

Michigan Law Review

Volume 19 | Issue 8

1921

Termination of War

John M. Mathews
University of Illinois

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Military, War, and Peace Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

John M. Mathews, *Termination of War*, 19 MICH. L. REV. 819 (1921).

Available at: <https://repository.law.umich.edu/mlr/vol19/iss8/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE TERMINATION OF WAR.

THE termination of war must, at the outset, be distinguished from the termination of hostilities or actual warfare. As has been said, war is "not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed."¹ Similarly, it follows that, although actual hostilities have ceased, the status of war may continue until terminated in some regular way recognized by international law as sufficient for that purpose. Actual hostilities are frequently terminated as the result of the signing of an armistice or a capitulation which may take the form of a protocol or preliminary agreement which regulates the relations between the belligerents until the definitive treaty of peace is signed and ratified.

There is no question that the President has full power to bring about the suspension of hostilities on his sole authority. Thus, during the Spanish-American War, actual hostilities were suspended by the protocol of August 12, 1898, (which was not submitted to the Senate) and by Presidential proclamation of the same date.² But, as the Supreme Court pointed out: "A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. 'A truce or suspension of arms,' says Kent, 'does not terminate the war, but it is one of the *commercias belli* which suspends its operations * * * At the expiration of the truce, hostilities may recommence without any fresh declaration of war.'³ With reference to this point, the attorney-general of the United States took the same view, declaring that "notwithstanding the signing of the protocol and the suspension of hostilities, a state of war between this country and Spain still exists. Peace has not been declared and cannot be declared except in pursuance of the negotiations between the peace commissioners authorized by the protocol."⁴ Moreover, a recognition of the continuation of the war in spite of the suspension of hostilities and the signing of the protocol was expressed in the definitive

¹ MOORE'S DIGEST OF INT. LAW, VII, 153.

² 30 STAT. AT L., 1780.

³ *Hijo v. United States*, 194 U. S. 315, at p. 323.

⁴ 22 OP. U. S. ATTY.-GEN. 191. (Aug. 24, 1898). For qualification of the latter part of the Attorney-General's statement, see below.

treaty of peace which, in the preamble, mentioned the desire of the two parties "to end the war *now existing* between the two countries."⁵

The principle thus upheld by the Supreme Court, by the Attorney-General and by the treaty-making authority would seem to be too well established to be questioned. Nevertheless, in view of the lengthy delay which has followed the signing of the armistices with Germany and Austria-Hungary in November, 1918, due to the failure of the President and Senate to agree upon the terms of a definitive treaty, some question has been raised as to whether our status since the suspension of hostilities is one of war or of peace. Diplomatic relations with the Central Powers remain severed, but commercial relations with Germany have been to some extent resumed.⁶ President Wilson, in transmitting to Congress on November 11, 1918, the terms of the armistice, made the statement that "the war thus comes to an end, for having accepted these terms of the armistice it will be impossible for the German command to renew it." The President could scarcely have intended by this statement to indicate his belief that the war had been legally terminated, but merely that for practical purposes actual warfare was at an end.

The above statement of the President, however, was construed by a lower Federal court as equivalent to an official proclamation by the President of the end of the war. The question before the court involved the construction of a provision of an act of Congress of 1917 which made criminal certain conduct if committed "during the present war." The court declined to order the penalty inflicted, on the ground that the war had in fact ended upon the announcement of the President.⁷

This, however, does not seem to have been a well-considered case. Even though the statement of the President had been intended as an official proclamation of the legal end of the war, it is somewhat doubtful whether the President could thus, by his sole act, upon the mere signing of an armistice with a foreign belligerent, bring the war to a legal termination. It is true that the Supreme Court seems

⁵ MALLOY, TREATIES, II, 1690.

⁶ Limited intercourse with the enemy may be permitted, even during hostilities, by act of Congress prescribing the conditions under which it may be carried on. *Hamilton v. Dillin*, 21 Wall. 73.

