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AUKUS and War Powers:

The Constitutional Dimensions of Grand Strategy

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ABSTRACT

This report explores the legal and political alignment of Australian, British, and American war powers, within the context of the AUKUS (Australia, U.K., U.S.) security partnership. While the focus of the AUKUS agreement has been on industrial and technological factors, achieving the strategic and deterrent effects that the partnership hopes to project will depend on how its capabilities are used. To that end, the partners will have to align their political and legal systems closely to produce the desired effects. Yet this is easier said than done. Misunderstandings over each other's constitutional war power procedures can have significant diplomatic and strategic consequences. Notably, in 2013, when President Obama called off airstrikes against Bashar Assad's regime, after its use of chemical weapons, David Cameron's unexpected failure to obtain parliamentary support for British participation was cited as a key reason for the reversal.

The aim of the report is to examine the AUKUS agreement through the lens of the partner nations' war powers regimes. First, it sets out the aims of the partnership and the role that war powers play in the strategic dimension of the AUKUS agreement. A series of contributors' essays then detail the legal and political frameworks of the war powers regimes in the United Kingdom, Australia, and the United States, considering them in light of their AUKUS commitments. Finally, the report draws together some overarching themes, considering the potential legal and political problems that may arise from AUKUS and suggesting policy-relevant solutions for closer scrutiny and cooperation, given its grander strategic objectives.

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War Powers and AUKUS: The National Context

The United Kingdom

- The British government does not legally require a debate nor a vote in Parliament to declare or make war. The Crown, acting through the Prime Minister, possesses the sole legal right to do so, known as the war prerogative.

- The King is the Commander-in-Chief of the armed forces, whose legal prerogative powers to command and organise the armed forces are delegated to the Defence Council and Defence Board, both chaired by the Secretary of State for Defence and responsible to the Prime Minister.

- Politically, Parliament plays a key role in supporting military operations, particularly the House of Commons, which provides legitimacy to military actions through debates or formal votes, as well as passing budgets and the Armed Forces Acts, which provides the legal basis for the military and must be renewed every five years.

- Britain's alliances depend heavily on the political position adopted by the government; the greater the government's majority in Parliament, the freer its hand to act as it sees fit. However, Parliament can play a significant political role in pressuring governments to adhere to, or abandon, their commitments, especially when they govern with a slim or fractious majority.

- For offensive or defensive military action overseas, the government possesses the prerogative right to deploy forces without a debate in or vote by the House of Commons, although in most instances a debate will be had, either prior to or shortly after action commences.

- For offensive military action overseas involving the significant commitment of troops, the government will normally seek a debate in, and vote by, the House of Commons to obtain legitimacy, if not legal authority, for the operation.

Australia

- The Australian government does not legally require a debate nor a vote in Parliament to declare or make war. The executive power of the Commonwealth is vested in the Queen under §61 of the Constitution, exercisable by the Governor-General as the Queen's representative, who is also the Commander-in-Chief of the armed forces under §68.

- The decision to authorise the commitment of forces lies with the Prime Minister as head of the Commonwealth government in Canberra, functionally exercised through a decision of the National Security Committee of the Cabinet. The lawful authority to deploy troops is a constitutional executive power found in §61 of the Constitution.

- These powers fall under the ambit of the 'constitutional executive power', informed by, but not identical to, the prerogative powers of the British Crown.

- The use of prerogative powers vested through §61 and §68 is not constitutionally qualified by requirements to notify, consult, or seek approval from Parliament, although in practice the government informs parliament, may debate a substantive motion, and even vote upon it.

The United States

- Only Congress may formally declare war or enact other statutory authorization to wage war (such as an Authorization for the Use of Military Force) under Article I of the U.S. Constitution.

- There has always been uncertainty as to whether the President is vested with inherent authority to "make" war absent a formal declaration of war or statutory authorization.

- Historical practice supports the exercise of this inherent Presidential power, derived principally from Commander in Chief clause of Article II of the Constitution, at least in the absence of specific statutory restrictions (such as cutting off funding) for prosecuting a war.

- Article II has been interpreted to include management of war and foreign affairs.

- The shared nature of war powers between Congress and the President continues to generate interpretive debates on the source and scope of presidential authority to wage war without express congressional authorization.

- Although Congress possesses substantial powers related to declaring and waging war, Presidents often undertake smaller, shorter, less casualty-intensive uses of force unilaterally under their authority as Commander in Chief and aggregate of inherent executive powers.

- It is widely recognized that the President is vested with inherent authority to respond with force to any attack against U.S. territory or its armed forces abroad, an authority expressly acknowledged in the 1973 War Powers Resolution.

- Whether a treaty commitment of mutual defence provides an independent basis for the unilateral exercise of presidential war power remains controversial. However, it is likely that a President confronted with an event triggering such a treaty obligation will treat the treaty as an important source of constitutional authority.

- Legally, presidents have broad discretion over the use of military force, but there exist very strong political incentives to not undertake - or refuse to undertake - uses of force out of line with congressional sentiment.

- Whether a President is willing to undertake full-scale war absent the formal approval of lawmakers remains a complex question with significant uncertainty.

    - A key factor in this assessment is the perceived political risk associated with acting absent congressional support.

    - However, it is likely that unless Congress takes a strong and express stand against such a war-making initiative, future presidents will follow the pattern of treating congressional ambivalence as evidence of implied support.

Introduction: AUKUS and War Powers[1]

> THE 'SYRIA VOTE' HAS LED TO LINGERING QUESTIONS ON THE RELATIONSHIP BETWEEN ANGLO-AMERICAN WAR POWERS ARRANGEMENTS AND THE CREDIBILITY OF THESE STATES' ALLIANCE COMMITMENTS

In late-August of 2013, during the early years of the Syrian civil war, the Syrian President Bashar al-Assad conducted a large-scale chemical weapons attack against civilian targets in the outskirts of Damascus. This serious and flagrant violation of international law prompted Britain, France, and the United States to swiftly draw up plans to conduct joint airstrikes against Syrian military facilities. However, in an unexpected move, the British Prime Minister David Cameron sought parliamentary approval for the use of force before strikes were launched. Given the nature of the case, he assumed he would receive strong support. On August 29th, by a slim margin, the House of Commons voted against military action.

It was said that the British 'Syria vote' was a key reason why the U.S. stalled, and thereafter abandoned, its proposed use of military force against Assad. Senior American foreign policy figures, including then-Secretary of State John Kerry, argued that Britain was to blame for the U.S.' hesitancy, as the vote forced Obama to seek his own similar form of legislative approval; a congressional authorisation for the use of military force (AUMF). Although a disarmament deal was brokered between Obama and Russian President Vladimir Putin before Congress could decide, rendering the issue moot, the 'Syria vote' has led to lingering questions on the relationship between Anglo-American war powers arrangements and the credibility of these states' alliance commitments. Specifically, the Syria case demonstrated the potential for constitutional war power questions to lead to misunderstandings between allied governments, and for that to have significant strategic implications. The nature of a nation's war powers regime and its possible impact on that state's international commitments is thus a crucial issue to consider in any alliance arrangement.

In recent years, the United States and Britain, together with Australia, have entered into a critical new security partnership. A pivotal pact in the Indo-Pacific signed in 2021 by London, Washington and Canberra, AUKUS was designed first and foremost as a 'technology accelerator' to procure nuclear-powered, conventionally-armed attack submarines (SSNs) for Australia. Based on a British design, the boat is intended to be operated by the Royal Navy and the Royal Australian Navy well into the 2080s, jointly crewed by submariners of both nations. Alongside the development of this fleet, AUKUS created Submarine Rotational Force West, with British and American submarines increasing their patrol visits to Australia. This submarine element has become known as the 'Pillar I' part of the agreement. However, AUKUS was soon expanded to include a broader and more nebulous grouping of advanced technologies and asymmetric capabilities, such as quantum computing, artificial intelligence, hypersonic weapons, and autonomous underwater systems. These are known collectively as the 'Pillar II' capabilities, and are a high priority for all three nations, particularly for deterring and challenging grey-zone competition below the threshold of war.

