

Michigan Law Review

Volume 18 | Issue 7

1920

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Recommended Citation

Edward S. Corwin, *Power of Congress to Declare Peace*, 18 MICH. L. REV. 669 (1920).

Available at: <https://repository.law.umich.edu/mlr/vol18/iss7/5>

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THE POWER OF CONGRESS TO DECLARE PEACE

IN the course of the discussion which has been aroused in Congress by the proposal to declare hostilities with Germany at an end by joint resolution, Senator Thomas of Colorado has brought forward evidence showing that on one occasion the Convention which framed the Constitution voted down unanimously a motion to vest Congress with the power to "make peace." This evidence is good so far as it goes, but it does not support all of Senator Thomas's deductions from it, nor indeed has he given an altogether complete account of it. The proposal in question was made and rejected by the Convention on August 17, 1787.¹ One ground for its rejection was that the making of peace would naturally fall, not to the Executive, as Senator Thomas would have it, but to the treaty-making body, which was, by the plan at that date before the Convention, the Senate alone.² And the principal argument which was offered against the proposal Senator Thomas ignores altogether. It was the argument made by Ellsworth and repeated by Madison, that "it should be more easy to get out of war than into it"—the obvious deduction being that the making of peace ought therefore to be lodged with a less cumbersome body than Congress. The Convention were apparently unacquainted with the "single-track mind"!

There are certain facts, of course, which anybody who has ever read the Constitution would not think of denying in discussing Mr. Porter's resolution to declare war with Germany at an end.³ One

¹ FARRAND, RECORDS OF THE FEDERAL CONVENTION, II, pp. 318-319.

² The President was not made a part of the treaty-making body till September 7th: *Op. cit.*, II, 538.

³ The text of the Parker Resolution is as follows: "Whereas the President of the United States in the performance of his constitutional duty to give to Congress information of the state of the Union has advised Congress that the war with the Imperial German Government has ended, resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, that the state of war declared to exist between the Imperial German Government and the people of the United States by a joint resolution of Congress, approved April 6, 1917, is hereby declared at an end.

"Section 2: That in the interpretation of any provision relating to the date of the termination of the present war, or of the present or existing emergency in any acts of Congress, joint resolutions or proclamations of the President containing provisions contingent upon the date of the termination of the war, or of the present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war, or of the present or existing emergency, notwithstanding any provision in any act of Congress or joint resolution providing any other mode of determination of the date of the termination of the war, or of the present or existing emergency.

"Section 3: That, with a view to securing reciprocal trade with the German Government and its nationals, and for this purpose, it is hereby provided that unless within

is that the Constitution does not specifically vest Congress with the right to make peace. Another is that peace in the international sense, and binding both parties to the war thus concluded, may be made by treaty, and therefore, on the part of the United States, by the President and Senate. Still another is that since treaties are "law of the land," a treaty of peace duly made and ratified would

forty-five days from the date when this resolution becomes effective the German Government shall duly notify the President of the United States that it has declared a termination of the war with the United States and that it waives and renounces on behalf of itself and its nationals any claim, demand, right or benefit against the United States, or its nationals, that it or they would not have the right to assert had the United States ratified the Treaty of Versailles, the President of the United States shall have the power, and it shall be his duty, to proclaim the fact that the German Government has not given the notification hereinbefore mentioned and thereupon and until the President shall have proclaimed the receipt of such notification, commercial intercourse between the United States and Germany and the making of loans or credits, and the furnishing of financial assistance or supplies to the German Government or the inhabitants of Germany, directly or indirectly, by the Government or the inhabitants of the United States, shall, except with the license of the President, be prohibited.

"Section 4: That whoever shall willfully violate the foregoing prohibition, whenever the same shall be in force, shall upon conviction be fined not more than \$10,000, or, if a natural person, imprisoned for not more than two years, or both; and the officer, director or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers or other articles or documents, or any vessel, together with her tackle, apparel, furniture and equipment, concerned in such violation, shall be forfeited to the United States.

