

THE SHARE OF THE PRESIDENT OF THE UNITED STATES IN A DECLARATION OF WAR

A SUBJECT of warm debate in the convention which framed the Constitution of the United States was where the power of making or declaring war should be vested.

The committee of detail reported in favor of giving Congress power "to make war." Pinkney opposed this on the floor, preferring to bestow it on the Senate. That this was also the view of Hamilton appears in the draft of a constitution which he gave to Madison, towards the close of the convention.¹ In the debate on the report, Pinkney urged that it "would be singular for one authority to make war, and another, peace." Butler, who followed him, thought the President was the proper depository. It was then moved to make the clause read "to declare war," instead of "to make war." Gerry said that he had "never expected to hear in a republic a motion to empower the executive alone to declare war." Mason thought that neither the executive nor the Senate could safely be intrusted with the power of war; and finally the word *declare* was substituted for *make* by the large majority of States.²

As a declaration of war takes thus the shape of a special Act of Congress, it requires, like any other bill, order, vote, or resolution, the approval of the President. It must be then the product of an agreement of mind between three depositaries of governmental power. The two Houses of Congress first successively agree, and the President then manifests his assent.

It will be remembered that a formal declaration of war, until recently, was not, as a matter of international law, necessary or indeed usual. Most wars during the eighteenth and nineteenth centuries were fought

¹ Farrand, Records of the Federal Convention, III, 619, 622.

² *Ibid.*, II, 143, 168, 182; Elliot, Debates, V, 439.

under the rule of a word and a blow, with the blow coming first and the word possibly left unsaid.³

The United States, since it adopted its present Constitution, has been engaged in eight foreign wars.

The first, coming at the close of the eighteenth century (1798–1800), was a limited or imperfect war, as distinguished from a general war. Congress authorized acts of hostility on the sea against vessels of France by way of reprisal, without any formal declaration of war. “Such a declaration by Congress might have constituted a perfect state of war, which was not intended by the government.”⁴ The reasons of the action taken by Congress were stated; namely, “depredations on the commerce of the United States,” and captures of American vessels “in violation of the law of nations and treaties between the United States and the French nation.”

The second war was with Tripoli (1800–1805). She declared war against us. We recognized a state of war as existing, but acted only on the defensive, through a naval expedition, and made, ourselves, no formal declaration of war.

The third war was against Algiers, and our action (Act of March 3, 1815) was substantially the same as that in the case of the Tripolitan War.

The fourth war was that of 1812 with Great Britain. Congress then made a declaration of the existence of war between the two countries. No statement was made as to its causes or objects (Act of June 18, 1812).

The fifth was the Mexican War. Here the President informed Congress that Mexico had invaded the United States and that a state of war existed. Congress responded by an Act (of May 13, 1846) reciting that war existed by the act of Mexico and providing for the support of hostilities. A motion in the House of Representatives for a declaration of war was rejected by a large majority. The House of Representatives in the next Congress, on January 31, 1848, passed a resolution “that the war was unnecessarily and unconstitutionally begun

³ Woolsey, *Introduction to the Study of International Law*, sec. 115; Calvo, *Le Droit International*, IV, secs. 1903 *et seq.*; Takahashi, *International Law applied to the Russo-Japanese War*, Chap. 1, sec. 1; this JOURNAL, 2: 57.

⁴ *Bas v. Tingy*, 4 Dallas, 37: see *Talbot v. Seaman*, 1 Cranch, 1.

by the President of the United States." John Adams wrote of it in 1815:⁵

Mr. Madison's administration has proved great points, long disputed in Europe and America.

1. He has proved that an administration under our present Constitution can declare war.

2. That it can make peace.

The sixth of our foreign wars was that with Spain. Here a special Act of Congress (of April 20, 1898) presented an ultimatum, and was in effect a declaration of war, unless the demand stated should be immediately complied with. Spain did not comply with it, but withdrew her minister at Washington, and on April 25, 1898, a declaration of war was recommended by the President, adopted by Congress, and approved by him. This enacted "that war be, and the same is hereby declared to exist, and has existed since the twenty-first day of April Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain."

It will be observed that, in this formal declaration, no causes of grievance against Spain are stated.

