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Major Research Paper

Executive Prerogatives for National Defence in the
Westminster and Congressional Traditions

Submitted to
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Problem Statement: Liberal democratic nations require popular legitimacy, accountability, restrained government and the rule of law for their functional stability. Executive prerogatives in Congressional and Westminster traditions of liberal democratic governance, when perceived to be unaccountable or unrestrained, challenge the legitimacy of liberal democratic government. Loss of legitimacy, in turn, can trigger public responses for calls for constitutional reform to abolish the prerogatives of the executive or greater accountability and constraint of the executive. To avoid such destabilizing scenarios liberal democracies have developed formal mechanisms of the legislature and judiciary to ensure that the executive and the law can co-exist. These mechanisms have been established in theory, historical developments and constitutional law and statute. Informal mechanisms exist as conventions, precedent and other extra-constitutional pressures on the executive. Both formal and informal mechanisms work together to constrain the executive from overreaching its constitutionally provided for prerogative over national defence.

Over time, liberal democratic theorists and jurists have justified and defended the continued inclusion of executive prerogative as necessary for the national defence, while binding it in other areas. Both, liberal Congressional and Westminster traditions, seek to rule by consensus, consent and constraint of power. Hence, without the executive they are left exposed to particular weaknesses in their ability to respond to threats to their national security. The executive, vested with prerogative powers in the realm of national defence has proven to be necessary to safeguard liberal governance from internal and external threats that would disrupt or exterminate liberal rule. The prerogative powers are identified in the paper as ambiguous, ambivalent, arbitrary and outside of the law. These qualities create a paradox in liberalism as government powers in

liberal democracies are expected to be bound in law, predictable and defined. Critics of executive prerogative for national defence point to the illiberal nature of the prerogatives and seek to bind them in law. They maintain that the prerogatives threaten the rule of law and liberal governance as executive prerogatives are unaccountable and executives use the prerogatives to abuse the powers of their Constitutional position. In light of these important critiques of executive prerogative over national defence in liberal democracies this paper attempts to answer the question; Are executive prerogatives for national defence defensible under liberal democracy?

The paper examines the prerogative powers exclusively in the area of national defence in Congressional and Westminster traditions and finds that the prerogatives for national defence in liberal democracies are justifiable. The prerogatives are justifiable because liberal democracies in the Westminster and Congressional traditions in Canada and United States have installed judicial and legislative mechanisms with the power to constrain the executive from overreaching its constitutionally defined role. The paper argues that in both traditions the executive may test the boundaries or even break through the boundaries of his/her constitutional authority and implement illiberal policies, but he/she will be forced back to a liberal constitutional position because mechanism of accountability and restraint are in place. Over centuries these mechanism have been developed and refined through theory and historical developments. Today the the judicial and legislative tools are in place to bind the prerogative if deemed necessary.

The paper is divided into six sections that explain the development and role of the prerogatives and defend their continued place in liberal democracies. A number of terms are used throughout the paper which require common understanding; thus, the first section will define the key terms

and concepts that are used throughout the paper including definitions of liberalism, liberal democracy and executive prerogative power.

The second section will identify the legal, theoretical and historical developments of liberal democratic government that provide and justify the prerogative for national defence and maintain the legislative and judicial mechanisms to constrain the prerogative. The section begins with a review of the major judicial developments that contributed to shaping and defining the limits of the prerogatives. The section additionally identifies the theoretical contributions of John Locke that have informed our understanding of liberal government and the national defence prerogatives. Locke provides important justifications for the maintenance of an executive vested with prerogatives. The prerogatives according to Locke are necessary in times of emergency as the branches of government, by their nature, are unable to respond quickly. His contribution to the theory of liberal government provide for constraints on the prerogative by dividing government between legislative and executive branches and making the legislature supreme. Additionally, he identifies the right to “appeal to heaven” (i.e. revolution), as the theoretical remedy for executive abuse of the prerogatives. His theories on government and the prerogatives were influential in the development of both Congressional and Westminster traditions. The section also identifies the contribution of William Blackstone to our understanding of the prerogatives. Finally, the section ends by describing the importance and development of responsible government in holding the political executive to account in Canada’s Westminster tradition.

The third section will explain the historical development of the prerogatives in the US

Congressional tradition. Significant differences in the structure of government exist between the Congressional and Westminster traditions with implications for the prerogatives. The Congressional tradition has constrained many of the powers of the executive that are not constrained in the Westminster, largely relegating the executive's prerogatives to emergency situations. The section finds that key developments in the framing of the US Constitution produced a number of unique mechanisms that at once constrain the executive while allowing the executive significant prerogative over national defence. Both the Congress and Courts have played important roles in binding the prerogatives.

The fourth section will identify measures of accountability and constraint that are both formally documented in US and Canadian constitutions or constitutional conventions. The fifth section will present two case studies that will support the argument of the paper. The case studies will demonstrate that each tradition maintains the necessary mechanisms to balance the prerogatives and liberalism. In Canada the courts, in several cases, have refused to impede the executive's prerogative for national defence. The paper will examine the ruling in *Prime Minister v.*

Khadr. In the US the case study will examine the War Powers Resolution and Congresses role in constraining the President. Finally, each case will argue that the prerogatives are necessary and legitimate under liberal democracies.

Finally, the sixth section will present a conclusion to the paper in which the main argument of the paper, that executive prerogative powers in the Congressional and Westminster tradition are defensible under liberal democracy because they maintain mechanisms of accountability and restraint, will be reiterated.

Section One - Definitions: The executive and prerogatives for national defence do not stand alone, they fit within a structure of governance that give them power and boundaries. It is important to create a common understanding of the key terms and concepts used throughout the paper. Thus, liberal democracies are those democratic governments that have adopted and incorporated the principles of liberalism. Liberalism is a philosophical ethic composed of a broad number of principles that are applied to areas of everyday life such as politics and economics. Raymond Guess identifies, “four chief components of classical liberalism” (Guess 2002: 323). First, it places a, “high positive value on toleration.” Second, liberalism places a, “special normative importance to a particular kind of human freedom.” Third, liberalism is, “committed to individualism.” Finally, liberalism is consumed with a, “kind of anxiety, the fear of unlimited, concentrated, or arbitrary power” (Guess 2002: 323).

Democracy is a system of government whereby the majority of citizens, through consent and consensus, decide on the duties and functions that the government will carry out. Democracies maintain that the rule of law is supreme. Liberalism and democracy, when combined, form the systems of government that are found in the Westminster and Congressional traditions of governance. Liberal democracies are therefore those democracies that value the principles of liberalism defined above. Westminster and Congressional traditions, govern sovereign nation states. These states, as all states, are susceptible to a number of challenges to their security. National defence is therefore the term used to identify a number of preventive, preemptive and reactive measures that liberal democratic governments undertake to ensure the continued maintenance of sovereignty.

Because all nations face challenges to their sovereignty and national security, liberal democracies have maintained that the executive, imbued with the prerogatives best serves national defence. Both of the traditions examined in this paper, since their founding, have defended the inclusion and maintenance of executive prerogatives as integral to their national security. Executive prerogative in each political tradition has its unique qualities. The Congressional definition of prerogative powers are those, “implied” powers that are not explicit in the Constitution but which have been developed over time through their application by Presidents. In the Congressional tradition the prerogatives are not only limited to the realm of war and emergency but this is where, “circumstances that cast the inner tensions of executive power into high relief” (Galston in Liebert et. al. 2012: 158) are found and will be examined in this paper.

Prerogative powers in the Westminster tradition differ greatly in their scope and function. The executive in the Westminster tradition exercises a number of prerogatives in the domestic and foreign realms that are essential to its parliamentary democracy and to its mechanisms of accountability. However, only the prerogative for national defence will be examined in the paper. There exist two famous definitions of prerogative powers in the Westminster tradition, the first from legal scholar, AV Dicey, who defines them as, “The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown” (Government of United Kingdom 2009: 7). Legal scholar William Blackstone has defined them as, “Those powers that the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects” (Government of United Kingdom 2009: 7).

Views of the prerogatives are also different in the Congressional and Westminster traditions. The executive prerogative in the Westminster tradition were originally seen to have, “been created for the benefit of the people” (Lagassé 2010: 7) because they provide for national defence. The Congressional tradition in contrast is suspicious of executive prerogative and of all government power in general, maintaining a number of formal and informal mechanisms to constrain executive power. American suspicion of executive power is attributable to its colonial history and adversarial relationship with the King, which will be explained further in the paper.

