealth Affairs, the Home Secretary, the Secretary of State for Defence, the Secretary of State for International Deployment and the Security Minister. No legislation authorises this institution.[141]

The power remains as a matter of law in the hands of the Prime Minister. This was recognised in the 2005 House of Lords Select Committee Report on the issue of Parliament's role in waging war. The Report observed that:

> "It is commonly accepted that the prerogative's deployment power is actually vested in the Prime Minister, who has personal discretion in its exercise and is not statutorily bound to consult others, although it is inconceivable that he would not do so in practice".[142]

The House of Lords did not identify who the Prime Minister would consult.

[140] Chilcot Report (2016) Executive Summary at [399].
[141] Head & Boehringer *The Legal Power to Launch War – Who Decides?* (Routledge, Oxford 2019) at p.116.
[142] House of Lords Select Committee on the Constitution "Waging War: Parliament's Role and Responsibility, Vol 1", July 2006 (London: HMSO).

## Part 2 – War Powers in the United States of America

### *Introduction*

Unlike the situation in Australia, the issue of the distribution of war-making powers under the U.S. Constitution has been has the subject of much scholarly debate.[143]

The U.S. Constitution has a strict separation of powers, with a textually demonstrable commitment of the issue of war powers to a single co-ordinate political department – the Congress. However, despite the clarity of the constitutional text, scholarly debates and political struggles continue to be waged over where the locus of war-making powers is properly located.

The "pro-Executive" model argues that the Constitution must be read against the backdrop of Europeans theorists who heavily influenced the legal thought of the Framers.[144] Reliance is also placed on functionalist reasoning which places war powers into the Branch most institutionally competent to initiate military hostilities.[145]

The "pro-Congress" scholars rely principally on formalist reasoning based on the text and structure of the Constitution. They argue that the constitutional separation of the war powers was written to purposely reject the ideas of the European theorists by vesting the power to initiate hostilities in Congress.[146]

Whilst these debates have continued without the emergence of a clear winner, there has been a marked arrogation of power by the Executive Branch since the last occasion on which Congress formally declared a state of war to exist.[147]

The capacity of Congress to commence wars and condition Executive action in respect of armed conflicts was never seriously disputed up until the 1950s.[148] Since that time, however, various administrations have claimed certain exclusive constitutional powers in respect of war-making. These claims have taken various forms, but typically rely upon Article II of the Constitution, including the Commander-in-Chief power, the power in respect of foreign

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[143] *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) at p.634-635 per Jackson J ("*A century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other*").

[144] (eg) Vattel and Blackstone who assigned war powers to the Executive.

[145] John C. Yoo, *The Powers of War and Peace*, (University of Chicago Press, 2005) at p.155.

[146] Charles A. Lofgren, "War-Making Under the Constitution: The Original Understanding", 81 *Yale LJ*. 672 (1972) at p.700.

[147] Being on 2 June 1942 against Romania, Bulgaria and Hungary. Since the Washington Administration, Congress has enacted 11 separate formal declarations of war in five different wars. Each declaration has been preceded by a Presidential request either in writing or before a joint session of Congress: Elsea, J.K. & Weed M.C., "Declarations of War and Authorizations for the Use of Military Force" *Congressional Research Service* (April 18, 2014) at pp.4-5.

[148] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd Ed.) at p.104.

affairs[149], and any residual prerogative power.[150] At the same time, such claims necessarily read down Congress' Article I power to "declare War".[151]

The ramifications of a constitutional state of affairs in which the Executive assumes broad war-making powers beyond the reach of both Congress and judicial review may once have appeared startling.[152] History has proven those concerns to be well-founded.

The acceptance of doctrinal claims that the Executive has exclusive power over matters of foreign affairs and war powers has seen American citizens subjected to; detention without trial[153], mass (warrantless) domestic surveillance programs[154], targeted killings abroad[155], rendition[156], and "enhanced interrogation" techniques.[157]

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[149] See (eg) Saikrishna B. Prakash & Michael D. Ramsey, "The Executive Power over Foreign Affairs" *Yale L.J.* 231, 252-54 (2001).

[150] Akhil Reed Amar, *America's Constitution, A Biography*, (Random House, 2005), Chapter 2, page 47: "*The old Congress possessed only powers "expressly" conferred by the Articles. The new Congress would enjoy powers "herein granted," both in explicit terms and by fair implication*."; *cf* John Locke, *Second Treatise of Civil Government* (1690) at Chapter XIV, section 160: "*This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution.*"

[151] Hereinafter, the "Declare War Clause".

[152] See (e.g.) Jackson J in *Youngstown* at p.642 ("*Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may, in fact, exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President .. can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture*").

[153] In *Rasul v. Bush* 542 U.S. 466 (2004), the Court rejected the President's claim that it would be an unconstitutional interference with the President's commander-in-chief power to interpret the *habeas corpus* statute to encompass actions filed on behalf of Guantanamo detainees; In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Government argued that the President had Article II powers to detain enemy combatants (including U.S. citizens) notwithstanding that an Act of Congress was directed at preventing Executive detention (the *Non Detention Act* 18 U.S.C. §4001(a)). The Court did not have to address this submission as it found, by majority, that such detention was within the scope of the *2001 Authorization for Use of Military Force*: Pub. L. No. 107-40, §2 (a), 115 Stat. 224, 224 (2001); Stephen I. Vladeck, "A Small Problem of Precedent: 18 U.S.C. 4001(a) and the Detention of U.S. Citizen "Enemy Combatants"", 112 *Yale L.J.* 961 (2003) at p.968.

[154] *Klayman v. Obama* 957 F. Supp. 2d 1 - Dist. Court, Dist. of Columbia 2013 per Judge Leon "*I cannot imagine a more 'indiscriminate' and 'arbitrary' invasion than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval*.."; *cf American Civil Liberties Union v. Clapper*, No. 13-3994 (S.D. New York, December 28, 2013).

[155] Bruce Ackerman, *The Decline and Fall of the American* Republic, (Belknap Press, Cambridge Mass., 2010) "*The "torture Memos" generated by the Office of Legal Counsel under George W. Bush symbolize the extraordinary collapse of executive constitutionalism at moments of crisis*" at p.143; Alford R.P., "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens" *Utah Law Review*, 2011, vol. 1203 at p.1272: "*The executive branch now has the final say on the constitutionality of its decision to kill an American citizen, since it asserts that no court has jurisdiction to review its opinion*"; see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

[156] Bruce Ackerman, *The Decline and Fall of the American Republic*, (The Belknap Press, 2013) at p.143 referring to "*the shocking outbreak of presidential illegality in the war on terror*. *The "torture memos" generated by the Office of Legal Counsel under George W. Bush symbolize the extraordinary collapse of executive constitutionalism at moments of crisis. It would be a tragic mistake to view this episode as a momentary aberration in the life of the modern presidency. To the contrary, it was an entirely predictable consequence of the President institutional setup – which puts the meaning of national security law at the mercy of a politicized Office of Legal Counsel and a super politicized White House Council*".

[157] Harold H. Koh, "Can the President be Torturer in Chief?"*, Indiana Law Journal*, Vol 81:1145, (2006) at p.1159: "*If this law authorizes the President to kill terrorists, why should it not also authorize the President to use torture as "necessary and appropriate" force to extract information from terrorists? The obvious answer is because it is never "necessary or appropriate" to use torture in a War on Terror*".

This modern system has been described as one of "executive initiative, congressional acquiescence, and judicial tolerance"[158] involving nothing short of "the extraordinary collapse of executive constitutionalism" during which time Congress's powers of appropriation and oversight were incapable of arresting the steady march toward Executive hegemony.[159] Yet that was not the original intent.

***The Philadelphia Convention***

The pre-Revolutionary period was marked by strong anti-executive sentiments amongst the colonists.[160] Indeed, the conduct of the American Revolutionary War was governed by the Continental Congress and later, more formally, under the auspices Articles of Confederation which provided for no distinct executive branch of government.[161] As it would transpire, the British experience became "far more distant" from the Constitution's Framers than their own experiences with colonial and State governments, and under the Continental Congress and Articles of Confederation.[162]

After the conclusion of the Revolutionary War, the Continental Congress was tested in late 1786 when Shays' Rebellion took place in and around Massachusetts. Although the Rebellion's impact on the Constitution remains debatable[163], it highlighted the inability of the Continental Congress to adequately react to existential threats.[164] Washington was sufficiently concerned to write to Madison concerning the insurrection, "What stronger evidence can be given of the want of energy in our governments than these disorders?".[165] The rebellion possibly precipitated a reluctant Washington's attendance at the Philadelphia Convention.[166]

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[158] Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Mary-Christy Fisher, 1990) at p.117.

[159] Bruce Ackerman & Oona Hathaway, "Limited War and the Constitution: Iraq and the Crisis of Presidential Legality" 109 *Mich. L. Rev.* 447 (2011) at p. 485: "*Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding*"; *cf* Curtis A. Bradley & Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism" 118 *Harvard Law Review* 2047 (2005).

[160] Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power – The Origins* (Ballinger Publishing Company, Cambridge Massachusetts, 1976) at pp.15-16 ("Sofaer"). This anti-executive feeling in the colonies was later translated into State governments that in general were dominated by the legislative branch.

[161] Thomas Paine. *Writings of Thomas Paine — Volume 1 (1774-1779): The American Crisis*, (J Watson, editor, 1835), at p.123: "*There are certain powers which the people of each state have delegated to their legislative and executive bodies, and there are other powers which the people of every state have delegated to Congress, among which is that of conducting the war, and, consequently, of managing the expenses attending it; for how else can that be managed, which concerns every state, but by a delegation from each?*", *Common Sense*, Philadelphia, 5 March, 1782.

[162] Sofaer *supra* at p.15.

[163] Akhil Amar does not feature the "*rebellion as a major causal force driving the Constitution of 1787–88*" in his book, *America's Constitution: A Biography* – see Chapter 3, note 39; *cf The Federalist* Nos. 6, 21 & 25, 28, 74 (Alexander Hamilton), and No. 43 (James Madison).

[164] Sofaer A.D., *War, Foreign Affairs and Constitutional Power – The Origins* (Ballinger Publishing Company, Cambridge Massachusetts, 1976) at pp.25-26;

[165] Letter from George Washington to James Madison (Nov. 5, 1786), in 4 *The Papers of George Washington* 331, 332 (W.W. Abbot & Dorothy Twohig editors, 1995).

[166] See Ron Chernow *Washington, A Life* (Penguin Books, 2010) at chapter 41 (pp 517-519); see also Amanda L. Tyler, "Suspension as an Emergency Power", 118 *Yale L.J.* 600 at pp.624-626; Gordon S. Wood, *The Radicalism of the American Revolution*, (First Vintage Books, 1993) at p.209 as to the central importance of Washington to the ultimate adoption of the Constitution.

Shays' Rebellion was finally put down in February 1787 by a privately funded militia. A few months later, in May, the Constitutional Convention convened in Philadelphia. As a result of these experiences there was said to be widespread demand for a stronger Executive.[167]

The Constitutional Convention was held in private session in Philadelphia from May to September 1787. What we know of it largely comes from the notes James Madison took and transcribed years later.

Two formal plans were submitted to the Convention's Committee on Detail (being those of Edmund Randolph of Virginia and William Patterson of New Jersey). The original 'Virginia Plan' of 29 May allocated to the legislature 'the Legislative Rights vested in Congress by the Confederation' and assigned to the executive 'the Executive rights vested in Congress by the Confederation'.[168] However, the plan left open the question of where war powers were properly to be located.

The first draft of the Committee of Detail was presented on 6 August 1787. A power to 'make war' was located amongst the legislative powers, and the 'President' was designated 'commander in chief of the Army and Navy of the United States'.[169]

The Convention debated the proposed war powers clause on 17 August 1787.[170] This aspect of the debate tends to be the principal focus of much of the academic discussion concerning original understanding. On the proposed wording "To make war", Charles Pinckney of South Carolina (whose state Constitution separated war-making powers from the Executive) suggested that it be the Senate and not the House who should possess the power of 'making war'.[171]

Pinckney had earlier advocated (on 1 June) for a "vigorous Executive" but said that he was "afraid the Executive powers of [the existing] Congress might extend to peace & war".[172] Similarly, John Rutledge, also of South Carolina, had earlier stated that "he was not for giving [the Executive] the power of war and peace".[173]

Only Pierce Butler, another South Carolinian, suggested that the Executive be given the war power. He was "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it".[174] In response to this, Elbridge

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[167] Sofaer *supra* at pp 24-25, referring to "*the dangers and inefficiencies of unbalanced, legislative government*"; John Yoo, *Crisis and Command: A History of Executive Power from George Washington to the Present*, (Kaplan Publishing, 2011), Chapter 1, p.11.

[168] 1 Farrand at pp.21, 30ff; William M. Treanor, "Fame, the Founding, and the Power to Declare War", 82 *Cornell L. Rev.* 695-772 (1997) at p.713.

[169] 2 Farrand at pp.144, 146 respectively.

[170] G.R. Stone *et al Constitutional Law*, Seventh Edition (Aspen Casebooks, 2013) at pp.389-390; Sofaer *supra* at pp.25-38.

[171] 2 Farrand at p.249: of the Legislature, Pinckney said "*Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions*."

[172] 1 Farrand at pp.64-65.

[173] 1 Farrand at p.65.

[174] 2 Farrand at p.249; Neither delegates referred to the language in their own State constitution.

Gerry (Mass.) said that he "never expected to hear in a republic a motion to empower the Executive alone to declare war".[175]

Madison and Gerry then "moved to insert "declare," striking out "make" war; leaving to the Executive the power to repel sudden attacks." Madison's notes have the motion gaining the support of all delegates except those from New Hampshire and Connecticut. James Madison, Elbridge Gerry, Roger Sherman, and George Mason all opposed giving the President the power to wage a war: a vote of seven (yes); two (no) and one (abstention).[176]

The records of the debate conclude with the disclosure that "On the remark by Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Ellsworth gave up his objection and the vote of [Connecticut] was changed to [yes]". Thus, the vote ended up as eight to one in favour of the amendment.[177]

Dr James McHenry, who also took notes on this critical date, recorded the following: "Debated the difference between a power to declare war, and to make war — amended by substituting declare — adjourned without a question on the clause".[178] These notes are consistent with the understanding that no major structural reallocation of power occurred because of the amendment. Indeed, nobody other than Pierce Butler argued that the Executive should be able to commence wars. Far from his motion carrying the day, it was ridiculed.

Thomas Jefferson, who was stationed in Paris during the Convention debates, understood the import of what had occurred in the allocation of powers. He wrote to fellow Virginian James Madison on 6 September 1789 stating that "we have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay".[179]

***The Provisions of the U.S. Constitution***

At first blush, it seems readily apparent that the text of the Constitution adequately settles any debate over the locus of war-making powers. Congress may by dint of Article I of the U.S. Constitution "*declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water*".

Congress also possesses the authority to "*raise and support Armies*", to "*provide and maintain a Navy*", to "*make Rules for the Government and Regulation of the land and naval Forces*", "*[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions*" and to "*provide for organizing, arming, and disciplining, the Militia*".[180]

A general grant of executive power is vested in the President by Article II of the Constitution. Specifically, it provides that "*[t]he President shall be Commander in Chief of the Army and*

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[175] *Ibid*; *cf* John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War *Powers*", 84 *Calif. L. Rev.* 167, 196-217 (1996); at p.262; *cf* John Hart Ely, *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath* (Princeton University Press, 1995) at p.5.
[176] 2 Farrand at p.249.
[177] Nine states cast votes; Massachusetts abstained on the issue; New Jersey and New York were not represented at this point, and Rhode Island did not attend the Convention.
[178] 2 Farrand at p.250.
[179] *The Papers of Thomas Jefferson* (Julian P. Boyd ed., 1958 at p.397).
[180] Article I, section 8.

*Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States*".[181]

***Early Custom and Practice***

Washington assumed the Presidency with a regular military force of less than 840 men, and with no Congressional approval to utilize them or the State militias. He was therefore driven to seek Congressional support for every military campaign he engaged in.[182]

When Washington discussed a potential military expedition against the Creek nation with South Carolina Governor William Moultrie in the summer of 1793, he indicated that he hoped to launch an "offensive expedition against the refractory part of the Creek nation, whenever Congress should decide that such measure be appropriate and necessary. The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure".[183]

The most important foreign affairs decision of the Washington Presidency 'by far' was the President's Declaration of Neutrality in the war that Revolutionary France began with England in 1793.[184] The declaration had wide ramifications as it affected treaties between the US and France, and the reception of a French ambassador. Washington had submitted a list of questions to his cabinet, including whether to involve Congress in the matter by calling the two Houses together. Jefferson reported to Washington that this question had "been decided negatively".[185]

This matter ultimately led to the *Pacificus-Helvidius* essays between Alexander Hamilton and James Madison (respectively). Hamilton defended the President against the charge that he had committed certain heresies by unilaterally declaring neutrality and suspending treaties. As it turned out, when Congress reconvened on 3 December 1793, Washington explained his actions, and both Houses passed resolutions of approbations, praising his conduct.[186]

Conceptually, a presidential declaration of neutrality might be seen to impermissibly encroach upon the very subject matter reserved to Congress under the War Powers Clause: that is, whether to go to war, *or not.* Hamilton addressed this issue head on. He contended that the implicit congressional power to reject war did not preclude the President from taking executive action to preserve peace leading up to any declaration.[187]

In Hamilton's words "If the Legislature have a right to make war on the one hand - it is on the other the duty of the Executive to preserve Peace till war is declared".[188] The proclamation of neutrality in those circumstances merely established "an antecedent state of things" which

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[181] Article II, section 2.
[182] Sofaer *supra* at pp.116-117.
[183] Prakash, S., "Unleashing the Dogs of War: What the Constitution Means by "Declare War"", *Cornell Law Review*, Vol 93:45, 2007, at pp.97-98; Sofaer *supra* at p.129.
[184] Sofaer *supra* at p.103.
[185] Sofaer *supra* at p.104; There was concern that the Republican House would favour pro-French policies.
[186] Sofaer *supra* at p.116.
[187] See William R. Casto, "*Pacificus and Helvidius Reconsidered*", *Northern Kentucky Law Review* Vol 28:3 p 612 (2001) at p.622.
[188] *Pacificus No. 1* in *The Pacificus-Helvidius Debates of 1793-1994* (Morton J. Frisch editor, Liberty Fund, 2007) at pp.13-14.

Congress 'ought' to factor into its decision, but would be "free to perform its own duties according to its own sense of them".[189] Hamilton plainly believed that only Congress could declare war notwithstanding his theory of concurrent powers in respect of neutrality.[190]

From an formalist perspective, such evidence of the contemporaneous understanding of the Declare War Clause strongly militates in support of the pro-Congress interpretation.[191] In contrast to such evidence, the pro-Executive scholars can produce no statements in which the expression "declare War" was to be read as confined to mere formal announcements.[192]

These examples demonstrate a consistent theme amongst the Framers: absent sudden invasions, only Congress could determine when to commit the nation to war.[193]

***Early Supreme Court cases***

During the administration of John Adams, Congress authorized a limited war with France ("the Quasi-War"). President Adams asked Congress to prepare the country for war while he undertook negotiations with towards a peaceful resolution. Whilst no war was officially declared, Congress did enact a number of statutes during this time that included a power to seize French ships travelling to (but not from) French ports.[194]

In *Little v. Barreme*[195], the Supreme Court found that the captain of a U.S. frigate was liable to pay damages to the owner of a neutral Danish vessel captured during the Quasi War with France. Marshall C.J., delivering the opinion of the Court, gave a strict reading to the Act of Congress authorizing capture of vessels travelling to French ports. As the Danish vessel was travelling *from* a French port, the Executive action was unauthorized by Congress and, accordingly, the seizure was unlawful.

*Little v. Barreme* is significant as the Court found that damages were payable notwithstanding that the captain of the U.S. ship was acting on orders from the President. That is, the Act of Congress trumped the presidential command in respect of defining the scope of the conflict.

***Structural Considerations and The President's Role in Foreign Affairs***

In matters of national security, the nature and extent of the President's foreign affairs power must be reconciled with the war power by those who would advocate for the primacy of Congress. There is undoubtedly the potential for dovetailing between the two powers from a functional perspective. For example, in his address 1823 address to Congress, President Monroe espoused his doctrine declaring the United States' intention to oppose European attempts at colonising the Western hemisphere. Just as Washington's Neutrality Proclamation

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[189] *Pacificus No. 1 ibid* at p.15.
[190] William R. Casto, "*Pacificus and Helvidius Reconsidered*", *Northern Kentucky Law Review* Vol 28:3 p 612 (2001) at p.622.
[191] See Cameron O. Kistler, "The Anti-Federalists and Presidential War Powers", 121 *Yale L.J.* 459 (2011) at p.466 ("*The presidentialist interpretation of the Declare War Clause is simply implausible in light of the state ratification debates*").
[192] W.M. Treanor, "Fame, the Founding and the Power To Declare War", 82 *Cornell L. Rev*. 695 (1997) at p.718.
[193] This formulation is known as the Liberal Paradigm of Emergency Power: Russell D. Covey, "Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout" 105 *Yale L.J.* (1996).
[194] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd Ed.) at pp. 23-26.
[195] 6 U.S. 170 (1804).

was said to risk French relations, Monroe's implied threat risked provoking European aggression.[196]

The seminal pro-Executive decision in this field is the heavily criticised *U.S. v. Curtiss-Wright Export Corp*.[197] The President had, by proclamation, prohibited the sale of arms to parties engaged it the Chaco conflict in Bolivia. The proclamation was made pursuant to a joint resolution of Congress. Justice Sutherland recognized the President as the "sole organ" of the federal government in the field of international relations, and foreign affairs as "a power which does not require a basis for its exercise an act of Congress".[198]

The decision in *Curtiss-Wright* was relied upon by the Administration in the course of a constitutional power struggle played out over the right to recognize Jerusalem as being a city in "Israel" in *Zivotofsky v. Kerry.*[199]

Congress had passed legislation which directed the Secretary of State to record the birthplace of an American citizen born in Jerusalem as "Israel" if requested to do so.[200] The question was whether that legislation impermissibly infringed upon the President's power to recognize foreign states. The Constitution does not explicitly address the issue of recognition of foreign nations.

In a 6:3 opinion, the Court held that the federal statute unconstitutionally usurped the President's *exclusive* Article II power. Kennedy J, for the majority, reasoned that the Reception Clause (the President's power to receive foreign ambassadors) was a strong structural indicator that the power to recognize foreign states lay with the President. Similarly, the Article II power to make treaties and to appoint ambassadors gave further confirmation of the President's authority over recognition decisions.[201] Kennedy J also addressed "functional considerations". Because the question of whether or not to recognize a foreign nation can only have one answer, it followed that the President's power must be exclusive.

The Administration cited *Curtiss-Wright* as authority for the proposition that the President was "the sole organ of the federal government in the field of international relations". However, the majority specifically eschewed any reliance on *Curtiss-Wright* as a basis to support their opinion. The Court declined to acknowledge such "unbounded power". Kennedy J noted that the "sole organ" description of the President's power over all international relations "was not necessary to the holding of *Curtiss-Wright*" which was, after all, based on congressionally authorized action.

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[196] Matthew C. Waxman, "The Power to Threaten War", *The Yale Law Journal*, 123:1626, 2014, at p.1644.
[197] 299 U.S. 304 (1936); Michael D. Ramsey, "The Myth of Extraconstitutional Foreign Affairs Power", 42 *Wm. & Mary L. Rev.* 379 (2000) at p.42 ("*Curtiss-Wright is a striking departure from the usual view of constitutional law*").
[198] 299 U.S. 304 (1936) at p.319-320; although this *dicta* is relied upon to support a unitary view of presidential power over foreign affairs, it is noteworthy that this decision did not hold that Congress impermissibly intruded into Article II Executive authority. Indeed, the Court referred to the "*unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed*…": at pp.321-322
[199] 576 U.S. 1059 (2015).
[200] § 214(d) of the *Foreign Relations Authorization Act of 2003.*
[201] Congress has a confirmation role in respect of treaties and ambassadors, but it has no such power to initiate international diplomacy without involving the President.

Importantly, Kennedy J concluded that "[t]his is not to say Congress may not express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision".[202]

*Zivotofsky v. Kerry* thus recognizes the pragmatism underlying the position of the President as the appropriate rubric through which foreign affairs are to be conducted (as opposed to a sole repository of constitutional power in respect of all foreign relations). However, the history of the Framing, ratification, and early practice all militate towards a conclusion that the Framers and ratifiers of the Constitution understood the Declare War Clause to require that the President gain Congressional approval before committing the nation to war.

A fundamental shift in the accepted constitutional allocation of war powers occurred with the advent of the Cold War, and the conflict on the Korean peninsula in 1950.[203] A new constitutional doctrine has gained currency since that time which gives primacy to the President in the initiation of hostilities.[204] Administrations now regularly invoke the President's Article II powers as Commander-in-Chief and associated foreign affairs powers to justify armed incursions, and put far less emphasis on the Congressional power to 'declare War'.[205]

***The Functionalist Approach to Interpretation of War Powers Under the Constitution***

The originalist defence of Executive war powers has taken a more nuanced form designed to capitalise on the rise of modern military industrial complex. In this iteration of the argument, the Framers are said to have been wise enough to have created a flexible system of war powers that eschewed fixed rules on how wartime decisions were to be made. Such a framework is highly pragmatic and easily adaptable to the circumstances that now confront the nation.

This explication of the pragmatic roots of the constitutional system of war powers can "then slip imperceptibly into a defense of executive prerogative, chiefly to initiate the use of force without prior congressional approval, but also, it seems, to disregard statutory restrictions on military judgments as events might require".[206]

The following section traces the lineage from the Founding roots to the modern era in order to scrutinise the case for a functionalist interpretation of War powers based principally on prudential considerations.

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[202] Or decline to ratify a peace treaty, as the Senate did (55-39) in the case of the Treaty of Versailles in 1919.
[203] "*Korea was a watershed*": John Hart Ely "*Suppose Congress wanted a War Powers Act that Worked*", *Columbia Law Review*, Vol 88, Nov 1988 No.7, 1379-1431 at p.1391; Louis Fisher, *Presidential War Power* (University Press of Kansas, 2013, Third Edition) at p.104.
[204] For example; R.F. Turner, *Repealing The War Powers Resolution,* 109–110 (1991); P. Bobbitt, "War Powers: An Essay on John Hart Ely's "War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath"", *Michigan Law Review* 92:1364 (1994), pages 1364-1400; Yoo J.C., "The Continuation of Politics by Other Means: The Original Understanding of War Powers"*,* 84 *Cal. L. Rev.* 167, 173–74 (1996); John Yoo, *The Powers of War and Peace*, (the University of Chicago Press, 2006) at pp.17, 144, 165.
[205] John C. Yoo, "The Continuation of Politics by Other Means: The Original Understanding of War Powers", 84 *Calif. L. Rev.* 167, 196-217 (1996); Saikrishna Prakash, "Reply: A Two-Front War" 93 *Cornell L. Rev.* 197 (2007).
[206] D.J. Barron, D.J. & M.S. Lederman, "The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, an Original Understanding" *Harvard Law Review*, Vol 121 January 2008, no.3, 689-804 at p.801.

***Lincoln: The Constitution is not a Suicide Pact*[207]**

At the outbreak of the Civil War, following the attack on Fort Sumter on 12 April 1861, President Lincoln imposed a blockade on southern ports. In his message to a special session of Congress on 4 July 1861, Lincoln defended his actions by reference to the existential threat that was presented: "it was with the deepest regret that the Executive found the duty of employing the war power, in defense of the Government, forced upon him. He could but perform this duty or surrender the existence of the Government".[208]

Congress later passed a statute ratifying Lincoln's military action. The question of whether the President had a right to institute a blockade of the ports came before the Supreme Court in *The Prize Cases*.[209] The Supreme Court inquired whether, at the time this blockade was instituted, a state of war existed which would justify resort to such means of subduing the hostile force. The Court held that "if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[210]

This was an important constitutional moment for the country. A bare majority of five justices held that, as of late April 1861 a state of "Civil War" existed as a matter of fact. It followed, under international law, that if foreign ships ran the blockades, they were subject to arrest and seizure.[211] Although recognizing a duty on the part of the President to meet any existential threat with force, the Court did not decide that the Executive possessed a broad independent war-making power. Rather, the facts of the case fell within the exception contemplated by the Framers involving the repulsion of 'sudden attacks', and not the initiation of war.[212]

Lincoln's subsequent conduct is consistent with view that the President is compelled to act in the face of existential threats, *a fortiori* when Congress is not in session. Lincoln explained his actions to Congress when it returned for a Special Session in July 1861: "Whether strictly legal or not [the blockades and raising of militias] were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would ratify them".[213] Congress passed legislation ratifying Lincoln's actions.[214]

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[207] *Terminiello v. City of Chicago*, 69 S. Ct. 894, 912, 937 (1949) (Jackson, J., dissenting) "*There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the [Constitution] into a suicide pact*".

[208] Lincoln's July 4th, 1861 Message to Congress.

[209] 67 U.S. 2 Black 635 (1862) (1863).

[210] 67 U.S. 2 Black 635 (1862) at p 661 (Grier J).

[211] George P. Fletcher, *Our Secret Constitution – How Lincoln Redefined American Democracy* (Oxford University Press, 2001) at pp.80-81: "*The Court was able to craft this conclusion without conceding that the Confederacy represented an independent belligerent power waging full-scale war*".

[212] It is noteworthy that Nelson J dissented in *The Prize Cases* on the basis that "*no Civil War existed between this Government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the laws of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war…*": 67 U.S. 2 Black 635 (1862) at p.698.

[213] Lincoln's July 4th, 1861 Message to Congress.

[214] Thomas Jefferson also made references to higher obligations that might arise in times of emergency that obviate the need for strict observance of the written laws. For instance, he opined, *"[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.*": Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810).

After Virginia seceded from the Union on 17 April 1861, Maryland's strategic importance became acute given its proximity to Washington. On 27 April, Lincoln unilaterally authorized General Winfield Scott to suspend the writ of *habeas corpus* at or near any military line between Philadelphia and Washington. On 25 May, federal troops arrested John Merryman in Maryland, for recruiting and training sympathizers to the Confederate cause.

Chief Justice Roger Brooke Taney, sitting in the federal District Court, issued a writ of *habeas corpus* to secure Merryman's release and delivery before the Court by 28 May.[215] In Taney CJ's opinion, Lincoln had acted unconstitutionally as only Congress had the power to suspend the writ (found in Article I of the Constitution).[216]

In response, Lincoln disregarded Taney CJ's order. Lincoln posited the question to Congress on 4 July 1861 that an insurrection "in nearly one-third of the States had subverted the whole of the laws - Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?".

He answered his own question in the negative. He thought that the President would violate his oath "if the government should be overthrown, when it was believed that disregarding the single [instance of constitutional] law, would tend to preserve it".[217]

***Korea: The Executive Ascendant***

On 3 July 1950, the Department of State prepared a Memorandum that dealt with the authority of the President to repel an attack on the Korean peninsula. That opinion provided "that the President's power to send the Armed Forces outside the country is not dependent on congressional authority has been repeatedly emphasized by numerous writers". The opinion then enumerated 85 instances of the use of American armed forces without a declaration of war.[218] Examples included the Boxer Rebellion in 1900-1901 where the President sent 5,000 troops to Peking.[219]

Part of the argument set out in the Memorandum rested upon the change that was effected upon the ratification of the United Nations Charter. It was said that "the President was entitled to use armed forces in protection of the foreign policy represented by the Charter". In the case of Korea, the "continued defiance of the United Nations by the North Korean authorities would have meant that the United Nations would have ceased to exist as a serious instrumentality for the maintenance of international peace". It followed, as the argument went, that the interests of the United States were interests that the President as Commander-in-Chief could protect by the employment of the Armed Forces without a declaration of war.

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[215] *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (Case No. 9487).

[216] Article I, Section 9 of the Constitution ("*The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it*"); Akhil Reed Amar, *America's Constitution*, (Random House, 2005) Chapter 3 at p.122.

[217] Lincoln's 4 July 1861 Message to Congress; see also Akhil Reed Amar, *America's Constitution, A Biography*, (Random House, 2005), Chapter 3, p.122

[218] These having been incorporated in the *Congressional Record* for 10 July 1941; Ely (*supra*) refers to the Secretary of State Dean Acheson's testimony before Congress in 1951 in which he espoused the notion that Congress lacked authority to stop the President committing US forces to an overseas deployment (at page 8).

[219] And to which can be added and the excursions into Mexico by General Pershing in pursuit of Pancho Villa (as ordered by President Woodrow Wilson in 1916).

President Truman's commitment of U.S. troops to Korea in 1950 represented a direct assault on the constitutional authority of Congress. No president in the past had taken the country to war without first receiving a declaration or authorization from Congress.[220]

This was Lockean prerogative "with a vengeance".[221] The reason why the Truman administration took the view it did and commenced an inexorable shift in the balance of power between the political branches is unclear. Gary Wills suggests that 'the Bomb' "redefined the presidency, as in all respects America's "Commander in Chief" (a term that took on a new and unconstitutional meaning in this period)".[222] Whilst there had been temporary emergency measures taken in the past[223], the Executive war-making power had started to become entrenched.

***The Role of the Courts***

Following the Founding, the Supreme Court weighed into disputes involving fundamental questions of whether wars had been commenced.[224] However, part of the thesis explaining how the Executive has arrogated power to itself since the Korean War involves recognising an abdication by the Court of its role in the process of judicial review. Although this abdication has not been without exception, there have been many fundamental questions left unanswered in recent times through the invocation of the non-justiciable political question and standing doctrines.

The Court's willingness to involve itself in war-powers issues began to wane after WWII. In *Ludecke v Watkins*[225], a German national who had been sent to a German concentration camp (and later escaped) was the subject of an internment order by the U.S. Attorney-General in 1942. He was thereafter the subject of a presidential order directing his removal from the United States by January 1946. The Executive orders were made pursuant to the *Alien Enemy Act of 1798* which was enlivened "whenever there is a declared war between the United States and any foreign nation or government".

