GERMAN REARMAMENT AND UNITED STATES TREATY RIGHTS

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A RECENT Press Release¹ issued by the Department of State takes the position that the rearming of Germany is a violation of the Treaty of Berlin² in that it deprives the United States of one of the

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1. Department of State, Press Release, Saturday, September 22, 1934: Weekly Issue No. 260, Publication No. 641. The first item is captioned "Exportation of Arms and Munitions to Germany" (released September 18). The release reprints a letter written September 11, 1933, to an aircraft company which had inquired whether it was permissible to sell and export to Germany an airplane for police use. This letter sets forth:

1) "Article 170 of the Treaty of Versailles, TREATY OF PEACE (1919) 66, reads [in part] as follows:

" 'Importation into Germany of arms, munitions and war material of every kind shall be strictly prohibited.'

2) "Art. I of the Treaty between the United States and Germany Restoring Friendly Relations, [U. S. TREATY SER., No. 658 (1921)], reads as follows:

" 'Germany undertakes to accord to the United States, and the United States shall have, and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.'

3) "Article II of the same Treaty reads in part as follows:

" 'With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties: (1) that the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.'

4) "Article 170 of the Treaty of Versailles is included in Part V referred to in Article II, quoted above. Violation of that Article would constitute, therefore, not only a violation of Germany's obligations to the other parties to the Treaty of Versailles, but also a violation of its Treaty obligations to the United States.

5) " 'As Germany accepted the decisions of the Conference of Ambassadors', embodied in a letter of August 21, 1926, addressed to the Secretary General of the League of Nations, that Article 198 of the Treaty of Versailles (likewise embodied in Part V) should be understood, in part, as meaning, 'The police may not possess aircraft.'

6) "This Government [the United States], under the provisions of Articles I and II of the Treaty . . . [of Berlin] . . . enjoys all the advantages stipulated in Articles 170 and 198, the importation of military aircraft into Germany or the possession or use of aircraft by the German police would constitute a violation of the treaty rights of this Government."

(Signed) Cordell Hull

2. Text in 61 CONG. REC. 5769 (1921); 42 STAT. 1939 (1921). The relevant provisions of the Treaty of Versailles are added to the text in SEN. DOC. No. 70, 67th Cong. 1st Sess., Ser. No. 7927 (1921); and in U. S. TREATY SER., No. 658 (1922). The official title of the

"rights and advantages stipulated for the benefit of the United States" in the Treaty of Versailles.³ Still more recently the announcement by the German Government of its intention to restore conscription has been urged by a section of the American press as a violation of the Treaty of Berlin and a basis for an American protest, if not more definite action.

It is true that the Treaty of Berlin specifically mentions and by reference incorporates certain sections of the Treaty of Versailles, including Part V (the military clauses), as a reservoir from which rights and advantages deemed of benefit to the United States or its citizens, might be claimed;⁴ but the suggestion for the first time publicly advanced at this late date that we deemed the continued disarmament of Germany to be included among the rights and advantages to which we laid claim seems startling, perhaps even dangerous; for the assertion of a right carries with it the implication that action may be taken to enforce it. It is, therefore, pertinent to examine the circumstances which led up to the conclusion of the Treaty of Berlin in the form in which it was cast and to inquire whether its literal text, its interpretation at the time its ratification was assented to, or a construction thereof according to the principles of international law justify the conclusion reached by the State Department Press Release and by the interventionist press.

Chronology of Events leading up to the Treaty of Berlin

Consent to the ratification of the Treaty of Versailles was refused by the Senate of the United States by a vote of 53-38 on November 19, 1919.⁵ A final attempt to pass the Treaty, amended by the so-called Lodge reservations, also failed to secure the necessary two-thirds majori-

treaty is "Treaty between the United States and Germany Restoring Friendly Relations"; in this article it is referred to as the Treaty of Berlin.

3. Treaty of Berlin, art. II, 42 STAT. 1943 (1921).

4. Treaty of Berlin: "Article I. Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States.

"Article II. With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties: (1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

"The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions." 42 STAT. 1942-3 (1921).

5. 58 CONG. REC. 8803 (1919).

ty.⁶ Towards the end of 1919 Senators Lodge and Knox introduced several resolutions⁷ simply stating that the war was over or that peace again existed between the United States and Germany, but these were never taken up by the Senate. Finally, on April 1, 1920, Representative Porter introduced a Joint Resolution terminating the state of war.⁸ After amendment by the Senate,⁹ it was passed by both bodies¹⁰ but was rejected by President Wilson, whose veto failed to be overridden, but only by a handful of votes in the House.¹¹ Thus, the United States was forced to remain in a technical state of war with Germany and await the action of the incoming Republican administration. On April 12, 1921, President Harding took up the subject in a message to Congress.¹² The next day a Joint Resolution was introduced in the Senate¹³ and, after some minor differences had been adjusted, passed by both Houses¹⁴ and approved by the President on July 2, 1921. "Its effect," according to the only authority who appears to have written on the subject,

"was not only to give statutory recognition to the state of peace already actually existent but also to assert large claims on behalf of the United States and its nationals as against Germany and Austria-Hungary. In so far, it implicitly appeared to delimit the conditions under which negotiations should be undertaken with those States. . . ."¹⁵

Such a unilateral declaration was, however, deemed insufficient for the resumption of diplomatic relations with Germany. Therefore, a treaty was negotiated at Berlin by an American Commissioner, Mr. Ellis Loring Dresel, and the German Government. This treaty, which incorporated sections of the Knox Resolution in its preamble, was signed on August 25, 1921. It was submitted to the Senate on September 24th by the Chairman of the Foreign Relations Committee, with two reservations added by that Committee, and after lengthy debate, during which various amendments which will be discussed hereafter were rejected, was consented to on October 18, 1921, by a vote of 66 to 20.¹⁶ Ratifications were exchanged on November 11, 1921, and thus the treaty took effect just three years after the cessation of hostilities.

6. 59 CONG. REC. 4599 (1920).

7. See, for instance, 59 CONG. REC. 544 (Dec. 13, 1919).

8. 59 CONG. REC. 5129 (1920).

9. *Id.* at 6566, (May 5, 1920).

10. Passed Senate May 15, 1920, 59 CONG. REC. 7102, 7681; passed House May 21, 1920, 59 CONG. REC. 7429.

11. The vote, on May 28, was 220-152 in favor of the resolution. 59 CONG. REC. 7809.

12. 67 CONG. REC. 173 (1921).

13. *Id.* at 188 (1921).

14. Passed House June 30, 1921, 61 CONG. REC. 3261; passed Senate July 1, 1921, 61 CONG. REC. 3299. Text *ibid.* and in 42 STAT. 105 (1921).

15. Yntema, *The Treaties with Germany and Compensation for War Damage* (1923) 23 COL. L. REV. 511, 512.

16. 61 CONG. REC. 6438, 7194 (1921).

Examination of the Text

Insamuch as the primary reason for the Senate's rejection of the Versailles Treaty was an aversion to our joining the League of Nations and as this position seemed to have the support of the country, it is not surprising to find that any connection with the League was repudiated by Article II, Section 2 of the Treaty of Berlin.¹⁷ Section 3 excludes such other parts of the Versailles Treaty as were thought to hold within them either the danger of foreign entanglements¹⁸ or a subordination of internal American affairs to League interference.¹⁹ On the other hand, the United States wished to reserve "all rights, privileges, indemnities, reparations, or advantages" which were stipulated for its benefit under the Treaty of Versailles; and therefore, in Article II, Section 1, it apparently lumped together substantially all the remaining parts of the Versailles Treaty,²⁰ mentioning, among others, Part V, which deals with the disarmament of Germany, and with which the State Department Press Release is concerned. The desire effectively to guard material claims is further evidenced by Article II, Section 4, of the Treaty of Berlin, which emphasizes and reserves this country's privilege to participate in the Reparation Commission, if it elects to do so, and by Section 5, which refers to that Article of the Treaty of Versailles which deals with prize courts.

It may be asked why the omnibus section of the Treaty of Berlin made mention of Part V of the Treaty of Versailles if that Part did not set forth any "rights, privileges," and so forth, stipulated for the benefit of the United States. The answer is to be found in the lack of precision with which the Treaty was apparently drafted, and possibly also in the desire not to narrow the reservoir from which tangible benefits might

17. Part I of the Treaty of Versailles is the Covenant of the League of Nations.

18. The captions of the excluded parts are: II, Boundaries of Germany; III, Political Clauses for Europe; IV, § 2, China; § 3, Siam; § 4, Liberia; § 5, Morocco; § 6, Egypt; § 7, Turkey and Bulgaria; § 8, Shantung.