Though difficult to fully define, definitions of executive prerogatives in both traditions share common traits of ambiguity and arbitrariness (Mansfield 1989, Lagassé 2012). In addition to being arbitrary, they are unrestrained by law and are often criticized as being unchecked by other branches of government (Bland/Rempel 2004). These arguments will be shown to be unfounded in the case studies. Liberal democracies are also defined by their necessity of clarity, predictability and stability. In liberal democracies the prerogatives of the executive branch of government defy liberal principles of legally restrained and checked power as well as clarity and predictability. Because the executive has been able to maintain certain powers outside of formal mechanisms of restraint, a paradox in liberalism is produced. Lack of clarity and, “ambiguity” (Lagassé 2012: 161) over the prerogatives exists in both traditions. The UK ministry of justice in a 2009 report on the issue of prerogatives stated that, “the scope of the ‘Royal’ prerogative power is notoriously difficult to determine” (United Kingdom: 7). The interminable scope of the prerogatives and their ambiguity make it such that they often clash with today’s views on the principles of liberal democracy and add to the contestability and debate over their legitimacy in

today's liberal democracies.

Critics claim that executive's prerogatives include those that argue in favor of greater constraints on the prerogative for national defence and those who recognize their importance but criticize their abuse. They argue that when abused they challenge notions of liberalism and of democracy leading to loss of legitimacy (Bland, Rempel, Reform Party of Canada). Aucoin, Jarvis and Turnbull claim that abuse of the prerogative (rather than the prerogative itself), "undermines the democratic spirit" (Aucoin et al. 2011: 19). Proponents of executive prerogative in both traditions argue that executive prerogatives are necessary, have been elaborated upon in centuries of development of liberal theory and are legitimate because they are restrained and accountable through numerous formal and informal mechanisms.

Section Two - Legal, Theoretical and Historical Development of the Prerogative: Executive prerogatives are not static, they have fluctuated, been adapted and changed over time through developments in legal thought, political theory and historical events. The prerogatives began in early English history as the unbound exclusive powers of Kings and, over time, have been limited and bound in law (Maddicott 2010: 3). Executive use of the prerogative has additionally been constrained by the division of branches of government into the executive, judiciary and legislative branches. In reviewing the history of the Westminster tradition the paper intends to identify the key legal, theoretical and historical developments that have worked to bind the prerogatives and develop the prerogatives for national defence as we know them today. The section will identify key judicial developments that impacted the prerogatives, identify the importance of Locke's theoretical contribution to the prerogatives, identify the contributions of

William Blackstone and finally describe the development of responsible government.

The development of constraints on the prerogative is the history of struggle for sovereignty between Kings and Parliament, both seeking to maximize their authority to rule and to gain a strengthened positions in the “constitutional ordering of the country” (Craig in Forsyth 1998: 66). In early English history two major factors were necessary for monarchy to maintain its status as dominant force in ruling. First, the monarchy needed to maintain a well-financed and equipped army to police and defend the realm as well as enforce the Kings orders (Maddicott 2010: 3). The second factor that was necessary, legitimacy of monarchical rule, was critical to the monarchy’s ability to balance competing political interest and maintain power. Legitimacy was also crucial for the consent of raising taxes to maintain the army. The legitimacy of the reign of Kings relied on the consent and support of a number of stakeholders including nobles, landholders and church officials among others (Herman 2011: 5). Kings that were unable to gain their consent and support could be faced with opposition. A political balance of power was achieved through the development of parliament. The establishment and development of parliament was not as a democratizing gesture on behalf of enlightened Kings, but a way to consolidate and expand power over territorial gains and mollify dissent within the realm (Hicks 2010: 20). Additionally, it allowed the King to obtain consent for levies and taxes required for raising and maintaining armies for conquering and defence. Much of the history of England’s move towards constitutional monarchy and parliamentary supremacy has been marked by, often brutal and bloody, struggles with the King over the prerogatives (Hicks 2010, Pincus 2011).

Major works of jurisprudence such as the *Prohibitions del Roy*, by Sir Edward Coke had a

significant impact on constraining executive prerogative by advocating the separation of the branches of government, specifically the executive from the judiciary. The *Prohibitions del Roy* reversed the previous advice given to King James by the Archbishop of Canterbury that, “the judges of were but delegates of the King, with the consequence that he (the King) could take ‘what causes he shall please to determine, from the determination of the judges and determine them himself’” (Craig in Forsyth 1998: 67). In essence, the thinking prior to Coke’s 1656 publication of the *Prohibitions del Roy* was that the courts decisions had no force without the support of the executive, making the courts an extension of executive policy. Lord Coke argued for the necessity of, “dividing” the authority between executive and judiciary (Craig in Forsyth 1998: 67). Coke argues in favor of the supremacy of the legislature in the creation of law stating that, “the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament” (Coke 1658). He further addresses the issue of the prerogatives claiming that, “the King hath no prerogative, but that which the law of the land allows him” (Coke 1658). This is a significant reversal of previous practice and places law in the supreme position of power, not the King.

Though key works of jurisprudence acted to bind the prerogatives several other important cases upheld the prerogative in the area of national defence. In the *Case of Ship-Money*, Lord Henry Parker, begins the decision by identifying; “That the King ought to have aid of his subjects in times of danger, and common aid in case of common danger, is laid downe for a ground, and agreed upon by all sides.” But what is at issue for Lord Parker is how far the Kings subjects must go and what kind of support they must provide. He identifies four key areas to be addressed in the case. “First, by what Law the King may compell aid. Secondly, when it is to bee levied.

Thirdly, how it is to be levied. Fourthly, what kind of aid it must be.” (Parker:) This important case made three important decisions regarding the prerogative for national defence. First, the court upheld the King’s prerogative to defend the realm (Craig in Forsyth 1998: 70). Second, it found that the King had the right to levy taxes without the consent of parliament to pay for defending the realm, upholding a previous ruling, the *Bate’s Case*, that granted James I to levy a defence tax, “by Letters Patent under the Great Seal” (Craig in Forsyth 1998: 69). Finally, it upheld that the, “King is sole Judge of danger” (Lord Parker).

Two other cases further supported the King’s prerogative to levy tax without parliamentary approval, *Darnel’s Case* and *Hampden’s Case* both affirmed that the King (Charles I at the time) could levy taxes to defend the realm, “when he chose to allege the existence of a state of emergency” (Craig in Forsyth 1998: 71). These legal developments played an important role in shaping the prerogatives, equally important were the contributions of political theory.

John Locke and early theoretical foundation of the prerogative: In addition to major works of jurisprudence and court decisions, the development of the prerogatives and government for national defence were supported through political theory. Liberalism today is the dominant underlying political philosophy that determines how we constitute legitimate government and policy in the US and Canada. John Locke made significant contributions to our theoretical understanding of liberal democratic government as a social contract between rulers and ruled and to our understanding of the importance of the rule of law, accountability and restrained government. In his 1689 *Second Treatise on Government*, Locke, provides the theoretical framework for the establishment for liberal democratic government in which the legislature is

supreme and for vesting the executive with powers to decide when and what actions should be appropriately taken in the interest of national defence. Prerogatives for national defence are therefore theorized in the earliest bodies of theoretical work that influenced the development of liberal democracy in Canada and the US and are key to government today.

On the status of people and freedom Locke states that, “Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent” (Pfiffner 2008: 22). Government therefore develops when, “one divests himself of his natural liberty and puts on the bonds of civil society” (Pfiffner: 2008 22). Because people, “divest” there, “natural liberty” they enter into a system of government in which power, “is divided into legislative and executive power” (Mansfield 1989: 199). According to Locke the legislature must always be supreme, as the legislature, “is bound to dispense justice and decide the rights of the subject by promulgated standing law” (Pfiffner 2008: 22). Locke additionally separates the executive and legislature as no one person can, “have both legislative and executive power in civil society” (Mansfield 1989: 199).

According to Locke, law takes the arbitrariness out of government and provides a process for resolving disputes and grievances. He strongly advocates the view that law and constitutions are central to man’s escape from the state of nature and necessary for the establishment of government and society that support man’s freedoms stating, “Freedom of men under government, is, to have a standing Rule to live by, common to every one of that society, and made by the Legislative power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and to be subject to the inconstant, uncertain, unknown, Arbitrary

Will of another man” (Fatovic p.277).