⁷ *U. S. v. Hicks*, 256 Fed. 707 (1919).

to have held that the Civil War was ended in different states on different dates by Presidential proclamations.⁸ In case Congress had by act or joint resolution adopted a different date as the end of the Civil War from that mentioned in the President's proclamation, it is not clear that the court would not have followed the determination of Congress rather than of the President. Congress, however, in a statute continuing a certain rate of pay to soldiers in the army did so "for three years after the close of the rebellion, as announced by the President" in his proclamation.⁹ Congress thus adopted the date set by the President, and the Supreme Court, in other cases, seems to take the actions of both the President and Congress into consideration in determining the date of the conclusion of the Civil War.¹⁰

Even though it should be held that the proclamation of the President alone was sufficient to terminate the Civil War, nevertheless it is to be remembered that that war, though having in some of its aspects the characteristics of a war between independent states, was in other respects a mere domestic insurrection which was suppressed by the overthrow of the insurrectionary government. Hence the method to be pursued in determining the date of the conclusion of the Civil War might well be different from that to be followed in the case of a foreign war in which the foreign belligerent still has a government in existence at the termination of hostilities. At any rate, as indicated above, in the case of the armistices with the Central Powers, the President's announcement to Congress is not to be considered as an official proclamation of the legal termination of the war.

Congress has given evidence by its acts that it did not regard the signing of the armistices of 1918 and the announcement by the President as bringing the war to a legal termination. Thus, after the armistice of November 11, Congress passed and on November 21, 1918, the President approved the War-time Prohibition Act, which

⁸ *The Protector*, 12 Wall. 700; 14 STAT. AT L., 811, 814.

⁹ 14 STAT. AT L., 422.

¹⁰ *U. S. v. Anderson*, 9 Wall. 56, 70; *McElrath v. U. S.*, 102 U. S. 438; *Lamar v. Browne*, 92 U. S. 187. In the *Anderson* case, the court said: "As Congress, in its legislation for the army has determined that the Rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it."

made illegal the sale of distilled spirits for beverage purposes "after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President."¹¹ The validity of this act was attacked in the Supreme Court of the United States on the ground, among others, that demobilization had been effected, that the war had been concluded, and that thereby the war emergency upon which the operation of the act had been predicated was removed. The court, however, denied the contention and upheld the validity and continued operation of the act of Congress in spite of the cessation of hostilities. "In the absence," said the court, "of specific provisions to the contrary the period of war has been held to extend to the ratification of the Treaty of Peace or the proclamation of peace. * * * 'Conclusion of the war' clearly did not mean cessation of hostilities; because the act was approved ten days after hostilities had ceased upon the signing of the armistice. Nor may we assume that Congress intended by that phrase to designate the date when the Treaty of Peace should be signed at Versailles or elsewhere by German and American representatives, since by the Constitution a treaty is only a proposal until approved by the Senate." The court also held that the President's statement that "the war thus comes to an end" was meant in a popular sense and was not an official proclamation of the termination of the war.¹²

In addition to the War-time Prohibition Act, many other acts of Congress passed during the World War provided that they should remain in force until the termination of the war or until a varying length of time thereafter. Thus, in the Trading with the Enemy Act of 1917, it is provided that "the words 'end of the war' as used herein shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this act."¹³ This and corresponding provisions in other war-time acts of Congress indicate that it was the expectation of that body that the war would end normally with a treaty of peace, but the provision just quoted seems to indicate that Congress also

¹¹ 40 STAT. AT L., 1045, 1046.

¹² *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146.

¹³ 40 STAT. AT L., 412.

thought that the war might terminate at a prior date by Presidential proclamation. It is not to be supposed from this, however, that Congress necessarily intended to intimate that a foreign war could be terminated by mere presidential proclamation without a treaty of peace, since this was the exercise by Congress of the power, not to terminate war nor to determine the duration of the war in the international sense, but merely to determine the period during which one of its acts should remain in force.

The normal and usual method of terminating war between foreign nations is by a formal treaty of peace. The wars in which the United States has been engaged have been almost invariably so terminated. In the case of the Spanish-American War as indicated above the definitive treaty of peace was preceded by a preliminary agreement, which also included the armistice, providing for the suspension of hostilities. In the cases of the War of 1812 and the Mexican War, there was no armistice nor preliminary agreement, but the definitive treaty of peace was signed while hostilities were still in progress. Even in the cases of the wars with the Barbary states, in which, as we have seen, no formal declarations of war were issued by the United States, treaties of peace were negotiated. The warlike operations conducted between the United States and France in 1798 did not, as we have seen, constitute a full-fledged war, and the treaty of 1800 by which amicable relations between the two countries were restored was not, strictly speaking, a treaty of peace. Most of the treaties of peace to which the United States has been a party mention in the preamble the desire of the parties to end the war existing between them. The French treaty of 1800, however, speaks of the desire of the parties merely "to terminate the differences" which have arisen between them.¹⁴

