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Parliament's Secret War

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Deciding to pursue war or armed conflict is arguably the most serious decision that any government can take. Profound suffering and the loss of human life inevitably ensues. Legally, British constitutional orthodoxy dictates that the exercise of the power to enter into armed conflict remains a matter for the Prime Minister, exercising the royal prerogative.[1] This constitutional fact has remained unchanged throughout the twentieth and twenty-first centuries. However, since 2003 the ability of Members of the House of Commons to debate and vote upon a substantive motion of support for various kinds of armed conflict has fuelled an impression of structural constitutional change. For many members of the public and media commentators the balance of power has shifted from government towards the Commons, to the extent that the decision now requires a conjoined effort between Parliament and government.

In practice, however, war decision-making in Britain has long been described as 'an intensely prime ministerial activity',[2] one which can in itself render our democratic and parliamentary structures vulnerable. Although parliamentary consent for 'any war for the defence of any dominions or territories which do not belong to the Crown of England'[3] has been required since 1700 (and remains good law), this statute has received only fleeting mention in the twenty-first century.[4] Until 2003, there was no serious commentary arguing that parliamentary consent was constitutionally required to wage war. When we look to possible legal controls there is a similar drought: domestic courts have been unwilling to adjudicate upon

[1] Deployment by means of the royal prerogative has long been a constitutional principle in respect of the regular forces. The power to deploy the reserve forces, however, is statutory in nature. See section 56(1) of the Reserve Forces Act 1996: 'The Secretary of State may make an order under this section authorising the calling out of members of a reserve force if it appears to the Secretary of State that it is necessary or desirable to use members of a reserve force for any purpose for which members of the regular services may be used'.

[2] P Hennessy, *The Prime Minister: The Office and Its Holders Since 1945* (London, Allen Lane, 2000) 103.

[3] Act of Settlement 1700, s 3.

[4] HC Deb 21 October 2005, vol 437, col 1087, Claire Short (Lab) in respect of the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill.

the legality of the war prerogative's exercise. When presented with the opportunity to rule on the legality of using the prerogative to wage war, courts have thus far opted to treat the issue as non-justiciable.[5] This was reiterated by Lord Reed in the Supreme Court, when he remarked obiter that decisions 'such as declarations of war' remain among the 'well established exceptions' to the principle that judicial review of the exercise of executive discretion is a requirement of the rule of law.[6] This point was reinforced in 2017 by the Supreme Court in *Miller*.[7] In addition to this, the English courts remain unwilling to issue declaratory opinions on the legality of conflicts according to the rules of public international law due to both lack of jurisdiction and the view that to do so would be contrary to the public interest.[8]

Parliamentary involvement appeared to be shifting towards filling this accountability lacuna in the early twenty-first century. After 2003, when the House of Commons had for the first time been asked to provide its approval prior to the invasion of Iraq, the talk of a 'War Powers Convention' (a rule of political practice), which requires the consent of the Commons prior to armed conflict, began to appear in the media, official publications, and Hansard.[9] Since Iraq, this rule appears to have solidified in practice through a series of parliamentary debates and votes prior to (or at the outset of) armed conflicts in 2011, 2013, 2014 and 2015.[10] After the Commons vote in August 2013, when the Conservative Government failed to secure parliamentary support for action against the Assad regime, some commentators hailed the impact of the convention as 'historic'[11] in the sense that it represented a strengthening of democratic control of the state's ultimate power to wage war. Others called it a 'vote of shame',[12] demonstrating that the Government had failed to convince Parliament of the need for action because it had not sufficiently learned from the experiences of previous administrations.

We were drawn to this project by a common curiosity, namely, a desire to understand the exact role Parliament plays in relation to armed conflict under the

[5] *R (on the Application of Gentle and Clarke) v Prime Minister, the Secretary of State for Defence, and the Attorney General* [2007] QB 689 [26]: 'issues relating to the conduct of international relations and military operations outside the United Kingdom are not justiciable', and *Campaign for Nuclear Disarmament v Prime Minister, Defence Secretary, and Foreign Secretary* [2002] EWHC 2777 (Admin) [47].

[6] *Evans v Attorney General* [2015] UKSC 21, [2015] 1 AC 1787, [52].

[7] *R (Miller and Others) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [53].

[8] *CND v Prime Minister* [2002] EWHC 2777 (Admin), [2003] ACD 36.

[9] C Mills, 'Parliamentary approval for military action' (House of Commons Library Briefing Paper No 7166, 12 May 2015); J Rozenberg, 'Syria intervention: is there a new constitutional convention?' *The Guardian* (2 September 2013).

[10] However, in ch 3 we critique the extent to which the War Powers Convention has been complied with in practice.

[11] T Stanley 'Syria vote: this historic night was a humiliation for David Cameron but a victory for Parliament' *The Telegraph* (29 August 2013); R Hutton and T Penny, 'Historic Vote Sees Cameron Defeated by Lawmakers on Syria' *Bloomberg Online* (20 August 2013); G Phillipson, '"Historic" Commons' Syria vote: the constitutional significance (Parts I and II)' *UK Constitutional Law Association* blog (19 September 2013 and 29 November 2013).

[12] MJS, 'The vote of shame' *The Economist* (30 August 2013) <www.economist.com/blogs/blighty/2013/08/britain-and-syria> accessed 8 March 2017.

War Powers Convention. For the last 14 years, we have watched the debates in the Commons from our different public law and international law vantage points, both noticing changes in the interaction between government officials and members of Parliament, and the negotiation and later renegotiation of that relationship. Our investigations reveal a complex picture of how the British political constitution works in practice, and how it is shaped and determined through relationships between different political actors. It is these relationships and their negotiations that we trace and evaluate over the forthcoming chapters.

In this chapter, we set out the contrast between the former and the current engagement of Parliament on issues of war. The traditional manner of engaging the Commons on issues of war was limited to procedural motions, preventing Members from registering their views through a vote. But since 2003 debates have only been held on substantive motions which require parliamentary approval prior to the start of hostilities. Motions of this nature allow MPs to vote clearly for or against armed conflict.[13] It has been argued that whilst the previous engagement allowed members of the House to be barely informed, the new shift—and the new convention—finally involves Parliament in a meaningful manner on issues of war.[14] MPs receive information about the conflict, often in the form of a legal opinion on the lawfulness of military intervention, and some insight into the Government's strategic long-term plans. At first sight, the emergence of the new convention appears to have improved the quality of both parliamentary involvement and parliamentary scrutiny. In particular, we note, the decision of subsequent governments to abide by the War Powers Convention and seek parliamentary approval prior to the deployment of troops appears to have replaced governmental discretion with accountability, MPs' exclusion with their participation, and ultimately a prima facie increase in the transparency of any decision to wage war. These three values—accountability, participation, and transparency—we believe are core values in a democracy and should thus guide the proper relationship between the Government and Parliament.

In this monograph, our aim is to unpack the precise nature of the evolving War Powers Convention and contextualise this against the values of accountability, participation, and transparency. We therefore evaluate questions surrounding the emergence, content and strength of the putative War Powers Convention. Our analysis considers a series of parliamentary debates and votes which seem to suggest that the ancient prerogative to make war in the monarch's name is being gradually democratised by an increasingly strong Parliament. Thereafter, we turn to consider the extent to which the convention in its present state represents a step forward for political accountability, participation, and transparency in respect of the exercise of war powers.

