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The Power of Congress to Declare Peace

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NOTES

THE POWER OF CONGRESS TO DECLARE PEACE.*

"It should be more easy to get out of war than into it."

MR. ELLSWORTH *in the Constitutional Convention.*

International lawyers are not in agreement on the question as to whether a treaty of peace is necessary to establish a state of peace, after two or more nations have been at war. The following authorities hold that a treaty of peace is necessary: Fiore,¹ Lawrence,² Bluntschli,³ Pomeroy,⁴ and Rivier.⁵ On the

*This article constitutes one chapter of a book to be published under the general caption, "War and the Constitution."

¹ Fiore, Pasquale, *International Law codified* see 1953-1955-1961.

² Lawrence, T. J., *Principles of International Law*, sec. 217.

³ Bluntschli, J. C., *Das Moderne Volkerrecht*, sec. 703.

⁴ Pomeroy, J. N., *International Law*, sec. 272.

⁵ Rivier, A., *Lehrbuch des Volkerrechts*, sec. 69.

other hand, Phillimore,⁶ Oppenheim,⁷ Heffter,⁸ Seward,⁹ Vattel¹⁰ and Hall¹¹ hold that a treaty of peace is not absolutely necessary to establish a state of peace.

Oppenheim points out that war may be terminated in three different ways; 1, a belligerent may end the war thru subjugation of his adversary, 2, the belligerents may abstain from further acts of war and glide into peaceful relations without expressly making peace thru a special treaty and 3, the belligerents may formally establish the condition of peace thru a special treaty of peace.¹²

In modern times, at least, illustrations of the first are rare. Under the second, the parties remain in a condition of uncertainty and where the stakes of war are large, this method is seldom resorted to. Prof. Charles C. Tansill has listed seventeen wars that have been terminated by a mere cessation of hostilities.¹³ In cases of this sort it is a moot question as to what period of suspension of war is necessary to justify the presumption of the restoration of peace. No definite rule has been agreed upon. In every case this must be determined with reference to collateral facts and circumstances.¹⁴

The foregoing discussion demonstrates that there is a lack of agreement from the international law standpoint as to the steps that are necessary to establish a state of peace. When we consider the question from the standpoint of American constitutional law in connection with the operation of our government, under a written constitution, the difficulties of reaching a cor-

⁶ Phillimore, Sir Robert., *International Law*, part 12 C. 1, Par. 510-11.

⁷ Oppenheim, L., *International Law*, sec. 261-262.

⁸ Heffter, A. W., *Das Europaische Volkerrecht der Gegenwart*, sec. 177.

⁹ Seward, Sec. of State to Mr. Goni, Spanish minister, July 9, 1868, U. S. Dip. Corres. 1868, 11-32-34.

¹⁰ Vattel, E. de, *Law of Nations*, Book IV c. II, sec. 11.

¹¹ Hall, W. E., *A treatise on International Law*, III, c. IX.

¹² Oppenheim, *International Law*, Vol. 2, p. 322.

¹³ Sweden and Poland 1716; France and Spain 1717; Russia and Persia, 1801; Spain and Mexico, 1810; Spain and Chile, 1810; Spain and Bolivia, 1810; Spain and Costa Rica, 1910; Spain and Guatemala, 1810; Spain and Salvador, 1810; Spain and Columbia, 1810; Spain and Honduras, 1810; Spain and Paraguay, 1810; Spain and Ecuador, 1810; Mexico and Texas, 1836; France and Mexico, 1861; Prussia and Lichtenstein, 1866 and Spain and Peru, Chile, Bolivia and Ecuador, 1864; (Chas. C. Tansill, Leg. Ref. division, "Termination of wars by mere cessation of hostilities," Library of Congress).