Of our six foreign wars, then, preceding those now being waged with Germany and Austria-Hungary, only one, and that the first, was prosecuted under a declaration of war setting forth the causes leading up to it.

An important advance in regulating the relations of nations to each other was made in 1907 by the Convention as to the mode of opening hostilities, which was adopted *ad referendum*, by the second Hague Conference.

In this (Article I) the contracting Powers recognized that hostilities between them should not commence without a preliminary and unequivocal notice, which should have either the form of a declaration of war, stating the reasons for it (*motivée*), or that of an ultimatum, with a declaration of war in case of the rejection of the ultimatum. One of the leading participants in the conference has expressed himself thus in regard to the provision for a statement of the reasons for declaring war:

⁵ Life and Works, X, 167.

It will be noted that the declaration and the ultimatum require a statement of the reason of the war, and it is to be hoped that the difficulty of a perfect justification may exercise a restraining influence upon prospective belligerents. . . . It must be admitted that the convention is very modest, for it leaves the Powers free to declare war at their pleasure, provided only that the pretext be capable of formulation.⁶

The United States ratified this convention in 1909; and Article I was to take effect in case of war between two or more of the contracting Powers. Germany having also ratified it during the same year, when the President last spring became satisfied that the United States should enter into war with that empire, or that war substantially existed between them already, he called a special session of Congress to which he communicated his views on April 3, 1917.

As causes of war he mentioned these:

1. Germany's announcement that from and after February 1, 1917, "it was its purpose to put aside all restraints of law or of humanity and use its submarines to sink every vessel that sought to approach either the ports of Great Britain and Ireland or the western coasts of Europe or any of the ports controlled by the enemies of Germany within the Mediterranean."

2. Germany's execution of that purpose, involving such a submarine warfare against commerce as is a "warfare against mankind" and all nations, in the course of which American ships have been sunk and American lives taken.

3. The vindication of human right, of which the United States "is only a single champion."

4. Germany's denial of "the right of neutrals to use arms at all within the areas of the sea which it has proscribed, even in the defense of rights which no modern publicist has ever before questioned their right to defend."

5. Her intimation that the armed guards carried by American merchantmen would be treated as pirates.

6. The menace to the peace of the world and the freedom of its peoples flowing from "the existence of autocratic governments, backed by organized force which is controlled wholly by their will, not by the will of their people."

⁶ Scott, *The Hague Peace Conferences*, I, 519, 522.

7. The impossibility of maintaining "a steadfast concert for peace," except by a partnership of democratic nations, as "no autocratic government could be trusted to keep faith within it, or observe its covenants."

8. The sending by Germany of spies and intriguers into the United States.

9. Our conviction "that in such a government, following such methods, we can never have a friend; and that in the presence of its organized power, always lying in wait to accomplish we know not what purpose, can be no assured security for the democratic governments of the world."

10. Our resolution to fight "for the ultimate peace of the world and for the liberation of its peoples, the German peoples included; for the rights of nations, great and small, and the privilege of men everywhere to choose their way of life and of obedience."

11. The duty of the United States, as "one of the champions of the rights of mankind," to make these "as secure as the faith and the freedom of nations can make them," and to make the world "safe for democracy."

12. That Germany is acting through "an irresponsible government which has thrown aside all considerations of humanity and of right, and is running amuck."

13. That the United States will "fight for the things which we have always carried nearest our hearts — for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free."

To this message Congress promptly responded by the following resolution of April 6, 1917:

Joint Resolution Declaring that a state of war exists between the Imperial German Government and the Government and people of the United States and making provision to prosecute the same.

Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America; therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the state of war between

the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

It will be noticed that the distinction is here observed which was made in the President's message, between the Imperial German Government and the German people, and that, on the other hand, it is stated that the German Government has made war against both the Government and the people of the United States.

It is to be noted, also, that Congress has not specified what were the "repeated acts of war against the Government and the people of the United States" by which war has been "thrust upon the United States."

It is hardly open to dispute that of the grounds of complaint mentioned by the President in his address, those above numbered 1, 2, 4, 5, 8, 9, and 12 may be regarded as American grievances, justifying war.