[13] M Jack (ed), *Erskine May: Parliamentary Practice,* 24th edn (London, Lexis Nexis, 2011) 330.

[14] J Strong, 'Why Parliament Now Decides on War: Tracing the Growth of the Parliamentary Prerogative through Syria, Libya and Iraq' (2015) 17 *The British Journal of Politics and International Relations* 604.

A. Role of the House of Commons in War Powers Decisions: An Historical View

In view of the furore surrounding the consequences of the new convention, readers are to be forgiven for thinking that parliamentary engagement is an entirely novel constitutional development. But this is much mistaken. There is a tradition of the Executive engaging Parliament on aspects of war powers which pre-dates the War Powers Convention. This practice stems from the beginning of the twentieth century. What stands out in particular when we consider this history is the stark shift effected by the new convention in Parliament's favour. It is therefore important to track the changes and progress which the War Powers Convention instantiates in our constitutional arrangements when compared with past practice.

I. The Adjournment Motion: Procedural Marginalisation and Public Deception

Throughout the last century, MPs discussed wars in Europe in the 1940s, the Korean War and the Suez invasion in the 1950s, the Falklands in the 1980s, the Gulf War and Kosovo in the 1990s, Iraq at the beginning of the twenty-first century, and more recently Libya, Syria and others. Numerous debates have been held in relation to almost every military deployment, some before and most after the start of military action. However, one of the crucial changes imported by the convention is the change in the nature of the parliamentary procedure used to effect such debates. Before Iraq, debates in the Commons were traditionally held pursuant to an adjournment motion.[15] It was the Government, not Parliament, that initiated such debates. The purpose of doing so was to allow the Government to control both the content of debates in Parliament and their outcome. The motion—'That this House do now adjourn'—was moved by a Government Minister, and gave the House a chance to discuss matters without recording a substantive decision on the merits of the matter. Although called 'the adjournment motion', the Government actually had no wish for the House to adjourn or to bring the debate on the floor to an end. In the words of Robin Cook, the late Foreign Secretary, a debate on an adjournment motion 'enable[d] the Commons to hold a debate without any risk of a serious division [vote] at the end of it'.[16] During these debates, then, no substantive vote would take place, and as a result the concerns of the House of Commons could be easily ignored.

The second problem with adjournment debates is how they were interpreted by the media and the wider public. They have been known to obscure the messages expressed in the debates. Parliamentarians have expressed concerns to this end.

[15] Jack, *Erskine May* (n 13) 402–04.
[16] R Cook, *The Point of Departure* (London, Simon & Schuster Ltd, 2003) 187.

Harry Ewing noted that 'People outside simply do not understand the procedures that the House of Commons adopts on such great occasions. It would have been far better to debate a [substantive] motion … We would then have known clearly where we stood'.[17] In the same vein Kenneth Clarke complained that adjournment motions are used 'to make sure that there was no substantive vote taking place at any stage. The whole thing was used more as a process of explanation and persuasion than it was of giving Parliament a real way to challenge the decision of Government in respect of war'.[18] Moreover, an adjournment debate did not guarantee a parliamentary vote. Indeed, in practice adjournment debates frequently concluded without a vote taking place. If, however, the Opposition wished to express concerns about government policy, then a vote could be forced. Yet, even this did not represent a real, clear challenge to government policy. The vote could not take place on a matter of substance under the procedure; instead it was merely a vote for or against adjournment. Needless to say, this was exceedingly confusing to the public. From a constituent's position, it was unclear whether an MP's vote in favour of adjournment supported or condemned government policy on armed conflict. As Tony Benn declared, votes on adjournment debates afford the House 'absolutely no power in the matter'.[19] They allowed for no amendments and no opportunity to provide (and put on record) the support for military personnel or (dis)approval of the Executive's policies. In effect, adjournment motions engage Parliament whilst they also simultaneously 'de-parliamentarise decision-making'.[20]

Specific examples are required to understand the twin concerns of bypassing substance and confusing the public. The 1956 Suez crisis, which occurred when Egypt nationalised the Suez Canal, provides a particularly concerning illustration. Parliament was recalled from summer recess on 12 September 1956 and the House of Commons was given a chance to debate potential military action. During the discussion, the Opposition insisted that Britain should not use military force without an additional parliamentary debate, nor should action be taken without the approval of the international community (by way of the UN Security Council). Yet, although the Opposition wanted to push for a vote, under an adjournment motion this would have ended the debate and sent the House back into recess.[21] The absurd effect of this would be to postpone further discussion of the issue to a time when it would become irrelevant (eg when the Government would have already sent the troops abroad).

So, through an adjournment debate, Parliament was effectively being 'held hostage'. Although MPs could discuss the Suez Crisis, they did so under the pressure of being sent back into recess and being prevented from being involved

[17] HC Deb 11 December 1990, vol 182, col 894 (Harry Ewing).

[18] House of Lords, Select Committee on Constitution, 'Waging War' (2006), citing Kenneth Clarke, [42].

[19] HC Deb 31 May 1995, vol 260, cols 1021–22 (Tony Benn). See also M White: 'Britain debates aim of intervention as: War divides parties and unites old political foes' *The Guardian* (31 May 1995) 8.

[20] 'Waging War' (n 18), citing evidence given by Katja Ziegler [43].

[21] The pro-Government majority would insist on adjournment and send the House back into recess through a vote in favour of the adjournment motion. HC Deb 12 September 1956, vol 558, cols 2–149.

in the matter further. As one MP put it, to adjourn at a time like this would be 'a negation of democracy'.[22] But despite such concerns the debate was adjourned when the Labour leader failed to secure a promise from the Government to wait before using military force. He forced a division on the motion to adjourn and the Government won the vote 300 to 232, sending Parliament back into recess.

It should come as no surprise, then, that in respect of the use of adjournment motions in response to Suez, Kosovo and other wars, MPs and Government Ministers alike have argued that: 'The question of whether British troops are committed to action ought to require the dignity of a more meaningful procedure'.[23] By the time the Iraq war was under discussion in 2002, the calls for procedural change had reached fever pitch. MPs insisted that although they had no 'legal or constitutional right to decide the matters [of military deployment]', they had a 'duty to represent people'.[24] If Parliament was to be involved on issues of war, then this had to be in a manner in which its members could perform their representative function. As the Iraq War would subsequently demonstrate, this could only be achieved if Parliament had a real opportunity to debate on a substantive question of war and if it was able to vote clearly for or against military action.

II. Debate and Vote on a Substantive Motion: Empowering the House of Commons

Before the War Powers Convention crystallised, the Iraq War represented a major turning point in parliamentary practice. By October 2002, MPs began to pose basic questions regarding the Prime Minister's perception of his royal prerogative power and, more specifically, about whether Parliament could and would have a say on the use of military force. MPs across party lines insisted that the Commons should be consulted *prior* to the decision to go to war.[25] But Blair stood firm on tradition, emphasising that in respect of Kosovo and of Afghanistan 'we gave the House ample opportunity not only to debate, but to declare and express its view. I am sure that we will do so again, in accordance with the normal tradition of the House'.[26] The Prime Minister did not specify whether this would involve a debate on an adjournment or substantive motion, or indeed whether the House would be allowed to debate and vote prior to the initiation of hostilities. Both the form of engagement of Parliament and its timing were therefore at stake.