¹⁴ Seward, Sec. of State, Dip. Corres, 1868, Vol. 2, p. 32-34.

rect decision are greatly increased. At the outset, it should be emphasized that the Constitution of the United States contains no specific grant of power to any branch of the government to make peace. Art. 1, sec. 8, Clause 11, confers on Congress the power to declare war. Is it to be implied that Congress by a repeal of the declaration of war, can establish a state of peace? Art. 2, sec. 2, Clause 2, confers on the President and the Senate the treaty power. Is it to be implied, that a state of peace can be established only by treaty?

If we examine the American practice, we shall find that of our five foreign wars, four were concluded by treaty and one by joint resolution. The Revolutionary War was terminated by the Treaty of Paris, September 3, 1783; The War of 1812 by the Treaty of Ghent, December 24, 1814; The Mexican War by the treaty of Guadalupe Hidalgo of February 3, 1848, the Spanish American War by the treaty of Paris, December 10, 1898 and the World War by the Knox Resolution of July 2, 1921.

If we examine the authorities, we find hopeless confusion. John Randolph Tucker apparently supports both positions, and he has been quoted by partisans on both sides. At one time he said, "Congress cannot create the status of peace by repealing its declaration of war, because the former requires the concurrence of two wills, the latter but the action of one."¹⁵ But he also said, "Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war."¹⁶ The apparent contradiction can be removed by an analysis of the contexts. In the first case Mr. Tucker is speaking of a negotiated peace and obviously Congress has no means of carrying on *pourparlers* directly with a foreign government. In the second case, he no doubt refers to a mere legal termination of hostilities which he believes Congress can bring about, with a treaty to follow made by the President and the Senate.

Senator Knox on May 5, 1920¹⁷ presented an elaborate

¹⁵ Quoted in H. ST. G. Tucker, *Limitations on the Treaty Making Power*, p. 357.

¹⁶ Tucker, *The Constitution of the United States*, II, 718.

¹⁷ Cong. Rec. Vol. 59, part 7, pp. 6556-66.

argument to the effect that Congress could by joint resolution terminate the war with Germany and establish a state of peace. He considered the problem from two aspects, the domestic and the international. We shall attempt to briefly summarize his position. Senator Knox contends (1) that "war is a state or condition of governments contending by force";¹⁸ that is to say, war is actual hostilities. It has been so construed by the Supreme court¹⁹ and by the War Department. (2) The power to declare war is in Congress, which created the status of war by a law which like any other law can be amended, modified or repealed. (3) The purpose of the war powers of the Constitution is to give the government the legal power and the practicable ability to conduct actual hostilities. (4) The war powers cannot be exercised BEFORE a war is legally declared or DE FACTO existing, nor AFTER actual hostilities have ceased. (5) C. J. Chase in *Ex parte Milligan*²⁰ speaking for himself, and Justices Wayne, Swayne and Miller said, "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists, where peace exists, the laws of peace must prevail." (6) The very fact of ending hostilities, ended the war powers without any action whatever by Congress. *Domestically*, the war powers ceased with the end of hostilities. More than seventeen months have elapsed since the last shot was fired in the World War.

Internationally, (1) the war is at an end by virtue of the Armistice. The Armistice was in reality a surrender, a capitulation. Its terms do not look toward a temporary suspension of hostilities. It is an armistice in name only; (2) the war is at an end by the "silent cessation" of hostilities which concluded the war in fact. (3) Our late allies and associates claim that we are at peace. Our erstwhile enemies admit it. (4) The Imperial German Government has ceased to exist and it is well understood that we "have no quarrel with the German Peoples." Hence we are at peace internationally.

Then Senator Knox goes on to say that the President continues to declare that we are at war, but that as a practical matter the only war he wages is a war against American citizens and American industry. Hence he urges the passing of the

¹⁸ 2 Westlake, *International Law*, 1.

¹⁹ *The Eliza*, 4 Dallas, 40-1800, *The Amelia*, 1 Cranch 28-1801.