19. Part XIII covered Labor: membership in the League of Nations was a condition precedent to membership in the body envisaged for the execution of the provisions of this Part; and the International Labor Office, to be set up under this Part, was stated to be a part of the organization of the League. (Art. 392).

20. That is, all the parts not excluded by Article II, Sections 2 and 3. The captions of the incorporated parts are: IV, § 1, German Colonies; V, Military, Naval and Air Clauses; VI, Prisoners of War and Graves; VIII, Reparation; IX, Financial Clauses; X, Economic Clauses; XI, Aerial Navigation; XII, Ports, Waterways, and Railways; XIV, Guarantees; XV, Miscellaneous. Part VII is not mentioned in the Berlin Treaty at all, presumably because it had become a dead letter by the time this Treaty was negotiated; it is captioned "Penalties" and contains the "war criminals" clauses. The first of these dealt with the trial of the Ex-Emperor William II. In January, 1920, the Dutch Government had refused the Allies' demand for his surrender and later rejected a second demand with the assurance that precautions would be taken to guard the exile; with this understanding the Allies declared themselves content. N. Y. Times, Jan. 23, 1920, at 1, col. 3; *id.* March 6, 1920, at 3, col. 2; *id.* March 31, 1920, at 1, col. 4.

be claimed. That the language of the Treaty does lack precision is well illustrated by the fact that, although it expressly excludes Part III of the Treaty of Versailles, which is the part that contains Article 42, providing that Germany is forbidden "to maintain or construct any fortifications" in certain areas near the Rhine, it nevertheless mentions Part V, in which is found Article 180 stipulating that fortifications maintained in the same area be dismantled and disarmed. Is it reasonable to suppose that the drafters intended to make the military stipulations of Part V any more binding than the disavowed provisions of Part III?²¹ Further evidence of the fact that reference to Part V was inserted as a result of careless draftsmanship may be found in the fact that, although the primary purpose of the Treaty of Berlin was to conclude a peace settlement from which should be excluded all reference to or entanglement with the League of Nations, Part V contains the following references to the League:

Article 164. Up till the time at which Germany is admitted as a member of the League of Nations the German Army must not possess an armament greater than the amounts filed in Table No. II . . .

Germany agrees that after she has become a member of the League of Nations the armaments fixed in the said Table shall remain in force until they are modified by the Council of the League. Furthermore she hereby agrees strictly to observe the decisions of the Council of the League on this subject.

Article 213. So long as the present Treaty remains in force, Germany undertakes to give every facility for any investigation which the Council of the League of Nations, acting if need be by a majority vote, may consider necessary.²²

These provisions fill the Treaty of Berlin with inexplicable inconsistencies if German disarmament is to be regarded as a "right, privilege, indemnity, reparation or advantage" stipulated for our benefit. Under Article 164 Germany may increase her armaments with the consent of the Council of the League. But Article II, Section 2, of the Treaty of Berlin stipulates that this country shall not be bound, unless it expressly gives its assent, by any action taken by the League, the Council or the Assembly. Thus, if we were to refuse our assent to a decision of the Council made under Article 164, which Germany, be it noted, agrees strictly to observe, we should under the logic of the Press Release reach the result that Germany would be violating the treaty rights of this government, but not those of the signatories of the Versailles pact. Since this is obviously absurd, it must be assumed that, as far as Article 164

21. Other similar instances in which "the Treaty of Berlin ignores the essential relations between the parts of the Treaty of Versailles which it accepts and which it rejects" have been pointed out in COUNCIL ON FOREIGN RELATIONS, SURVEY OF AMERICAN FOREIGN RELATIONS (1928) 468.

22. TREATY OF VERSAILLES (June 28, 1919) 64, 77.

is concerned, it was our intention always to assent to any decisions taken thereunder, decisions which would affect primarily, if not almost exclusively, European political questions. Yet this is improbable inasmuch as the principal purpose of signing a separate treaty with Germany was to keep our skirts clear of the League of Nations, especially in so far as it might tend to entangle us in European political affairs. Article 213, above quoted, impliedly leaves the determination of Germany's continued compliance with the disarmament clauses under the control of a bare majority of the Council. The League is, therefore, constituted the permanent agency to enforce the provisions of Part V. If we consider the disarmament clauses a "right" or "advantage" stipulated for the benefit of this country, we are bound by our separate treaty to avail ourselves thereof "in a manner consistent with the rights accorded to Germany under such provisions."²³ The only supervisory agency to whose investigation Germany, after acquiring League membership, has agreed to submit her armaments is the Council. Therefore, should we desire to assert our "right" and to investigate the actual state of Germany's military, naval and air forces at any time, Germany can insist that only the Council can do so. For the reasons already stated, it is inconceivable that we intended to subject to the control and discretion of the League in this manner any rights which we meant to claim.

Article 213 of Part V also stipulated that the disarmament clauses "for the execution of which a time-limit is prescribed, shall be executed by Germany under the control of Inter-Allied Commissions specially appointed for this purpose by the Principal Allied and Associated Powers." As American representation on these commissions is thus expressly provided for, it must, if the recent view of the State Department is correct, have been one of the "rights and advantages stipulated for the benefit of the United States." And yet no American, as will be brought out later, has ever sat on any of these Inter-Allied bodies.

Genesis of the Treaty and Contemporary Interpretations

In order to ascertain what the Senate of the United States understood the inclusion of Part V to signify at the time when it consented to the ratification of the Treaty of Berlin, it will be necessary to summarize authoritative opinions expressed during the post-war efforts at peace-making.

Secretary Lansing has stated that of all the American delegates at the Paris Peace Conference only President Wilson favored including in the Covenant of the League of Nations, which was incorporated as Part I of the Treaty of Versailles, an "affirmative guaranty," that is, one involving the contemplated use of force in making good the guar-

23. Treaty of Berlin, art. II, § 1, par. 2, 42 STAT. 1943 (1921).

anty of the sovereign rights of the members of the League.²⁴ Mr. Lansing, believing that such a provision was "entirely out of harmony with American ideals, policies and traditions"²⁵ vainly endeavored to persuade the President to substitute a negative covenant which amounted to a mere promise of "hands-off."²⁶ But Mr. Wilson insisted upon writing his version into Article 10 of the Covenant, the article which was the chief cause for the Senate's rejection of the Versailles Treaty.

The antipathy with which Article 10 was regarded by the Senate during the post-war period was well expressed by Senator Lodge, who was Chairman of the Foreign Relations Committee when it later reported out the Treaty of Berlin. Speaking of the proposed League in February of 1919, he said:

"In the main our share in any league must be almost wholly for the benefit of others. We have the right, therefore, to demand that there shall be nothing in any agreement for the maintenance of the world's peace which is likely to produce new causes of difference and dissension . . . or put us in a position where we may be forced to serve the ambitions of others. There is no gain for peace in the Americas to be found by annexing the Americas to the European system."²⁷

And Senator Knox, who, as we shall see, was largely responsible for the basic formula underlying the Treaty of Berlin, objected to the proposed League on the ground that it carried within it the seed of future war.²⁸

It seems clear that the objections made to Article 10 must, in the minds of those who ratified the Treaty of Berlin, have applied with equal force to a policy which proclaimed the continued disarmament of Germany a concern of our government. However, the conflict of opinion in the Senate regarding the Versailles Treaty raged to such an extent around Part I, the Covenant of the League of Nations, that the remaining sections, such as Part V, received scant attention.²⁹ Nor did the Porter Resolution,⁸ by which Congress subsequently attempted to make peace, indicate any tendency to regard the continued disarmament of Germany as a benefit accruing to the United States. Members of the House generally were aware of the fact that this resolution had been drafted by Senator Knox;³⁰ in fact, Cordell Hull, then a representative from Tennessee, read a "recent resolution" by Senator Knox,³¹ which, he

24. LANSING, *THE PEACE NEGOTIATIONS* (1921) 124.

25. *Id.* at 82.

26. *Id.* at 167.

29. LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* (1925) 373.

30. See statement of Representative Fields, 59 CONG. REC. 6457 (April 21, 1920).

31. The reference is apparently to the resolution introduced by Senator Knox on December 13, 1919, and reported out by the Foreign Relations Committee, in the form cited by Mr. Hull, on December 20, 1919. 59 CONG. REC. 544 (1919).

27. 57 CONG. REC. 4527 (1919).