The petitioner sought a writ of *habeas corpus* on the basis that the President's powers under that Act did not survive the cessation of hostilities in Europe, which were said to have ceased upon the signing of the German Instrument of Surrender at Rheims, France on 7 May 1945. In a 5:4 decision, the Court held that the question of whether "a state of war still exists" was for the political branches to determine. Justice Black in dissent stated: "I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction".[226]

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[220] Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013, 3rd Ed.) at p.104.
[221] Schlesinger *supra* at p.143; similarly John Hart Ely *supra* at pp.10-11.
[222] Gary Wills, *Bomb Power: The Modern Presidency and the National Security State* (Penguin Press, New York, 2010); For a contrary view which holds that the advent of nuclear capabilities should mean that the question of deployment be Congress's see P. Raven-Hansen, "Special Issue: The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Nuclear War Powers", 83 *AJIL* 786.
[223] Wills references the fact that "*Loyalists were rounded up in the Revolution. Suspected aliens were imprisoned in the Quasi-War of the 1790s. Lincoln cancelled habeas corpus in the Civil War. Roosevelt interned Japanese American citizens in World War II*".
[224] Eg, *Little v. Barreme* and the *Prize Cases*.
[225] 335 U.S. 160 (1948).
[226] Justices Douglas, Murphy and Rutledge joined in dissenting.

With the Supreme Court now deferring to the political branches on factual questions that it once grappled with, the stage was set for the ascendancy of the Executive. The office of the President was armed with nuclear capability, the Cold War had crystallized the fear of the spread of Communism, and the UN Charter had given the President a reason to become involved in the collective security of nations further afield.[227]

***Youngstown – the Steel Seizures Case***

When a President acts in a field in which Congress has legislated, or has expressed an intention not to legislate, the acknowledged touchstone for constitutional analysis is *Youngstown*.[228]

President Truman had attempted to take over of the steel mills during the Korean War, ostensibly for the reason that a labour strike would have impacted on the war effort. Congress had, however, passed the *Taft-Hartley Act* dealing with labour strikes, and had considered but rejected the inclusion of a provision granting the President authority to seize businesses.[229]

Justice Jackson based his opinion on the notion that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress".[230] He tripartite taxonomy as follows: "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter".[231]

Applying this analysis, Jackson J concurred in the (6:3) majority opinion which found that the President had acted unconstitutionally, his powers falling within zone three of the matrix and thus at their lowest ebb. What is immediately noteworthy about Justice Jackson's approach is that, whilst it recognized a zone where powers may be concurrent, it plainly proceeds on the basis that, where Congress acts decisively, its position takes primacy.[232]

Jackson J's decision in *Youngstown* remains the seminal constitutional authority concerning war-powers.[233] It echoed the concerns of the Framers who had sought to restrain the exercise

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[227] The presidencies of Eisenhower and Kennedy plainly have their own interesting features to contribute to the narrative. Louis Fisher *supra* by and large describes the Eisenhower era as one of compliance and co-operation with Congress, including in respect of the Formosa dispute: pp.116-124. Arthur Schlesinger *supra* takes a similar view in respect of Eisenhower's early years, but recognizes an aggrandizement of power evidenced by the expansion of US foreign policy and the increasing centralization in the office of the Presidency: at pp.159-168.

[228] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579; Harold H. Koh, "Can the President be Torturer in Chief?", *Indiana Law Journal*, Vol 81:1145 (2006) at p.1160.

[229] *Labor Management Relations Act of 1947* 29 U.S.C. § 401-531 (The *Taft–Hartley Act* of 23 June 1947).

[230] 343 U. S. at p.635.

[231] 343 U. S. at pp.635-638.

[232] "*His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch a representative Congress*": 343 U. S. at pp 645-646.

[233] However, notwithstanding Youngstown's canonical status, it was 'rewritten' in 1981 in *Dames & Moore v Regan* 453 U.S. 654 (1981). It involved an exceptionally deferential approach to executive power by relying on inferences from statutes that did not expressly deal with certain subjects (in order to elevate the analysis into

of executive power: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations".[234]

### *Vietnam: The Executive 'Rampant'*[235]

The August Revolution by the Viet Minh commenced in the same month that Japan capitulated in 1945. Within a year, the re-occupation of Indochina by the French led to the commencement of the First Indochina War in which the Viet Minh received support from communist China from 1950. In the era of McCarthyism, the US Government decided it to be in the country's foreign policy interests to provide military aid to the French.[236] In July of 1954, the French signed the Geneva Accords, agreeing to a ceasefire and withdrawal to the south of the 17th Parallel. The US was not a signatory; however, it pledged that it would not interfere with the Accords.[237]

The Eisenhower administration continued to conduct paramilitary operations in Indochina. By the time of the Kennedy administration in 1961, there were 400 Special Forces troops and approximately 100 other military advisers dispatched (contrary to the understandings under the Geneva Accords). By the end of 1962, there were 11,000 US troops in South Vietnam.[238]

Following the Gulf of Tonkin Incident in which the USS Maddox was apparently fired upon by torpedoes, President Johnson addressed the nation and called for a "limited and fitting" response without seeking a "wider war".[239]

Within days, Congress passed the Tonkin Gulf Resolution authorising the use of military force, with no dissenting votes in the House, and only two in the Senate.[240] Notwithstanding the limited form of assistance the President had asked for, the terms of the Resolution were very broad. It authorized the President to "take all necessary steps, including the use of armed force" to assist the US interests in Vietnam.[241]

By the end of 1965, there were 184,000 US troops in South Vietnam. Another 207,000 were added in the course of 1966. By 1968 there were 510,000 troops in total.[242]

Questions by the Senate Committee on Foreign Relations concerning the legality of the war and its escalation beyond stated objectives were addressed in a State Department memo

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Category 1), and similarly by drawing inferences from Congressional acquiescence to executive conduct. In this way, the case marked a dramatic de facto expansion of Categories 1 and 2 of Youngstown, with a concomitant narrowing of Category 3 – the only category where the President might be overruled by valid legislation: Harold H. Koh, "Can the President be Torturer in Chief?", *Indiana Law Journal*, Vol 81:1145, 2006, at pp.1160-1161.

[234] 343 U. S. at p.655.

[235] As described by Schlesinger *supra* at Chapter 7.

[236] $10 million in 1950 to $1.1 billion in 1954.

[237] Louis Fisher *supra* Chapter 6, pp.127ff.

[238] See (eg) Committee on Foreign Affairs, *The War Powers Resolution – A Special Study of the Committee on Foreign Affairs* – Committee Print from pp.1-3; John Hart Ely *supra* from p.11; Schlesinger *supra* at Chapter 7; Fisher *supra* Chapter 6, pp.127ff.

[239] Louis Fisher *supra* Chapter 6, pp.128-131; 88th Cong. 2d Sess. 25 (1964).

[240] John Hart Ely *supra* p.19.

[241] Although John Hart Ely also suggests that the broad language of the Tonkin Gulf Resolution authorized the ground war in Cambodia, "*though barely*": Ely, *supra* at pp.31-32.

[242] Committee on Foreign Affairs *supra* at pp.7-8.

prepared by Leonard C. Meeker.[243] It was asserted in the memo that "an attack on a country far from our shores can impinge directly on the nation's security".[244] Meeker relied primarily on the President's powers under Article II of the Constitution as Commander in Chief, the SEATO Collective Defense Treaty[245], and the Tonkin Gulf Resolution of August 1964.

As was the case in the Truman Administration's defence of its expansive interpretation of Executive war powers, Meeker sought to show that the President had committed troops into conflicts without Congressional authority on at least 125 occasions.[246] The principal example given was when "President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950s".[247] That is, the Johnson Administration was using the most controversial example of troop commitment by a President in the history of the nation as precedence to justify the escalation of the war in Vietnam.

The U.S. involvement in South-East Asia was challenged in the courts, typically by servicemen-petitioners ordered to be deployed into the conflict. The litigation strategy was to contend that the Executive officers issuing orders for deployment were acting unconstitutionally because Congress did not properly authorize the War.[248] The Courts developed a position that recognized the appropriateness of collaborative conduct between the political Branches on questions of military operations. The subject matter of such collaborations was held to be a non-justiciable political question where it was shown that there had been "sufficient mutual participation" between Congress and the President.[249]

The War became increasingly unpopular following the Tet Offensive in 1968. On 30 April 1970, President Nixon announced to the nation that 20,000 U.S. troops were involved in an attack on the Viet Cong inside Cambodia.[250] Mass protests around the country followed, including at Kent State University, with tragic consequences. Only a few members of Congress had known about the U.S. Operations in Cambodia and Laos at this time.

By the end of 1970, Congress repealed the Tonkin Gulf Resolution. The War was now being fought without express congressional support. This then brought into question whether the element of "mutual participation" identified by the Courts continued to exist. That question was raised in *DaCosta v Laird* by a petitioner who had received orders to be deployed into the conflict.[251] The Court once again sided with the Executive holding that: "It was not the intent of Congress in passing the repeal amendment to bring all military operations in Vietnam to an

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[243] Meeker, L. C., "The Legality of United States Participation in the Defense of Viet-Nam", *Department of State Bulletin*, (4 March 1966); Reprinted in 75 *Yale LJ* 1085 (1966).
[244] Department of State Bulletin (1966) at p.484.
[245] This treaty provided that an armed attack against Vietnam would damage the peace and security of the USA.
[246] Department of State Bulletin (1966) at p.484: "*Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the "undeclared war" with France (1798-1800)*".
[247] Department of State Bulletin (1966) at pp.484-485
[248] (eg) *Orlando v. Laird*, 443 F.2d 1039 (1971).
[249] Also discussed in *Massachusetts v. Laird*, 451 F.2d 26 (1971). The Court found that there had been sufficient mutual participation because Congress had approved large expenditures for the conduct of the war.
[250] M. Ratner & D. Cole, "The Force of Law: Judicial Enforcement of the War Powers Resolution", *Loyola of Los Angeles Law Review*, Vol 17: 715-766 (1984) at pp.728-730.
[251] 448 F.2d 1368 (2nd Circ, 1971).

abrupt halt".[252] The means by which the political branches mutually participate in disengaging from armed conflict was therefore also treated as a non-justiciable political question.[253]

The Court recognised that a "Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon, without support, men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions placed and continued them in that dangerous posture". The case was again dismissed on political question grounds.

The publication of the *Pentagon Papers* in June of 1971 revealed years of duplicity on the part of the Executive administration. Congress thereafter passed an appropriations measure with the 'Mansfield Amendment' attached to it.[254] The Amendment provided that "it is hereby declared to be the policy of the United States to terminate at the earliest possible date all military operations of the United States in Indo China".

President Nixon did not veto the amendment, but issued a signing statement in which he stated that the measure was "without binding force or effect, and it does not reflect my judgment about the way in which the war should be brought to a conclusion".[255]

Nixon thereafter commenced renewed bombing and mining of the ports in North Vietnam in 1972, while peace talks were on foot. A formal peace agreement was executed in Paris in January of 1973, and US troops were withdrawn from South Vietnam by March of 1973. Bombing in Cambodia during this period of time, however, intensified.[256]

***Congress Fights Back: The War Powers Resolution***

From this account we see that from 1969 Congress began to disapprove of the Vietnam War, largely to no avail.

The repeal of the Gulf of Tonkin Resolution in 1970 (being the authorization to commence the War), and the use of appropriations power proved futile.[257] Between 1969 and 1973, Congress passed legislation on no fewer than 10 occasions designed to fetter presidential authority to conduct the Vietnam War. However, Nixon continued to take unilateral action to escalate the conflict.

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[252] *Ibid* at [4] per Circuit Judges Kaufman, Anderson and Feinberg; at [5]; The Court held that "*If the mutual action by the Legislative and Executive branches and the particular means of collaboration they adopted to escalate a police action into large scale military operations are not a violation of the Constitution, as we held in Orlando, it can hardly be said that the combined efforts of the same two branches to achieve an orderly deceleration and termination of the conflict are*".

[253] *Mitchell v. Laird*, 448 F.2d 611 (D.C. 1973) where the Court refused to characterize appropriations legislation as "approval or ratification of a war already being waged at the direction of the President alone".

[254] PUB.L.MO.92-156 (1971).

[255] Committee on Foreign Affairs *supra* at pp.38-39; a federal District Court Judge took issue with Nixon's language in the signing statement: *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D. N.Y. 1972) at p.146.

[256] Operation *Freedom Deal*; John Morocco, *The Vietnam Experience: Rain of Fire: Air War, 1968-1975* (Boston Publishing Company, 1988) at p.172.

[257] M. Ratner & D. Cole, "The Force of Law: Judicial Enforcement of the War Powers Resolution", *Loyola of Los Angeles Law Review*, Vol 17, 1984, pages 715-766 at pp.729-730.

In May of 1973, Congress passed a Bill sponsored by Senator Thomas Eagleton which provided that "none of the funds herein appropriated … may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia".[258] Nixon vetoed the Bill. The political branches later reached a compromise by June of 1973, which Nixon signed into law.[259]

Against this background, and with the Presidency severely weakened by domestic issues, Congress passed the *War Powers Resolution of 1973* over Nixon's veto. The Resolution required the President in every possible instance to consult with Congress before introducing US forces into hostilities, and to submit a written report within 48 hours of utilizing US forces absent a declaration of war.[260]

Furthermore, Congress could, at any time, direct the President by concurrent resolution to remove US forces from hostilities.[261] More controversially, however, Congress granted the President latitude to use military force for 60 days; if the President thereafter failed to gain Congress's authorization during that time, the Resolution required him to withdraw forces within the next 30 days.[262]

The result was that Congress handed the President a 90-day period in which the Executive could engage in unilateral armed conflict. That was in effect a minimum period - the 'war powers clock' only commences the countdown if the President files a hostilities report within the first 24 hours.

Nixon's veto of the Bill on 24 October 1973 included the statement that the Resolution: "would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after 60 days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution – an action which does not normally have the force of law, since it denies the President its constitutional role in approving legislation … I believe that both of these provisions are unconstitutional".[263]

Congress overrode the President's veto on the same day.[264]

### *The War Powers Resolution in Practice*

According to section 2(a), the *War Powers Resolution* was intended to "fulfill the intent of the framers" and to "insure that the collective judgment of both the Congress and the President" would apply to the introduction of US forces to foreign hostilities.

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[258] John Hart Ely *supra* pp.32-35.
[259] Discussed in *Holtzman v. Schlesinger*, 484 F.2d 1307 (1973) per Mulligan J.
[260] 50 U.S.C. §§1542, 1543 (1976).
[261] § 1544(b)-(c).
[262] Thus allowing for a 90 day period in which the President can engage in unilateral armed conflict.
[263] Nixon, in this statement, foreshadowed the decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) which found a legislative veto of delegated executive action unconstitutional. The clause of the War Powers Resolution which enables Congress to terminate a presidential military deployment bears similarities to the clause successfully challenged in *Chadha*. Although Congress has yet to invoke the concurrent resolution provision, its constitutionality remains in issue. John Hart Ely recognizes the issue but opines, "*My personal opinion is that section 5(c) is not unconstitutional*" once viewed in context - Ely *supra* at p.119.
[264] The presidential veto was overridden by votes of 284:135 (House) and 78:18 (Senate).

The Resolution has had no such effect: it arguably expresses an intent contrary to that held by the Framers, and does not serve to ensure a collective judgment between the political Branches.

Presidents from Ronald Reagan to Barak Obama have made repeated use of military force without either seeking or obtaining the authority of Congress.[265] As John Hart Ely noted, Presidents committing United States troops to combat have treated the *War Powers Resolution* as unconstitutional. They have repeatedly failed to notify Congress, or have filed a report which was intentionally non-compliant (and which according to executive branch officials, did not therefore start the Resolution's 60 day clock running).[266] However, despite the lack of formal compliance with its strict terms, Presidents had submitted some 132 reports to Congress to September 2012 expressed to be 'consistent with' the War Powers Resolution.[267]

Some significant examples of where Presidents have not filed formal hostilities reports include the sending of US troops to Kosovo in 1999 and Libya in 2011.

***Kosovo 1999***

President Clinton ordered US military forces to participate in a NATO-led military operation in Kosovo in March 1999. On 24 March 1999, US warplanes in conjunction with NATO forces began attacking Serbian forces in Kosovo. Clinton appeared on television and stated to the nation that the airstrikes were necessary to protect innocent Albanians and to prevent the conflict from spreading to the rest of Europe.

The deployment was highly controversial as it occurred without either congressional or U.N. Security Council authorization, and without a plausible claim of self-defense.[268]

On 26 March 1999, Clinton notified the Congress "consistent with" the War Powers Resolution that on 24 March the military (in coalition with NATO allies) had commenced air strikes against Yugoslavian forces in order to support the ethnic Albanian population of Kosovo.