Those numbered 3, 6, 7, 10, 11, and 13, present a somewhat different question. In them German attacks upon the peace of the world, and the freedom of peoples; the evils of autocratic government; the liberation of the peoples of the world, the German peoples included; and the duty of making the world safe for democracy, of securing the rights and liberties of free peoples, and of seeking to set up such a concert between them as will make the whole world free, are set forth as causes for our going to war. The matters which the President here sets up touch us less directly than do the other matters to which he referred. They are questions of world politics, and of worldwide application. Congress did not see fit to put them into its list of grievances, in terms; but it does not invalidate the declaration of war, that the President and Congress have not agreed on precisely the same statements to support it. They have agreed, however, in the result of making, by the action of each, a declaration that war exists.

Such a declaration is analogous to a judgment of a court, held by several judges, which recites certain premises on which it is founded. All the judges may agree on the terms of the judgment, and yet a mi-

nority may dissent from the reasons stated by the majority in support of it. Such a difference of opinion does not make the judgment any the less conclusive on the parties. The result is reached unanimously, though by different paths.

In most countries no questions of this character can arise, because a declaration of war has been with them a simple act of the executive power, though it may subsequently require parliamentary ratification. In the United States it is a dual act. It is put in words by Congress: it is then to be put in effect by the President's approval of those words and proclamation of what has been so enacted. A new international *status* is thus created, authorizing such action as he may deem proper in his capacity of commander-in-chief of the army and navy. In the language of the Supreme Court of the United States:

War can alone be entered into by national authority; it is instituted for national purposes, and directed to national objects. . . . Even in the case of one enemy against another enemy, therefore, there is no color of justification for any hostile act, unless it be authorized by some act of the government giving the public constitutional sanction to it.⁷

The manner in which our seventh foreign war (that with Germany) was declared, in April, 1917, was largely followed when, in December, 1917, our eighth foreign war was declared against Austria-Hungary. The President made an address to Congress, in which, referring to the war between the United States and Germany, he said that he should not go back to relate its causes, but desired to consider its objectives. As to what these were, he continued, he and Congress were "the spokesmen of the American people." The great and immediate object was "to make conquest of peace by arms." The United States could not regard the German Government as the spokesman of the German people. When that people should say, "through properly accredited representatives," that they would agree to a settlement "based upon justice and the reparation of the wrongs their rulers have done, the United States would regard the war as won." This country did "not wish in any way to impair or to rearrange the Austro-Hungarian Empire." Nor was any interference with the internal affairs of Germany intended. The worst that could happen to her people was that if they continued to be

⁷ Talbot v. Janson, 3 Dall., 133, 160.

under masters interested to disturb the peace of the world, "it might be impossible to admit them to the partnership of nations which must henceforth guarantee the world's peace," or "to admit Germany to the free economic intercourse which must inevitably spring out of the other partnerships of a real peace." Finally, he recommended as a military necessity an immediate declaration that the United States was in a state of war with Austria-Hungary, now "simply the vassal of the German Government," and "not acting upon its own initiative or in response to the wishes and feelings of its own peoples, but as the instrument of another nation."

He then reverted to the reasons for which the United States had entered into war. It had "been forced into it" to save its political institutions "from corruption and destruction." "The purposes of the Central Powers," he added, "strike straight at the very heart of everything we believe in; their methods of warfare outrage every principle of humanity and of knightly honor; their intrigue has corrupted the very thought and spirit of many of our people; their sinister and secret diplomacy has sought to take our very territory away from us and disrupt the union of the States. Our safety would be at an end, and our honor forever sullied and brought into contempt, were we to permit their triumph. They are striking at the very existence of democracy and liberty. It is because it is for us a war of high, disinterested purpose, in which all the free people of the world are banded together for the vindication of right, a war for the preservation of our nation and of all that it has held dear of principle and of purpose, that we feel ourselves doubly constrained to propose for its outcome only that which is righteous and of irreproachable intention, for our foes as well as for our friends. The cause being just and holy, the settlement must be of like motive and quality. For this we can fight, but for nothing less noble or less worthy of our traditions. For this cause we entered the war and for this cause will we battle until the last gun is fired."