While it is generally recognized that a treaty of peace is the normal and usual method of terminating a war between foreign nations, the question may be raised as to whether this is the sole method which the United States can adopt in terminating a foreign war. That it is the sole method has sometimes been asserted by good authorities. Thus, in the course of his opinion in the case of *Ware v. Hylton* in the Supreme Court of the United States, Justice Chase said: "A war between two nations can only be concluded by

¹⁴ MALLOY, TREATIES, I, 496.

-treaty."¹⁵ Again, Senator Lodge, chairman of the Foreign Relations Committee, said on the floor of Congress: "Peace can be made only by the President and Senate."¹⁶ These statements, however, were *obiter* and cannot be accepted as conclusive of the matter. It does not follow that, because all the previous foreign wars in which the United States has been engaged have been ended by treaty, that is the only way in which such a war of the United States may be ended.

There are three ways generally recognized in international law whereby war may be terminated. Coleman Phillipson, at the beginning of his work on the subject, states them as follows: "(1) by a mere cessation of hostilities on both sides, without any definite understanding supervening; (2) by the conquest and subjugation of one of the contending parties by the other, so that the former is reduced to impotence and submission; (3) by a mutual arrangement embodied in a treaty of peace, whether the honors of war be equal or unequal."¹⁷

With reference to the power of the United States to terminate war in these three ways, it has sometimes been questioned whether the United States is empowered to terminate war by the conquest and subjugation of the enemy. This doubt is based upon a statement by Chief Justice Taney in the case of *Fleming v. Page* in which he said: "The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement * * * A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country."¹⁸ In the same opinion, however, the Chief Justice admits that, by the laws and usages of nations, conquest is a valid title, and it has been recognized by the Supreme Court that the United States has full powers in international relations that other sovereign and independent nations have.¹⁹ Certainly, the courts would not inter-

¹⁵ 3 Dall. 236.

¹⁶ CONGRESSIONAL RECORD, April 21, 1914, Vol. 51, p. 6965.

¹⁷ TERMINATION OF WAR AND TREATIES OF PEACE, p. 3.

¹⁸ 9 How. 603, 614.

¹⁹ *Fong Yue Ting v. U. S.*, 149 U. S. 698.

tere if the United States prosecuted a duly declared foreign war to the extent of subjugating the enemy and overthrowing his government.²⁰

The termination of war by the reciprocal intermission of hostilities has sometimes occurred. When, in 1868, hostilities between Spain and Peru having ceased for several years without a treaty of peace, and the United States having offered to sell certain warships to Peru, Spain protested that this action would violate our neutrality as the status of war still continued. Secretary of State Seward denied the Spanish contention, however, on the ground that the war had ended. "It is certain," he said, "that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made."²¹

In case the United States should be a party to a war which resulted in the complete subjugation of the enemy and the overthrow of his government or in the cessation of hostilities for a sufficient length of time to indicate that there is no intention of renewing them, there either would or could be no formal treaty of peace and the question would then arise as to where, in our government, the power to declare peace resides. Where war is ended by treaty, the treaty is primarily a contract or bargain between the powers concerned, which is recognized as binding by international law if no duress has been exercised against the negotiators. Furthermore, in the United States, a treaty is a part of the supreme law of the land, and this is therefore a legal method of ending war. Subjugation of the enemy and long cessation of hostilities, however, are facts and not laws, though legal inferences and conclusions may be built upon them. The question is, in our government, what branch or authority is competent to establish the legal inference that, as the result of such facts, the war is ended and peace is restored?

The Constitution makes no specific grant of power to any branch of the government to make peace. In the Constitutional Convention, however, the matter came up for discussion on August 17, 1787, in connection with the consideration of the power to make war. Mr. Pinckney was in favor of vesting the power to make war in the Senate, remarking that "it would be singular for one author-

²⁰ Cf. *Luther v. Borden*, 7 How. 1.