On 28 April 1999, the House voted on four resolutions related to the Yugoslav conflict. The outcomes were internally inconsistent: (i) Congress voted down a declaration of war (427:2); (ii) it voted against an "authorization" of the air strikes (213:213); (yet) (iii) it voted against requiring the President to immediately end US participation in the operation (139:290); and, notwithstanding the earlier resolutions, (iv) it voted to fund the involvement to the tune of $18.6 billion (311:105).[269]

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[265] Fisher *supra* pp.144-145.
[266] John Hart Ely, *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath*, (Princeton University Press, 1995) (Ely) at p.49.
[267] President Ford submitted 4, President Carter 1, President Reagan 14, President George H. W. Bush 7, President Clinton 60, President George W. Bush 39, and President Barack Obama (at least) 11; see Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at p.14.
[268] Curtis A. Bradley & Jack L. Goldsmith "Congressional Authorization and the War on Terrorism" 118 *Harvard Law Review* 2047-2133 (2005) at p.2090.
[269] The War Powers Resolution expressly provides that authorization should not be inferred from appropriations; *cf* Memorandum from Randolph D. Moss, Assistant Attorney General, to Janet Reno, Attorney General "Authorization for continuing hostilities in Kosovo" (Dec. 19, 2000); Louis Fisher, *Presidential War Power*, (University Press of Kansas, 2013) at p.199.

On 30 April 1999, Representative Tom Campbell and other members of the House filed a suit in federal District Court seeking a ruling requiring the President to obtain authorization from Congress before continuing the air war.[270] The petitioners contended that the President was in violation of the *War Powers Resolution* requiring a withdrawal of U.S. forces after 60 days in the absence of congressional authorization. The President maintained that the War Powers Resolution was unconstitutional. In dismissing the suit, District Court Judge Friedman noted that, as Congress had not acted as a whole to order the withdrawal, there was no 'constitutional impasse' or 'actual confrontation'.[271] This result was affirmed on appeal.[272] The Supreme Court refused *certiorari*.[273]

The bombing campaign lasted 78 days. The NATO-led peacekeeping Kosovo Force entered Kosovo on 12 June 1999. The 60-day (intended) time limit had well expired by then without formal notification or attempted withdrawal of US forces.[274]

***Libya 2011***

On 21 March 2011, President Obama submitted to Congress, "consistent with the War Powers Resolution", a report stating that on 19 March he had directed US military forces to commence "operations to assist an international effort authorized by the United Nations (U.N.) Security Council … to prevent a humanitarian catastrophe … in Libya".[275]

The President's position was that the intervention was undertaken "pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive" and was justified in the "national security and foreign policy interests" of the United States.

On 1 April 2011, the Office of Legal Counsel (OLC) of the US Justice Department issued a 14-page memorandum opinion entitled "Authority to use Military Force in Libya".[276] The President's legal authority to direct military force in Libya was said to turn on two matters: (i) whether the operations would serve sufficiently important national interests; and (ii) whether the operations would be sufficiently extensive in "*na*ture, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Constitution.[277] In respect of each issue, the opinion of the OLC was that the intervention was justified.[278]

It is notable that the *War Powers Resolution* was only mentioned twice in the Memorandum. Rather than discussing the need for authorization or the impending time limit for withdrawal

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[270] *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999); see also Grimmett, R.F., *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at pp.4-6.
[271] *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) at p.43.
[272] *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) in which the political question doctrine was also relied upon: "*in my view, no one is able to bring this challenge because the two claims are not justiciable. We lack "judicially discoverable and manageable standards" for addressing them, and the War Powers Clause claim implicates the political question doctrine*" (Judge Siberman, concurring).
[273] 531 U.S. 815 (2000).
[274] Brendan Flynn, "The War Powers Consultation Act: Keeping War Out of the Zone of Twilight", 64 *Cath. U. L. Rev*. 1007 (2015) at p.1032.
[275] R.F. Grimmett, *War Powers Resolution: Presidential Compliance,* Congressional Research Service (September 25, 2012) at pp.11-12.
[276] US Justice Department, Office of Legal Counsel, "Authority to Use Military Force in Libya," April 1, 2011 (hereinafter, the "Memorandum").
[277] Page 10 of the Memorandum.
[278] Page 13 of the Memorandum.

of forces, it was said that the WPR's structure "*recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces*" into hostilities or circumstances presenting an imminent risk of hostilities.[279] That is, rather than being seen as a fetter on Presidential power, the *War Powers Resolution* was identified as empowering the President to act unilaterally.

On 3 June, 2011, the House passed a resolution (268:145) expressed in terms that "the President shall not deploy, establish or maintain the presence of units and members of the United States Armed Forces on the ground in Libya" except to rescue members of the Armed Forces.[280]

On 15 June 2011, well past the 60 day limit in the War Powers Resolution, the Administration submitted report describing the US actions in Libya together with a statement that the President was of the view that "the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision".[281]

That is, the President interpreted the term "hostilities" - which was intended to be broad enough to trigger the war powers clock in all forms of conflict – such that the War Powers Resolution is left without any real operative force, and is amenable to the most transparent stratagems of circumvention.[282]

***Conclusion to Part 2***

The passage of the *War Powers Resolution* was intended to "rein in a presidency run amok", and to reassert congressional prerogatives over foreign policy-making.[283] However, it has largely proved ineffective.[284] Every president since Richard Nixon, Democrat and Republican alike, has refused to recognize the WPR's constitutionality.

John Hart Ely attributes the failure to rein the Executive in to "a combination of presidential defiance, congressional irresolution, and judicial abstention"."[285] Congress's powers of appropriations and spending, together with the power of impeachment, have not proved to be effective checks.[286] It remains the case that the present system has seen the Executive assume

[279] Page 8 of the Memorandum.
[280] H.Res. 292.
[281] R.F. Grimmett, *War Powers Resolution: Presidential Compliance*, Congressional Research Service (September 25, 2012) at p.13.
[282] If there is a positive to be found in this experience, it is that there was at least a form of dialogue being undertaken between the political branches which might in part be attributed to the terms of the Resolution.
[283] Howell, W.G. & Pevehouse, J.C., *While Dangers Gather – Congressional Checks on Presidential War Powers*, (Princeton University Press, 2007) at pp.4-6.
[284] Each of Ely, Fisher, and Ackerman & Hathaway (*supra*) reach this conclusion.
[285] John Hart Ely, "Suppose Congress wanted a War Powers Act that Worked", *Columbia Law Review*, Vol 88, Nov 1988 No.7, 1379-1431 at p.1381: "*the President either has not reported under section 4(a) or has failed to specify what he is filing is a section 4(a)(i) "hostilities" report, thus avoiding the 60-day clock*".
[286] B. Ackerman & O. Hathaway "Limited War and the Constitution: Iraq and the Crisis of Presidential Legality" 109 *Mich. L. Rev*. 447 (2011): "*Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding.. successes have been so erratic and unpredictable that they will have little deterrent effect on future assertions of presidential unilateralism*", at p.485.

the ascendency on the question of war-making powers.[287] Congress's attempts to arrest the gravitational pull toward executive hegemony in American war-making, including by enacting the *War Powers Resolution*, have not had their intended effect.[288]

However, observation that the Constitution was intended to be an 'invitation to struggle' for the privilege of directing American foreign policy appears axiomatic when viewed through the lens of a system expressly designed to counter ambition with ambition.[289] In reality, the subject matter of war powers should not be seen as a discrete head of power within the Constitution, divorced from its surroundings. Von Clausewitz's famous aphorism in this sense becomes particularly apposite.[290] The power to engage in armed conflicts forms but a part of the far broader spectrum of stratagems that comprise modern statecraft. In modern terms, power is understood in terms of influence: threats of war, diplomatic recognition, intelligence operations, foreign aid, international agreement making, and dialogue are the true determinants of war and peace.[291] If that proposition is accepted, then it may disclose a much more complex interaction of law and strategy than is often assumed in war powers debates, and open up the interpretive debate to the introduction of functional considerations.[292]

The constitutional text should, however, always serve as a focal point to solve such problems of inter-Branch co-ordination.[293] When assessed by reference to text, history, and structure, the Framers and "We the People" who ratified the Constitution well understood the purpose of the Declare War Clause: that is, absent sudden invasions, only Congress can determine when to commit the nation to war.

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[287] Bruce Ackerman warned that, "*almost 40 years ago, Arthur Schlesinger Jr. sounded the alarm in The Imperial Presidency (1973). Yet the presidency has become far more dangerous today*": Ackerman, B., *The Decline and Fall of the American Republic*, (The Belknap Press, 2013 ed) at p.188.

[288] W. T. Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, (University Press of Virginia, 1981) at p.261.

[289] Edward S. Corwin, *The President, Officer and Powers 1787-1957* (NYU Press, 1957) at p.171; *The Federalist* No. 51 (Madison): "*Ambition must be made to counteract ambition*".

[290] General Carl von Clausewitz *On War* (translated by Colonel J.J. Graham, 1909 reprint): "*We see, therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means*", at Chapter 1, Section 24.

[291] See Travers McLeod, *Rule of Law in War* (Oxford University Press, 2015) at p.18.

[292] Matthew C. Waxman, *The Power to Threaten War*, The Yale Law Journal, 123:1626, 2014, at p.1682; see also *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394 (1928) at p.406: "*the constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental co-ordination*".

[293] Jack M. Balkin, *Living Originalism*, (The Balknap Press, 2011) at pp.50-51; see also Akhil Reed Amar, *America's Unwritten Constitution*, (Basic Books, 2013) at Chapter 3, p.108ff (Interpretive approaches should have at their heart legal coherence and fidelity to the text and the Founding principles).

## Part 3 – War Powers in Australia

### *Introduction*

Over 250 years ago, the Parliament of Great Britain passed the *Stamp Act 1765* and the *Tea Act 1773*. These actions placed the Thirteen Colonies in America on the path to revolution and independence. Australia, meanwhile, remained a country populated only by its indigenous peoples. European settlement was still over a decade away. The manifestation of the Australian colonies' desire for sovereignty would take another century. Its ultimate realisation would take even longer.

The Commonwealth Constitution did not come into force until 1901. It was not a Constitution born out of revolution as was the case of the United States. Neither was it a document pervaded by the uncompromising republican sentiments present in 1780s America.

However, when Sir Henry Parkes made his call for the formation of "a great national Government for all Australia" at Tenterfield in 1889, he did so primarily on national security grounds.[294] He deemed the creation of an Australian government as "essential to preserve the security and integrity" of the colonies.[295]

Sir Henry was following a well-trodden path. Alexander Hamilton, when writing as Publius to "the People of the State of New York" a century earlier in December 1787, similarly identified the "common defense" as the foremost reason why New York should join the other states who had ratified the newly minted U.S. Constitution in order "to form a more perfect Union".[296]

### *Early National Security Concerns*

The issue of colonial defence assumed some prominence from around 1878 when the Secretary of State for the Colonies, Lord Carnarvon, commissioned a report upon the defences of the Australian colonies. At that stage, naval defence was left almost entirely to the Imperial Government. The result was a joint undertaking between Great Britain and the Colonies to fund an auxiliary fleet. Each colony retained a separate domestic military force consisting mainly of partly paid or unpaid volunteers.[297]

Whilst the issue of common tariffs had always been a major stumbling block on the path to Federation, the "real motive" underpinning the need for a union was the concern around increased foreign activity in the Pacific.[298] The Australian colonies became aware that the Germans had designs on New Guinea, and the French were making claims over the New Hebrides, and to create a "Devil's Island" type penal colony in New Caledonia.[299]

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[294] Ronald Norris *The Emergent Commonwealth* (Melbourne University Press, 1975) at p.109.
[295] On 24 October 1889 at the Tenterfield School of Arts, Tenterfield, NSW.
[296] *The Federalist* No. 23; Preamble to the US Constitution.
[297] In 1889, Major General Sir J. Bevan Edwards was commissioned by the Home Government to inspect the military forces and defences of the Australian colonies and to report on them: John Quick & Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Co, London, 1901), Vol 1, pp.100-105 ("Quick & Garran"). Every proposal for any kind of Federation had failed up until 1883, notwithstanding a number of intercolonial conferences from 1863-1880: Quick & Garran at p.117.
[298] Quick & Garran, Vol 1, pp.100-105; Every proposal for any kind of Federation had failed up until 1883, notwithstanding a number of intercolonial conferences from 1863-1880.
[299] Thomas Just *Leading Facts Connected with Federation* (The Mercury, 1891) at pp.49-50; Quick & Garran, Vol. 1, p.110

On 28 November 1883, a "convention" of all seven colonies plus Fiji met in Sydney. Samuel Griffith, Premier of Queensland, submitted a resolution, which was adopted, that it was "desirable that a Federal Australasian Council should be created for the purpose of dealing with the following matters: 1. The marine defences of Australasia, beyond territorial limits".[300]

In 1887, the *Australasian Naval Defence Act* (Imp) was passed to give effect to an agreement that the Imperial Government construct and equip a fleet of ships that were to be maintained by the Australasian colonies at their expense.[301]

In 1889, General Edwards was sent to Australia to inspect and report upon the defences of the colonies. His report was "one of the strongest arguments ever submitted in favour of the political federation of the Australian colonies".[302] Sir Henry Parkes' Tenterfield speech in the same year spawned a discussion in which all the colonies were interested. It led to an "informal meeting" of the colonies, namely the Melbourne Conference of 1890. The Conference then recommended a national convention; the Sydney Constitutional Convention of 1891.

Despite these origins, the issue of war powers did not feature prominently in the Constitutional Debates.[303]

***Background to the Constitutional Clauses dealing with War Powers***

Section 68 of the *Commonwealth Constitution* provides:

> "The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."[304]

This is not a provision that was intended to authorise the Governor-General to declare War. It was based on the Commander-in-Chief clause in the U.S. Constitution which grants the President the authority to command the military, while Congress retains the exclusive power to declare War.

Publius, in *The Federalist* No. 69 (written by Alexander Hamilton) said of the Commander-in-Chief clause that:

> "The President is to be Commander-in-Chief of the Army and Navy of the United States. In this respect his authority ... would amount to nothing more than the supreme command and direction of the Military and Naval Forces, as first General and Admiral of the Confederacy; while that of the British King extends to the *declaring of war* and to the *raising* and *regulating* of fleets and armies; all of which, by the *Constitution* under consideration would appertain to the Legislature."

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[300] Quick & Garran Vol 1, pp.110-111; p.561; Sir Henry Parkes had changed his mind about the desirability of a Federal Council and, as a result, New South Wales did not form part of the new scheme. When the Federal Council was established in 1885. The subject of "general defences" was a topic able to be referred to the Federal Council.
[301] Quick & Garran Vol. 1, p.563.
[302] Quick & Garran Vol 1, p.563.
[303] Ronald Norris *The Emergent Commonwealth* (Melbourne University Press, 1975) at pp.117, 119.
[304] This is based on s.15 of the *British North America Act of 1867*.

Quick and Garran noted that the vesting of the command of the naval and military forces was "one of the oldest and most honoured prerogatives of the Crown, but it is now exercised in a constitutional manner".[305]
The principal source of executive power is found in s.61 of the Constitution. It provides that:

> "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

The Constitutional Committee of the 1891 Convention included in its list of issues to be decided, an Executive with powers "correlative to those of Legislature".[306] Inglis Clark's initial draft provided that "The Executive power and authority of the Commonwealth is vested in the Queen, and shall be exercised by the Governor-General as the Queen's Representative".[307]

A subsequent draft was amended by the Convention on Samuel Griffith's motion in April, 1891 to read: "The Executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution, and the Laws of the Commonwealth".[308]

The 1891 draft Constitution failed to receive support from the colonies, but formed the working document at the Adelaide Convention in 1897. Edmund Barton there characterised the executive power of the Crown as "primarily divided into two classes". He first identified "those exercised by the prerogative". Second were "the offsprings of Statutes", namely "those which are ordinary Executive Acts, where it is prescribed that the Executive shall act in Council".[309]

As finally presented to the Melbourne Convention in 1898, the provisions which were to become s.61 of the Constitution were embodied in two clauses, neither of which referred to "maintenance". The change into a single clause in the form of s.61 was made in the Drafting Committee without debate.[310]

To compound the problems with understanding the drafting of s.61, there is no clear evidence of a common understanding held by the Framers as to its scope.[311] The text of s.61 therefore remains "barren ground for any analytical approach".[312]

Section 51(vi) of the Constitution provides that that the Commonwealth Parliament has the power to make laws for the peace, order and good government with respect to:

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[305] Quick & Garran, Vol 2, p.713; The authors go on to query "Of what use would be the command without the grant of the supplies necessary for its execution?".
[306] John M. Williams *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at p.53.
[307] This draft was based on s.9 of the *British North America Act 1867*; John M. Williams *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at p.80.
[308] Official Report of the National Australasian Convention Debates, (Sydney), 6 April 1891 at p.777.
[309] Official Report of the Australasian Federal Convention Debates, (Adelaide) 19 April 1897 at p.910.
[310] John M. Williams *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) at p.1091.
[311] *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 at [60] (French CJ).
[312] Nicholas Condylis "Debating the Nature and Ambit of the Commonwealth's non-statutory executive power [2015] *Melbourne University Law Review*, Vol 39: 385 at p.432, citing Leslie Zines "The Inherent Executive Power of the Commonwealth" 2005, 10 *Public Law Review* 279.