²⁰ 4 Wallace 2.

formal resolution. The Knox Peace Resolution expressly refers to the declaration of April 6, 1917, to the effect that "a state of war existed" and then states "that said state of war is hereby declared at an end." Congress passed the Resolution May 21, 1920. It was vetoed by President Wilson on May 27, 1920. In July 1921, Congress passed another Joint Resolution declaring peace and President Harding signed it on July 2, 1921. The latter resolution did not expressly repeal the war declaration but merely announced that such state of war was "hereby declared at an end."

The debates in the House of Representatives on the Knox Resolution from April 6 to April 10, 1920, throw some light²¹ on the power of Congress to declare peace. Those who believed that Congress had the power to terminate the World War and establish a state of peace argued that in the absence of specific withholding of power by the Constitution, Congress possesses the broad authority to legislate and to provide for the general welfare, especially under the condition existing, where the other branches of the government failed to function. It was contended that if the Constitution is not interpreted in a liberal way in emergencies like this, the governmental system will become unworkable.²² Mr. Kreider²³ pointed out that in the Trading with the Enemy Act, Congress had authorized the President to end the war by proclamation, and if Congress can authorize a declaration of peace, it can also enunciate peace itself. Mr. Newton²⁴ argued that if Congress has no authority in this matter, the United States in case of a stubborn President might remain at war for years against the desire of the nation. Mr. Rogers contended that in the absence of express Constitutional prohibition it follows by necessary implication that the grant of power to declare war carries with it the power to end war.²⁵ Those favoring the Knox Resolution argued generally that Congress should have the right to say "we have quit fighting" and to state the conditions upon which trade might be resumed with the German people.

A favorite quotation for the advocates of Congressional

²¹ Debates in Congress, April 6 to 9th, 1920, Cong. Record.

²² Mr. Evans of Nebraska, Apr. 9, 1920, p. 5854, Cong. Record.

²³ April 9, 1920, p. 5846, Cong. Record.

²⁴ April 8, 1920, p. 5788, Cong. Record.

²⁵ Apr. 8, 1920, p. 5779, Cong. Record.

power is to be found in the Opinions of Attorney General.²⁶ It reads, "The power to declare war undoubtedly includes, not only the right to commence war, but to recognize its existence when commenced by others, to declare that there is a war and thereupon to make provisions for waging war; to determine so far as the nation can assert and enforce its will how long the war shall continue, and when peace is restored The rights of war do not necessarily terminate with the cessation of actual hostilities. . . . It is for Congress, the department of the national government to which the power to declare war is entrusted by the Constitution, to determine when the war has so far ended that this work can be safely and successfully completed."

Among the opponents of the Knox Resolution, Mr. Connally²⁷ contended that the investiture of power to deal with a given subject matter in one department, excludes its exercise by another. He thus concluded that peace can be established only by treaty. Further he opposed the latitudinarian construction of the advocates of the Knox Resolution by arguing that in case one branch of the government had authority to assume in certain emergencies functions pertaining to another branch, it would then be necessary for some authority to determine when such emergency had arisen, and no provision is made for this by the Constitution. He also pointed out that in the Constitutional Convention of 1787 the question was debated whether Congress should have the power to make peace and it was decided in the negative. This decision says Mr. Connally was the result of mature deliberation and in harmony with the principle of checks and balances.²⁸

Mr. Flood contended that the war with Germany did not end by lapse or discontinuance, but by agreement and that the Knox Resolution is not a mere declaration of peace, but an international agreement and as such cannot be regulated by Congress.²⁹

The general theory underlying the Knox Resolution to the effect that what Congress can pass it can repeal, has been vigorously attacked by showing that this assumption fails to recognize

²⁶ Vol. 13, p. 63-5.

²⁷ April 9, 1920, Cong. Record, p. 5776.

²⁸ Ibid 5772.

