Legislative Neutrality in the United States

C.H. McLaughlin
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BY C. H. McLAUGHLIN*

WITHOUT venturing at this late date to impeach the authority of Humpty Dumpty on the tyranny of words, one can yet feel regret that the term "neutrality" has fallen into the hands of his acolytes. In popular usage it seems to have lost precise content, so that it merely connotes broadly any attitudes, principles or measures calculated to avoid participation in war. Hence the current confusion of "neutrality" legislation with security legislation in general.

In fact, there are two fundamental categories of security legislation. The first seeks to subject the relations of belligerent and neutral states to legal limitations. These may be of the traditional sort, which sought only to give precise definition to the rights and duties of neutrals, or they may be of the more recent type, which condemns a war of aggression as itself an illegal institution to be resisted by the collective force of international society. In either case the neutral relies for security and protection of its rights upon the rule of law as applied to states rather than upon any domestic policy it has developed. In appealing to this rule of law it must, of course, be prepared to accept responsibilities under it: in the first case, observance of specified neutral obligations; in the second, participation in the program of collective security. The first type is the traditional neutrality of international law, to which

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1"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be Master—that's all."

—Lewis Carroll, Through the Looking Glass.
alone can the term "neutrality" be applied in strict usage. The second—collective security—is not in this strict sense a form of neutrality at all, for that connotes an attitude of impartiality on the part of the neutral state; rather, it is a substitute for neutrality, like it only in invoking a rule of general law.

Wholly different is the second fundamental category of security legislation, which curtails the commercial relations of neutrals with belligerents in order to avoid the possibility of a quarrel over the rights and duties created by them. The instrument used is the civil embargo, partial or complete, upon trade with belligerents. Isolation by this means rests upon no principle of international legal regulation; it is wholly a domestic restriction applied by the neutral to its own nationals. Neither is any question of right or justice raised, either as between the belligerents or in the relations of neutrals to belligerents. On the contrary, isolationist states assume that any effort to insist upon the application of legal standards to these relations can only result in drawing the unhappy umpire into the fray. This result they propose to avert by the prudent device of avoiding the assertion of even generally recognized commercial rights, not necessarily because of indifference to the maintenance of rights, but from a conviction that the price of wars is invariably greater than any commercial sacrifice which might serve as a quarantine against them.

Until its entrance into the World War the United States based its policy on the international law of neutrality. After the War there were indications not only in the new collective security devices written into the Covenant of the League of Nations, but also

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2The civil (or pacific) embargo is to be distinguished from the hostile embargo. The former is a detention in port of a state's own vessels or exportable products, for the purpose either of protecting domestic shipping from foreign depredations or of influencing the conduct of a foreign state by curtailling its supplies. Examples from American history include Jefferson's embargo of 1807 (infra, p. 613 and note 41); a series of munitions embargoes directed against Latin-American states and China (infra, p. 641 and notes, especially no. 132); the munitions embargo against Italy and Ethiopia under the Neutrality Law of 1935 (infra, p. 644); and the Spanish arms embargo, first under the Joint Resolution of January 8, 1937, then under the Neutrality Act of 1937 (See Finch, The United States and the Spanish Civil War, (1937) 31 Am. J. of Int. L. 74-81; Borchard, "Neutrality" and Civil Wars, (1937) 31 Am. J. of Int. L. 304-306; Buell, United States Neutrality in the Spanish Conflict, (1937) 13 Foreign Policy Reports, No. 17, pp. 210-211). Hostile embargo involves the detention or seizure of vessels of a foreign state, commonly as an act of reprisal to compel that state to make reparation for an illegal act; it is in no sense an act of protective isolation. On embargoes generally see 2 Hyde, International Law (1922) 182-185; Dana's Wheaton, International Law (1866; reprint 1936) sec. 293, especially Dana's note No. 152.
in the commitments of the United States, that the international law of neutrality had somehow been quietly shelved. The United States for some years, alternately sniffed the tempting odor of collective security and skittishly retreated. In the end, executive policy drew her further toward cooperation than legislative policy went in principle. Observation of the futile and perhaps insincere application of sanctions to Japan and Italy, coupled with increasing alarm at the growth of unwelcome ideologies in Europe and Asia, stimulated a reaction until legislative policy veered sharply toward the isolationist position. It is perhaps too soon to set our recent legislation into the perspective of history; nevertheless, an explanation or criticism of our present policy, which is the object of this paper, would be futile if some effort were not made to set it into a historical context. Only in the light of past achievements and failures can it be evaluated.

I. THE UNITED STATES AND THE INTERNATIONAL LAW OF NEUTRALITY

The shaping of the international law of neutrality was a slow process; for centuries even the principle of impartiality was not recognized. Grotius urged that a neutral ought not to strengthen an unjust cause nor to hinder a just one. If it could reach a determination that one belligerent was waging an unjust war, it ought to refuse supplies and freedom of passage for troops to that belligerent and permit them exclusively to its opponent. Only in the eighteenth century did the idea of impartiality become an essential characteristic of neutrality. Even then this standard was not applied with great nicety: a neutral might furnish troops to belligerents or allow freedom of passage for troops; a belligerent...

3 In ancient times a third state was expected to make a choice between two belligerents and to favor one by granting free passage to its troops or furnishing supplies which would assist it in the conduct of war. During the whole of the Middle Ages partiality for one belligerent seems to have been considered not inconsistent with neutrality. Thus, a third state could give assistance to either belligerent and yet maintain that it was not a party to the war. Treaties were made for the specific purpose of binding one signatory not to give such assistance to the enemies of the other signatory in a war in which the first wished to remain neutral. See 2 Oppenheim, International Law (5th ed. by Lauterpacht, 1935-1937) 492-493; Walker, The Science of International Law (1893) 374-378; Neutrality, Its History, Economics and Law (1936) Vol. 1, The Origins, by P. C. Jessup and F. Deák, passim.

4 "It is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." 3 Grotius, De Jure Belli ac Pacis (1625) c. XVII, par. III. 1.
might avail itself of such resources as a neutral could furnish, might levy its troops or grant letters of marque to its merchantmen on neutral territory.\(^5\)

As late as the Seven Years' War the British were insisting upon the principle of maritime commerce known as the Rule of 1756. This required neutrals to confine their commerce with belligerents to the limits customary in time of peace. Any effort to profit by the opportunity of taking over the normal trade of a belligerent and thus permit it to receive a continuous supply of goods through the use of neutral merchantmen would justify treatment of such vessels as part of that belligerent's merchant marine.\(^6\) During the War of the American Revolution neutral states wished to supply goods to the colonies. The Dutch, particularly, insisted upon their right to trade freely with the belligerents, arguing that the goods were assimilated to the neutral character of the vessel in which they were carried—in the usual formula, "free ships, free goods."\(^7\) Disregarding this contention the British continued to interfere with Dutch shipping on the basis of the Rule of 1756 until a rupture between the two countries was imminent. But in 1780 a novel development occurred. At the invitation of Catherine of Russia a number of neutral states formed what has become known as the First Armed Neutrality.\(^8\) This concert of powers insisted that


\(^7\) Hall, International Law (8th ed. by Higgins, 1924) sec. 255, shows the origins of the doctrine, which, chiefly because of the persistence of the Dutch, was incorporated into a number of seventeenth century treaties; in the eighteenth century it gained impetus from French support. In part it was then rationalized on the basis of the now discredited theory that a neutral's ships were assimilated to the national territory somewhat in the character of floating islands; hence they fell under the usual rule as to respect for the territorial integrity of neutrals.

\(^8\) The principles of the First Armed Neutrality were stated in Catherine's circular to Great Britain, France and Spain, See 3 Martens, Recueil de Traité (2d ed. 1817-1835) p. 158. In origin, they were Danish. They included (1) freedom to neutrals to engage in coastwise trade between belligerent ports; (2) exemption of belligerent goods, except contraband, from seizure, when carried in neutral vessels; (3) definition of contraband in terms of the Anglo-Russian treaty of commerce of 1766 (arms, ammunition, salt peter, and a few other articles; naval stores and ships timbers not included); (4) the requirement that to be binding a blockade should be maintained by sufficient naval force to render penetration difficult; (5) stipulation that the preceding principles should govern the decisions of prize courts. See also the Russian treaties of 1780 with Denmark and Sweden. 3 Martens, Recueil de Traités (2d ed. 1817-1835) 189, 198. For discussion consult 1 Reddie, Researches, Historical and Critical, in Maritime Inter-
belligerent property was free in neutral vessels unless contraband in character, and that blockades of belligerent ports must be effectively maintained to be binding. But in the face of the superior naval strength of Great Britain the First Armed Neutrality was unable to give effect to these principles and had become, in Catherine's own words, "an armed nullity" before its dissolution in 1783. Nevertheless, it was of permanent importance in having defined a platform of neutral rights which gained general acquiescence during the nineteenth century.

These developments, then, were in the immediate background when the United States set about defining its position as a neutral in the wars of the French Revolution and the Napoleonic era. The factors conditioning our policy, it must be remembered, were not those of the present day. A young, weak state, it seemed imperative that we enjoy a breathing space in which to consolidate our position, develop our resources and achieve some unity of purpose. Yet we owed our independence to the preoccupation of England with the continental wars, and were committed both by treaty and by popular sympathy to support of the French. Under these circumstances the wisdom of a temporizing, noncommittal attitude was obvious. If our success in this diplomatic game was not complete, it was certainly not negligible, though it may well be that the chief factors in that success were our own insignificance and the width of the Atlantic Ocean.

On April 22, 1793 President Washington issued his famous proclamation, pledging the United States to "a conduct friendly and impartial towards the belligerent powers." This was followed

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national Law (1844) 321-357; Scott, The Armed Neutralities of 1780 and 1800 (1919); Sir F. Piggott and G. Ormond, Documentary History of the Armed Neutralities (1919). For a good summary see Bemis, A Diplomatic History of the United States (1936) ch. III.


10The Treaty of Alliance of 1778 contained a guaranty by the United States from that time and forever of "the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace," a concession made in return for a reciprocal guaranty by France of the territory of the United States. There was also a Treaty of Amity and Commerce of the same year. 1 Malloy, Treaties, Conventions. International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909 (1910) 468 ff., 479 ff.; 2 Miller, Treaties and Other International Acts of the United States of America (1931) p. 3, 35.

11American State Papers, Foreign Relations (1832) 140; reprinted in Fenwick, The Neutrality Laws of the United States (1913) 17.
in 1794 by Congressional legislation prohibiting Americans from fitting out warships, supplying ordnance or other military equipment, or helping to recruit troops for a belligerent power. 12 In some respects the American position went beyond any conception of neutral obligations which was then current, and this advanced view was elaborated in the detailed administrative steps which the government took to regulate its neutral commerce. 13

The first test of the new program occurred when the French Government instructed its minister, Citizen Genêt, to enlist troops and commission privateers on American soil. 14 In this, it is improbable that the French deliberately ignored our position; it is more likely that they relied upon the early-eighteenth century theory of neutrality, which permitted most of the activities upon which Genêt embarked. 15 Our neutrality did not seem to the French government to be inconsistent with a partial discharge of our treaty obligations. But the United States stood upon its declaration and demanded Genêt's recall. 16

From the British Government, however, we were unable to obtain acquiescence in our policy. In accordance with its conception of neutral rights that government interfered with enemy property wherever it could find it, even in neutral ships on the high seas. British men-of-war captured some three hundred American vessels engaged in trade with the French islands in the West Indies. 17 This situation was aggravated by persistent disputes

13See Hamilton, Instructions to the Collectors of Customs. August 4, 1793, in 1 American State Papers, Foreign Relations, 140; reprinted in Fenwick, The Neutrality Laws of the United States 170. For a review of the cases arising under the Act of 1794, see Dana's Wheaton, International Law, note No. 215 by Dana, Pt. III (pp. 543-557).
14For Genêt's first instructions and despatches see Turner, Correspondence of the French Ministers to the United States, 1791-1797, in (1903) 2 Annual Report of the American Historical Association; see also 1 American State Papers, Foreign Relations (1832) 140.
15This is apparent from the fact that Genêt was instructed not to invoke the Treaty of Alliance; under its terms he might have demanded military aid in defending the West Indies. Incorporated into the Treaty of Amity and Commerce (footnote 10, supra) were the principles that free ships made free goods, that foodstuffs and naval stores were never contraband, and that enemies of one signatory could not use the other's neutral ports for outfitting privateers or bringing in prizes. (Articles XXII, XXIII, XXIV). As a neutral, the United States could furnish France with much needed foodstuffs and naval supplies, probably more valuable to her than American military assistance.
16August 16, 1793. For further details see 4 Moore, Digest of International Law (1906) 485-487; 5 Moore, International Arbitrations (1898) secs. 4404-4412.
17The capture was made under a British order-in-council of November
over the northeastern boundary, which had been left unsettled by the Treaty of 1783, and over the failure of the British to evacuate the fur posts in the Northwest and of the United States to pay private obligations to the British incurred before the Revolution. Popular feeling ran high and retaliatory proposals were made in Congress which might easily have involved us in war. In these circumstances President Washington sent Jay to London with instructions to try to reach an agreement on these various sources of disturbance. Jay was successful in negotiating the treaty of 1795 which bears his name, but it can hardly be denied that the price he paid for peace was a virtual surrender of our position on neutrality. Great Britain agreed to compensate for injuries arising from her spoliations of American shipping, but there was no retraction of the principle under which she assumed to act. The formula “free ships, free goods” was ignored, and no distinction was made in the references to carriage by neutrals of enemy goods in favor of non-contraband articles. Contraband was defined to include not only implements of war but naval stores, and “provisions and other articles not generally contraband” could be preempted by the British if they became contraband in fact. This was virtually a notice of intention to make foodstuffs contraband. A definition of blockade was significantly omitted, so that paper blockades were not excluded. Substantially, these provisions meant acquiescence in the British Rule of 1756, a situation which continued for twelve years, the specified duration of the Treaty.