A potent technological and strategic partnership, AUKUS builds upon the Defence Trade Cooperation Treaties (DTCT) signed bilaterally by the U.S. with Great Britain and Australia in 2007. It has already amplified the investments of the three partner nations in their own industrial bases while encouraging similar investments into each other. This began with a £2.4 Bn Australian investment in Rolls Royce and BAE Systems to develop British nuclear reactors and design the SSN-AUKUS boat, complementing a £4 Bn contract signed by BAE and the British government in 2023, and a further $3Bn USD for U.S. shipyards that are constructing the Virginia-class submarines. Yet beyond the defence industrial boost it provides, the most crucial role AUKUS plays is as a deterrent, procuring advanced warfighting capabilities to stabilise the Indo-Pacific and push back against maritime

1 The authors would like to thank Professor Matthew C. Waxman, Professor Geoffrey Corn, Carrie Filipetti and Dr Charlie Laderman, both for their presentations and contributions to the webinar that sparked this report, and for their subsequent comments on draft versions of these paper. They would also like to thank all who attended, and asked questions, during that webinar, which was hosted by the Centre for Grand Strategy, King's College, London, and the Vandenberg Coalition in July 2024.

coercion by China and other belligerent actors. Although strictly speaking a 'security partnership' that lacks a mutual security clause, AUKUS has elements of a formal treaty alliance, involving significant collaboration beyond the scope of a normal arms deal. While it may never be a 'NATO-of-the-East', AUKUS builds on the exceptionally strong historical, cultural, security, and intelligence ties between Australia, the UK, and the US, forming a security partnership that is deeper than many formal treaty alliances. The three countries already enjoy an unparalleled degree of interoperability and coherence in their joint strategic thinking, while the U.K. and the U.S. maintain the world's strongest alliance, reaffirmed by the new Atlantic Charter in 2021. As such, for all the discussion of AUKUS as a non-alliance agreement, analysis should not focus on such legal specifications at the expense of the substance of the partnership.

In pursuing these aims, AUKUS faces three sets of challenges: procedural, industrial, and political. The industrial challenge is, and will remain, the key focus of the partnership in the coming years. Developing the technological and industrial base of these allies will ensure the partnership bears fruit in the short, medium, and long term. However, overcoming procedural, political, and legal challenges is integral to achieving AUKUS' long-term objectives, providing security and deterrence both regionally and globally. As Kurt Campbell, the U.S. Deputy Secretary of State, recently emphasised, AUKUS is:

> not a jobs program, [and] it is not a technology development program. Those are corollary advantages. This is **a security partnership that is profoundly constitutional** and has the potential to not only create fundamentally new realities on the ground... but also change the nature of the way each of our three countries operate together.

These political, legal, and constitutional challenges have so far been side-lined in the debate on AUKUS. While several studies have examined the legal challenges behind the partnership, these have usually focused on the nuclear element of the agreement, specifically regarding the transfer of nuclear technology by a nuclear weapons state to a third-country under the Non-Proliferation Treaty. Although some have noted the strategic shifts that will be required by these three allies to achieve the aims of the agreement, none have examined the challenges that the existing legal and political architecture of these three states' poses to the credibility of AUKUS' fundamental strategic purpose; to uphold the rules-based international order, democratic governance, and human rights in the Indo-Pacific, as outlined in its signatories' defence strategies.

"WHILE TECHNOLOGICAL AND INDUSTRIAL FACTORS ARE CLEARLY CENTRAL TO THE AGREEMENT, THIS REPORT FOCUSES ON EXPLORING THE POLITICAL AND LEGAL CHALLENGES THE PARTNERSHIP MAY FACE FROM THE WAR POWERS REGIMES OF THE THREE STATES"

As such, while technological and industrial factors are clearly central to the agreement, this report focuses on exploring the political and legal challenges the partnership may face from the war powers regimes of the three states. **Political alignment involves the informal, non-legal standards which structure the war powers arrangements** of each nation, while **legal alignment involves the formalisation of these standards into concrete conditions that each of the partners agrees to abide by**. Political alignment is softer and involves ensuring that each of the partner states is aware of the political processes by which war and foreign affairs decision-making is conducted, as well as maintaining an in-depth, up-to-date understanding of how the present leadership in each state conceptualises their political and constitutional requirements to exercise such powers. Understanding and avoiding another 'Syria vote' scenario is a major motivation behind political alignment, although there are many corollaries that follow this further down the decision-making hierarchy, mainly concerning exercises and operational deployments.

Although the Syria vote is the most memorable recent case of allied misalignment on war powers issues, constitutional misunderstandings have led to rifts between the three AUKUS partners in many conflicts, particularly between Britain and the United States. For instance, how the British and U.S. governments perceived the constitutional limitations on their war powers played a prominent role in the decision-making that underpinned the Suez Crisis of 1956, as well as how and when the United States entered the Second World War. Equally, there are times when one partner has declared war or warlike operations and the others have not necessarily joined them in doing so; the Falklands war of 1982, although enabled by U.S. support, involved no strong measure of backing by the U.S. Similarly, Britain's refusal to join U.S. operations in Vietnam when it was heavily engaged in supporting Malaysia during

the Indonesian Confrontation (1963-66) similarly demonstrates that these close allies will not necessarily act in concert, despite strong political obligations to do so. While these three governments tend to act collectively in many instances, it is worth considering the moments when they did not exercise their war powers in unison, and how this may impact the aims of strategic partnerships such as the AUKUS agreement.

Since it was signed, AUKUS has proven politically resilient. The agreement has survived the transition from the Morrison to the Albanese government in Australia, while enduring the 'Year of the Three Prime Ministers' in the United Kingdom to become a key defence commitment of Sir Keir Starmer's new Labour government. It also looks set to be the centrepiece of U.S. strategy in the Indo-Pacific regardless of who holds the Presidency in 2025. All of these demonstrate the widespread, cross-party support for AUKUS amongst the three partner nations that seems unlikely to change in the remainder of this decade. Indeed, AUKUS' strategic significance looks set to increase substantially by 2030. However, despite this welcome political unity, developing and strengthening both the understanding of each other's political and legal processes for defence cooperation between the AUKUS partners is vital; an underlying requirement of the partnership's current commitments to succeed, and a future consideration for deepening and developing its wider strategic ambitions.

"CREATING A BETTER UNDERSTANDING OF HOW THESE STATES MAKE WAR CAN HELP BRIDGE THE GAP AND MINIMISE STRATEGIC MISALIGNMENT ON KEY ISSUES OF FOREIGN POLICY"

This report considers the former in the context of the latter, recognising that AUKUS' interoperability is premised on a minimum level of legal alignment, but that the partnership itself would derive benefit from a clear, considered path toward political awareness and legal alignment on a range of matters that are strategically significant for these allies. In so doing, this report builds upon an emerging body of work by national security lawyers and political scientists analysing the relationship between the constitutional foundations of war powers and American alliances or strategic signalling and the ability to threaten force. Although the decision to use force is, and will remain, the sovereign decision of each partner nation, creating a better understanding of how these states make war can help bridge the gap and minimise strategic misalignment on key issues of foreign policy.

I. The United Kingdom

Daniel Skeffington

> LEGALLY SPEAKING, THE BRITISH GOVERNMENT DOES NOT REQUIRE A DEBATE NOR A VOTE IN PARLIAMENT TO AUTHORISE THE USE OF ARMED FORCE

In the United Kingdom, there is a wealth of historical information as to how and when the government can make war. Legally speaking, the British government does not require a debate nor a vote in Parliament to authorise the use of armed force. The Prime Minister may authorise the commitment of British forces to military action on behalf of the Crown, a power known as the war prerogative. This decision is taken by the Prime Minister in Cabinet, advised by the National Security Council and the Chiefs of the Defence Staff among others. In the event of a major conflict it is normal for the Prime Minister to assemble a War Cabinet composed of a select few key Ministers, although they have preferred to manage most major conflicts since 1945 through an ad hoc committee of their own devising, such as the Egypt Committee during the Suez Crisis. The Prime Minister also retains sole discretion to authorise the use of nuclear weapons, including a pre-emptive nuclear first strike, and is the Minister responsible for leading the UK's nuclear policy, including AUKUS.

It has long been the practice of the British government to seek at least tacit approval from Parliament for most major military operations, usually through informal debates or votes of confidence. Parliament supported the Second World War and prosecuted it under a national coalition government, headed by Winston Churchill. Actions such as Korea (1950-53), Borneo (1963-66), the Falklands (1982), and the Gulf (1990-91) had broad parliamentary support and were discussed regularly in the House. The Suez Crisis of 1956 is perhaps the exception to this, involving as it did the misdirection and deception of the House by the Prime Minister and his Foreign Secretary. Until the Second Gulf War in 2003, these debates were considered to be advisory[2]. As such, although the government has never legally required the assent of Parliament to engage in military operations, it often possesses its implicit or overt political support, with the executive being receptive to, and reflective of, the opinion of Parliament and the public.

As the Crown retains the prerogative to make and declare war, so too does the King remain the Commander-in-Chief of the armed forces. However, the practical legal powers associated with this role, such as the "command and administration" of the British military, have long been delegated to the Defence Council, a body of defence ministers and senior military officers chaired by the Secretary of State for Defence. This is more a formal body, and the practical work of the Ministry of Defence, including the execution of operations, is done by the Defence Board and the three Service Boards, respectively chaired by the heads of the Royal Navy, the Army, and the Royal Air Force. The Boards exercise the authority to deploy the armed forces as requested by Ministers.