²¹ *DIP. COR.* 1868, II, 32, quoted by MOORE, *DIG. OF INT. LAW*, VII, 336.

ity to make war and another peace," thus indicating his belief that the power to make treaties, which at that stage in the proceedings was vested in the Senate alone, included the power to make peace.²² This view was also held by Mr. Ellsworth, who declared that "there is a material difference between the cases of making war and making peace. It should be more easy to get out of war than into it. War also is a simple and overt declaration; peace attended with intricate and secret negotiations." Mr. Mason also was for "clogging rather than facilitating war; but for facilitating peace." When, therefore, it was moved to add "and peace" after "war" so as to give Congress the power to declare war and peace, it was unanimously voted down.²³

The above proceedings of the Convention, together with those which took place in connection with the consideration of the treaty-making power, indicate that the convention assumed that there was no such similarity in the methods to be pursued in declaring war and in making peace as that they should necessarily be vested in the same branch of government. While the Convention assumed that the power to make treaties included the power to make peace, it did not exclusively vest the latter power by an express grant in any branch of the government, nor did it expressly deny to Congress such power. It may be that the Convention felt that if Congress were given the power to make peace, then such grant might be construed as exclusive, and thus peace could not be made by the treaty-making power and *vice versa*. There is nothing, however, to indicate that the Convention considered at all the case where a war results in the subjugation of the enemy and the overthrow of his government so that no functionaries exist with which a treaty can be made or the case where hostilities have long since ceased and the treaty-making power is impotent to conclude peace on account of an irreconcilable difference of opinion between the President and the Senate over the terms of the treaty. Had these cases been considered, it is not clear that the Convention would not have vested the power to declare peace under such circumstances in some body other than the treaty-making authority.

The consideration of the second of the two cases mentioned above has recently become of practical importance on account of the fail-

²² JOURNAL OF THE CONSTITUTIONAL CONVENTION, [Hunt. Ed.] II, 188.

²³ *Ibid.*, p. 189.

ure of the President and the Senate for a long time to agree upon the terms of the treaty of peace with Germany. In view of the deadlock between the component parts of the treaty-making authority, Congress essayed to take the initiative in restoring peace by passing a joint resolution for that purpose. The joint resolution, which was passed by Congress and vetoed by the President in May, 1920, reads in part as follows: "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."²⁴

The question of the power of Congress to declare peace after a foreign war, not having before arisen in a practical form, has been comparatively little considered. Some expressions of opinion, however, have been made on the point and apparently contradictory statements can be found. Hare, in his work on the Constitution, says: "It is the right of the President, and not of Congress, to determine whether the terms (of peace) are advantageous, and if he refuses to make peace, the war must go on."²⁵ Similarly, in the report of the Judiciary Committee of the forty-ninth Congress on the treaty power, made by John Randolph Tucker, it is stated that "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."²⁶ In his work on the Constitution, however, Tucker says: "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."²⁷ Judge Baldwin appears to be of the same opinion. "Peace," he says, "could no doubt also be restored by an act of Congress. As a declaration of war takes the shape with us of a statute, it would seem that it can be repealed by a statute."²⁸ A sim-

²⁴ CONGRESSIONAL RECORD, May 15, 1920, Vol. 59, p. 7680.

²⁵ J. I. C. HARE, AMERICAN CONSTITUTIONAL LAW, Vol. I, p. 171-2.

²⁶ Quoted by H. ST. G. TUCKER, "LIMITATIONS ON THE TREATY-MAKING POWER," p. 357.

²⁷ J. R. TUCKER, "THE CONSTITUTION OF THE UNITED STATES," Vol. II, p. 718.

²⁸ S. E. Baldwin in AM. JOUR. OF INT. LAW, Vol. 12, pp. 13-14.

ilar conclusion is reached by Whiting, who says: "As it is in the power of the Legislative Department to declare war, and to provide or withhold the means of carrying it on, Congress also may, after hostilities shall have ceased, declare or recognize peace."²⁹