6, 1793, directing seizure of all ships carrying goods to or from colonies belonging to France. 1 American State Papers, Foreign Relations, 430. Cf. the orders-in-council of June 8, 1793 and January 8, 1794, 1 American State Papers 240, 431. See also the report of the secretary of state “on the spoliations and vexations on American commerce,” etc., transmitted by the president to Congress on March 5, 1794; 1 American State Papers 423.


191 Malloy, Treaties 590-609; 2 Miller, Treaties 245.

20Article VII: “Whereas complaints have been made by divers merchants and others, citizens of the United States, that during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty,” etc. This language implies the illegality of the orders-in-council, but the major seizures were under the order of November 6, 1793, which went even beyond the Rule of 1756.

21Article XVII.

22Article XVIII; See Newcomb, New Light on Jay’s Treaty (1934) 28 Am. J. of Int. L. 685-693.

23Article XVIII, third paragraph.

24In addition to the articles noticed, the Treaty contained provisions for settlement of other issues. American debts to Great Britain were to
As might be expected, every effort was made by the French to induce the United States not to enter into such commitments. Monroe, then American minister in Paris, was so sympathetic with the French that he gave assurances not authorized by his instructions. It was his view that the Senate would not consent to ratification of the Treaty, but he overestimated the opposition to it. When the Treaty was ratified, he retreated to the disloyal position that the electorate would show its displeasure by defeating Washington at the next election, a suggestion which encouraged the French Government to interfere in the election in the hope of turning American public opinion against the administration. Its efforts in this direction were rendered futile by Washington's decision not to stand for a third term. Monroe was recalled, and the French Government declined to receive his successor, thus suspending diplomatic relations.25 There followed the notorious XYZ affair, which led the administration to prepare actively for war, and so aroused popular feeling against the French that it was difficult to proceed cautiously.26 War was not declared, but extensive privateering against French commerce was carried on for the next two years. Nevertheless, when Talleyrand concluded that it was not to the advantage of the French to alienate the United States at that time, and let it be known through indirect channels that an American representative would be received cordially in Paris, President Adams courageously nominated a minister. In the face of a public opinion tuned to the de facto naval warfare which we were carrying on, this action was so unpopular that it

be paid on the basis of awards by a mixed commission. Great Britain agreed to evacuate the fur posts by June 1, 1796. A mixed boundary commission was to fix the northeastern boundary, and an agreement was reached for ultimate determination of the northwest boundary. Free commerce on the Mississippi for both signatories was recognized, the British East Indies were opened to American commerce, and a restricted commerce with the West Indies offered. The Treaty prevented almost inevitable war with Great Britain, assured American credit and prosperity, perhaps saved American nationality. But Lord Grenville drove a hard bargain, his hand strengthened by the fact that Hammond, the British Minister in Philadelphia, through intimacy with Alexander Hamilton, was able to estimate accurately how much the United States would concede. On the negotiations see Bemis, Jay's Treaty: A study in Commerce and Diplomacy (1923).


completed the destruction of the Federalist Party. It is not too much to say that only strong executive action by a president determined to maintain peace could at that time have preserved the country's neutrality.\textsuperscript{27}

Thus in several trying situations the neutral position of the United States had been maintained, although it can scarcely be said that we had preserved intact the principles of neutrality which we had advanced. Still it was a beginning and, in the main, a commendable one. But difficulties were by no means past. During the administrations of Jefferson and Madison, this country was caught in the tortuous course of European policy and forced to play one belligerent against the other in a hazardous diplomatic game. In the end we were drawn into the War of 1812, a result which must not be simplified into a conclusion that our neutrality policy was futile or mistaken. The great European struggle which began in 1803 and continued until the final defeat of Napoleon was essentially a commercial conflict between powers dominating respectively the land and the sea. Consequently, the position of neutrals was particularly precarious. At the outset the British struck a serious blow at our shipping by advancing what has since become known as the continuous voyage doctrine,\textsuperscript{28} for as the law then stood it was possible for France to obtain goods from the French West Indies in neutral bottoms, provided the goods were shipped first to American ports, then reshipped to France. Breaking the continuity of the voyage in this way had previously been considered to give neutral character to the goods.\textsuperscript{29} In retaliation

\textsuperscript{27}The privateering against France was judicially characterized as "limited war." Bas v. Tingy, (1800) 4 Dall. 37, 1 L. Ed. 731; cf. Gray v. United States (1886) 21 Ct. Cl. 340. For the negotiations incidental to resumption of relations with France see 5 Moore, International Adjudications, Modern Series (1929-1933) pp. 203 ff.

\textsuperscript{28}That is, that the ultimate belligerent destination of the vessel, irrespective of any intermediate neutral destination, determined the character of the goods for purposes of applying the law of contraband (later extended to blockade). For the early history see Woolsey, Early Cases on the Doctrine of Continuous Voyages, (1910) 4 Am. J. of Int. L. 823. Accounts of the development of the doctrine, with voluminous citation of authorities, may be found in 2 Hyde, International Law (1922) 602-634; 2 Oppenheim, International Law (5th ed. by Lauterpacht, 1935-1937) 671-680.

\textsuperscript{29}In the Polly, Lasky master, (1802) 2 C. Rob. 361, Sir William Scott had expressed the view that landing of cargoes and payment of tariff duties in a neutral port was sufficient to give neutral character to the goods; he did not consider whether a rebate of the duties on re-exportation of the goods again deprived them of neutral character. In 1805, 1806, and 1807 the re-exports of foreign goods from the United States exceeded domestic exports. Heckscher, The Continental System; an Economic Interpretation (1922) p. 103. In 1805 the Prize Appeal Court of the Privy Council, in the Essex, Orne master, (1805) 5 C. Rob. 368, held that goods could not be neutralized
against the British innovation, the Jefferson administration put into effect the Non-Importation Act of 1806, directed at British commerce with the United States.\textsuperscript{30} The British were not impressed by this policy of exclusively economic coercion; on the contrary, their interferences with what we conceived to be our neutral rights became increasingly obnoxious. These took the form of orders-in-council restricting neutral commerce, and extensive impressment of American seamen.

The British orders-in-council and the retaliatory decrees of Napoleon comprised in his "Continental System" were designed by each of the respective powers to prevent the other from obtaining the benefits of neutral commerce.\textsuperscript{31} The British began in May, 1806, by an order establishing a blockade of the coast of northern Europe from the River Elbe to Brest.\textsuperscript{32} Napoleon countered in November with the Berlin Decree, forbidding commerce with Great Britain and authorizing seizure of vessels coming from England or her colonies to ports under his control.\textsuperscript{33} In 1807 there were two British orders-in-council, which prohibited coastwise trade between European ports under French control, established a blockade of all European ports excluding the British flag, and permitted commerce with France only through British ports, at which a duty was imposed upon certain enumerated articles, including cotton, sugar, molasses, tobacco and rice.\textsuperscript{34} From this it is clear that the British policy was to prevent Napoleon from receiving contraband goods useful to military operations, but at the same time to feed into French ports non-contraband products, including English goods, by licensed neutral ships, and by taxing this trade, to finance the conduct of campaigns on the Continent.\textsuperscript{35} Finally, by the Milan Decree of December 17, 1807, Napoleon by importation into neutral ports unless bona fide tariffs were paid; evidence of rebates would deneutralize the cargo again. See Neutrality, Its History, Economics and Law (1936), Vol. 2: The Napoleonic Period, by W. A. Phillips and A. H. Reede, 117-125.

\textsuperscript{30} Act of April 18, 1806, 2 Stat. at L. 879.

\textsuperscript{31} The best detailed history of the period is Adams, History of the United States of America During the Administrations of Jefferson and Madison (1891-98), Books III and IV; for analysis of the continental System see Heckscher, The Continental System, an Economic Interpretation (1922); Melvin, Napoleon's Navigation System; a Study of Trade Control During the Continental Blockade (1919). Good summaries may be found in Neutrality, Its History, Economics and Law, Vol. 2, The Napoleonic Period, by W. A. Phillips and A. H. Reede, Ch. VI and VII; Bemis, Diplomatic History, ch. IX.

\textsuperscript{32}3 American State Papers, Foreign Relations 267.

\textsuperscript{33}3 American State Papers, Foreign Relations 289.

\textsuperscript{34}3 American State Papers, Foreign Relations 267, 269.

\textsuperscript{35}See Bemis, Diplomatic History (1936) 149.
declared that ships which paid the tax required by the British Government or permitted themselves to be searched by British cruisers were "denationalized" and hence good prize.  

Had these stringent executive orders been strictly enforced, neutral shipping must have been nearly driven from the seas. But Yankee skippers were not to be deterred by paper blockades; in fact, their gains from the forbidden neutral commerce were enormous, so that concern over rights became submerged in the consoling contemplation of profits. What really stirred the wrath of Americans was the invasion not of commercial but of personal rights. To obtain adequate man-power for its fleet the British government resorted to the use of press gangs and removal of seamen from neutral vessels, on the slightest evidence of their British nationality. Undoubtedly a considerable number of British seamen had taken refuge in the ships of neutral states from the brutal discipline and barbaric conditions then prevalent aboard British men-of-war, but if these deserters were the sole object of search, the British were hawking for butterflies. In fact, they took other game. The intolerable character of the interference can be realized when we recall that at least 10,000 men were forcibly removed from American merchantmen and impressed into the British naval service. Of these, it is improbable that more than one-tenth were actually British subjects. An almost incredible climax was reached in 1807 when a British man-of-war, the Leopard, fired upon the American warship Chesapeake, which was then in a defenseless condition, and after compelling submission, impressed four members of the crew, of whom three were undoubtedly native-born Americans.  