28. *Id.* at 4528 (1919).

stated, was the pattern for the Porter Resolution. This early Knox resolution contained the following passage:

"That unless the German Government notifies the Government of the United States that it acquiesces in and confirms irrevocably to the United States all undertakings and covenants contained in the Treaty of Versailles conferring upon or assuring to the United States or its nationals any rights, powers, or benefits whatsoever, and concedes to the United States all rights, privileges, indemnities, reparations and advantages to which the United States would have been entitled if it were a ratifying party to said treaty, the President of the United States shall have power, by proclamation, to prohibit commercial intercourse between the United States and Germany, and the making of loans, or credits, and the furnishing of financial assistance or supplies to the German Government, or the inhabitants of Germany, directly or indirectly, by the Government of the United States or the inhabitants of the United States."³²

Mr. Hull was undoubtedly correct in asserting that Senator Knox was the father of the resolution wherein occurs for the first time the phrase "all rights, privileges, indemnities, reparations and advantages to which the United States would have been entitled" had it ratified the Versailles Treaty. And this phrase was carried practically verbatim into the Porter Resolution, the final version of which declared:

"That until by treaty or act or joint resolution of Congress it shall be determined otherwise, the United States, although it has not ratified the Treaty of Versailles, does not waive any of the rights, privileges, indemnities, reparations or advantages to which it and its nationals have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof or which under the Treaty of Versailles have been stipulated for its benefit as one of the principal allied and associated powers and to which it is entitled."³³

Senator Knox's interpretation of what these rights, and so forth, were is, therefore, of primary importance. He gave it at some length when the Porter Resolution reached the Senate. But before considering his view, let us set forth the opinions expressed in the House, so that a chronological presentation may be made of all the utterances in Congress which tend to throw any light upon contemporary congressional interpretation of the Treaty of Berlin and its precursors.

Those members of the House who spoke in favor of the Porter Resolution considered American rights carefully safeguarded, believing that there was no danger of any loss on account of the operations of the Alien Property Custodian or under the Trading With the Enemy Act,³⁴ or stating that the recognition of our rights under the Versailles Treaty was desirable for the welfare of the United States and its citizens because

32. Id. at 960.

33. Id. at 6493.

34. Representative Huddleston, in id. at 5351 (April 8, 1920).

they would pave the way toward a settling of business conditions and toward the resumption of unhampered trade.³⁵ As one of its opponents Mr. Hull stated:

"I can scarcely conceive of a more dishonorable attitude before the world than that in which this resolution would place the United States Government and the American people. It places us in the attitude of rejecting the treaty negotiated at Versailles and signed by Germany and all our allied Governments, but at the same time demanding of the German Government that it shall comply with the terms of the treaty in so far as they bestow benefits upon the United States and its citizens. It would be impossible to express or imagine the amazement, hatred, contempt, and ridicule with which the allied governments and enlightened nations of the world over would view our Government and our people if this resolution should be passed . . . And yet this is precisely the pusillanimous proposal that would be made to Germany after deserting our allies . . ."³⁶

It is difficult to conceive that Mr. Hull could have viewed the Porter Resolution as a "pusillanimous proposal" by which we would have been "deserting our allies", if he had interpreted it as contemplating American insistence upon Germany's continued compliance with the military clauses of the Versailles Treaty. It would therefore appear that the disarmament of Germany, which the Department of State some fourteen years later was to consider a treaty right, was not regarded by Mr. Hull in 1920 as one of the "benefits bestowed upon this country and its citizens by the Treaty of Versailles", and reserved to us by provisions of the sort contained in the Porter Resolution which he was then attacking. Certain it is that his Democratic colleagues in the House opposed the Resolution solely because in their opinion it failed to protect wholly material interests such as the American title to the seized German ships and to the funds in the hands of the Alien Property Custodian, the costs of the Army of Occupation, the payment of claims arising out of the sinking of the "Lusitania" and other pecuniary claims, the provisions in favor of manufactures and commerce stipulated in Article 274 of the Versailles Treaty, the question of private property rights and interests in the enemy countries, matters pertaining to contracts of various kinds, negotiable instruments and fire, life, and marine insurance, all of which were covered in Part X of the Versailles Treaty, and other material rights and benefits of a kindred nature.³⁷ Only one representative, Mr. Ayres of Kansas, referred to any section of Part V, and then to Article 173, providing for the abolition of universal compulsory military service in Germany, in his list of rights which this country had under the Treaty

35. Representative Rogers, in *id.* at 5361 (April 8, 1920).

36. *Id.* at 5412 (April 9, 1920).

37. See, for example, the remarks of Representatives Linthicum, Flood and Ferris at 59 CONG. REC. 5348, 5871, and 6227, respectively.

of Versailles; and, since the next example that he cited was the war criminals clause, which even at that early date had become a practical nullity,³⁸ his observations do not seem entitled to great weight. The minority report from the House Committee of Foreign Affairs, which accompanied the Resolution to the Senate, did not embody Mr. Ayres' objection; it dealt exclusively with financial and material rights or interests and expressed the same fears mentioned with regard to their insufficient protection under the Resolution, especially since it made no provision for the renunciation by Germany of the Prussian-American Treaties of 1785 and 1828 which, in case of war, gave the merchants of either country the right of free departure with all their property.³⁹

It was possibly for the purpose of meeting these latter objections that the Senate amended the Porter Resolution so that, in addition to certain changes not here material, it was made to contain a long proviso expressly stipulating for the retention of the Alien Property Custodian funds until Germany had made suitable provision for the satisfaction of all claims of American nationals, the guarantee of most favored nation treatment, the confirmation of all fines and forfeitures imposed by the United States during the war, and the waiving of German pecuniary claims, "any existing treaty between the United States and Germany to the contrary notwithstanding."⁴⁰

Senator Knox, who evidently regarded this proviso as a concrete sanction for the "rights, privileges, indemnities, reparations [and] advantages" referred to in the section to which it was appended,³³ stated that it had been drafted to secure those rights which the United States had a "right to expect and demand." Since Knox was, as we have seen, the father of the Porter Resolution, his remarks on this point are cited in full as affording the best evidence of what these contemplated rights were:

"By the treaty [of Versailles] we became, as one of the principal allied and associated powers, with our associates co-owners of the following property, rights, and privileges: A part of German territory in Europe and all of Germany's territorial overseas possessions; of parts of Schleswig in trust for Germany or Denmark; of all the German national property, imperial and state, and the private property of the ex-Emperor and other royal personages, without compensation for that in the colonies, with compensation for that in Memel; of the public utilities in areas ceded to the principal allied and associated powers; of all German cables, reaching all over the world; of practically all German merchant marine shipping and of certain portions of her inland ship-

38. No Germans were ever handed over to the Allies under the provisions of this article. An agreement whereby a certain number were to be tried by the German Supreme Court was concluded shortly after this debate took place.

39. 59 CONG. REC. 6491 (May 4, 1920). On this subject see also the remarks of Senator McCumber. *Id.* at 6855 (May 11, 1920).

40. *Id.* at 6492.

ping; of bonds in the total fixed amount of 100,000,000,000 gold marks, and of a commitment for an indefinite further issue; of certain amounts of gold specified; of German claims against Austria, Hungary, Bulgaria, and Turkey; of a maximum of 200,000 tons of shipping per year to be built by Germany; and as single owner in our own right of all American securities, certificates, deeds, or other documents of title, including shares of stock, debentures, debenture stocks, or other obligations of any company incorporated in accordance with our laws, as also all materials, and so forth, which may have been taken from our citizens during the war.

"By this same treaty our citizens became the beneficiaries, fully and completely, with the nationals of other allied and associated powers, *of restrictions accepted, grants made, and obligations incurred by Germany with reference to her external commerce* in the matter of duties, charges, and commerce restrictions, reciprocity treaties, customs provisions, shipping, freedom of transit, free zones, the internationalization of her great internal waterways, railway transit, and the Kiel canal. We are likewise the beneficiary of the principle accepted by Germany that Germany is responsible for herself and for her allies for all loss and damage to which the allied and associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies, and this includes—under the broad wording of the provision—not alone the loss and damage resulting from the operation of Germany and her allies, but loss suffered as the result of the allied and associated powers.

* * *

"While not now waiving our rights to all the foregoing, *ultimately we want, sir, only those parts which will provide for the compensation of our citizens for the losses they suffered because of the war, and those parts which will assure them equality of treatment with the nationals of the most favored nation in all matters pertaining to residence, business, profession, trade, navigation, and commerce.* It is to secure these, which we have a right to expect and demand, that the proviso of the resolution before us is drafted."⁴¹

It is clear that the rights which Senator Knox had in mind comprised only the reimbursement for past losses suffered by, and the securing of future commercial benefits for the United States and its citizens. Not even the most liberal construction can read into his remarks any reference to Part V of the Versailles Treaty, and certainly none to the disarmament of Germany.