[22] HC Deb 13 September 1956, vol 558, col 322, Leslie Hale.

[23] R Cook, *The Point of Departure* (London, Simon & Schuster Ltd, 2003) 187–88.

[24] HC Deb 6 September 1990, vol 177, cols 774–75 (Tony Benn). Similar statements were also made in 2002–03, see Jack Straw HC Deb 18 March 2003, vol 401, col 900: 'never before, prior to military action, has the House been asked on a substantive motion for its explicit support for the use of our armed forces. The House sought that, but, more important, it is constitutionally proper in a modern democracy'.

[25] Graham Allen, Tam Dalyell, Alice Mahon from Labour, as well as Norman Baker and Charles Kennedy from Lib Dems, asked questions about the Government's intentions and received inadequate answers.

[26] HC Deb 24 September 2002, vol 390, col 11.

In December 2002, the Conservative leader, Iain Duncan Smith, once again raised questions in respect of a role for Parliament in the making of the actual decision to deploy troops to the Middle East. Mr Duncan Smith urged the Prime Minister to permit a vote on troop deployment using a substantive motion. But the request was rejected for its potential to endanger troops, whilst deployment itself was labelled as a merely 'contingent' move.[27] Ultimately, troops were deployed without a vote in Parliament, but this fact did not escape criticism in the House.[28]

Although troops had been deployed to the region, one crucial element had still not been decided: the question of whether or not the British Government would start hostilities against Saddam Hussein's regime. In early 2003, parliamentary support for a debate and vote on a substantive motion before any commitment to hostilities grew louder still. On 22 January 2003, the House of Commons debated an adjournment motion titled 'Defence of the World', which focused on the policy towards Iraq. At the end of the debate there was an adjournment vote, and 53 MPs voted against the adjournment: this was a show of rebellion against the Government's Iraq policy, since 44 of those who voted against the adjournment were Labour MPs.[29] Tam Dalyell, who had forced the division, reminded the Government: 'If the House is not to be demeaned, it should have a vote before any commitment to action. I hope that the House authorities and those who control these things will take that seriously, otherwise the House of Commons will be greatly demeaned'.[30] Dalyell of course had a vote on a substantive motion in mind.

By the end of February, the support for Parliament to vote on a substantive motion had reached across party lines. In quick succession calls for action came from Alex Salmond (SNP), Richard Allan (Lib Dem), Menzies Campbell (Lib Dem), Douglas Hogg (Con), and even the Leader of the House and then Foreign Secretary, Robin Cook (Lab).[31] On 26 February 2003, 121 Labour MPs voted in support of a motion that 'the case for military action against Iraq [was] as yet unproven'.[32] Robin Cook commented that 'For the Government, the outcome was difficult and revealing'.[33] A further signal indicating how serious MPs were about their involvement came in respect of an Early Day Motion affirming that Parliament had not approved military action in Iraq, and calling for a debate and vote in the House of Commons prior to the deployment of troops. This motion was put forward by Tony Wright MP (Lab), and received 126 signatures, the majority of which came from Labour MPs.[34] Graham Allen (Lab) had gathered a large

[27] HC Deb 18 December 2002, vol 396, col 835.

[28] Gerald Howarth (Con, Aldershot) asked why the press had received this information a day before the House Commons (ibid, cols 846–47). Jeremy Corbyn suspected that the whole statement was something that 'softens us up for war', that the Government had no intention of seeking either UN or parliamentary approval for war (ibid, col 856).

[29] HC Deb 22 January 2003, vol 398, col 405.

[30] ibid, col 372–73 (Tam Dalyell).

[31] HC Deb 24 September 2002, vol 390, col 51 (Douglas Hogg and Tam Dalyell).

[32] HC Deb 26 February 2003, vol 400, col 363.

[33] HC Deb 6 March 2003, vol 400, col 970 (Robin Cook).

[34] House of Commons Early Day Motion 773 of 2002–2003 (12 February 2003), Tony Wright MP.

number of MPs in support of the view that Parliament should be both the final decision-maker and the ultimate source of legitimacy in this sphere. If approved, the motion would give Parliament the right of approval before any British troops were committed to hostilities abroad.[35] This mounting pressure, coupled with the failure to secure international legal backing contributed to unrest within government (notably the resignation of Robin Cook). These factors compelled the Prime Minister to permit a substantive debate and vote on 18 March 2003. The Government secured a majority (412:149), but many Labour MPs rebelled. On 20 March 2003 Britain went to war in Iraq.

For the first time in the history of the Westminster Parliament, the House of Commons was permitted by government to debate and vote on a *substantive* motion *prior* to the start of hostilities. According to the main protagonists, the goal of this new parliamentary involvement was manifold. First, for MPs, the substantive motion allowed them to represent the people and voice their views through a vote.[36] In addition to representing the people, MPs aimed to hold the Government to account by challenging its policies and strategies, and requiring more information and explanation.[37] It was clear the sands were shifting. Cook explained the potentially serious impact of these new developments in the following terms:

> It has been a favourite theme of commentators that this House no longer occupies a central role in British politics. Nothing could better demonstrate that they are wrong than for this House to stop the commitment of troops in a war that has neither international agreement nor domestic support. I intend to join those tomorrow night who will vote against military action now.[38]

In short, a vote on an adjournment motion could easily be disregarded,[39] but the same could not be said of a vote following a substantive debate. As one former MP put it: 'A vote cannot be ignored'.[40]

Regardless of the motivations of the actors involved in the Iraq saga (explored in chapter two), a profound shift occurred in the relationship between the House of Commons and the Government in respect of war powers. The House of Commons had shifted from a position where it was marginalised by procedural involvement, using a motion which risked the deception of the public, to the centre stage, as it was asked to provide the political backing necessary to legitimise military action. MPs had negotiated a position of real influence on questions of war. The events surrounding Iraq firmly impacted upon subsequent

[35] P Bowers, 'Parliament and the use of force', House of Commons Library, Standard Note, SN/IA/1218 (25 February 2003) 4–11.

[36] HC Deb 6 September 1990, vol 177, cols 774–75 (Tony Benn).

[37] We are grateful to David Howarth, former MP, for this comment, 17 February 2016.

[38] HC Deb 17 March 2003, vol 401, col 736 ff.

[39] Narvik Debate on 7 and 8 May 1940, which Chamberlain won, but with a greatly reduced majority and thus two days later he resigned. HC Deb 7 May 1940, vol 360, cols 1073–196 and HC Deb 8 May 1940, vol 360, cols 1251–366.

[40] David Howarth, former MP, 17 February 2016.

parliamentary practice. Since 2003, a consistent pattern has emerged: every time the Government contemplated the deployment of troops, MPs have been invited to discuss and support military action through a substantive motion. This is true of almost every occasion in the last 14 years.[41] The outcome of each of these votes has been respected by the Government as a binding expression of parliamentary (and in turn democratic) will.