"Section 5: That nothing herein contained shall be construed as a waiver by the United States of its rights, privileges, indemnities, reparations or advantages to which the United States has become entitled under the terms of the armistice signed November 11, 1918, or which were acquired by or are in the possession of the United States by reason of its participation in the war or otherwise; and all fines, forfeitures, penalties and seizures imposed or made by the United States are hereby ratified, confirmed and maintained."

Since the text of this article was written, the Parker Resolution has passed the House and gone to the Senate, where it has been displaced by the Foreign Relations Committee with the Knox Resolution. This latter document reads as follows:

"Joint resolution repealing the joint resolution of April 6, 1917, declaring a state of war to exist between the United States and Germany, and the joint resolution of December 7, 1917, declaring that a state of war exists between the United States and the Austro-Hungarian Government.

"Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, that the joint resolution of Congress passed April 6, 1917, declaring a state of war to exist between the Imperial German Government and the Government and people of the United States, and making provisions to prosecute the same, be, and the same is hereby repealed, and said state of war is hereby declared at an end:

"Provided, however, that all property of the Imperial German Government or its successor or successors, and of all German nationals which was on April 6, 1917, in or has since that date come into the possession or under control of the Government of the United States or of any of its officers agents or employes, from any source or by any agency whatsoever, shall be retained by the United States and no disposition thereof made, except as shall specifically be hereafter provided by Congress, until such time as the German Government has by treaty with the United States, ratification whereof is to be made by and with the advice and consent of the Senate, made suitable provisions for

establish for the United States peace in the domestic sense as well as in the international sense; in other words, a status of which the courts, the Executive, and all the agents of government would have henceforth to take due cognizance.

Yet these generally agreed facts do not take us very far. The mere fact that Congress is not specifically authorized to make peace

the satisfaction of all claims against the German Government of all persons wheresoever domiciled, who owe permanent allegiance to the United States, whether such persons have suffered through the acts of the German Government or its agents since July 31, 1914, loss, damage or injury to persons or property, directly or indirectly through the ownership of shares of stock in German, American or other corporations, or otherwise, and until the German Government has given further undertakings and made provisions by treaty, to be ratified by and with the advice and consent of the Senate, for granting to persons owing permanent allegiance to the United States, most-favored nation treatment whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and confirming to the United States all fines, forfeitures, penalties and seizures imposed or made by the United States during the war, whether in respect to the property of the German Government or German nationals, and waiving any pecuniary claim based on events which occurred at any time before the coming into force of such treaty, any existing treaty between the United States and Germany to the contrary notwithstanding.

"To these ends, and for the purpose of establishing fully friendly relations and commercial intercourse between the United States and Germany, the President is hereby requested immediately to open negotiations with the Government of Germany.

"Section 2: That in the interpretation of any provision relating to the date of the termination of the present war or of the present or existing emergency in any acts of Congress, joint resolutions or proclamations of the President containing provisions contingent upon the date of the termination of the war or of the present or existing emergency, the date when this resolution becomes effective, shall be construed and treated as the date of the termination of the war or of the present war or existing emergency, notwithstanding any provision in any act of Congress or joint resolution providing any other mode of determining the date of the termination of the war or of the present or existing emergency.

"Section 3: That until by treaty or act or joint resolution of Congress it shall be determined otherwise, the United States, although it has not ratified the Treaty of Versailles, does not waive any of the rights, privileges, indemnities, reparations or advantages to which it and its nationals have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof or which under the Treaty of Versailles have been stipulated for its benefit as one of the principal allied and associated powers and to which it is entitled.

"Section 4: That the joint resolution of Congress, approved December 7, 1917, declaring that a state of war exists between the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States and making provisions to prosecute the same, be and the same is hereby repealed and said state of war is hereby declared at an end, and the President is hereby requested immediately to open negotiations with the successor or successors of said Government for the purpose of establishing fully friendly relations and commercial intercourse between the United States and the governments and peoples of Austria and Hungary."