Paradoxically though, while advocating government and the rule of law, Locke contributed significant support for prerogative powers of the executive that allow the executive to circumvent law and the supremacy of the legislature, “for the good of society several things should be left to the discretion of him, that has the Executive Power” (Locke: XIV, 159, 5). Locke himself defines the prerogative as the power, “to act according to discretion, for the public good, without the prescription of law, and sometimes even against it is called the Prerogative” (Locke: XIV 160, 5). Locke is sometimes seen as a paradoxical figure. His writings contributed greatly to the promotion of the need and establishment of the rule of law promulgated by a legitimately established and sovereign parliament, while at the same time taking part in, “...revolutionary action against Charles II in the Exclusion Crisis” (Fatovic p.281). Despite his arguments with Charles II he valued the role of an executive imbued with prerogatives. He recognized that despite the ideal place of the legislative branch as the supreme power, it was generally ineffective at dealing with emergencies. In his study of executive power Harvey Mansfield argues that, “Locke asserts the supremacy of the legislative power but also the supreme executive...who stand perpetually ready to go beyond the rules” (Mansfield 1989: 203). Locke states that, “Many things there are, which the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands, to be ordered by him” (Locke: XIV 159, 11-15). In addition to being unable to predict future events, the legislature was (and continues to be) afflicted by more mundane restriction of not being able to be in session and being composed of too many people to take action quickly (Locke: XIV 160, 5). Locke maintained the need for prerogative powers because of “unforeseen

and uncertain Occurrences” (Fatovic p.278) and that the extraordinary is an ordinary part of politics. Sole reliance on the legislature and judiciary to govern in all situations were, “difficult and even undesirable” (Fatovic p.278).

However, unlike Machiavelli and Hobbes, Locke theorized a place for an executive whose power was limited (Pfiffner 2008: 20). According to Mansfield, “Locke established the weak, theoretical executive conformable to the anti-monarchical animus of his day” and that, “the executive would be dutiful and subordinate” (Mansfield 1989: 200). Prerogative power, according to Locke was not absolute power. Prerogative power came from the, “Peoples permitting their Rulers, to do several things of their own free choice” (Locke 164, 5-7). Power therefore flows from the people to the executive, not the inverse of absolutist power that flows from the executive. Locke reiterates several times in his Second Treatise that the prerogative must be carried out in the name of the, “publik good.”

Locke was not naive enough to believe that all executives would respect the prerogatives. In his Treatise he accounts for abuses of the prerogative and provides a remedy for cases where executives used the prerogative for personal benefit. Locke, states that when the executive abuses the prerogative and when rights have been infringed and there are no legislatures or courts, “The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to appeal to Heaven” (Locke: 168, 9). In this, Locke provides for the theoretical justification for revolution against the executive when the majority of people believe that their rights and life have been threatened by a tyrannical executive and they have no other recourse in the legislature or judiciary.

Prerogative powers that Locke envisioned give the executive the maneuverability to identify danger and respond to attack from foreign powers and provide for the national defence. Locke would be one of the central liberal thinkers that the Framers of the American Constitution would rely on in the drafting of the Constitution. Likewise, Locke's work would greatly influence the development of the Westminster tradition ensuring that the executive prerogative for national defence was maintained in the Crown, despite a number of prerogatives in other areas being constrained by law.

In addition to legal and theoretical developments, historical events played key roles in the development of the prerogatives for national defence. Key among these was the Glorious Revolution and the enactment of the English Bill of Rights which resulted from the revolution. The short experience with Commonwealth government and the arbitrariness with which Cromwell ruled over military and defence did more to instill fear of arbitrary executive power than any other factor. Arbitrary rule, "with no reference to known political institutions" (Childs 1988: 401) was unpopular and quickly led to the Restoration of monarchical rule in England. The Glorious Revolution, in which Whig radicals, influenced by the early liberal philosophers, such as Locke, fought to oust James II from power over his adherence to the Catholic faith, attempts to centralize and bureaucratize government and grow the strength of the army (Pincus 2009: 6). Early liberals, warning of the dangers of excessive power to liberty, revolted against James II (Pincus 2009: 6). As part of his project in governance reform James II, "succeeded in raising, maintaining, and deploying an efficient and disciplined army" (Pincus 2009: 7). Though the parliament had the, "power of the purse" and, "could always emasculate

any plans to enlarge the army by refusing to vote for additional revenues, the, “tame and inexperienced parliament of 1685” gave James II the funds he required to enlarge the army (Childs 1988: xviii). To Whigs, standing armies were the “ultimate” (Kohn 1975: 3-4) expression of power, and were incompatible with liberty and the tenants of English liberal thought developing during the era. Further outraging Whigs, James II not only grew the size of the army but swelled the ranks of the officer corps with Catholics (Childs 1988: 20). He also used the army to enforce his agenda and strengthen the authority of the central government (Childs 1988: 84). By growing the size of the army James II inherited the problem of quartering soldiers. According to the Petition of Rights of 1628 and the Disbanding Act of 1679, it was illegal for armies to be quartered in a subject's home without consent (Fields & Hardy 1991: 404-405). The quartering of soldiers was offensive to the English and increased number of soldiers necessarily came the increased demand for quartering (Childs 1988: 85). This growth and use of the army domestically was seen, by many, as an abuse of the national defence prerogative. Recalling the Locke’s appeal to heaven, radical Whigs took to arms to oust the King from power.

The end of the Glorious Revolution resulted in significant limitation of royal prerogatives for national defence. The Bill of Rights of 1689 and the Act of Settlement were both instrumental in binding the prerogatives in statute (Lagassé 2012: 164). They also reaffirmed many of the principles of Magna Carta (Fields and Hardy 1991: 404-405). Key principles of the 1689 Bill of Rights that transferred prerogative power from King to Parliament include (Government of United Kingdom 1689);

- Making it illegal to suspend law without the consent of Parliament;
- Making it illegal to levy or raise taxes without consent of Parliament;
- Making it illegal to raise an army without Parliamentary consent.

These provisions in the Bill of Rights were aimed at reducing the capacity of the executive to abuse the prerogative for national defence would have a significant impact on the development of the Congressional tradition in the US and for the development of the Westminster tradition in the UK and Canada. Many of these principles are reflected in the US Bill of Rights. Despite the Glorious Revolution the King maintained the national defence prerogative throughout the seventeenth and eighteenth centuries. With the rise in calls for democratization and entrenchment of responsible government the King's ministers gained a greater role in the exercise of the prerogatives. Legal scholar William Blackstone completed a comprehensive study of the legal system in the Westminster tradition in which he extensively addressed the prerogatives.

William Blackstone: Blackstone in his 1765, *Commentaries on the Laws of England*, provides us with insights into the legal nature of the prerogatives. He illustrates that through the force of law it is the King's prerogative to, "make treaties...with foreign states and princes" and that it is the, "sole prerogative of the King to make war and peace" (Blackstone). The prerogative for making war and peace is built upon the prerogative for conducting foreign relations, as the King, "is the delegate or representative of his people" (Blackstone). He adds, "It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves" (Blackstone).

Blackstone, in describing and justifying the prerogative for national defence echoes Locke and the social contract theorists stating, “the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in sovereign power” (Blackstone). The executive therefore represents the collective interests of the body of people, or the national interest, in defence matters. The prerogative of making war and peace also makes the King the Commander in Chief of the nation’s military forces or as Blackstone calls him the “generalissimo, or the first in command.” Although, “The King has the sole power of raising and regulating fleets and armies” (Blackstone), he is powerless to do so without the consent of parliament for levying taxes. The decision in the *Case of Ship-Money*, that provided for the Kings right to levy taxes for national defence was reversed during the Glorious Revolution and is reflected in Blackstone’s work. One of the central principles of liberalism that had settled into English common law, and are reflected in American law, is that citizens should not be taxed without consent, or “no taxation without representation,” (as was a common slogan during the American War of Independence). Blackstone states that, “no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament” (Blackstone). He adds that, “no man shall be compelled to yield any gift, loan, or benevolence, tax or such like charge, without common consent of parliament” (Blackstone). Thus, Parliament, in law, has a powerful mechanism to restrain the Kings prerogative for national defence by refusing to levy taxes from the citizenry for the armed forces.