When the Democratic administration yielded place to a Republican administration, the aversion of the American government toward involvement in European affairs was, if anything, increased. In his message to Congress of April 12, 1921, President Harding declared that, although account had to be taken of the fact that our interests had been woven into the Versailles settlement in such a way that it could not be ignored in a separate treaty of peace, he nevertheless proposed accepting the confirmation of our rights and interests as provided for in that treaty

41. *Id.* at 6565 (May 5, 1920). (Italics ours).

only on the assumption that this could be accomplished "by such explicit reservations and modifications as will secure our absolute freedom from inadvisable commitments." Furthermore, he proclaimed, "Helpfulness does not mean entanglement, and participation in economic adjustments does not mean sponsorship for treaty commitments which do not concern us, and in which we will have no part."⁴²

At the President's suggestion, Senator Knox introduced what is now known as the Joint Resolution, which, as has been stated, was passed by both Houses¹⁴ and approved by President Harding. Of the two sections which were later incorporated in the Preamble of the Treaty of Berlin the first reads as follows:

"Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by any Act or Acts of Congress; or otherwise."⁴³

The other section follows the wording of the proviso added to the Porter Resolution discussed above, with but minor alterations occasioned by the inclusion of claims against Austria-Hungary.

The debate on this resolution yields a little more specific information as to the attitude of Congress regarding foreign entanglements and regarding the question of German disarmament itself. Senator King was the first to shed light on the problem. In opposing the resolution he stated:

"The position of the supporters of the Knox resolution is that when the armistice was signed we had no further business in Europe, whether or not . . . the defeated powers (were) compelled to sign a treaty and execute its terms were no concern of this Government."⁴⁴

And, most significantly, Senator Nelson objected to the resolution in the following terms:

"By this resolution we insist upon full reparation for ourselves, but are wholly oblivious as to whether our allies . . . secure any reparation at all. We are also by this resolution wholly oblivious to the disarmament of Germany—a matter most vital to the future peace of the world. . . . Under this peace resolution we have no ground for insisting on the removal of this menace."⁴⁵

The Senators who favored the resolution, including certain Demo-

42. 61 CONG. REC. 173 (1921).

43. 42 STAT. 1940 (1921).

44. 61 CONG. REC. 8327 (April 30, 1921).

45. *Id.* at 748 (April 28, 1921).

crats, were wholly desirous of freeing this country from Wilsonian treaty commitments. Senator Shields, after agreeing with a previous speaker that the Covenant of the League had been the issue in the 1920 election and that it had been overwhelmingly rejected, expressed the opinion that it was so intertwined with the Versailles Treaty that it was impossible to execute the latter without the League of Nations.

"Thus the infirmities of the Covenant of the League of Nations," he continued, "affect the treaty to such an extent and so inextricably as to make the document, the treaty proper, hopelessly and incurably bad, and the only possible thing to do *is to scrap the entire document*, in my opinion. As to the apprehension that the resolution will have that effect, *I have understood that that is the object of it*, and that is why I am going to vote for it."⁴⁶

Senator Lodge, the Republican leader in the Senate, agreed that that was his understanding, also.⁴⁷

In the House, Representative Huddleston, another Democrat, again supported the endeavor to make a peace not involving "chronic intermeddling." He asserted, speaking of the Treaty of Versailles,

"Few or none of its provisions are for our benefit; they relate in chief to reparations for Britain and France and to international boundaries—to European balances of power and to a multitude of delicate questions in which we have no interest. The treaty carries the seed of a hundred wars."⁴⁸

Representative Fish, in supporting the resolution, plainly voiced the Congressional sentiment against the United States undertaking to enforce the disarmament of Germany.⁴⁹

Why, then, in the face of the sentiments of members of both Houses, and in the face of the surge of anti-entanglement feeling which swept the Republican party into power in 1920, did the Treaty of Berlin incorporate by reference that part of the Versailles Treaty which deals with German disarmament? The excerpts thus far quoted, *which have omitted no mention of any opinion considering such disarmament a concern of the United States*, seem to substantiate the surmise hazarded in the discussion of the text of the treaty, to wit, that after the exclusion of all parts of the Versailles Treaty which were thought to contain the danger of future European entanglements, American rights under all the remaining parts were claimed and these apparently innocuous parts were lumped together in Article II, Section 1 of the Berlin Treaty.

The administration sought to comply with the Knox resolution to such an extent that it even incorporated parts of it in the Treaty of Berlin. When the German Government requested a more specific definition of the rights, privileges and so forth reserved by the United States, it is understood that the American Commissioner, Mr. Dresel, did little to

46. Id. at 838 (April 30, 1921). (Italics ours).

47. Ibid.

48. Id. at 2455 (June 11, 1921).

49. Id. at 2459 (June 11, 1921).

clarify the situation, merely stating that it was the intention of Congress that America and its citizens should not be at any disadvantage as compared with its co-belligerents.

The same perplexity which worried the German Government was felt by certain members of the Foreign Relations Committee. When the Treaty was submitted to the Senate for ratification, Senator Borah, for example, observed:

"I do not believe that it is possible for any lawyer, trained though he is in the analysis of legal instruments, to tell the American people what our rights would be under the treaty. I know that I have not been informed of them, and I think one of the ablest lawyers in the United States was before the committee . . .

"Suppose France is not satisfied with Germany's demobilization and insists that other beneficiaries of the treaty help to enforce this provision of the treaty; what position would we be in under this treaty? I venture to say that no man can define what our position would be. Technically we could refuse, but practically we could not ignore her request.

"Under section 170 [of Part V] we have importation of arms, munitions and war materials of every kind prohibited. Suppose some of the beneficiaries of the treaty should insist on enforcement of this provision; what would be our position towards France and England under this treaty? We claim certain rights and privileges. Those dovetail into these numerous conditions of Part V."⁵⁰

From the last two sentences it would appear that Senator Borah regarded Part V as containing, not rights and privileges, but rather only onerous "conditions" correlative to the rights and privileges set forth in other parts of the Versailles Treaty. He was apparently apprehensive that reference to the Treaty of Versailles would make it appear that all the rights, privileges, indemnities, reparations and advantages thus reserved were being secured to us by virtue of the activities of the Allies in crippling Germany militarily and that from this would arise a moral obligation to cooperate in enforcing the military clauses of Part V. The same concern was expressed by several other Senators, like Watson⁵¹ and La Follette,⁵² who feared that the United States might be called upon to enforce these clauses not for our own benefit, but for the political advantage of certain European Powers.

Senator Moses, an important factor in the drafting of the Treaty of Berlin, sought to allay such fears by saying:

"We have asked nothing beyond the restoration of certain rights belonging to us by international law and freely accorded to us in the prior days of peace and mere recompense for the actual monetary cost of maintaining our portion of the army of occupation in Germany since the signing of the armistice nearly

50. *Id.* at 5776 (Sept. 24, 1921).

51. *Id.* at 6379.

52. *Id.* at 6436 (Oct. 18, 1921).

three years ago. To these should perhaps be added our natural desire to safeguard ourselves against an adverse application of mandatory provisions in lands to which we hold an undivided fifth interest in fee, and the claims not yet formulated for reparation to be accorded to our destroyed or damaged shipping, or to our nationals, who in one way or another directly suffered as a consequence of the operations of war.

"None of these, however, is a problem which necessarily brings us in contact with any of the machinery which the treaty of Versailles sets up; one of them, indeed, has already been provided for by the armistice. None of them may not be settled by direct negotiation and without recourse to any entanglement which one group of opponents of this instrument says we cannot avoid and which another group of its opponents says we are cravenly seeking to evade; and none of them has any point of contact with the nebulous jurisdiction of the League of Nations.

". . . having freed ourselves from the onerous obligations and implications which its (the Treaty of Versailles') involved articles contain, I can see no reason why an irreconcilable should withhold his assent to its ratification.

