

The Democratization of the War-Making Power

Forrest Revere Black

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE DEMOCRATIZATION OF THE WAR-MAKING POWER*

"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."¹

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 for Art. 1, Sec. 8 of the Constitution specifically provides that "Congress shall have power to declare war." The word "declare" was inserted in lieu of the word "make," in order to leave to the executive the power to repel sudden attacks.² 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.³ Such is the status of this power from the standpoint of constitutional theory.

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

¹ Writings, Hunt, Ed. VI, 312.

² Madison's Journal of the Const. Conv., Aug. 17, 1787; Farrand, Vol. 2, p. 318.

³ See Schouler, *Constitutional Studies*, 137; S. E. Baldwin, *The Share of the President in a Declaration of War*, Am. Jour. of Inter. Law, XII, p. 10. Senator Bacon in Cong. Record, XL, pt. 3, 59 Cong. 1 Sess. 2132.

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 not 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."⁴

John Adams says of the War of 1812, "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."⁵

In the case of the Mexican War, our diplomatic correspondence was so conducted as to prevent a spirited people accepting our demands and our armed forces were so maneuvered as to ultimately lead to a collision with Mexican troops. On May 11, 1846, President Polk asked Congress to pass a bill reciting that war existed by act of Mexico and providing for the support of hostilities. In spite of the opposition of some of the greatest leaders in the Senate and of more than a majority of the members of the House, the Congress of the United States yielded to the President's request. Nevertheless, a year and a half later, on January 3, 1848, a joint Resolution passed the House of Representatives by a vote of 85 to 71 declaring that the Mexican War had been "unnecessarily and unconstitutionally begun by the President."⁶ An attempt on February 14, 1848, to rescind this resolution was defeated 105 to 94.⁷ Daniel Webster once said, "Nobody declared the Mexican War, Mr. Polk

⁴ Cong. Record, 65 Cong. 3 Sess. 1824. See Berdahl, War Powers of the Executive in the U. S., Univ. of Illinois 1920, pp. 78-98. Finley and Sanderson, The American Executive and Executive Methods, p. 280. Bryce, Am. Commonwealth, I, 359. Schouler, Constitutional Studies, 138.

⁵ Life and Works of John Adams, X, 167-168.

⁶ Cong. Globe, 30 Cong. 1 Sess., p. 95.

⁷ *Ibid.*, p. 344.

made it." Senator Lodge, after quoting Webster, goes on to say, "The President can do that without any resolution of Congress."⁸

The Spanish American War tells the same story. The President is the dominating figure. In reality, Congress has no discretion in declaring war. In the spring of 1898, Spain had already made several concessions. The American Minister to Spain pleaded for leniency. In an appeal to the President on April 10, 1898, he said, "I hope that nothing will now be done to humiliate Spain, as I am satisfied that the present government is going, and is loyally ready to go, as fast and as far as it can."⁹ Four days before this personal appeal of our minister, the Ambassadors of Great Britain, Germany, Austria, France, Italy and Russia united in an appeal to President McKinley for a peaceful settlement.¹⁰ Such was the situation when on April 11, McKinley asked Congress to declare war. In this very message he referred to the offer of arbitration on the part of Spain and said, "To this I made no reply." The legislature under the circumstances, acted as a mere ministerial agent of the President. Benton says that in the opinion of nearly all writers on international law the particular form of intervention in 1898 was "unfortunate, irregular, precipitate and unjust to Spain."¹¹

When the political philosophy of Woodrow Wilson is written it will be interesting to know what explanation will be given to the speech delivered by our late War President at Des Moines on February 1, 1916. On this occasion Wilson said, "No government can make war in the United States. The people make war through their representatives. The Constitution of the United States does not give the President even a participating part in the making of war. War can be declared only by Congress, by an action which the President does not take part in and *cannot veto*. I am literally by constitutional arrangement, the mere servant of the people's representatives." It would not be difficult to venture

⁸ Speech of Sen. Lodge, Cong. Record, Mar. 2, 1917—4761.

⁹ For. Rels. 1898, 747.

¹⁰ Benton, International Law and Diplomacy of the Spanish American War, pp. 89, 90.

¹¹ *Ibid* 108.

an explanation if this statement had been uttered by Andrew Jackson. But Woodrow Wilson was both a constitutional lawyer and an historian. Whether we consider it from the standpoint of strict constitutional theory or of precedent, it fails utterly to describe either the *de jure* or the *de facto* status of the power of declaring war.