To understand how the King’s prerogative in the areas of foreign affairs and defence are further

held accountable it is first important to understand that, in law, the King (the executive) is infallible. Blackstone states that, “the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong” (Blackstone). Blackstone further states that in addition the King “is not only incapable of doing wrong, but of even thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness” (Blackstone). Because the King cannot, “misuse his power” (Blackstone:), “evil counselors” and, “wicked ministers” (Blackstone:) are held accountable through provisions in the constitution that provide for indictments and parliamentary impeachments for those that, “dare to assist the crown in contradiction to the laws of the land” (Blackstone:). For those ministers who would abuse the war making prerogative, “the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting or concluding a national war, is in general sufficient to restrain the minister of the crown from a wanton or injurious exertion of this prerogative (Blackstone:). In sum, threats of impeachment in parliament and legal action in the courts work to constrain the King’s ministers from abuse of the prerogatives. The threat of a minister’s impeachment today is part of the convention of responsible government.

Canadian Law & The Convention of Responsible Government: As demonstrated the Westminster tradition has a long theoretical and legal history of vesting the prerogative of national defence in the executive. The foundation of Canadian government lies in the Westminster tradition and has maintained the prerogative in the Canadian Crown. The power of the executive, according to Peter Aucoin is, “vast” (Aucoin et. al 2004: 50), it, “includes the power to appoint...command the Canadian armed forces and power to dissolve Parliament in preparation for a new general election” (Aucoin et. al 2004: 50). This vast power requires adequate mechanisms to protect

against abuse. The Canadian constitution, adhering to the principles of the Westminster tradition, are composed of both law and convention. For the purposes of examining executive prerogative and its defensibility in Canada, this section will examine the most significant pieces of legislation that define the prerogative of the executive for defence. It will then elaborate on the convention of responsible government that ensures democratic oversight of the prerogative.

The Constitution Act of 1867 established Canada as a dominion of the British Crown (Malcomson & Myers: 53). It is the founding legal document for the nation which established its governmental institutions in the Westminster tradition. Section 15 of the Constitution Act states, “The Commander in Chief of the Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen” (Constitution Act as cited in Lagassé 2010: 6), meaning that, “in both theory and practice” (Lagassé 2012: 7) the, “governing Cabinet that exercises the Crown’s prerogative has had an independent authority” over national defence (Lagassé 2012: 7). Maintaining the prerogative vested in the Canadian Crown serves several purposes, it ensures that, “the gaps and silences left by statutes” (Lagassé 2012: 168) are filled and ensures that, “no Prime Minister can claim ownership of the armed forces or overtly associate the military with his or her party” (Lagassé 2011: Embassy). Additionally, “the military’s ability to speak impartial truths to prime ministerial power rest on the fact that their ultimately loyalty belongs with the head of state” who is the Canadian Crown (Lagassé 2011: Embassy).

The National Defence Act, passed by Parliament in 1985, reinforces the status of the executive's prerogative over national defence and, “recognized the value of preserving a large degree of

executive discretion” (Lagassé 2012: 7) over national defence. Section 14 clearly states that the Canadian Armed Forces (CF), “are the armed forces of Her Majesty raised by Canada” (National Defence Act 1985: Sec 14). Although the CF are the Canadian Crowns, the Cabinet, “exercises the Crown’s prerogative (Lagassé 2012: 7). This is reflected in section 3 of the Act which states, “There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside” (National Defence Act 1985: sec. 3). This section of the act vests responsibility for national defence and the Department of National Defence in the the Cabinet and the minister appointed to act as Minister of Defence. Although the Cabinet is legally responsible for national defence the Crown maintains executive authority. In Canada the Crown is the head of state and the Governor General is delegated powers to represent the Crown (McCreery in J. Smith 2012: 46). In keeping with this tradition the Act states in section 12 (1) that, “The Governor in Council may make regulations for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect” (National Defence Act 1985: 12 (1)). The Governor General, whose office has been, “delegated” powers by the Crown sits, “in council” and may receive advice from the Privy Council, composed of the appointed Cabinet, on issues of national defence and maintenance of Canada’s defence capabilities (Aucoin et al. 2004: 12). Acting on the advice of Cabinet it is the Governor in Council that provides authority for national defence decisions.

As demonstrated above executive prerogatives for national defence in Canada are established in law. However, it is the convention of ministerial responsibility, or responsible government that

provides democratic oversight of the executive prerogative making it palatable for liberal democracy. Constitutional conventions are those unwritten rules that are, “based on implicit political agreement and enforced in the political arena rather than in the courts” (Malcolmson & Myers: 32). The convention of responsible government forms a powerful democratic mechanism for holding government (i.e. the PM and his Cabinet) responsible to the House of Commons for its policies, including the exercise of the prerogative of national defence. This is only possible in the Westminster tradition because of the principle of Parliamentary Supremacy that allows it authority to oversee and hold the executive accountable.

Malcolmson and Myers identify five principles of responsible government. First, the Crown which is the formal holder of executive power will only act on the advice of its ministers (the Cabinet). Because the Governor General is, “an appointed official” and, “...not democratically accountable, it would generally be intolerable in a democratic country such as Canada for such broad powers to be exercised in accordance with the governor general’s personal judgment or discretion” (J Smith: 76). To address this problem a constitutional convention whereby the PM, “advises” the Governor General has been instituted (J Smith: 76). Therefore in the Westminster tradition, “the Queen reigns and the Prime Minister Rules” (Erskine May in Bagehot 2009: xxiv).

The second principle that Malcolmson and Myers identify is that the Crown, under normal circumstances, only appoint as advisors Members of Parliament. The Cabinet is appointed by the Governor General, delegated powers of representation by the Crown, and is by tradition composed of ministers from the party which holds the confidence of the House of Commons.

The third principle that Malcolmson and Myers identify is that Cabinet will act together and collectively assume responsibility for government. In Canada, responsible government, means that Cabinet, “must always have the confidence of a majority of elected MP’s in the House of Commons” (Aucoin et al. 2004: 11). Under the rule of the confidence convention the, “government is responsible to the House of Commons for the exercise of the powers of government and governs only as long as it had the confidence of a majority of elected MPs” (Aucoin et al. 2004: 11). If the Cabinet loses the confidence of the House of Commons the Cabinet must resign or, “hold a new general election” (Aucoin et al. 2004: 13). A government may lose the confidence of the House, and fall, several ways. First, by provoking a confidence vote in which the majority vote that they do not have confidence in the government. Second, the Opposition may move a motion of non-confidence through the House. Third, key legislation such as the annual budget being voted down would cause a loss of confidence and cause a government to fall. In addition to the entire Cabinet individual ministers are also held accountable.

The fourth principle is that the Crown will only appoint ministers to Cabinet who have the confidence of a majority of member of the House of Commons. Ministers are appointed to a ministry for which they have authority and for which they are responsible and held to account for that ministries policies. However, Cabinet ministers are not directly accountable to the Commons; they are accountable to the Prime Minister (Franks 1987: 232). When a government falls it falls as one, Commons cannot select and force individual ministers from power. In cases where a minister and his/her policies led to enough public pressure and calls for his resignation, a minister may be asked by the Prime Minister to change course, make amends for his infraction or

resign.

Finally, when a PM and his/her Cabinet loses the confidence of House they must resign (Malcomson & Myers: 56-57). In such a case a general election should ensue, which should be called by the PM. The party formally in government is eligible to run in the election but must garner enough seats in Commons to re-gain confidence. These principles of responsible government ensure that the Crown and its ministers that advise the Crown govern in the interest of the nation and can be held democratically accountable for their policies.

The key force within parliament for holding government to account are opposition parties. Their primary responsibility as part of the House of Commons is to, “oppose” or scrutinize government (Lagassé 2010: 11). Opposition parties have a number of mechanisms in which to oppose scrutinize and criticize the government. Debate and question period, according to CES Franks, provides five functions for opposition (Franks 1987: 153). First, it allows the opposition to draw attention to particular issues. Second, it can obstruct the forward momentum of government policy and force compromise with opposition’s demands. Third, it aides in, “delaying a headstrong government” (Franks 1987: 153). Fourth, it allows a forum for the opposition to prove that the government has faults. Finally, it can act to rally members of the opposition and public support for the opposition’s ideas. Opposition parties and forums to safely debate and question government are therefore critical to holding the political executive accountable for the exercise of the prerogative for national defence.

In addition to debate and question period D’Aquino, Doern and Blair identify standing

committees and ad hoc and special committees as, “mechanisms to secure executive accountability” (D’Aquino et al 1983: 26). Those committees relevant to issues of national defence include the House of Commons Standing Committee on National Defence and Veterans Affairs and the Senate Committee on National Security and Defence (Bland & Rempel 2004: 20). CES Franks identifies that committees can do several things that the House cannot (Franks 1987: 161). These include conducting investigations in which they can interrogate ministers and public servants in order to develop research and reports to help develop government policy or investigate the failures of policy (Franks 1987: 161). Committees can force the government to provide the House of Commons with information on their policies which can be used to criticize the direction that the government is taking on particular issues. Committees are also where backbench MPs can be relevant to the formation or opposition to government policy (Franks 1987: 161). It is also where pressure groups composed of concerned citizens can voice their concern on particular issues (Franks 1987: 161).