> IT HAS LONG BEEN THE PRACTICE OF THE BRITISH GOVERNMENT TO SEEK AT LEAST TACIT APPROVAL FROM PARLIAMENT FOR MOST MAJOR MILITARY OPERATIONS, USUALLY THROUGH INFORMAL DEBATES OR VOTES OF CONFIDENCE

The British Prime Minister possesses wide latitude in their ability to interpret international law constraints on the use of force, although in practice this is usually delegated to others in government, advised by the Law Officers (Attorney General and Solicitor General) and the Legal Adviser to the Foreign Office. There is a legal test for the use of force, which is currently that the decision to use force must be 'arguable' before a court and must follow the Law of Armed Conflict (LOAC) and International Humanitarian Law (IHL), but these rarely present practical problems to a government intent on acting. Britain has consistently adopted a broad definition of the self-defence provision in the UN Charter, and accepted that the concept of 'imminent attack' can develop to meet new circumstances. Similarly, there are no formal legal checks on the Prime Minister's ability to threaten the use of force to coerce adversaries politically or diplomatically, although there are substantial political

2 In many cases, such as the confidence motion in Neville Chamberlain's government on May 8th, 1940, they indicated a loss of faith in the Prime Minister and government rather than the war effort (although had Lord Halifax been appointed as Prime Minister over Winston Churchill in May of 1940, this may have had consequences for British foreign policy toward Germany.)

limitations on their ability to do so. One may consider the decisive threat to use force in the Fashoda Incident of 1898, where MPs publicly and overwhelmingly supported the hard-line stance of Lord Salisbury's government against a French military expedition to the Sudan, as an example of this, akin to President Eisenhower's strategic use of the Formosa Resolution in 1955 to resolve the First Taiwan Straits Crisis. In the latter case, which involved a series of Taiwanese islands being shelled by the Communist People's Republic of China, Eisenhower sought congressional authorisation to signal his resolve, pledging to use all means necessary - including nuclear weapons – to defend the islands. This threat encouraged the Chinese to back down without the use of force. Similarly, there are no formal legal restrictions on the Prime Minister's ability to release intelligence for diplomatic or strategic purposes, such as occurred in the run up to Russia's 2022 invasion of Ukraine.

> **THE STREAMLINED DECISION-MAKING PROCESS OF THE CABINET EMPOWERS THE PRIME MINISTER TO TAKE DECISIVE ACTION ON MATTERS OF WAR AND FOREIGN AFFAIRS IN ALL BUT THE LARGEST OF MILITARY DEPLOYMENTS**

There are also several well accepted norms that pertain to war power. For instance, there is the longstanding common law norm of judicial deference to the executive on matters of war and foreign affairs, rendering the war prerogative largely immune from judicial review in all but the most exceptional circumstances. This is well evidenced in the jurisprudence on war powers, including the approaches taken throughout significant constitutional texts in English law, the relevant case law of the House of Lords and the U.K. Supreme Court, and general constitutional understandings in Parliament. Similarly, there is a widely accepted norm that parliament's involvement ought not to 'impinge upon the operational effectiveness of the armed forces' nor place personnel in danger, and it has normally been the case that military commanders are to determine how operations are conducted once they are underway.

As such, under the British constitution the powers of the government to direct action in war are at once expansive and limited. The streamlined decision-making process of the Cabinet empowers the Prime Minister to take decisive action on matters of war and foreign affairs in all but the largest of military deployments. There are relatively few legal limitations on Britain's war powers, which are far more constrained by political factors and considerations of international law. In this, the personal beliefs of the Prime Minister can, and often have, played a key role in determining how these powers are exercised. Yet whomever is in office will also be faced with the political realities of securing Cabinet, parliamentary, and public support for their operations, alongside domestic and international legal considerations, and the military and diplomatic constraints on the practical use of force.

Syria and the War Powers Convention

There have been some calls since the late 1990s to reform this system and place war powers on a statutory footing, similar to the U.S. War Powers Act. Yet all such efforts have failed. Whilst senior government ministers have advocated for a war powers statute over the years, a report by Gordon Brown's government - itself supportive of codification - in 2009 advised against this, arguing that legislation would unduly constrain the government to act in the interests of national security. There were wider concerns that a war powers act would open the government's foreign policy to judicial challenge in the courts, as well as practical difficulties in defining armed conflict and the rapidly changing nature of modern warfare.

> **THE 'WAR POWERS CONVENTION' ... HOLDS THAT THE GOVERNMENT WILL ALLOW THE HOUSE OF COMMONS TO DEBATE AND VOTE ON THE DEPLOYMENT OF THE ARMED FORCES OVERSEAS**

However, Prime Minister Tony Blair's decision to call a one-off vote on the Iraq War in 2003 was said to have created a limitation on the prerogative nonetheless, known as the 'war powers convention'. The convention holds that the government will allow the House of Commons to debate and vote on the deployment of the armed forces overseas, although the wording of the convention only commits the government to hold a debate, and not a vote, at the first opportunity. While not legally enforceable, this convention has had a considerable impact on the use of armed force, particularly between 2011 and 2015. David Cameron was the first Prime Minister to put this into practice, calling a retrospective vote on airstrikes launched against Libya in 2011. This was followed by a pre-emptive vote on intervention against Syria in 2013, which he famously lost. The Syria vote was the most significant defeat of a government's military policy since 1782, when Lord North resigned over his handling of the American Revolution. Lord Robertson, former Secretary-General of NATO and current chair of Britain's new Strategic Defence Review, recalls Syria as the moment when Vladimir Putin learned he could act with impunity and challenge the international order. The case is therefore significant for Britain's commitment to coalition operations, and to the deterrent effects the AUKUS partnership hopes to achieve.

The Syria vote is an interesting example of how reliant the British system is on Prime Ministerial leadership and the political support of the Commons. In 2012, President Obama drew a "red line" over the use of chemical weapons in Syria, which the Syrian government subsequently crossed, using sarin gas against its own civilians in 2013. At the time, Cameron was governing under a fairly weak coalition, an unusual situation in British politics that meant his handling of Parliament was especially important. Yet Cameron failed to persuade Parliament as to the merits of the operation, putting forward a weak case for the campaign's strategy while avoiding much-needed one-on-one discussions with MPs, both in his own party and in the Opposition. Questions were also raised in Parliament as to the wisdom of Obama's red line, which now meant the U.S. and its allies either had to respond or be humiliated by inaction. This had repercussions for how MPs perceived the campaign's strategy. As such, while the 2013 vote points out the potential constitutional issues Britain might face regarding its alliance or coalition commitments, it is more a study in failed leadership and party dynamics than of constitutional processes. The war powers convention clearly played a role, as MPs expected to be involved in any decision to act, but it was Cameron's mismanagement of events that turned this expectation into a constraint. This ultimately turned on the political judgement of the Prime Minister and how he approached the matter, rather than any formal constitutional arrangements.

> "CAMERON FAILED TO PERSUADE PARLIAMENT AS TO THE MERITS OF THE OPERATION, PUTTING FORWARD A WEAK CASE FOR THE CAMPAIGN'S STRATEGY WHILE AVOIDING MUCH-NEEDED ONE-ON-ONE DISCUSSIONS WITH MPS, BOTH IN HIS OWN PARTY AND IN THE OPPOSITION"

It is notable that the government only sought wider parliamentary approval between 2011 and 2015, when Cameron was Prime Minister and when a majority of MPs did not clearly support military intervention[3]. Cameron sought parliamentary authority for British strikes on Islamic State targets in Iraq and to expand such operations to Syria. As Dr James Strong has rightly noted, during this period the war powers convention may have done more to undermine Britain's credibility as an ally than enhance it; in 2014, for instance, the U.S. pursued airstrikes unilaterally, neither waiting for nor requesting British involvement. However, when majority governments were elected in 2015, 2017 and 2019, the strength of the convention waned, as did its influence on Britain's alliances. More recent actions, such as the airstrikes against Syria in 2018 and the ongoing campaign against the Houthis, saw the government respond unilaterally, arguing the strikes were in accordance with the convention despite holding neither a debate nor a vote before it launched them. This has led some to claim that the convention is more of a practice, lacking widespread support amongst constitutional actors[4]. As with the Houthi strikes, this essentially turns on how the Prime Minister chooses to conduct themselves, and the degree of political resistance HM Opposition is willing to organise in response.

A War Powers Resolution?