Further, if as a matter of fact the President does not even have "a participating part in the making of war" and if as a matter of fact he is "the mere servant of the people's representatives," then the campaign slogan of 1916 to the effect that "HE kept us out of war" does not seem very sincere. Prof. William E. Dodd, a great admirer of the war President, has thrown additional light on this problem. He says, "In August, 1915, he (Wilson) had become convinced that he would be unable to keep out of the great war. Of course this feeling could not be made public. Only the closest observer noticed that in the Public Defense Act and in the Adamson Law there were definite grants of military powers to the President that could be explained upon no other ground."¹²

A history of the events leading up to our formal participation in the World War indisputably demonstrates the respective roles of the President and the Congress in the exercise of this important power. It was the President, in complete control of our diplomatic negotiations and foreign affairs, who wisely or unwisely led us into the World War. It was within his power to determine the nature of American neutrality and to interpret the American attitude toward Germany and British violations of international law, that affected the rights of our citizens. It was the action of the President that made possible the breaking off of diplomatic relations with Germany on February 3, 1917—"a serious step which generally ends in war."¹³

It was the President, who on February 26, 1917, addressed Congress and said, "I am not now proposing or contemplating war or any steps that need lead to it. * * * I request that you will authorize me to supply our merchant ships with defensive arms, should that become necessary." A few Senators led by Senator La Follette opposed the

¹² Woodrow Wilson and his Work, 1920, p. 180.

¹³ Lawrence, Principles of International Law, p. 301.

Armed Ship Bill because he thought it would be futile and could only result in loss of vessels and lives and property. He contended that its only purpose and effect would be to lure our merchantmen to danger.¹⁴ The Armed Ship Bill did not pass. It is common knowledge that the President acting without authority from Congress did arm our merchant ships with guns and gunners from the Navy and sent them into the prohibited "War Zone." All of these measures it is true were undertaken only after the most direct assurances of a peaceful purpose and an attempt to "save the nation from war." But as in all human affairs, the logic of events inevitably dominates and the pretensions of statesmen are forgotten. The stage was set. There could be no turning back. On April 6, 1917, Congress did the President's bidding and formally declared that a state of war existed between the United States and the German empire.

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.¹⁵

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. Article 1, Sec. 8, Clause 11, is as concise and definite as it can be

¹⁴ Cong. Record, April 4, 1917.

¹⁵ All of our foreign wars have been formally commenced not by a declaration of war, but by a recognition of war. The declaration that war "exists" is the usual form in all countries. (See Quincy Wright, *The Control of Foreign Relations*, footnote p. 286.) Prof. John Bassett Moore says, "the co-existence of the two phrases may be ascribed to motives of political strategy rather than to any belief or supposition that they denote different legal conceptions." See Pro. Am. Phil. Society, Minutes 60, XVII. The term war "exists" presupposes that war has come to us because of foreign aggression.

written. It reads, "Congress shall have power to declare war." 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."¹⁶ 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 electorate should be given a participating role in the momentous power of declaring war. 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 occasion, the referendum shall be submitted to the electorate."

The governing class sometimes has selfish reasons for engaging in war. To the ambitious it means power; to the corrupt, it means profit; to the majority of office holders, it means color and excitement in lieu of monotonous routine. It would be much easier for organized agencies to bring direct pressure to bear upon a legislative body of 532 members, meeting in one place, than to control a majority of the electorate composed of twenty-five millions of people. Further, Congress is a political body. As such, its vote on war or peace would be influenced more by considerations of party loyalty than by the merits of the issue. The Congressman is often influenced by motives that are wholly foreign to the citizen. He has helped in the process of shaping policies.

¹⁶ Journal of Const. Convention, Hunt Edition II, 188.

Perhaps he has delivered a carefully prepared speech. He is openly committed to a definite policy. If a foreign nation so conducts itself as to challenge that policy, the Congressman feels a personal affront. His pride and his vanity have been wounded. In this sensitive state of mind, he associates the attack on his pet policy as an attack on national honor. Consistency is more important to him than either justice or peace. He can't back down, so he votes for war.

But the chief merit of the proposed 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 might be possible to conceive of an issue that would more quickly and easily arouse the passions of the electorate than the passions of Congress; but under our proposal Congress must take the initiative in referring the question of war or peace to the electorate. The proposal is thus 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. 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?