Additionally, because of parliamentary supremacy, the Parliament can move to constrain the executive prerogatives in statute either by eradicating the prerogative in question, as was done in the 1689 Bill of Rights, or by supplanting prerogatives, meaning the authority to exercise those prerogatives moves to parliament (Lagassé 2012: 164). However, legislation that would bind the prerogatives, according to the Interpretation Act, “must reveal a clear intention to bind the executive” (Lagassé 2012:165). This requires parliament to be precise in its language when drafting legislation. However, provisions in statute are often imprecise and intent of parliament uncertain increasing the ambiguity of the prerogative for national defence (Lagassé 2012: 164). Parliament and statute simply cannot foresee and legislate every possible situation in

which the executive would exercise the prerogative. It is then left to the Supreme Court of Canada to decide if Parliament's legislation binds the prerogative that it set out to expressly bind.

Role of the Judiciary and judicial review: Canada's Westminster system maintains a separate judiciary, created by the Federal government that now adjudicates on issues involving the constitution (Malcomson & Myers 2002: 149). David Smith quotes K.C. Wheare in explaining the function of the courts, "While it is the duty of every institution to established under the authority of a constitution and exercising powers granted by a constitution to keep within the limits of these powers, it is the duty of the courts, from the nature of their function, to say what these limits are. And that is why courts come to exercise this function in a federal government" (D. Smith 2010: 112). The Court has the constitutional authority to review the actions of the Parliament and executive. This includes the authority to review cases involving the use of the prerogative. Parliament can create statute to constrain the prerogatives but the judiciary must first review the legislation before the prerogative can be bound. It is, "only the courts" that can, "decide if a statute actually binds the Crown" (Lagassé 2012: 166). However, although the Court does maintain its authority to review cases involving the prerogatives for national defence and foreign affairs, the Court has been hesitant to make any ruling that would actually bind the executive in these areas. In cases where the Parliament has passed legislation expressly with the purpose of binding the prerogatives the executive can continue to exercise and "adopt a broad interpretation of its remaining prerogatives until the judiciary rules otherwise" (Lagassé 2012: 166). Legislation is often the result of political compromises, even in majority government situations. This tends to create legislation that is imprecise. As mentioned above it is this caveat that legislation be precise in its binding of the prerogative, where it often fails. Although in

theory the Court could exercise significant authority as will be demonstrated in the case study it has refused to do so.

Section Four - The American Congressional Tradition: This section will detail the development of the Congressional tradition in the US. The section will show that executive powers and its constraint were foremost in the minds of Colonial Americans before the War of Independence. Colonial Americans held similar beliefs to that of liberal philosophers on the state of human nature and sought to put into practice the theories of Locke. In particular they sought to create an executive that mirrored that of Locke's executive in time of emergency and borrowed from Locke's ideas on the separation of powers to create accountability and constraint. As will be demonstrated American's fear of tyranny emanating from the executive branch influenced the development of the Constitution and role of the President. In the literature, constraint of executive prerogatives are emphasized in the Congressional tradition. Principles and mechanisms of accountability and constraint that are built into the Congressional system make the executive prerogatives defensible under the United States liberal democracy.

In 1776 the US waged a war of independence to separate its political ties to the UK. Leaders of independence drafted the Declaration of Independence which reiterates key liberal principles of equality, and right to, "Life, liberty and the pursuit of happiness" (Declaration of Independence). The document goes on to provide a, "detailed indictment of executive 'injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States'" (Milkis and Nelson 2008: 3). The driving force behind the theoretical justification for

the War of Independence came from American Whigs and their disdain for King George III's abuse of executive power. A central tenet of American Whiggism that developed in the eighteenth century was, "a profound distrust of power" (Bailyn 1973: 27). Whiggism, when combined with protestant Christian theology and religious values, produced not only a distrust of power but an almost mystical or supernatural view of power. Power was not only dangerous but, "evil...and infinitely corrupting", "it must be controlled, limited and restricted in every way compatible with minimum civil order" (Bailyn 1973: 26). Many American colonists and in particular American Whigs viewed history as an, "organic cycle of birth maturity and death" (Wood 1969: 29). History, American Whigs believed, held many examples of this great organic cycle; great societies where liberty flourished for years would eventually decay under corruption and power would shift and become concentrated in the hands of the few, creating tyranny (Wood 1969: 29). The causes of the historical fluctuations in the rise and fall of democratic societies, they believed, hinged on the presence of corruption in society and a fundamental belief that man was fallible. They believed that the cycle between democracy and tyranny was trending towards tyranny and that the gains of the Glorious Revolution of 1688 were being undermined by monarchical corruption and royalties' unquenchable desire for power. England's delicate constitution ensuring the liberties of Englishmen, Whigs believed, was being destroyed by the unconstrained prerogatives of the monarchy which lead to subtle and slow corruption of the other two branches of government including the House of Lords and Commons (Wood 1969: 32).

Despite their distrust of concentrated discretionary executive power, the American Constitutional Framers recognized the importance prerogative powers played in a nation's security. Although the Framers were supportive of executive power it had to be constrained within a system of

checks and balances. Balance and constraint were key to maintaining the executive prerogatives in the Constitutional system while maintaining principles of liberal democracy.

Like their British counterparts, American Whigs, sought to implement the values of liberalism in their politics and were versed on the writings of Locke and Blackstone as well as versed in English history and jurisprudence. They believed, “that if they were successfully to resist tyranny ‘they ought to be well versed in all the various government of ancient and modern states’” (Wood 1966: 6). They thus became well versed in and influenced by liberalism, Christian theology, Whig political thought, and their own reading of English and world history (Kohn 1975: 4). Many observers could not understand why American colonists were ready to fight a war of independence. At the time the American colonists, “knew they were probably freer and less burdened with cumbersome feudal and monarchical restraints than any part of mankind in the eighteenth century” (Wood 1966: 5). In a sense the war and the Constitution of 1787 became a preemptive attempt to avoid the historical cycle of tyranny.

After the success of the war and the failure of the Confederacy, a Constitutional Convention was called in 1787 to draft a Federal Constitution to put into place a functional government that would succeed where Confederacy had failed (Rossiter 1961: Introduction). The Federalist papers make an important contribution to our understanding of the Constitutional Framers views and intentions in drafting the Constitution and role of the President. The Papers are a collection of newspaper articles providing supporting arguments for ratification of the Constitution as states debated the ratification of the Constitution for membership to the Union. They were drafted by James Madison, Alexander Hamilton and John Jay (Rossiter 1961: Introduction). The Papers

address the need for an executive imbued with prerogative powers and a system of government able to balance and check power between three branches. In paper No.51 Madison, reflecting Locke's view of human nature, eloquently makes the case for the necessity of government with the proper mechanism to constrain power and identifies the challenges in instituting such a system of government. He states, "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (Rossiter 1961: 321). Thus, Madison in paper No. 51 demonstrates the Framers underlying theory of the nature and need for government; while there is a need for government it must be constructed in such a way whereby it can be constrained. Madison further argues in paper No. 51;

"...the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government." (Rossiter 1961: 321)

Hamilton in paper No. 75, further develops the idea of creating government that can constrain itself by dividing powers over foreign relations and defence between the executive and legislature. Stating that foreign relations and defence,

“...form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them” (Rossiter 1961: 451).

Using the pessimistic Lockean view of human nature the Framers constructed a constitutional system in which ambitions would be used to insure against the concentration of power. Again, recalling the theoretical work of Locke and the necessity of the prerogative for national defence, Hamilton in paper No.23, makes the argument that security is never assured and the threats to a nation and its liberties are unpredictable. Because of the unpredictability of threats to national security Hamilton states that a Federal government must be endowed with the prerogatives to defend itself without constitutional constraint that might endanger the nation;

“The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is

impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense” (Rossiter 1961: 153)”

Though Hamilton in paper No.23 argues in favor of vesting the Federal government with sufficient powers for national defence he does not identify which branch should be endowed with those powers. Hamilton in paper No. 70 builds upon paper No. 23 and Madison’s statement identifying and arguing that the executive branch should be vested with prerogatives for national defence. Combining Lockean theory and Roman history he reiterates that at times it is necessary for an executive to maintain powers outside of the reach of law in order to maintain liberal society:

“Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the

formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome” (Rossiter 1961: 423).