> "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".

The early draft of the clause in the Commonwealth Bill of 1891 provided that power related to "the military and naval defence of the Commonwealth and the several States, and the *calling out* of the forces to execute and maintain the laws of the Commonwealth, or of any State or part of the Commonwealth".[313] Similar wording referring to the "calling out of the forces" was maintained through to the Adelaide session in 1897.

The expression "calling out" suggested that, as is the case with the U.S. Constitution, the question of committing the military forces to armed conflict lay with the parliament. However, the word "control" was substituted for "calling out" at the Melbourne session in 1898.[314]

Quick and Garran were in no doubt that the legislative power which ultimately found expression in s.51(vi) was one limited to "defence". The authors said of the parliament that:

> "It could not enter upon naval and military enterprises solely with a view to foreign conquests and aggression; its power is to be used for the defence of the Commonwealth and of the several States, and for the preservation of law and order within its limits."[315]

Indeed, the understanding amongst the Framers was that the legal power to declare war formed no part of the legislative power in s.51(vi), nor the executive power under s.61. The power to make war had traditionally been part of the Royal prerogative that was only able to be passed from the King to the Governor-General by instrument under s.2 of the Commonwealth Constitution.[316]

***Early views***

Sir Anthony Mason has noted that "the Constitution did not in 1901 enable Australia to enter into a treaty with a foreign State or make a declaration of war".[317] This encompassed the lack of both legislative and executive power to take such actions.

In *Farey v Burvett* (1916) 21 CLR 433, Isaacs J was of the view that, whilst some of the King's prerogative powers were included in s.61 of the Constitution, the power to create war was not one of them: "The creation of a state of war and the establishment of peace necessarily reside in the Sovereign himself as the head of the Empire".[318]

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[313] Emphasis added.
[314] Quick & Garran Vol. 1, p.561.
[315] Quick & Garran Vol. 1, p.564; It is also noted that s.15(vi) was conceived as an exclusive power. Section 114 of the Commonwealth Constitution relevantly provides that: "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force...".
[316] Charles Sampford & Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.355.
[317] Sir Anthony Mason, "The Australian Constitution 1901—1988" *Australian Law Journal*, Volume 62, October 1988, at p.753; Australia (and the other dominions) were given a degree of autonomy in relation to commercial treaties: Senate Legal and Constitutional Affairs Committee, *Trick or treaty? Commonwealth power to make and Implement Treaties* (The Senate, Canberra, November 1995). at [4.10].
[318] *Farey v Burvett* (1916) 21 CLR 433 at 452.

The ratification of the Statute of Westminster in 1942 backdated to 2 September 1939 largely ended the role of the United Kingdom Parliament to legislate for Australia and to control its foreign relations.[319] The war-making prerogative thereafter came to be understood to form part of the s.61 executive powers of the Governor-General. This occurred without an amendment to the Constitution.

The question of where the locus of war making powers resided was not addressed in the course of this process of change. For example, if the power to declare war was a prerogative one, was it amendable to control by the parliament? That is, did parliament also come to possess power over the subject matter of war where it had previously lacked it? If not, was the prerogative to be exercised by the "Governor-General as the Queen's representative" as contemplated in s.61, or otherwise?

There is no reference to "Governor General in Council" in sections 61 or 68. Quick and Garran[320] state that the distinction made in the Constitution between the Governor-General and the Governor-General in Council was based on differences between the nature of the various powers. Those regarded within the prerogative were granted to the Governor-General alone, and others not in that category to the Governor-General in Council.[321] If true, that would mean the decisions concerning war powers were not intended to be exercised "with the advice of the Federal Executive Council".[322]

History does not identify a single unifying theme when it comes to the constitutional exercise of war powers. This largely reflects the gradual development of Australia as a sovereign nation. With sovereignty attained, however, a clearer theme involving the arrogation of war powers to the Executive emerges. At the same time, the constitutional roles of the Governor-General and the Parliament have correspondingly diminished.

As will be seen, what remains is hardly recognisable from the text of the Constitution.

***A history of Australia's commitment to major conflict***

From Federation, the legal position was understood to be that, if part of the British Empire was at war, then the whole Empire including Australia must also have been at war.[323] When Australia achieved autonomy in the course of WWII, the Executive branch determined Australia's commitment to armed conflict.

The Executive has made some attempts to inform the parliament of the basis of its decisions. Such 'attempts' are invariable ex post facto the determination to commit troops to hostilities. There is no constitutional right for parliament to impose an *ex ante* veto. Indeed, the Executive's decisions that are laid before the Parliament for debate have always been debated

[319] *Statute of Westminster Adoption Act 1942* (Cth).
[320] Quick & Garran at p.406.
[321] See also James Stellios, "The Zines's, The High Court and the *Constitution*" (6th edition, The Federation Press, 2015) at p.373; Zines disputes this could be the case as, for example, s.128 empowers the Governor-General alone to submit a proposal or to alter the Constitution to the electors for their approval.
[322] Section 63 of the Commonwealth Constitution; In Quick and Garran's view, "all matters" relating to the disposition and management of the federal forces were intended to be regulated by the Governor-General with the advice of the Ministry "having the confidence of Parliament": Quick & Garran Vol. 2, p.713.
[323] See (eg) *Farey v Burvett* [1916] HCA 36; (1916) 21 CLR 433 at p.452 (Isaacs J); Although the extent of actual participation in hostilities might be a matter for each Dominion to decide.

occur in the abstract. Motions are typically in terms of whether the papers that are laid before House "should be printed" or taken note of.[324]

***World War I***

The crisis in Europe following the assassination of Archduke Franz Ferdinand in 1914 occurred in the midst of a Federal election campaign.[325] Both Prime Minister Joseph Cook and Labor Opposition Leader Andrew Fisher made campaign statements of support for Britain, should it decide to commit to war.

On 31 July 1914 in a speech at Colac, Victoria, Fisher declared that "should the worst happen, after everything has been done that honour will permit, Australians will stand beside the mother country to help and defend her to our last man and our last shilling".[326]

Almost two days before the British Government declared war on Germany on 4 August 2014, an emergency meeting of Australia's federal Cabinet took place.

The Governor General, Sir Ronald Munro Ferguson, cabled the Colonial Secretary in London offering, in the event of war, the transfer of the Royal Australian Navy to the British Admiralty and an expeditionary force of 20,000 men.[327] The force was to be at the "complete disposal of the Home Government" with Australia meeting all expenses.[328] Prime Minister Cook released this cable to the press, possibly seeking to gain an advantage over his counterpart in the upcoming poll.

War was finally declared when British PM Herbert Asquith and four of his Ministers, who had deliberated at 10 Downing Street on the evening of Tuesday, 4 August, decided that Britain should commit to war.[329] Asquith summoned the Privy Council. With very short notice, three Privy Councillors (none of them elected) joined the King at Buckingham Palace to declare war.

Thus, it was the case that the decision to commit to war was not made by the Cabinet, nor the Parliament, but by a powerful, political clique. By that stage, Australia had already committed itself to war contingent only upon Britain's own decision.

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[324] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.13.

[325] The poll was held on 5 September 2014.

[326] Jonathan Curtis "To the Last Man – Australia's entry into World War I" *Parliamentary Library Research Paper Series* (31 July 2015) at 2.

[327] Overall, 324,000 members served overseas with the Australian Imperial Force. From a population of fewer than five million, Over 415,000 signed up to serve. By war's end, over 60,000 were killed and 156,000 wounded, gassed, or taken prisoner. Australia suffered the highest proportional losses of any of the forces within the British Empire (19% losses in terms of the forces committed, and far higher in terms of those embarked): Jonathan Curtis "To the Last Man – Australia's entry into World War I" *Parliamentary Library Research Paper Series* (31 July 2015) at p.3.

[328] Charles E.W. Bean *The Story of ANZAC, Official History of Australia in the War of 1914-1918*, Volume 1 (Angus and Robertson, 1939) pp.28-29.

[329] After Germany's declaration of war upon Russia on Saturday, 1 August 1914, those favouring intervention in Cabinet pressed for British Naval assistance to France. Four of Prime Minister Asquith's Ministers submitted their resignation letters. On the morning of Tuesday, 4 August 2014, German troops invaded Belgium. This shifted British opinion in favour of war. Bound by the Treaty of 1839 to respect Belgian neutrality, the issue remained whether Britain would commit to war or press for the matter to go to international arbitration at The Hague. Cabinet decided to send a cable to Berlin, urging Germany to respect Belgian neutrality and demanded an answer by midnight on 4 August 2014.

In the final days of him Prime Ministership, Joseph Cook announced Australia's involvement in the Great War on the basis that "When the Empire is at war, so is Australia at war".[330]

A double dissolution election was held on 5 September 1914. The Fisher Government was elected. The Governor-General opened the new parliament on 8 October 1914, and the parliament debated a motion to agree to the Governor General's address. The question was resolved in the affirmative, without division, in the House of Representatives and the Senate.[331]

***World War II***

Australia learned of Britain's declaration of war against Germany by short-wave wireless at 8pm on 3 September 1939.

By 9pm that same night, Prime Minister Robert Menzies took to the radio to address to the nation. He stated that:

> "Fellow Australians, it is my melancholy duty to inform you officially that, in consequence of the persistence of Germany and her invasion of Poland, Great Britain has declared war upon her and that, as a result, Australia is also at war."[332]

Parliament had adjourned on 16 June 1939. It was recalled on 6 September 1939. Menzies delivered a ministerial statement on the war in Europe and tabled a White Paper containing texts of documents exchanged between the United Kingdom and Germany.

A motion that "the paper be printed" was debated in both Houses. John Curtin, the opposition leader, queried why the Prime Minister had not seized this first opportunity of meeting the Parliament to outline "the intentions of the Government in respect of the defence of this Commonwealth". Curtin then read a statement that the democratic rights of the people must be safeguarded to the maximum and, to ensure that this be done "it is essential that the Parliament of the Commonwealth should remain in session".[333] The Debate on the ministerial statement was then adjourned in the House of Representatives (but passed in the Senate).

When the Labor Party came into power in 1941, it considered that the effect of the *Statute of Westminster* and the equality of status provisions in the Balfour Declaration meant that the nation had assumed the power to declare war in its own right.[334]

Australia made declarations of war against Finland, Hungary, Romania and Japan in 1941. However, to ensure that those declarations were valid, a formal delegation of the war-making

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[330] Charles Sampford and Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.357.

[331] The motion moved was "That the Address be agreed to by the House": Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at pp.7-8.

[332] Charles Sampford and Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No. 2, at p.358.

[333] *Commonwealth Parliamentary Debates, House of Representatives*, 6 September 1939, pp.36-37.

[334] The 1926 Balfour Declaration had provided that it was "an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations" that the Governor-General of a Dominion is the representative of the Crown but not the representative or agent of "his Majesty's Government in Great Britain".

power of the King to the Governor-General was obtained under s.2 of the Commonwealth Constitution. On 16 December 1941, the Attorney-General, Dr H.V. Evatt informed the House of Representatives that:

> "A Full Cabinet meeting was held [on] 8 December, and it was unanimously decided that a declaration of war against Japan in relation to the Commonwealth and its Territories should be made to operate from 5 o'clock on that date."[335]

Dr Evatt then went on to refer to the delegation of prerogative power pursuant to s.2 of the Commonwealth Constitution having been undertaken because:

> "the matter was too important and too urgent to invite any legal controversy. We, therefore, decided to make it abundantly clear that that there was an unbroken chain of prerogative authority extending from the King himself to the Governor-General."[336]

In 1951, it was the Governor-General who signed off on a peace with Germany.

The formal declarations of war made in 1941 and 1942 are the only times that the Governor-General acting on ministerial advice has officially declared war against an enemy country.[337]

***Korea***

In June 1950, the Security Council passed a Resolution that the members of the United Nations "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area".[338]

A commitment to provide the services of the Australian Navy was made by Sir Robert Menzies to the British Prime Minister, Clement Attlee, on 29 June 1950. Subsequently, there was a decision to commit ground troops.

Parliament was recalled on 6 July 1950. A Motion, moved by the Prime Minister, sought approval of the action taken by the Government, in placing at the disposal of the United Nations the forces that had been indicated in the statement made by the Prime Minister. Opposition Leader, Ben Chifley, indicated that the Opposition would support the Motion. The Motion was also debated and approved in the Senate.[339]

It is not known what role, if any, the Governor General played in that process.[340]

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[335] *Commonwealth Parliamentary Debates, House of Representatives*, 16 December 1941, Vol 169, p.1078.
[336] *Commonwealth Parliamentary Debates, House of Representatives*, 16 December 1941, Vol 169, pp.1088-1089.
[337] Under section 4 of the *Defence Act 1903*, the Governor-General may proclaim a 'time of war'; Australia has since become involved in overseas incidents in Malaya, Malaysia, Vietnam, Somalia, Cambodia, East Timor, Iraq (in 1991 and 2003), Bougainville, Bosnia, Rwanda, Afghanistan, and Syria.
[338] U.N. document S/1511 of 27 June 1950. The vote was seven (including the U.S.) in favor, to one (Yugoslavia) opposed, with two (Egypt and India) not voting, and one member (U.S.S.R.) absent.
[339] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.13.
[340] Charles Sampford and Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.368, footnote 74.

### *Vietnam*

Australia entered its longest conflict with neither a formal declaration of war nor as a result of a United Nations Resolution (as had been the case with Korea).

Australia provided 30 military advisers to Vietnam in 1962 to train the South Vietnamese Resistance to the Communist North. There was no Statement to Parliament in respect of the initial commitment of Advisers in 1962. The announcement that "Australia was sending a group of military instructors" was made by way of a press release by the Minister for Defence, Athol Townley, on 24 May 1962. Parliament had adjourned on 17 May 1962 and did not meet again until 7 August 1962.[341]

On 2 November 1964, less than three months after the Gulf of Tonkin Incident, Prime Minister Robert Menzies announced the introduction of a new scheme for peacetime conscription by which 20-year old males were chosen by a ballot of birth dates to serve for 2 years in the Australian Army. This included overseas service.

Australia formally offered a commitment of a battalion of troops to the U.S. on 13 April 1965, and the offer was accepted.[342] In his ministerial statement of 29 April 1965, Menzies had said that "the Australian Government is now in receipt of a request from the Government of South Vietnam for further military assistance".[343] In response, the Leader of the Opposition, Arthur Calwell, said "we oppose the Government's decision to send 800 men to fight in Vietnam. We oppose it firmly and completely".[344]

Despite the opposition, the motion 'that the paper be printed' was resolved in the affirmative in the House (60:44).[345] The motion 'that the Senate take note of the paper' was also resolved in the affirmative (without division).[346]

No formal declaration of war was made, and the historical accounts make no mention of the involvement of the Governor-General.[347] Almost 60,000 Australians served in Vietnam over the 10-year conflict. Some 521 died and more than 3,000 were wounded.

### *First Gulf War*

A major shift in practice occurred in respect of Australia's involvement in the First Gulf War.

Prime Minister Bob Hawke placed on parliamentary record the train of events that led to the decision to commit Australian armed forces to combat. United Nations Security Council

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[341] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.16.
[342] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.17.
[343] Commonwealth Parliamentary Debates, House of Representatives, 29 April 1965, p.1060.
[344] Commonwealth Parliamentary Debates, House of Representatives, 4 May 1965, p.1102.
[345] Commonwealth Parliamentary Debates, House of Representatives, 6 May 1965, p.1288.
[346] Commonwealth Parliamentary Debates, Senate, 24 & 25 May 1965, p.1211.
[347] Charles Sampford and Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.369, footnote 75.

Resolution 678 was identified as providing legal authorisation for the use of military force to liberate Kuwait.[348]

On 21 January 1991, the Prime Minister addressed the House and stated:

> "On 17 January, after consulting senior Ministers, I gave effect to that decision by authorising our Naval Task Force in the Gulf to participate in such operations. I then formally notified the Leader of the Opposition (Dr Hewson) and the Governor-General of the Government's action".[349]

He explained that the decision to commit Australian armed forces to combat "is of course one that constitutionally is the prerogative of the Executive".

The motions moved were that the House and the Senate "take note of the paper". The Opposition leader, Mr John Hewson, indicated his Party's support for the motion, but was critical of the Government for failing to consult "prior to its original decision to deploy Australian defence forces to the Gulf".[350]

The Governor-General, Mr Hayden, apparently made it clear that he would have had no trouble signing the relevant instruments, but that he was the one to do so.[351]

Yet the Prime Minister's statement to the House appears to indicate that, although Cabinet was involved in the sense of being consulted, the decision to commit troops was entirely in the hands of the Prime Minister.

### *Afghanistan*

Following the attacks in the USA, Prime Minister John Howard announced at a press conference on 4 October 2001 Australia's commitment to the Military Coalition led by the United States.[352]

Bombing of targets in Afghanistan commenced on 7 October 2001. On 8 October 2001 Federal Parliament was dissolved. A Federal election was held on 10 November 2001. The 40th Parliament next met on 12 February 2002.

