CESSATION OF HOSTILITIES,
TERMINATION OF THE WAR AND OF THE EMERGENCY

Cicero says that War is a contest or contention carried on by force. But usage applies the term, not to an action, [a contest,] but to a state or condition: and thus we may say, War is the state of persons contending by force, as such.[1]

Whether war begins with the formal pronouncement of a political department of government,[2] or arises out of the organized armed resistance of nations[3] is not the subject of this memorandum. Neither is it intended to consider the extent of the President's power, under the Constitution and in the absence of congressional direction, to employ the armed forces of the nation in the defense of its national interests.[4] For this discussion the status of actual war in which this country is engaged will be assumed, whether that war has been formally declared by Congress as provided in the Constitution,[5] has been stated by the President to exist,[6] or is otherwise recognized as a fact.[7] Under any of these conditions of existing war, it is proposed to explore the steps by which the nation returns to a condition of peace, and the procedure by which peace may be restored.

Cessation of Hostilities

Although war may have its origin in the commencement of hostilities, ordinarily it does not end with their mere cessation. The close of actual armed conflict between nations is followed by three phases

of war which should be distinguished both for international and national purposes. These phases are the cessation of hostilities, the technical termination of the war and the ending of the emergency created by the war. Viewed either for purposes of statutory construction or for its bearing on the exercise of constitutional powers by the President or the Congress, each of these consequential phases of war has its separate aspects.

The term "cessation of hostilities" has not yet received the clear-cut interpretation by the courts which they have given to the phrase "termination of the war." The latter, as will be seen, refers to a change in international political relations — to the reversion from the status of war to that of peace. The former indicates a condition of fact, namely the conclusion of military operations.[8]

The distinction between a cessation of hostilities and the termination of the war was not acute during the first World War, since only a few wartime statutes of that period used the word "hostilities."[9] On the other hand, a number of current statutes provide that they shall terminate upon "the cessation of hostilities." Some of these include a provision that the President shall proclaim the date when hostilities terminate. Others authorize an alternative announcement by concurrent resolution of the Congress.[10] A number specify no medium of pronouncement.

These various provisions raise constitutional questions regarding the authority of the President or of the Congress to declare the cessation of hostilities. This problem should not be confused

with the more difficult one involved in the provision of certain temporary wartime legislation, that they shall remain in force until a specified date "or until such earlier time as the Congress by concurrent resolution, or the President, may designate."[11]

In his letter to the President of September 1, 1945, the Attorney General said:

> I turn to another group of statutes: those which are to be terminated "upon the cessation of hostilities, as proclaimed by the President." Speaking once more in general terms, I believe that a provision of this type should be interpreted to refer to a formal proclamation, issued after you have determined that the facts warrant such action. Any less formal action on your part would not in my opinion be given by the courts the legal effect of terminating a wartime statute, in the absence of proof in the document itself that it was your intention so to do. [H. Doc. 282, 79th Cong., 1st sess., p. 30]

It would seem that the President, as Commander-in-Chief of the Army and Navy is in a better position than the Congress to judge whether hostilities have in fact terminated or are merely suspended. But viewed strictly as a declaration of a fact, there is no apparent reason in law why Congress by concurrent resolution may not proclaim their cessation. It is another matter whether a declaration by concurrent resolution would satisfy provisions in current statutes that cessation of hostilities shall be proclaimed by the President. And if the date announced by concurrent resolution should be at variance with the fact, the resolution might be considered to be a legislative act, requiring presentment to the President in order to be constitutional.[12]

Should no official declaration be made that cessation of hostilities in the present war has taken place,[13] confusion may arise in construing that date as used in contracts or in court equity decrees. In the absence of such a determination, a court would have to look to other evidence of the fact. At the present time it is doubtful that a court should assume the responsibility of declaring that hostilities have ended.[14]

A failure to proclaim the cessation of hostilities may also affect the termination of a number of State statutes and city ordinances. It has been ruled by the Attorney General of California that, unless otherwise terminated by legislation, wartime statutes of that State which shall determine on "cessation of hostilities" shall continue in full effect unless "the date is fixed by proclamation or resolution."[15] This view as to the function of the term, "cessation of hostilities," approximates the declaration to the happening of an event, rather than to the statement of a fact.

Because of the widely distributed use of the term, it would seem preferable to have the date when hostilities ceased to be determined by the President for the country at large, rather than to have it depend upon the varying pronouncements of State governments and court decisions. If the cessation of hostilities is announced by proclamation after federal legislation has been enacted, extending or repealing current wartime statutes, it would seem advisable to state

therein the grounds for the finding of fact. Otherwise the proclamation may be considered to be a political as distinguished from a factual announcement -- correct if cessation of hostilities like that of war is a political matter, but of questionable evidentiary value if intended to announce a factual date. The declaration should not be retroactive, and should be made as soon as the military features warrant its pronouncement.

The absence of an armistice preceding the surrender by Japan has required the construction of the term "armistice" as it appears in some legislation. This was necessary with regard to the following provision in the Independent Offices Appropriation Act, 1946, Public Law 49, 79th Congress, 1st sess., May 3, 1945:

> That upon the expiration of sixty days after the cessation of hostilities between the United States and the principal enemy powers or after the date of an armistice between the United States and the principal enemy powers, this appropriation shall cease to be available for obligations unless Congress shall otherwise provide by law.

It was decided in this office that for the purpose of the above provision, the unconditional surrender of Japan on September 2, 1945 was equivalent to an armistice.[16] Since the statute referred in the alternative to "cessation of hostilities" or to an "armistice," it was concluded that these terms were not synonymous.[17]

Termination of the War

An armistice heralds a suspension of arms, temporary or permanent, but not peace in the technical sense.[18] This distinction was recognized during the First World War when, under a joint resolution

active "during the continuance of the present war,"[19] the President, after the Armistice of November 11, 1918, seized cable lines[20] and operated telephone[21] and telegraph systems.[22] It was applied to court-martial proceedings,[23] to the Espionage Act,[24] The War Housing Act,[25] and to the amendment of the Lever Fuel and Food Control Act,[26] and the Wartime Prohibition Act.[27]

As against this consensus, that war does not cease upon an armistice, cases to the contrary should either be conceded to be in error or to be justified solely on the basis of their especial function. One of these cases[28] involved the construction of the provision in the Selective Service Act of May 18, 1917, authorizing the Secretary of War "during the present war"[29] to suppress and prevent the maintenance of bawdy houses in the vicinity of cantonments. The period of the statute was held to terminate with the President's pronouncement to the Congress on November 11, 1918, that the war had come to an end. The President's statement was said to be at least prima facie correct until events should show the contrary. In support of this conclusion, the court pointed to the different wording in the act of November 21, 1918, which forbade the sale of distilled spirits for beverage purposes "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 of the United States."[30]

Judge Evans' opinion in the Hicks Case was followed in an Alaskan case which construed the words "in time of war" contained in a local criminal statute.[31] The date of the armistice as the end of

the war has also been applied to the definition of a "veteran" in a Massachusetts preference statute.[32] It is specifically adopted in the Veterans Pension Act of March 20, 1933,[33] and in a California statute regarding a constitutional provision granting to veterans a limited tax exemption.[34]

War proper ends as it begins, as a political relation.[35] Foreign wars are ordinarily said to terminate with the exchange of treaty ratifications.[36] On the other hand, both the opening and the closing of the American Civil War were determined by the dates of presidential proclamations.[37] These American precedents should weigh on the question of the President's power to establish internationally the relation of war or peace,[38] or at least to terminate a foreign war in so far as conditions within the country are concerned.

Against this statement is the remark by President Wilson at the close of World War I that he had no power to end the war.[39] It is also contrary to the view that the conclusion of wars comes within the treaty-making power[40] which, however, leaves to speculation the use of executive agreements as an instrument for terminating a foreign war.[41]

Although Congress may declare war,[42] it does not follow that Congress may also declare the peace.[43] At the close of World War I attempts were made to proclaim its end by concurrent resolution of the Congress.[44] The official ending of the war, however, was finally pronounced by joint resolution,[45] since the later treaties with Germany,

Austria, and Hungary recited the joint resolution,[46] no substantial headway has been made in determining whether the international relation of war, as distinguished from its international status, was officially ended by the treaty or the resolution.[47] In promulgating treaties with Germany and Austria, the President restated the date of the resolution as that when the war ended.[48] Although the recitation in the treaties does not seem to have been intended as an agreement with regard to the official date, it may be argued that the unilateral declaration by the President in his proclamation was accepted by the foreign governments.[49] If so, the date of the joint resolution (July 2, 1921) would be given internationally a retroactive effect.[50]

Current wartime legislation sometimes provides for its termination upon the ending of the war, as proclaimed by the President.[51] On the other hand, the precedent of the joint resolution seems to be established, at least when the rights of alien enemies are not considered. It is probable that the date on which war ends is decided by different events, depending on the purpose for which it is used.[52]

The requirement for a declaration ending the war by a political department of the government seems to be firmly established.[53] If such were not the case, there might be considerable justification for asserting, that just as wars may end by the total destruction of an enemy and the incorporation of its territory, so they may end by the unconditional surrender of the enemy.[54] History records instances of wars ending without a formal statement.[55]

13 Duration of the War and Emergency

It is clearly recognized that an emergency in government creates no new constitutional powers. It does, however, authorize the exercise of dormant powers.[56] Such emergency powers include the war powers of the Congress and the President.[57] It is well recognized that once these powers are called into action, their scope, within the framework of the Constitution, is curtailed only by the exigencies of war.[58] The length of their duration would seem to be similarly limited only by the occasion for their exercise, which should not be measured with the same precision as is the technical existence of a state of war.