Having made the case in support of an executive vested with prerogatives for national defence, Hamilton at the same time recognizes that prerogative powers can become concentrated and abused and in effect become a “two-edged sword” (Galston in Liebert et al. 2012: 159). While they could be essential for national defence they could be used to further narrow interests of the president in the domestic realm (Galston in Liebert et al. 2012: 159). In paper No.69 he states the importance of also being able to constrain the executive ensuring that the executive did not have unlimited executive discretionary powers as did the kings of Europe;

“The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature” (Rossiter 1961: 417-18).

Blackstone defined the King as infallible and therefore unimpeachable, it was his ministers who gave ill advice that were to be impeached. The Federalists made provision in the Constitution

that broke with the tradition of executive infallibility but kept the concept of impeachment. The President, as the executive authority, would also be unlike the King in that he was fallible and could be impeached. In paper No. 69, Hamilton states; “The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law” (Rossiter 1961: 416). The power to impeach the president would be vested in the hands of the House of Representatives while power to conduct a trial of the President would be vested in the Senate. By dividing the impeachment powers between the legislative chambers they ensured that the executive remained independent, accountable to the people and would not be subjected to threats from the legislature.

However, perhaps the most important check on the concentration of power in the presidency was the Framers concept of an executive that is elected directly by the people and not by parties or legislature, as in the Westminster tradition. Hamilton in No. 68 states that, “the executive should be independent for his continuance in office on all but the people themselves” (Yoo in Liebert et al. 2012: 203). According to John Yoo the framers were, “deeply concerned that a president chosen by Congress would keep his eye only on the happiness of legislators” (Yoo in Liebert et al. 2012: 203). By making the election of the president reliant on the people, through the electoral college, and limited to two four year terms in office the President's capacity to concentrate executive power is significantly restricted (Yoo in Liebert et al. 2012).

The Federalists provided a strong argument in favor of a Federal constitution with an executive vested with significant prerogatives in the international arena but with limited power in the

domestic and who must share power with congress, creating a system of checks and balances. The Federalists would ultimately persuade the states to ratify the Constitution that was produced at the Constitutional convention of 1787. The ratified Constitution, through the vesting clause in Article II, vests executive power in the President. Powers vested in the President are divided by enumerated and, “implied” powers. Enumerated powers are those that are written into the Constitution and which the President exercises alone. Implied powers are those that are not written into the Constitution but which Presidents since George Washington have taken the liberty to exercise in a number of cases. The enumerated powers of the President include that, “the President shall be the Commander in Chief of the army and Navy of the United States, and of the Militia of the several states” (US Constitution Art. II Sec. II). Additionally, the President, “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties...” (US Constitution Art. II Sec. II). The “implied” powers of the President are vital and form prerogative powers. In times of emergency and war the, “President’s power to command the forces swells out of all proportion to his other powers” (Rossiter 1960: 11). It is additionally an implied power of the president to decide when the nation faces an emergency and when it does not. Implied powers during times of emergency have included the power to imprison, torture, kill and surveil (Pfiffner 2008).

According to Cheever, “In giving ‘executive power’ to the President, the Fathers had the foreign-relations power chiefly in mind, although they protected this power from abuse by giving the Senate a voice on treaties and Congress the power to declare war” (Cheever 1952: 17). However, they provided powerful enumerated power to the Congress to stop abuse and constrain the President. Enumerated powers of Congress include the power to, “lay and collect taxes, duties

imposts and excises to pay debts and provide for the common defence...”, “declare War”, “raise and support Armies”, “provide and maintain a Navy”, “make Rules for the Government and regulation of the land and naval forces”, “provide for calling forth the Militia”, “provide for organizing, arming and disciplining the Militia” (US Constitution Art. I Sec.VIII). According to American scholar Clinton Rossiter the President as Chief of State is a, “symbol of our sovereignty, continuity and grandeur” (Rossiter 1960: 18). As Chief Executive he, “reigns but he also rules; he symbolizes the people, but he also runs their government” (Rossiter 1960: 18). The Federalists had produced a system of government that drew upon many influences of the Westminster tradition which they knew well. However, they made radical changes to their new constitutional model. The following section will explore the implications of the differences between the Congressional and Westminster traditions.

Constitutional Mechanisms of Accountability and Constraint Westminster vs.

Congressional Traditions: The paper has provided an overview of the key legal, theoretical and historical developments that have contributed to our understanding of liberal democracy in the Congressional and Westminster traditions. This section will compare and contrast these traditions in order to identify the implications of their differences. The section concludes that the implication of the Congressional tradition is that it focuses on constraining the executive while avoiding holding the executive directly responsible. The implication of the Westminster tradition is that it focuses on holding the political executive accountable, with constraint being a byproduct of accountability. As is argued throughout this paper, though each approaches accountability and constraint differently, executive prerogatives are determined to be defensible in liberal democracies when the system can constrain prerogatives. The implication of three

methods for constraint and accountability are identified and explored including:

1. written constitution v. constitution composed of statute and convention,
2. executive separate from legislative v. political executive within legislature
3. shared powers between adversarial branches v. concentrated powers with accountability

First, the US Constitution is composed only of statute defined in a written constitution, which states the power the President has in the area of defence and national security; unlike the Westminster constitution that includes unwritten conventions. The implication of this is that the prerogatives of the President are significantly less adaptable or flexible. Conventions in the Westminster tradition have proven to be a malleable tool of the Cabinet in the realm of national defence. In 1939, PM Mackenzie King, requested that the Parliament vote on Canada's intention to declare war on Nazi Germany and enter into hostilities in support of the Allies (Lagassé 2010: 14). The King government ceded its prerogative to declare war to Parliament potentially creating a new convention for following governments. However, his predecessor PM Louis St. Laurent refused to allow a vote to take place in Parliament on the deployment of Canadians to the Korean War, reversing the precedent laid by his predecessor (Lagassé 2010: 14). The implication of this flexibility in declaration of war and deployment of armed forces is that it allows the political executive to transfer responsibility for the decision to Parliament when politically in his/her favor. In contrast the American President is constrained by having to seek a congressional declaration of war or approval for military engagements and although he/she might

gain congressional approval he/she as commander in chief will still be held accountable in the court of public opinion.

Second, the US Constitution divides power between separate executive, legislative and judicial branches and gives each branch equal status, no branch is subservient to the other. The implication of this is that each competes with the others for power producing incentives for mutually constraining the power of the others. Branches of government in the Westminster tradition are not separated as in the Congressional model. The focus in the Westminster tradition is on ensuring accountability of the Cabinet which requires that the Cabinet be a part of Commons. Cabinet is accountable for their use of the prerogatives by being monitored and criticized by opposition parties in Commons. Although the Cabinet maintains exclusive jurisdiction on issues of foreign affairs and national defence the Cabinet also maintains ultimate responsibility. Whereas in the Congressional traditions branches are equal, the principle of Parliamentary Supremacy and the fact that the political executive and his/her Cabinet sit within the legislature creates a system where the political executive can be held accountable to Commons.

In the Canadian Westminster tradition the PM is the political executive but also a member of parliament and the head of his/her political party. Through national party conventions members and delegates of the parties select their party leader through leadership races. Those citizens who are not registered members of the parties do not have a voice in the selection of the party leader. Once selected for the position of party leadership the leader leads the party in national elections to gain a majority of seats in the House of Commons. Once the party gains a majority

of seats through a general election and maintains the confidence of Commons the leader of that party is, by convention, appointed by the Governor in Council to be the Prime Minister. He is supported by his/her Cabinet whose members are also appointed by the Governor in Council. Thus, to become Prime Minister the leader of the party must win the election in his/her riding, not a national election as in the Congressional tradition. The implication is that the PM represents his/her constituency in parliament but must also govern in the interest of the nation as he/she must maintain the confidence of Commons. In contrast the Congressional tradition puts legal restrictions on the length a president can serve to two four year terms, Canada's Westminster tradition places no statutory limits on how long the PM and Cabinet can remain leader of a political party and at the head of government. However, by convention, general elections are to be called every five years, if no general elections are called within the five year mandate and Cabinet maintains confidence of the Commons. Whereas the American President can serve for four years with little fear of being ousted from his/her position, Cabinet is at the mercy of the confidence of the Commons which can resign confidence in the government at any time in the several ways indicated earlier in this paper. One of the ways indicated was through a vote in Commons on the annual budget. In the Westminster tradition the Cabinet puts forward a budget which must be approved through a vote by the Commons. A majority vote in opposition to the budget is a vote of non-confidence in the government, which would fall and general election called. The implication of this is that in the Westminster tradition the political executive maintains the prerogative for national defence and capability to design the annual budget that will support his/her defence agenda. This gives the Westminster political executive, whose party maintains a majority, significant powers over his Congressional counterpart. The Presidents defence agenda is at the mercy of Congress whose members focus on the narrow interests of

their constituents and not necessarily on the national interest, as he/she dictates what will in the budget and does not have to lobby the legislature for funding to support his/her defence agenda.