There is a peculiar reason why this proposal is especially significant at this time.¹⁷ Our War Department, in carrying out its policy of preparedness, is now making contracts with potential manufacturers of war supplies all over the country. The negotiations are being conducted in secret. No outsider can say how many signed contracts are filed in the vaults of the War Department at Washington. In general the plan is for the War Department to make a contract with the manufacturer of war supplies assuring him capacity production; the price to be determined at the time the goods are delivered on the basis of cost plus a "normal"

¹⁷ See articles by the author in *The New Republic*, Dec. 15, 1925, and in *The Nation*, August 27, 1930.

rate of profit; the contract to be automatically operative upon the declaration of war.

Through the courtesy of Major Mars of the United States Army the author was offered the opportunity of examining an official memorandum relating to "The War Department Adjustable Price Contract (for war or other national emergency)" bearing the date of March 5, 13 and 18, 1924, and issuing from the War Department at Washington. The chief stipulations of the contract are as follows: "(1) The Government shall pay a contract price which shall only include a *normal* rate of profit. (2) It is not contemplated that these proposals will necessarily be of a competitive nature. For emergency work, contracts will be let almost entirely on the basis of availability and desirability of the contractor and the exigencies of the emergency. (3) It is necessary that all emergency contracts shall provide that they may be terminated at any time. If they be so terminated, the Contractor is entitled to costs actually expended in connection with the contract and contemplated in his contract price. (4) There is no provision for the cancellation of this contract during peace time at the option of the Contractor. It is provided however in Article X that this contract may be terminated by the United States at any time upon notice in writing from the Contracting Officer to the Contractor. (5) The contract may be executed either during peace time or during the emergency for which required. If executed during peace time, *performance* is automatically suspended until further notice from the government. In case the contract is signed during an emergency, performance may be suspended by notice in writing at the time of execution and prior to any expenditures by the Contractor. In EITHER of the foregoing cases, the contract remains effective and *binding*, the beginning of performance ONLY is suspended. (6) If the contract be executed in time of peace it shall remain in full force and effect for three years only, with the provision that the Assistant Secretary of War may require its continuance for one additional year. A further continuance, beyond either the three- or four-year period, must take the form of a new contract, but nothing in this contract is to be construed as binding the Contractor to enter into such subsequent contract. (7) The Contractor

shall not employ nor retain in his employment any person whose employment the Contracting Officer shall designate as undesirable or detrimental to the interests of the United States."

It should not be understood that these contracts relate only to "munitions" in the strict sense. The War Department program is much more ambitious than that. The ultimate aim is to contract in advance for thousands of articles, either directly or indirectly useful in case of another war. In short, the War Department is engaged in the gigantic task of parcelling out contracts and granting concessions to the prospective purveyors of the greatest nation for the next war. It is difficult to grasp the enormity of the task. The whole proceeding bristles with temptation. Major Mars informs us that the patriotic gratuitous offer of big business men and of the National Association of Manufacturers has been accepted and that their advice is being acted upon in the placing of contracts. The "Dollar-a-Year-Man" is being replaced by the more philanthropic emissary of Big Business.

It does not sound convincing to argue that there will be no favoritism shown in the making of these contracts, for the reason that the contracts are so drawn as to be distinctly favorable to the government. It is indeed true that a guarantee of a "normal" rate of profit, with capacity production, might not appear very attractive to a munition maker in a booming period of prosperity. But in reality, the attractive feature from the business man's standpoint is *free* insurance against the dismal days of depression, *provided* the interests concerned can create the emergency, and secure the declaration, the existence of which automatically makes the contracts operative.

But what right has anyone to assume that the contract, as drawn, is favorable to the government? The paper guarantee of a "normal" rate of profit may in reality develop into something quite different. On this point, the following considerations are significant. Why the gratuitous offer of Big Business to bind itself by this particular form of contract? If the War Department desired to fully protect the interests of the American people, why did it specifically provide in Clause Two of "The Adjustable Price Contract Memo-

randum" that "it is not contemplated that these proposals will necessarily be of a competitive nature"? Further, one will examine the Memorandum in vain to find any regulation or control in the parcelling out of these contracts. It is purely a matter to be determined by the whim and caprice of the officials of the War Department. Is it possible to conceive of a scheme more favorable to the development of monopolistic control of the vital necessities of the nation in the next war? If this development occurs, what will happen to the paper provision guaranteeing a "normal" rate of profit? It should also be noted in passing that Clause Seven of the Memorandum quoted above will place in the hands of these same interests an effective weapon to kill the closed union shop.