The different statements quoted above appear to be somewhat contradictory, but they are capable of being, at least to some extent, reconciled. Hare and Tucker in the report cited are evidently speaking of a negotiated peace, which Congress confessedly cannot make since it has no means of carrying on *pourparlers* directly with a foreign government. In the exercise of its power to regulate foreign commerce, however, or in the exercise of some other granted power, Congress can pass a law embodying proposed terms of peace and can make the operation of such law contingent upon the consent of the enemy government being secured to such terms, but the communication of such terms to the enemy and the notification by the enemy of their acceptance must be transmitted through the President and such offer and acceptance would constitute an international agreement if not a treaty. Baldwin and Tucker in their treatise on the Constitution do not specify the sort of peace to which they are referring, and their statements, in the unqualified form in which they appear, cannot be fully accepted as invariably true. The determination of the question is dependent on collateral facts and circumstances, which differ in different cases. Whiting's statement, though general in form, doubtless refers primarily to the case of a civil war. Moreover, he does not assert the power of Congress to create a status of peace, but merely to declare or recognize its existence after hostilities shall have ceased.

By the reciprocal intermission of hostilities if long continued, the concurring will to peace of the erstwhile enemy may be indicated without formal notification, especially if evidenced by some positive action that there is no intention of renewing them. It would hardly be maintained that Congress could end a foreign war by declaring peace in the midst of a campaign while the war is being actively waged on both sides. Of course, under the Constitution, Congress cannot appropriate funds for the support of the army for a longer period than two years, and Congress might withhold or limit appropriations for this purpose whether hostilities are in progress or not, and thus tie the hands of the President in prosecuting the war and

²⁹ W. Whiting, "War Powers Under the Constitution," [43rd Ed.], p. 312.

compel him to sue for peace, but such action on the part of Congress would not end the war as a legal status.

The passage of a peace resolution by Congress, based on the assumption that the former enemy has no intention of further prosecuting hostilities, would indicate that such is also no longer the intention of our Government so far as Congress can determine the policy of our Government in such a matter, and would have weight as coming from that branch of the Government whose action and coöperation are necessary not only for the declaration of war but also for its vigorous prosecution. The passage of such a resolution would indicate that, so long at least as Congress remained of the same mind, funds for the further prosecution of the war would not be forthcoming. It would, if coupled with the continued cessation of hostilities by the former enemy, constitute a concurrent undertaking to terminate the war without terms, but such action by Congress would not preclude the subsequent making and ratification of a treaty defining the terms of peace. The concurrent undertaking to terminate the war might possibly be tacit if cessation of hostilities be sufficiently long continued, or the intention not to renew them might be indicated by positive action. In the case of the attempt to terminate war with Germany, the undertaking of that power not to renew hostilities was evidenced by her ratification of the Treaty of Versailles, which itself provided that, upon its coming into force, (which should happen upon its ratification by Germany and three of the allied and associated powers), the state of war should terminate. In spite of this provision, however, the state of war between the United States and Germany continued in the absence of ratification of the treaty by the United States, but, even so, the war could doubtless be terminated by a similar concurrent undertaking on the part of the United States not to renew hostilities, as evidenced by a joint resolution of Congress.

A state of war may exist before it is formally declared by Congress. It has been customary for Congress not to declare war, but to recognize by declaration the existence of a state of war through the acts of the foreign government against which the declaration is directed. The Constitution does not specifically vest Congress with the power to recognize the existence of a state of war, but it will not be denied that this power is implied and included in the power to declare war. Hence, it may be argued that Congress has the implied

power to recognize by declaration a state or condition in which war has in fact ceased, due to the long cessation of hostilities or to the complete subjugation of the enemy. Even though the international force of such a Congressional declaration might be denied, it would still have domestic force with reference to the rights and duties of our citizens. Such a Congressional determination, as we have seen, has been recognized by the Supreme Court as having weight in a domestic sense in the case of our Civil War.³⁰ If the Confederacy had been successful, the Civil War would doubtless have been terminated by a treaty of peace. As it was, the method of its termination differed but little from that which would be followed in the case of a foreign war in which the United States should completely subjugate the enemy and overthrow his government.