The legislature in both traditions has the power to bind the executive in law. In the Westminster tradition Phillippe Lagassé identifies three ways that Parliament can bind the prerogative; first, “abolish a prerogative through statute” (Lagassé 2012: 167). Second, “parliamentary statutes can supplant prerogative powers” (Lagassé 2012: 167). Third, “limit their exercise by statute”(Lagassé 2012: 167). Likewise Congress in the US can pass legislation overriding any of the President's powers. It would then be up to the Court to decide if the legislation is Constitutional or not.

The third method by which power is constrained in the Congressional tradition is that the branches of government are forced to share powers. The executive and legislative branches are constitutionally bound to share power on issues of national defence. The concept of sharing power forms a powerful constraint on executive ability to concentrate and abuse power. Power to, “declare War” and impose taxes for War (US Constitution Art. I Sec.VIII) is vested in the Congress, while the President is the Commander in Chief of the military forces (US Constitution Art. II). Hence, while the President can direct American military forces to operationally engage, the duration and success of his military engagement can be severely hampered by an oppositional congress that can restrict funding to the military. In Federalist 58 Madison argued that, “This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure” (Rossiter

1961: 359). Congress can additionally deny the legal basis for the engagement by refusing to “declare war.”

This division of responsibilities between Congress and the President can be seen to convolute accountability for national defence. However, the overarching aim of the Framers was to constrain the powers of the President, not hold him/her directly accountable to the Congress for his/her policies. The executive office in the Congressional tradition is a co-equal branch with the Congress and the Court. Holding the President directly accountable to Congress would make the President subordinate to Congress and would therefore diminish the Presidents room to maneuver and the offices main function which is to execute the law. In this way the executive in the Congressional tradition is free to act on behalf of the nation in times of emergency but can be reined in by Congress should he/she abuse his Constitutional powers.

The concept of sharing power is antithetical to the Westminster tradition. As explained above the Westminster tradition relies on the convention of ministerial responsibility. Sharing power becomes impossible when more than one entity is to be held accountable. Alan S. Williams put it best when he said that, “any time that you have two ministers accountable, you have no minister accountable” (Williams 2006: 72). Hence attempts by the legislature or Cabinet to share decision making powers on issues of defence endanger the system of ministerial responsibility (Lagassé 2010).

Case studies: This section will use case studies from the Canadian Westminster tradition and US Congressional tradition to demonstrate how executive prerogatives are appropriately constrained,

making them justifiable under liberal democracy. The Canadian case will use the Supreme Court case of Prime Minister v. Khadr and demonstrate the Courts ability to review the prerogative powers of the political executive. The US case study will be based on the War Powers Act of 1973 and Congress's authority to force the President to seek Congressional approval for military engagements.

Canada Case Study: Prime Minister v. Khadr, 2010 SCC 3, [2010] 1 S.C.R 44- By maintaining the authority to adjudicate on the Charter of Rights and Freedoms, Canada's Supreme Court (SCC), as mentioned earlier, plays an important role in defending liberalism in Canada's democracy. It also maintains the authority to deliver rulings on executive prerogatives. This gives it immense political power which it must be mindful of when ruling on cases (Malcomson & Myers 2002: 150). In 2002, at the age of 15, Omar Khadr was captured by US military forces in Afghanistan and was detained indefinitely at the Guantanamo Bay detention centre in Cuba. Mr. Khadr faced, "murder and terrorism related charges" (SCC Summary) before a special military commission. During his detention, Mr. Khadr, was given "no special status as a minor" and was, "not allowed to communicate with anyone outside Guantanamo Bay" (SCC Summary). Additionally, he was subjected to harsh interrogation methods including sleep deprivation (SCC Summary). During his time at Guantanamo he requested assistance from the Canadian government to be repatriated. However, the government instituted a policy to deny his repatriation until he had been tried for his crimes by a US military commission. Mr. Khadr, "sought judicial review of the policy" (SCC Summary) not to repatriate him, claiming that the policy infringed on his section 7 Charter rights. Two lower Canadian Federal courts concurred that Mr. Khadr's Charter rights had been violated and ordered the

government to repatriate Mr. Khadr (Makin 2010). What is of interest in the courts decision regarding the Khadr case for the purposes of this paper is that the SCC overturned the lower courts decisions not based on the infringement of Khadr's Charter rights, but its objection to the lower courts interference with the prerogatives of the executive.

In its ruling the SCC, "affirmed the principle that prerogative power cannot shield executive decisions from judicial review and remedy" (Lagassé 2012: 173). The SCC stated that it had, "limited power...to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution" (SCC Sec. 37). It further stated that it, "concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action" (SCC Sec. 38). The Court claimed that this, "limited power" or "narrow power" to review the prerogatives extended to "...determine(ing) the legal and constitutional limits within which such decisions are to be taken" (SCC 37). The Court further stated that it could rule to ensure that the "government's foreign affairs prerogative is exercised in accordance with the constitution" (SCC Sec. 37).

However, the SCC also ruled that, "the executive branch of government is responsible for decisions under this power and that the executive is better placed to make such decisions within a range of constitutional options" (SCC Sec. 37). And that, "the conduct of foreign affairs lies with the executive branch of government" (SCC Sec. 40). The court further ruled that the executive branch needed to maintain, "flexibility" in how the prerogatives are used. Recalling the work of Locke and Blackstone, the court recognized the necessity of maintaining an

executive vested with prerogatives for national defence and foreign affairs. Upholding Locke's justification for the prerogative the court concurred that the, "complex and ever-changing circumstances" (SCC Sec. 39) required that the prerogatives remained a necessary function of the executive.

The court chose the middle ground in its ruling, provided that Canada's Westminster system has the appropriate mechanisms in place to maintain executive prerogative and defence liberal democratic principles. While it maintained its right to review the prerogatives it also refused to provide a ruling that would set a precedent that would impede or bind the executive's prerogative. The Court ruled that, "Canada infringed Mr. Khadr's s. 7 rights" (SCC Sec. 39) and ruled that it was the government's responsibility to remedy the situation and act in, "conformity with the *Charter*" (SCC Sec. 39). Because of the Court's refusal to rule on the prerogatives and because of, "the limitations of the Court's institutional competence" (SCC Sec. 46) to do so, the Court threatens to become an irrelevant force in Canada's ability to rule on the prerogatives in a way that would bind them. In future decision, future governments can argue before the court that the Court itself has admitted that it lacks the competence to rule on the prerogatives.

US Case Study: War Powers Resolution- The US Congressional tradition case study focuses on the War Powers Resolution passed by Congress in 1973. The intent of the case study is to demonstrate Congress's power to constrain the executive from abusing the prerogative of national defence but at the same maintain the flexibility to respond national security threats without legal constraints that could jeopardize national security in times of emergency. Congress, through the War Powers Resolution upheld the liberal premise developed in law, theory and

history of allowing the executive flexibility in providing for the national defence. However, the legislation is also an attempt by Congress to rebalance the constitutional system in which power over national defence was seen by Congress to have had tilted towards the Presidency. The conclusion of the case study argues that the War Powers Resolution provides a powerful example of how the Congressional tradition can maintain a powerful executive vested with prerogatives for national defence and respect principles of liberal democracy thus making the executive prerogatives defensible under the American liberal democratic system.

Constitutionally defined powers over the use of the military as detailed in previous sections are separated and shared between legislative and executive powers in the Congressional tradition. Congress through its legislative powers maintains the powers of making declarations of war and powers of appropriation for defence. The President maintains the executive prerogative to deploy and command the military. However, in practice constitutional interpretation can produce “a zone of twilight in which the president and congress may have concurrent authority, or in which its distribution is uncertain” (Henkin 1987: 285).