" . . . This treaty . . . contains all that the American people sought when the war ended, all that they indorsed in the last election, all that any of us hoped to attain when we took our stand in opposition to the treaty of Versailles, *and all that Congress had in mind when adopting the Knox resolution, which was this treaty's forerunner.*"⁵³

Senator Kellogg, on the other hand, seemed to interpret the Treaty in the sense recently advanced by the State Department and the public press. Mr. Kellogg's remarks on the point follow:

"Take Part V of the Versailles Treaty. By this treaty we also accept the rights and advantages stipulated for the benefit of the United States of the Versailles Treaty. Part V provides for . . . [summarizing the provisions]

"We carried on the war, at great sacrifice of life and of money, in order that Germany might not again imperil the peace of the world. Are we not interested in her disarmament? Is there any reason why we should not take the benefits to us of disarming Germany so that she may not again inflict such a calamity upon the world?"⁵⁴

Even this language, however, is sufficiently ambiguous to leave room for considerable speculation whether Senator Kellogg was really maintaining that the disarmament of Germany in which we were "interested" was a "right, privilege, indemnity, reparation, or advantage" within the terms of the Knox-Porter Resolution. If he was, only Senator Pomerene seems to have shared that view.⁵⁵

53. Id. at 6059-60 (Oct. 5, 1921) (Italics ours).

54. Id. at 5861 (Sept. 28, 1921).

55. Later in the debate, on October 18th, Senator Pomerene also inquired whether we were not "interested" in the stipulations of Part V. He picked a number of examples, at least two of which must be regarded as unfortunate choices if he wished to make the point that their observance was to be considered as among our treaty rights. One was the disarmament and dismantling of the fortifications near the Rhine which, as pointed out in the text, was a provision which we rejected when we excluded Part III. The other, in

It is true that certain Democratic Senators, Walsh of Montana and Hitchcock,⁵⁶ in attacking the Treaty of Berlin, construed the inclusion of Part V in a somewhat similar manner, although reaching conclusions widely different from those of Mr. Kellogg. Senator Walsh remarked,

"Part V of the treaty of Versailles deals with the disarmament of Germany. Its provisions are intended to make and to keep her militarily impotent. There is therein no reference to any 'rights' or 'advantages' or 'privileges' accruing to the United States except the 'right' or 'privilege' to have Germany no longer a menace to the peace of the world. The subject of indemnities and reparations is dealt with in an entirely separate part of the treaty of Versailles, and there is nothing in Part V referring either generally to that subject, or according to the United States, either indemnity or reparation."⁵⁷

In other words, Senator Walsh spelled out the "right," one would judge, merely because he felt that the inclusion of Part V in the Berlin Treaty must mean that it contained within it, because of the context, some right or advantage stipulated for the benefit of the United States. Having said this, he examined in great detail the full extent to which Part V disarmed the vanquished nation to the end that peace might prevail and argued that it was, "evidently the theory of this treaty that the United States is concerned in maintaining the peace of Europe, . . ."⁵⁷

But it must be remembered that Senator Walsh, a strong supporter of Wilson's pro-League policy, could undoubtedly be relied upon to adopt and point out any interpretation of the Treaty which might tend to force his opponents, the isolationists, into the inconsistent position of advocating intervention in European affairs. Moreover, the Senator used language which indicated that he really regarded Part V as imposing disabilities on Germany and not privileges on the United States, for he said:

"Unlike some other divisions of the treaty which deal with many matters in which the United States has no interest, at least no appreciable interest, but contain some stipulations out of which some right, privilege, or advantage accrues or may accrue to the United States, Part V is devoted exclusively to the disarmament of Germany and to the means of preventing her recrudescence as a military power."⁵⁷

And finally, he indicated plainly that he construed the military clauses as placing heavy responsibilities rather than conferring beneficial rights upon the United States. Was this country, he inquired,

"prepared to assume the responsibility of such a treaty with Germany? . . . Suppose that Germany should flagrantly disregard the covenants she will have entered into with us should this treaty become effective; . . . are the people

which we certainly evinced none of the "interest" which the Senator assumed, was Article 203 dealing with the Inter-Allied Commissions of Control, on which the United States has not at any time been represented. See *infra*, note 85.

56. 61 CONG. REC. 6366 (Oct. 17, 1921).

57. *Id.* at 6248-9, 6250, 6251 (Oct. 12, 1921).

of the United States prepared to undertake to coerce her into abandonment of such a policy? . . .

"It will not do to say we take only such advantages as accrue to us under the Versailles treaty; we assume none of the responsibilities it imposes. In this instance, at least, we cannot escape the responsibility. Are we prepared to say to the other nations interested that we are ready to join them in keeping Germany in military impotence in accordance with the provisions of the treaties . . . ? Is it the purpose of those who stand sponsor for this treaty to commit the country to the renewal of the war with Germany should she disregard the provisions of the treaty under consideration, and less drastic procedure should prove unavailing, or is it expected, in the light of recent history, that she will hereafter scrupulously and conscientiously adhere to her treaty obligations, whatever course her view of her interest may dictate or suggest, so that neither complaint nor compulsion will be necessary?"⁵⁷

He continued by stating that such a covenant could not be harmonized with the avowed Republican policy against interference in European quarrels:

"Whatever remote or highly contingent interest we may have in the observance of those provisions of the treaty before us, they are primarily intended not for our protection but for the protection of the immediate neighbors of Germany . . .

"I repeat that the Senator who taunted his Republican colleagues with abandoning their contention of the wisdom of non-interference in European affairs is correct in the view he takes. The only difference between us is that he contends that we should not go in at all; I, that we do not go far enough . . ."⁵⁷

Senator Walsh then insisted that if we undertook to keep Germany in a state of inferiority in a military sense, we must assure a disarmed Germany from unprovoked attack, and offered an amendment to this effect.⁵⁸

". . . I do insist," he said, "that, unless we are prepared to join with other nations in giving Germany some assurance of protection against unprovoked invasion, we should leave to such other nations the obligation to see that she remains disarmed."⁵⁷

Thus by indirection he exposed as unfounded the dubious claim, advanced, if at all, only by Senators Kellogg and Pomerene, that a "right," "privilege" or "advantage" for this country might be discovered in Part V.

58. The amendment read: "In view of the undertaking of the Government of Germany, recited in Part V of the Treaty of Versailles, to disarm and to remain disarmed, except as therein set forth, the right and advantage accruing from which undertaking is by this treaty specifically reserved to the United States, it agrees that so long as Germany shall observe the obligations of the said Part V the United States will join with the signatories of the said treaty of Versailles in any steps that may be mutually agreed upon to protect from invasion the territory of Germany as by the said treaty of Versailles defined or as delineated thereunder." *Id.* at 6361 (Oct. 17, 1921).

In the course of the debate on the Walsh amendment Senator Borah interjected the following prophetic words:

" . . . It would seem to be entirely equitable, and, entirely honorable, if we are to disarm Germany and to insist upon her remaining disarmed, that we should protect Germany against invasion or interference on the part of other powers. I have no doubt, for the evidence accumulates every day . . . that the fundamental foreign policy of certain of the great nations of Europe is to disarm Germany and then to dismember Germany. It is perfectly apparent that they will not feel at ease until Germany is Balkanized and restored to the position which she held prior to the time when Bismarck united Germany in one great empire. I entertain no doubt that that is the policy, well grounded and intelligently conceived, and that it will be determinedly executed. Such a policy means economic ruin to Europe and turmoil and strife without end."⁵⁹

He went on to say, however, that as he was opposed to involving this country in European affairs, he could not vote for the Walsh amendment but concluded: "I would, however, very readily support an amendment to eliminate from the pending treaty the references to Part V of the Treaty of Versailles."⁵⁹

Senator Walsh agreed that if his amendment were not accepted he would move to strike out the reference to Part V.⁵⁹ Such a motion, however, was never made, although the Walsh amendment was snowed under by a vote of 71-6.⁶⁰ The Senator then offered another amendment obligating the United States to use its good offices to prevent an unjustifiable invasion of Germany. The administration Senators now took a hand in the debate. Senator Lenroot denied that Part V had been made a part of the pending treaty, asserting that the United States had merely been given the rights thereunder which it would have had as a signatory of the Versailles Treaty, to be exercised consistently with the rights accorded to Germany under that pact. When pressed by Senator King to state whether this meant that the United States would have to defend Germany if she were attacked, Mr. Lenroot gave a somewhat confused reply. Senator Lodge, the party leader, came to his colleague's support with the brief statement,⁶¹ "We are not bound to assume any of those rights or privileges. We are left entirely free." Surely the phrase "bound to assume" indicates clearly that Senator Lodge regarded the stipulations of Part V as a burden not a benefit. Not one of the Republican majority indicated that there was any intention that the United States should undertake such a task. No one bothered to make a real answer to the arguments of the Senators who sought to construe the Treaty of Berlin in this manner. Their contention was not taken seriously, as is perhaps best demonstrated by the fact that the second Walsh amendment, also, mustered only six votes.⁶²

59. *Id.* at 6362.60. *Id.* at 6364.61. *Id.* at 6365.62. *Id.* at 6367.

Senator Walsh was possibly right in contending that there would be a moral obligation on the part of the United States to come to Germany's aid in the case of an unprovoked attack upon her, if Part V meant to the United States what he argued. But the other Senators seem to have rejected his view of American rights and certainly of American obligations. The conclusion therefore seems inescapable that only a handful of Senators considered the disarmament of Germany one of the reserved rights or privileges. As a further piece of evidence, it is to be noted that Senator Walsh's argument is sound, that if we meant that the disarmament of Germany was vital to us, then we were interfering deeply in European affairs. But the Republican majority did not think of supporting such an entanglement; its whole policy and its appeal to the country had been directed against precisely that sort of thing. Therefore, Part V cannot have been regarded by them as an American "right" or "privilege." Furthermore, Senators Lenroot, Walsh, and Hitchcock seemed to believe that the reciprocity which Germany could claim implied an obligation to defend her in case of attack; but their view was not accepted. Under such circumstances and taking the debate as a whole, the inference is justified that the Senate rejected the suggestion that the United States would ever claim that German disarmament was a "right, privilege or advantage" reserved for its benefit.