By the end of 1807 our resentment against the blockading decrees and impressment policy crystallized into a civil embargo on all foreign commerce of the United States. But the severe

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363 American State Papers, Foreign Relations 290.
37 On impressment see 2 Mahan, Sea Power in Its Relations to the War of 1812 (1905) 114-128; Zimmerman, Impressment of American Seamen (1925); Adams, History of the United States of America, During the Administrations of Jefferson and Madison, Bks. III and IX.
38 Of which a realistic picture is given in the works of the British novelist, Tobias Smollett. See his Roderick Random.
39 Bemis, Diplomatic History (1936) 145; 3 Adams, History of the United States of America, During the Administrations of Jefferson and Madison 94.
404 Adams, History of the United States of America During the Administrations of Jefferson and Madison, ch. 1.
injury to American shipping produced an opposition so strong that
the administration was obliged to repeal the measure in 1809.42 A
non-intercourse act directed against Great Britain and France was
substituted.43 When Madison assumed the presidency, this legis-
lation was beginning to have some effect upon the British, for the
British minister in Washington entered into an executive agree-
ment, under the terms of which the orders-in-council would be
withdrawn if the Non-Intercourse Act were applied solely to
France. Upon this assurance President Madison proclaimed re-
sumption of intercourse with the British, only to learn that their
minister had exceeded his instructions, which included the further
conditions that the United States accept the Rule of 1756, permit
the British navy to enforce the Non-Intercourse Act against
France, and acquiesce in seizure of American vessels trading with
countries which obeyed the Napoleonic Decrees. Since these
conditions were obviously unacceptable, there was nothing to do
but restore non-intercourse.44

Meanwhile domestic opposition to the policy grew apace and
a new scheme was adopted in 1810. Commerce with the whole
world was resumed, but the president was authorized to restore
the Non-Intercourse Act against either France or Great Britain,
whenever the other revoked its orders-in-council or decrees.45
Accordingly, Napoleon caused his Minister of Foreign Affairs to
write a note to the American Minister in Paris, informing him
that the Decrees of Berlin and Milan would cease to have effect
after November, 1810.46 The language of this note was extremely

42On the administration and the domestic effects of the embargo see
4 Adams, History of the United States of America During the Administrations of Jefferson and Madison, chs. 11, 12; Sears, Jefferson and the Em-
3 bargo (1927) 73-252.
43Act of Congress, March 1, 1809, 2 Stat. at L. 528; amended by Act
6 Digest of International Law (1906) 148ff.
44For the Erskine agreement fiasco see 5 Adams, History of the United
7 States of America During the Administrations of Jefferson and Madison,
8 chs. IV, V, VI; Tansill, Robert Smith, in 3 American Secretaries of State,
ed. by Bemis, (1927-1929).
45Act of Congress of May 1, 1810, 2 Stat. at L. 605.
46For the letter, Duc de Cadore to General Armstrong, Aug. 5, 1810,
see 3 American State Papers, Foreign Relations, 386 ff; Adams, History of the United States of America During the Administrations of Jefferson and
9 Madison, Bk. V, ch. XII, which treats the incident fully. "In this new
10 state of things," wrote Cadore, "I am authorized to declare to you, sir.
11 that the Decrees of Berlin and Milan are revoked, and that after November
12 1 they will cease to have effect—it being understood (bien entendu) that in
13 consequence of this declaration the English are to revoke their Orders in
14 Council, and renounce the new principles of blockade which they have
15 wished to establish; or that the United States, conformably to the Act
equivocal, and it later appeared that Napoleon's conduct was equally so, for on the same day he issued a secret decree ordering condemnation of sequestrated neutral vessels, in which he spoke of the Berlin and Milan Decrees as "permanent laws of the Empire." He was merely playing for a relaxation of the British orders-in-council by November, 1810. The British Government refused to alter its orders on the basis of such an informal communication, but President Madison again swallowed the diplomatic bait and restored the Non-Intercourse Act against the British. With the enemy thus singled out, public opinion became increasingly hostile toward Great Britain. Even so, there was little pressure from commercial interests for war. Although these interests were the chief sufferers from the impressment policy and the orders-in-council, it remained for the "warhawk" element in Congress to make capital of these grievances and carry us into war. This group was representative of western frontier sentiment, which favored war from motives quite foreign to the issue of neutrality. Ironically enough, we finally blundered into the war just when a new and more liberal British ministry had decided to make the concessions which might earlier have conciliated us.

Thus ended what was certainly the formative period in the development of the traditional law of neutrality. To assert that it failed to keep the United States out of war or to protect its neutral commerce is to ignore the fact that we had advanced a novel position in the face of British and French policy. The American view did not enjoy the general acquiescence which would justify its assertion as international law. What matters is not so much whether it was respected during the Napoleonic wars, but whether it emerged from those wars as a lost cause or a growing body of...
law. That the latter was the case is amply proven by the respect accorded it during the following century.

In 1817 the United States enacted a neutrality law which was consolidated with the 1794 law in the Act of April 20, 1818, a statute which became the permanent basis of our neutrality law.\textsuperscript{51} This legislation prohibited the fitting out or arming in the United States of vessels for the use of belligerents, the enlisting of troops for belligerent armies, or the initiation and equipping of a military expedition directed against a state at peace with the United States. These provisions were inspired primarily by violations of our neutral position during the course of the Spanish-American wars of independence.\textsuperscript{52} Similar situations recurred in the Canadian Rebellion of 1837,\textsuperscript{53} the British effort to recruit in the United States during the Crimean War,\textsuperscript{54} and the frequent filibustering expeditions in aid of the Cuban insurgents.\textsuperscript{55}


\textsuperscript{52}In February, 1806, Francisco de Miranda organized in New York a military expedition which set out for South America in several ships, headed by the Leander. Two of the schooners captured by the Spanish fleet, carried thirty-six Americans. Colonel W. S. Smith, surveyor of the port of New York, and Lowell J. Ogden, owner of the Leander, were prosecuted for violation of the Neutrality Act of 1794, but acquitted by the jury. United States v. Smith and Ogden, (1806) 27 Fed. Cas. No. 16,341-16, 342b. On December 30, 1815, the Spanish Minister, Luis de Onis, long a resident of the United States, sent to Secretary of State Monroe a long list of breaches of neutrality which he had recorded. 4 American State Papers, Foreign Relations 423. Correa de Serra, the Portuguese Minister, also called attention to the fitting out of privateers in American ports and urged tightening of the statutes. Dana's Wheaton, International Law, Note No. 215 by Dana, at p. 541; quoted by Fenwick, Neutrality Laws of the United States 35.

\textsuperscript{53}An expedition recruited in the United States took possession of Navy Island, in the Niagara River. Supplies were conveyed from the American shore by the ferry boat Caroline, which was taken by Canadian loyalists after an affray in which several Americans were killed or wounded, set on fire and turned over the falls. On March 10, 1838 Congress enacted a law authorizing seizure of vessels or munitions intended for use in unlawful hostilities. 5 Stat. at L. 212. See People v. McLeod, (1841) 25 Wend. (N.Y.) 483, 37 Am. Dec. 328; for the diplomatic controversy which centered in the Caroline incident consult 4 Miller, Treaties of the United States 443-457.

\textsuperscript{54}Attorney General Cushing acted vigorously to break up the recruiting, and the United States demanded the recall of the British Minister and consuls because of their participation. 34th Cong., 1st Sess., S. Ex. Doc. No. 35; Brebner, Joseph Howe and the Crimean War Enlistment Controversy Between Great Britain and the United States, (1930) 11 Canadian Historical Review 300-327.

\textsuperscript{55}Narcisco Lopez led two filibustering expeditions in aid of Cuban insurgents between 1849 and 1851. From 1853 until 1860 the famous William Walker organized numerous expeditions, despite considerable efforts by the authorities to prevent them. These movements continued with some frequency until the Spanish-American War. See Curtis, The Law of Hostile
On the international stage, events pushed European states steadily toward the American position. The neutralization of Switzerland and Belgium on a permanent basis showed in striking manner the possibilities of really impartial conduct.\(^5\) In the Declaration of Paris of 1856 the rule of "free ships, free goods," the rule that neutral goods except contraband are free even in enemy vessels, and the rule that blockades to be binding must be effective, were incorporated into a great law-making convention.\(^5\) Although this was an important concession to the American position, the United States did not itself become a party to the Declaration.\(^8\)

In the American Civil War the United States was placed for the first time in a position in which national interest might conflict with its own conception of international neutrality. The continuous-voyage doctrine, of which we had previously complained, was not only applied by us but extended to cover the first half of the broken voyage,\(^5\) or a voyage from neutral port to neutral port when the goods were destined for subsequent transportation by land or sea to a belligerent.\(^6\) But in the main the problems which arose were settled in accordance with the law of neutrality. When an American cruiser removed the Con-

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\(^5\) See 1 Oppenheim, International Law (5th ed. by Lauterpacht, 1935-37) pars. 98-99 for accounts of Swiss and Belgian neutrality, with citation of authorities.

\(^6\) Martens, Nouveaux Recueil Général de Traités (1843-1875) 767; Piggott, The Declaration of Paris (1919); Malkin, The Inner History of the Declaration of Paris, (1927) 8 British Year Book of International Law 1-44.

\(^8\) The United States Government objected to Article I of the Declaration, which read, "Privateering is and remains abolished." At that time a weak naval power, the United States declined to give up privateering unless Article I were amended by adding, "And that the private property of subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband." See the digest of Marcy's reply to the signatories in 1 Savage, Policy of the United States Towards Maritime Commerce in War, 1776-1914 (1934), pp. 76-80, and documents. Despite its refusal on this point, the United States has in practice acted in accord with the Declaration.


\(^8\) Cf. The Springbok, (1866) 5 Wall. 1, 18 L. Ed. 488; The Peterhoff, (1866) 5 Wall. 28, 18 L. Ed. 564. See 2 Hyde, International Law (1922) 611-614, 615; 2 Oppenheim, International Law (5th ed. by Lauterpacht, 1935-37) 674-676.
federate commissioners, Mason and Slidell, from the English mail steamer Trent, en route from Havana to England, it clearly violated British neutrality. But our government recognized that the action was indefensible and surrendered the prisoners.\textsuperscript{61} The British were guilty of unneutral service in failing to use due diligence to prevent Confederate cruisers fitted out in British shipyards from escaping to prey upon United States commerce, but here again neutral obligations were recognized and reparation made for the depredations of these cruisers.\textsuperscript{62}

The wars of the Near East between Russia and Turkey in 1878, Italy and Turkey in 1911, and among the Balkan powers in 1912-1913 were conducted almost entirely on land, and scarcely affected the commerce of the United States. Of greater consequence were the Boer War\textsuperscript{63} and the Russo-Japanese War,\textsuperscript{64} less for their effect upon American neutrality than for the stimulus they gave to consideration of the problems of neutrality by the Second Hague Conference (1907). Conventions were produced which contained significant codifications of the law regulating rights and duties of neutrals in both land and naval warfare.\textsuperscript{66} Again, the London Naval Conference of 1908 produced a codification (the Declaration of London of 1909) of the law relating to blockade, contraband, unneutral service, destruction of neutral prizes, transfer to neutral flag, enemy character, convoy, resistance to search, and compensation.\textsuperscript{66} The Declaration of London was observed in the war between Italy and Turkey, and in the World War was urged upon the belligerents by the United States. The Central Powers indicated their willingness to adopt it if their opponents did so also,\textsuperscript{67} and with certain reservations and modifications.

\textsuperscript{61}For the diplomatic correspondence see 4 British and Foreign State Papers 602-657; 7 Moore, Digest of International Law 768-779. See Bemis, Diplomatic History (1936) 370-372; 2 Hyde, International Law (1922) 636-639.


\textsuperscript{63}See Campbell, Neutral Rights and Obligations in the Anglo-Boer War (1908); Baty, International Law in South Africa (1900).

\textsuperscript{64}See Hershey, The International Law and Diplomacy of the Russo-Japanese War (1906); Lerouse, Le Droit International Pendant la Guerre Maritime Russo-Japonaise (1924).


\textsuperscript{66}See Scott, The Declaration of London (1919) for text, papers, etc.

\textsuperscript{67}For the diplomatic correspondence see Diplomatic Correspondence
Great Britain put the Declaration into force during the first two years of the war. But on July 7, 1916 Great Britain and France issued a joint memorandum characterizing the Declaration as unduly restrictive of belligerent rights in view of the rapidly changing conditions of warfare, and announcing their return to the traditionally accepted rules of international law.

In fact, it became apparent from the outset that all these protestations were only lip service to the law of neutrality; generally recognized rights of neutrals were frequently infringed. From August, 1914 to April, 1917, when the United States entered the War, there were repeated violations of our neutrality by Great Britain, France, Italy and Germany:

"...the sowing of mines on the high seas; the extensive and unreasonable sea zones involving danger to neutrals; the destruction of neutral ships captured in midocean; the unwarned sinking by submarines of neutral ships and of belligerent merchant ships on which neutrals were rightfully travelling; the forcing of our ships and of our mails into belligerent ports for the purposes of search, seizure, and censorship; the extension of contraband to cover foods and supplies to civil populations; the stoppage of our ships on the high seas for the purpose of taking persons off them."

Repeated protests against these practices were made by Secretaries of State Bryan and Lansing on the ground that they were contrary to established international law. But none of our contentions was accepted by any one of the belligerents; in the situation confronting them, they argued, these claims of neutral rights must yield to a higher law of self-preservation which abrogated the traditional set of rights and obligations.