²⁹ April 8, 1920, Cong. Record, p. 5870.

the distinction between an act of legislation as such and a resolution creating a status or condition. It has been pointed out that Congress cannot in general repeal resolutions of the latter class of which resolutions admitting states to the Union, incorporating territory and admitting nationals to citizenship are examples.³⁰

So much for the arguments pro and con on the Knox Resolution. Altho the precedent has been set and a war has been terminated by Congressional resolution, we believe that the impartial scholar, after a study of the evidence must conclude that our Constitution is at present vague and ambiguous on this point. Theoretically Congress, thru its control of appropriations, could bring about a situation which would virtually constitute a termination of hostilities. It is our opinion that an attempt to employ this indirect method of control would be highly undesirable.

Believing as we do, that "it should be easier to get out of war than into it," we favor an amendment which will specifically give to Congress the power to terminate hostilities. It should be noted however that the discretionary exercise of the power to terminate hostilities involves two other considerations which should not be left to implication especially when an attempt is being made to clarify the Constitution. These considerations are (1) The power to terminate hostilities is not identical with the power to make peace. The latter requires the assent of both sides, unless perhaps both antagonists mutually abandon hostilities. To permit Congress to attach clauses or conditions to its act terminating hostilities, which are to be accepted or considered by the enemy, would constitute an invasion of the treaty making power.³¹ (2) The exercise of the discretionary power to terminate hostilities necessarily implies the further power of determining the aims and objects of the war.

We propose a formal amendment to the Constitution of the United States which shall read as follows: "Congress shall have the power to determine the aims and objects of a war and to terminate hostilities. Congress, in terminating hostilities shall not invade the treaty making power by attaching clauses

³⁰ Wright, p. 292, *The Control of American Foreign Relations*.

³¹ See Senator C. S. Thomas' article, *Central Law Journal*, Vol. 92, p. 144.

and conditions to its act, to be accepted or considered by the enemy.”

Personally we believe that the Congress under the present Constitution has the power to determine the aims and objects of a war. Pomeroy says, “The organic law nowhere prescribes or limits the causes for which hostilities may be waged against a foreign country. The *causes of war* it leaves to the *discretion and judgment of the legislature*.³² Ordronaux declares that “The general power to declare war, and the *consequent right* to conduct it as long as the public interests may seem to require” is vested in Congress.³³ Story says, “It should be difficult in a republic to declare war, but not to make peace. The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its *propriety* and *necessity*.³⁴ Henry Clay, in a speech at Lexington, Kentucky, on November 30, 1847, sensed the issue when he said, “Either Congress or the President must have the right of determining the objects for which a war shall be prosecuted. There is no other alternative. If the President possesses it and may prosecute it for objects against the will of Congress, where is the difference between our free government and that of any other nation which may be governed by an absolute Czar, Emperor or King.”³⁵

In opposition to these great authorities, we well remember that Senator La Follette was condemned as a traitor and defeatist when he suggested the desirability of a discussion of war aims on the floor of the Senate. During the World War, the dominant view seemed to be, that after war is declared, it must be prosecuted to the bitter end as the President may direct, until one side or the other is hopelessly beaten, with one man, the President—in sole command of the destinies of the nation. Senator La Follette declared, in one of the greatest speeches that has been delivered in the Senate in this generation, “It is said by many persons for whose opinions I have a profound respect and whose motives I know to be sincere that ‘we are in this war

³² Introduction to the Constitutional Law of the U. S., 9th Ed., 1886, p. 373.

³³ Constitutional Legislation, p. 496.

³⁴ Commentaries on the Constitution, 5th Ed. 1891, p. 92.

³⁵ Quoted in Senate Com. on Privileges and Elections in re La Follette speech, 65 Cong. 1913, p. 79.

and must go thru to the end.' That is true. But it is not true that we must go thru to the end *to accomplish an undisclosed purpose, or to reach an unknown goal.*"³⁶

The proposal advocated in this essay, if written into the fundamental law will not only remove the present uncertainty, the continuance of which can not be justified in a country living under a written Constitution, but also it will vest in our most broadly representative body a necessary power in the process of democratizing our war-making machinery.

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³⁶ Cong. Record, October 6, 1917.