There was no statement to parliament.[353]

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[348] The Security Council passed Resolution 678 on 29 November 1990. It gave Iraq until 15 January 1991 to withdraw from Kuwait and empowered states to use "all necessary means" to force Iraq out of Kuwait after the deadline. Iraq did not meet the deadline.

[349] *Commonwealth Parliamentary Debates, House of Representatives*, 21 January 1991, p.2.

[350] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.18.

[351] Charles Sampford & Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.370.

[352] It should be noted that Prime Minister Howard invoked Article IV of the ANZUS Treaty. However, its terms provide that where there is an "armed attack in the Pacific area" that each of Australia, New Zealand and the United States agreed to "act to meet the common danger in accordance with its constitutional processes".

[353] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.20.

***The Second Gulf War***

On 10 January 2003, Prime Minister Howard stated at a press conference that "some forward deployment" of elements of the Australian Defence Force may occur.

On 22 January, the Defence Minister, Robert Hill, announced the Government's decision to send the HMAS *Kanimbla*, elements of the Special Forces and a RAAF Recognisance Team to the Middle East.

On 4 February, the Prime Minister delivered a ministerial statement to explain the "government's belief that the world community must deal decisively with Iraq".

On 1 March 2003, a motion was moved by the Prime Minister that the "House condemns Iraq's refusal to abide by UN Security Council resolutions and endorses the government's decision to commit ADF elements to the international coalition of military forces".[354] Leader of the Opposition, Simon Crean, responded that "Labor opposes your commitment to war".[355]

On 17 March, the Prime Minister gave a press conference in which he stated that Federal Cabinet would meet that evening to discuss Australia's military participation in Iraq.

On the evening of 17 March 2003 (EST), President George W. Bush set a 48-hour deadline for Iraqi President Saddam Hussein to leave Iraq or face war.

The war in Iraq commenced on 20 March 2003 AEST. Australians were involved in those combat operations.

The House of Representatives affirmed the Motion of 1 March on 20 March 2003 (80:63).

On the same date, the Senate debated the Government's Motion. The Motion was amended to a call for the Australian troops to be withdrawn and returned home. This was passed in the affirmative (37:32).

The Governor-General Dr Peter Hollingworth's involvement was almost non-existent. The Governor-General sought clarification from the Attorney-General as to his role in the process. The Attorney did not respond. The Prime Minister, however, did. He told Governor-General that his predecessors had not been involved in past decisions and that no involvement was necessary. The Prime Minister gave the Governor-General an undertaking to bring the decision to go to war to the Federal Executive Council "for noting".[356]

A fundamental decision was made to commit Australian military forces to a conflict which did not immediately trigger any "defence" issues in a strict sense. Cabinet made a decision on the evening of 17 March 2003 and the matter was debated after the event.

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[354] *Commonwealth Parliamentary Debates, House of Representatives*, 18 March 2003, p.12,505.
[355] *Commonwealth Parliamentary Debates, House of Representatives*, 18 March 2003, p. 12,512.
[356] Charles Sampford & Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at pp.373-374; Australia had also ceased accepting the compulsory jurisdiction of the International Court of Justice in March 2002, such that Iraq was thereafter precluded from taking the matter to that Court to have the war declared as illegal. If this was done while troops were still amassing outside of Iraq, it may have fundamentally altered legal opinions.

If there was any constitutional role to play for the Parliament, then no decision was forthcoming as the Parliament voted to approve the deployment and the Senate voted to have the troops withdrawn and returned home. No motion was passed by both Houses endorsing the government's decision to commit the military to the Iraq conflict.

Section 61 of the Constitution formally vests prerogative powers in the Governor-General, yet he was told to in effect stay out of the matter. What if the Governor-General had legitimate concerns about the legality of war?

The central prerogative power has been assumed by the Prime Minister, with some unspecified involvement of his Cabinet. The purported legal means by which the decision to go to war in Iraq appears to have been implemented is by action taken by the Defence Minister and transmitted through the chain of command under the putative authority of the *Defence Act 1903* (Cth).[357] However, there are strong reasons to dispute that any such legal authority existed.[358]

Two Inquiries were held after the Iraq conflict. On 18 June 2003, Senator Faulkner referred an inquiry to the ASIO, ASIS and DSD Committee, requiring it to examine the intelligence upon which the Government relied in committing the country to war. The Committee received some 24 submissions and held five hearings (only one being public) and reported to the Parliament on 1 March 2004. The Committee concluded:

> "The case made by the Government was that Iraq possessed WMD in large quantities and posed a grave and unacceptable threat to the region and the world, particularly as there was a danger that Iraq's WMD might be passed to terrorist organisations. This was not the picture that emerges from an examination of all the assessments provided to the Committee by Australia's two intelligence agencies".[359]

The Government had relied upon both flawed U.K. and U.S. intelligence to advance the case for war, notwithstanding the doubts expressed by the Australian intelligence agencies.

The cost of the Iraq war was enormous on any account.[360] The conflict destabilised the Middle East through the mass migration of displaced persons, widespread sectarian violence, and the mobilisation of an international terrorist organisation which had its roots in Iraq.

The process of checks and balances that should exist in a system of parliamentary democracy overlaid by a constitutional separation of powers failed the Australian public.

***Humanitarian Interventions***

The Portuguese colony of East Timor was invaded by Indonesia in 1975. In 1999, Australia organized and led the International Force East Timor (Interfet), a non-UN force operating in

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[357] Sections 8, 9 and 9A; Charles Sampford & Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) Vol 18 No 2, at p.377.

[358] For example, Sections 8 and 63 of the *Defence Act 1903* (Cth) attempt achieve a delegation of the war prerogative from the Governor-General to the Minister for Defence: Geoffrey Lindell "The Constitutional authority to deploy Australian Military Forces in the Coalition war against Iraq" *Constitutional Law and Policy Review*, Vol 5, No 3 (November 2002) at p.47.

[359] Parliamentary Joint Committee 2004 at p.93.

[360] "$3b and rising rapidly: cost of the war to Australian taxpayers" *The Sydney Morning Herald*, 20 March 2007.

accordance with UN resolutions designed aid a vote for independence. Interfet's role was to establish peace and security, protect the UN Mission established to conduct the vote, and to facilitate humanitarian assistance operations. Australia contributed a large military presence.

In a war of national defence, after war is declared, the commander-in-chief of the military determines the best way to defeat the enemy. For example, just days after the nation was attacked on 9/11, Congress passed a joint resolution authorising the President to pursue the perpetrators.[361]

However, in a humanitarian intervention, the goals are usually ambiguous. Questions arise as to how victory is to be defined, whether ground troops should be used, where responsibility for what goes on in the country lies, and how much risk members of the armed services are to take for the sake of civilians. Governments are less willing to expend political capital in such situations. On this basis, it has been said that the public only weakly supports humanitarian intervention.[362]

Since 1947, Australia has provided more than 65,000 personnel to more than 50 United Nations and other multilateral peace and security operations.[363] In 2014, the Security Council resolved to make policing an integral part of the mandates of the United Nations Peacekeeping Operations and Special Political Missions. This is an emerging concept which has not, to date, found any expression in the terms of the United Nations Charter.[364]

The Responsibility to Protect is a doctrine justified on purely humanitarian grounds but which involves an intervention in the domestic affairs of sovereign nations. Humanitarian crises such as Darfur, Rwanda and Kosovo are examples of humanitarian missions which invariably involved a military dimension to them.[365]

It remains a principle susceptible to the criticism that States could readily mask self-interested intervention under the guise of humanitarian concerns.[366] Yet it is a principle which has invoked the Australian national interest as a basis to justify military deployments. Such deployments do not readily fit within traditional conceptions of the "defence" power, or the war prerogative.[367]

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[361] Authorisation for Use of Military Force against Iraq Resolution of 2002, PUB L. No 107-243, 116 Stat. 1498 (2002); Yet the mission in Iraq lacked clear objectives and the military quickly became bogged down in a full-scale occupation and without an exit strategy. Richard Hanania "Humanitarian Intervention and the War Powers Debate" (2012) *The Journal Jurisprudence*, 47 at p.92.

[362] Richard Hanania "Humanitarian Intervention and the War Powers Debate" (2012) *The Journal Jurisprudence*, 47 at pages 87-89 ("support for almost any question that mentions peacekeeping is generally low and very stable").

[363] Nina Markovic, "Australia's Engagement with the United Nations" Parliamentary Library Briefing Book; In August 2008, the Senate Standing Committee on Foreign Affairs, Defence and Trade issued a report on Australia's involvement in peacekeeping operations. The Committee identified a number of criteria against which decision-makers should assess whether or not to commit to peace-keeping operations, including whether there was an adequate "exit strategy".

[364] No. 2185, 20 November 2014.

[365] International Commission on Intervention and State Sovereignty, "The Responsibility to Protect" (2001).

[366] Matthew C. Waxman "Intervention to Stop Genocide and Mass Atrocities" (Council on Foreign Relations Special Report No 49 (October 2009)) at p.10.

[367] Grotius believed that a sovereign's behaviour could be so egregious that a neighbouring State had a duty to act. However, a premium was placed on abiding by treaties, non-interference, sovereignty and territorial integrity. Hobbes thought that the State existed to provide security for its own people and morality had little to do with its relations with other States: Richard Hanania "Humanitarian Intervention and the War Powers Debate" (2012) The Journal Jurisprudence, 47 at p.60.

***Syria – an example of mission creep***

By way of a media release on 14 August 2014, Prime Minister Tony Abbott announced that an RAAF C130 Hercules was engaged in an humanitarian mission which involved dropping 10 pallets of supplies in the form of biscuits and bottled water to "Yezidi Civilians trapped on Mount Sinjar encircled by ISIL forces".[368] Mount Sinjar is in northern Iraq, not far from the border of Syria.

However, by Sunday 31 August 2014, the Prime Minister announced that the RAAF would conduct "further humanitarian missions" in the form of transporting arms and munitions at the request of the United States.

By 14 September 2014, the Prime Minister stated that Australia would assist "to counter the ISIL terrorist threat". This involved deploying eight FA-18 aircraft, along with refueller aircraft and early warning and control aircraft. A Special Operations Task Group was also sent to assist military advisers.

On 24 March 2015, Prime Minister Abbott revealed that Australia's aircraft were already providing services to allied aircraft conducting "air operations throughout the theatre, and that includes air operations in Syria".[369]

No parliamentary debate took place before these changes occurred. It is not known whether Cabinet consideration was given to the escalation of Australia's involvement in the conflict.

***The Separation of Executive and Legislative Powers in Australia***

The Constitution was framed so as to closely correspond with the American model in the classical division of powers between the three organs of government.[370] However, the Executive power is exercised across a broad spectrum of constitutional functions, and is imbricated with both judicial and legislative powers.

The Court has recognised Parliament's ability to delegate legislative power and the Executive government's ability to receive it.[371] It has also recognised the existence of non-Chapter III administrative bodies that exercise Executive power in quasi-judicial proceedings which determine the (sometimes fundamental) rights of disputants.[372]

Unlike the U.S. experience, until recently very few cases in Australia had turned on the separation of legislative and executive powers.[373]

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[368] ISIL refers to the Islamic State of Iraq and the Levant (otherwise known as "ISIS" or "Daesh").
[369] "Tony Abbott says Australian military to stay in Iraq for as long as necessary" *Sydney Morning Herald*, 25 March 2015.
[370] *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at p.276 (Dixon CJ, McTiernan, Fullagar & Kitto JJ).
[371] *Victorian Stevedoring & General Contracting Company Pty Ltd v Meakes & Dignan* [1931] HCA 34; 46 CLR 73; For example, "Henry VIII clauses" are statutory provisions purporting to authorise the promulgation of wide-ranging subordinate legislation that can either amend or be inconsistent with the principal statute.
[372] (eg) *Brandy v Human Rights & Equal Opportunity Commission* [1995] HCA 10; 183 CLR 245.
[373] When George Winterton wrote on the topic in 2004 in the Adelaide Law Review, there had been, since Federation, fewer than 10 cases in the High Court concerning s.61. Since that time there has been an upsurge.

***Executive Power: The Royal Prerogative and Section 61 of the Constitution***

By its terms, s.61 it "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth".

No difficulty arises with the notion of executive power being derived from statute (that is, involving the concept of "execution" of laws.[374] However, a number of difficulties in the interpretive approach arise from the term "maintenance" and the activities that may be embraced within it. Additionally, the verb "extends" is also suggestive of a power that is not readily ascertainable.[375]

The interpretative debate has a number of dimensions. Most fundamentally, there are differing views as to whether the non-statutory executive power in s.61 is sourced directly from s.61 itself consistently with the Commonwealth's character and status as a national government (the "inherent view")[376], or whether it is informed by the royal prerogatives (the "common law" view).[377]

Determining the content of 'the prerogative' is also problematic. Blackstone's definition included those powers and rights which the common law recognised as belonging uniquely to the Crown. Dicey expanded this definition to include all those "capacities" shared with natural persons that the Crown could exercise without statutory authorisation.[378] The prerogative powers alone may, in certain circumstances, interfere with the legal rights and duties of others, whereas the capacities are always subject to the general law and do not permit of coercive action.[379]

Professor Winterton conceptualised the ambit of s.61 executive power in terms of its "breadth" and "depth". Breadth refers to the subject matters with respect to which the executive government is empowered to act, having regard to the constraints within the federal system. This dimension is determined by examining the extent of the Commonwealth's legislative competence.[380]

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[374] *Brown v West* (1990) 169 CLR 195 at p.202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

[375] Cheryl Saunders, *The Constitution of Australia: A Textual Analysis* (Hart Publishing Ltd, 2011) at p.176.

[376] Nicholas Condylis "Debating the Nature and Ambit of the Commonwealth's non-statutory executive power [2015] *Melbourne University Law Review*, Vol 39: 385 at p.387.

[377] The common law view was principally advanced by Professor George Winterton: George Winterton "*Parliament, the Executive and the Governor-General: A constitutional analysis*" (Melbourne University Press, 1983); There was further debate over whether the "prerogative" should be understood as following Dicey's definition, being the "residue of authority left in the hands of the Crown" or as a "discretionary power to be exercised for the public good" as conceptualised by Locke: Cheryl Saunders, *The Constitution of Australia: A Textual Analysis* (Hart Publishing Ltd, 2011) at p.177; see also Herbert Vere Evatt, *Certain Aspects of the Royal Prerogative: A Study in Constitutional Law* (LLD Thesis, The University of Sydney, 1924).

[378] Being the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown; Peter Gerangelos "Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the M68 Case" [2018] *UWALawRw* 20; (2018) 43(2) *University of Western Australia Law Review* 103 at p.121.

[379] *Plaintiff M68/2015 v Minister for Immigration* [2016] HCA 1; 257 CLR 42 at [133] (Gageler J).

[380] George Winterton *Australian Federal Constitutional Law* (Peter Gerangelos, editor, 4th edition, Law Book Co., 2017) at p.299. This analysis appears to have been rejected in Williams, certainly insofar as it can be said that the breadth of Commonwealth executive power is co-extensive with the legislative powers enumerated in the Constitution: *Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156.

Depth refers to the "precise actions" which the executive government is empowered to undertake in respect of those subject matters.[381] It is determined by examining the powers of the Crown recognised by the common law and the matters inherent in s.61.[382]

Differences in the understanding concerning the underpinnings of s.61 and the prerogative has led to fundamentally different outcomes. For example, in the *Tampa* case, Black CJ (in dissent) undertook an analysis of the content of the prerogative as the residue of authority left to the Executive under s.61. The majority, however, placed emphasis on the primacy of s.61 and adopted an open-ended view of its scope by reference to "the idea of Australia as a nation".[383]

***An Analogy to Treaty Making***

In the United States, the *Constitution* expressly fetters the Executive in the entry of Treaties. Treaties are to be entered on the advice and consent of a two-thirds majority of the Senate.[384]

By contrast, in Australia there is no express requirement in the Constitution for parliamentary approval of the Executive entering treaties. Although in *Pape* and *Williams* the Court held that the certain executive powers sourced in s.61 were not valid unless supported by legislation, it is arguable that the power of the Executive with respect to foreign policy is distinguishable, derived as it is from the prerogative powers of the British Crown.[385]

Sir Maurice Byers, in his evidence before the Senate Legal and Constitutional References Committee on 16 May 1995, expressed the view that Parliament could, under s.51(xxxix) of the Constitution, pass a law that the Parliament be informed before a Treaty was ratified. He did not think, however, that such power would extend to denying the Executive the right to enter into such a Treaty.[386]

In the United Kingdom, legislation was passed in 2010 which required Treaties to be laid before both Houses of Parliament prior to ratification, with the House of Commons ultimately having a power of veto over any ratification.[387]. Despite Treaties not automatically forming part of the domestic law, it is undeniable that they nevertheless have profound consequences for the nation.[388]

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[381] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1; (2016) 257 CLR 42 at [130] (Gageler J).
[382] *Barton v The Commonwealth* (1974) 131 CLR 477 ay p.498 (Mason J; the "depth" of Commonwealth executive power "includes the prerogative powers of the Crown; that is, the powers accorded to the Crown by the common law").
[383] *Ruddock v Vadarlis* (2001) 110 FCR 491 at [180] ("*Tampa*"); Cheryl Saunders, "The *Constitution* of Australia: A Textual Analysis" (Hart Publishing Ltd, 2011) at pp.178-179.
[384] Art II, S. 2, cl 2.
[385] Justin Gleeson SC, "The Australian *Constitution* and International Law" (2015) 40 *Australian Bar Review* 149 at p.156.
[386] Justin Gleeson SC, "The Australian *Constitution* and International Law" (2015) 40 *Australian Bar Review* 149 at p.157; Professor Winterton expressed the opposite view. Because of his belief that s.61 was ultimately derived from the royal prerogative, it was inherently subject to legislative abrogation.
[387] The Ponsonby Rule was a constitutional convention that involved treaties being laid before Parliament before ratification. The rule has now been codified in ss.20-25 of the *Constitutional Reform and Governance Act 2010* (UK).
[388] See, for example, *Commonwealth v Tasmania* (1983) 158 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Horta v Commonwealth* [1994] HCA 32; (1994) 181 CLR 183.