The declaration of an emergency preceding the event of war does not seem to have been used by Presidents Lincoln and Wilson.[59] It is clear, however, that a war emergency may exist prior to the entrance of this country into a war.[60] The emergency is the danger to the country resulting from the war situation. Prior to our entrance into the present war, the war emergency was proclaimed by the President,[61] and recognized in statutes[62] that were later upheld in the courts.[63]

No case law has determined the period when a war emergency, once called into being, shall necessarily have run its course. That it does not cease with an armistice is well established.[64] Whether or not it would outlast the ratification of a peace treaty or the declaration by the Congress or the President that the war has ended, would seem to depend on the condition of events at the time, rather than on the technical termination of the war status. Since the war power is

considered all-sufficient to protect the country prior to actual entry into a war and to assure its successful conclusion when entered,[65] the power should continue as long as the international conditions following cessation of hostilities warrant its exercise, and until the national disturbance caused by the war has been readjusted.[66]

After the Civil War it is certain that the emergency which the war produced extended beyond the proclamations of the President,[67] usually considered to have ended the war.[68] Similarly, neither the war powers of the Commander-in-Chief nor of the Congress should be cut off by a pronouncement that had to do solely with the termination of an international political relation, or with the cessation of hostilities.[69] Such declarations may well be evidentiary as to the ending of the war emergency, but are certainly not conclusive as to the fact.[70]

William H. Rose

December 21, 1945

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Cessation of Hostilities, Termination of the War and of the Emergency

44/1/ ##FN1

[1] Hugonis Grotii, De Jure Belli et Pacis, abr. tr. by William Whewell, v. 1, p. 2; Prize Cases, 67 U.S. (2 Black) 635, 666; Wheaton's International Law, 6th ed., v. II, pp. 630 ff.

"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. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case there may be said to be an act of war, but no state of war." [Moore, International Law Digest, v. VII, p. 153.]

"As the state of nature was a state of peace, and not a state of war, the natural state of nations is a state of peace and society, and hence it is a maxim of the law of nations, founded on every principle of reason, justice and morality, that one nation ought not to do an injury to another. As the natural state (that of nations) is a state of peace and benevolence, nations are morally bound to preserve it. Peace and friendship must always be presumed to subsist among nations; and therefore he who founds a claim upon the rights of war, must prove that the peace was broken by some national hostility, and war commenced: but mere conjecture, supposition and possibility, can render no competent evidence of the fact." [Miller v. The Resolution, 2 Dall. 1, 3.]

Ronan, English and American Courts and the Definition of War, 31 Am. Jour. of Int. Law, pp. 642-658; McNair, The Legal Meaning of War, and the Relation of War to Reprisals, 11 Transactions of the Grotius Society, pp. 29-51; Wright, A Study of War, v. 2, p. 698.

44/2/ ##FN2

[2] "In short, the status of the country as to peace or war, is legally determined by the political and not the judicial department ..... In a legal sense, the state of war or peace is not a question in pais for courts to determine. It is a legal fact ascertainable only from the decision of the political department": U. S. v. One Hundred and Twenty-nine Packages, 27 Fed. Cas. (No. 15941) pp. 284, 289. See: Talbot v. Jansen, 3 Dall. 133, 160; U.S. v. Palmer, 3 Wheat. (16 U.S.) 610, 634; The Divina Pastora, 4 Wheat. (17 U.S.) 52; The Nuestra Senora de la Caridad, ib. 497; The Santissima Trinidad, 7 Wheat. (20 U.S.) 283; Hamilton v. McClaughry, 136 Fed. 445, 449; In re Wulsen, 235 Fed. 361, 365; Sutton v. Tiller, 6 Coldwell (46 Tenn.) 593, 595, 98 Am. Dec. 471; Perkins v. Rogers, 35 Ind. 124; Thalluson v. Cosling, 170 Eng. Rep. 714; Glenn, The Army and the Law (Schiller ed. 1943) p. 86.

Footnote 2 cont'd on next page

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"Congress and the President are the constitutional judges of states of war and peace and their decision should be abided in patience by the courts": United States v. Oglesby Grocery Co., 264 Fed. 671, 692, reversed 255 U.S. 168.

"The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government. Such determination is conclusive and binding upon the courts": Kneeland-Bigelow Co. v. Railroad Co., 207 Mich. 546, 553.

"While reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them": The Schooner Endeavor, 44 Ct. Cls. 282, 288.

"By Natural Law, when either violence is to be resisted, or punishment is to be exacted from an offender, no declaration is required ..... But by the Law of Nations, a declaration of war is requisite in all cases to give occasion for those peculiar effects; not on both sides, but on one"; 3 Grotius, De Jure Belli et Pacis (Whewell) lib. III, ch. XIII, § VI, 1, 2, pp. 59, 62. See: Vattel, Law of Nations (Chitty ed. 1853) bk. III, ch. IV, §§ 51, 52; Pufendorf, De Jure Naturæ et Gentium (Classics of International Law) v. 2, bk. VIII, ch. VI, § 15 and cf. Bynkershoek, Quæstionum Juris Publici Libri Duo (Classics of International Law), v. 2, ch.II; Oppenheim, International Law (4th ed.), v. 2, §§ 93-95; Wheaton, International Law (6th ed. Keith) pp. 635-648.

"The contracting powers agree that hostilities between them should not begin without a previous unequivocal notice, which shall be either in the form of a declaration of war with reasons therefor, or of an ultimatum with a conditional declaration of war": Article I, Convention Relative to the Opening of Hostilities, Second Hague Peace Conference, 1907, 2 Am. Jour. of Int. Law, p. 90, ib., Supp., p. 86

Since wars may in fact begin without a declaration, it would not seem to be necessary for both countries to declare war. The "Hoyton," 165 Eng. Rep. 602, 603: "In cases of this kind it is by no means necessary for both countries to declare war." The Alina Ann, 1 Dodson 24h, 247 (1813): "A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other" (quoted, Prize Cases, 67 U.S. (2 Black) at 668). At the Second Hague Conference, Colonel Ting, a Chinese representative, inquired "whether a declaration of war can be considered by the State toward which it is directed as a unilateral act and whether the latter can regard it as null and void": Hague Peace Conferences (1907), v. 3, p. 169. Regarding the congressional resolution of April 6, 1917 (40 Stat. 1) and the President's Proclamation (40 Stat. 1651) announcing that "a state of war exists" see Hackley, The Relations between the United States and the Central Powers, 11 Am. Jour. Int. Law 628. See Hudson, The Duration of the War between the United States and Germany, 39 Har. L. R. at pp. 1084, 1085. See Stowell, Convention Relative to the Opening of Hostilities, 2 Am. Jour. of Int. Law, pp. 50-62, 56; Grotius, War and Peace, quoted in note 2, supra. Cf. Bishop v. Jones & Petty, 28 Texas, 294, 319: "It is true, it [war] may

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and has frequently in later times been commenced and carried on without either a notice or declaration. But still, there can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with war-making power."

Declarations of war may be retroactive: The Pedro, 175 U.S. 354; The Buena Ventura, 87 Fed. 927 (War with Spain); The Rita, 87 Fed. 925.

Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. R. 485, 490; Finkelstein, Judicial Self-Limitation, 37 Har. L. R. 338, 347; Weston, Political Questions, 38 Ib. 296, 328.

Courts judicially recognize the existence of a state of war: Prize Cases, 67 U.S. (2 Black) 635, 667; Weinmann v. United States, 271 Fed. 906, 945; Hamilton v. McClaughry, 136 Fed. 445, 449; In re Hutson, 235 Fed. 362, 365. See Moscos Valley Town-Site Co. v. M'Adoo, 257 Fed. 143, 148.

4/3/ ##FN3

The Elisa, 4 Dall. 37, 40; The Amy Warwick, 1 Fed. Cas. (No. 341) 799, 803, aff'd. Prize Cases, 2 Black (67 U.S.) 635, 666; The Park Hill, 18 Fed. Cas. (No. 10,775a) 1187, 1196; The U.S. v. Smith, 27 Fed. Cas. (No. 16,342) 1192, 1230; Planter's Bank v. St. John, 19 Fed. Cas. (No. 11,208) 809, 810; Marks, et al. v. U. S., 20 Ct. Cls. 147, aff'd. 161 U.S. 297 (Indian Wars); Baker v. Gordon, 23 Ind. 204, 208; Lewis & Co. v. Ludwick, 46 Tenn. 368, 373; Arce v. State, 202 S.W. (Texas) 951; The Eliza Ann, 165 Eng. Repts. (1 Dods 244) 1296, 1299; The "Fanchonette" 17 Eng. Rept. 366, 368.

Sir John F. Maurice, Hostilities without Declaration of War (1700-1870); Historical extracts showing when hostilities began without declaration of war, H. Rept. 754, pp. 9-12, 52d Cong., 1st sess., Feb. Doc. 3044, 2 Am. J. of Int. Law, pp. 57-62; Kent's Commentaries, Int. Law (ed. Abdy, 1866) pp. 186-192; Hall, Int. Law, 6th ed., p. 370; Theodore S. Woolsey, America's Foreign Policy, p. 91, also The Beginnings of War, 1 Proceedings of Am. Pol. Sci. Ass'n., pp. 54-68, and note 57 infra; Whiting, War Powers under the Constitution of the U. S., 43d ed., 1871, p. 38; Moore, Int. Law Digest, VII, p. 171; Hamm, English and American Courts and the Definition of War, 31 Am. Jour. of Int. Law, pp. 642-658; Tatsuchami, Int. Law, Russo-Japanese War, p. 6; Randall, War Powers of the Executive, ch. IV; Phillipson, International Law and the Great War (1915) ch. III.

"War as a legal fact, it was decided by the Supreme Court in Prize cases, can exist by invasion of this country by a foreign enemy or by such an insurrection as occurred during the Civil War, without any declaration of war by Congress at all, and it is only in the case of a war of our aggression against a foreign country that the power of Congress must be affirmatively asserted to establish its legal existence." [Taft, Our Chief Magistrate and his Powers, p. 94.]

"But every forcible contest between two governments, de facto, or de jure, is war. War is an existing fact, and not a legislative decree. Congress alone may have power to 'declare' it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by invasion; and then it exists, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its

previous existence. In either case it is the fact that makes 'enemies,' and not any legislative Act." [Dole v. Merchants' Mutual Marine Insurance Co., 51 Maine Reports, 465, 470.]

"It is submitted that the preceding cases go far toward asserting that material war, the existence of authorized and organized hostilities between two states, creates a legal status of war. Whether one considers that the fact itself makes the state of war, or whether the fact is merely indicative of the intention of the parties, the courts have generally found that the state of war begins with such acts. The adoption of this doctrine on a wider scale would go far toward clearing up the problem of defining the state of war." [Bonan, English and American Courts and the Definition of War, Am. Jour. of Int. Law, v. 31, pp. 642, 658.]

4/4/ ## FN4

Prize Cases, 2 Black (67 U.S.) 635, 668; U. S. v. Smith, 27 Fed. Cas. (No. 16,342) 1192, 1230; Taft, Our Chief Magistrate, p. 95; Burdahl, supra, ch. 3.

