



5-1-1934

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Recommended Citation

Forrest R. Black, *Shall We Democratize Our War-Making Machinery*, 9 Notre Dame L. Rev. 388 (1934).

Available at: <http://scholarship.law.nd.edu/ndlr/vol9/iss4/2>

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SHALL WE DEMOCRATIZE OUR WAR-MAKING MACHINERY?

“Long the victim of material forces, man has, by taking thought made himself master of wind and wave and storm. May he not, by taking thought, lift himself above the social conflicts that destroy civilization, and make himself master of his social destiny?”

INTRODUCTION

In the years that have passed since the World War, the peace-loving peoples of the world have become intensely interested in finding a way to prevent future armed conflict. Various proposals have been made: arbitration, the outlawry of war, international pacts, the League of Nations, the codification of international law and the World Court. It is our purpose to outline briefly a *supplementary* proposal looking toward the democratization of our war-making machinery. The specific question to be discussed might be formulated as follows: How far is it possible by formal constitutional changes to prevent or make more difficult a repetition of 1917-1918? What is the utility and what are the limitations of a written constitution as an instrument of control?

It is our contention that the Constitution of the United States as it relates to the “war power” is at present in an unsatisfactory form, and that the amending process can be employed effectively with reference to the four following powers: (1) The declaration of war; (2) The power of Congress to state the aims and objects of a war and to terminate hostilities; (3) The role of the President and the Senate in the treaty-making process; and (4) Conscription for foreign service.

"THE DECLARATION OF WAR"

"We should clog rather than facilitate the declaration of war."—Mr. Mason in the Constitutional Convention.

An examination of the governments of the world at the time the Constitution of the United States was adopted will disclose that in every country the power to declare war was vested in the Executive branch. The framers of our Constitution desired to break away from the beaten path. They intended that the most popular and most representative body in the new government they were establishing should have discretion in this all-important matter. Madison summed up the matter by saying:

"The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war and most prone to it. It has accordingly, with studied care, vested the question of war in the legislature."

If a foreigner, unfamiliar with the actual working of the American government, should make a study of the Constitution of the United States he would be convinced that Congress has within its discretion the power to declare war because Article 1, Section 8, of the Constitution specifically provides that "Congress shall have power to declare war." From the wording and the location of this clause in the fundamental law, it seems to be clear that it was the intention of the framers that a declaration of war should be a simple legislative act based upon the same procedure as any other legislative measure and like any other bill or resolution requiring the concurrence of both Houses of Congress, it must be submitted to the President for his approval or disapproval. Such is the status of this power from the standpoint of constitutional theory.

But as a matter of actual practice, the situation is entirely different. Congressman Dill has accurately expressed the

over-shadowing power of the President in the case of our four foreign wars. He said:

“History shows . . . that while Congress does possess that power [to declare war], in reality the President exercises it. Congress has *always* declared war when the President desired war, and Congress has *never* attempted to declare war unless the President wanted war. That was true of the War of 1812. It was true of the Mexican War. It was true of the Spanish-American War. It was true of the World War. It will probably be true of every war in which the nation engages so long as the present method of declaring war continues.”

It would be correct to generalize and say that in our four foreign Wars, Congress has only exercised the formal power of legalizing war as a status after the President has created a situation which has made the fact of war inevitable. In other words, with the growth of Presidential power the executive so manages the diplomatic affairs, that Congress can do no more and no less than to occupy the position that the President has put the country into. Our legislative body, in respect to the important power of declaring war, has virtually been reduced to a legitimizing agency, subservient to the President, deprived of initiative and discretion. Its only function is to clothe a *de facto* situation with the *de jure* habiliments and thus give it respectability.

The reason for the failure of this attempt to vest in the broadly representative legislative branch the *discretionary* power of declaring war is not to be found in any ambiguity in the formulation of the constitutional provision. Our constitutional practice has frustrated the theory and intent of the framers because of the President's dominating position as director of foreign affairs and as commander-in-chief of the army and navy. Mr. Gerry, in the Constitutional convention, expressed the orthodox view when he averred that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” But suppose that power had been given. Can any one who is familiar with our history

contend that we would have had any more or any less foreign wars, if the power of declaring war had been specifically vested in the chief executive?