The House Committee of Foreign Affairs, on the day (December 5th) when this address was delivered, agreed unanimously to report a declaration of war with this preamble:

Whereas, the Imperial and Royal Austro-Hungarian Government has severed diplomatic relations with the Government of the United

States of America, and has committed acts of war against the Government and the people of the United States of America, among which are its adherence to the policy of ruthless submarine warfare adopted by its ally, the Imperial German Government, with which the United States of America is at war, and by giving to its ally active support and aid on both land and sea in the prosecution of war against the Government and people of the United States of America; therefore, be it, etc.

On further consideration and consultation with the Senate Committee on Foreign Relations, the Act of December 7, 1917, was passed, in which for the preamble in the original draft was substituted the following:

Whereas, the Imperial and Royal Austro-Hungarian Government has committed repeated acts of war against the Government and the people of the United States of America; therefore be it, etc.

The final draft of the declaration of war against Austria-Hungary, therefore, unlike the earlier draft of the House committee, hardly seems to comply with the spirit of the Hague Convention of 1907, if read without reference to the previous address of the President on the subject of such a war. If, on the other hand, passed as it was with substantial unanimity, it may properly be read as approving and supplementing that address, and as incorporating the gist of that into itself, any such ground for criticism would be removed. In that all-important state paper, the President, it will be remembered, used the word *we* to signify himself and Congress. In other words, he spoke for both. To hold that he could properly do this would be to advance little, if at all, the prerogatives of the Executive. There is no people in the world today whose chief ruler has an extent of war power equal to that of the President of the United States. He is independent of cabinet control. He can call the ministers of the different departments of executive power into council with him or not, as he sees fit. He can indicate governmental policy in unofficial correspondence or public addresses, without reserve. He has for any such address what Lord Bryce has described as "an unrivaled platform."

In 1908 the Kaiser gave permission to publish the report of an interview between him and a foreigner upon an important matter of foreign policy. At once, he was called to account before the Reichstag. The Imperial Chancellor, as president of the Bundesrath, has a right to be

present at the deliberations of the Reichstag. The Chancellor at that time appeared before it and substantially repudiated what the Emperor had said at the interview in question, practically pledging himself that in the future nothing of such a nature would be said by the Crown that had not the previous approval of the constituted authorities.⁸

The President of the United States is subject to no such restraints. He holds an office which makes him in all other matters affecting international intercourse the spokesman of the whole country. Is he any the less such with respect to a declaration of war? He holds, not a part, but the whole, of the executive power of the United States. Its scope is not circumscribed by many limitations. Of such as there are, two are of particular importance, namely, the provision that while he alone can negotiate treaties, they are of no force until ratified by a two-thirds vote of the Senate; and that by which, while he alone can nominate to the higher public offices, the appointments can only be made with the consent of a majority vote of the Senate.

Four powers, though in their nature and history primarily of an executive character, are expressly conferred: namely, that of receiving ambassadors and other public ministers; that of commissioning all officers of the United States; that of granting reprieves and pardons; and that of a conditional veto. These four lines of authority are not strictly a part of the executive power of the United States, though, regarded as a matter of general political government, they belong in their nature to the executive power.

Two things are certain, when the functions of the President are considered with respect to their relation to a declaration of war. He has the right, and is under the duty, to communicate to Congress, before such a declaration is made, the facts and circumstances that in his opinion may call for it. It is also of no force, unless he approve it. It is certain, further, that he cannot approve it in part and disapprove it in part. He must, as in the case of any other measures of legislation, approve the whole or disapprove the whole.

There are then three stages in proceedings for declaring war by the United States. The first comes with the doings of the President in

⁸ American Political Science Review, XI, 660.

informing Congress of the state of our relations with the Power against which war may be declared. The second is the doings of Congress in making the declaration, and the third is the approval of the declaration by the President.

The second stage has become much more important since the Hague Convention of 1907, ratified by us and by Germany and Austria-Hungary in 1909, which requires the declaration, if not connected with an ultimatum, to state the reasons (*motifs*) for its adoption. The President, it may be assumed, if he recommends a declaration of war, will always state what seem to him the reasonable grounds for it. Congress may coincide with him in his views and give the same reasons for its action which the President has given. It may, however, coincide with him in his conclusion, but prefer to rest the declaration on a part only of the grounds specified by him, or even on grounds not stated by him at all. He has had his say, and Congress is now to speak and to speak decisively, subject always to the conditional veto.