"Offensive war can begin legally only through a legislative act. But the President can enter upon defensive war and the suppression of rebellion without waiting for any legislative movement; and he should do so, if, in his opinion, the safety of the country requires it": Burgess, Pol. Sci. and Constitutional Law, v. 2, p. 261.

4/5/ ## FN5

The U. S. Constitution, Art. I, § 8, cl. 11. All legislation, of course, is presented to the President, ib., Art. I, § 7, cls. 2 and 3. See Baldwin, Share of the President in a Declaration of War, 12 Am. Jour. of Int. Law, pp. 1-14.

"Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I thought it my duty to await their authority for using force in any degree which could be avoided": President Jefferson to the Congress regarding Spanish depredations, December 6, 1805, 2 Am. State Papers, For. Rel. 613, 7 Moore, Digest 162.

U.S. v. The Tropic Winds, 28 Fed. Cas. (No. 16,5l4a) 218, 219: "by the constitution congress alone can declare or recognise war."

Commercial Trust Co. v. Miller, 262 U.S. 51, 57; Prize Cases, 2 Black (67 U.S.) 635; U. S. v. Smith, 27 Fed. Cas. (No. 16342) 1192; Ex parte Givens, 262 Fed. 702, 705; Perkins v. Rogers, 35 Ind. 124, 135; Industrial Commission v. Hotar, 124 U.S. 418; William J. Bonan, English and American Courts and the Definition of War, 31 Am. Jour. of Int. Law, 642-658; Oliver P. Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L.R. 485, 490; Burdahl, supra, ch. 5.

U.S. State Dept., Declarations of War, 1914-1918, Saxon, Harding and Corwin, War Cyclopedia.

4/6/ ## FN6

Referring to the President's proclamations at the beginning and close of the Civil War, Chief Justice Chase said: "Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult

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if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken." (The Protector, 79 U.S. 700, 701.] Cf.: C. & O. R. R. v. U.S., 19 Ct. Cls. 500, 514 and 20 Ct. Cls. 49; Bishop v. Jones & Petty, 28 Texas, 294, 319, 320; Perkins v. Rogers, 35 Ind. 124, 135; Baldwin, The Share of the President of the U.S. in a Declaration of War, 12 Am. Jour. of Int. Law, pp. 1-14.

"The President is the Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation. Of course the instrumentality which this power furnishes, gives the President an opportunity to do things which involve consequences that it would be quite beyond his power under the Constitution directly to effect. Under the Constitution, only Congress has the power to declare war, but with the army and the navy, the President can take action such as to involve the country in war and to leave Congress no option but to declare it or to recognise its existence. This was the charge made against President Polk in beginning the Mexican War." [Taft, Our Chief Magistrate and his Powers, p. 94.]

See: Corwin, The President, Office and Powers, pp. 245, 246

"Although Congress is expressly given the power to declare war (Art. I, § 8, cl. 11), the President through his control of foreign relations may bring about a state of affairs which gives Congress little choice in the matter. In addition, the President may recognise the existence of a state of war and may take appropriate steps without waiting for Congress to act." Oerstenberg, American Constitutional Law, p. 78.

"It would be correct to generalise and say that in our four foreign wars, Congress has only exercised the formal power of legalising war as a status after the President has created a situation which has made the fact of war inevitable." Black, Control over Armed Forces, 19 Ky. L.J. 162-166, 163.

"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": 10 Adams, Life and Works, pp. 167, 168). Cf.: Prize Cases, 2 Black (67 U.S.) at 668: "He has no power to initiate or declare a war either against a foreign nation or domestic state." See infra, note #42.

14/7 7th FN 7

"This disuse of declarations [of war] does not grow out of an intention to take the enemy at unawares, which would imply an extreme degradation of moral principle, but out of the publicity and circulation of intelligence peculiar to modern times. States have now resident ambassadors within each other's bounds, who are accurately informed in regard to the probabilities of war, and can forewarn their countrymen. War is for the most part the end of a long thread of negotiations, and can be generally foreseen. Intentions, also, can be judged of from the preparations which are on foot, and nations have a right to demand of one another what is the meaning of unusual armaments. It is, also, tolerably certain that nations, if they intend to act

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insidiously, will not expose their own subjects in every quarter of the globe to the embarrassments of a sudden and unexpected war. And yet the modern practice has its evils, so that one cannot help wishing back the more honorable usage of feudal times." [Woolsey's] Introduction to the study of International Law (1867) p. 198.]

See: Bynkershoek, Quaestionum Juris Publici Libri Duo (Classics of International Law), v. II, ch. II, Wars may be Lawful without a Formal Declaration, pp. 13-25.

44/8/ ## FN8

Kahn v. Anderson, 255 U.S. 1, 9; Hamilton v. Kentucky Distilleries, 251 U.S. 146, 156-163; Portsmouth Co. v. U. S., 260 U.S. 327, 336; Southwestern Tel. & Tel. Co. v. City of Houston, 256 Fed. 690, 697; Commercial Cable Co. v. Burleson, 255 Fed. 99, 104; Memorandum, October 24, 1945, Determination that Hostilities Have Ceased in World War II; 32 Op. A.G. 190, 293, 296.

Paragraph 3 of the Japanese surrender instrument, signed aboard the U.S.S. Missouri, Tokyo Bay, September 2, 1945 reads: "We hereby command all Japanese forces, wherever situated, and all Japanese people to cease hostilities forthwith." Emperor Hirohito's proclamation reads in part: "I command all my people forthwith to cease hostilities, to lay down their arms and faithfully to carry out all the provisions of the instrument of surrender and the general orders issued by the Japanese Imperial General Headquarters hereunder." Paragraph 1 of the Japanese Order provides that: "The Imperial General Headquarters by direction of the Emperor, and pursuant to the surrender to the Supreme Commander for the Allied Powers of all Japanese armed forces by the Emperor, hereby orders all of its commanders in Japan and abroad to cause the Japanese armed forces under their command to cease hostilities at once, to lay down their arms, to remain in their present locations and to surrender unconditionally to commanders acting on behalf of the United States, the United Kingdom and the British Empire, and the Union of Soviet Socialistic Republics as indicated hereafter or as may be directed by the Supreme Commander for the Allied Powers." New York Times, Sept. 2, 1945, p. 3, col. 1.

44/9/ ## FN9

H. Rept. 801, pt. 2, 66th Cong., 2d sess., Public Res. 76).

44/10/ ## FN 10

See letter to the President by the Attorney General, September 1, 1945, H. Doc. 252, 79th Cong., 2d sess.

44/11/ ## FN11

Second War Powers Act, 1942, 56 Stat. 177, 50 U.S.C. App. § 645; Memorandum October 24, 1945, supra, Note #8.

44/12/ ## FN12

H. Con. Res. Nos. 85 and 86, 79th Cong., 1st sess. declared September 2, 1945 "to be the date of the termination of hostilities in the present war." This was the date of surrender in Tokyo Bay and of V-J day as proclaimed by the President: New York Times, Sept. 2, 1945, pp. 1 and 3. H. Con. Res. 91, 79th Cong., 1st sess. fixed the date as of August 14, 1945. This was the

Foot note 12 cont'd on next page

Foot note 12 Contd

date on which President Truman announced the acceptance by Japan of the terms of the Potsdam Declaration, and its unconditional surrender. New York Times, Aug. 15, 1945.

H. Con. Res. 98, 79th Cong., 1st sess., resolves "That the limited national emergency proclaimed on September 8, 1939, the unlimited national emergency proclaimed on May 27, 1941, and the hostilities known as World War II are hereby declared to be terminated." See memorandum, October 24, 1945, supra, note #8, U. S. Constitution, Art. I, § 7, cl. 3.

H.J. Res. 245, 79th Cong., 1st sess. declares "That the date of the cessation or termination of hostilities in any and all wars in which the United States has been engaged at any time since December 7, 1941, is hereby declared to be September 2, 1945, for all purposes, irrespective of any method heretofore prescribed by or under authority of law for the determination or fixing of such date of cessation or termination." H. J. Res. 272 would adopt December 7, 1945 as the date of cessation of hostilities and the termination of the war.

44/13/ ## FN13

At the hearing before the Subcommittee No. 4 of the House Judiciary Committee, October 26, 1945, 79th Cong., 1st sess., the Director of War Mobilization and Reconversion said that a "blanket revocation of all of those statutes would be unwise." Mr. Snyder further testified: "A few statutes terminate only through a resolution or proclamation that hostilities have ceased. I shall recommend that all such statutes as are no longer necessary be repealed by the Congress, rather than that they be terminated through a blanket action, such as a resolution or proclamation of the cessation of hostilities." [Hearings, pp. 13, 14.]

44/14/ ## FN14

See: The Protector, 12 Wall. (79 U.S. 700, 701); Letter of Attorney General to the President, September 1, 1945, House Doc. 282, 79th Cong., 1st sess.

The popular meaning of "cessation of hostilities" would seem to correspond to the events which followed upon the armistice as in the first World War, or the unconditional surrender of Japan in the present war. But the term used is not "armistice" or "surrender", and these words are not necessarily synonymous with "cessation of hostilities." See Note #17 infra. Cf. Hudson, supra, 39 Mar. L. Rev. at 1030. There should be some leeway for determining the fact; and the disposition of Japanese armed forces following the formal surrender on September 2d, should have a bearing (see note #8, supra).

During his testimony on October 26, 1945, given before the House Subcommittee of the Judiciary regarding the proposed resolutions to terminate the war, Mr. Snyder, Director of War Mobilization and Reconversion said: "The Army does not believe we can safely proclaim hostilities are at an end now, I am informed. Our troops are still deployed in numerous isolated

14 (contd.)
and unfriendly areas where the dangers of guerilla warfare are present. The War Department has representatives here who are prepared to explain the actual situation with respect to the continuation of 'hostilities'." Supra, note #13, p. 7.

In his third report as military governor of the American zone, October 31, 1945, General Eisenhower referred to growing unrest in Germany and to certain acts of resistance arising therefrom: "The incidents have been relatively unimportant in themselves, but, if widespread unemployment persists, the sentiments behind them may provide popular rallying points for activities which might grow into organized resistance directed against the occupation forces." [New York Times, November 1, 1945, p. 1, col. 4.]

On December 4, 1945, Walter Lippman wrote "Thus three and a half months after V-J Day, there is still a Japanese army of some 325,000 men in North China. The major part of them have not surrendered and are not disarmed." The Washington Post, December 4, 1945, p. 9, col. 1. An article in The Washington Daily News, November 17, 1945 placed the number of Japanese soldiers in China at 1,100,000, p. 8, col. 1. The Washington Post, December 13, 1945, p. 2, reported President Truman as saying that the U. S. Marines will remain in China until the terms of the Japanese surrender have been carried out. It estimated the Japanese forces in China at a million or more. In the same issue of the Post, Mr. Byrnes is said to estimate the number at 300,000 (Washington Merry-go-round, p. 15).