This attempt on the part of the framers to clog rather than facilitate the declaration of war, has been a signal failure. We cannot secure a popular control over the war-making machinery unless the process of declaring war is altered. The change to be effective, must be a fundamental one. The mere attempt to redistribute delegated power between the Legislative and Executive departments will be unavailing. The momentous power of declaring war should be lodged in the electorate. We favor the following amendment to the Constitution of the United States: "In all cases except actual invasion, the power to declare war shall be vested in the electorate. The Congress shall determine when and on what occasions, the referendum shall be submitted to the electorate."

The merit of the plan lies in the fact that it provides for a machinery by means of which a double check is placed on the process of unleashing the destructive forces of war. It is in harmony with the conception of the Constitutional convention that "We should clog rather than facilitate the declaration of war." The very existence of this tremendous power in the electorate will make for a greater responsibility in government. It will have a sobering effect upon the President and Congress. From time immemorial, governments have presumed to issue the final edict from which there could be no appeal, commanding their people when and where they should make war. Why not reverse the process? Why not try an experiment in the democratization of government and permit the American electorate to express its opinion on the question of participation or non-participation in the next trans-oceanic blood-letting?

THE TERMINATION OF HOSTILITIES

"It should be more easy to get out of war than into it."—Mr. Ellsworth in the Constitutional Convention.

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 correct 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. Article 1, Section 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? Article 2, Section 2, Clause 2, confers on the President and the Senate the treaty making 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 four foreign wars, three were concluded by treaty and one by joint resolution. The War of 1812 by the Treaty of Ghent, December 24, 1814; The Mexican War by the Treaty of Guadalupe Hidalgo, February 3, 1848; the Spanish-American War by the Treaty of Paris, December 10, 1898; and the World War by the Knox Resolution, July 2, 1921.

Although 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, through 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. (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 well remember that Senator LaFollette 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 profound respect, and whose motives I know to be sincere, that 'we are in this war and must go through to the end.' That is true. But it is not true that we must go through to the end *to accomplish an undisclosed purpose, or to reach an unknown goal.*"

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 to terminate hostilities. Congress, in terminating hos-

ilities, shall not invade the treaty making power by attaching clauses and conditions to its act, to be accepted or considered by the enemy." The above proposal, 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 democratization of our war-making machinery.

THE ROLE OF THE PRESIDENT AND THE SENATE IN THE TREATY MAKING PROCESS

"He [the President] may himself be less stiff and offish, may himself act in the *true spirit* of the Constitution and establish intimate relations of confidence with the Senate on his own initiative, not carrying his plans to completion and then laying them in final form before the Senate to be accepted or rejected, but keeping himself in confidential communication with the leaders of the Senate while his plans are in course, when their advice will be of service to him and his information of the greatest service to them; in order that there may be veritable counsel and a real accommodation of views instead of a final challenge and contest."—Woodrow Wilson, "Constitutional Government of the U. S." pp. 139-140. Columbia University Press, 1908.

The question at issue is, does the Senate have the constitutional right to know the facts and to actually participate in the treaty making function, as an advisory body to the President, while the treaty is being formulated, or does the Senate only have the constitutional right to say "yes" or "no" when the treaty in its final form is first presented to it? Or to put it in another way, is the action of the Senate upon a treaty an integral part of the treaty making function

which may be exercised at any stage of a negotiation, or is it merely to give sanction to a treaty that is already drafted?

In the case of the Treaty of Versailles, Woodrow Wilson violated the "true spirit" of the Constitution as expressed by him in 1908 in his book "Constitutional Government in the U. S." This treaty was negotiated in secret. The Senate was kept in the dark during the whole period of the negotiation. Not only did the President, by his interpretation of the treaty clause make the word "advice" mere surplusage, but he also attempted to interfere with the Senate in the exercise of its constitutional function of giving "consent." In order that the emasculation of the coordinate power of the Senate might be complete, he so drafted the treaty and the covenant, that they could not be separated and could not be voted on separately on their merits. On March 4th, 1919, in New York, the President, certain of victory, made the boast: "When that treaty comes back, gentlemen on this side will find the covenant not only in it, but so many threads of the treaty tied to the covenant, that you cannot dissect the covenant from the treaty without destroying the whole vital structure."