Authority over national defence tends to fluctuate in the Congressional tradition with the mood of the American public and between the varying levels of strength of Congress and President. Following WWII and with the onset of the Cold War, the executive had broad support for maintaining the Soviet Bloc at bay. This included initial support for the President Johnson and Nixons military strategy to ensure that countries in Southeast Asia did not fall under the influence of the Soviets. However, after a protracted military engagement with no positive resolution in the American favor, support for the President’s strategy, not only waned but

American's became distrustful of the President's intentions and judgment. Following the Vietnam War, there was strong support among the American public and Congress to constrain the powers of the President to unilaterally commit military forces (Mathais 1985:

44). Emboldened by an angry public and a weakened president, Congress passed the War Powers Resolution through the House of Representatives and Senate. However, the Nixon Administration argued that the legislation was, "both unconstitutional and dangerous" (Rushkoff 1984: 1332) and vetoed the resolution. However, as per Constitutional rules of the two thirds vote the House and Senate overrode President Nixon's veto. The purpose of the resolution was the following;

1. To ensure that the, "intent of the framers of the Constitution" was upheld by insuring that the, "collective judgment of both the Congress and the President" were consulted prior to the use of the military "into hostilities" (US Congress 1973: Sec. 2 A);
2. Assert that Congress was vested with the power to make all, "laws necessary and proper for carrying into execution" the powers of Congress and the US Government (US Congress 1973: Sec. 2 B) and;
3. Assert that the Constitution clearly defines when and under what circumstances the, "President as Commander-in-Chief" can commit military power. These include; a declaration of war made by Congress, specific statutory Congressional authorization, or, "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces" (US Congress 1973: Sec. 2 C).

In reviewing the first purpose of the resolution, Congress claimed that the Framers of the Constitution intended that both the Congress and President agree on the use of the military prior to its use. Congress, in passing the resolution clearly believed that mutual consultation on the deployment of the military to hostile situations would lead to better decisions being made about the use of the military. The second purpose of the resolution is to reaffirm that it is the Congress that creates law giving itself and the government the power to execute the laws. The third purpose of the resolution strictly defines and limits the President's legal use of the military to instances when Congress has declared war or when the nation or its military is attacked.

The resolution includes a number of practical measures that to ensure the President work and involve Congress in military commitments to hostilities. These provisions in the Resolutions are a means for Congress to gain information about the Presidents decisions and a means to constrain his use of the military while allowing flexibility to deal with emergency and provide for the defence of the nation. They can serve as a reminder to the President that his decisions are being scrutinized by Congress. The President is required to both consult and report to Congress on the use of the military prior to their deployment to engage in hostilities and throughout their engagement. The Resolution states that the President, “in every possible instance shall consult with Congress” (US Congress 1973: Sec. 3) prior to the military’s deployment where they will be engaged or likely be engaged in hostilities. It also states that the President, “shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations” (US Congress 1973: Sec. 3).

Despite Congresses demands in the resolution to be informed and seek approval for military operations, the Congress did acknowledge that there would be instances when the President would need to act decisively and without constraint. In instances where Congress has not passed a declaration of war and in which the military is committed Congress gave the President a 48 hour window to use the military without reporting requirements or approval (Carter 1984: 103).

Once the President has requested a declaration of war or other authorization of Congress it must do so, “within sixty calendar days” (US Congress 1973: Sec. 3). If the Congress does not provide authorization for the Presidents military engagement, the President is bound by the law to withdraw. In instances when Congress has passed a resolution of war, the President must not “report to the Congress less often than once every six months” (US Congress 1973: Sec 4. 3Cc).

Constitutionality, being a fundamental test of liberal democracy, must be examined in the case of the War Powers Resolution to determine if the executive prerogative for national defence is justified. However, fundamental to a Constitutional test is the underlying principle that the Constitution is founded on; checks and balances (Carter 1984: 110). Two broad schools of thought exist regarding the constitutionality of the War Powers Resolution. First, those that believe the Resolution to be unconstitutional (Emerson, Yoo) and those that believe that the Resolution is constitutional (Rushkoff, Mathais, Sofaer).

Those who see the War Powers Resolution as being unconstitutional argue that Congress only has the right to declare, “offensive wars” (Emerson in Carter 1987: 110) and that the Framers

intended to “grant the President substantial discretion over the use of the armed forces” (Carter 1987: 110). John Yoo concurs stating that the Framers invented the presidency to ensure that government possessed the “decision, activity, secrecy and dispatch” to lead the nation through the unforeseen circumstances of emergency, crises and war (Yoo in Liebert et al. 2012: 207). Those who support the constitutionality of the War Powers Resolution claim that the Framers “planned to limit the President’s inherent authority as Commander in Chief to ‘managing military engagements and other objectives authorized by the Congress” (Sofaer in Carter 1987: 110). They argue that the Resolution provides a “desirable restriction on the President’s capacity to make war when Congress is silent” (Rushkoff 1984: 1330)

Ultimately the investigation of the Framers intent on Constitutional question regarding the powers of Congress and the President are of little value to the larger question of whether or not the Congressional model can maintain both executive prerogatives in the area of national defence and at the same time maintain the principles of liberal democracy. Each of these three schools consult and attempt to interpret pre-constitutional documents such as the transcripts of the Constitutional Convention or Federalist Papers to support their argument. However, as Stephen L. Carter argues, “both sides assert that the intentions and practices of the Framers of the Constitution support their arguments” (Carter 1984: 110) and that neither “come(s) down firmly on one side or the other” (Carter 1984: 111). Carter argues that the Constitution, “creates a *system* of checks and balances within which all three branches interact” and that the more appropriate question when reviewing Constitutional questions is not to constantly refer to the Framers intent but to examine, “if the delicate balance of power among the three branches of government will be upset” (Carter 1984: 113). It is this balance of power between branches of

government that is critical in maintaining the principles of liberal government in the Congressional tradition as it ensures that the President can maintain prerogative powers for national defence with substantial checks against his/her ability to abuse his/her constitutional authority. However, this relies on a Congress that is willing to use its authority to constrain the President's powers in the area of national defence. Congress, often a fickle institution, is limited by only its own willingness to constrain the President. This admittedly can be difficult for members of Congress to do when a President maintains popular support for his/her policies.

Conclusion: The purpose of the research paper was to explore if prerogative powers of the executive for national defence were justifiable under liberal democracies in the Canadian Westminster and US Congressional traditions. The paper began by laying out common definitions that would be used throughout the paper, including definitions for liberal democracy and executive prerogative. It found that definitions for executive prerogatives were at best ambiguous, but common between the Westminster and Congressional traditions was that the prerogatives for national defence were those extra-constitutional and unspecified powers that allow the executive flexibility in quickly responding to threats to national defence without the approval of the legislature. At issue however was how they clashed with principles of liberalism that placed emphasis on the rule of law, transparency and chided discretionary powers. Our understanding of the prerogatives in the Westminster and Congressional traditions have been developed over centuries in theoretical and legal precedent. Major political theorists such as John Locke and legal scholars such as William Blackstone contributed significantly to our understanding of liberal democracy and maintained that executive prerogatives could co-exist without overpowering liberal principles, given the proper mechanism to constrain or hold the

executive accountable were in place. The historical foundation of the prerogatives in the legal and theoretical history of the Westminster tradition were then explored. The paper then detailed the Westminster tradition in Canada and the mechanisms that it has put in place to hold the executive accountable for national defence policies. It additionally defined the role and powers of the Courts in binding the executive's prerogatives. Afterward, the historical development of the American Congressional tradition and its emphasis on constraining the President was identified. Having experienced the adverse effects of the British Monarchies discretionary use of the prerogatives, the American Framers set out to develop a system of government that focused on constraining the executive while allowing the office flexibility in responding to national emergencies and threats to national defence. The paper then compared and contrasted these two traditions and their implications on executive prerogative for national defence. The paper demonstrated that the Congressional tradition is focused on constraining the executive while the Westminster focuses on accountability. The paper then demonstrated through case studies of each tradition how they maintain powerful mechanisms to bind the prerogative of the executive if needed. The Canadian case study focused on the Prime Minister v. Khadr case. It found that the Supreme Court of Canada maintains authority to review and adjudicate on cases involving prerogatives but has thus far recognized the implications of binding the executive in the areas of national defence and foreign affairs. The Congressional tradition case study focused on the 1973 War Powers Resolution passed by Congress to reinforce its Constitutional authorities in the conduct of war and oversight of the use of the military. It found that Constitutional divisions between the Congress and the executive ensure that Congress, given the will to do so, has the authority to limit the President's prerogatives in the area of national defence. Both of these traditions therefore maintain the mechanism to constrain the executive prerogative if an

executive infringes liberal principles.

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