In his V-J Day speech President Truman said: "As President of the United States I proclaim Sunday, September 2, 1945, to be V-J Day - the day of the formal surrender of Japan. It is not yet the day for the formal proclamation of the end of the war nor of the cessation of hostilities. But it is the day which we Americans shall always remember as a day of retribution — as we remember that other day, the day of infamy." [New York Times, September 2, 1945, p. 4, col. 6.]

44/15/### FN 15

Letter by Robert W. Kenny, Attorney General, to Harold P. Sawallisch, Assemblyman, dated September 25, 1945, Justice File 146-016-2:
" * * * Since our legislature has in thirteen statutes coupled the phrase 'cessation of hostilities' with a reference to proclamation, or a resolution, I can only conclude that it was the legislative intent, in the forty-seven other statutes enacted by the Fifty-sixth Regular Session which contain this phrase without specific reference to a proclamation or resolution that the date of cessation of hostilities would be determined by a proclamation or resolution. * * * I am, therefore, of the opinion that until the legislature amends or repeals any or all of the group of statutes containing 'cessation of hostilities' clauses, or the day is fixed by proclamation or resolution, these statutes continue in full effect." [p. 5]

Mr. Kenny cites a number of 1943 and 1945 California session laws that use the words "cessation of hostilities." How many of these also provide for a definite, alternative termination date is not known.

The Minnesota War Emergency Act (Laws, 1943, ch. 600) provided that "This act shall be effective until sixty days after cessation of hostilities in the present war as declared by proper federal authority and shall then

15 (contd.)
expire, or until July 1, 1945, whichever may first occur." It does not appear that this statute was extended in the Minnesota session laws, 1945.

Kansas Session Laws, 1943, ch. 207, § 3, provides for certain uses of the state war emergency fund "while the United States is engaged in hostilities with any foreign nation and no longer."

Section 2-435 of the Milwaukee City Code pertaining to re-employment rights of municipal employees provides "No persons who voluntarily re-enlist after cessation of hostilities as defined by the United States Government shall be entitled to the right to reinstatement."

44/16/ ## FN16

Memorandum, H. H. Eberly to the Assistant Solicitor General, October 4, 1945 sitting: The War Department Basic Field Manual, Rules of Land Warfare, October 1, 1940, §§ 253-259, 265; Convention IV of the Hague Convention of 1907, Articles 36-41 (American Journal of Int. Law, v. 2, Supp., pp. 111, 112); Moore, Digest of International Law, 1906, v. 7, p. 327; Commercial Cable Co. v. Burleson, 255 Fed. 99, 104; Dooley v. Johnson, 133 Cal., App. 459, 24 P(2) 540; O'Neill v. Central Leather Co., 87 N.J. Law 552, 94 A 789, 790.

"Since the decision of the Japanese in August to surrender contemplated that the terms of surrender would be reduced to writing, and since the Rules of Land Warfare provide that an armistice be agreed upon in writing and be duly ratified by the highest authority of the contending parties, I am inclined to the view that the August acceptance of surrender terms should not be regarded as the conclusion of the armistice."

"The surrender terms signed September 2, 1945, are much broader than an armistice. They provide not only for the cessation of hostilities -- permanently -- but also for the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated. It might be argued that this instrument is not an armistice, but since its legal effect is to do all and more than an armistice would accomplish, I think that if the State Department concurs, it would be proper to hold that the instrument of surrender is an armistice within the meaning of Public Law 49, 79th Congress. At least there appears to be grave doubt as to the continuance of appropriations. In this view of Public Law 49, the 60-day period provided for therein would commence to run from and after September 2, 1945." [Eberly memorandum, supra, p. 5.]

44/17/ ## FN17

Since Public Law 49 uses in the alternative the terms "cessation of hostilities" or "armistice," it would appear that in this statute the word "armistice" was probably not intended to have the same meaning as "cessation of hostilities." Therefore, if it should be concluded that the Japanese surrender is legally equivalent to, or includes, an armistice, such an interpretation of Public Law 49 would leave unaffected any question as to the termination date of "cessation of hostilities" as that expression is used in the war statutes." [Eberly memorandum, supra, note #16 (page 6 of memorandum).]

44/18/ ##FN18

"And thus, as Cellius says: A truce is not peace; for the war remains, though the fighting ceases." [3 Grotius De Jure Belli et pacis. (Whewell) Lib. III, ch. XXI, § I, p. 30h. "The truce or suspension of arms does not terminate the war; it only suspends its operation:" Vattel, Law of Nations (Gritty, 1853) bk. III, ch. XVI, p. 1hh. Puffendorf, De Jure Naturae at Gentium (Classics of International Law 1934) v. 2, bk. VIII, ch. 7, §§ 3-8; Phillipson, Termination of War and Treaties of Peace (1916) p. 56; Willoughby, The Constitutional Law of the United States, 2d ed., v. 3, p. 1562; 1 Kent, Com. on American Law (14th ed.) v. 1, pp. 159, 161; Palmer v. Pakorny, 217 Mich. 204, 186 N.W. 505.

The treaty of peace between the United States and Spain reads: "The United States of America and Her Majesty the Queen Regent of Spain, in the name of her august son, Don Alfonso XIII, desiring to end the war now existing between the two countries, ..." (underscoring supplied) 2 Malloy, Treaties, p. 1690. On the other hand the Versailles Treaty mentions the armistice of November 11, 1918 and refers to "the war in which they [allied and associated powers] were successively involved." Ib. v. 3, p. 3331.

44/19/ ##FN19

40 Stat. 904, H. J. Res. 309, July 16, 1918.

44/20/ ##FN20

Commercial Cable Co. v. Burleson, 255 Fed. 99, 104: The plaintiffs "rely upon the fact that after November 11, 1918, the war was from a military aspect closed, and that the powers of the President had changed. By virtue of what fact did they change? Not by the intent of Congress, because the resolution expressly extends the powers until peace has been declared. Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary ..... Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates war ..... An armistice effects nothing but a suspension of hostilities; the war still continues. It is true that a war may end by the cessation of hostilities, or by subjugation; but that is not the normal cause, and neither had hostilities ceased, nor had the enemy been subjugated in the sense in which that term is used." Rev. 250 U.S. 360.

In reading the armistice terms to the Congress, on November 11, 1918, President Wilson said "The war thus comes to an end." (This was not a declaration that the technical state of war was over. See H. Rept. No. 801, 66th Cong., 2d sess., pt. 2, p. 2; note #39 infra.)

See articles 36 and 37, Fifth Convention of the Second Hague Conference, 2 Am. J. of Int. Law, Supp., p. 111.

Oppenheim, International Law, 5th ed., v. 2, §§ 231, 233.

44/21/ ##FN21

Dakota Central Tel. Co. v. South Dakota, 250 U.S. 163; Eastland v. New England Tel. Co., 250 U.S. 195; Southwestern Tel. & Tel. Co. v. City of Houston, 256 Fed. 690, 697: "The signing of the armistice did not terminate the war. We are still at war, although active hostilities have been suspended, and may not be renewed." Aff'd. 259 U.S. 318.

Notes

44/22/ ###FN22

Burleson v. Dempsey, 250 U.S. 191; Heisman v. U.S., 271 Fed. 9##

44/23/ ###FN23

Kahn v. Anderson, 255 U.S. 1, 9, involving construction of the words "in time of peace" contained in the 92d Article of War. The court said: "That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable." Desertion after March 3, 1921 was not considered to be in time of war: Digest of opinions of the Judge Advocate General of the Army (Jan-Dec. 1922).

44/24/ ###FN24

United States v. Stone, 263 Fed. 130, rev'd. 255 U.S. 580; construing "when the United States is at war" contained in section 3, Title I, Act of June 15, 1917 (40 Stat. 219), and Act of May 16, 1918 (ib. 553); Marshall v. United States, 276 Fed. 121.

44/25/ ###FN25

United States v. Stein, 48 F. 2d, 626, involving the words "the termination of the present war," section 5, act of May 16, 1918, 40 Stat. 550, 552.

44/26/ ###FN26

Act of August 10, 1917 (40 Stat. 276), as amended by the act of October 22, 1919 (41 Stat. 297): United States v. Russel, 265 Fed. 444; U.S. v. Quincy Creamery Co., 264 Fed. 881, rev'd 255 U.S. 108; C. A. Wood & Co. v. Lockwood, 264 Fed. 453, 266 Fed. 785, rev. 255 U.S. 104; United States v. Swedlow, 264 Fed. 1016; United States v. Milligan, 268 U.S. 693, 695; U. S. v. Cohen, 255 U.S. 81; 11 A.L.R. n. pp. 1265-1273, cf. C. B. Newton Coal Co. v. Davis, 281 Fed. St. 74, involving revival of Lever Act by Executive Orders dated October 30, 1919 and November 5, 1919. At page 80 the court said: "Until the Supreme Court of the United States determines otherwise, the act in question must be held ineffective, after the cessation of hostilities in its broadest sense, freed from technical construction by acts of Congress, having a tendency to continue on paper only hostile conditions into a time of peace. With no reason of national importance to justify the exercise, and without constitutional authority to sustain it, courts will not uphold acts done either under an abortive power or one equally as bad, — a power once good but inert through its own limitation." Case aff'd. 267 U.S. 238. See United States v. Armstrong, 265 Fed. 683.

44/27/ ###FN27

Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 158-163; Vincenti v. United States, 272 Fed. 114, cert. den. 256 U.S. 700, 257 U.S. 634; United States v. Minary, 259 Fed. 707; Cornell v. Moore, 268 Fed. 993, 996, aff'd. 257 U.S. 491; Hannah & Hogg v. Clyne, 263 Fed. 599.

Re: federal control of railroads see: Hines, War History of American Railroads; Northern Pac. Ry. Co. v. North Dakota, 250 U.S. 135; Dexter & Carpenter v. United States, 215 U.S. 566; Nueces Valley Town-Sale Co. v. N'Addo, 257 Fed. 113; Kneeland-Bigelow Co. v. Railroad Co., 207 Mich. 546; 4 A.L.R. 1695.