The High Court has frequently held that the Commonwealth's executive power is subject to legislation where the ambit of the power was determined by reference to the Crown's prerogative.[389] In *Brown v West*, five members of the Court stated that: "Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute".[390]

However, as will be seen below, the understanding of executive power in s.61 is no longer considered to be co-extensive with notions of the royal prerogative. Section 61 contains an inherent source of executive power.

There is therefore a question as to whether, or the extent to which, parliament can curtail constitutional grants of executive powers that are expressly granted to the Governor-General under the Constitution (for example the power to prorogue the Parliament in s.5 or to appoint Federal Judges in s.72).[391]

***Cases dealing with the Scope of the Defence Power in Australia***

Sir Robert Menzies recognised that the defence power has "with judicial sanction" operated over an enormous area of domestic life.[392]

One of the most controversial measures during World War I was the internment provisions which permitted the detention of a person who was not charged with any offence, was not entitled to a Court hearing, and may not be made aware of the grounds upon which they were detained.[393] *Silent enim leges inter arma*.[394]

For the general population in the course of the World Wars, mobilisations of manpower and physical resources occurred. The civilian population became familiar with Commonwealth authority in what had always been State or municipal functions. Menzies wrote that "Food, clothing, petrol, mode of transport, investments, labour, manufacturing, were all Commonwealth-controlled; while personal and company taxes very properly rose to the highest points in our history". The Commonwealth thus became "all-pervasive, and was hated or loved, according to the individual taste in circumstances".[395]

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[389] *The AAP Case* (1975) 134 CLR 338 at p.406 (Jacobs J).
[390] (1990) 169 CLR 195 at p.202; cited with approval in *Williams (No 1)* (2012) 248 CLR 156 at [67], [195], [157].
[391] Justin Gleeson and Celia Winnett, "The Rule of Law and the Crown" in Martin Hinton and John M. Williams (eds), "The Crown" (University of Adelaide Press, 2018), at p.136; George Winterton, "The Limits and Use of Executive Power by Government" [2003] *FedLawRw* 17; 2003 31(3) *Federal Law Review* 421 at p.431.
[392] In the First World War under the *War Precautions Act*; and in the Second World War under the *National Security Act*.
[393] *Lloyd v Wallach* (1915) 20 CLR 299; Kate Chetty "A history of the defence power: its uniqueness, elasticity and use in limiting rights" [2016] *Macquarie Law Journal* Vol 16, 17 at p.26.
[394] "In times of war, the laws are silent"; The Roman Senate, when faced with imminent danger to the Republic, invested its elected consuls with absolute power and suspended all the ordinary forms of law until the danger was over; the words spoken by Marcus Cicero in his speech in c.52BC were in defence of Titus Annius Milo, who accused of murdering Publius Clodius Pulcher. Cicero argued self-defence and made the point that, in extreme cases, when one's own life is immediately threatened, disregard of the law was justifiable. Milo was convicted, 38 votes to 13, and went into exile: "*Pro Tito Annio Milone ad iudicem oratio*" at 11.
[395] Sir Robert Menzies, *Central Power in the Australian Commonwealth* at pp.66-67.

*Farey v Burvett*[396] is the seminal case arising out of WWI. It represents a very broad view of war-powers. Farey was convicted under Regulations promulgated under the *War Precautions Act 1914* (Cth).[397] He had sold bread at a price greater than the maximum allowed under an Order authorised by the Regulations. He appealed against his conviction, claiming that the Act was not within the defence power insofar as it authorised the making of regulations dealing with the price of bread.

Griffiths CJ held that the scope of the defence power must be able to extend to any law "which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources".[398] Isaacs J went further, stating that the limits of the defence power "are bounded only by the requirements of self-preservation."[399]

Sir Robert Menzies read *Farey v Burvett* "with the judgments in the *Engineers'* case as affecting a major growth, by interpretation, in the powers of the Commonwealth". He had "no doubt that most of us would be reluctant to accept the view of Isaacs J".[400]

At the time of Federation it was assumed that the power to declare war and enter treaties were not subsumed in s.61, but remained with the Crown to be exercised upon the advice of Imperial Ministers. However, Isaacs J in *Farey v Burvett* took had thought of s.61 that:

> "These provisions carry with them the royal war prerogative, and all that the common law of England includes in that prerogative so far as it is applicable to Australia".[401]

The *Communist Party Case*[402] arose when Australian forces were engaged with the Communist forces in Korea. The Menzies Government attempted to outlaw the Australian Communist Party. The preamble to the legislation recited the Marx-Lenin Revolutionary Objectives of the Australian Communist Party, its subversive activities, its integration with world communism and the damage it caused to the key industries vital to the security and defence of Australia. The substantive provisions of the Act declared the Australian Communist Party to be an unlawful association, and dissolved it.

The High Court found these provisions to be invalid. The effect of the legislation was that the Governor-General was left to judge the reach and application of the ideas expressed such as "security and defence of the Commonwealth" and "prejudicial to".[403]

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[396] [1916] HCA 36; (1916) 21 CLR 433.
[397] The *War Precautions (Prices Adjustment) Regulations 1916* (Cth)
[398] At p.437; the test applied was "can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that one cannot reasonably be regarded as affecting the other".
[399] *Farey v Burvett* at pp.453-4
[400] Sir Robert Menzies *Central Power in the Australian Commonwealth* (Cassell & Company Ltd, London, 1967) at pp.63-64.
[401] at p.452; These words were later cited by French J in the *Tampa Case* (at [177]).
[402] *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1.
[403] At p.179.

It was said to be contrary to principle to allow even *prima facie* probative force to recitals of facts upon which the law depended.[404] Dixon J was also of the view that the "present power is administrative and not legislative, it is not directed to the conduct of an existing war, and its exercise is not examinable and is not susceptible of testing by reference to the constitutional power above which it cannot validly rise".[405]

That is, notwithstanding a recognition of the nation's inherent right of self-defence, including under circumstances falling short of actual war, limits were set on the ability of parliament to legislate itself within a head of constitutional power and to give purely discretionary authority to the Executive in order to deal with people or organisations without reference to objective standards of conduct or behaviour.[406]

In *Thomas v Mowbray* (2007) 233 CLR 307, anti-terrorism legislation introduced following the September 11, 2001 attacks was passed. The legislation provided for control orders and preventative detention orders.[407] The High Court considered the validity of the legislation after the first control order was issued after Thomas had been convicted of a terrorist act, but where that conviction was overturned by the Victorian Court of Appeal on the basis that his confession was obtained under duress. Thomas' control order involved a curfew requirement and an obligation to report to Police.

By a 5:2 majority[408], it was held that the regime was valid and supported by the Defence power in s.51(vi) of the Constitution.[409] A broad interpretation of the defence power was identified by the majority, such that it extended beyond threats from "external enemies" and it was not limited to war in the conventional sense but rather to periods of increased international tension where the threat of domestic terrorism was real.[410]

This approach was redolent of the view taken by Fullagar J in the *Communist Party Case.* Fullagar J recognised a state of affairs that paralleled Grotius' notion of 'imperfect war'. His Honour stated that the defence power had been treated in the earlier cases as coming into existence upon the commencement or immediate apprehension of war and continuing during the war and the period necessary for post-war re-adjustment.

However, in a world of uncertain and rapidly changing international situations "it may well be held to arise in some degree upon circumstances which fall short of an immediate apprehension of war. In its secondary aspect, the power extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence".[411]

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[404] *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at p.188 (Dixon J); at p.264 (Fullagar J).
[405] At pp.185-186.
[406] Sir Robert Menzies *Central Power in the Australian Commonwealth* (Cassell & Company Ltd, London, 1967) at p.73; *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1 at p.278 (Kitto J); Kate Chetty "A history of the defence power: its uniqueness, elasticity and use in limiting rights" [2016] *Macquarie Law Journal* Vol 16, 17 at p.24.
[407] The regime in Division 104 of the *Criminal Code* involves the placing of restrictions on people's movements short of imprisonment, but which may amount to, in effect, house arrest.
[408] Gleeson CJ, Gummow, Callinan, Heydon & Crennan JJ; Kirby and Hayne JJ dissenting.
[409] Page 324 (Gleeson CJ); p.363 (Gummow & Crennan JJ); pp.503-504 (Callinan J); p.525 (Heydon J).
[410] Page 324 (Gleeson CJ); p.511 (Callinan J).
[411] *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1 at p.258 (Fullagar J).

***Cases Dealing with the Scope of the Executive Power in Australia***

In *Barton v Commonwealth*[412], Mason J stated that, by s.61, the executive power of the Commonwealth was vested in the Crown. It enabled the Crown to undertake all executive actions which were appropriate to the position of the Commonwealth under the Constitution and to the "spheres of responsibility" vested in it by the Constitution. It included the prerogative powers of the Crown.[413]

The "spheres of responsibility" were described by the High Court in *Davis v Commonwealth* as "derived from the distribution of legislative powers effected by the Constitution itself and from the character and status of the Commonwealth as a national polity".[414]

The breadth of Executive power was largely thought to be mapped onto the contours of the Commonwealth's enumerated legislative powers.[415] This assumption has now been displaced as a result of the recent cases.[416]

***Ruddock v Vadarlis* (2001) 110 FCR 491 (the *Tampa Case*)**

The *MV Tampa* rescued 433 people from a sinking fishing boat 140 kilometres off the coast of Christmas Island. Despite being requested not to do so, the Captain of the MV *Tampa* took the ship into Australian territorial waters. Shortly after, Australian troops boarded the vessel and detained those people that had been rescued.

The Commonwealth arranged for their transfer to New Zealand and Nauru so that their refugee status could be determined. The *Migration Act 1958* (Cth) provided a comprehensive regime for detention and deportation of non-citizens. However, the government did not seek to rely on its powers under the Act. Rather, it relied upon executive power under s.61 of the Constitution and specifically the prerogative power to regulate the entry of non-citizens into Australia.[417]

At issue was therefore whether the Executive retained a power to exclude and expel aliens, and whether those powers, if they existed, had been abrogated by the *Migration Act 1958* (Cth).[418]

North J at first instance denied the existence of a prerogative power of exclusion. On appeal, Black CJ agreed with North J in his dissent: "There is no doubt that, as a general principle of law, there is no Executive authority, apart from that conferred by statute, to subject anyone in Australia, citizen or non-citizen to detention".[419] The authorities showed that the prerogative

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[412] (1974) 131 CLR 477.
[413] at p.498.
[414] (1988) 166 CLR 679 at p.93 (Mason CJ, Deane and Gaudron JJ citing the *Wooltops Case* (1922) 31 CLR 421 at pp.437-439).
[415] In the *Victoria v The Commonwealth and Hayden* [1975] HCA 52; (1975) 134 CLR 338 (the *AAP Case*), Barwick CJ stated that 'the executive may only do that which has been or could be the subject of valid legislation'. The *AAP Case* must now be read in light of *Pape*, where it was decided that the source of the executive spending power must be found somewhere other than the spending and appropriations provisions in ss 81 and 83.
[416] *Williams v The Commonwealth* [2012] HCA 23; (2012) 248 CLR 156; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.
[417] Geoffrey Lindell "The Constitutional authority to deploy Australian Military Forces in the Coalition war against Iraq" *Constitutional Law and Policy Review*, Vol 5, No 3 (November 2002) at p.22.
[418] By the rule in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL).
[419] Citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (Brennan, Deane and Dawson JJ at p.19; see also Mason CJ at p.13; and McHugh J at 63).

power to exclude aliens in times of peace was at best doubtful, having been exercised for the last time in the UK in 1771.

Black CJ found that the provisions of the Act provided for a comprehensive regime for the control of Australia's borders.[420] The Act therefore operated to the exclusion of any residual executive power in any event.[421]

French J (with Beaumont J agreeing) determined that the executive power of the Commonwealth was intimately connected to Australia's status as an independent, sovereign nation State.

French J noted that use of the "prerogative" to describe the power in s.61 "may properly acknowledge its historical antecedents but not adequately illuminate its origins in s 61 of the Constitution".[422] Accordingly, his Honour took the view that, absent statutory extinguishment or abridgment, the executive power "would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion".[423] This was because "the power to determine who may come into Australia is so central to its sovereignty".[424]

Tampa is important as it represents the first express rejection of the common law prerogatives as defining the ambit of the s.61 power in its 'maintenance' limb. This position was subsequently adopted in *Pape* and confirmed in *Williams*.[425]

The majority decision, however, has been criticised. Professor Zines said of this decision that it is equally open to argue that as the governmental action involves use of coercive force against unarmed people and that "it is not to be supposed" that the Constitution (or the common law) would provide such power in the absence of its conferral by Parliament.[426]

***Pape v Federal Commission of Taxation* [2009] HCA 23; (2009) 238 CLR 1 (*Pape*)**

*Pape* concerned the question of whether the Executive had the power (in the course of the Global Financial Crisis) to deal with a fiscal emergency without express legislative backing. In a 4:3 decision, the High Court held that the Act authorizing 'bonus payments' to taxpayers was a valid law of the Commonwealth Parliament, supported by s 51(xxxix) of the Constitution as being incidental to the exercise by the Commonwealth Government of its Executive power under s.61 of the Constitution.

The plurality in *Pape* stated the power in very broad terms:

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[420] At p.507, [60]; Citing *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.
[421] At [64].
[422] At [179].
[423] At [193]; His Honour however acknowledged that this does not involve any conclusion about whether the Executive would, in the absence of statutory authority, have the power to expel non-citizens other than as an incident of the power to exclude; see also *Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195 at pp.210-211, [30]-[34] (French CJ).
[424] *Ruddock v Vadarlis* (2001) 110 FCR 491 at p.543 [193].
[425] Peter Gerangelos "Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the M68 Case" [2018] *UWALawRw* 20; (2018) 43(2) *University of Western Australia Law Review* 103 at p.146.
[426] Zines (2005) at pp.291-292; See also George Winterton "Australian Federal Constitutional Law" (Peter Gerangelos, editor, 4th edition, Law Book Co 2017) at pp.221-222.

> "*The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity*."[427]

This approach was criticized by three other Justices in that case.[428] Their Honours variously expressed concern that the power would become 'self-defining'. In their view, a matter should not be capable of being brought within the breadth of the Commonwealth Executive power merely because the Commonwealth has formed an opinion that it is dealing with a emergency of national concern.

There is force in this criticism. The use of perceived necessity as a criterion of constitutional validity comes at the expense of legal analysis and the application of accepted constitutional doctrine.[429]

***Williams v Commonwealth* [2012] HCA 23; (2012) 248 CLR 156 (*Williams No 1*)**

In *Williams*, it was held that the contract between the Commonwealth and the Scripture Union of Queensland was invalid because the Commonwealth lacked the executive capacity or power to enter into a contract on such a subject matter without legislative support.[430]

The Court rejected the proposition that Executive power extended to anything that could be the subject matter of legislation made under s.51 largely on the basis of federalism and separation of powers concerns. The majority judgments variously noted that s.96 (the grants in aid power) would be rendered superfluous if the Commonwealth could decide to spend on any subject matter outside of the rubric of s.96. Additionally, the absence of any counterpart to s.109 to resolve conflicts between the Commonwealth and State executive power underpinned the federal concerns in the majority judgments.

***CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514**

This decision bears many similarities to the *Tampa Case*. On 29 June 2014, an Indian flagged vessel carrying the Plaintiff and 156 other passengers was intercepted by an Australian Border Protection vessel in the Indian Ocean, not far from Christmas Island.

The Plaintiff claimed a well-founded fear of persecution that would qualify him as a refugee under the Refugees Convention. The Indian vessel became unseaworthy by reason of a fire and its passengers were taken aboard the Commonwealth vessel.