In view of this general disregard of the international law of neutrality it is necessary to inquire whether it must now be considered to have been abandoned. In part this must depend upon the effect of new international security devices developed after the war, but consideration of them must be deferred to the following section. Two facts are inescapable: there was no postwar

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70 Warren, Troubles of a Neutral, (April 1934) 12 Foreign Affairs, No. 3, p. 387; also in (June, 1934) International Conciliation, No. 301, p. 206.
71 Savage, Policy of the United States Towards Maritime Commerce in War, 1914-1918 (1936), chs. II, III, V, VI; and documents.
72 Ibid.
convention, restatement or agreement among the powers as to the status of neutrality; and there was no satisfaction of claims based upon the violations of neutrality from 1914 to 1917. When the latter question was raised with Great Britain in 1927, Secretary of State Kellogg did not press the validity of the claims, but entered into an executive agreement whereby the department of state was authorized to pay from rather limited sums owing to Great Britain such claims as it might, because of failure of personal legal remedies or from equitable considerations, think meritorious. This arrangement was coupled with the significant provision "that the right of each government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to [the neutrality] claims is fully reserved, it being specifically understood that the judicial position of neither government is prejudiced by the present arrangement." In effect this was a concession to Great Britain; the right of the United States to assert the law of neutrality exists in any case and is less important than the right to expect observance of that law. But the British government really reserved the right to repeat, if it chose, the violations of neutrality of which we complained. Nor did the United States secure genuine acceptance of its view that the German submarine warfare was illegal. The use of submarines was prohibited in the Treaty of Washington of 1922, but this was not signed by Germany nor ratified by all of the signatories. It seems all too probable that European states will not in any future war consider themselves bound by those rules of the international law of neutrality which were disregarded in the World War. In

73Senator Borah introduced a resolution calling for a restatement of the law of neutrality. 5 Res. 157, 70th Cong., 1st Sess., Cong. Rec., LXIX (Feb. 21, 1928), 3421. It was not adopted.


75Article I(3).

76For the text of the Treaty see Supplement (1921) 15 American Journal of International Law or Buell, The Washington Conference (1922) 395-98. On the provision as to submarines see Roxburgh, Submarines at the Washington Conference, (1922-23) 3 British Year Book of International Law 150-158. France failed to ratify, so that the treaty never came into force. It is now superseded by the London Treaty on Limitation of Naval Armament (1930), U. S. Treaty Series, No. 830. Part IV, which is still in force, requires submarines to adhere to the laws of war in attacking vessels, e.g., provide for the safety of passengers and crew. But this is virtually impossible in operations against armed vessels, hence is unlikely to be observed. Violations have recently occurred in the Mediterranean.
the absence of specific international agreement or specific denunciation, this large segment of the law remains today in a state of suspended animation.

A few conclusions emerging from this review of American experience with the law of neutrality need to be borne steadily in mind:

(1) There is no conclusive evidence that the violation of neutral rights of commerce has drawn the United States into foreign wars. Such violations have been frequent, but commercial interests have not pressed their grievances to the point of insistence upon war. Whether because losses were compensated by expansion of trade, or from more altruistic motives, shippers have preferred to rely upon claims for restitution after the cessation of hostilities. Were this the only problem it might prove possible to make the traditional law effective.

(2) Violations of neutral rights as to persons have caused far more difficulty because of the effect upon popular feeling. Yet even the cumulative effect of such violations has rarely been sufficient in itself to draw us into war. In combination with a diplomatic incident or an independent motive for war it becomes a potent factor, but John Adams proved that even this combination need not be irresistible.

(3) American experience is not very conclusive on the subject of isolation. Absolute embargo of American shipping proved politically impossible, despite Jefferson's strong control of Congress. Partial embargoes directed against belligerents had considerable effect but could not be maintained long enough to accomplish their end. The threat of selective application of non-intercourse was probably the most effective device of all. The fact that President Madison was hoodwinked by Napoleon should not blind us to the fact that this policy did produce immediate results.

(4) As a part of international law neutrality acquired a standing only when it came to accord with national interests. It was advanced by the United States as a national policy, resisted by the British as impolitic. When Great Britain ceased to dominate the seas, with the result that the naval strength of major powers became more nearly equal, when dependence upon neutral shipping in time of war became a larger factor in the belligerents' calcula-

77There is a large controversial literature on the question whether commercial and financial interests drew the United States into the World War. See especially, for the affirmative answer, Millis, The Road to War (1935); contra, Baker, Why We went to War (1936).
tions, then concessions were made. In like manner the permanence of this body of law will depend upon the resultant of this conflict of national interests. It is clear from the experience of the United States in the World War that a neutral desiring to rely upon it needs more tangible supports at some points than can be found in the respect of belligerents for law. Yet it is equally clear that the cumulative effect of a century and a half of neutrality is not negligible; ground has been steadily won and some of it has been retained.

(5) The status of important principles of the international law of neutrality has become uncertain as a result of general disregard during the World War. Reassertion of these rules, preferably on the basis of international agreement, is probably a prerequisite of their future application.

II. Experiments with Collective Security

Skepticism as to the future of the international law of neutrality is not confined to those who question its enforceability. Account must also be taken of the effect upon neutrality of the Covenant of the League of Nations, with its unique institution of collective security; and of the Pact of Paris (Kellogg Pact), which purports to outlaw war as an instrument of national policy. Although the United States has never ratified the Covenant, it cannot escape the consequences of widespread adherence by other states to such an instrument, which must be recognized as a law-making convention profoundly affecting international law and institutions. There is nothing in the law of neutrality either so long established or so universally accepted as to be proof against positive international legislation altering it.78

Few informed persons today assert that the Covenant has had no limiting effect upon the right of signatories to assume a neutral position. The line of disagreement is rather between what has been called qualified neutrality and no neutrality.79 The argument

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79 Until the end of the eighteenth century a distinction was commonly made between perfect and qualified neutrality. The latter term implied that the state in question was on the whole neutral but directly or indirectly aided one belligerent because of prior treaty obligations. 2 Oppenheim, International Law (5th ed. by Lauterpacht, 1935-37) 529-533, giving examples; Lauterpacht, Neutrality and Collective Security, (1936) 2 Politica 133-155, especially 142ff. The concept has been revived to fit the situation of states members of the League of Nations.
that neutrality cannot exist at all within the framework created by
the Covenant starts from the clause in Article 16 which declares
that Covenant-breaking states "... shall ipso facto be deemed to
have committed an act of war against all other members of the
League." Use of the word "war" lends color to the hypothesis
that member states are bound to regard themselves as occupying an
uneutral position with respect to violators of the Covenant. But
an act of war need not produce a state of war if the member states
choose not to accept the challenge. The question is not, in any
case, to be resolved by a mere turn of phrase; what has to be deter-
mined is whether the Covenant subjects member states to positive
obligations in the application of sanctions which are inconsistent
with the obligations of a neutral.

Attention may first be drawn to the fact that recourse to war
by member states is not in every case a violation of the Covenant.
The failure of the Council of the League of Nations, acting under
Article 15, to adopt a unanimous report, or its failure to find
subject matter for consideration other than that reserved to the
exclusive domestic jurisdiction of the parties, leaves the disput-

80 Article XVI, 1. That these words were not intended to mean that a
state of war automatically follows a breach of the Covenant seems apparent
from the detailed provisions for non-military sanctions which follow them.
See also note 89, infra.

81 This raises the vexed question of the legal meaning of war. In general
it may be said that (1) an act of war does not create a state of war unless
the injured state regards it as reason for active hostilities; (2) continuous
acts of war on a large scale, even in the absence of a declaration of war by
either state concerned, may be regarded by other states as war. Difficult
problems of interpretation have arisen recently, especially in connection
with hostilities in the Far East. See Wright, When Does War Exist?
(1932) 26 Am. J. of Int. L. 362; Wright, The Test of Aggression in the
Italo-Ethiopian War, (1936) 30 Am. J. of Int. L. 45; Lauterpacht, "Resort
to War" and the Interpretation of the Covenant During the Manchurian
Dispute, (1934) 28 Am. J. of Int. L. 43; Brierly, International Law
and Resort to Armed Force, (1932) 4 Cambridge L. J. 308; McNair, The Legal
Meaning of War, (1926) 11 Grotius Society Transactions 29; Williams,
Some Aspects of the Covenant of the League of Nations (1934) chapter on
The Covenant of the League of Nations and War, p. 298 et seq. All these
materials are summarized in an excellent Editor's Note in Briggs (Ed.), The
Law of Nations; Cases, Documents, and Notes (1938) 718-725.

82 Covenant, XV, 7: "If the Council fails to reach a report which is
unanimously agreed to by the members thereof other than the representatives
of one or more of the parties to the dispute, the members of the League re-
serve to themselves the right to take such action as they shall consider
necessary for the maintenance of right and justice.

83 Covenant XV, 8: "If the dispute between the parties is claimed by one
of them, and is found by the Council to arise out of a matter which by in-
ternational law is solely within the domestic jurisdiction of that party,
the Council shall so report and shall make no recommendation as to its
settlement." The Permanent Court of International Justice, in holding that
French nationality decrees issued in Tunis and Morocco, are not solely a
ants under no legal prohibition. A similar situation would exist when either or both disputants declined to comply with the recommendations of a unanimous report by the Council, or to accept a judicial decision or arbitral award by a tribunal invoked under Article 12. In any situation assertedly defensive, war might continue for some time before the Council or Assembly adopted any position which would bind other member states. The possibility that League members may recognize the belligerent status of rebels in a civil war within another member state affords a further example of legal war. It must be remembered also that the member states retain complete discretion to decide for themselves whether recourse to war in a given case constitutes a violation of the Covenant. Even in the face of a general opinion to the contrary, some members may therefore continue to treat a war as outside the provisions under which sanctions may be invoked. Or they may concur in the conclusion that a breach of the Covenant has occurred, yet be exempted from participation in sanctions. In all these cases there appears to be nothing in the Covenant which prohibits member states from assuming a position of neutrality with respect to the belligerents.

Even with respect to member states which concur in a finding that another member has resorted to war in violation of the Covenant, and which participate in the application of sanctions, matter within the domestic jurisdiction, has considerably narrowed the permissible scope of such findings by the Council. Tunis-Morocco Nationality Decrees, (1923) P. C. I. J., Series B, No. 4; 1 Hudson, World Court Reports 143.

84The Spanish civil war affords an interesting example. League members under the domination of Fascist powers, e.g. Austria and Hungary, have recognized the rebels as the de jure government of Spain. The Non-Intervention Committee has refused to accord belligerent status to Franco—though it may be argued that the non-intervention agreement is in itself a kind of collective declaration of neutrality. Thus Smith, Some Problems of the Spanish Civil War, (1937) 18 British Year Book of International Law, 26ff. A considerable controversy has raged in the British press as to the propriety of British recognition of belligerency, for a review of which see Garner, Recognition of Belligerency, (1938) 32 Am. J. of Int. L. 106-113. Italy and Great Britain have now reached an agreement involving withdrawal of Italian troops from Spain and recognition of belligerency by Great Britain. See Chamberlain's Speech of February 21, 1938 in the House of Commons; New York Times, February 23, 1938.

85In the Italo-Ethiopian dispute members of the Council separately indicated their views as to whether a violation of the Covenant had occurred. In the Assembly each state indicated whether it would participate in sanctions, Austria, Hungary and Albania refusing to do so.

86Under the Assembly's 1921 interpretation. See the secretary general's report of the legal position of such abstaining states with reference to the programs of sanctions, in Reports and Resolutions on the Subject of Article 16 of the Covenant, A 14, 1927, V. p. 83.
there remains the question whether such participation is consistent with neutrality. The sanctions may be either economic or military in character. Under the terms of Article 16 all member states undertake to subject the Covenant-breaking state "... to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a member of the League or not." If impartial treatment be an essential characteristic of neutrality, as was supposed for a hundred years after the close of the Napoleonic wars, then such economic discrimination clearly must constitute unneutral conduct. Yet the official interpretation offered by the Assembly of the League distinguishes such economic pressure from a resort to war. Without admitting the right of a Covenant-breaking state to require from members of the League observance of any of the accepted rules of neutral conduct, the League states nevertheless deny that the frank partiality of their economic sanctions constitutes a state of unneutrality even between them and the Covenant-breaking state.

This attitude cannot be reconciled with the law of neutrality even by emphasizing the element of military non-participation and minimizing economic discriminations. What the League has done

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87 Article XVI, 1.
88 For the practical meaning of the duty of impartiality see 2 Oppenheim, International Law (5th ed. by Lauterpacht 1935-37) 542-543, who says: "... The duty of impartiality today comprises abstention from any active or passive cooperation with belligerents; ... in addition the equal treatment of both belligerents regarding such facilities as do not directly concern military or naval operations ... If a neutral grants such facilities to one belligerent, he must grant them to the other in the same degree. If he refuses them to the one, he must likewise refuse them to the other. ..."
89 The Assembly adopted a resolution on October 4, 1921, interpreting the sanctions article thus: "The unilateral action of the defaulting state cannot create a state of war; it merely entitles the other members of the League to resort to acts of war or to declare themselves in a state of war with the Covenant-breaking state; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure." Reports and Resolutions on the Subject of Article 16 of the Covenant. A 14, 1927, V., p. 42.
90 See the remarks of Mr. Eden on October 23, 1935, in which he rejected the view that Great Britain could be neutral when acting under Article XVI, yet recognized the applicability of the neutrality rules of Hague Convention No. XIII. 305 H. C. Debates 218, 219; quoted by Lauterpacht, Neutrality and Collective Security, (1936) 2 Polita 141.
91 Cf. the remarks of Professor Quincy Wright before the American Society of International Law, April 26, 1935, (1935) 29 Proceedings of the A. S. I. L. 64-66.
is to return to a form of the Grotian conception of neutrality, from which partiality for the just cause was not excluded. How far this conception of qualified neutrality has modified the previous law of neutrality depends upon the extent of its acceptance. In a world in which the United States, Germany, (perhaps) Italy, Japan, and several other states stand outside the League of Nations, it is necessary to regard the Covenant as particular rather than general international law. But the adherence of Great Britain, France, the U. S. S. R. and most smaller states to the Covenant must be held to restrict the sphere of absolute neutrality so severely as to reduce it also to a body of particular international law, except, of course, in those situations in which member states as well as non-members remain free to assume a neutral position.