Notes

44/28/ ##FN28

United States v. Hicks, 256 F. 707 (April 3, 1919)

44/29/ ##FN29

Section 13 of 40 Stat. 76, 83.

44/30/ ##FN30

Section 1, 40 Stat. 1045, 1046.

The report of the Hicks case in The Chicago Daily Tribune, March 25, 1919, p. 1, col. 7 says: "Judge Evans refused to take cognizance of a telegram from Attorney General Palmer to the effect that Congress declared war and only congress could terminate it as far as the United States is concerned by ratifying a treaty of peace, and brushed aside a quotation from Secretary of War Baker that the armistice meant only a cessation of hostilities."

In response to a telegram from Perry H. Miller, U. S. Attorney, dated March 15, 1919, requesting authorities holding country still at war notwithstanding armistice, Attorney General Palmer wired: "Dunned March fifteenth. Department knows of no authorities to effect that country still at war, but can not conceive any court holding contrary. War began by declaration of Congress and can only be terminated by ratification of the treaty of peace." (March 18, 1919. Justice File 186033, sub 1844, Archives).

The background of the case is stated in a letter to the Attorney General dated April 3, 1919 in which Mr. Miller wrote:

"I deem it appropriate to state that in United States vs. Hicks, #8346, indicted for violation of the same Statute at the October Term, 1918, he entered a plea of guilty and was fined $50.00 and given five days in Jail.

"In the instant case, Hicks was represented by two Attorneys of experience. When arraigned for judgment upon the verdict, I recommended a sentence of four months in Jail, whereupon the Court stated in substance to counsel for Hicks that he had observed that a defending counsel generally at the March term had failed to read the indictments and raise the legal points that they should for their clients, and, if counsel for Hicks had made the point that the war was over, it would have presented a serious question, whereupon counsel for Hicks, taking the cue, entered a motion for arrest of judgment, and also for a new trial.

"Some argument was presented by both sides at the time when the Court set the case for argument at a later day. Although the Court avowed that he was not then deciding the case, I thought I could clearly see the bent of his mind, - hence my telegram to you of the 15th inst.

"When the case was finally argued, I cited 40 Fed. 393, Conley vs. Calhoun County, 2 W. Va. 416, Bouvier's definition of an 'Armistice', your opinion expressed by wire, contemporaneous construction by the Congress itself, etc., and later called the Court's attention to the opinion of Judge Hand in Commercial Cable Company vs. Burleson, and Commercial Pacific Cable Co. against same, 255 Fed. 99."

On April 7, 1919, John Lord O'Brian replied for the Attorney General: "In response to your communication of April 3, 1919, the Department decidedly disagrees with the opinion of Judge Evans that, as a technical legal matter,

30 (contd.)
the war is over, and desires that you continue to enforce the war laws upon the assumption that the war and the emergency therein specified still exists.

"As soon as any case involving Judge Evans' opinion to the contrary is in shape for being carried to a higher court, that course will be promptly instructed and taken." [Justice File No. 186,231]

In the Army Appropriation Act, July 9, 1918 (40 Stat. 845, 885) the wording of section 13 of 40 Stat. 83 was changed to "during the present emergency." The Hicks indictment was for a violation of the statute occurring on December 7, 1918. The court quotes the act of May 18, 1917 but not the amendment of July 9, 1918. Cf. U. S. v. Ingram, 255 Fed. 329.

44/31/ ##FN31

See, Hudson, The War Between the United States and Germany, 39 Har. L.R. at 1930, 1931.

U.S. v. Smithers, 6 Alaska 223 (March 1, 1920). Contra Affrin v. Alaska United Gold Mining Co., 6 Alaska 240 (April 24, 1922).

44/32/ ##FN32

Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N.E. 218 (July 2, 1930). Contra, adopting July 2, 1921: State ex rel v. Nixon, 66 Mont. 76, 213 Pac. 247.

44/33/ ##FN33

Section 1(c), 42 Stat. 819: "For the purpose of subparagraph (b) of this section, the World War shall be deemed to have ended November 11, 1918."

44/34/ ##FN34

Kaiser v. Hopkins, 6 Cal. (2) 537, 58 P(2) 1278, adopting November 11, 1918, after section 3612 of the Political Code of California. Cf. Dooley v. Johnson, 133 Cal., app. 459, 24 P (2) 540.

44/35/ ##FN35

See: Wield, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. R. 485, 490, 492; Palmer v. Pokorny, 217 Mich. 284, 186 N.W. 505; Dunlap v. Supervisors, 2 W. Va. 416; Ex parte Givins, 262 Fed. 702, 705 (court-martial); supra, notes 1 and 2.

44/36/ ##FN36

Hare v. Hilton, 3 Dall. 199, 236: "A war between two nations can only be concluded by treaty." See: United States v. Anderson, 76 U.S. 56, 70; Hijo v. United States, 194 U.S. 315, 323; Herreras Nephews v. United States, 43 Ct. Cl. 430, 436, aff'd. 222 U.S. 558; Hamilton v. Kentucky Distilleries Co., 251 U.S. 146; First Nat. Bank v. Anglo-Oesterreichische Bank, 37 F. 2d 564, 567, quoted infra note No. 50; Commercial Cable Co. v. Burleson, 255 Fed. 99, 104, supra, note 20; Ex parte Siebofsky, 273 Fed. 694, 696; 1 Kent, Commentaries on American Law, 161; 22 Op. A.G. 190. "Complying with your request over the telephone, I would call your attention to the following authorities holding that the ratification of the treaty of peace is the evidence of the termination of the war in the absence of some express legislation or express provision of the contract fixing some other evidence.": Letter September 18, 1919, Solicitor General Alex

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36 (contd.)
C. King to Congressman Edward L. Hamilton, citing United States v. Anderson, Mijo v. United States, supra, and 1 Kent, Commentaries on American Law, 159, 161 (Justice File No. 198,333).

"As to a declaration of peace, - it seems to me that this is of necessity a branch of the treaty-making power and not the proper subject matter of legislation.

"I do not believe that the repeal of an act declaring war would in any way change the existing status which the passage of the act had created, but that the subject would have passed beyond the legislative action.

"A control of Congress over this matter could be exercised by refusing appropriations and by repealing legislation for keeping in the service troops, or otherwise needed for carrying on the war, but that is not the proper subject for direct legislation." Letter Solicitor General Alex C. King to L. H. Woolsey, Solicitor for the Department of State, December 19, 1919 (Justice File No. 206,392).

"I have the honor to acknowledge the receipt of your letter of December 21, 1918 (Your File No. 763.72119/2786), in which you ask the views of this Department as to what specific event should mark the termination of the War within the meaning of legislation enacted for the duration of the War in which these terms are not defined.

"In view of the fact that the making of a treaty of peace appears to be clearly contemplated, the Department is inclined to think in the light of the following cases, Hamilton v. Yaker, 9 Wall. 32; Cooley v. United States, 182 U.S. 222; Mijo v. United States, 194 U.S. 315, 323; United States v. Grand Rapids and I. R. Co., 165 Fed. 297; Armstrong v. Bidwell, 124 Fed. 690; Ex parte Ortiz, 100 F. Ex Parte Townsend, 133 Fed. 74, the war will not have come to an end until the treaty 955; has been formulated and there has been an exchange of ratifications.

"It is worth noting that in Hamilton v. Yaker, supra, the Supreme Court intimated that not only must there be an exchange of ratifications, but a proclamation of the effectiveness of the treaty by the President, before the war can be said to have ended. Since, however, this intimation was not necessary to the decision it cannot be regarded as a controlling authority.": Letter January 4, 1919, Acting Attorney General Carroll Todd to The Secretary of State (Justice File No. 198,333).

On April 21, 1914, Senator Lodge said: "War can be declared only by the House and by the Senate. Peace can be made only by the President and the Senate. Neither peace nor war can be made without the assent of the Senate of the United States." Cong. Rec., v. 51, p. 6965.

4/37 HHFN37

37 It began and ended on different dates in different states: 14 Stat. 811 (April 2, 1866), 814 (Aug. 20, 1866); Prize Cases, 67 U.S. 635; The Protector, 79 U.S. 700; Brown v. Hiatts, 82 U.S. (15 Wall.) 177; Adger v. Alston, 82 U.S. (15 Wall.) 555; Williams v. Bruffy, 96 U.S. 176, 192, 193; Gatesville Institute v. Kauffman, 85 U.S. (18 Wall.) 151; Ross v. Jones,

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37 contd.
89 U.S. (22 Wall.) 576, 587; Raymond v. Thomas, 91 U.S. 712, 714; Lamar v. Brown, 92 U.S. 187, 193; Carroll v. Green, 92 U.S. 509, 511; Gooding v. Vara, 10 Fed. Cas. (No. 5,539) 601; Healy v. Motherwhed, 11 Fed. Cas. (No. 6,296) 960; State ex rel. v. Burgess, 23 La. Annual Rept. 225; Walker v. Hennabler, 69 Va. 521, 524; Isaacs, Taylor & Williams v. Richmond, 90 Va. 30, 38; Conley v. Supervisors, 2 W. Va. 416; Simmons v. Trumbo, 9 W. Va. 358, 364. Cf. United States v. Anderson, 76 U.S. (9 Wall.) 56, 70, 71; Hamilton v. Dillon, 88 U.S. (21 Wall.) 73, and McElrath v. United States, 102 U.S. 426, 438, emphasizing the recognition of the dates contained in the resolution, by subsequent statute: Mathews, The Termination of the War, 19 Mich. L. R. at p. 834. See Manger v. Abbott, 73 U.S. 534. But cf. Higler v. Malloy, 3 Fed. Cas. (No. 1,404) 364; United States v. Commandant, 25 Fed. Cas. (No. 14,642) 590 (Military Commission). The rule of the Federal Cases was not always followed in the State courts: Perkins v. Rogers, 35 Ind. 124; Nelson, Admir. v. Manning, 53 Ala. 549 (between Citizens of Alabama); In re Martin, 31 Howard Practice, 228 (habeas corpus, app); Bishop v. Jones & Petty, 25 Texas 294, 319, 320 (official commencement of Civil War to be determined by declaration of the Confederate Congress). See Willoughby, The Constitutional Law of the United States (2d ed.), v. 3, pp. 1568-1565.

44/38/ ##FN38
See Stowell, Convention Relative to the Opening of Hostilities, 2 Am. Journal of International Law 50, 56.