B. From Discretion to Democratisation

I. The Recognition of the War Powers Convention and the Values of Parliamentary Involvement

Since the debates on the Iraq War in 2002 and 2003 there has been a steady increase in both the nature and the scope of parliamentary engagement with the war prerogative. The nature relates to the change in the procedure used to involve Parliament, discussed above, whereas the increase in the scope of the involvement describes the type and extent of information provided to Parliament by government. This new era of parliamentary control of governmental discretion was given a constitutional foothold by the 2011 Cabinet Manual, which stipulates that:

> In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate.[42]

This written exposition of the convention purports to guarantee the House of Commons a debate prior to the deployment of troops, save in the event of an emergency or where such activity would prejudice the public interest. The recognition of the existence of the War Powers Convention as a constitutional convention in the Cabinet Manual is important. First, a constitutional convention is a constitutional rule with political (as opposed to legal) force and as such usually remains uncodified. Conventions apply between political actors in the political realm.[43] They cannot be enforced by courts, unlike legislation or common law rules. Yet, nevertheless, they are an important element of Britain's uncodified constitution—without studying them, we would get a misleading and incomplete picture of the constitution.[44] Although there is much academic disagreement

[41] The notable exception being Mali, where no consultation took place. In addition, the timing of the engagement has not always been respected.

[42] HM Government, *The Cabinet Manual: A guide to laws, conventions and rules on the operation of Government*, 1st edn (London, The Stationary Office, 2011) [5.38].

[43] *R (Miller and Others) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [141]–[146].

[44] M Elliott and R Thomas, *Public Law*, 2nd edn (Oxford, OUP, 2014) ch 2.

about the precise nature of conventions,[45] for the purposes of this discussion we need only be familiar with the fundamental (and uncontroversial) aspects of conventions. The role of conventions in the political sphere is to give effect to the 'morality of the constitution'.[46] To that end, it is helpful to think of conventions as a form of 'role morality', ie as rules of 'constitutionally appropriate behaviour' which become binding when any actor occupying a relevant role considers himself or herself to be bound by that rule in the context of his or her duties.[47] In that context, the decision by Tony Blair in 2003 to put the Iraq invasion to a vote, and his subsequent statement to a Parliamentary Select Committee that 'no Government could engage in a conflict if Parliament was against it',[48] indicate essential steps towards the emergence of a new rule. Blair's actions and statement represents the recognition or belief by a political actor in the context of his role in public life that he is required to be politically accountable to Parliament.

Yet, as Sir Ivor Jennings and others argue, the recognition of being bound by certain conduct is not sufficient to generate a rule of constitutional behaviour in and of itself.[49] A constitutional convention must be established by precedents (ie consistent practice), the relevant actors must believe they are bound by the rule in question, and there must be a constitutional reason (ie a normative reason) for the rule.[50] In this sense, the position of Tony Blair and his decision to take the matter to a vote was not sufficient to create a convention. It is only once this initial precedent—that government has to turn to Parliament and respect its position—has been consistently referred to and the rule has been given effect to by subsequent practice that a constitutional convention is solidified. For 14 years since 2003, the requirement for Parliament to be involved has been recognised by subsequent governments. Every time a new conflict arises, the Government through the Prime Minister, Foreign or Defence Secretary usually declares that it is committed to abide by the convention.[51] More and more frequently, members of the Government refer to the wording of the Cabinet Manual to bolster their commitment to the convention. In this context, the Cabinet Manual both expresses the certainty of existence of a new rule and clarifies its content. It confirms that there is a rule, that there are precedents, and that the rule has been followed by the

[45] J Jaconelli, 'The nature of constitutional conventions' (1999) 19 *Legal Studies* 24; G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford, Clarendon Press, 1984), A McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 *Modern Law Review* 853.

[46] AV Dicey 'Nature of Conventions of the Constitution' in Marshall, *Constitutional Conventions* (ibid) 10–12.

[47] McHarg, 'Reforming the United Kingdom Constitution' (n 45) 860.

[48] 'Waging War' (n 18), [86], quoting the 2003 proceedings of the Liaison Committee.

[49] Jaconelli, 'The nature of Constitutional conventions' (n 45) 29.

[50] ibid, 28–29.

[51] See, eg, Defence Secretary Michael Fallon's written statement (18 April 2016) HCWS678.

relevant actors (the Government and Parliament) as a standard of constitutionally appropriate behaviour.

Thirdly and finally, the recognition of the convention in the Cabinet Manual marks the successful end to a struggle to strengthen the position of Parliament in this realm of the constitution and to place it upon a more secure, codified footing.[52] Its codification is indicative of the importance and constitutional reason behind the political rule. This third and final element of the so-called Jennings' test is normative in nature.[53] There could be many reasons and justifications offered for the War Powers Convention, but our work focusses on the following over-arching justification, namely, that the Convention contributes to the democratisation of the war prerogative, and in turn, instantiates the values of 'good governance' (accountability, participation and transparency) into the relationship between the Executive and Parliament in the context of the war prerogative.[54]

Although our chosen values have become ubiquitous in official[55] and academic literature[56] promoting good governance there are no agreed or exhaustive definitions of any or either of them. Choosing values by which to measure the worth of any constitutional process is always an inherently controversial venture. In recent years, there has been an academic movement to establish the existence of 'global values' in constitutionalism.[57] This can be seen as part of a wider move towards 'cosmopolitan constitutionalism' in Western liberal democracies.[58] However, it remains a widely held view that values in constitutions remain the subject of inherent political contestation in respect of both their internal definitions, and their order of priority in any one system.[59] This is as true of the United Kingdom's uncodified constitution as any other system. One possible framework is to distinguish between those values which are of 'intrinsic' value (ie are of value in and of themselves), and those which are of 'ultimate' value because they promote particular goods.[60] In respect of the British Constitution, Jowell and O'Cinneide identify the three core (or intrinsic) values as 'liberty', 'representative government', and the 'rule of law'. These authors consider that 'transparency', 'accountability',

[52] A Blick, *The Codes of the Constitution* (Oxford, Hart, 2016) 109, and House of Commons Political and Constitutional Reform Committee, 'Constitutional Implications of the Cabinet Manual, 6th Report of 2010–2011, HC 734, [61].

[53] WI Jennings, *The Law and the Constitution*, 5th edn (London, University of London Press, 1959) 81.

[54] B Kingsbury, N Krisch and RB Stewart, 'The emergence of global administrative law' (2005) 68 *Law and Contemporary Problems* 15–61.

[55] OECD, 'Accountability, Transparency, Participation: Key Elements of Good Governance' <www.oecd.org/governance/regulatory-policy/irrc.htm> accessed 21 June 2017; European Commission, 'Principles of Good Governance: A White Paper' COM (2001) 428 (25 July 2001) 10–11.

[56] Kingsbury, Krisch and Stewart, 'Global administrative law' (n 54) 15–61.

[57] D Davis, A Richter and C Saunders (eds), *An inquiry into the existence of global values* (Oxford, Hart, 2015).

[58] M Loughlin, 'The end of avoidance' (2016) 38 *London Review of Books* 12–13.

[59] Davis, Richter and Saunders, *Existence of global values* (n 57) 13.

[60] J Raz, *The Morality of Freedom* (Oxford, OUP/Clarendon Press, 1986) 200 quoted in *Existence of global values* (n 57) 12.

and 'participation' are secondary values 'which have not yet become embedded in the bedrock of the British constitution'.[61] By contrast, Cane considers our chosen values of accountability, transparency, and participation to be 'immanent' or background values which underpin public law.[62] Although we agree that our chosen values may not be 'core' or 'intrinsic' values in the British constitution, we believe that they are the central values which drive our evaluation. We have chosen to test the relationship between government and Parliament against the benchmarks of accountability, transparency, and participation because we believe that they are the goods that political deliberation over armed conflict should strive to realise. Since the Iraq War of 2003 successive governments have attempted to argue that the War Powers Convention makes the process of deciding on war more open, accountable, and democratic due to the input of elected politicians. We test these claims throughout the book.