Senator Reed of Missouri, after the Walsh amendments had been disposed of, expressed himself as shocked that a guaranty for the protection of Germany should ever have been offered on the floor of the Senate, but admitted the cogency of Walsh's arguments to the effect that the Treaty of Berlin made us a party to the controversies of the Old World and that thereby we obligated ourselves to join the Allies should they propose to enforce compliance by Germany of Part V. His amendment to the effect that the United States assumed no obligations under or with respect to the Versailles treaty was, however, defeated by a vote of 66-7.⁶³ Senators Reed and Walsh seem to have had in mind the very dangers to which the State Department's Press Release exposes the United States. Yet the heavy vote against their amendments must have meant that, in the minds of the majority, such dangers did not exist, and the treaty was no doubt ratified on that assumption.

Finally a word should be said about the second of the cautionary reservations added to the Treaty of Berlin by the Senate Foreign Relations Committee, which reads:

"Subject to the further understanding . . . that the rights and advantages which the United States is entitled to have and enjoy under this treaty embrace the rights and advantages of nationals of the United States specified in the joint resolution or in the provisions of the treaty of Versailles, to which this treaty refers."⁶⁴

63. *Id.* at 6382.64. *Id.* at 5771, 5772 (Sept. 24, 1921).

The Knox Resolution had included "nationals" but the word was omitted in Article II, Section 1, of the Berlin Treaty. Senator Pomerene, the sponsor of this reservation, explained that in the Knox Resolution

"... the fact that there were two classes of claims, one belonging to the Government, the other belonging to our nationals, such as the claims of our nationals arising out of the sinking of the *Lusitania*, the *Suffolk*, and a hundred or more other vessels.

"Now, when it comes to the drafting of the treaty between the United States and Germany we used simply the phrase 'the United States,' ignoring entirely the nationals. It seems to me that under the rules of legal construction, when we had before us the two classes of claims and in the contract or treaty of peace we only referred to one, certainly a very strong legal argument could be made to the effect that it was the intention of the draftsmen to exclude the other class."⁶⁴

It thus seems that even this Senator, who on the last day of the debate asserted that we were interested in Part V,⁶⁵ seems to have considered that the "rights, privileges, indemnities, reparations or advantages" which were to inure to our benefit were primarily claims for the reimbursement of public and private expenditures or losses occasioned by the war.

The Treaty Construed in Accordance with International Law

Such an interpretation of the five consecutive words "rights, privileges, indemnities, reparations, or advantages" is wholly in accord with one of the recognized principles of construction of all written instruments, namely, the principle of association in interpretation embodied in the maxim *noscitur a sociis*. The sense of particular words is often greatly influenced by their association with other words and clauses. Thus, they may import a conventional sense and have great scope when so used without restriction in the context, but be susceptible of widely different applications when rendered more specific by accompanying provisions expressive of a particular intention or limited application. The following examples are among those given in a leading treatise on the subject:⁶⁵

"The expression, for instance, of 'places of public resort' assumes a very different meaning when coupled with 'roads and streets' from that which it would have if the accompanying expression was 'houses'. In an enactment respecting houses 'for public refreshment, resort and entertainment,' the last word was understood to refer to, not a theatrical or musical or other similar performance, but something contributing to enjoyment of the 'refreshment'."

Similarly, the use of the word "rights" in conjunction with "privileges," "indemnities," "reparations" and "advantages" qualifies its mean-

65. 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (2d ed. 1904) § 414, whose view has been adopted in this paragraph.

ing in the sense that it denotes some positive benefit, something tangible flowing to the United States, with regard to past or future financial or commercial adjustments with Germany; but the context will not admit of an interpretation which would embrace the intangible moral interest that Germany shall remain disarmed, with its implication that the United States might be requested to go to war again if Part V were violated.

This principle is also known as the *ejusdem generis* rule. Whereas an authority has expressed doubt whether this rule "is applicable in the construction of a document such as the Treaty of Versailles to which twenty-seven states are parties," because in the civil law the rule of *ejusdem generis* is not recognized to be so fundamental and universal as to be *communis juris*,⁶⁶ yet the same writer, in commenting on a decision of the Mixed Claims Commission, a body set up under the Treaty of Berlin, indicates that a recognition of this rule in construing an agreement made between only two parties, the United States and Germany, is perfectly proper.⁶⁶

Disregarding entirely the established maxim that ambiguous language may properly be construed against the party which drafted it,⁶⁷ we may reasonably fall back on plain common sense, not an exotic ingredient of the law, which negatives any such interpretation as the Press Release espouses. Nor should the well-known rule that change of circumstances may modify or dissolve the obligations of treaties be overlooked.⁶⁸ Inter-

66. McNair, *Application of the Ejusdem Generis Rule in International Law* (1924) 5 BRITISH YEAR BOOK OF INTERNATIONAL LAW 181-2. The decision referred to is Administrative Decision No. II, reprinted in (1924) 18 AM. J. INT. L. 177, 184, and covers an interpretation of the phrase "or otherwise" as used in Section 5 of the Knox Resolution, which was made an integral part of the Treaty of Berlin.

67. Text-writers: 2 VATTTEL, *LE DROIT DES GENS OU PRINCIPES DE LOI NATURELLE* (1758) § 264; 2 PHILLIMORE, R. J., *COMMENTARIES UPON INTERNATIONAL LAW* (1854) 93; WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* (1860) § 113; 2 PRADIER-FODÉRÉ, P. L. E. *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* (1885) § 1188; 2 WHARTON, *A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES* (1886) § 133; 1 OPPENHEIM, *INTERNATIONAL LAW* (4th ed. 1928) § 554. By international tribunals it has been accepted as "universally recognized as law." RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (rev. ed. 1926) § 30. The Mixed Claims Commission, in an opinion which involved the interpretation of an ambiguous clause in the Berlin Treaty, adopted the principle in the following words,

"The treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit, will be strictly construed against it." Opinion in the *Lusitania Cases*, Nov. 1, 1923, reprinted in (1924) 18 AM. J. INT. L. 361, 373.

68. The following excerpt from Mill, John Stuart, *Treaty Obligations* (1870) 8 FORT-NIGHTLY REV. (N.S.) 715, written with reference to the Russian denunciation at the time of the Franco-Prussian War of the Black Sea clauses of the Treaty of Paris of 1856, may serve as an example of eminent lay opinion:

"Nations should be willing to abide by the rules. They should abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected

national law, which is thoroughly practical, has taken account of this obvious truth for, whereas the general rule of *pacta servanda sunt* is considered the basic principle, yet the doctrine of *rebus sic stantibus* has long been recognized as its corollary.⁶⁹ This principle, pithily stated as "*omnis conventio intelligitur rebus sic stantibus*," means that when essential and motivating conditions which were in the contemplation of both parties at the time of signing a treaty, not concluded for any stated period of time, have suffered a substantial change or if unforeseen circumstances of an important nature have arisen, then the treaty obligations affected by the change are no longer binding on the contracting parties. That this doctrine, involving the interpretation of such phrases as "essential and motivating conditions" and "a substantial change," is a dangerous one cannot be denied, as it opens the door to unilateral denunciation of treaties by nations who have tired of and feel they are strong enough to disregard some irksome obligation.⁷⁰ Yet the *clausula* has frequently been read into and applied to treaties during the nineteenth century,⁷¹ especially to provisions for unilateral demilitarization,⁷² such as the prohibition to fortify Huningen in Alsace imposed

to be kept. And they should conclude their treaties as commercial treaties are usually concluded, only for a term of years

"It is the misfortune of such stipulations, even if as temporary arrangements they might have been justifiable, that if included for permanency they are seldom got rid of without some lawless act on the part of the nation bound by them. If a lawless act, then, has been committed in the present instance, it does not entitle those who imposed the conditions to consider the lawlessness only, and to dismiss the more important consideration, whether, even if it was wrong to throw off the obligation, it would not be still more wrong to persist in enforcing it. If, though not fit to be perpetual, it has been imposed in perpetuity, the question when it becomes right to throw it off is but a question of time. No time having been fixed, Russia fixed her own time, and naturally chose the most convenient."