It will be observed that the Senate substitute does not contain the provision of the House resolution declaring a trade embargo penalty unless Germany accepts the resolution within forty-five days. Instead, it requests the President to open negotiations with Germany. For the rest the Constitutional problems raised by the two resolutions seem to be identical.

does not prove that it does not possess powers in the exercise of which, on proper occasions, it may bring peace about. Congress was also denied by the Convention of 1787 the power to charter corporations;⁴ notwithstanding which it has repeatedly exercised this power, and has been sustained by the Supreme Court in so doing.⁵ Nor, again, does the fact that peace, whether domestic or international, may be, and ordinarily is, attained by the treaty route prove that all other roads thereto are closed. To cite some parallel cases: Certain businesses are subject to both the taxing power by Congress and to the police power of the States;⁶ the penalties of offenses against the United States may be remitted either by presidential amnesty or congressional amnesty;⁷ treaties may be abrogated, so far as the United States is concerned, both by act of Congress and by agreement between our Government and the other parties thereto;⁸ certain international conventions may be entered into by the President alone, upon authorization by Congress, or by the President and Senate without such authorization;⁹ restrictions upon the entry of aliens into the United States,¹⁰ may be imposed equally by treaty or by act of Congress, as may also certain regulations of foreign commerce.¹¹ In short, it frequently happens that the same legal result may be produced by very different powers of government; nor need this fact lead to confusion, since, as soon as any of the competent powers has acted, the result is produced.

The contention that war may be ended in a way to determine the question for our own people and government only by the ratification of a treaty of peace might conceivably produce very curious results. The President, who is Commander-in-Chief of the Army and Navy, and a majority of both branches of Congress, which declares war and maintains the forces necessary for its prosecution, might desire peace and yet be unable to obtain it because a third of the Senate plus one Senator were contrary minded. Or our erstwhile antagonist might be the contrary minded one. Or the war might have resulted in the extinction of said antagonist.¹² Such, in

⁴ FARRAND, *Op. cit.*, II, pp. 615-616 (Sept. 14th). See also comment of Bradley, J., in 12 Wall. 457, 460, 461.

⁵ *McCulloch v. Maryland*, 4 Wheat. 316, is of course the leading case. See also *Uxton v. North River Bridge Co.*, 153 U. S. 525, and cases there cited.

⁶ See *McCray v. U. S.*, 195 U. S. 27, and cases there cited.

⁷ *Brown v. Walker*, 161 U. S. 591.

⁸ *The Head Money Cases*, 112 U. S. 580.

⁹ *Field v. Clark*, 143 U. S. 649.

¹⁰ *Fong Yue Ting v. U. S.*, 149 U. S. 698, and cases there cited.

¹¹ *Bartram v. Robertson*, 122 U. S. 116, and *Whitney v. Robertson*, 124 U. S. 190.

¹² Indeed Senator Knox makes the point that our antagonist, the German Imperial Government, has been extinguished.

fact, was the situation at the close of the Civil War, which accordingly could not be brought to an end in the legal sense by a treaty of peace, albeit it was a public war in the fullest sense of the term.²³

Neither general principles nor authority sanction any such anomaly. Congress may repeal or otherwise curtail the legal operation of any measure which it had the power to enact in the first place, though naturally it cannot repeal the acts already done under the sanction of such measure while it was still operative. Congress cannot now invalidate, nor does it wish to, what was properly done by virtue of its declaration of war upon Germany; but it can withdraw its sanction from any further hostilities against our former foe, and this sanction is "war" in the legal sense. Likewise, it can require that in the future interpretation of any "provision relating to the termination of the present war or of the present or existing emergency in any" acts or resolutions of Congress or of any proclamations issued in pursuance thereof, the date when the now proposed resolution becomes effective "shall be construed and treated as the date of the termination of the war or of the present or existing emergency." All this upon the most obvious principles. As to authority, the following passage from COOLEY'S PRINCIPLES OF CONSTITUTIONAL LAW is pertinent:

"Over political questions the courts have no authority, but must accept the determination of the political departments of the Government as conclusive. Such are the questions of the existence of war, the restoration of peace," etc.²⁴

By "political departments" Cooley means the President and Congress.