The advocates of this War Department policy blandly assure us that their aim is preparedness. To argue that it is an insurance against war is absurd. It merely adds another incentive for war on the part of the vested interests concerned. In case of a serious and long-extended industrial depression, consider the tremendous pressure that will be brought to bear upon Congress by the business interests for a declaration of war. To the holder of one of the contracts, the declaration of war will be a Godsend; the spectre of impending bankruptcy will vanish and the "Contractor" will flourish because *capacity production* and a *normal rate of profit* is guaranteed. The "declaration" is the magic talisman. It matters not whether the enemy is large or small, far or near. The pretext for the declaration, i. e., the insult to national honor, can be furnished.

This program is not only dangerous and revolutionary, but there is one fact that further aggravates the situation. There is no specific legal authority for this program of the War Department. It has never been specifically sanctioned by Congress. The War Department is obviously operating on the theory that whether legal or not, the materials stipulated for in the contracts will be needed IF war is declared. If that contingency arises, the War Department is confident that Congress will pass the necessary validating legislation.

In this connection it is interesting to note that some of the same representatives of the War Department and of Big Business who favor this so-called preparedness plan are also

supporting the proposal of the Christian Science Monitor for a constitutional amendment providing for the conscription of wealth in the next war.^{17a} They realize that there is a possibility that such an amendment may be adopted, especially in view of the fact that both of the great parties in their 1924 platforms pledged themselves to a similar proposal. In the face of a favorable public opinion toward the conscription of wealth in war time, industrial leaders are virtually forced to do lip-service for such an amendment. To act otherwise would be a disclosure of their personal interests in war.

Suppose the amendment conscripting wealth is incorporated into the Constitution of the United States. Such an amendment would not be self-executing. Congress alone could give it vitality by the passing of appropriate legislation. What effect will the War Department preparedness plan have on the Congress of the United States when it considers the enactment of legislation to carry out the policy of the amendment? The phrase "conscription of wealth" is ambiguous. To what extent is it intended that the power of conscription be exercised? Is the phrase synonymous with confiscation? The big business interests who have bound themselves by War Department contracts are going to have a good case when they plead in Congress that they should be protected by the guarantee of a "normal" rate of profit—they are going to argue that "conscription of wealth" should be interpreted as a mere conscription of *excess* profit. When that plea is made, the fact that the War Department had no specific legal authority when it made the contract, will not be germane. Big Business will not rely on legal technicalities. It will be a matter of honor. Thus the so-called preparedness plan not only affords *free depression insurance* but also some of our hard-headed American business men are beginning to realize that it will be an effective weapon to forestall the possibility of a real conscription of wealth in the next war.

The press is the chief agency in the making of public opinion. No student of American journalism will be so bold as to assert that the big advertisers have no control over the

^{17a} See Christian Science Monitor, July 9, 1924.

editorial policy of our great newspapers. The investments of American capital in foreign countries and the general policy of economic exploitation is even now causing the army and navy to be used as collection agencies and for police protection. This plan of the War Department merely adds another incentive for war on the part of the vested interests. If a serious and prolonged industrial crisis should come, we believe that the interests of the whole American people would be better safeguarded if the propagandists for war should be required to convince not only a majority of the Congress, but also a majority of the American electorate.

We favor the proposal for a popular referendum on war for the following reasons: (1) It is in harmony with the present tendency toward a greater democratization of government. (2) The substitution of direct for delegated power in the determination of the momentous question of war or peace is in accord with the theory of limited government. (3) The vesting of this power in the electorate will have a sobering influence on the Executive in the conduct of foreign affairs. (4) It will furnish an additional check, tending to preserve the fundamental immunities against governmental power. Under the present procedure, Congress in declaring that a state of war exists, automatically expands its own powers. Driven by the theory of necessity it disposes of the lives, the liberty and the property of the citizen by majority vote. Professor Burgess has said,¹⁸ "If government can throw these limitations off and on at its pleasure, and this it can do provided it can always invent the occasion for such procedure of its own motion, then * * * they do not really exist at all." Ethically the power to sanction foreign war should rightly rest with those who will bear the brunt of war. In cases other than invasion, where time permits, we see no peculiar reason why the power of making the momentous decision should be vested in a legislative body. The question of war or peace can be simply formulated. A popular referendum at least will prevent the horror of war being foisted upon the many without their consent.

FORREST REVERE BLACK.

University of Kentucky College of Law.

¹⁸ Recent Changes in Constitutional Theory, p. 18.