> "AS RECENTLY AS JANUARY, STARMER WAS EXPRESSING SUPPORT FOR CODIFYING THE CONVENTION THROUGH A RESOLUTION IN THE COMMONS, OR EVEN BY STATUTE. PURSUING THIS COULD HAVE IMPLICATIONS FOR HOW BRITAIN WAGES WAR AND FOR ITS CREDIBILITY AS AN ALLIANCE PARTNER"

It is unclear how this convention will develop under the new Labour government of Sir Keir Starmer. When pressed on the issue in Parliament, the Prime Minister agreed with Rishi Sunak that the prerogative is 'essential' for British security. However, as recently as January, Starmer was expressing support for codifying the convention through a Resolution in the Commons, or even by statute. Pursuing this could have implications for how Britain wages war and for its credibility as an alliance partner. If the government does press for a Resolution, it is worth asking whether it would look simply to restrain the government's

3 Parliament was also operating under the Fixed Term Parliaments Act (FTPA), an unusual piece of legislation introduced to stabilise the 2010 Conservative-Liberal Democrat coalition government by mandating that a parliamentary term lasted a full five years. Prior to this, elections could be called before the five year term was over by the incumbent Prime Minister. The FPTA effectively removed confidence motions as a means to hold the government to account, lessening the importance of the Syria vote, as it could not force Cameron from office. It was repealed in 2022.

4 A constitutional principle is a foundational constitutional norm, possessing very strong reasons for existing, custom and long usage. Several examples can be found in Anne Twomey, The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems, (Cambridge: Cambridge University Press, 2020) 31-35. For more on this, see published and forthcoming work by the Unwritten Norms and Constitutional Principles Project.

war-making abilities, or whether it would be structured with an outward-facing character in mind, strengthening the relationship between government and parliament to act as an instrument of deterrence against rogue international actors. This discussion has been lacking in debates on both AUKUS and war powers and is worth considering in an era of renewed great power competition, especially given how central the role of parliament has long been to the war-waging process. This, of course, would not require a Resolution to achieve, and could be enshrined by more regular and robust defence and foreign affairs debates in the House of Commons, instigated by the government or the Opposition.

> **THE STRUCTURE OF THE WAR PREROGATIVE IS UNLIKELY TO SERIOUSLY UNDERMINE ANY OF BRITAIN'S ALLIANCE COMMITMENTS, INCLUDING AUKUS, ALTHOUGH THE POTENTIAL FOR ANOTHER 'SYRIA VOTE' SCENARIO REMAINS**

A Resolution may also look to specify time constraints for a debate in the Commons, ensuring MPs can vote on action before troops are committed. This could impinge upon the government's ability to deploy the military as it sees fit, which is a vital tool for how the government conducts its wider foreign policy. As we have seen, the prerogative authorises the deployment of forces on a range of tasks, such as freedom of navigation exercises, training missions, or basing units in foreign countries as 'tripwire forces' where they may even be drawn into a confrontation. If a Resolution to codify or expand the war powers convention was to include specifications as to the timing of a debate in the Commons, this could impinge upon the government's ability to deploy the military as they see fit. This must be considered by those proposing the codification of the convention, particularly regarding Britain's alliance commitments, Freedom of Navigation Operations, and the prepositioning of 'tripwire' forces across the globe. However, it is worth noting the convention does not currently pertain to the timing of a vote nor the command and control of the armed forces, and codification would seem unlikely to include this.

This also raises issues concerning the pre-positioning of forces prior to a conflict. In the lead up to the invasion of Iraq, MPs were only given a vote when tens of thousands of troops had already been deployed in theatre, adding additional pressure on Parliament to back military action to avoid damaging the UK's credibility as an ally. Yet creating a more binding commitment on the government as to when it holds a debate or a vote on military action may impact Britain's ability to position its armed forces in support of its diplomatic posturing, and this dynamic is worth bearing in mind regardless of whether the government seeks to pass a Resolution.

The War Prerogative and AUKUS

> **PARLIAMENT HAS LONG PLAYED A SUBSTANTIAL ROLE IN MAJOR MILITARY ACTIONS LAUNCHED BY THE UNITED KINGDOM AND HAS EVEN TAKEN A LIMITED ROLE IN DETERRING ADVERSARIES FROM INITIATING HOSTILITIES. THIS WILL REMAIN THE CASE, AND IS A POWERFUL ASSET THAT SHOULD BE BETTER INTEGRATED INTO HOW THE WAR PREROGATIVE IS CONCEPTUALISED AND EXERCISED**

As things stand, the structure of the war prerogative is unlikely to seriously undermine any of Britain's alliance commitments, including AUKUS, although the potential for another 'Syria vote' scenario remains. Yet instances like the Syria case are due more to political mismanagement than they are constitutional structures. This rests more on the attitudes and abilities of individual Prime Ministers, and how they manage the complex realities of governing in war and crises, than it does the constitutional strictures of Britain's constitution. Parliament has long played a substantial role in major military actions launched by the United Kingdom and has even taken a limited role in deterring adversaries from initiating hostilities. This will remain the case, and is a powerful asset that should be better integrated into how the war prerogative is conceptualised and exercised, both by the government and by Parliament.

Both Sir Keir Starmer and his Defence Secretary, John Healey, have made promising statements since taking office, such as offering the Shadow Defence Secretary and other relevant MPs access to intelligence briefings. These sorts of moves are sensible, practical, and welcome, encouraging detailed parliamentary involvement in the decision-making process before decisions are taken, whilst mitigating against partisanship or politicking. However, there exists the potential to upset this arrangement, particularly if the new government is intent on pursuing the thorny issue of 'codifying' Britain's war prerogative through a Resolution of the House of Commons, or even more problematically by passing a statute. At a minimum, any such move should involve as rigorous a process as the 2007-2009 Brown Review. It is doubtful it would reach a different conclusion.

> **AS FAR AS IS PRACTICABLE, MINISTERS SHOULD LOOK TO INVOLVE ELEMENTS OF PARLIAMENT AT ALL STAGES OF THESE PROCESSES, PERHAPS EVEN BY CIRCULATING DRAFT MEASURES VIA A CLOSED SESSION TO MPS WITH SECURITY CLEARANCE. THIS WOULD PROVIDE GREATER SURETY FOR BRITAIN'S ALLIES AS TO ITS POLITICAL COMMITMENT TOWARD AUKUS, SHOULD ITS DETERRENT CAPACITIES FAIL**

Finally, increasing dialogue between the three partners is crucial, especially to manage expectations and share burdens between the Euro-Atlantic and Indo-Pacific. This process of expectation management will fall upon the Ministry of Defence, which is responsible for publishing the regulations of the armed forces and British Defence Doctrine, and also Senior Ministers, who are empowered to approve the parameters for the use of force and national 'caveats' - political rules that allow a nation's forces to opt out of certain operations. As far as is practicable, Ministers should look to involve elements of Parliament at all stages of these processes, perhaps even by circulating draft measures via a closed session to MPs with security clearance. This would provide greater surety for Britain's allies as to its political commitment toward AUKUS, should its deterrent capacities fail. This is one area where the new government could take active steps to avoid confusion amongst its close allies, especially over its commitments and responsibilities. London would do well to draw up its own strategic aims for force posture cooperation, and where it wants Britain to contribute in terms of roles and missions. This would set clear strategic intent behind the British commitment to the partnership, albeit one that can evolve as the agreement develops.

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II. Australia

Dr Samuel White

> THE QUESTION OF WHO AUTHORISES THE USE OF THE WAR PREROGATIVE IS THEREFORE A LIVE ONE WITH NO CLEAR ANSWER. IT SEEMS THAT THE ULTIMATE AUTHORITY TO UTILISE THE MOST EXTREME MILITARY MEASURES, SUCH AS CONVENTIONAL NUCLEAR WEAPONS, IS HELD AT THE HIGHEST LEVEL, BUT THIS AGAIN IS A POLITICAL DECISION

The Australian Constitution of 1901 demonstrates that constitutions are a product of their times. For the Australian Framers were so concerned with capturing British convention and practice that they overlooked how to properly account for, and divide, the power of war. Early Australian Governments were 'unsure as to whether [they] could even declare war against another country without British Government approval'. Indeed, Australia has only ever declared war in one conflict, at the outset of the Second World War, and even this was in some ways a formality underpinned by bonds of Empire. As Prime Minister Robert Menzies noted in 1939:

> ...in consequence of the persistence of Germany in her invasion of Poland, Great Britain has declared war upon her, and ... as a result, Australia is also at war.

While a declaration of war will trigger the war prerogative, as will 'self-defence', this is where the clarity ends. The Australian Constitution does not expressly provide powers to deploy military personnel or the declaration of war or warlike operations, nor does it contain any powers for the Parliament in relation to any decision regarding armed conflict. Writing in the 1820 on the nature of the British war prerogative, the English legal scholar Joseph Chitty took the position that:

> What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion.