69. Garner, *Revision of Treaties and the Doctrine of Rebus Sic Stantibus* (1934) 19 IOWA L. REV. 312, is a clear and comprehensive discussion of the various views held concerning the doctrine and of its application to treaties by national and international tribunals. See also, 1 OPPENHEIM, *op. cit. supra* note 67, § 539; Williams, *The Permanence of Treaties, the Doctrine of Rebus Sic Stantibus, and Article 19 of the Covenant of the League* (1928) 22 AM. J. INT. L. 89; LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933) 277; Bullington, *International Treaties and the Clause "Rebus Sic Stantibus"* (1927) 76 U. OF PA. L. REV. 153. The doctrine is of long standing and was invoked by Queen Elizabeth, 2 ZOUCHE, *JURIS ET JUDICII FEALIS SIVE JURIS EXTER GENTES EXPLICATIO* (Brierly's translation, 1911) 102; Spinoza was among the first to formulate it in the sphere of international law, *Tractatus Politicus*, c. III, § 14, see 2 OPERA (1893) 324.

70. WILLIAMS, *CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS* (1929) 91, states: "The doctrine is not that a State has a unilateral right to declare itself not bound by a subsisting contract; it is that the treaty itself has gone, since an essential condition in which it was concluded has disappeared. . . ."

But this definition does not make possible a frictionless application of the doctrine.

71. See KAUFFMANN, ERICH, *DAS WESEN DES VÖLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS* (1911) 12-37.

72. "Conspicuous among treaties doomed by their nature to obsolescence are those by

upon France by the Treaty of Paris of 1815,⁷³ and the clauses of the Treaty of Paris of 1856 which neutralized the Black Sea.⁷⁴ As recently as February 3, 1935, France and Great Britain have admitted the principle with respect to the obligations of Germany under Part V of the Versailles Treaty, offering to abrogate these provisions as a condition of certain political readjustments.⁷⁵ Turning to our own history we find that the convention of 1817 between the United States and Great Britain whereby the armament of the two nations on the Great Lakes was limited has also been disregarded under stress of altered circumstances; during the Canadian Revolution of 1837-38 the British Government largely increased its naval armament in those waters without asking the permission of the United States, and during the Civil War our government did likewise.⁷⁶

The inexpediency of seeking to impose perpetual treaty obligations⁷⁷ has been recognized by the Great Powers in recent years⁷⁸ and even at

which a State defeated in war is obliged to abstain from fortifying or otherwise making free use of some part of its territory, when the restriction is not imposed as forming part of a system of permanent neutrality." 1 WESTLAKE, *INTERNATIONAL LAW* (2d ed. 1910) 296.

73. Denounced, soon after its accession to power, by the provisional government of 1848 on the ground that there had been a complete change in the moral outlook of the French Government.

74. Denounced by Russia in 1870. Her wishes were complied with by the London Conference of 1871, although only after lip service to the doctrine *pacta servanda sunt* had first been given by the adoption of the following declaration: "C'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des parties contractantes, au moyen d'une entente amicale." Yet Russia, who was among the nations signing this declaration, in 1886 denounced Article 59 of the Treaty of Berlin of 1878, which stipulated that Batum should be a free port. See POURITCH, *REBUS SIC STANTIBUS* (1918) 116.

75. N. Y. Times, Feb. 3, 1935, at 1, col. 8; id. Feb. 4, 1935, at 1, col. 6.

76. For other instances of the application of the principle in the history of the United States see FOSTER, *THE PRACTICE OF DIPLOMACY* (1906) 301-305.

77. FOSTER, *op. cit. supra* note 76, at 299 gives the following amusing illustration: "Francis I and Henry VIII concluded a 'perpetual peace' in 1527 between France and England, and on the one part there were given as hostages two archbishops, eleven bishops, twenty-eight nobles, and thirteen towns; but even these did not prevent a fresh war in the same generation." While his interpretation of the Treaty of London of 1527 is erroneous, in that the magnates and municipalities mentioned merely pledged their possessions as security [2 Bernard, *Recueil des Traitez* (1700) 147], this does not vitiate the aptness of the illustration.

78. Wilson, R. R., *Revision Clauses in Treaties since the World War* (1934) 28 *AM. POL. SCI. REV.* 901. The writer stresses the necessity of permitting needed changes and, after a review of some 200 "revision" clauses in engagements made by the seven Great Powers from the World War to 1932, arrives at the conclusion: "Finally, the post-war period has seen, not a relinquishment of the rule *pacta servanda sunt*, but at least some evidence of a realization that *pacta*, if they are to be really effective, should be consistent with actual conditions, and should thus reflect the continuing will of the party states." *Id.* at 909.

the Paris Peace Conference of 1919 the doctrine of *rebus sic stantibus* was accepted in practice as regards certain treaties of the past,⁷⁹ in principle, with reference to the future. Article 19 of the Covenant of the League of Nations reads:

"The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

Unfortunately the means provided for carrying the principle expressed in Article 19 into effect are such as to make it, for practical purposes, a nullity.⁸⁰

Even if the Versailles Treaty were wholly silent as to the European public policy involved in disarming Germany, it could scarcely be argued that it envisaged, as a condition of such a plan, a permanently disarmed Great Power in Europe.⁸¹ But it is unnecessary to invoke an implied *rebus sic stantibus* with reference to Part V of the Versailles Treaty. No such abnormal condition of permanent inequality was incorporated in that section by its framers.

"When the draft of the Peace Treaty of Versailles," writes Professor Noel Baker,⁸² "was first presented to the German Delegation in May, 1919, they made the following observation upon Part V: 'Germany is prepared to agree to the basic idea of the army, navy and air regulations . . . provided this is a beginning of a general reduction of armaments.' To which the Allied Powers in their famous answer replied as follows:

"The Allied and Associated Powers wish to make it clear that their requirements in regard to German armaments were not made solely with the object of rendering it impossible to resume her policy of military aggression. They are also the first steps towards that general reduction and limitation of armaments which they seek to bring about as one of the most fruitful preventives of war, and which it will be one of the first duties of the League of Nations to promote.'"

79. Article 435 of the Treaty of Versailles declares that certain clauses of the European settlement of 1815 concerning the neutralized zone of Savoy and the free zones of Upper Savoy and Gex "are no longer consistent with present conditions" and therefore the High Contracting Parties, some of whom participated in the Congress of Vienna, are willing to accept a modification thereof.

80. OPPENHEIM, *op. cit. supra* note 67, § 167 (o).

81. "A treaty that is to endure for all eternity and to be supported, without limitation in time, by the armed force of the contracting Powers, is as great an absurdity as a will that is to regulate for all time the descent of the property of a testator . . . Nor can the world be ruled by a system of a perpetual and unbreakable international entail." WILLIAMS, *INTERNATIONAL PEACE AND INTERNATIONAL CHANGE* (1932) 2.

82. BAKER, *DISARMAMENT* (1926) 25. The author is Professor of International Relations in the University of London.

The Notes thus exchanged are, under the established practice of International law, to be considered as a binding interpretation of Part V of the Treaty and would seem to be included in the category of "rights accorded to Germany under such provisions."⁸³ Accordingly the governments of Europe, Professor Baker concludes, are under a legal obligation to disarm.⁸⁴ Unfortunately, they have not carried out this obligation despite numerous conferences since the World War. Under these circumstances, even if this country had a clear legal right to insist on German disarmament and from the beginning had had a definite intention to claim such a right, it would seem somewhat surprising for the United States to advance such a claim. France and Great Britain are apparently prepared to abandon it, at least in part. They once had it; we never did.

Part V, however, contains additional proof that a perpetual disarmament of Germany was not contemplated. Article 164 begins with the words "Up till the time at which Germany is admitted as a member of the League of Nations, the German army must not possess an armament greater than the amounts fixed" in the Tables annexed. And, according to the later paragraphs in the same article, Germany agreed that "the armaments fixed in the said Table" should remain in force until they were modified by the Council of the League. This would seem to indicate that the treaty-makers had in mind some rearmament of Germany after she had entered the League.⁸⁵

The Actual Application of Part V in Recent Years

The United States had never, up to the time of the Press Release publicly intimated that it claimed any rights under Part V; in fact, its actions have indicated a contrary conclusion. The United States was never represented on the Inter-Allied Commissions of Control which supervised and enforced the execution of the disarmament clauses,⁸⁶ although the Military Commission, at least, remained in Germany for more than five years after the Treaty of Berlin came into effect.⁸⁷ Fur-

83. Article VIII of the Covenant also promises general disarmament.

84. BAKER, *DISARMAMENT* (1926) 25.

85. The same argument is advanced in a leading article "A Debate on Realities," *London Times*, May 31, 1934, at 15, col. 2.

86. NOLLET, *UNE EXPÉRIENCE DE DÉSARMEMENT* (2d ed. 1932) 12. "On sait que les États-Unis s'abstinrent totalement. . . . L'abstention des États-Unis créa, en tout cas, une vacance à la présidence de la sous-commission des fortifications, qui avait été réservée pour un général américain."