The ground upon which the power of Congress to declare peace is usually based is its power to repeal any act or resolution which it had the power to pass. Thus, it has been said that "Congress has the right, 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."³¹ It does not necessarily follow, however, that from the mere fact that Congress by act or joint resolution can create a status of war, it can restore peace by a simple repeal of its former act. This seems to have been tacitly admitted by the framers of the Congressional peace resolution of 1920, which provided not only for the repeal of the previous declaration of war but also expressly declared the state of war thereby created to be at an end. They thus assumed to exercise the power, not only to recognize the existence of peace by repealing the declaration of war, but also to create a status of peace by Congressional resolution. Congress can doubtless repeal its declaration of war, but the question is whether such repeal operates to restore peace. In the *Hicks* case, cited above, with reference to the contention that since Congress alone can begin war, consequently it alone can terminate it, the court said: "But that does not follow because the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expresses itself as to give that body any authority

³⁰ *U. S. v. Anderson*, 9 Wall. 71.

³¹ E. S. Corwin, "The Power of Congress to Declare Peace," *MICHIGAN LAW REVIEW*, XVIII, 674.

itself to terminate it."³² Congress can pass an act or joint resolution admitting a state into the Union, but it would hardly be maintained that, after a state has once been admitted, Congress could expel it by a simple repeal of the act admitting it. Similarly, Congress can by resolution propose a constitutional amendment to the state legislatures for ratification, but after the proposed amendment has been transmitted to the legislatures the function of Congress is at an end.³³ These instances, however, merely indicate that Congress cannot always undo what it has the power to do, but do not necessarily prove that it cannot restore peace by the repeal of the declaration of war.

Light on the question as to the power of Congress to restore peace may perhaps be drawn by analogy from the power of Congress to acquire new territory. This power also is not expressly granted in the Constitution to any branch of the government, but it has been implied from the powers to make war and to make treaties,³⁴ but may also be derived from the principle that, in its international relations, the United States has such powers as international law recognizes in states generally. The usual method of acquiring territory has been by treaty, but that method has been followed only when there was a ceding power with which a treaty could be made and which continued to exist as an independent government after the annexation of such territory to the United States. Texas and Hawaii were acquired by joint resolution of Congress. In both those cases, there were no governments with which to make treaties except the governments of the territories annexed, which ceased to have an independent existence at the moment of annexation. Texas was annexed in pursuance of the express grant to Congress of the power to admit new states into the Union, but since Hawaii was not admitted as a state, its annexation by Congress represents a greater extension of power.

Another example of the acquisition of territory by Congress is found in the operation of the guano island act of 1856, which provides that when any citizen of the United States discovers a guano island not occupied by the citizens of any other government and not within the lawful jurisdiction of any foreign country and shall take

³² *U. S. v. Hicks*, 256 Fed. 707.

³³ JAMESON, *THE CONSTITUTIONAL CONVENTION*, [1st ed.], p. 505, sec. 549.

³⁴ *American Insurance Co. v. Canter*, 1 Pet. 511.

peaceable possession of the same, such island may, at the discretion of the President, be considered as appertaining to the United States.³⁵ The question of the validity of this act arising in the Supreme Court, that tribunal found ample warrant for it in the principle that, by international law, territory may be acquired by discovery or occupation, as well as by cession or conquest, and when citizens of a nation take possession of unoccupied territory, the nation to which such citizens belong may exercise such jurisdiction as it sees fit over the territory so acquired.³⁶

In the case of acquisition of territory, the power of Congress to do so by statute or joint resolution is recognized as proper where there is no foreign government with which a treaty can appropriately be made. The same distinction would be followed in the case of the alienation of territory. If alienated to a foreign power, it would seem that the treaty method would have to be adopted, but if the alienation take place in the form of a grant of independence to a particular portion of our territory, the appropriate method would be by statute or joint resolution.³⁷ Similarly, in the case of making peace, it would seem that where the subjugation of the enemy by the United States and the overthrow of his government occurs, since there is then no government with which to make a treaty, it becomes by analogy the function of Congress by act or joint resolution to declare peace. Also, in the case of the long cessation of hostilities, since this is recognized by international law as a method of ending war, if there is no intention of renewing such hostilities, the evidence of such lack of intention might, if predicated on sufficient evidence of a similar lack of intention on the part of the former enemy, be given by Congressional act or joint resolution.³⁸ It has been objected that, if Congress can declare peace, it can also pass a law to bring the army home and thus interfere in the direc-

³⁵ 11 STAT. AT L., 119.

³⁶ *Jones v. United States*, 137 U. S. 202.

³⁷ W. W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES*, Vol. I, p. 513.