Chitty's position has been cited in both British and Australian judgments in relation to the scope of the war power. As I have argued elsewhere:

> That the war prerogative only becomes empowered through necessity fails to accept the sui generis nature of warfare. To limit the war prerogative to instances where the enemy is at the gates fails to accept that the only reason they are stopped is because the gates were constructed; or, in other terms, a good offence requires a good defence. The war prerogative necessarily extends to preparation for, and response to, instances of war, rather than being enlivened during war.

The question of who authorises the use of the war prerogative is therefore a live one with no clear answer. It seems that the ultimate authority to utilise the most extreme military measures, such as conventional nuclear weapons, is held at the highest level, but this again is a political decision. The Cold War shows us that Commanding Officers of naval assets could have held the authority; and whilst it is unclear if that will be the case in Australia, there is nothing within prerogative case law that would suggest such a delegation to be unlawful, akin to Britain's Trident system.

Within the AUKUS agreement, therefore, Australia's position with using the war prerogative is one of relative political and legal ease. Notwithstanding Australia's recent Parliamentary Joint Committee scrutiny, the war prerogative enjoys an uncomplicated legal framework. The decision to send troops is political, made by the government, while the power to give commands is found within the Constitution, and the requirement for the Australian Defence Force to follow the orders is found in statute. However, the lawful authority for troops to deploy is 'constitutional executive power'. The main difficulty has therefore been around identifying the basis for which the war prerogative is enacted, rather than the process by which it is.

The War Prerogative and the Executive Power

Broadly speaking, Australia's war powers function in a similar manner to Britain; a 2023 review by a Joint Parliamentary Committee recommending that they remain 'fundamentally a prerogative of the Executive'. Decisions are taken by the National Security Committee in Cabinet, advised by the Departments of Defence, Foreign Affairs, Trade, the intelligence community, and others. Yet there are some important distinctions from the British model, the most important of which is found in §61 of the Australian Constitution, which states 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 the Constitution, and of the laws of the Commonwealth.

Although §61 'describes, but does not define' executive power, the High Court has stated that this executive power 'enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution'. Executive power is therefore 'a general power to carry out all the other functions of government'.

It can be added, however, that executive power is not a singular power but a collection of powers derived from multiple sources. Importantly, the High Court of Australia has recognised that non-statutory executive power under s 61 of the Constitution encompasses at least:

> A. powers defined by the capacities of the Commonwealth common to legal persons (capacities)
>
> b. prerogative powers, privileges and immunities of the Crown which are properly attributable to the Commonwealth (prerogative powers)
>
> c. inherent authority derived from the character and status of the Commonwealth as a national government (nationhood power)

How is this all to be reconciled? To be a lawyer in Australia is, in a sense, to be a legal historian - particularly so when discussing the royal prerogative. The High Court of Australia has emphasised that 'the ambit of the executive power of the Commonwealth cannot begin from a premise that the ambit of that executive power must be the same as the ambit of British executive power', but that '[c]onsideration of the executive power of the Commonwealth will be assisted by reference to British constitutional history'. For this reason, there has been a shift away from 'prerogative writs' towards 'constitutional writs', while the Full Court of the Federal Court of Australia held that, in lieu of exercising prerogative powers, 'it is preferably described as the exercise of Constitutional executive power'. Such a holistic approach to constitutional executive power is useful from a practitioner's perspective. Yet from an academic perspective, there is merit in retaining a three-limbed definition to help delineate in discussions and analysis between an exercise of royal prerogative power and an exercise of nationhood power. The High Court has indicated that the Commonwealth executive government only has power to interfere with the legal rights of other persons if it is exercising its prerogative powers, absent statutory authority.

"AUSTRALIA'S WAR POWERS FUNCTION IN A SIMILAR MANNER TO BRITAIN; A 2023 REVIEW BY A JOINT PARLIAMENTARY COMMITTEE RECOMMENDING THAT THEY REMAIN 'FUNDAMENTALLY A PREROGATIVE OF THE EXECUTIVE'"

The War Prerogative – Breadth and Depth

Although discussions around constitutional executive power are rare, a seemingly unique Australian methodology has evolved, whereby it has become common practice to adopt the distinction between the 'breadth' and 'depth' of constitutional executive power. This practice was adopted by Justice Gageler of the High Court of Australia, who holds 'breadth' to relate to 'the subject-matters with respect to which the Executive Government of the Commonwealth is empowered to act having regard to the constraints of the federal system', whilst depth denotes 'the precise actions which the Executive Government is empowered to undertake in relation to those subject matters'. Some elements of the royal prerogative have

> THERE IS VERY LIMITED AUSTRALIAN CASE LAW DEALING WITH THE ISSUE OF INTERNATIONAL LAW'S IMPACT UPON THE WAR PREROGATIVE. THIS MUST BE TAKEN INTO ACCOUNT WITHIN ANY ALLIANCE – PARTICULARLY ONE BASED AROUND MILITARY OPERATIONS, SUCH AS AUKUS

a wide breadth but limited depth, such as the granting of honours, or matters with limited breadth in a federal construct but exceptional depth (such as the war prerogative). Depth can moreover be understood to limit the Commonwealth executive government's ability to undertake coercive activities. The reference to 'coercive activities' in turn reflects a number of fundamental constitutional principles, many of which derive from English case law and core constitutional documents.

Critically, these breadth and depth limitations are most severe when it comes to the 'internal', rather than 'external', aspects of society. The war prerogative is one of the oldest (if not the oldest), and yet least understood and discussed prerogatives of the Crown, dealing almost exclusively with the external domain. It is possible to split the war prerogative's 'depth' into two sub-branches: depth of power with respect to persons; and depth of power with respect to property. This distinction was established in the Burmah Oil Co. v Lord Advocate case of 1964 in the British House of Lords which held that the government's decision to authorise the destruction of the Burmah Oil Company's oil fields as British forces retreated from the Japanese invasion of Burma in 1942 was lawful under the prerogative, but that compensation was payable to the company for damages caused. It is clear from cases such as Burmah that the war prerogative authorises the use of lethal force against combatants and individuals, and to destroy property. It is a plenary power.

Moreover, within the Australian context, federalism is a critical lens through which the exercise of constitutional executive power must be interpreted. Luckily for any discussion of the war prerogative, the issue of federalism is not in contention. Although the duty to defend the country is not exclusive to the Commonwealth, the constitutional framework and corresponding authority for an exercise of the war prerogative lies solely with the Commonwealth – in part because the Commonwealth holds the authority for use of the military, and in part because the war prerogative in the United Kingdom has historically fallen under the authority of the Prime Minister. This is complemented by the fact that, as the King's representative in Australia, the Governor General is constitutionally consigned the position of Commander-in-Chief of the ADF.

AUKUS, International Law and the Prerogative

Until AUKUS was announced, Australia's position on nuclear safety and security had followed a linear path based around non-proliferation and ardent standards. In the aftermath of the Second World War, Australia emerged as a proactive participant in global atomic discussions. Later support for peaceful nuclear programs, including the South Pacific Nuclear Free Zone, have caused some consternation amongst members of the alliance. So, too, has AUKUS required a thorough review of legislation that could hinder Australia's participation – including the Comprehensive Nuclear Test Ban Treaty.

Whilst the issue comes up often, there is very limited Australian case law dealing with the issue of international law's impact upon the war prerogative. This must be taken into account within any alliance – particularly one based around military operations, such as AUKUS. For instance, some have argued that the principle of legality could arguably incorporate international legal rights into domestic law. However, this argument is untested in court, and whilst intellectually stimulating ought not to be relied upon in any discussion of interoperability within AUKUS. The only relevant precedent that can be applied is in Habib v Commonwealth, which related to alleged complicity by Australian intelligence agents in the cruel and inhumane treatment of Habib after his capture in Afghanistan. The Federal Court emphasised that the Commonwealth's prerogative powers with respect to external affairs would not authorise the Commonwealth to engage in crimes against humanity, or to breach Commonwealth legislation. The earlier situation would be in breach of a public policy test at any rate (although arguably completely legal under the war prerogative) and the latter is a matter for domestic law. Habib provides little guidance in determining the Australian position.

Furthermore, Australia's approach to interpretations of the royal prerogative can differ from the British, as seen in Barton v. The Commonwealth (1974). In Barton, the High Court held that the Commonwealth government's foreign affairs prerogative was not put into abeyance by the Extradition (Foreign States) Act 1966, a statute that regulated the extradition of foreigners – a power normally considered a prerogative power. Barton held that a stringent

test was required to see if the prerogative was placed in abeyance, noting that a clear and unambiguous intention must be expressed by Parliament for the prerogative to be overridden. In so doing, Australian practice contrasts with the seminal British House of Lords case of De Keyser's Royal Hotel (1920), which held that an Act of Parliament which confers powers that cover the same area as a prerogative power – such as occurred during the First World War, which buildings were requisitioned under the Defence of the Realm Acts instead of the war prerogative – will necessarily place the prerogative into abeyance. There is a clear divergence here between British and Australian constitutional law, with the former suggesting Acts of Parliament can displace the prerogative, and the latter preserving elements of the prerogative in spite of such Acts. The extent of this distinction has rarely been explored in the jurisprudence of either state, beyond the confines of a very limited number of cases.