Whenever a declaration of war has been enacted and approved, it unquestionably becomes the right and duty of the President to give public notice of it to all neutral Powers. To the Power against which war is declared no formal notice is absolutely necessary before the opening of hostilities, nor indeed ever. It will hear of it soon enough through channels of information open to all.

The most important thing here is to give notice of the fact of the declaration, and the time of its going into effect. It is less necessary to specify immediately the grounds on which it rests. As to what these are, is the declaration itself now the sole evidence? Or can the President, in making his announcements to foreign nations, add to or subtract from those declared by Congress to support its action?

"Results, not processes," Samuel Warren once wrote, "are for the eye of the world." It must be remembered that in announcing a declaration of war, the chief end in view is to state the fact of the existence of war, as evidenced by such a declaration. The grounds for it, or the want of grounds for it, have become, for the time being, comparatively unimportant.

John Bassett Moore begins his consideration of the title "War" in his Digest of International Law, by this remark:

Much confusion may be avoided by bearing in mind the fact that by the term "War" is meant 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.⁹

A declaration of war announces, or creates and announces, such a legal condition of things. It may or may not go into further particulars, according to the position of the government making it, in regard to the Hague Convention of 1907. If it states what constitutes this legal condition, and purports to describe the controlling facts leading up to the declaration, its validity and effect will not depend on the truth or falsity or relevancy of what may be set forth in its assignment of causes. They are mentioned merely to give public notice of the grievances which the nation making it claims to have suffered from the nation against which it is directed.

A declaration of war at once charges the President with a double responsibility. In addition to his holding the civil executive power, he must now assume the supreme direction and command of military and naval activities. This, however, he takes subject to limitations not ordinarily existing in other countries.

As the Supreme Court of the United States has held in a leading case, the duty and power of the President under a declaration of war are "purely military," and if he makes conquests they cannot

extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. . . . The genesis and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purpose of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. . . . 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.¹⁰

The war power, however, as shared between the President and Congress, is not limited to achieving military successes. "It carries with it inherently the power to guard against the immediate renewal of the

⁹ VII, 153.

¹⁰ *Fleming v. Page*, 9 How., 603, 614.

conflict, and to remedy the evils which have arisen from its rise and progress.”¹¹

As the war power is shared between the President and Congress, but Congress does not share in the executive power, the breadth of the President's prerogatives as to the closing of a war becomes of special importance. The limits imposed directly by the Constitution are few; its main one being the requirement of the consent of the Senate. Those imposed by implication are, so far as the courts have thus far spoken, also few, but of high importance.

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.¹²

The preamble of the Constitution must also be considered in this connection. “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.” May this be construed to include a delegation of power to declare war in order to secure liberty to foreign peoples? Our war with Spain assumed that there is such a power, and the assumption met with general public acquiescence. It was made by the President, this year, in advising the declaration of war by the United States against Germany and Austria-Hungary; repeated in his public letters and addresses, and has a strong current of public sentiment in its support. In view of the general trend of opinion as to enlarging the functions of the general government, it is quite unlikely that the courts will ever take a different view.

To make a declaration of war requires the assent of Congress as well as of the President. To end a war, it is enough for him to obtain the assent of the Senate, if he acts under the treaty-making power. Peace could, no doubt, also be restored by an Act of Congress. As a declara-

¹¹ *Stewart v. Kahn*, 11 Wall., 493, 507. ¹² *Ex parte Milligan*, 4 Wall., 2, 120.

tion of war takes the shape with us of a statute, it would seem that it can be repealed by a statute. Its normal effect can also be subjected to limitations and exceptions resting on the authority of the President alone.

While the general and natural mode of ending a war is by treaty, peace may presumably be secured also by an absolute conquest followed by the destruction of the enemy's government. So far as concerns the United States, however, this would seem excluded by the doctrine of *Fleming v. Page*, unless what had been, for the time being, held as enemy's territory should be only taken to be turned over to such new government as the inhabitants might agree to institute.

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