In chapters two, three and four we look at the three values in turn. But the boundaries between individual values are necessarily artificial. For example, although no one would dispute the status of accountability as a 'golden concept' in governance, its 'evocative powers make it … very elusive … because it can mean many different things to different people'. In short, accountability is capable of encompassing notions of transparency, trust, and the requirement of participation by relevant actors, depending on the definition adopted.[63] In truth, the situations described in each chapter engage with all of the values in different ways. Each of the values are dependent on each other for their own existence. Their relationship mirrors the domino effect: where one value is undermined the others must also fall.

a. Accountability

Despite the above caveats, each of the values deserves preliminary attention on its own terms. Accountability can be conceptualised as the core value underpinning any democratic endeavour.[64] The nuts and bolts of the War Powers Convention, namely the requirement to have a debate and vote on a substantive motion prior to armed conflict, can be seen as an accountability process. If well executed, an accountability process can 'promote [the] efficient and effective performance of the required task' by encouraging 'the primary actor to gather information and to exchange ideas with those calling to account'.[65] The new trend favouring debates and substantive motions, which has crystallised into a constitutional convention, clearly denotes the construction of such an accountability process

[61] J Jowell and C O'Cinneide, 'Values in the UK Constitution' in *Existence of Global Values* (n 57) 360.

[62] P Cane, 'Theory and values in public law' in P Craig and R Rawlings, *Law and Administration in Europe: essays in honour of Carol Harlow* (Oxford, OUP, 2003) 14–16.

[63] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447, 448.

[64] ACL Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford, OUP, 2001) 76.

[65] ibid, 79.

which was previously unavailable in the British constitutional order. According to Tony Benn MP, 'If you tell young men in the Services that they have got to go under orders and kill, and may be killed, you are talking about the most important decision literally in their lives and that should not be taken other than by a democratic vote in the House of Commons, in Parliament'.[66] This sentiment was echoed by a former Attorney-General, who suggested that increased parliamentary involvement in the war prerogative was essential to restoring public confidence in its exercise: 'I do not think today that it is practicable to suppose that the public will be satisfied in terms of confidence in the commitment of our Armed Forces to what we might call an "armed conflict" situation solely on the exercise of the prerogative by the Prime Minister'.[67]

b. Participation

Citizen participation, whether directly or through elected representatives, imbues governmental decisions with legitimacy. Alongside accountability, participation acts to dilute corruption in decision-making.[68] In the broader context, participation involves consulting 'parliamentary' bodies across a range of national and international organisations which perform governance functions.[69] There is also an inextricable link between participation and the type of representative democracy which operates in Westminster. At the core of participation as a value, is the idea that decisions subject to citizen (or representative) participation can be made in a more deliberative manner, and that the outcome will be enhanced as a result.[70] Although all votes falling under the War Powers Convention have been subject to some form of party whip, Members of the Commons have shown sensitivity to the views of constituents in the course of debates. In 2015, in respect of air strikes against ISIS/ISIL in Syria, Labour party leader Jeremy Corbyn allowed members of the parliamentary party a free vote, despite maintaining an official 'anti-war' party line.[71] In respect of entirely whipped votes, significant numbers of MPs have rebelled in successive votes.[72] In the simplest terms, the advent of debates and votes under the War Powers Convention constitutes evidence of enhanced participation by democratic representatives.

One of the key contributions of parliamentary participation in this context, then, is to provide a process by which the dominance of any one figure in the

[66] 'Waging War' (n 18) [38].

[67] ibid, [39], quoting former Attorney-General, Lord Mayhew of Twysden.

[68] C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *The European Journal of International Law* 187, 199.

[69] ibid, 200.

[70] RA Irvin and J Stansbury, 'Citizen Participation in Decision Making: Is It worth the Effort?' (2004) 64 *Public Administration Review* 55–65.

[71] P Wintour and R Mason, 'Syria airstrikes: Jeremy Corbyn gives Labour MPs free vote' *The Guardian* (30 November 2015).

[72] The largest rebellion occurred in respect of the Iraq War against Toby Blair's Labour Government: J Ennis and J Grogan, 'The mother of all rebellions' in P Cowley (ed), *The Rebels: How Blair mislaid his majority* (Politico's, London, 2005).

decision-making process can be counteracted by publicly testing the Government's case for war. Participation by elected representatives can act to prevent executive dominance of any given policy area. Although the Iraq War was clearly the original catalyst for what the convention would become, history will not look kindly on the Blair Government's treatment of Parliament, nor will it look favourably on the actions of Blair towards his own Cabinet ministers and officials. After the completion of his inquiry, Sir John Chilcot remarked that within the Executive, Blair exhibited 'sheer psychological dominance' over key actors within the Cabinet.[73]

Other MPs have straightforwardly suggested that increased parliamentary participation would contribute to *better* decisions being made about armed conflict. Clare Short told the Lords' Constitution Committee in 2006 that the exercise of the royal prerogative power by the Prime Minister alone leads to decisions being taken in a 'vacuum'. She further highlighted that a requirement for parliamentary scrutiny may result in better considered and prepared decisions: 'If any Prime Minister knew that he had to bring before the House of Commons … a full statement of why and the analysis, I think that means the whole issue would have to be better scrutinised, better thought through, better prepared and the decision would be better made'.[74]

c. Transparency

Transparency is amongst the most pervasive values in the liberal democratic order. Its use cuts across fields and disciplines including the 'media, markets, democracy, regulation, and public administration'.[75] In its simplest form it connotes the idea that for a decision to be made visible, there must be a disclosure of the information or resources upon which the decision is based. As a value, its contribution to governance is that it allows the affected party (in our case, the citizen represented by Parliament) to avoid 'making shots in the dark, in circumstances where the light could so easily be switched on'.[76] Transparency is relevant in two senses in the context of the War Powers Convention; first, the mechanism of public voting on substantive motions (ie a vote directly 'for' or 'against' an armed conflict) allows members of the public to directly assess the views of their constituency MP, and the stance of political parties.[77] In comparison to the discussions and votes on adjournment motions, which used to be the traditional way of engaging the House, now debates are accessible and votes easily understandable. Secondly, we have

[73] Sir John Chilcot, Oral Evidence to the House of Commons Liaison Committee (2 November 2016), Question 48 <www.parliament.uk/documents/commons-committees/liaison/John-Chilcot-oral-evidence.pdf> accessed 2 November 2017.

[74] 'Waging War' (n 18), [44] and Volume II: Evidence, Q 2.

[75] EC Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 *Current Legal Problems* 272, 272.

[76] *R (Eisai Ltd) v National Institute for Health and Clinical Excellence (NICE) and Others* [2008] EWCA Civ 438 [50].

[77] Mainstream news outlets have taken to publishing the voting roll. See BBC.

seen how the increased disclosure of intelligence, legal advice, and information in general by government to Parliament, fuels more informed decision-making by Members of the Commons. Although the information supplied to Parliament still depends 'on the goodwill of the Executive or the existence of a convention that Parliament should be informed',[78] there appears to be less of an effort to consciously 'marginalise [Parliament] by lack of information'.[79] In short, prerogative discretion has given way to democratic deliberation and control. The question remains, however, whether these new levels of transparency are sufficient to render Parliament an effective scrutineer of the use of the war prerogative.