But the proposed Porter Resolution has also a second purpose, namely, to force the German Government, by the threat of cutting off all commercial relations with it—relations which are now going on in the midst of "war"!—to proclaim the cessation on its part of hostilities against this country and the renunciation of any claims against this country which the German Government "would not have the right to assert had the United States ratified the Treaty of Versailles." This provision, at least, it will be contended, amounts to an attempt on the part of Congress to usurp the treaty-making power. In fact, however, the proposal is grounded on the securest

²³ *The Prize Cases*, 2 Black 635.

²⁴ P. 157 [3rd Ed.]

of precedents, on Madison's Non-Intercourse Act,¹⁵ on the "reciprocally unjust" clause of the McKinley Tariff Act, which was sustained by the Supreme Court in the case of *Field v. Clark*¹⁶ against the objection just recited, on the "maximum and minimum" clause of the Dingley Act, on the Canadian Reciprocity Act passed during President Taft's administration and at his special instance.¹⁷ In all these cases Congress did just what it is proposing to do at the present moment; it was using its power to regulate "commerce with foreign nations" to induce certain concessions from those nations. And the way it went about the business was the same as that taken in the Porter resolution; it enacted certain conditional restrictions or relaxations upon American trade with the nations designed to be reached, such restrictions or relaxations to go into effect upon the ascertainment by the President of the existence of a certain set of facts described in the congressional act itself. Such legislation is called "contingent legislation," and the right of Congress to pass it by virtue of its control over foreign commerce has been asserted far too long to admit of its being successfully challenged today. Nor, again, is it any objection to such legislation that in carrying it out the President may be required to exercise his powers of diplomatic negotiation. Whatever powers the President is vested with are always available, within constitutional limits, the better to enable him to discharge his constitutional duty to "take care that the laws be faithfully executed."¹⁸

Congress has the right, then, simply by virtue of its power to repeal its previous enactments, to declare hostilities with Germany to be at an end, and its declaration to this effect, once duly enacted, will be binding upon the Courts and the Executive alike. Also, it has the right, by virtue of its power to regulate "commerce with foreign nations" and to "pass all laws necessary and proper" to that end, to curtail or even to prohibit American trade with Germany, and this it may do either forthwith, or conditionally upon the occurrence or non-occurrence of certain events the ascertainment and proclamation of which may be left with the President. Both these propositions are sustained by analogy, principle, and authority, while the opposing view rests upon the fallacious supposition that since peace in a legal sense would undoubtedly ensue upon the ratification of a treaty of peace with Germany, a treaty of peace is the

¹⁵ Sustained in *Brig Aurora v. U. S.*, 7 Cranch. 382.

¹⁶ See note 9, *supra*.

¹⁷ See W. H. Taft, "OUR CHIEF MAGISTRATE," etc. (1916), pp. 111-112.

¹⁸ *In re Neagle*, 135 U. S. 1.

only way to obtain it. But there is more than one road leading to peace, as to Rome, and a sovereign government, which the United States undoubtedly is in the field of foreign relations,¹⁹ has access to them all, unless it can be shown to be cut off therefrom by some definite constitutional prohibition, such as opponents of the Porter Resolution have not yet produced. There is, in brief, no sound constitutional reason why Congress should not switch off the current which it turned on three years ago, and so permit Uncle Sam to let go at last a very troublesome and quite useless live wire.

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¹⁹ *Holmes v. Jennison*, 14 Pet. 540; the *Chinese Exclusion Cases*, 130 U. S. 581.