Within the AUKUS agreement, these considerations are likely to come into play around varying levels of justiciability of the prerogative. In Britain, justiciability issues have come under renewed debate since the U.K. Supreme Court ruling in the R (Miller) v Secretary of State for Exiting the European Union (2017) – (Miller I) – which opened up the question as to whether all prerogative powers were subject to judicial review. It is possible that issue-motivated groups seeking to halt or challenge AUKUS deployments would do so through challenging the foundational decision to do so – particularly if a decision to use troops might risk escalation – which has the potential to cause alliance commitment issues. However, it should be noted that the justiciability issues raised in Miller explicitly exclude the war and foreign affairs prerogatives, and this has been upheld in the jurisprudence and judicial practice of subsequent cases, rendering the likelihood of judicial intervention in British deployments unlikely in practice.

Equally, in Australia deployments should be consistent with Australian public policy, and her international legal obligations should inform this public policy, presumably on the basis that international law regulates international relations. This position differs substantially to the British position in Al-Waheed and Serdar Mohammed v Ministry of Defence (2017), which held that British military forces may detain individuals for longer than 96 hours, in contravention of the European Convention on Human Rights' (ECHR) article 5(4), if the reason for doing so is imperative for security reasons. The Australian position has merit in reflecting and confirming Australia's sovereignty, which is only bound domestically by international law insofar as Australia domestically implements it.

"THERE IS A CLEAR DIVERGENCE HERE BETWEEN BRITISH AND AUSTRALIAN CONSTITUTIONAL LAW, WITH THE FORMER SUGGESTING ACTS OF PARLIAMENT CAN DISPLACE THE PREROGATIVE, AND THE LATTER PRESERVING ELEMENTS OF THE PREROGATIVE IN SPITE OF SUCH ACTS. THE EXTENT OF THIS DISTINCTION HAS RARELY BEEN EXPLORED IN THE JURISPRUDENCE OF EITHER STATE"

AUKUS and the Twenty-First Century

The eminent nineteenth-century English constitutional theorist A.V. Dicey once noted that 'Federal government means weak government'. It was a deliberate choice by the Framers of the Australian Constitution to adopt a federal system, based around the unique security threats the Australian continent faced when thrust into self-government in the nineteenth century. Such history is not dated when discussing the threats that the AUKUS agreement seeks to address. In Australia, nuclear safety regulations are constitutionally divided. It is for this reason that the 2023 Australian Parliamentary Joint Committee tasked with reviewing the war prerogative reconfirmed that it should remain prerogative and outside of parliamentary scrutiny. This was to retain flexibility against a range of threats, including "the vagaries of partisan politics via [uninformed] parliamentary processes".

As a tool of legal analysis, legal history can enhance understanding of contemporary institutions and practices. The venerable English legal historian Sir William Holdsworth once noted that legal history is 'necessary to the understanding and intelligent working of all long established legal systems'. This point is 'particularly true when examining constitutional rules', especially British constitutional concepts, that are 'original and spontaneous, the product not of deliberate design but of a long process of evolution'. It seems that, unlike Britain or the United States, Australian practice reflects a continued political desire for no direct parliamentary involvement in the exercise of the war prerogative. And, although similar in many respects to the British war prerogative, Australian case law has diverged from British precedent in important – if not revolutionary – ways. Indeed, whilst 80% of Australians may be wishing for an evolution, Australia's Constitution still reflects the political realities of England's Glorious Revolution, perhaps even more than England herself.

With regard to the AUKUS agreement, this makes Australia's position rather straightforward, and for the U.K. and the U.S. Australia's constitutional framework still represents the easiest of the three to plan around. Absent a normative 'war powers convention', as has tentatively emerged in the United Kingdom, Australia is free to uphold its alliances and security partnerships based solely on the decision of the Commonwealth government. Constitutional executive power is a power that has grown primarily through anxiety – anxiety about its expansive nature, and anxiety about how to control it. Whilst it is difficult to imagine Australia involving itself in any major conflict in the Indo-Pacific without serious parliamentary debate, the government enjoys a wide degree of latitude to act as it sees fit in matters of war and foreign relations. Neither case law nor statue suggest strong limitations to this power at present, nor seem likely to in the future – it remains a highly flexible power, with nearly unlimited depth, to secure Australia.

"ABSENT A NORMATIVE 'WAR POWERS CONVENTION', AS HAS TENTATIVELY EMERGED IN THE UNITED KINGDOM, AUSTRALIA IS FREE TO UPHOLD ITS ALLIANCES AND SECURITY PARTNERSHIPS BASED SOLELY ON THE DECISION OF THE COMMONWEALTH GOVERNMENT"

"NEITHER CASE LAW NOR STATUE SUGGEST STRONG LIMITATIONS TO THIS POWER AT PRESENT, NOR SEEM LIKELY TO IN THE FUTURE – IT REMAINS A HIGHLY FLEXIBLE POWER, WITH NEARLY UNLIMITED DEPTH, TO SECURE AUSTRALIA"

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III. The United States

Dr Patrick Hulme

> THE FRAMERS OF THE U.S. CONSTITUTION GAVE CONGRESS ALONE THE POWER TO DECLARE WAR. AT THE SAME TIME, THE PRESIDENT WAS ENDOWED WITH THE POWERS OF COMMANDER-IN-CHIEF OF THE MILITARY, AND THE PRESIDENT'S EXECUTIVE POWERS UNDER THE CONSTITUTION HAVE BEEN INTERPRETED TO INCLUDE MANAGEMENT OF FOREIGN AFFAIRS

Unlike the United Kingdom and Australia, the United States has a system of government with an independently elected President and Congress. The Constitution of the United States divides the powers over foreign relations – including war powers - between these two separate branches of government. The drafters of the U.S. constitution in the late-eighteenth century explicitly sought to create a system of war powers wholly different from that of the United Kingdom[5]. While in the then-existing British model the monarch held the war prerogative, the framers of the U.S. Constitution gave Congress alone the power to declare war. At the same time, the president was endowed with the powers of commander-in-chief of the military, and the president's executive powers under the Constitution have been interpreted to include management of foreign affairs.

The exact extent of Congress and the president's war powers have been widely debated for decades, and will continue to be into the foreseeable future. From the Constitution's ratification through the Second World War, U.S. participation in major wars came pursuant to formal declarations of war passed by Congress. Like most other countries, the United States has not formally issued a declaration of war after 1945, however. Many have argued that an "Imperial Presidency" has usurped Congress's powers over war and peace in the years since the Second World War, especially after President Truman undertook the 1950-53 Korean War absent formal authorization from Congress. The unilateral war powers of the president became extremely controversial during the Vietnam War, which resulted in the 1973 War Powers Resolution (WPR). While the WPR requires termination of military deployments undertaken without congressional authorization no later than 60 days after presidential initiation, presidents have frequently claimed the resolution is unconstitutional, and there have been at least two (Serbian air campaign and Libyan NATO campaign) uses of force that have seemingly violated the WPR. Through executive branch practice and inaction by the legislative and judicial branches, the WPR has been watered down.

Commentators frequently emphasise that in the years following Truman's "Police Action" in Korea, presidents have consistently averred a power to undertake war unilaterally, and have demonstrated a willingness to act unilaterally on many occasions: e.g. in the Dominican Republic (1965), Grenada (1983), Panama (1989), Somalia (1992-94), Kosovo (1999), Libya (2011), against ISIS (2014), and most recently in Yemen in early 2024. Yet, missing from this list is full scale war undertaken unilaterally after Korea. Each of the four major wars undertaken by the United States since Korea—i.e. Vietnam, the Gulf War, and the invasions of Afghanistan and Iraq—has seen a president seek and obtain formal statutory authorization from Congress before utilising military force. And while presidents have even in these cases consistently claimed they were able to act unilaterally, in private they often fretted greatly at the prospect of undertaking a full-scale war on their own authority (and thus exposing themselves to massive political fall-out should the use of force end in less than spectacular fashion). Indeed, there have actually been several instances since the Second World War of presidents seemingly desiring to use force, but baulking at the opportunity once it became clear congressional authorization would not be forthcoming. The most recent example of this might be in the 2013 "red-line" crisis with Syria (in which, coincidentally, British war powers questions also proved quite relevant)[6].