A word about military sanctions must be added. It cannot, of course, be asserted that use of them does not constitute belligerency, whatever may be one's judgment of the moral issue involved. But the language of Article 16 places upon member states no obligation whatever to participate in such sanctions; the Council merely recommends them to the members. Presumably, a refusal to cooperate in economic sanctions would render a member state liable to expulsion by the Council under Article 16, paragraph 4, but this result could hardly follow a refusal to join in military sanctions, since the member states assume no positive obligation. Consequently, it would seem to be open to a non-participating state to declare its neutrality.

From these instances of permissible neutrality within the framework of the League in cases of disputes between member states, it is clear (a) that member states may assume a position of absolute neutrality in several situations in which legal war is not precluded, and also in the event of their non-participation in military sanctions; (b) that League members regard participation in eco-

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92 Supra, p. 605, and notes 3 and 4.
93 I. e., law in force among a small number of states, or among a considerable number not including all the Great Powers.
94 Article XVI, 2: "It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League."
95 "Any Member of the League which has violated any Covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon." After the refusal of Austria, Hungary and Albania to participate in sanctions against Italy, Mr. Litvinov, the delegate of the U. S. S. R. suggested expelling them, but no action was taken.
nomic sanctions not as belligerency or unneutral conduct but as a kind of qualified neutrality. A very similar situation would exist where one or both of the disputants were outside the League, for an invitation must under such circumstances be extended to the non-member state or states to submit to the obligations of membership for the purposes of the dispute. If the invitation is accepted, the machinery of Articles 12 to 16 of the Covenant can be applied in the normal way; if it is declined, the refusal will subject the non-member disputant to Article 16 if it resorts to war against a member, or will leave further action with reference to two non-member disputants to the discretion of the Council. In these situations the principles which govern the right of League members to remain neutral would be those which govern disputes between members in which Articles 12 to 16 may be invoked. Finally, absolute neutrality may continue not only in those situations in which it is permitted to League members, but also as a status assumed by non-members.

If the Covenant does not make all recourse to war illegal, the question must next be asked: What is the legal effect upon war and neutrality of the Treaty for the Renunciation of War (Pact of Paris)? In this case the interest of the United States is a direct one, for it is a signatory of the Pact. Parties have agreed to "... condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." They further agree that settlement of disputes among them, of whatever nature or origin "shall never be sought except by pacific means." This language clearly indicates that even as among signatories not all recourse to war is prohibited. Obvious exceptions to such prohibition are war (a) as a means of lawful self-defense; (b) as a form of sanc-

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96Covenant, Article XVII.
97Recent practice with reference to neutrality has not been very conclusive. States, including members of the League, have concluded treaties contemplating neutrality, but assuming the good faith of the parties these may be treated as contingent upon discharge of League obligations. See Lauterpacht, Neutrality and Collective Security (1936) 2 Poltica 141, note 2. Members of the League declared their neutrality in the war between Bolivia and Paraguay in the Chaco (infra, p. 634), but this preceded the League's determination that Paraguay was the aggressor; subsequently they cooperated in unilateral application of the arms embargo to Paraguay. No state has abolished its neutrality laws.
99Article 1.
100Article 2.
tion in collective security proceedings under such an instrument as the Covenant of the League; (c) between signatories and non-signatories; (d) against a signatory which has broken the Pact by improper resort to war. But to elaborate such situations is really superfluous, for the illegality of a war does not make it any the less a war; hence, unless the Pact imposes upon states adhering to it some obligation to deal in an unneutral manner with states which resort to war in violation of it, it would seem that the right to remain neutral is unaffected.

In fact, this must be the case, for no machinery has yet been developed for adjudging a belligerent to be a violator of the Pact, nor has any sanction been provided for the case of its violation. On several occasions where there has been resort to force, leading signatories, including the United States, have reminded the disputants of their obligations under the Pact, but no official condemnations of such disputants as violators of the Treaty were issued. It is not clear whether recourse to force short of war is included in the prohibition, but it may be doubted whether the legal fact of violation of the Pact can be made to depend upon the absence of a declaration of war when the scope of the hostilities does in fact amount to war. Of course, this remains an academic question in the absence of any machinery for official findings of fact or conclusions of law as to the character of the aggression. In like manner, the application of any sanction to a violator of the Pact must wait upon such official findings, so that no real occasion has arisen to determine whether some sanction is implied in the instrument itself. It is unlikely that this was intended, nor does there appear to be any reason for distinguishing this from other international treaties, which are characteristically without sanction. This conclusion is strengthened by the principle stated in the Preamble, that “any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty;” obviously this is only

101 For instances see 2 Oppenheim, International Law (5th ed. by Lauterpacht 1935-37) 156-157. In the Ethiopian war the Pact was made the basis of action against Italy by the United States. See also the Budapest Articles of Interpretation, adopted by the International Law Association, (1934) 38 International Law Association 1-70.

102 See Wright, The Meaning of the Pact of Paris, (1933) 27 Am. J. of Int. L. 39. He argues that any armed force or reprisal is within the prohibition of the Pact, which seems the logical view.

103 On the existence of war de facto see references in note 81, supra.

an affirmation of the usual rule that treaty breakers can derive no protection from the treaty.

Efforts have been made to "implement" the Pact in ways designed to render it more effective. In 1929 Senator Capper introduced a resolution calling for a munitions embargo directed against any state which the president should declare to have violated the Pact, but this resolution failed of adoption.\(^\text{105}\) Attempts were made for several years to secure general adherence to a consultative pact which would pledge signatories of the Treaty to consult together with respect to the proper action to be taken in situations in which a violation of the Treaty might be involved.\(^\text{106}\) At the 1932 Geneva Conference on the Limitation of Armaments Mr. Norman Davis was authorized by the United States to commit this government (a) to consultation with other states in case of threats to peace; (b) to abstention from any action which would defeat a collective effort to restore peace in cases where the conference of states determined that a state had violated its international agreements and the government of the United States concurred in that determination.\(^\text{107}\) The United States has also advanced the so-called Stimson doctrine of recognition, which would deny recognition to annexations or puppet states won in violation of international agreements.\(^\text{108}\) These devices show a disposition to make the Pact of Paris more effective, but in view of the still contingent nature of any assumption of an unneutral position with respect to violators of the Pact it would be too much to say that they have restricted the right of neutrality.

What conclusion, then, emerges from this discussion of the relation of neutrality to collective security and the renunciation of war? Simply that there remain today many situations in which states, even when parties to these new international institutions, are...

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\(^\text{105}\) Joint Resolution of February 11, 1929. For the text see International Conciliation, No. 316 (January, 1936), 12-14.

\(^\text{106}\) For a severe condemnation of consultative pacts, see Moore, An Appeal to Reason, (1933) 11 Foreign Affairs 547-588, at 570. They would seem, however, to be a necessary administrative device if the Pact is to be made effective.


\(^\text{108}\) U. S. Department of State Press Releases, January 9, 1932, p. 41. For criticism see Williams, Some Thoughts on the Doctrine of Recognition in International Law, (1934) 47 Harv. L. Rev. 776-794. See also Hill, Recent Policies of Non-Recognition, (1933) International Conciliation, No. 293; McNair, The Stimson Doctrine of Non-Recognition, (1933) 14 British Year Book of International Law 65-74; Garner, Non-Recognition of Illegal Territorial Annexations and Claims to Sovereignty, (1936) 30 Am. J. of Int. L. 679-688.
legally free to adopt a position of neutrality under the older international law. In this strictly legal sense the position of the United States has not materially changed. But any analysis which left the problem at this point would be open to serious criticism. It must be recognized that neither neutrality nor collective repression of war is, in its present form, static. Both institutions are by their nature forced to aspire to universality, and it is apparent that they cannot attain it jointly. For whatever the current modus vivendi may be, the extent of the one will always be in inverse proportion to the extent of the other. Absolute neutrality can exist only to the extent that collective security is incomplete, whether that incompleteness be in the collectivity of states pledged to the institution or in the variety of situations to which it is thought practicable to apply it. The two institutions are invariably complementary, never coordinate; and this is the proof of an essential inconsistency and exclusiveness which belies the legal accord. It is necessary, then, to form some judgment as to the relative merits of the two institutions, a question of policy which must take account of what practical experience we have had with each. That ground has already been covered for neutrality; it must now be approached with respect to collective security.

The three major tests of the present machinery for collective security have been the Sino-Japanese conflict in Manchuria (1931-1933), the dispute between Bolivia and Paraguay over the Gran Chaco area (1928-1935), and the Italian-Ethiopian war (1935-1936). Since each of these incidents furnishes in itself subject matter for a detailed study, this account must be reduced to the barest sketch of such facts as seem indispensable to an understanding of the results.109

The Manchurian dispute began with the occupation of Mukden and other points by Japanese forces. As early as September 21, 1931, the Chinese Government invoked Article 11 of the Covenant. Between that date and December 10 the Council considered the problem at three successive sessions, but its only positive acts were a resolution of September 23 requesting withdrawal of troops, reminders to China and Japan on October 17 of their obligations under the Pact of Paris, and a resolution of October 24 urging as a basis of negotiation the withdrawal of troops by Japan and the assumption by China of responsibility for the safety of Japanese subjects. Secretary of State Stimson announced the intention of the Government of the United States to cooperate: on October 9 he declared that the United States "would endeavor to reinforce what the League does," on October 16 this country accepted an invitation to participate in the Council's discussions on the basis of the Pact of Paris, and on October 20 our Government independently reminded the disputants of their obligations under the Pact of Paris.

Not only were these steps ineffective but the theatre of war expanded steadily. After many disagreements unanimity was obtained on December 10 for the appointment of a Commission of Inquiry (the Lytton Commission)\textsuperscript{110} to investigate the dispute on the spot. Although hostilities had reached the proportions of a major war in January, the Stimson Doctrine of Nonrecognition had been announced on January 7, and the Japanese had attacked Shanghai at the end of the month, it was not until the end of February that the Commission arrived in the Orient. Meanwhile the Chinese Government invoked Articles 10 and 15 of the Covenant and referred the dispute to the Assembly. An extraordinary session, convened on March 3, called upon Japan to withdraw troops from Shanghai and cease hostilities. A week later it adopted the Stimson Doctrine and appointed a Committee of Nineteen to follow developments and draft a settlement. At Shanghai the Japanese encountered unexpected opposition and abandoned the costly enterprise in May, but no concessions were made in Manchuria. Japan recognized the puppet state of Man-

\textsuperscript{110}Lord Lytton (Great Britain), chairman; General Henri Claudel (France); General Frank R. McCoy (United States); Dr. Heinrich Schnee (Germany); Count Aldrovandi (Italy).
chukuo on September 15. After a leisurely investigation lasting seven months, the Lytton Commission reported on October 2, 1932. Its admirable, if rather tardy, report111 contained a dispassionate review of the whole situation, designed not to wound the sensibilities of either belligerent. However, it recommended dissolution of the puppet state and creation of an autonomous Manchuria under Chinese sovereignty, with new treaties to guarantee the rights of both states. This the Japanese were no longer disposed to accept.

When the report was considered by another special session of the Assembly in December, the small powers pressed for action against Japan; the large ones were noncommittal. Temporizing, the Assembly referred the whole question to the Committee of Nineteen, which made futile efforts to persuade Japan to submit the dispute to a commission of conciliation. Eventually, the report had to be considered on its merits, and the Assembly had little choice but to accept it. It thus condemned Japan and committed itself to the myth of Chinese sovereignty in Manchuria. An Advisory Committee to concert action against Japan was created, and with it the United States collaborated. But Great Britain declined to be a party to active intervention; consequently, measures had to be confined to nonrecognition of Manchukuo and its legal ostracism from international conventions such as the Universal Postal Union.112 Even this legal boycott has in part yielded before the practical necessities of intercourse. Japan gave notice of withdrawal from the League, effective March 27, 1935.