II. Towards Balanced Political Deliberation

When placed in its broader context, the War Powers Convention itself, and its results, illustrate a trend away from hierarchical decision-making towards a form of representative participation mirrored across public administration.[80] In some ways, the convention has helped formalise the role of the Loyal Opposition in Parliament by importing the maxim of *audi alteram partum* (or the 'duty to hear the other side').[81] Although the legal decision to initiate war will always remain solely within the purview of the Government, one of the core purposes of the War Powers Convention is to permit prior political scrutiny of the Government's case for war. In further evidence that parliamentary involvement in the war prerogative had become a moral imperative, several key parliamentarians report that the developments of the twenty-first century rendered them 'much exercised'[82] and in favour of the 'generosity'[83] that government had shown to Parliament. This, in turn, truly meant that the prerogative (the residue of discretionary legal power stemming from the Crown) was being recognised as 'a relic of a past age'[84] and is being treated as such by the new convention-driven constitutional arrangement. As such, the convention was essential because 'Accountability and representative Government go together'.[85] The Convention, therefore, imports some sense of political balance into decision-making about armed conflict by enhancing Parliament's role. However, it cannot be said to put Parliament on an equal footing with government, as the Government retains the final power of decision-making.

[78] 'Waging War' (n 18) [43] and S Payne, Volume II: Evidence, 17.

[79] ibid, K Zeigler, Volume II: Evidence, 56 (s III).

[80] L Blomgren Bingham, T Nabatchi and R O'Leary, 'The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government' (2005) 65 *Public Administration Review* 547.

[81] G Webber, 'Loyal Opposition and the political constitution' (2017) 37 *Oxford Journal of Legal Studies* 357, 371.

[82] House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial accountability to Parliament) 4th Report, 2003–04, HC 422, para [19]: '"much exercised" by the approach taken by the Government to the war in Iraq. He believed that modern conditions demanded that any major military action should have explicit parliamentary approval'.

[83] ibid, William Hague para [22].

[84] Per Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 101.

[85] C Harlow, *Accountability in the European Union* (Oxford, OUP, 2002) 190.

If there was any doubt as to democratic progress and the 'withering'[86] decline of the prerogative, the events of August 2013 provided clarification. For the first time in constitutional history, Parliament voted to prevent government from pursuing armed conflict in Syria. The Conservative–Liberal Democrat Coalition Government motion supporting intervention against the Bashar Al-Assad regime to prevent chemical weapons attacks against the Syrian people was defeated by 272 to 285 votes. The Deputy Prime Minister, Nick Clegg (Liberal Democrat), made clear that the Government would respect 'the will of Parliament'.[87] No military action was taken, and the press called the result of the vote 'historic'.[88] For one commentator the events of 2013 demonstrated that 'Votes such as last night's are no longer mere rubber stamps but a binding convention that can change the foreign policy of a government'.[89] In short, a sovereign Parliament had finally tamed the most primal exercise of the prerogative.

The constitutional convention, which came to be known as the 'War Powers Convention' had injected 'constitutional propriety'[90] into a previously unchecked area. The lacuna between law and politics into which the war prerogative had previously fallen was now imbued with the values of good governance, which prevented the exercise of arbitrary power. In some senses, the United Kingdom had finally made progress in eroding what is known as the 'double democratic-deficit' in relation to war powers, referring to the lack of democratisation in both international organisations and national constitutional arrangements for controlling deployment of the armed forces.[91] For the first time, the convention gave teeth to Parliament's democratic credentials.

There are of course a range of ways in which parliaments across democracies can be involved in the democratic control of war powers. The parliaments with the strongest form of democratic control are those which are legally empowered to conduct *ex ante* approval of military action and can compel debates and investigations into the use of war powers, regardless of Executive will. By contrast, the parliaments with the weakest form of democratic control are those which exist in constitutional arrangements requiring no parliamentary action for the use of military force; and where no specific control or debate could be initiated by Parliament relating to the use of military force.[92] Currently the German Constitution,

[86] A Blick, 'Emergency powers and the withering of the Royal Prerogative' (2014) 18 *The International Journal of Human Rights* 195.

[87] HC Deb 29 August 2013, vol 566, col 1545.

[88] T Stanley 'Syria vote': (n 11), R Hutton and T Penny 'Historic Vote' (n 11).

[89] J Hallwood, 'The Syria vote was a triumph of parliamentary sovereignty' *New Statesman* (30 August 2013).

[90] S Payne (2008) 'War Powers: The War Prerogative and Constitutional Change' (2008) 153 *The RUSI Journal* 28, 29.

[91] H Hanggi, 'The use of force under international auspices: parliamentary accountability and "democratic deficits"' in H Born and H Hanggi (eds), *The 'Double Democratic Deficit': Parliamentary Accountability and the use of Force Under International Auspices* (Geneva, DCAF, Ashgate, 2004).

[92] S Dieterich, H Hummell, and S Marschall, 'Strengthening Parliamentary "War Powers" in Europe: Lessons from 25 National Parliaments' Geneva Centre for the Democratic Control of Armed Forces (Policy Paper No 27, 2008), Ch 4.

considered to be amongst the strongest democratic arrangements, requires a vote of consent in the German Parliament (*Bundestag*) before military action is lawful in Germany. In a decision in 1994, the German Federal Constitutional Court (*Bundesverfassungsgericht*) confirmed that such a consenting vote was a legal requirement inherent in the background principles which inform interpretation of the German Constitution.[93] The *Bundesverfassungsgericht* ruled that:

> The provisions of the Basic Law that relate to the forces are designed not to leave the *Bundeswehr* (armed forces) as a potential source of power to the executive alone, but to integrate it as a "parliamentary army" into the constitutional system of a democratic state under the rule of law.[94]

Although the British constitution contains no legal arrangements compelling parliamentary involvement in war powers, let alone any rules permitting Parliament to initiate controls of its own motion as is the case in Germany, it would be misleading to argue that there are no constitutional limits on Executive power in the area. In fact, the War Powers Convention has significantly strengthened parliamentary control in this domain. Despite not being a legal rule, the convention appears capable of producing results to the same effect as the German arrangements. Given that the military action in Syria was voted down by Parliament in 2013, and the Government respected the outcome of that vote, we can see an emerging parallel between the normative force of the German and British constitutional rules.

C. Roadmap of the Book

The promised enhancement of Parliament's participation in the process of political deliberation over armed conflict implicit in the War Powers Convention raises questions of its real effect. Namely, the enthusiasm accompanying the changes in the relationship between Parliament and government assumes that in practice the convention has encouraged the values of accountability, transparency and participation to flourish. Both authors were drawn to the project by a common curiosity about how the War Powers Convention really works in practice and in the chapters that follow, we subject the assumption that the War Powers Convention facilitates the recognition of the three good governance values to scrutiny. To do this we examine the extent to which the current relationship between the Government and Parliament in the context of war powers actually vindicates these governance values. Our argument presents an outside perspective of what happens between Parliament and the Government.[95] At this juncture we should make clear the limitations on the scope of our argument. We do not claim that the

[93] German Federal Constitutional Court's 'Out of area' Judgment (BVerfGE 90, 286 of 12 July 1994).