44/39/ ##FN39
"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." President Wilson's reply to questions propounded by Senator Fall, 58 Cong. Rec. 4177, August 22, 1919. It should be borne in mind that a number of current war-time statutes expressly provide that they shall end on the termination of the present war as proclaimed by the President (House Doc. No. 282, 79th Cong., 1st sess., p. 115 ff.). See Industrial Com. of Ohio v. Rotar, 124 O.S. 418, 179 N.E. 135; Perkins v. Rogers, 35 Ind. 125, 137; Kneeland-Bigelow Co. v. Michigan Central Railroad Co., 207 Mich. 546, 174 N.W. 605, 608; Ken-Rad Tube & Lamp Corp. v. Badeau, 55 Fed. Supp. 193, 197. See Wright, Control of Foreign Relations, pp. 39, 268; Russell, Legal Powers and Methods to End War, 13 George Washington L.R. 346, 349; Mathews, The Termination of War, 19 Mich. L. R. at p. 833; Hudson, 39 Harv. L. R. at p. 1033.

Parliament authorized the king in council to declare the date to be treated as the end of World War I, but provided that: "the date so declared shall be as nearly as may be the date of the exchange or deposit of ratifications of the treaty or treaties of peace." (Termination of the Present War (Definition), sub. 8 and 9, Geo. V, c. 33, 65 Sol. Journal 793.) See Parliamentary Debates, v. 32, Nos. 85, 86, 275-286, 357-363, as reported in statement prepared by the Legislative Reference Division, Library of Congress on the Duration of the War Legislation of Congress (Justice File

39 (cont'd.)
No. 106,333). "The great war came to an end, for official purposes, at midnight of 31st August, 1921": 66 Sol. Journal 15; Legal Effects of the Termination of the War, id., pp. 15, 25, 26, 28, 71. Chun v. Public Trustee, 67 Sol. Journal 168.

44/40/ ##FN40

View of the Minority of the House Com. on Foreign Affairs disapproving H. J. Res. 327, 66th Cong., 2d sess. (H. Rept. 801, Pub. Doc. 7653, pt. 2, p. 3), declaring the end of the war; vetoed by President Wilson (H. Doc. 799, 66th Cong., 2d sess., Pub. Doc. 7748; 59 Cong. Rec. 7747-8).

44/41/ ##FN41

As to the use of executive agreements see: Wright, The United States and International Agreements, 38 Am. J. Int. Law 343-55; Borchard, Shall the Executive Agreement Replace the Treaty, 36 Am. J. Int. Law 637-43; McDougal and Lans, Treaties and Congressional-executive or Presidential agreements; interchangeable instruments of National Policy, 54 Yale L. J. 181-351. Borchard, Treaties and Executive Agreements--A Reply, 54 Yale L. J. 616-664; McClure, International Executive Agreements, p. 11; Hilton, The Use of Presidential Power, p. 250.

44/42/ ##FN42

United States Constitution, Art. 1, § 8, cl. 11. See: Clambrun, The Executive Power (1916), ch. 7, The Power of Declaring War.

"History shows, though, that while Congress does possess the 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." Rep. Bill, 65th Cong., 1d sess., 57 C. R. 1838; quoted, Odell, Wartime Powers, pp. 9, 10.

44/43/ ##FN43

See United States v. Higbie, 256 Fed. 707, 710.

Authority of the Congress to declare peace was considered and rejected during the Constitutional Convention of 1787: Madison Papers, v. 3, pp. 1358, 1359; Elliot, Debates on the Federal Constitution, v. 5, pp. 438, 439; Story, Commentaries on the Constitution, v. 2, §§ 1168 ff.

"The inquiry may be suggested, Upon what, then, can the treaty-making power operate independently of that of Congress?

"The answer is not difficult. The status of war created by Congress may be determined by a status of peace created by treaty--agreements as to mutual extradition, mutual expatriation, for the cession of territory to the United States, mutual intercourse by ambassadors, etc., and all proposals as to matters which may be consummated by statutory law.

"Some stress is laid upon the power of a treaty of peace to repeal a declaration of war. It is conceded that this may be, but the reverse is equally true. A peace by treaty to-day may be repealed by a declaration of war tomorrow. 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." [House Report 1177, 65th Cong., 2d sess., Pub. Doc. 7501; Tucker, Limitations on the Treaty-Making Power (1915), pp. 356, 357.]

"Our system, on the contrary, intrusts the executive department of the government to a chief magistrate, who during his term of office, and so far

43 (contd.)
as his power extends, is virtually a king. Instead of a prime minister, designated by the legislature and dependent on their votes for his continuance in office, we have a President chosen for four years, who can be removed only by an impeachment and conviction for treason, corruption, or other high crime or misdemeanor. He is as much the representative of the entire people of the United States as any member of Congress can be of his district, and should therefore exercise the discretionary powers confided to him by the Constitution in the way that he may deem best calculated to promote the welfare of the country, which may not be the way deemed best by Congress. Take, for instance, the case of a war which Congress thinks unnecessary or unjust, and wishes to close on terms that the enemy are willing to accept. Still, it is the right of the President, and not of Congress, to determine whether the terms are advantageous, and if he refuses to make peace, the war must go on. Under such circumstances it would clearly be the duty of Parliament to withhold the supplies necessary for carrying on the war, because such a vote on their part would produce a change of ministry, followed by the return of peace; but as a corresponding action on the part of Congress will not lead to a cessation of hostilities, it is clearly their duty to provide the means for prosecuting the contest with effect and bringing it to an honorable termination." [Hare, American Constitutionnal Law, v. 1, 1889, pp. 171-172]

"To illustrate, suppose war has been declared. The status of war is thus constituted. How can it be stopped when once begun? The President and Senate can make a treaty of peace, but must war continue until the President and Senate agree to the terms of peace? 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. Besides this direct method, Congress, by the denial of supplies, as Parliament in England may do, would bring the war easily to an end, though the President might desire to continue it." [Tucker, Constitution, v. 2, 1899, § 352, p. 718]

"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 declaration of war takes the shape with us of a statute, it would seem that it can be repealed by a statute." [12 American Journal of International Law, Baldwin "The Share of the President of the United States in a Declaration of War", pp. 1, 13-14.]

"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, terminate military or provisional governments, or may regulate them and cause them to be modified or wholly withdrawn, whether originally erected by its own authority or by the war power of the President, and may institute civil

43 contd.
territorial governments in their place." [Whiting, War Powers under U.S. Constitution, 43rd edition, 1871, pp. 312, 313.]

"The power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative." Commercial Trust Co. v. Miller, 262 U.S. 51, 57.

"Congress has the right, then, simply by virtue of its power to repeal its previous enactments, to declare hostilities with Germany to be at an end, and its declaration to this effect, once duly enacted, will be binding upon the Courts and the Executive alike." [33 Michigan Law Rev., Corwin's "The Power of Congress to Declare Peace", pp. 669, 674-675]

"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, 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." [19 Mich. Law Rev. Mathews' "The Termination of War", pp. 819, 831.]

"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 presented on sufficient evidence of a similar lack of intention on the part of the former enemy, be given by Congressional act or joint resolution. [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.]" [Ib., p. 832]

44/4/ ##FN44

Berdahl, War Powers of the Executive, p. 235.

Memorandum: Can Congress Declare Peace by a Concurrent Resolution, Office of the Solicitor, Dept. of State (Justice File No. 356,398), p. 2:

"But even assuming that Congress has the power to declare peace in the usual legislative way, about which there may be some doubt, it seems clear that it cannot declare peace by a concurrent resolution whose only force is to express the opinion of the two bodies comprising Congress, to bind them between themselves, and to bind them alone.

"If it is correct, therefore, to conclude that a concurrent resolution has no legal effect as an Act of Congress, it may be inquired what its effect is. The effect of such a resolution would simply be to register the opinion of the Houses of Congress on the question of peace. It would have no binding effect upon the Executive. The war measures passed by Congress would still, so far as such a resolution is concerned, remain in effect. The Executive could continue to enforce them, and a question for the Courts might be raised should any citizen of the United States endeavor to disregard them."

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44 (contd.)

In reply, Solicitor General King wrote (letter to L. M. Hoolsey, Solicitor for the Department of State, December 19, 1919):

"By an independent but much less extensive examination than this memorandum (see supra) disclosed I had reached the same conclusion that a Concurrent Resolution performs only two offices: First, to regulate procedure in the two Houses of Congress, including the matter of adjournment for more than three days, where they desired similar procedure, such resolution being enacted under the clauses of the Constitution which authorizes the Houses of Congress by order to regulate their procedure, and also the section relating to adjournments exceeding three days; second, as an expression of the opinion of the two bodies upon the subject, which would be entitled to the respectful consideration of the Executive because of its source, but would be in no way binding upon him and might, if undertaking to invade his prerogatives, be properly objected to.

"Wherever such resolution amounts to legislation or an act of Congress as a legislative body, it is really a Joint Resolution and needs Executive approval."

4 4 45/ ## FN45 President Wilson vetoed H. J. Res. 327, which would have declared the war at an end: H. Doc. No. 799, 66th Cong., 2d sess., Public Doc. 7768. H. J. 382, approved March 3, 1921, provided that for the purpose of certain statutes, joint resolutions and proclamations, the effective date of its enactment should be taken as the date of terminating the war (41 Stat. 1359); construed 32 Op. A.G. 505. At least one case accepted this date as the time when the war ended. C. F. & I. Co. v. Industrial Com., 73 Colo. 579, 216 Pac. 706 (1923). S. J. Res. 15 (42 Stat. 105), approved July 2, 1921, declared the end of the war with Germany and with Austria-Hungary. The date of July 2, 1921, is usually recognized as the one of official ending of this war. Swiss Insurance Co. v. Miller, 267 U.S. 42, 45; Great Northern Railway v. Sutherland, 273 U.S. 182, 184; Zimmerman v. Hicks, 7 F. 2d 441, aff'd. 274 U.S. 253 (Trading with the Enemy Act); Miller v. House, 276 Fed. 715 (demand by Alien Property Custodian signed before, but served after July 2, 1921, held ineffective to base title); In re Miller, 281 Fed. 764 (demand of Custodian served prior to July 2, 1921, is enforceable after that date), appeal dismissed, 262 U.S. 760; Application of Miller, 288 Fed. 760, 767. See Sutherland v. Guaranty Trust Co., 11 F. 2d 696; In re Sutherland, 23 F. 2d 595; Miller v. Camp, 280 Fed. 520; Matheson v. Hicks, 10 F. 2d 872. The Trading with the Enemy Act was reserved from the resolution (§ 5): Commercial Trust Co. v. Miller, 262 U.S. 51, 57, 201 Fed. 804; Munich Reinsurance Co. v. First Reinsurance Co., 6 F. 2d 742, appeal dismissed, 273 U.S. 665. See Miller v. Camp, 280 Fed. 520. As wartime regulations requiring passports, see: Sichofsky v. United States, 273 Fed. 694, 277 Fed. 762; United States v. Wallis, 278 Fed. 838; United States ex. rel. The Karnath, 22 F. 2d 288; United States v. The Karnath, 29 F. 2d 314; Flora v. Husted, 8 F. 2d 335; Takeyo Koyama v. Burnett, 8 F. 2d 940; In re Bevelacqua, 295 Fed. 862 (Naturalization).