³⁸ Congress could obviously not take such action by concurrent resolution, since this would be an attempt to exclude the President from an act of a legislative character. The joint resolution, however, could be passed over the President's veto, but the President could still prevent the full return of normal peace conditions by refusing to resume diplomatic relations.

tion of the army in the midst of a campaign.³⁹ This would not necessarily follow, but even if it did, the difficulty would be largely avoided by confining the power of Congress to declare peace to the two cases mentioned. Where, however, the government of the enemy has not been overthrown nor have hostilities ceased for so long a time as to indicate that there is no intention of renewing them, the only appropriate method of ending war is by the exercise of the treaty power. If the treaty method is followed in terminating the war, the exact date of its termination, in so far as its domestic effect is concerned, may still be determined by the President, since the treaty of peace is put into effect in a domestic sense by proclamation of the President, and the date of the termination of the war as fixed in such proclamation need not necessarily correspond with the actual date of the exchange of ratifications of the definitive treaty of peace.

In the two cases mentioned,—overthrow of the enemy's government, and long cessation of hostilities—if Congress fails to act, can the President bring the war to an end by proclamation? In August, 1919, Senator Fall of New Mexico propounded the following question to President Wilson: "In your judgment, have you not the power and authority, by a proclamation, to declare in appropriate words that peace exists and thus restore the status of peace between the government and people of this country and those with whom we declared war?" The President's reply was: "I feel constrained to say * * * not only that in my judgment I have not the power by proclamation to declare that peace exists, but that I could in no circumstances consent to take such a course prior to the ratification of a formal treaty of peace."⁴⁰ In view of the fact that neither of the two conditions mentioned in which Congress can declare peace then existed, as well as of the fact that the treaty of peace then pending before the Senate had been neither ratified nor rejected by that body, there seems to be no reason to question the correctness of the President's answer. But if either of these two conditions existed, it would seem that, by analogy with the method of ending the Civil War, there is some ground to suppose that the President would have the power in question although the question is involved in

³⁹ Speech of Mr. Connally in House of Representatives, CONGRESSIONAL RECORD, April 8, 1920, vol. 59, p. 5773.

⁴⁰ CONGRESSIONAL RECORD, Aug. 22, 1919, pp. 4434, 4435.

some doubt. In one case, as we have seen, the Supreme Court seemed to recognize the dates of the termination of the Civil War as depending on the proclamations of the President, without considering the concurrent action of Congress.⁴¹ The dates chosen by the President in his proclamation, however, were sanctioned by a subsequent act of Congress, and the Supreme Court in other cases seems to consider the action of Congress as of substantial if not controlling weight in determining the end of the Civil War.⁴² The situation with reference to the power in question seems analogous to that with reference to the power to permit limited intercourse with the enemy in time of war. In each case, it would seem that the President alone may exercise the power, though probably not if against the expressed will of Congress; but, whether so or not, he may exercise it with the concurrent authority of Congress.⁴³ In the absence of any conflicting action on the part of Congress, the courts would doubtless consider themselves bound by the President's proclamation in determining private rights, as, in the case of the *Protector*, the Supreme Court considered itself so bound, "in the absence of more certain criteria, of equally general application."⁴⁴

JOHN M. MATHEWS.

University of Illinois.

⁴¹ *The Protector*, 12 Wall. 700.

⁴² *U. S. v. Anderson*, 9 Wall. 71.

⁴³ *Hamilton v. Dillin*, 21 Wall. 73. In this connection it may be pointed out that certain war-time acts of Congress indicate that, in the opinion of that body, the President alone by proclamation could at least recognize the termination of war for the purpose of indicating the period during which such legislation should operate. See, *e. g.*, 40 STAT. AT L., 412.

⁴⁴ 12 Wall. 700.

GENERAL REFERENCES.

MOORE, J. B. DIGEST OF INTERNATIONAL LAW, VII, 335-8.

CORWIN, E. S. THE POWER OF CONGRESS TO DECLARE PEACE, MICH. LAW REV., XVIII, 669-675.

U. S. HOUSE OF REPS., Rept. No. 801, pts. 1 and 2, 66th Cong., 2nd sess.

PHILLIPSON, C. TERMINATION OF WAR AND TREATIES OF PEACE.

AMERICAN JOURNAL OF INT. LAW, July, 1920, pp. 384-7; 419-20.