[94] Judgment of the Second Senate of 7 May 2008 on the basis of the oral hearing of 12 February 2008—2 BvE 1/03—[57]. <www.bundesverfassungsgericht.de> accessed 7 November 2016.

[95] We spoke informally with several MPs about various aspects of the book. However, this is not, nor is it intended to be, an empirical study which draws upon interviews or qualitative analysis.

involvement of the House of Commons in armed conflict decisions will render decisions to wage war or refrain from action inherently more strategic or morally better. Instead, we simply accept that the democratisation of certain aspects of armed conflict decisions has now reached a point of no return. That is to say, there are certain circumstances in which the House of Commons will expect to be politically and democratically involved in armed conflict decisions under the War Powers Convention. In light of this, we seek to uncover ways in which parliamentary engagement in these circumstances can be both constitutionally meaningful and useful.

Chapter two evaluates the relationship between Parliament and the UN Security Council in relation to armed conflict decisions. By mapping out both the international and the domestic avenues for securing support for the use of force, we reveal that there is a 'hierarchy of fora' in which decisions to go to war are discussed. This is driven by the Government's own perspective: first comes the need to build a case on the international political stage (usually before the UN Security Council), and subsequently, after having failed to secure legal backing for its action from the international community, comes the need to build a domestic political case for war in Parliament. The dynamics of these two-stage processes demonstrate that the War Powers Convention requiring parliamentary (and in turn democratic) approval was not born for reasons of constitutional 'good governance'. Instead, it was strategically designed to fill a lacuna in legitimacy created when the British Government has failed to secure explicit and unambiguous support from international institutions. It is then that Parliament has been used as a surrogate for the Security Council to compensate for the lack of an international legal basis. What is additionally worrying, however, is the extent to which international legal language dominates the discourse used by the Government and other participants both on the international and domestic level. The terminology used before the House of Commons is almost no different in kind to the discussion in the UN Security Council. In fact, the debates mirror Security Council discussions. The pervasiveness of the international legal language means that when the decision to go to war is 'brought home', international law acts as a trump card, effectively stifling political discourse. This prevents MPs from engaging on important policy questions, which we argue they are constitutionally mandated to ask. The current situation therefore prevents MPs from performing their duty and negates the purported reasons behind the birth of the War Powers Convention—accountability, transparency and participation.

In chapter three we consider the extent to which the relationship between the Government and Parliament as defined by the War Powers Convention fails to adequately promote the value of political accountability. We deepen our inquiry by showing in more detail how Parliament's role on questions of war depends entirely upon the extent to which the Government is willing to cooperate with Parliament and to share information. If the convention initially looked like it would level the playing field between Parliament and the Government, the analysis of practice since its codification in the Cabinet Manual reveals that this is simply not true.

The Government remains substantially in control of when the convention is used and the circumstances to which it applies. Precedent by precedent, dispute by dispute, successive governments have made use of both the timing and the 'emergency argument' to avoid prior debates or votes in Parliament. On occasions where Governments have allowed parliamentary debate and votes, this engagement has been timed so as to be 'too late to influence policy'.[96] We further reveal how additional exceptions to the operation of the convention have been created incrementally—first, by excluding the use of drones from parliamentary oversight and secondly, by exempting special forces embedded in other countries' military forces and their subsequent participation in military actions abroad under the public interest exception. The exceptions that have been carved out of the codified convention significantly reduce the number of occasions on which Parliament would be expected to be involved.

Chapter four digs deeper still into the process of parliamentary engagement to uncover the deficit in participation which has been present in armed conflict decisions throughout the twentieth and twenty-first century. This deficit is driven by an endemic information asymmetry that exists between government and Parliament in the context of war powers. Unsurprisingly, this asymmetry favours the Government. It has a corrosive effect on Parliament's ability to exercise its constitutional functions. The negative effects of secrecy begin with where decisions to go to war are taken within the internal machinery of the Government. Secrecy's ill-effects can be seen in the way that government uses secrecy as a justification for excluding Parliament altogether, or for releasing select amounts of sensitive information to a small number of parliamentarians who are subject to an oath of confidentiality. The chapter tracks the uses of classified information on a spectrum which ranges from a blanket ban on disclosure by government, to the carefully managed public disclosure of claims based on classified information (secret intelligence). It reveals that the unequal and asymmetric relationship between the Government and Parliament serves the former since it allows the twin evils of groupthink and information asymmetry to flourish. An information-starved or poorly informed Parliament is ultimately easier for a government to control and to persuade. In the end, 'unanimity override[s MPs'] motivation to realistically appraise alternative courses of action.'[97]

Chapters two through four of *Parliament's Secret War* therefore reveal how the emergence and operation of the constitutional convention requiring parliamentary approval prior to the deployment of troops masks the real reasons behind parliamentary involvement (one of convenience and strategy), the extent to which the convention is subject to arbitrary exceptions, and the information asymmetry that dictates the engagement between Parliament and government. Even more, the chapters demonstrate that overt reliance on the international legal

[96] HC Deb 24 September 2002, vol 390, cols 96–97, Edward Garnier (Con).

[97] P t'Hart, *Groupthink in Government: A study of small groups and policy failure* (Baltimore, The Johns Hopkins University Press, 1990) 7.

discourse actively stultifies domestic political discourse. In this sense, we argue that the convention is a distraction, and that focusing on it to describe the relationship between Parliament and government is misleading. In fact, to talk about a co-equal political relationship between Parliament and the Government is to remain blind to the inherent imbalance and asymmetry between the two institutions. The first three chapters of the book therefore uncover the real 'secret war' that Parliament has fought for meaningful involvement, accurate information, and to compel the Executive to present its case for armed conflict with integrity.

Given the gap between what the convention is seeking to achieve and the problems identified when examining the actual operation of the relationship between the Government and Parliament, in the final two chapters we propose possible solutions. In light of this, chapters five and six put forward a package of solutions intended to bolster the governance values by reinvigorating political discourse within Parliament.

In Chapter five, we first consider the proposals made by other scholars. We show how the efforts of 'formalising' Parliament's role—either by capturing the convention in a parliamentary resolution or in primary legislation—misunderstands the true nature of the deficit in the current relationship between the House of Commons and the Executive. We believe that these proposed solutions would not fundamentally address the problems identified in this book. It is not the locus of rules about the relationship that matter, but the nature of political activity that is important. In view of this, we put forward alternative solutions to foster political discourse and deliberation and to promote both a culture of challenge and ultimately a culture of justification in Parliament. In this context, we insist that whilst the Government may present military action to MPs in legal terms (ie as a 'legal' or potentially 'illegal' war), in the political sphere law has the effect of suffocating political discussion and politics.

We therefore look for solutions that can free MPs of the straitjacket that law and legalistic language imposes. In the first instance, we argue that MPs can divorce their understanding of their own function from international law and perceive interventions as *wars of choice*. In addition, we argue that from an MPs' perspective a discussion about military action has to start with an awareness and understanding of the available information. From our perspective, an informed Parliament and more particularly, informed MPs are the antidote to poor decision-making and groupthink.[98] By educating themselves about the situation on the ground, the international and domestic motivations for action, the long-term strategy and the economic investment as well as the capability of the British armed forces, MPs can ensure better transparency and accountability of governmental decision-making. In the end, the fuller the inclusion of the House of Commons, the higher the number and diversity of challengers of the 'case for war' and a potentially more nuanced decision. Ultimately, our aim is to reveal that although Parliament may be

[98] Sir John Chilcot, 'Sir John Chilcot's Public Statement' (6 July 2016), <www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement> accessed 12 February 2017.

used strategically, MPs have a number of options available to them to expand their own influence over the final decision and to question government policy.