> WHILE PRESIDENTS HAVE ... CONSISTENTLY CLAIMED THEY WERE ABLE TO ACT UNILATERALLY, IN PRIVATE THEY OFTEN FRETTED GREATLY AT THE PROSPECT OF UNDERTAKING A FULL-SCALE WAR ON THEIR OWN AUTHORITY

5 This is ironic, because over time the U.S. president seemingly became "imperial", while in the United Kingdom a war powers convention has begun to develop. Thus, despite having precisely opposite legal endowments, the U.S. and U.K. have begun to see a relatively close convergence in actual war powers practise over time and especially in recent decades.

6 See Part I: The United Kingdom, in this report.

LEGALLY, PRESIDENTS HAVE VAST DISCRETION OVER THE USE OF MILITARY FORCE, BUT AS A PRACTICAL MATTER OF POLITICS PRESIDENTS HAVE VERY STRONG INCENTIVES TO NOT UNDERTAKE USES OF FORCE OUT OF LINE WITH CONGRESSIONAL SENTIMENT

In sum, it is clear presidents are quite willing and able to undertake smaller, shorter, less casualty-intensive uses of force unilaterally, but it is not clear whether presidents are willing to undertake full-scale war absent the formal approval of lawmakers. Legally, presidents have vast discretion over the use of military force, but as a practical matter of politics presidents have very strong incentives to not undertake uses of force out of line with congressional sentiment.

Implications for AUKUS

Since the United States began forming peacetime alliances in the early Cold War, allies have long had a strong interest in deciphering the domestic constraints faced by American presidents—a fact not lost on American leaders. Secretary of State John Foster Dulles once stated, for example, that "If it were known or believed abroad that…[the USSR] could obliterate London and Paris by atomic bombs and that we would not do anything until Congress…had been assembled and had debated and adopted a declaration of war…our alliances would crumble overnight."

Allies have, understandably, proven quite concerned about the president's power to respond unilaterally in their defence. In the run-up to the Second World War, for example, Britain and other allies and partners found the President's inability to declare war absent Congress frustrating. After the Second World War, this concern arose again in the early 1970's as congressional opposition to war in general, and the passage of the War Powers Resolution in 1973 in particular, seemingly created the risk of an enfeebled American executive unable to uphold American commitments to alliance partners. Allies sought to be reassured that the president was willing to come to their aid, despite the new law. Hence, allies tended to quietly approve as American executives began to once again wriggle free of congressional constraints after Vietnam and Watergate. Indeed, there is strong reason to believe that while Americans might bemoan a president willing and able to act without waiting for congressional approval, allies strongly desire that the American leader be able to come to their aid unrestrained by congress.

FROM A LEGAL PERSPECTIVE, IT IS THEORETICALLY POSSIBLE TO HAVE A SITUATION IN WHICH CONGRESS AUTHORISED THE USE OF FORCE AND THE PRESIDENT DRAGGED THEIR FEET. FROM A MORE PRACTICAL POLITICAL PERSPECTIVE, HOWEVER, LAWMAKERS CAN PUT GREAT PRESSURE ON PRESIDENTS TO ACT EVEN WHEN THEY ARE RELUCTANT TO DO SO

Recent concern has grown over whether a president could undermine an alliance relationship that Congress supports. From a legal perspective, it is theoretically possible to have a situation in which Congress authorised the use of force and the president dragged their feet. From a more practical political perspective, however, lawmakers can put great pressure on presidents to act even when they are reluctant to do so. Many have pointed out, for example, that much of the impetus for action during the Cuban Missile Crisis was precisely pressure from lawmakers—indeed, at one point in the crisis President Kennedy remarked to his brother that while he thought it distasteful to "quarantine" the island, he thought he would have been impeached if he did not. Likewise, much of the historical evidence has shown that Lyndon Johnson had grave doubts about entering the Vietnam conflict, but feared the domestic political fallout at home if he was seen as retreating on an American treaty commitment. Even Donald Trump proved incapable of ignoring the wishes of Congress when he sought to remove U.S. troops from Syria in 2019, but was pressured by bipartisan opposition in Congress to not do so. Ultimately, Trump relented and the troops remained. If Trump were unable to resist congressional pressure over what was, in the grand scheme of things, a lesser interest, it seems difficult to imagine a president would realistically be able to congressional pressure to fulfil a formal alliance obligation.

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IV. AUKUS, War Powers, and Strategic Posture

Daniel Skeffington

What, then, does an examination of these three constitutions tell us about the arrangements for the use of armed force with regard to AUKUS? Although Britain and Australia may retain similar systems, Australia enjoys a more straightforward process in practice, while Britain has at times been influenced by the parliamentary pressures of coalition governments or mismanagement by Prime Ministers. The U.S. is formally the constitutional outlier, although somewhat ironically the practical dynamics that underpin its war powers often prove similar to the United Kingdom today. The key distinction is that the war power is divided between Congress and the President, with the Constitution granting Congress the power to declare war, and the President depending on Congress for funding and resources to wage war, and if perceived necessary for formal statutory authorization. The uncertain nature of a president's inherent authority to commit U.S. armed forces to conflict and the limits on the scope and duration of such commitment may prove an additional hurdle for any alliance seeking U.S. commitment to a conflict. An analogy may be drawn here to the opening years of the Second World War, although it is notable that Britain and the U.S. were not then formally "allies". However, it is important to note that even under the most restrictive interpretation of inherent presidential power, a U.S. president would have solid legal authority to respond to an attack on U.S. armed forces abroad with necessary and appropriate force. Thus, the deployment of U.S. forces for deterrent purposes or to demonstrate support for allies may also have significant legal implications in relation to the president's authority to fully commit the U.S. to military action if those forces are attacked.

Equally, given that U.S. constitutional law in particular is so ambiguous and contested on these matters, and often turns more on political than strictly legal constraints, it seems likely that the more the U.S. operates jointly with allies, the more willing the President will be to assert unilateral power, and the less likely Congress will challenge that power. While this does not necessarily make the president's actions more legal per se, this dynamic means that stronger political unity around AUKUS in a crisis would probably embolden the president to push the boundaries domestically. In a sense, the more the president is willing to push these boundaries, the stronger their alliance commitments become. This turns, in essence, on the political judgement of the President, and their willingness to lean into their AUKUS commitments in a crisis. While this is also true in both Britain and Australia, it is most obvious and consequential in the case of the U.S., whose constitutional war powers are the most overtly legalistic.

> "THE UNCERTAIN NATURE OF A PRESIDENT'S INHERENT AUTHORITY TO COMMIT U.S. ARMED FORCES TO CONFLICT AND THE LIMITS ON THE SCOPE AND DURATION OF SUCH COMMITMENT MAY PROVE AN ADDITIONAL HURDLE FOR ANY ALLIANCE SEEKING U.S. COMMITMENT TO A CONFLICT"

Furthermore, while all three states retain broad discretionary war powers, particularly to conduct 'small wars' or operations below the threshold of formal warfare, how they incorporate the legislature into their decision-making processes can play a significant role in large-scale conflicts and formal warfare. Legal issues are often second-order questions that flow from these initial political decisions, and concern how an alliance puts its strategic ambitions into practice, either through deterrence or actual warfighting.

How might these divergent regimes impact the agreement in practice? First and foremost, questions arise regarding the allies' force posture and commitments to AUKUS from a strategic perspective. For the United States, AUKUS is now a standard bearer for its vision of 'integrated deterrence' in the Indo-Pacific alongside partnerships like the Quad, aimed more at amplifying and augmenting its allies' capabilities in the region than directly increasing its own hard power. The U.S. is no longer the sole hegemon in the region and must lean more heavily on networks of partnerships to advance its broader foreign policy goals, aligning its interests with its key strategic partners. Although the idea of 'integrated deterrence' remains elusive in practice, it **implies America will now rely more heavily on its allies in the Indo-Pacific**, but questions remain as to Britain and Australia's role should a regional confrontation occur.

The answer to this is central to AUKUS, for **should deterrence fail then each states' war powers regime will shape how they uphold their obligations in this theatre**. While many recognise that the Indo-Pacific and Euro-Atlantic are intrinsically linked, the Royal Navy is primarily aimed at deterring Russia rather than China, so Washington and Canberra must

manage their expectations accordingly. On the other hand, Australia's AUKUS submarines will help fill America's submarine capability gap between now and the 2040s, directly sharing the American burden of boxing in China to the first island chain. As a reliable and credible force posture is pivotal to the success of AUKUS, each state must be clear on the role they are expected to play in a crisis scenario. As such, **caveats, rules of engagement, and acceptable escalation dynamics must be acknowledged and aligned** to achieve this.

