

Now to say, never again

George Williams
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With the withdrawal of Australia's combat troops from Iraq, we should examine how we got there in the first place. Australia should never again go to war based only on a decision of the government of the day. Parliamentary approval should be required for a prime minister to commit Australian troops to hostile action overseas.

Britain is moving in this direction, and so should Australia.

It might be expected that the Australian Constitution sets out who can declare war for Australia. After all, there are few exercises of power more important than committing the nation to war. Unfortunately, the Constitution does not provide an answer. It says nothing about who can declare war for Australia or the circumstances in which we might go to war, including whether Australia can use military force as part of a pre-emptive strike. There is certainly nothing resembling the Japanese Constitution, which states that "the Japanese people forever renounce war as a sovereign right of the nation".

It is not surprising that much is left unsaid. The Constitution was framed in the 1890s according to the conventions and practices of the Westminster traditions of that era. This was not a time when popular or even parliamentary involvement in decisions about war was contemplated, let alone that Australia might consider itself bound by the rules of a body like the United Nations. If we were bound in any way, it was to the foreign policy of Britain.

Without a clear answer in the text of the Constitution, some have argued that the decision to go to war in Iraq should have been made by Parliament or the people. However, the unwritten practices of the Constitution provide that the decision lies within the sole prerogative of the prime minister and cabinet. Parliament or the people may be consulted, but the decision will still be made in the secrecy of the cabinet room. The governor-general will then be informed as commander in chief of any decision to go to war, and by convention must follow the decision or be dismissed.

Australian practice is based on how the British war powers have been exercised for hundreds of years. They give maximum discretion to the government of the day. However, change is afoot after Iraq, with British Prime Minister Gordon Brown proposing to give up his power to declare war without parliamentary approval.

This would take Britain closer to the rules in the United States Constitution. While President George W. Bush is the "commander in chief" of the US armed forces, the power "to declare war" is held by Congress. Despite this, presidential power has been used without the approval of Congress to engage in undeclared wars in countries such as Vietnam. This has led to ongoing debate over which branch of government has the war powers of the nation.

The tension between the US Congress and president was resolved quickly over whether to go to war in Iraq. In the aftermath of the September 11, 2001, terrorist attacks, Congress authorised the president to use US armed forces "as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq". The

resolution allowed the US to go to war with or without the backing of the UN Security Council.

This raises the question of whether Parliament or the people should play a role in Australia. I believe that such a decision is not one for the people. A plebiscite is too unwieldy for such a question. A popular vote on whether to go to war should be rejected.

Parliament, on the other hand, should play a role. One reason is the obligations assumed by Australia under international law. Australia has been a party to the UN Charter since 1945. Its preamble says that the UN was established "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind". It also says that "armed force shall not be used, save in the common interest". After the experience of two world wars, the drafters of the UN Charter established a world order based on two principles: to bring about the resolution of international disputes by peaceful means; and the recognition that the use of force is only justified as a last resort in the interests of the international community, and not of individual states.

Under this framework of international law, the use of force is prohibited. The charter says that all nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state". This cardinal principle is subject to two exceptions. Nations may go to war where this is authorised by the UN Security Council or where it is an act of self-defence.

The effect is that the use of force by Australia raises different issues than were imagined in 1901. A key question in going to war in Iraq in March 2003 was whether Australia breached its international obligations, which I believe that it did. This had ramifications for the nation and its long-term security and economic prosperity beyond the decision to use force in Iraq. This is one reason why it is no longer appropriate for the decision to go to war to be left solely in the hands of the government. This was especially the case with Iraq where popular opinion was against the war and there were serious doubts about a pre-emptive strike.

Australia went to war in Iraq only after parliamentary debate, although that debate was not binding and occurred only after troops had been pre-deployed. The matter was brought before the House of Representatives in March 2003 on a motion by the then prime minister John Howard. He recognised that the decision lay with his government, but thought it appropriate that the Parliament, at the first opportunity, had the chance to debate this motion. It was considered essential "that the reason for that decision be made plain to the representatives of the people and that they have a full opportunity to debate them and to have their views recorded". The House of Representatives voted on party lines to authorise the use of force. On the other hand, a separate vote in the Senate called "for the Australian troops to be withdrawn and returned home". The government ignored the vote in the Senate.

Proposals have sought to make parliamentary votes binding to remove the exclusive power of the government to go to war. As no referendum is needed, it is possible to limit the government's war power by ordinary legislation. One such attempt was a Bill introduced by Democrats senators Andrew Bartlett and Natasha Stott Despoja soon after the Iraq War began. It sought to give both houses of Federal Parliament a separate veto power over any decision to send Australian troops overseas. The veto would only have been subject to exceptions covering the movement of personnel in the normal course of their peacetime activities and swift action in the event of an emergency. The Bill was not passed

and never became law.

A role should be established for Parliament in decisions to use force outside of Australian territory. However, I do not think the Democrats' Bill achieved the right balance. The Senate should not have a separate veto. I favour a compromise whereby the decision to go to war is made by a joint sitting of both houses. This would emphasise its importance and would involve all of the people's representatives in a single vote. This proposal would generally allow the government to gain the outcome it wishes, with its greater majority in the lower house likely offsetting its deficit in the Senate. While the prime minister's war power would be subjected to new checks and balances and greater deliberation, this would in most cases still enable the government to determine the course for which it will ultimately have to answer at the ballot box.

Lessons need to be learnt from how Australia became involved in the Iraq conflict. Rather than the events of 2003 being forgotten, we should change how we go to war. Any future decision by Australia to take hostile action overseas should also be made by the Federal Parliament.

George Williams is the Anthony Mason Professor at the University of New South Wales and a visiting fellow at the ANU College of Law