Finally, chapter six responds to the current misuse of secrecy in order to avoid the pitfalls of the public presentation of intelligence described in chapter four. The argument proposes a solution to ameliorate the issues to date with the public reliance by the Government on claims based upon classified intelligence. The solution uses secrecy. In short, it proposes that the whole House of Commons should scrutinise and debate reports of the Joint Intelligence Committee in closed sessions. This form of secrecy, which we might call *inclusive secrecy* works for the benefit, as opposed to the detriment, of the constitution. It recognises that our elected representatives must see classified information or secret intelligence in the context of war powers because the secrets kept therein are in some sense '"our" secrets'.[99]

D. Methodology: The Political Constitution and Evidence-Based Public Law

In this book, we try and depict how our political constitution works in practice. As public lawyers, we often distinguish between political and legal constitutionalism. Whilst we regularly analyse how the legal part of the constitution operates and what the constitutional legal rules in this context are,[100] the political constitution often remains only an abstraction, dominated by theoretical debates among scholars.[101] We may talk of different sources—constitutional conventions and traditions—and reiterate provisions contained in Cabinet Manuals and Ministerial Codes, but we fail to really capture what type of behaviour these political rules require. Our interest in this monograph is therefore precisely that which usually escapes analysis—the political constitution in action. To understand the scope of these political rules—constitutional conventions—is to understand how they operate in practice. Because constitutional conventions are born out of and changed through political interaction and negotiation, studying this context is key to understanding the scope of the constitutional rule.[102]

The methodology adopted in this monograph is thus two-fold: first, our aim is to map out the scope and content of the convention from the ground up. In this context, we build on parliamentary materials, debates in the Commons, reports of

[99] J Chafetz, 'Whose Secrets?' (2013–2014) 127 *Harvard Law Review* 86, 87.

[100] Consider inter alia A Tomkins, 'In defence of the political constitution' (2002) 22 *Oxford Journal of Legal Studies* 157 and G Gee and G Weber, 'What is a political constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273.

[101] See, for example, (2013) 12 *German Law Journal*: a special issue on 'political constitutions'.

[102] D Feldman, 'Constitutional Conventions' in M Qvortrup (ed), *The British Constitution: Continuity and Change* (Oxford, Hart, 2013) 94.

select committees and inquiries, as well as statements made by politicians to try to accurately depict the perception of the convention held by MPs,[103] ie those who 'operate the constitution' in this context.[104] In short, if the political constitution is 'no more and no less than what happens',[105] then, we seek to build an accurate picture of what is happening in the context of war powers. To do this, we adopt the same methodological approach we would take in relation to determining how legal rules work. We use the materials to understand how 'each institution builds up its own picture of the constitution as viewed from its own position within it'[106] and contrast these conflicting conceptions to establish the 'proper standard of behaviour'.[107] We look at political history and practice to determine 'what the political rule is' and how it has developed.

In a purely legal context, our approach would be called doctrinal, seeking to provide a 'systematic exposition of the rules governing a particular legal category, analysing the relationship between rules, explaining areas of difficulty and, perhaps, predicting future developments'.[108] But because our inquiry concerns the political dimension of the constitution, our work has to be informed by what happens in the political context. We need to understand how the War Powers Convention as a rule is 'implemented' and whether or not it is obeyed or departed from. In a legal context, a departure would suggest a violation of the law, but would not affect its *status* as the law. But in a political context, a breach or departure from a political rule is crucial because it undermines the existence of the rule, its scope or indeed the belief that a behaviour captured by the convention is binding.[109] In this sense, in the political context, understanding how the political rule—a constitutional convention—is obeyed is to understand what the rule is and what it requires. In this regard, our analysis of how the convention, as it is captured in the Cabinet Manual, fails to live up to its promise in practice is crucial in showing the extent, content, and true nature of the convention.

We call the approach we adopt to mapping out the constitutional convention *evidence-based public law*, because we feel this is an approach that allows us to achieve the goals set by doctrinal style research in a political setting. We use it to determine the current political practice and also to build up an evidence base from which we can later construct more theoretical normative arguments. Both of these elements are typical of public law scholarship. As a consequence,

[103] ibid, 94.

[104] Jennings opined that: 'the short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law' in Jennings, *The Law and the Constitution* (n 53) 81–82.

[105] JAG Griffith, 'The political constitution' (1979) 42 *Modern Law Review* 1, 19.

[106] Feldman, 'Constitutional Conventions' (n 102) 94.

[107] P Morton, 'Conventions of the British Constitution' (1991–1992) 15 *Holdsworth Law Review* 114, 138–44.

[108] E Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra, Australian Government Publication Service, 1987).

[109] Jaconelli, 'The nature of constitutional convention' (n 45) 42–45.

from chapter to chapter, the reader will notice a recurrent style of governmental behaviour. We depict this behaviour in relation to several military interventions to reveal the extent to which the repetitive behaviour is the norm in the relationship between government and Parliament. This repetition of examples also reinforces the extent to which government has through consistent practice determined or perhaps even cemented the presence of this troubling asymmetry. We believe strongly that such a case-by-case evidence based approach is beneficial for public lawyers, as it allows us to fully understand the operation of the constitution in context. This could not be achieved by simply focusing on abstract concepts or indeed only on written rules.

The second part of the book—chapters five and six—moves from an approach intended to establish 'what the rule is' to an approach that examines 'what the rule or appropriate standard of behaviour ought to be'. Here, we argue that the constitution as it applies to war powers would be best served by politics being liberated from the constraints imposed by public international law.[110] At this point we do introduce normative solutions, which some readers may see as theoretical. This is true to the extent that the future relationship between government and Parliament in the context of war powers is not readily predictable. If it is predictable, it perhaps cannot be predicted by public lawyers. However, our normative arguments sit atop the evidence base we have constructed in the previous chapters. This is what informs and strengthens their contribution: it offers solutions to problems we have directly identified. The solution is to map out a space in which the politics of the political constitution can be reinvigorated and permitted to flourish.

Finally, this book—and even its title—is focused on 'war', even though no formal declaration of war has been made since World War II.[111] Today, most military conflicts between nations are 'undeclared', with both sides failing to issue a formal declaration of war. Instead, warfare is referred to as 'military action', 'armed response' or in UN speak the 'use of force'. We use all of these terms—including war—interchangeably to refer to any deployment of troops or weapons (including drones and Special Forces) abroad. Although our definition of war or armed conflict is generous, as the analysis shows, governments seek to define conflicts and carve out exceptions to the convention based on equally generous interpretations.

[110] M Loughlin, *Sword and Scales: An examination of the relationship between law and politics* (Oxford, Hart, 2000), ch 1; H Arendt, 'Reflections on Little Rock' in P Baehr (ed) *The Portable Hannah Arendt* (London, Penguin Classics, 2003), C Schmitt and G Schwab (trans), *The Concept of the Political* (Chicago, University of Chicago Press, 1995), chs 7–8, B Crick, *In Defence of Politics*, 5th edn (London, Continuum, 2005), ch 7.

[111] The last formal declaration was made against Thailand (formerly Siam) in 1942; see 'Waging War' (n 18) [10].