Possession of the Chaco Boreal has been a bone of contention between Bolivia and Paraguay for more than half a century. Boundary treaties were negotiated in 1879, 1887 and 1894, but remained unratified. Arbitrations were proposed but never completed. Finally Paraguayan troops attacked and captured the Bolivian Fort Vanguardia in December, 1928. The dispute was not officially brought to the notice of the League, but the Council instructed President Briand to remind Bolivia and Paraguay of their obligations under the Covenant. At the same time the Pan-American Conference on Conciliation and Arbitration, then meeting


112For the measures, as proposed by the Advisory Committee of the Assembly, see Official Journal, (1932) Special Supplement No. 113, pp. 10-13.
in Washington, created a committee of five, which on December 14 extended its good offices to the belligerents. Both accepted. A protocol was drawn up and signed, providing for a nine-member Commission of Investigation and Conciliation. The belligerents agreed first to a cessation of hostilities and exchange of prisoners, then, on July 1, to let the commission take up the boundary dispute. In view of these arrangements the Council dropped the matter. But the commission over a period of three years was unable to arrange any settlement acceptable to both states.

Meanwhile, each pushed military preparations. In the spring of 1932 Paraguay withdrew from the negotiations, and hostilities were resumed. When a major Bolivian offensive captured Forts Boqueron and Toledo, Paraguay ordered general mobilization and appealed to the League on August 1, invoking Articles 10 and 11 of the Covenant. Despite pressure from the Council, the Pan-American Commission (transformed into a “Committee of Neutrals”), and nineteen American governments which applied the Stimson Doctrine in unison, an armistice could not be arranged. Bolivia declined to evacuate her newly-won territory as a basis of negotiation. Out of deference to the special interest asserted by the United States in matters confined to American governments, the League hesitated to intervene strongly, although only the Covenant was involved, Bolivia having never adhered to the Pact of Paris. Hence, the Council merely appointed a committee to follow the efforts of the Committee of Neutrals.

Fortune now favored the Paraguayan arms; in major engagements in which thousands of soldiers were killed, Paraguay recovered lost ground, captured a dozen forts and took the Bolivian general headquarters. As a result of this disaster, two Bolivian governments fell in quick succession, and Bolivia had perforce to resume peace negotiations under the auspices of the Committee. Progress was so desultory that the Council at last decided to act directly. In February, 1933, it sent an investigating commission to the Chaco, and made a further appeal for an armistice. The only result was that on May 10 Paraguay formally declared war on Bolivia. With the deliberateness which seems to characterize League investigations, the Chaco Commission proceeded to South America only in October. With difficulty it prevailed upon Paraguay to grant a temporary armistice from December 19 to December 30. After one extension to January 6, 1934 hostilities were resumed. By February 22 the Commission had completed a
draft treaty, but both belligerents objected to it on many counts. Nevertheless, it was reported to the Council as a practicable basis of settlement, and the report was adopted.

A proposed arms embargo on both belligerents so alarmed Bolivia, which imported all its munitions, that she decided to cooperate with the League and invoked Article 15. Some states imposed the embargo independently, but the Council suspended decision until its Advisory Committee could report under Article 15. This report called for evacuation of a zone at the front, followed by a peace conference at Buenos Aires; if the conference failed, then settlement of the frontier was to be referred to the Permanent Court of International Justice. Of course, Bolivia, having little left to lose, accepted this report and Paraguay rejected it; on this basis the latter was held to be the aggressor, and the partial arms embargo against Bolivia was lifted. As a result of this arbitrary judgment, Paraguay gave notice on February 23, 1935 of withdrawal from the League. In June the belligerents were induced by Argentine and Chile to agree on an armistice and begin peace negotiations in Buenos Aires. Armies were demobilized, embargoes lifted, and the League withdrew from the affair. At no time had its efforts or the efforts of the American Governments produced any result; the end came only when one belligerent had at terrible cost of life obtained a victory over the other. Paraguay retained most of the Chaco, but the two governments were unable to agree upon any terms of permanent peace, so that the whole issue remains open.

The League's greatest effort and most significant failure occurred in the Italo-Ethiopian War. Although Article 11 was invoked by Ethiopia on January 3, 1935, the Council took no direct action until September. At the outset it reminded the disputants of their general arbitration treaty, concluded in 1928. Outside the League there was no little diplomatic activity. Laval of France and Mussolini reached an understanding at Rome, presumably on the basis of a free hand for Italy. Negotiations looking to an arbitration of the initial incident at Wal-Wal bogged down until Ethiopia, informing the League that Italy had declined, invoked Article 15. England and France then brought pressure to persuade Mussolini to accept arbitration. He did so, but delayed action by constant objections as to the composition of the commission and the scope of its inquiry. Meanwhile, the Italian Government was transporting an army to Africa so that the question
became a progressively broader one than that of the Wal-Wal incident.

At its May meeting the Council contented itself with a resolution noting the impending arbitration and providing for a meeting on August 25 if the commission had not reached a settlement by then. The commission set to work on June 6. Without waiting for its findings, Italy continued to move troops and supplies to Ethiopia, using the arbitration as a device to postpone League inquiries. Ethiopia requested the Council to send neutral observers, but no action was taken. At its meeting on July 31 the Council was reminded by President Litvinov of its May resolution, but Laval proposed an adjournment to permit Great Britain and France to find a basis for settlement, and this carried. Conversations were accordingly held between British, French and Italian representatives on the basis of a treaty of 1906 which allocated their respective spheres of interest in Ethiopia. The negotiations were exclusive of Ethiopia, as the treaty had been; but even so no basis of settlement acceptable to Italy emerged. Meanwhile Ethiopia protested that it could obtain no munitions because many League members were enforcing an arms embargo against both countries. Italy continued to round out its expeditionary force. Finally, on September 3, the arbitral commission reported its conclusion that neither power was responsible for the Wal-Wal incident. Nevertheless, Italian preparations for war continued.

When the Ethiopian representative pressed for immediate action under Article 15, the Council finally took up the matter and appointed a Committee of Five to seek a formula. It reported on September 18 a plan under which Ethiopia would accept foreign advisers (including Italian) in her public services, but Italy was not satisfied. In the end the Council was obliged to revert openly to Article 15 and appointed a Committee of Thirteen to draft a report. This document was submitted on October 5; it refuted Italian charges of barbarism in Ethiopia and asserted Italy's obligation to refrain from force. But the rainy season had ended in Ethiopia and Italian troops were already on the march. Ethiopia invoked Article 16, whereupon the Council appointed a Committee of Six, which reported that Italy had resorted to war in violation of Article 12. This report was accepted. At the Assembly meeting of October 9 all members but Italy, Albania, Austria and Hungary followed the Council in voting to apply sanctions. A "Committee for Coordination of Measures under Article 16" was created, with a smaller Committee of Eighteen to propose
sanctions. These fell into five categories: an arms embargo against Italy; a prohibition of loans and credits to Italy; a boycott of all Italian imports; embargoes on the export of certain raw materials to Italy; a mutual assistance agreement to minimize losses among League members. Hostilities could have been checked quickly by closing the Suez canal or by a naval blockade of Italy, but resort to such devices was apparently blocked by the British Admiralty's doubt that it was then prepared to resist Italian military reprisals.

It must also be said that neither Great Britain nor France was wholly sincere in its support of sanctions at this time, for on December 8 Sir Samuel Hoare and Pierre Laval revealed their agreement on a "peace plan" which would have awarded about two-thirds of Ethiopia to Italy. Public indignation forced the British Cabinet to drop Hoare, so that the sanctionists remained in possession of the field. Short of military sanctions, the most promising attack was by an embargo on oil, but it too involved danger of reprisals. Attention therefore turned toward obtaining mutual assurances of support in the event such an embargo was applied. Still Great Britain hesitated, until Hitler's reoccupation of the Rhineland on March 7 made further consideration impossible. Within a month the whole sanctions program began to disintegrate and all thought of military sanctions was of course abandoned, especially as the French Government was disgruntled by British refusal to act against Hitler. Ethiopian resistance crumbled, and annexation was proclaimed. Sanctions were abandoned by Great Britain in June, by the League in July. Yet there can be little question that Italy's economy had suffered greatly from these impositions; her trade was cut nearly in half, her gold reserve drained by at least one-third. Had the pressure been continued for a year, capitulation must have been inevitable. But it was not the policy of the major powers to work this calamity in Italy when the conquest of Ethiopia was already a fait accompli. To do so might have created a serious disturbance of the already precarious balance of power.

It is unnecessary here to attempt a comprehensive statement of the factors contributing to the failure of the collective system. Many causes emerge from even so inadequate a summary of events as that just given: (1) delays caused by (a) reluctance to force the issue before conciliatory methods were exhausted, (b) the difficulty of obtaining impartial information without extended
investigation, (c) the need of reconciling variant points of view within the League as to the most effective procedures; (2) administrative difficulties resulting from (a) the multiplicity of uncoordinated peace agencies, (b) the lack of organization or experience in the application of sanctions, (c) the desire to avoid reprisals by holding sanctions to the minimum pressure which might be effective, (d) the difficulty of effectively adjusting national policies and economies to the collective program; finally, (3) the absence of real unanimity of purpose (a) because of difficulty in obtaining assurance of support from non-members (though the consistent cooperation of the United States has been very striking), (b) because of the existence of many almost irreconcilable national interests within the framework of the League and the willingness of the great powers to sabotage the collective program in the immediate national interest, (c) because of reluctance to abandon the balance of power theory of security until collective security was stronger, and the consequent support of two inconsistent institutions. The faults as to machinery and technique are not fundamental; time and experience might well correct them. But the subversion of the collective process by the diplomacy of power politics reveals the persistence of a selfish and calculating nationalism on a dominant scale. So long as this is true collective repression of war cannot be effective.

What, finally is to be said of the effect of collective security upon neutrality? “Considered as an institution,” says M. Politis, “neutrality is the product of international anarchy.” But one who agrees with this ought not to be convinced that neutrality is outmoded, for international anarchy persists. The decision to abandon or retain neutrality rests upon a judgment whether collective security can or cannot dispel that anarchy. In view of the failure of past efforts to do so, in view of the disinclination of League states to resort again to a sanctions policy, and in view

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113 Politis, La Neutralité et la Paix (1935) 11.
114 Cf. Prime Minister Chamberlain’s speech of February 22, 1938 (New York Times, Feb. 23, 1938): “At the last election in 1935 it was still possible to hope that the League of Nations might afford collective security. I believed it myself. I don’t believe it now. “If I am right in saying that the League as constituted today is unable to provide collective security for anybody then I say we must not try to delude small and weak nations into thinking that they will be protected by the League against aggression and act accordingly, when we know that nothing of the kind can be expected.
“I doubt whether the League will ever do its best work as long as its members are nominally bound to impose sanctions or use force in support
of the continued toothlessness of the Pact of Paris, one can only conclude that for the immediate future neutrality is likely to be at least as appropriate as M. Politis supposed it was in the nineteenth century.

III. The Retreat Toward Isolation: United States Neutrality Act of 1937

If the prospect of choice between the shattered remnants of neutrality and the shattered remnants of collective security has created a dilemma, that dilemma is nowhere better reflected than in the recent legislation and administrative practice of the United States. The royal road to security having terminated in a thicket, the wayfarers scattered in search of paths. Apparently each found a different one, and Congress put them all into the Neutrality Act of 1935. Yet that legislation has undergone little substantive alteration in subsequent acts. It was reenacted with minor changes in 1936 and extended along the lines of least resistance in 1937.

In so far as these successive laws can be said to codify a rational security program, that program appears to contemplate the use of embargoes (1) to exert pressure, perhaps in cooperation with collective security measures, upon states conducting illegal wars; (2) to reduce the number of dangerous situations arising from commercial contacts with belligerents, in which the United States might be obliged to fall back upon the assertion of its rights under the law of neutrality. It is doubtful which of these objectives exerted the more persuasive influence upon the legislative mind; probably it would be fair to say there was general acquiescence in

of its obligations. I would not change a single article in the Covenant, not even Article XVI, in the hope that some day it might be reconstituted in such a form that we might rely upon its being able to use its powers for the functions for which they were originally intended.

"I would have it clearly understood today that the League cannot use them and cannot be expected to use them, and that nations which remain in the League must be saddled neither with liabilities nor risks which they are not prepared to undertake; nor must other nations expect that the League will provide that security which it was once hoped it would provide.