→ Justice Learned Hand seems to have doubted the effectiveness of the joint resolution to end the war without presidential proclamation. On August 12, 1921, Henry Bennett Leary wrote to Attorney General Daugherty:

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45 (contd.)

"I beg to call your attention to the fact that Judge Learned Hand, in the United States District Court for the Southern District of New York, on July 28th held and stated from the bench that the United States are not at peace and that the resolution approved July 2d was of no force or effect until the proclamation of the President, if then. Judge Hand repeated these statements in Chambers on August 3d and 4th, and signed an order based thereon, in the matter of 'Miller v. Schaefer'" (unreported). (Justice File No. 198,333.)

On August 15, 1921, the Attorney General inquired of the United States Attorney in New York regarding this statement. On August 20, 1921, Justice Hand wrote from vacation to the United States Attorney:

"I have the honor to acknowledge your favor of August 16th, which has been forwarded me here. The matter referred to in the wire of the Attorney General regarding the effect of the peace resolution arose, I think, in connection with a case against the Alien Property Custodian - the plaintiff's name I do not remember. The suggestion was made at the bar that property captured, i.e., property as to which the Alien Property Custodian had given notice of capture could not be released to possession by him, among other reasons because we were at peace. As the capture had been made in 1918, the suggestion was in any event irrelevant because peace if declared would not have restored the property. In the course of the colloquy between counsel and me, I said that in any case a state of peace would not be recognized by the courts till promulgated by the President, but it was not properly a ruling, because it was unnecessary. This is unquestionably the law, but I regret that I cannot at present situated recall any citations." (Justice File No. 198,333) See supra, Note #36, letter by Acting Attorney General Todd, dated January 4, 1919, referring to a dictum in Hauer v. Yaker, 9 Wall. 32.

When private rights were at stake, as in the suspension of the statute of limitations in actions by or against alien enemies, the date of July 2, 1921, was not always adopted: First National Bank v. Anglo-Osterreichisch Bank, 37 F. 2d 564, following State cases which held that the running of the statute dates from the time of treaty ratification (not clear whether the date of exchange of ratifications is meant): Siplyak v. Davis, 276 Pa. 49, 51 (Workmen's Compensation); Gervin v. Diamond Coal and Coke Co., 278 Pa. 469, 472 (Workmen's Compensation); Zelisnik v. Lytle Coal Co., 82 Pa. Super 489 (Workmen's Compensation); Kossig v. Ellison & Sons, 89 Pa. Super 208-212 (assumpsit; date ratified by President); Arnold v. Ellison, 96 Pa. Super 118, 121 (assumpsit, date ratifications were exchanged); Palmer v. Parkney, 217 Mich. 284 (contract, date of President's proclamation of peace, Nov. 12, 1921). See: Ohlendock v. Semsler, 299 Fed. 182; Kotsias v. Tyser (1920), 2 K.B. 69 (insurance, date ratifications are exchanged). Cf. Duffy-Arnell, etc. Co., Ltd. v. Rex (1922), 1 K.B. 599 (official termination of war not intended); Rattray v. Holden, 36 Times L. R. 798 (date fixed by Order in Council under the Termination of the Present War (Definition) Act).

Contra, adopting July 2, 1921: Industrial Com. of Ohio v. Hotar, 124 O. 418, 179 N.E. 135; Inland Steel Co. v. Jelsnovic, 84 Ind. App. 373; Clemons v. Perry, 51 S.W. 2d 857 (Tex.) (action by an administrator to establish a claim). Adopting March 3, 1921: C. F. & I. Co. v. Industrial Commission,

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(45 contd.)
73 Colo. 579, 216 Pacific 706. As to status of citizen of Yugoslavia after February 7, 1919: Kolundjija v. Hanna Ore Mining Co., 155 Minn. 176, 193 N.W. 163; contra, Inland Steel Co. v. Jelenovic, supra; Valdes v. Bosch, 179 N.Y.S. 713, 109 Misc. 306; Dickinson, Recent Recognition Cases, 19 Am. Am. Jour. of Int. Law 263, 266. See Dickinson, The Unrecognized Government or State in English and American Law, 22 Mich. L. R. 29. Kogalj v. Alaska Gastineau Mining Company, 288 Fed. 549: War does not suspend running of period for filing claims under Alaska Workmen's Compensation Act; cf. Africa v. Alaska United Gold Mining Co., 6 Alaska 540.

"A successful belligerent is not likely to be disposed to permit its enemy to gain the technical or substantial benefits accruing from the resumption of peace, through the mere abandonment of hostilities and the demobilization of military forces, or by other acts falling short of agreement": 3 Hyde, International Law (2d rev. ed., 1945), § 904, p. 2386. Cf. Hudson, 39 Har. L. R. at 1035, n. 54.

On the running of interest on debt see: Quinnes v. Miller, 291 Fed. 768 (interest suspended from April 6, 1917, to July 11, 1919—see note No. 52, infra); Robertson v. Miller, 286 Fed. 503 (agent in this country); Hicks v. Quinnes, 269 U.S. 71 (interest allowed); Miller v. Humphrey, 7 F. 2d 330 (bank deposit).

See: Merrell, Legal Powers and Methods to End War, 13 Geo. Washington L. R. 346-356; Thomas, The Power of Congress to Establish Peace, 55 Am. L. R. 86-104; Marshall, War Powers of the Executive in the United States, pp. 247, 248; Field, The Doctrine of Political Questions in the Federal Courts, 8 Minn. L. R. 485, 490, 491; Mathews, The Termination of War, 19 Mich. L. R. 619-634; Baldwin, The Share of the President of the United States in a Declaration of War, 12 Am. Journal of International Law, pp. 1-14; Corwin, Power of Congress to Declare Peace, 18 Mich. L. R. 669-675; Moman, English and American Courts and the Definition of War, 31 Am. Journal of Int. Law 648-658; Hudson, The Duration of the War Between the United States and Germany, 39 Har. L. R. 1020-1045; 66 Sol. Journal, pp. 18, 35, 46, 58, 71; Black, The Power of Congress to Declare Peace, 19 Ky. L. R. 327-335, same article under title The Termination of Hostilities, 62 Am. L. R. 248-256; Black, Control Over Armed Forces, 19 Ky. L. J. 162-166; Tansill, Termination of War by Mere Cessation of Hostilities, 38 Law Quarterly Rev. 26-37; Balling, Unconditional Surrender and a Unilateral Declaration of Peace, 39 The Am. Pol. Sci. Rev. 474-480; The Proper Construction of the Term "The End of the War," 67 Central L. J. 273; Hyde, International Law (2d rev. ed., 1945), v. 3, §§ 904-8.

44/45 ## FN46

The Treaty of Peace between the United States and Germany was signed at Berlin, August 25, 1921; ratification advised by the Senate, October 18, 1921; ratified by the President October 21, 1921; by Germany, November 2, 1921; ratifications, exchanged at Berlin, November 11, 1921; proclaimed, November 14, 1921 (42 Stat. 1939). The Treaty of Peace between the United

Notes

46 (contd.)
States and Austria (replacing Austria-Hungary which had ceased to exist) was signed at Vienna, August 24, 1921; ratification advised by the Senate, October 15, 1921; ratified by Austria, October 6, 1921; by the President, October 21, 1921; ratification exchanged at Vienna, November 8, 1921; proclaimed, November 17, 1921 (42 Stat. 1946). The Treaty of Peace between the United States and Hungary (replacing Austria-Hungary which had ceased to exist) was signed at Budapest, August 29, 1921; ratification advised by the Senate, October 18, 1921; ratified by the President, October 21, 1921; ratified by Hungary, December 12, 1921; ratifications exchanged at Budapest, December 17, 1921; proclaimed, December 20, 1921 (42 Stat. 1951).

See Hudson, 39 Har. L. R. at pp. 1037-1038.

44/47/##FN47

See: Hudson, The Duration of the War Between the United States and Germany, 39 Mich. L. R. 1020 -- 1045. For a discussion of the hour of the day when the First World War ended see ib. pp. 1038-1039.

Institute of Politics, Williams College Publications. Round-table conference of the Institute of Politics at its first session, 1921. Professor James Wilford Garner, Prof. of Pol. Sci. Uni. of Ill. Leader of Round Table.

The Leader added that a fourth method of terminating war had been attempted in the last year, namely legislative action by one belligerent. China and the United States had experimented with the method. Such a method must be sharply queried at the outset. There were no precedents for such an action. [p. 126]

"On the other hand," added the speaker, "I see no reason why such a method should not be possible. [p. 126] provided the opposing belligerent acquiesces. Germany will no doubt be glad to acquiesce in the case. [p. 127]

"However, such action does not get us anywhere; it terminates hostilities but does not settle the issues between the parties. War is, in part, a legal condition. The military aspect alone is affected by this method. What of our existing treaties with Germany? Of property held by the enemy? The existing treaties must be renewed or replaced, the property dealt with in some way or other. A Joint Resolution of Congress does not do this. Hence not much importance attaches to it in actual fact. There must be a bilateral agreement to settle bilateral problems. Such a bilateral agreement may take the form of a separate treaty with Germany or ratification of the Treaty of Versailles, with or without reservations. But we cannot escape this alternative; we cannot go on with the Joint Resolution alone."

44/48/##FN48

For citations to treaties see note #45.

44/49/##FN49

See, Hudson, supra, note #47, p. 1038; Garner, supra, note #47.

The argument does not seem to be made that since a unilateral declaration of war is sufficient to create the international relation of war, following a cessation of hostilities the status of international peace should be proclaimable unilaterally. See supra, note #2; cf. Balling, Unconditional Surrender and a Unilateral Declaration of Peace, 39 The American Political Science Review, pp. 478-480; 3 Hyde, International Law quoted supra, note #45.