Impressed by the tremendous import of the issues at stake, Woodrow Wilson deliberately decided to take the gambler's chance and in so doing, he abandoned his better judgment as expressed in 1908. Because of the miscalculation of the temper of the United States Senate, the master strategy of Woodrow Wilson went down in defeat, and it is our contention that that defeat should be sufficient to discredit this policy for all time. The Treaty of Versailles failed miserably to make a case for secrecy, expediency, or dispatch, the three contentions stressed by the advocates of the Wilsonian policy.

We propose that the Constitution be formally clarified by adopting the Owen Amendment: "The President shall have the power, by and with the advice of the Senate, to frame

treaties, and with the consent of the Senate, a majority of the Senators present concurring therein, to conclude the same." We have placed our faith in the doctrine that "Democratic leadership requires democratic methods of procedure." Whether the future for us, shall be war or peace, is to be determined largely by those who control our foreign relations. We do not hold that our international policies should be determined in the market-place. Detailed treaties cannot be made intelligently by plebiscite. But we do maintain that the ends of democracy will best be served by assuring the representatives of the people in the United States Senate a real participation in the treaty making power. The President alone under our system, has direct access to the sources of information; and this is as it should be. But if we are to have a more direct popular control over the making of treaties, cooperation and counsel and advice are necessary. To make these effective, the Senate *during the period of the negotiation*, must possess the facts, so that it can be an informed advisor.

CONSCRIPTION FOR FOREIGN SERVICE

"Liberty with danger is to be preferred to servitude with security."—Sallust.

The American people well remember the extravagant claims that were made for compulsory military service by the propagandists of preparedness. It was confidently asserted that this was a new sovereign remedy, a magic specific for all of the ills that democracy is heir to. It would make for obedience and discipline, thus preventing lawlessness; it would assimilate the alien, and thus unify the nation; it would make for national and individual efficiency, it would "spiritualize our democracy and democratize our plutocracy." In short, it would perform the joint task of the school and the melting pot.

Is it necessary for us to say that these ridiculous claims can only be characterized as "seller's puff"? Does any seri-

ous minded student today believe that conscription is the hand-maiden, the *ne plus ultra* of democracy? Has it brought respect for law in post-war America? Did it promote national unity in Austria, in Poland, in Russia? Did it "spiritualize the democracy" of France, of Germany or of England? The answer is to be found in the Dreyfus affair, the Zabern incident and the Ulster crisis. Professor John Dewey is near the truth when he says: "Compulsory military service is the remedy of despair—despair of the power of intelligence."

We might as well face the future in a realistic manner. The possibility of civil war or invasion is very slight. The student of world politics, who is conversant with the problems of imperialism, foreign investments, and international trade knows that Europe, Asia and Africa are the breeding places of future war. The time may not be far distant when a powerful press and strongly entrenched vested interests, will again urge the sending of a conscript army to the old world. There is one sovereign remedy, if you want to be certain that American boys are not again to be drafted and consigned to foreign shores. If the American people really want to prevent a return to vassalage the constitutional amending process is at their service.

The blessings of personal liberty are too precious and the power of conscripting men for foreign service is too devastating to entrust to the discretion of any temporary political majority in power. We believe with Professor Freund that it is the aim of a written Constitution to secure the "matured, deliberate popular will." Here is a fundamental question of policy which should be defined and circumscribed by unequivocal constitutional mandate and prohibition.

We have no desire to hamstring our government in case of a defensive war. If American territory is ever invaded, the Federal Government should have the constitutional power to employ conscription of both wealth and men. We urge

that a formal amendment be added to the Constitution which shall provide: "In case of the actual invasion of American territory by a foreign power, Congress shall have the power to conscript wealth and men for purposes of defense; in all other cases, the above power is hereby prohibited to the Federal Government."

CONCLUSION

The constructive proposals herein presented, if considered as a unit, would tend to clog rather than facilitate our entrance into another foreign war. If the worst should come to pass, the popular referendum at least will prevent the horror of war being foisted upon the many against their consent. The proposals will secure to the people in the future a more direct popular control over the war making machinery. They are in harmony with the present tendency for a greater democratization of government. The proposal relating to conscription for foreign service will safeguard the citizen against the most despotic power that any government can wield. We do not claim that constitutional clarification alone will, *ipso facto*, usher in a new day. We make no claim to have discovered a sovereign remedy that in some mysterious manner is certain to assure us a usurpation-proof constitution in the future. All that we are attempting to do is to demonstrate that the solution proposed would be an *improvement* over the present system. It is because of our firm conviction on this point that this article has been written.

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