"I believe that if the League would throw off shams and pretenses which every one sees through, if it would come out with a declaration of what it is prepared to do and can do as a moral force to focus public opinion throughout the world, it would justify itself and it would be a real thing. It might draw into the League again some of those who have lost faith in it in the past, and a future League might be assured for the benefit and salvation of mankind."

executive collaboration with League sanctions during the Italo-Ethiopian war, despite unwarranted stretching of the Act, but later opinion has attached more significance to the second objective. What is certain is that an increased degree of isolation is the instrument upon which Congress has elected to rely.

No attempt can be made here, beyond comments incidental to the analysis of the legislation in question, to indicate the antecedents of isolationist policy. That would be a task involving virtual reexamination of American diplomatic history.\textsuperscript{116} The occasion for its resurgence may be found in increasing apprehension that the United States would be left without defenses against unwilling participation in the impending European cataclysm so freely predicted in recent years. Naturally, this fear has been aggravated by successive alarums stimulated by the realization of many of Hitler's objectives in foreign policy, the international interventions in the Spanish civil war, and the Japanese thrust into central China, to mention only the most portentous events. Practical formulation of the legislation owes much to the concrete proposals made by Mr. Charles Warren in a well-known paper published four years ago.\textsuperscript{117} In it he pointed out numerous gaps in our neutrality laws as they existed in 1914, which would need to be plugged if those laws were ever to protect us effectively in a future war.

His proposals included (1) control of radio broadcasting; (2) prohibition of the sale of arms and ammunition to all belligerents; (3) prohibition against carriage by American vessels of arms and ammunition consigned to belligerents or travel by American citizens as passengers or members of the crew on any ship carrying such cargo; (4) prohibition against entry of our ports or waters by armed commercial ships belonging to belligerents or of ships of a belligerent state permitted by it to fly the American flag for purposes of deception; (5) revision of all treaties permitting prizes to be brought into our ports; (6) prohibition against the entry into our ports or waters of submarines—whether war or commercial—and of all aircraft of belligerent countries; (7) internment of

\textsuperscript{116} For the origins of our isolation policy see Rippy and Debo, The Historical Background of the American Policy of Isolation (1924) 9 Smith College Studies in History. An interesting sketch of the development is Latané, From Isolation to Leadership (1918).

\textsuperscript{117} Troubles of a Neutral, (1934) 12 Foreign Affairs, 377; reprinted (1934) International Conciliation, no. 301, p. 196. Mr. Warren was Assistant Attorney General in charge of enforcing United States neutrality laws from 1914 to 1917.
merchant ships of belligerent nations which remain in our ports
more than a specified time after the outbreak of war; (8) strengthen-
ing of laws intended to prevent the supply of belligerent war-
ships on the high seas from our ports; (9) prohibition against the
entry into our ports and waters of ships of a belligerent state which
shall have violated neutrality laws or our statute laws; (10) exten-
sion of our statutes applicable to belligerent navies to cover
ships chartered, requisitioned or otherwise officially controlled by
belligerent governments as adjuncts to their navies; (11) prohi-
bition of the public floating of loans in this country by belligerent
governments; (12) prohibition of the enlistment of American
citizens in belligerent armies or the assembling in this country of
reservists in belligerent armies.\footnote{118Troubles of a Neutral, (1934) 12 Foreign Affairs, 380-386; Inter-
national Conciliation, no. 301, 199-205.}

A cursory inspection of these
proposals reveals at once their basic design to insulate the United
States against contacts with belligerents. The immediate influence
which they exerted is attested by the fact that one of the proposals
was incorporated into the Communications Act of 1934,\footnote{11948
Stat. at L. 1104, sec. 606 (c), authorizing the president in time
of national emergency to suspend the Commission's regulations as to radio
transmission, close stations or take them over for public use.}
another (in part) into the Johnson Act of 1934,\footnote{120Act of April 13, 1934. 48 Stat. at L. 514, prohibiting the marketing
in the United States of the securities of governments in default on payment
of war debts to the United States. This of course had no direct applica-
tion to belligerents as such but defaulting governments included most of
Europe.}
and five others
into the Neutrality Act of 1935.\footnote{121The five proposals included were:
(1) Embargo on arms and ammunition to belligerents.
(2) Prohibition on the carriage of arms and ammunition to belligerent
countries on American vessels.
(3) American citizens allowed to travel on belligerent ships only at
their own risk.
(4) Submarines forbidden to enter our ports or waters during war.
(5) The existing provisions against the departure from American ports
of supply ships for belligerent warships strengthened by exacting a bond
when the evidence is insufficient to refuse clearance under the 1917 Neutrality
Act.
See James T. Shotwell in (1936) International Conciliation, No. 316, 9-10.}

The core of the Neutrality Act of 1935\footnote{122Public Resolution—No. 67—74th Congress; S. J. Res. 173; text in
(1936) International Conciliation, No. 316, 46. Approved August 31, 1935.} was the embargo in
section 1 on the export of "arms, ammunition, or implements of
war," as they might be specifically enumerated by the president,
to any belligerent port or to any neutral port for transshipment to
a belligerent. The prohibition was to take effect "upon the out-

break or during the progress of war," when the president pro-
claimed such fact, and could be extended by proclamation to other
states when they entered the war. The arms embargo was not a
complete innovation; it had a history somewhat independent of
other isolationist policies. Of course, nothing in the international
law of neutrality imposed upon neutrals any obligation to prohibit
their nationals from exporting munitions or other contraband to
belligerents, although the neutral was itself obligated to refrain
from such traffic. In fact, the practice of most large states
countenanced private trade in contraband. Among smaller
states, presumably from desire to avoid controversy with belliger-
ents, domestic prohibitions against such trade were not uncom-
on. During the World War the United States permitted
trade in munitions, but British control of the seas made it im-
possible for the Central Powers to take advantage of it; on that
account the German Government protested that sale only to the
Allies was a violation of the obligation of legal impartiality. For
this claim no supporting precedents could be invoked; although
the practical effect of the trade was undoubtedly discriminatory,
that result followed from no deliberate inequality of treatment.

But the policy of the United States has not been uniformly tol-
erate of the munitions traffic. The use of the embargo and non-
terconnexion during the wars of the French Revolution and Napo-
leonic era has already been noted. There exists also a modern
series of statutes, directed primarily toward control of private
trade in arms with Latin American countries in which civil dis-
turbance might be encouraged by that trade. A Congressional
resolution of April 22, 1898 gave the president a broad discretion
"... to prohibit the export of coal or other material used in
war from any seaport of the United States until otherwise ordered

123 See Garner, The Sale and Exportation of Arms and Munitions of
War to Belligerents, (1916) 10 Am. J. of Int. L. 749-797; Hudson, Internal
Regulation of the Trade in and Manufacture of Arms and Ammunition,
Report to the Nye Committee Investigating the Munitions Industry, Senate
124 Trade in contraband is not forbidden to the nationals of a neutral
by international law, but such trade is at the owner's risk since the contra-
band is liable to seizure by belligerents.
125 See the summary of 19th century practice in Woolsey, The Burton
Resolution on Trade in Munitions of War, (1928) 22 Am. J. of Int. L.
610, at 611.
126 Woolsey, The Burton Resolution on Trade in Munitions of War,
(1928) 22 Am. J. of Int. L. 610, at 611.
127 For the diplomatic communications see U. S. Foreign Relations, 1915
128 Supra, 613-615.
by the president or by Congress.”\textsuperscript{129} A restrictive amendment
of March 14, 1912, limited the prohibition to cases in which
the president might find “... that in any American country
conditions of domestic violence exist which are promoted by
the use of arms or munitions of war procured from the United
States. ...”\textsuperscript{130} On January 31, 1922 these earlier resolutions were
repealed and in their stead was substituted a joint resolution which
extended the 1912 provision so as to make it apply not only to
American countries but also to “any country in which the United
States exercises extraterritorial jurisdiction.”\textsuperscript{131} Actually, these
several resolutions were invoked only with respect to Mexico,
China, Honduras, Cuba, Nicaragua and Brazil,\textsuperscript{132} and in most of
these cases there was no question of neutrality involved because
rebel belligerency had not been recognized. Finally, on May 28,
1934 Congress passed a joint resolution empowering the president
to prohibit the sale of arms and munitions in the United States “to
those countries now engaged in armed conflict in the Chaco.”\textsuperscript{133}
The resolution, which was put into effect against Bolivia and
Paraguay on the same day,\textsuperscript{134} stated its purpose to be the reestab-
lishment of peace and directed the president to consult with other

\textsuperscript{129}30 Stat. at L. 739.
\textsuperscript{130}37 Stat. at L. 630.
\textsuperscript{131}42 Stat. at L. 261.
\textsuperscript{132}On June 29, 1934 the secretary of state listed the following presi-
dential proclamations of embargo under these resolutions (Department of
State Press Releases, No. 248, p. 455):
(1) March 14, 1912 (revoked Feb. 3, 1914), applying to Mexico.
(2) October 19, 1915 (revoked Jan. 31, 1922), applying to Mexico.
(3) March 4, 1922 (still in force), applying to China.
(4) January 7, 1924 (revoked July 18, 1929), applying to Mexico.
(5) March 22, 1924 (still in force), applying to Honduras.
(6) May 2, 1924 (revoked Aug. 29, 1924), applying to Cuba.
(7) September 15, 1926 (still in force), applying to Nicaragua.
(8) October 22, 1930 (revoked March 2, 1931), applying to Brazil.
To these should be added the embargo of June 29, 1934, applying to
Cuba. See Hudson, Internal Regulation of the Trade in and Manufacture of
Arms and Ammunition, Report to the Nye Committee Investigating the
Munitions Industry, Senate Com. Print No. 1 (1935), 73rd Cong., 2nd
Sess., pp. 54 ff.
\textsuperscript{133}48 Stat. at L. 811.
\textsuperscript{134}Proclamation of May 28, 1934; revoked Nov. 14, 1935. Bolivia pro-
tested that the embargo violated a treaty of May 13, 1858 with the United
States, requiring most favored nation treatment as to prohibitions on im-
ports and exports. The United States Government replied that the em-
bargo was on sales but not exports. Hudson, The Chaco Arms Embargo,
299 U. S. 304, 57 Sup. Ct. 216, 81 L. Ed. 255, the Supreme Court held that
the discretion given the President to apply the embargo if he found it
would contribute to the reestablishment of peace between Paraguay and Bo-
livia was not an undue delegation of legislative authority.
LEGISLATIVE NEUTRALITY

states in applying it. It would thus appear that very respectable precedent existed for the use of arms embargoes as a kind of policing instrument. In that sense the provision of the Law of 1935 could hardly be regarded as an innovation.

In addition to the arms embargo the Law of 1935 established a system of registry and licensing for persons engaged in the munitions trade, and prohibited exportation or importation of arms, ammunition or implements of war by persons not duly licensed.\footnote{Sec. 2. These provisions were carried over into the Acts of 1936 and 1937.} Administration of the registration and licensing was vested in a National Munitions Control Board consisting of the secretary of state (chairman and executive officer), the secretary of the treasury, the secretary of war, the secretary of the navy, and the secretary of commerce. In the event of a proclamation by the president putting into effect the munitions embargo, American vessels were prohibited from carrying munitions to any belligerent port or to any neutral port for transshipment.\footnote{Sec. 1.}

This prohibition reflects the consensus of opinion that no way of protecting such commerce exists. During the World War Congress had threshed over resolutions for the arming of merchantmen,\footnote{See Bradley in (1935) 29 Am. Pol. Sc. Rev. 1037.} but such a method is not likely to avoid difficulties with belligerents. The same could be said of the older practice of using convoys, while the nationalization of the merchant marine in war time would probably not be admitted as a legal safeguard against search and seizure.\footnote{Bradley in (1935) 29 Am. Pol. Sc. Rev. 1037. In the World War only the Netherlands excluded armed merchantment, like warships, from its ports.}

In this the Act followed purely isolationist views. In cases of doubt as to the destination of vessels carrying contraband, the president was authorized to require owners to post bond, with sufficient sureties, conditioned that men or cargo not be delivered to a belligerent vessel.\footnote{Sec. 4.}

Finally, the Act of 1935 authorized exclusion of belligerent submarines from United States ports or territorial waters,\footnote{Sec. 5.} and prohibited American citizens from travelling on belligerent ships except at their own risk.\footnote{Sec. 6.} Efforts were made during the World War to restrict travel by United States nationals, and warnings have not infrequently been given to nationals to remove from areas
of civil disturbance or war;\textsuperscript{142} nevertheless, the new provision was the first effort to give this policy legislative formulation. It cannot be regarded as a very effective one from the standpoint of security, since the death of Americans would arouse public feeling whether or not they had assumed the risk.