Notes

44/50/ ### FN50

One case which involved the running of a statute of limitations held that private rights could not "be affected by this mere pro tanto declaration, as the treaty itself [Austrian] specified when it shall have effect": The First National Bank v. Anglo-Oesterreichische Bank, 37 F(2) 564, 566. The court also said (567): "The joint resolution of July 2, 1921, did not terminate the war. This resolution was not legally binding on Austria, and regardless of its political effect, it was not a legal realization of peace as that can be accomplished only by a bilateral treaty of peace".

44/51/ ### FN51

See: House Doc. No. 282, 79th Cong., 1st sess., p. 115; 57 Stat. 244; 58 Stat. 886.

44/52/ ### FN52

See Hudson, supra, note #47, p. 1044, 1045; Mansell, supra, note #45.

On July 14, 1919 the State Department authorized the resumption of trade and communications with persons residing in Germany: 58 Cong. Rec. 4159. Postal relations were resumed on the following day. Order No. 3327, Postal Bulletin, July 18, 1919, cited 13 Geo. Washington L. R. 353; Hudson, supra, at 1032.

44/53/ ### FN53

See: Letter to the President by the Attorney General, September 1, 1945, House Doc. No. 282, 79th Cong., 1st sess.; supra, notes Nos. 1, 2, 35, 36, 37.

44/54/ ### FN54

See Balling, Unconditional Surrender and a Unilateral Declaration of Peace, 39 Am. Pol. Sci. Rev., pp. 475-480; cf. Hyde, International Law (2d rev. ed. 1945) § 904, p. 2386, quoted note #45, supra; cf. Hudson, 39 Har. L. R. at 1035, note 54.

44/55/ ### FN55

See: Oppenheim, International Law (4th ed. 1926) v. II, §§ 261,265; Sec. 262: "The regular modes of termination of war are treaties of peace or subjugation; but cases have occurred in which simple cessation of all acts of war on the part of both belligerents has mutually and informally brought the war to an end"; sec. 265: "If he be willing to re-establish the captive or expelled head of the vanquished State, it is a treaty of peace concluded with the latter which terminates the war." Fullmore International Law (2d ed.) v. 3, § DCL, Terrill, Termination of War by Mere Cessation of Hostilities, 26 Law Q. R. 29-37;

"There are three ways of terminating hostilities between belligerent States, namely: (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 honours of war are equal or unequal .....

"If the second mode, history presents a larger number of instances, especially in earlier times when, on the one hand, might predominated over and was synonymous with right, and, on the other, when inequality of civilization and less settled national life conduced to territorial expansion and

Notes

55 (contd.)
absorption." Phillipson, Termination of War and Treaties of Peace (1916), p. 3. Regarding wars of conquest see: Fleming v. Page, 50 U.S. (9 Howard) 603, 614; Mathews, The Termination of War, 19 Mich. L. R. 624.

At the end of the First World War, Great Britain and Bulgaria signed no treaty of peace: 13 Geo. Washington Law Review 345. See: Moore, International Law Digest, v. VII, pp. 336-337.

"What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances." Secretary of State Seward, 2 U.S. Diplomatic Correspondence (1868) 34, quoted, Hudson, The Duration of War Between the United States and Germany, 39 Har. L. Rev. at 1030, n.; Moore, International Law, v. 7, p. 336; H. Rept. No. 801, 66th Cong., 2d sess., Pub. Doc. 7683, pt. 1, p. 2.

44/56/ ##FN56

Wilson v. Kew, 243 U.S. 332, 348: "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 426. U. S. v. Hirabayashi, 46 F. Supp. 657.

44/57/ ##FN57

See Martin v. Mott, 25 U.S. (12 Wheat) 19, 29, 30; Sterling v. Constantin, 287 U.S. 378, 399. "Under the Constitution and subject to the safeguards there set for the protection of life, liberty and property ..... the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on": Highland v. Russell Car Co., 279 U.S. 253, 261, 262; Brown v. Wright, 137 F(2) 484, 489.

Johnsen, Increasing the President's Power; Conkling, The Powers of the Executive Department.

44/58/ ##FN58

Within constitutional limitations the war power "is a power to wage war successfully": Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 426; U. S. v. MacIntosh, 283 U.S. 605, 622 (quoting John Quincy Adams); Hirabayashi v. U.S., 320 U.S. 81, 93; and infra; Brown v. Wright, 137 F. (2) 484, 489; Schueller v. Drum, 51 F. Supp. 363, 386, 387. Henderson v. Kimmel, 47 F. Supp. 635, 641: "The war power is a broad and comprehensive grant. It is well-nigh limitless". United States v. Beit Bros., 50 F. Supp. 590, 591; U. S. v. Naviglia, 52 F. Supp. 946, 947; Hannah & Hogg v. Clyne, 263 Fed. 599; U. S. v. Hirabayashi, 46 F. Supp. 657, 661; U.S. v. Hutchinson, 55 F. Supp. 648, 650; U. S. v. Fire Center, 50 F. Supp. 404, 405. Timken-Detroit Axle Co. v. Alma Motor Co., 144 F. (2) 714, 718: "Total war, today, is not a figure of speech but a grim fact." Bowles v. Chew, 53 F. Supp. 787, 789: "If National Security demands, the limits within which the war powers may be exercised are not circumscribed." United States v. Oglesby Grocery Co., 264 Fed. 691, 692: "The powers of Congress, in time of war, are comparable to the police powers of the states in time of peace, and equally incapable of fixed limits." See Mittrell v. Hatter, 243 Ala. 472, 477, 10 So. (2) 827; Schaffer v. Leimberg, 62 N.E. (2) 193, 194 (Mass.). Swift v. Mile Pontiac Sales, 34 N.Y.S. (2) 888, 890: "Power to take any

58 (contd.)
and all necessary and reasonable steps, not otherwise in contravention of the Constitution or the moral law to carry on the war effectively."

"It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces": Hirabayashi v. U. S., 320 U.S. 81, 93. See: Stewart v. Kahn, 11 Wall. 493, 507, infra, note #66; U. S. v. MacIntosh, 283 U.S. 605, 622-623. See: Prize Cases, 67 U.S. (2 Black) 635; Miller v. U.S., 78 U.S. (11 Wall.) 268; Selective Draft Law cases, 245 U.S. 366; Hamilton v. U.S., 249 U.S. 397; Ex parte Quirin, 317 U.S. 1, 25. Weichmann v. U.S., 108 F. (2) 180, 194; Ebel v. Drum, 52 F. Supp. 189, 194; Allen v. Colby, 47 N.H. 544; Charles E. Hughes, 12 A.B.A. Rep. 232, 236; Willoughby, Constitution, v. 3, § 1033.

44/59 ##FN59 The National Defense Act was signed on June 3, 1916 (39 Stat. 166). War was declared on April 6, 1917 (40 Stat. pp. 1 and 1650). Several proclamations were issued warning against violations of neutrality during war. See index: 38 Stat. pt. 2; 39 Stat. pt. 2.

See: Preparation for World War I: Ramsay, The United States of America, v. II, pp. 616 ff.

44/60 ##FN60 See note #63, infra.

44/61 ##FN61 Proclamation No. 2352, September 8, 1939, 4 Fed. Reg. 3851, 54 Stat. 2643 (limited emergency); Proclamation No. 2487, May 27, 1941, 6 F. R. 2617, 55 Stat. 1647 (unlimited emergency).

44/62 ##FN62 Selective Training and Service Act of 1940, 54 Stat. 885; National Defense Mobilization Act, 54 Stat. 1090; National Defense Housing Act, 54 Stat. 1125, 1135; An Act to promote the defense of the U. S., 55 Stat. 31; etc. See recognition in legislation of emergencies proclaimed by the President: H. Doc. No. 282, 77th Cong., 1st sess., pp. 1001-1017.

See National Defense Act, 1916, 39 Stat. 166, June 3, 1916.

44/63 ##FN63 United States v. City of Chester, 144 F. (2) 415, 419: "Nor can it be considered necessary that the United States must be at war in order that the Congress and the Executive possess the constitutional sanction to prepare for it. Such an interpretation would be so unrealistic as not to warrant serious consideration" (Lanham Act). United States v. 243.22 Acres of Land, 43 F. Supp. 561, 566: "There is no provision of law that this country must be at war before preparing for its defense." Henderson v. Myers, 44 F. Supp. 682, 685: "Congress, however, can invoke the war power ..... during times of peace, for the future protection of the nation." See Ashwander v. Valley Authority, 297 U.S. 288, 326.

44/64 ##FN64 See supra, note Nos. 19-27; United States v. Negrete, 265 Fed. 179, prohibiting "during the present emergency" the operation of bawdy houses within the zone of military camps.

Notes

64 (contd.)

It is, of course, possible for the President to proclaim the end of an emergency period for purposes of a particular statute. See letter, September 25, 1945, Attorney General to Director of the Bureau of the Budget, re: proposed proclamation to end the emergency period defined in section 124 of the External Revenue Code (26 U.S.C.§124(e)); Justice File 5-04-12; Proclamation No. 2668, September 29, 1945, 10 F.R., p. 12175, October 4, 1945.

44/65/ ## FN65

Supra, notes Nos. 58 and 63.

44/66/ ## FN66

Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507: "The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." See: Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 161; Commercial Cable Co. v. Burleson, quoted supra, note #20.

44/67/ ## FN67

See Stewart v. Kahn, supra, note #66; Burgess, The Civil War and the Constitution (2 vols.); Burgess, Reconstruction and the Constitution; Act of March 2, 1867, An Act to provide for the more efficient government of the Rebel States, 14 Stat. 428; Amended, Act of July 19, 1867, 15 Stat. 14.

44/68/ ## FN68

Supra, note #37.

44/69/ ## FN69

Commercial Trust Co. v. Miller, 262 U.S. 51, 57: "The next contention of the Trust Company is that the Act being a provision for the emergency of war, it ceased with the cessation of war, ceased with the joint resolution of Congress declaring the state of war between Germany and the United States at an end, and its approval by the President, July 2, 1921, and the Proclamation of Peace by the President, August 25, 1921. The contention, however, encounters in opposition the view that the power which declared the necessity is the power to declare its cessation and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field."

44/70/ ## FN70

Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 162, 163: "That a statute valid when enacted may cease to have validity owing to a change of circumstances has been recognized, with respect to State laws, in several rate cases ..... Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life

Notes

70 (contd.)
of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."

See: Ex parte Siebefsky, 273 Fed. 694, 696.

William H. Rose
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