> **COOPERATING ON CAVEATS REGARDING THE USE OF INTEROPERABLE CAPABILITIES SUCH AS THE AUKUS-CLASS OF SUBMARINES WILL BE VITAL TO ENSURING THEY REMAIN A CREDIBLE DETERRENT FORCE**

Historically, Britain has been critical of the use of such caveats on NATO operations in Afghanistan, where they were said to have undermined the effectiveness of the operation. As the British Defence Secretary Des Browne noted of NATO in 2006, 'The fundamental point is that [it] is an alliance. When it decides to use military force, all partners should be prepared to face equal risk'. Even when caveats were nominally dropped in 2008, the definition of key terms like 'emergency' continued to offer less willing partners an absolute veto on troop commitments. Given the close cooperation of the three AUKUS partners, caveats appear less likely to feature in strategic considerations than they have in many of the NATO interventions since 1990. However, **cooperating on caveats regarding the use of interoperable capabilities such as the AUKUS-class of submarines will be vital to ensuring they remain a credible deterrent force**, particularly in the Indo-Pacific, where Britain may be less willing to commit significant assets that are needed to deter Russia in the Euro-Atlantic.

> **A COMPREHENSIVE EFFORT ON THE PART OF ALL THREE ALLIES TO MINIMISE EXPECTATION GAPS, UNDERSTAND AND PRE-EMPT POTENTIAL STRATEGIC MISALIGNMENT ON THE DECISION TO USE FORCE, AND RECOGNISE THE LIMITS OF GIVEN DEPLOYMENTS COULD GO A LONG WAY TO ENHANCING THE OVERALL EFFECTIVENESS OF AUKUS' STRATEGIC DETERRENT EFFECTS, ENSURING THAT ANY ESCALATION IS MANAGED TO THE SATISFACTION OF LONDON, WASHINGTON, AND CANBERRA**

Discrepancies between allies' capability aims can also present challenges to how the partners signal their resolve, undermining the deterrent effects which are so central to AUKUS. While debates over the specific roles or missions that allies would participate in have been difficult to start, particularly in the Australia-U.S. context, this may ease as threats grow, capabilities begin to mature, and the three states' long-term political trajectories are confirmed after 2024. A comprehensive effort on the part of all three allies to minimise expectation gaps, **understand and pre-empt potential strategic misalignment on the decision to use force, and recognise the limits of given deployments could go a long way to enhancing the overall effectiveness of AUKUS' strategic deterrent effects**, ensuring that any escalation is managed to the satisfaction of London, Washington, and Canberra. The AUSMIN (Australia-US) and AUKMIN (Australia-UK) ministerial bilaterals are starting points for these discussions and should be built upon.

It may be also worth considering **the threshold at which offensive grey-zone and asymmetric activities may breach sub-threshold competition and thereby require parliamentary debate or authorisation**. NATO has noted that repeated grey-zone attacks, such as cyber-attacks and sabotage, may trigger its article five provision; **similar clarity would be valuable if operations are likely to cross the threshold of war, and therefore may be classed as acts of aggression**. If discussed among the AUKUS partners, this could help shape the internal escalation dynamics behind their combined Pillar 2 capabilities. This is especially relevant given the increased interest by all three actors in deterring adversaries through grey-zone responses and countermeasures.

Finally, all three countries should **consider the legal implications of mixed-crewed Virginia and AUKUS-class submarines being involved in a conflict in which one of the crew nations chooses not to involve themselves**. Although this report has not sought to explore this particular issue in depth, the questions it raises have some bearing on how war powers are exercised, and ought to be taken into account by LOAC experts concerned with the strategic dimensions of the alliance. From a strictly legal point of view this is a thorny issue, although the precise political circumstances in which it might come to fruition are harder to imagine. While questions have been asked in each of the AUKUS states as to their political obligations regarding, say, the defence of the Taiwan Strait, it is difficult – though not impossible – to imagine a case where all three do not feel politically obligated to act in concert with one another, absent a genuine inability to do so. This has led to criticisms that Australian submariners integrated into the crews of American submarines could be automatically involved in a war with China if one broke out while they were at sea. Although U.S. military commanders have pushed back against this, there is no clear strategy for what happens if an incident like this occurs. As the first Australian officers have now graduated from British and U.S. nuclear submarine training and will serve aboard Virginia-class boats, this is a question worth asking.

Joint crews may, at first glance, seem unlikely to cause legal concerns in the immediate future; the number of Australian submariners on American and British boats is small, and while they are thoroughly integrated into these crews, they are there in a training capacity. Indeed, if a conflict were to break out and it was deemed necessary to send a jointly crewed boat in support of operations, the repercussions would probably be most relevant to a domestic Australian audience, who may be concerned with becoming party to a conflict that its government has not expressly entered into. However, these legal concerns would naturally turn on the political circumstances of the conflict in question; if a jointly crewed boat is at sea when a conflict occurs and other assets in the region cannot be called upon to cover its duties, then this throws up a plethora of interesting and thorny questions for which no satisfying answers yet exist. Does the presence of Australian submariners on a British or U.S. boat mean it is less likely to be used in a conflict, particularly if one breaks out over Taiwan? If so, how does this reduce its deterrent effects? Do Australian submariners require express permission from Canberra to enable them to operate aboard an allied ship that is at war, and can a jointly crewed boat be used on operations so long as the Australian personnel onboard do not participate in action? What would the legal status of Australian submariners who are not technically be at war with the enemy aboard a boat that is at war? Presently, such questions have few clear answers.

“THE MORE PRESSING CONCERN IS WHETHER A FOREIGN POWER AT WAR WITH THE U.S. WOULD CONSIDER A JOINTLY CREWED BOAT A SUFFICIENT THRESHOLD TO DEEM AUSTRALIA PARTY TO THAT CONFLICT”

These are questions without precedent, and difficult to resolve in advance through hypotheticals. A good start would be for the AUKUS nations to consider whether clarifying the legal position of Australian sailors aboard British and American vessels will preserve or undermine allied deterrence, particularly around how such sailors are expected to serve in a conflict. Questions clearly remain beyond this, such as whether this decision is ‘pre-approved’ by Canberra or whether this automatically makes Australia party to any conflict in which one of these joint submarines is involved. It is evident that the involvement of any Royal Australian Navy sailors in a belligerent role would require the express approval of Canberra – the more pressing concern is whether a foreign power at war with the U.S. would consider a jointly crewed boat a sufficient threshold to deem Australia party to that conflict. This is primarily a political question without legal answer, based on a calculated determination by the foreign power. It must be noted that, conversely, jointly crewed vessels present potential deterrence benefits, as a foreign power may not wish to risk war with a group of states such as AUKUS if an attack threatens to drag in multiple opponents whose crews are thoroughly integrated aboard each other’s warships.

These questions only multiply in scale and severity if the AUKUS-class boats are fully staffed by a joint crew, as Admiral Sir Ben Key has stated they likely will be. Without clarity – or at least forethought – on these issues, it is difficult to see how a mixed-crew submarine does not cause significant legal, diplomatic, and domestic political issues if deployed in an area where a significant conflict may break out. Absent a more considered legal position, mixed crew vessels could limit the options of the deploying nation, whose crew may not know if they are able to contribute to a conflict without the express approval of Australia – approval which it is extremely unlikely to give in advance, unless it serves its own strategic purposes. The partners would do well to resolve these crewing tensions prior to a conflict breaking out, even if only internally, pre-empting a potentially significant diplomatic or logistical crisis in advance. Some relevant legal precedent may be drawn from drone operations in the Middle East by Britain and the U.S., as well as prior practice of crew exchanges and training sailors for extended periods aboard allied ships, but this is a world away from a deliberately and fully integrated crew.

“FOSTERING A GREATER UNDERSTANDING OF EACH OTHER’S POLITICAL AND LEGAL SYSTEMS WILL BE ESSENTIAL IN ACHIEVING THE BROADER STRATEGIC, DETERRENT, AND WARFIGHTING GOALS AUKUS HAS SET ITSELF”

Australia, the United Kingdom, and the United States have already overcome a number of legal and political challenges to enable the AUKUS agreement. Strict technology sharing laws have been rewritten, nuclear proliferation concerns have been assuaged, and a strategic political consensus has emerged in their three national capitals. A shared language, legal and political histories, cultural commonality, and close security, intelligence, and defence relationships create the conditions for a deep and lasting partnership. Yet closer cooperation on the practical legal and political realities of operationalising the agreement have yet to be fully addressed. These begin and end with the allies’ war powers regimes. At present, all three enjoy tolerable-if-varying levels of political and constitutional flexibility, ranging from the simple, centralised process in Australia to the negotiated process between the U.S. Presidency and Congress, with Britain hovering somewhere in between. Yet fostering a greater understanding of each other’s political and legal systems will be essential in achieving the broader strategic, deterrent, and warfighting goals AUKUS has set itself, over and above the pressing industrial and technological challenges.