87. ROQUES, *LE CONTRÔLE MILITAIRE INTERALLIÉ EN ALLEMAGNE, SEPTEMBRE 1919-JANVIER 1927* (1927) 144, states that the last members of the commission left Germany on February 28, 1927, seven years, five months and thirteen days after General Nollet's arrival in Berlin.

thermore, the United States was represented on the Conference of Ambassadors not by a diplomat who cast a vote, but by an observer.⁸⁸ It is wholly unlikely that the representative of the United States signed the letter of August 21, 1926, addressed to the Secretary General of the League of Nations,⁸⁹ referred to in the Press Release¹ and which made a vital link in the chain of reasoning leading up to its conclusion. It seems inconceivable that the Senators who voted for the Berlin Treaty in 1921 thought that they were thereby submitting the definition of an American right claimed under that treaty to the ambassadors of Great Britain, France, Italy, and Japan. Furthermore, it seems that the United States representative at the most recent disarmament conference was not, in principle, opposed to a certain measure of German rearmament.⁹⁰ And other departments of our government seem to have pursued a different policy toward Part V than that which the State Department now apparently believes itself to have adhered to since 1921.⁹¹

European governments, other than possibly France, have not in recent years placed the same interpretation on Part V as our State Department now does. Reports have long been current in the press that Italy is more or less openly permitting the dispatch of arms and munitions to Hungary. The British Government has refused to interfere with the sale and shipment to Germany of airplane engines to be used "for commercial purposes,"⁹² although Sir John Simon acknowledged that there was a double purpose to which many air machines might be put.⁹³ When

88. N. Y. Times, May 7, 1921, at 1, col. 8.

89. In this same year a protest regarding a munitions plant was lodged in Vienna on behalf of the Council of Ambassadors by the British, French, Italian, and Japanese Ambassadors. N. Y. Times, Jan. 24, 1926, § II, at 9, col. 2. The decision to terminate the activities of the Interallied Military Commission in Germany was made at a meeting in Geneva on Dec. 12, 1926 by the representatives of Great Britain, France, Belgium, Italy, and Japan. It was the culmination of earlier negotiations in the Council of Ambassadors, during which the representative of the United States, a councillor of embassy, was present only in the role of observer. ROQUES, *op. cit. supra* note 87, at 141-142.

90. On his return from the Disarmament Conference in June, 1934, the Swedish Foreign Minister, M. Sandler, in a speech at Malmo stated: "The ex-neutrals, like the British, Italian, and American Governments, have assumed that a certain measure of German rearmament is unavoidable." London Times, June 11, 1934, at 11, col. 2.

91. N. Y. Times, Sept. 19, 1934, at 8, col. 4; London Times, Sept. 18, 1934, at 12, col. 3; *Id.* Sept. 19, 1934, at 10, col. 3; (Nov. 1934) 41 CURRENT HISTORY 200.

92. On May 14, 1934, Sir John Simon, Secretary of State for Foreign Affairs, stated in the House of Commons: "The fulfillment of the order does not, however, conflict with the terms of the relevant international instruments." London Times, May 15, 1934, at 8, col. 4. See, also Lord Ponsonby's Speech in House of Lords May 7, 1934, reported in London Times, May 8, 1934, at 7, col. 1.

93. Statement made in House of Commons July 30, 1934, reported in London Times, July 31, 1934, at 8, col. 7. In the same speech Sir John Simon refused to make any

asked in the House of Commons, with reference to an inquiry which the French Ambassador had made on the subject of such orders, "whether his Majesty's Government proposed to take any action," Mr. Baldwin replied, "The answer . . . is in the negative."⁹⁴ The most influential British newspaper has seconded the Foreign Office⁹⁵ in its efforts to encourage Europe in the process of "passing from a system of stability through the military preponderance of France and her associates to one of stability by balance."⁹⁶ These are words of statesmanship which take account of realities; but the extremely legalistic view advanced in the Press Release, even if it were based on correct principles of construction, lacks this *sine qua non* of any sound international policy. Strange enough, the United States, not a direct party to the Treaty of Versailles, which it openly repudiated because of its potential military commitments, seems to have taken a more extreme attitude towards its military stipulations than have any of the direct signatories of that Treaty, at least up until March 20, 1935, when France and Italy protested, not against the disappearance of Part V, but against its unilateral denunciation. The result is anomalous.

Finally, it may be noted that when on February 3, 1935, Great Britain and France proposed to release Germany, on certain conditions, from Part V of the Treaty of Versailles, it is understood that the United States was not consulted, its consent being neither asked nor given. Had it been assumed either by the Allied Governments or by the United States that we had rights under Part V, it is hardly conceivable that the Allies would have undertaken to cede American rights or that the United States would submit to their cession by others. This would seem to establish conclusively, if further evidence were needed, that neither the Allied

statement as to whether Germany was observing her obligations in the Peace Treaties with regard to military air forces, which would amount to charges that would naturally lead to a demand for proof, although admitting that her air development was very marked. *Ibid.*

94. London Times, May 17, 1934, at 7, col. 3.

95. For the British Government's attitude see Sir John Simon's speech at Geneva, May 30, 1934, reported in London Times, May 31, 1934 at 14, col. 1, and Prime Minister MacDonald's speech at Seaham Harbor, June 14, 1934, reported in *id.*, June 15, at 18, col. 2, wherein he said: "Again and again when we were negotiating these things it was made perfectly clear that Germany would be treated on terms of equality, and so far as this country is concerned she will. We have passed our word, and it will be carried out."

96. Leading article "The Arms Outlook," London Times, May 9, 1934, at 15, col. 2. See also, Leading Articles *id.*, May 28, 1934, at 15, col. 2; May 30, at 15, col. 4; May 31, at 15, col. 2; June 1, at 17, col. 2. This newspaper is believed to mirror the views of the Foreign Office accurately; for an example fully substantiated by documentary proof, see Merk, *British Government Propaganda and the Oregon Treaty* (1934) 40 *AM. HIST. REV.* 38, 51.

Governments nor the United States seriously conceived American rights, advantages, or benefits to be involved in Part V of the Treaty of Versailles.

Conclusion

Thus, viewed from any angle, the opinion that Germany by rearming would violate the treaty rights of this country cannot be sustained. The literal text of the treaty, the interpretation thereof at the time of its passage, the debates concerning the resolutions on which it was based, and its construction according to the accepted principles of international law do not admit of such a conclusion. The delegates who drew up the Versailles Treaty did not envisage perpetual inequality for Germany; and the majority of foreign governments have not acted on such an assumption. Even if the initiation of a general limitation of armaments had not been expressly asserted to be the motive for exacting the clauses of Part V, some such understanding would have to be implied to save such conditions, if assumed to be perpetual, from being considered anomalous. To continue to apply a contract literally when circumstances have changed, or when events on the occurrence of which it was predicated have not come to pass, would be in effect to change the bargain which the parties have made. Even France and Great Britain have given tangible evidence of their belief in the obsolescence of Part V. Furthermore, ever since 1919 the overwhelming current of opinion in this country has been strongly opposed to American interference in European affairs; and this government's representatives abroad have consistently refused to promise co-operation in any project tending to such a result.⁹⁷

The interpretation proclaimed by the Press Release might, were it the result of deliberation, indicate a radical change of policy. It is not within the scope of this article to discuss the exigency which may have led the State Department to take such an unusual step.⁹⁸ Nor is this the place to consider the past attitude of the United States with regard

97. Sir John Simon made every effort to include in the British Draft Convention at Geneva a Consultative Pact looking forward to the application of economic sanctions phrased in such terms as to secure American support, but confessed that Mr. Norman Davis' declaration at Geneva, made with the authority of the United States government, had rendered this hope vain. *London Times*, May 19, 1934, at 7, col. 3.

98. The policy first received publicity at the recent Senate Committee Investigation of the American munitions industry, at which a memorandum of August 5, 1933, prepared by the State Department after inquiry had been made by the representative of a foreign government, was produced. The policy was first outlined in a confidential memorandum to President Hoover from Secretary Stimson in May, 1931. *New York Times*, Sept. 19, 1934, at 8, col. 4; *London Times*, Sept. 19, 1934, at 10, col. 3.

to treaty violations.⁹⁹ The suggestion that German armament implies an American treaty violation may prove portentous, for it invites and has resulted in a request to vindicate the violation and plunge the United States into commitments which the Knox Resolution repudiated. The Press Release should be withdrawn or overruled, and the Department of State should make it clear that the rearmament of Germany, whatever may be thought about it, is not a violation of the Treaty of Berlin.

99. *Chae Chan Ping v. United States*, 130 U. S. 581 (1889); *Charlton v. Kelly*, 220 U. S. 447 (1913).