The National Security Committee of Cabinet directed that the Commonwealth vessel sailed towards India. The Commonwealth vessel remained in the vicinity of the Indian coast from 10 July 2014 to 22 July 2014. It then became apparent that Australia would not be able to reach

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[427] At [233] (Gummow, Crennan and Bell JJ).
[428] Hayne & Kiefel JJ, and Heydon J
[429] *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 at p.581, [126] (Gummow and Hayne JJ).
[430] [2012] HCA 23; (2012) 248 CLR 156 at pp.179-180 [4], 216-217 [83] (French CJ), p.233 [138] (Gummow and Bell JJ), p.281 [289]-[290] (Hayne J), p.359 [548] (Crennan J), p.374 [597] (Kiefel J). see also George Winterton *Australian Federal Constitutional Law* (Peter Gerangelos, editor, 4th edition, Law Book Co 2017) at p.272.

agreement with India in order to discharge the passengers. The Commonwealth vessel then sailed towards the Cocos (Keeling) Islands where the asylum seekers were taken into immigration detention.

The Plaintiff claimed that his detention on the Commonwealth vessel was unlawful and sought damages for wrongful imprisonment.

The Commonwealth relied upon powers under the *Migration Act 1958* (Cth) which allowed it to detail persons and cause them to be taken to "a place outside the migration zone".[431] The Commonwealth also relied upon its executive power under s.61 of the Constitution.

Hayne and Bell JJ found that the legislation did not authorise the Plaintiff's detention. They then turned to the question of non-statutory executive power. They rejected that there was any such executive power, referring to the decision in *Chu Kheng Lim v Minister for Immigration* (1992) 175 CLR 1 where it was stated:

> "Neither public official nor private person can lawfully detain [an alien] or deal with his or her property except under and in accordance with some positive authority conferred by the law".[432]

Their Honours went on to state that "There is no basis for limiting the force of what is said there, or treating the decision as not dealing with whether, absent statutory authorisation, the Executive has the power to detain".[433]

Kiefel J similarly reasoned that the legislative powers were not available in the circumstances of the present case.[434] Her Honour then dealt with the non-statutory executive power issue. Her Honour noted that "the terms of s.61 do not offer much assistance in resolving questions as to the scope of executive power".[435]

The Commonwealth submitted that the scope of executive power was informed by the prerogative powers of the Crown. This was because the power to exclude and expel an alien from Australia's territory carried with it the power to do all things necessary to make its exercise effective.[436] However, Kiefel J noted the existence of such a power says nothing about whether the executive government could exercise it.[437]

Her Honour rejected the Commonwealth's case on the basis that *Chu Kheng Lim* stands for the proposition that a statute is required to authorise and enforce the detention by the Executive of aliens for the purpose of expulsion.[438]

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[431] Section 72(4) of the *Maritime Powers Act 2013* (Cth).
[432] at p.19 (Brennan, Deane and Dawson JJ).
[433] At [149]; Notably, there was a citation in that sentence which contrasted the decision in *Ruddock v Vadarlis* (2001) 110 FCR 491 at [195] wherein French J shad ought to distinguish the decision in *Chu Kheng Lim.*
[434] At [255].
[435] At [259].
[436] The Commonwealth made reference to the Privy Council decision in *Attorney-General for Canada v Cain* [1906] AC 542 at p.546 ("One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State [and] the State has the power to do those things which must be done in the very act of expulsion …").
[437] At [265].
[438] At [265], [273].

These, however, were minority decisions. Of the majority, French CJ, Crennan J and Gageler J did not deal with the issue of executive power. Keane J, however, did. His Honour referred to French J's decision in *Ruddock v Vadarlis* with approval. Notably, Keane J stated that it was "not in doubt" that the executive power referred to in s.61 extends to "the making of war and peace".[439]

The judgments of Keane J and Kiefel J expose very different approaches to s.61. Keane J's was a functionalist approach based on the inherent view. His Honour eschewed any reliance upon the prerogative.

Kiefel J's approach was based on the common law view of s.61. Her Honour determined the ambit of the putative power by examining whether the common law permitted the Crown to expel friendly aliens from its territory. In doing so, her Honour relied on the "detailed analysis" undertaken by Black CJ in *Vadarlis*.[440]

***Plaintiff M68/2015 v Minister for Immigration* [2016] HCA 1; 257 CLR 42**

*Plaintiff M68* concerned the validity of arrangements under which the Commonwealth participated in the detention of asylum seekers at the Regional Processing Centre on Nauru. The majority of the Court held that the Commonwealth's participation in that detention was authorized retrospectively by the *Migration Act*. The majority held that the section of the *Migration Act* did not contravene the principle in *Chu Kheng Lim* in purporting to authorise the Executive to exercise punitive detention.[441] While it was not necessary for the majority to consider whether the government's conduct was supported by executive power, Gageler J (in dissent) did so.

Gageler J stated that:

> "The nature of the Commonwealth executive power can only be understood within [the] historical and structural constitutional context"[442]

His Honour's reasoning placed almost exclusive reliance on traditional conceptions to interpret s.61. That is, the prerogative powers known to the common law, the capacities which emanate from the Commonwealth's juristic personality, the Australian understanding of 'the Crown' at Federation, the principles of responsible government implied in the Constitution as understood in light of Australian colonial experience and as reflected in the deliberations of the Framers, as well as statutes which have curtailed or abrogated prerogative executive power in the past. No mention was made of any inherent executive nationhood power as recognised in the *Pape* case.[443]

Gageler J's decision has been said to reinforce the views of those commentators who press the case for interpreting the Constitution pursuant to the common law prerogatives, as opposed to

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[439] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; (2015) 255 CLR 514 at [484].
[440] *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; (2015) 255 CLR 514 at [266].
[441] Section 198AHA.
[442] At [129].
[443] That is, derived directly from s.61 and determined by reference to the status of the Commonwealth as a national government: Peter Gerangelos "Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the M68 Case" [2018] *UWALawRw* 20; (2018) 43(2) *University of Western Australia Law Review* 103 at pp.106-107.

discovering inherent power in s.61 purely on the basis of 'nationhood' considerations which are ill-defined and lack legally-discernible principles to inform their precise content and ambit.[444]

***Attempts by the Parliament to condition the exercise of Executive War Powers***

Although there has been condemnation by both major parties of the commitment of troops overseas without *ex ante* parliamentary involvement when they are in opposition, no steps have been taken to codify the powers of the Governor-General to initiate war.

The Defence Act 1903 (Cth) now provides a statutory footing for most potential internal security actions by the Australian Defence Forces.[445]

The new Part IIIAAA of the *Defence Act 1903* (Cth) was inserted after the September 11 attacks. It permits the use of lethal force by Australian military by firing upon civilian aircraft or shipping where they present a threat to the "Commonwealth interest".[446] There is no need for a declaration of war nor any actual armed conflict to be taking place. Checks and balances include the concurrence of the Prime Minister, Attorney General, Defence Minister and the Governor-General. The powers are at least as extensive as any found in the common law world.[447] Comparable powers were struck down by the German Constitutional Court.[448]

There are no legislative provisions concerning declaring war against other countries. Section 50C of the *Defence Act 1903* had required that members of the Army may be required to serve overseas.[449] There was no requirement for parliamentary approval for this to occur.[450]

This was not always the case. Before the *Defence Act 1903* (Cth) was amended by the *Defence Legislation Amendment (Enhancement of the Reserves and Modernisation) Act 2001*, it provided that, if a proclamation was issued, Parliament had to be informed and be recalled within ten days if it was not sitting. It is not clear why parliamentary consultation was removed in 2001, as neither the explanatory memorandum nor second reading speech explain the change.

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[444] Peter Gerangelos "Section 61 of the Commonwealth Constitution and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the M68 Case" [2018] *UWALawRw* 20; (2018) 43(2) *University of Western Australia Law Review* 103 at p.145.

[445] Discussed in Cameron Moore, *Crown and Sword* (ANU Press, 2017) at pp.172-176.

[446] See discussion in Cameron Moore, "Calling out the Troops – the Australian Military and Civil Unrest: The Legal and Constitutional Issues by Michael Head" [2009] *MelbULawRw* 35; (2009) 33(3) *Melbourne University Law Review* 1022; see also Michael Head *Calling Out the Troops* (Federation Press, 2009) at p.177.

[447] Cameron Moore, *Crown and Sword* (ANU Press, 2017) at p.173.

[448] (2006) 115 BVerfG 118, cited in *Oliver Lepsius* "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court strikes down a prominent anti-terrorism provision in the new *Air-transport Security Act*" (2006) 7 *German Law Journal* 761 at p.763.

[449] Members of the Army may be required to serve either within or beyond the territorial limits of Australia.

[450] Sections 59 and 60 of the *Defence Act 1903* (Cth) allow the Governor-General to proclaim a call-up of most adults and make them liable to serve in the armed forces in a time of war (as defined in s.4). Subsection 60(5) of the Act requires a resolution of both Houses of Parliament to approve the proclamation.

In 1985, Senator Colin Mason of the Australian Democrats introduced the *Defence Amendment Bill 1985*, which sought to require parliamentary approval in most circumstances before Australian troops could be deployed overseas. The Bill did not pass.[451]

During the debates over committing troops to Iraq in 2003, Senators Andrew Bartlett and Natasha Stott-Despoja (Democrats) introduced a private senator's Bill.[452] The Bill proposed to repeal and substitute section 50C of the *Defence Act 1903* for a requirement that both Houses of Parliament to approve a declaration of war and commitment of troops overseas. The Bill failed to pass.

Senator Andrew Bartlett reintroduced a similar Bill on 13 February 2008.[453] Again the Bill failed to pass.

Later in 2008, Senator Scott Ludlam (Greens) introduced a Bill that also sought to repeal section 50C of the *Defence Act 1903* and replace it with a provision that required parliamentary approval.[454] The Bill failed to pass.[455]

***Conclusion to Part 3***

The legal power to declare war first seen to form part of the Australia's war powers as a prerogative to be exercise solely on advice that passed from the King to the Governor-General no later than 1942.

This is to be understood in the context where Australia was a Dominion at the time of World War I, and not an independent sovereign nation with the power to declare war.

The preamble of the Commonwealth Constitution itself makes it clear that the nation brought into being was "*one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland*".

When the constitutional delegates arrived in England, the Imperial Parliament wanted to make two amendments to the draft the Australian people had already approved.[456] Both changes had to do with Australia's existence as an independent nation.

The draft approved by the people sought to make it clear that the *Colonial Laws Validity Act* (CLVA) would not apply to the newly formed Commonwealth of Australia. The CLVA was an Imperial law that allowed Britain to override colonial laws that were "repugnant" to Imperial legalisation. The second issue was that the draft provided that appeals to the Privy Council were to be abolished (s.74).

The Bill introduced to the House of Commons attempted to reverse those provisions. Both of these changes were seen by the UK as crucial to maintaining the Empire; and were opposed by

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[451] Deirdre McKeown & Roy Jordan, "Parliamentary involvement in declaring war and deploying forces overseas" *Department of Parliamentary Services Background Note* (22 March 2010) at p.2.
[452] *Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill 2003.*
[453] *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008.*
[454] *Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008 [No. 2].*
[455] The Bill was introduced on 17 September 2008 and, on 20 August 2009, was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee. The Committee reported on 25 February 2010 and recommended that the Bill not proceed.
[456] Alfred Deakin *The Federal Story* (Cambridge University Press, 1944) at p.157.

the Australian delegates as undermining Australian sovereignty. The UK eventually won out in that the Constitution voted on by the people was changed in these ways. The United Kingdom was not a foreign power at Federation.[457]

From these origins, the Australian nation underwent a gradual change stemming from the time of the Balfour Declaration in 1926, to the adoption of the *Statute of Westminster* in 1942, to the enactment of the *Australian Citizenship Act 1948* (Cth), then to the *Royal Style and Titles Act 1973* (Cth)[458], and finally to the passage of the *Australia Acts* when it emerged as a fully sovereign nation.[459]

The changes also involved the relocation of war powers from the Imperial Crown to the Australian polity. Where those war-powers settled was not an issue addressed relevant Constitutional amendment.

The Framers of the Constitution had designed a system of separation of powers to avoid concentrating too much power in a single person or arm of government. The power to take the nation to into armed conflict and risk lives, not only on the battlefield but at home by way of reprisals, is an awesome one.

*Williams* stands for the proposition that the Executive power to enter into contracts or spend public money is in most cases limited to that for which it has authority positively conferred on it by statute. That conclusion stands in stark contrast to the notion that the locus of the power to take a nation to war resides with the Executive and is exercisable under the Constitution without the need for the involvement of parliament.

Yet this is the case. The Executive in the broad sense has undertaken the decisions to commit the nation into armed conflict. If *Vadarlis* and *Pape* are correct, the Governor-General is clothed in undefined arbitrary and discretionary non-statutory powers.[460] These powers are inherent to s.61 of the Constitution and are defined consistently with the Commonwealth's character and status as a national government.[461]

However, the modern convention has been to circumvent all vice-regal consideration of the exercise of war powers such that the decisions now appear to be unmoored from any constitutional anchor point.

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[457] *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* [1985] HCA 8; (1985) 159 CLR 351 at p.437 (Deane J), p.458 (Dawson J); *Nolan v Minister for Immigration and Ethnic Affairs* [1988] HCA 45; (1988) 165 CLR 178 at pp.183-184 (Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ); *Sue v Hill* (1999) 199 CLR 462 at [90] (Gleeson CJ, Gummow & Hayne JJ), [165]-[166] (Gaudron).

[458] *Southern Centre of Theosophy Inc v South Australia* [1979] HCA 59; (1979) 145 CLR 246 at p.261 (Gibbs J: "[i]t is right to say that this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia").

[459] The effect of section 1 of the *Australia Act 1986* (Cth) was to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories; *Sue v Hill* (1999) 199 CLR 462 at [96] (Gleeson CJ, Gummow & Hayne JJ), [173] (Gaudron); see also Michael Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24(1) *Melbourne University Law Review* 1.

[460] Duncan Kerr "The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law" [2009] *UTasLawRw* 8; (2009) 28(2) *University of Tasmania Law Review* 145 at p.180.

[461] *Pape* (2009) 238 CLR 1 at pp.63-64 [133] (French CJ), p.89 [232]-[233] (Gummow, Crennan and Bell JJ); Although the High Court has not rejected the relevance of the prerogative when interpreting s.61, the recent cases suggest a limited role: *cf Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195.

The two Iraq Wars and Australia's involvement in Afghanistan commenced without the exercise of the war prerogative by the Governor-General or its delegation to the Prime Minister.[462] This would appear to be a major shift in practice without any constitutional amendment having taken place, let alone any debate or public consideration of its desirability.[463]

Professor Williams believes that Australia breached its international obligations in committing forces to Iraq and that, because of the ramifications, it is no longer appropriate for the decision to use force by the military to be left solely in the hands of the Executive.[464] However, all attempts at encroaching on the executive war-power by way of a legislative veto have failed.

While parliamentary approval to commit the country to war is not legally required, a democratic government in the Westminster tradition should, as a matter of practical reality, enjoy the confidence of the lower House. Parliament can move a motion of no confidence in the Government of the day. Yet such normative mechanisms of oversight do not allow for *ex ante* approval for what is, on any view, a momentous decision when it involves the commitment of a nation to war. History tells us that such decisions are made and troops committed while Parliament is in recess or, as was the case in WWI, in the midst of an election campaign.

The current approach of decision-making via Cabinet does not make for informed public debate. Cabinet is not recognised in the Constitution and it does not have any legal or constitutional decision-making powers.[465] The thought of a commitment of troops being politicized or the subject of a "captains call" or a kitchen cabinet process in the absence of any inter-branch oversight is an even more troubling possibility.

In discussing issues such as Constitutional change or whether Australia's interests are best served with the English Monarch as our head of state, we should be mindful that it is not just a formalistic debate about how we wish to be perceived as a nation. Our present constitutional compact was drafted by people who perceived that Australia's foreign affairs would be governed by, what is now, a foreign power.[466] That this viewpoint was entrenched in the Constitution over a century ago in terms that persist to this day (but avoided by such expedients as uncodified convention) is a state of affairs that should give rise to real concern by a discerning public.

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[462] Charles Sampford & Margaret Palmer, "The Constitutional Power to Make War" (2004) *Griffith Law Review 2009*, Vol 18 No 2 350-384 at p.379.
[463] Charles Sampford & Margaret Palmer "The Constitutional Power to make War: Domestic Legal Issues raised by Australia's Action in Iraq" *Griffith Law Review* (2009) 18(2): 350 – 84 at p.370; Head & Boehringer "The Legal Power to Launch War – Who Decides?" Routledge, Oxford 2019 at pp.122, 192.
[464] Geoffrey Lindell "The Constitutional authority to deploy Australian Military Forces in the Coalition war against Iraq" *Constitutional Law and Policy Review*, Vol 5, No 3 (November 2002) at p.6; Professors Williams and Lindell both favour parliamentary involvement in the decision-making process. Professor Williams favours a situation whereby the decision would be made by a joint sitting of both Houses.
[465] Geoffrey Lindell "The Constitutional authority to deploy Australian Military Forces in the Coalition war against Iraq" *Constitutional Law and Policy Review*, Vol 5, No 3 (November 2002) at p.351.
[466] *Sue v Hill* (1999) 199 CLR 462.