Perhaps the most significant thing about the 1935 legislation was the manner of its administration. On its face it bore the earmarks of isolationist policy, but it seems never to have been interpreted in that way by the President. Within a month after its enactment, the Italian attack on Ethiopia began. On October 5 President Roosevelt issued two proclamations, one forbidding shipment of munitions to the belligerents,\textsuperscript{143} the other giving notice that American citizens could travel on belligerent ships only at their own risk.\textsuperscript{144} A previous proclamation had enumerated the "arms, ammunition, and implements of war" which were to be included within section 2.\textsuperscript{145} But this was not all; with his proclamations the President issued the following statement to the press:

"In view of the situation which has unhappily developed between Ethiopia and Italy, it has become my duty under the provisions of the Joint Resolution of Congress approved August 31, 1935, to issue, and I am today issuing my proclamation making effective an embargo on the exportation from this country to Ethiopia and Italy of arms, ammunition, and implements of war. Notwithstanding the hope we entertained that war would be avoided, and the exertion of our influence in that direction, we are now compelled to recognize the simple and indisputable fact that Ethiopian and Italian armed forces are engaged in combat, thus creating a state of war within the intent and meaning of the Joint Resolution.

"In these specific circumstances I desire it to be understood that any of our people who voluntarily engage in transactions of any character with either of the belligerents do so at their own risk.\textsuperscript{146}

No basis existed in the Act for the statement that ". . . any of our people who voluntarily engage in transactions of any character


\textsuperscript{143}Department of State Press Releases, October 5, 1935, p. 251; reprinted in (1936) International Conciliation, No. 316, p. 53.

\textsuperscript{144}Dept. of S. Press Releases, October 5, 1935, p. 256; (1936) International Conciliation, No. 316, p. 56.


\textsuperscript{146}Dept. of State Press Releases, October 5, 1935, p. 255; (1936) International Conciliation, No. 316, p. 57.
with either of the belligerents do so at their own risk;" it was the beginning of a consistent effort to organize a "moral embargo" which would reenforce any sanctions plan adopted by the League.

The President's policy was elaborated in various speeches during the next three months, in which he commented particularly upon the increase in trade with Italy and urged that exports be held to peace time levels. In his Annual Message to the Congress on January 3, 1936 he explained the Government's policy as a two-fold neutrality: discouragement of hostilities, first, by refusal to supply munitions to belligerents; and second, by refusal to furnish other American products likely to aid in the prosecution of war, in quantities greater than normal exports. Legislation intended to convert this policy into law was introduced, but failed of passage. In such ways as were available to it, however, the Government pushed its "moral embargo." The secretaries of state, commerce, and the interior issued warnings against trade in materials useful to the belligerents; there were hints of refusal by the Government to protect shippers who failed to comply, and of embargoes on special commodities, especially oil; publicity was focused on the steadily increasing exports to Italy; the Export-Import Bank threatened to call loans on vessels used in carrying war materials; the United States Shipping Board detained a cargo of oil consigned to Italy.

How effective these measures might have been or what additional methods of persuasion would have been employed, it is now impossible to say; for the failure of the League to move promptly or far in sanctions made any real coordination of effort impossible and contributed to the defeat of the administration's legislation. The ultimate breakdown in sanctions occurred before any significant test had been made. It appears probable, however, that nothing effective could have been accomplished without a more formal legal basis; not a few large scale manufacturers complied with the Government policy, but their altruism is shown by the trade figures to have been more than offset by more materialistic competitors.

148 Ibid., 114-115.
149 See Department of Commerce, United States Foreign Trade with Italy, Italian Africa, and Ethiopia, monthly statements from October, 1935. Also Bradley, The United States of America and Sanctions, p. 118, note 3, in which he shows the percentage gain in trade in successive months from Oct. 1935 as follows: with Italy, 10%, 12%, 8%, 60%, with Italian Africa, 40%, 800%, 3,250%, 840%.
In the end the whole incident, coupled as it was with the League's failure, only increased the tendency to eschew any further cooperative efforts, to fall back upon an admittedly isolationist policy, and to buttress it by further legislation designed to limit executive discretion.\footnote{The 1935 resolution was extended to May 1, 1937 by the Act of February 29, 1936. H. J. Res. 492, Pub. Res. 74; text in (1936) 30 Am. J. of Int. L., Supplement, p. 109. For the president's discretionary power to extend the arms embargo to belligerents entering a war after its outbreak was substituted a mandatory requirement to do so. An embargo on loans and credits was added.}

The United States Neutrality Act of May 1, 1937 is the most recent formulation of legislative policy. With the exception of section 2, embodying the "cash-and-carry" plan,\footnote{Sec. 2 was limited to a period of two years; it expires May 1, 1939.} the Act is permanent in form, but it seems improbable that it will emerge from any serious test without alterations, if indeed it is not soon revised as a result of some shift of the legislative wind. Since it has not yet been applied in any actual situation, no estimate of it can be made from the administrative point of view, but an analysis of its provisions furnishes sufficient material for extensive consideration. Even the fact that it has not been applied is in itself significant.

Is the new legislation mandatory or permissive in type? Opinion has differed in the absence of judicial construction. What seems to be involved is an interpretation of the introductory clauses of the several sections, which indicate the circumstances under which they may be invoked. Section 1(a), which refers to the imposition of an arms embargo on two or more foreign states, begins with the following language:

"Whenever the president shall find that there exists a state of war between, or among, two or more foreign states, the president shall proclaim such fact, and it shall thereafter be unlawful, [etc.] . . ."\

In section 1(c) provision is made for the application of the arms embargo to civil wars, but the function of the president is very different:

"Whenever the president shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition or implements of war from the United States to such foreign state would threaten or endanger the peace of the United States, the president shall proclaim such fact, and it shall thereafter be unlawful, [etc.] . . ."

Finally, the provision in section 2(a) for the restriction and
regulation of sales of key products essential in the conduct of war, is introduced in these terms:

"Whenever the president shall have issued a proclamation under the authority of section I of this Act and he shall thereafter find that the placing of restrictions on the shipment of certain articles or materials in addition to arms, ammunition and implements of war from the United States to belligerent states, or to a state wherein civil strife exists, is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, he shall so proclaim, and it shall thereafter be unlawful [etc.] . . . ."

Other sections need not be quoted, since nearly all become operative on the issuance of the proclamation under either section 1(a) or section 1(c). On the basis of the quoted language was it intended that the president exercise executive discretion in recognizing or ignoring de facto states of war? If one may judge from President Roosevelt's failure to proclaim the existence of a state of war between Japan and China on the one hand and his immediate recognition of the existence in Spain of a state of "civil strife" of the required gravity\footnote{On January 8, 1937 Congress enacted a Joint Resolution establishing an embargo on exportation of "arms, ammunition or implements of war" to Spain for use of either of "the opposing forces" there. Public Resolution No. 1, 75th Cong., 1st Sess. This resolution, relating specifically to the Spanish civil war, was superseded by the general provision of the Act of 1937, permitting the president to institute an arms embargo by proclamation of a state of civil war dangerous to the peace of the United States. Act of 1937, Sec. 1 (c). For discussion of the Spanish embargo see references in note 2, supra.} on the other, the administration cannot be expected to take a narrow view of its discretionary power. Obviously, it is possible to argue for or against invoking the Act in the Sino-Japanese conflict on grounds of policy. The belligerents themselves carefully cultivated the legal fiction that a state of war did not exist by omitting declarations of war and continuing to accredit diplomatic representatives to each other; apparently, this was in part intended as a hint to other powers and to the League of a pretext upon which they could avoid the necessity of an intervention none felt disposed to undertake. The present Government seems to have been motivated also by desire not to interrupt trade or impede the removal of nationals and unwillingness to put into operation its "cash-and-carry" plan because China had little cash and less carrying capacity,\footnote{A characteristic statement of this view, by an Administration spokesman, may be found in Senator Elbert D. Thomas's radio address of November 4, 1937, Schooling Our Patience, (1937) 4 Vital Speeches, No. 3, p. 84.} though it is difficult to
see how she is in any way better situated to bring imports through the Japanese blockade without the Act.

From a legal point of view all this must be regarded as a tissue of irrelevant fictions, which do not alter the bald fact that a state of war exists.\textsuperscript{154} The only legal argument which the administration might advance would be that a strict interpretation of the words of section 1(a), "Whenever the president shall find that there exists a state of war," would attach consequence not to the existence of the objective fact of a state of war, but to the subjective process of the president's choosing to find it or not find it. The unprofitable character of such a quibble is apparent when one remembers the exclusive and plenary nature of the chief executive's controls in matters of foreign relations.\textsuperscript{155} That he would receive judicial support for the broadest discretion cannot be doubted. On the question of policy unanimity could hardly be expected, but it is difficult to find justification for the blatant assertion of Representative Hamilton Fish that the president's failure to apply the Act constituted a violation of his oath of office for which he might properly be impeached.\textsuperscript{156} It will be noted that the Act leaves a greater discretion to the president in case of civil war than international war; presumably this reflects a sense of the greater probability in the latter case that the United States might become involved in hostilities through ill-conceived executive action.

\textsuperscript{154}Cf. note 81, supra, and references there cited.

\textsuperscript{155}The opinion in United States v. Curtiss-Wright Export Corporation, (1937) 299 U. S. 304, 81 L. Ed. 255, 57 Sup. Ct. 216, (note 134), if not the decision, supports a broad executive discretion. The Court relied upon (1) the need for secrecy in the conduct of foreign affairs, and the president's better opportunity to obtain knowledge through confidential sources of information; (2) the unbroken legislative practice of relegating discretion in the conduct of foreign affairs to the President.

\textsuperscript{156}Representative Tinkham of Massachusetts first advanced this view in an abusive cable to Secretary Hull (New York Times, Oct. 14, 1937: 16:3) after which Mr. Fish asserted it on the floor of Congress in the following language: "... It [the Neutrality Law of 1937] was to go into effect as soon as a state of war existed, and if President Roosevelt does not know that there is a war being waged between Japan and China he should get a new Secretary of State. The President has deliberately nullified an Act of Congress and repudiated the law of the land, and I agree with Representative Tinkham that he ought to be impeached for not carrying out the law and for endangering the peace of our country." New York Times, October 17, 1937; 40: 6. Doubtless Messrs. Tinkham and Fish are on firm practical ground in suggesting impeachment, since the process of legislative justice has been characterized by frequent defections from judicial standards (See references in Pound, Outlines of Lectures on Jurisprudence [4th ed. 1928] pp. 56-57), but their view of the president's discretion under the Act is untenable.
The embargo on arms, ammunition and implements of war is carried over from the earlier laws. In the mandatory form which it assumed in the 1936 Act and retains in the 1937 Act, application of the embargo against all belligerents in an international war follows automatically upon the president's finding that war exists. No distinction can be made between the aggressor and the victim of aggression; nor, in the case of civil wars to which the embargo is applied, between the rebel and the government forces. Nor can the embargo, unless fortuitously, be so administered as to reinforce a program of international sanctions. If, indeed, the League states should invoke military sanctions against an aggressor to which the embargo had been applied, it would be necessary to extend the prohibition to them on the ground they had become involved in the war as belligerents. The Act does not prevent migration of munitions industries to neutral countries, so that it would be permissible to establish Canadian branch factories financed from the United States. Thus Canadian branches could supply Great Britain with munitions produced by American capital, if Canada remained neutral.\(^{157}\)

The most striking addition to the Acts of 1935 and 1936 was the provision in section 2 for what has already been referred to as the "cash-and-carry" plan. It is in this that the progressive tendency toward isolation is most apparent. The plan is an extension of the insulating idea of the arms embargo to other commodities (the list to be determined by the president) which might be of such importance to belligerents that unrestricted trade in them would endanger the security and peace of the United States or the lives of its citizens. On proclamation by the president American vessels may be prohibited from carrying such articles either to belligerent ports or to neutral states for transshipment to belligerents. Foreign vessels may convey such articles from the United States to the same destinations only after all right, title and interest has been transferred from the American to foreign owners. That is to say, all belligerents may freely purchase the articles specified in the United States provided they acquire title to them before removing them (the "cash" feature), and provided they remove them in their own ships or in

\(^{157}\)For discussion see especially Buell, The Neutrality Act of 1937, (1937) 13 Foreign Policy Reports, No. 14, p. 170. If Canada is to be regarded as an "American Republic" within the meaning of section 4 of the Act (see infra, p. 655), a further question arises, but she could not benefit from the exemption there given in any war in which Great Britain was cooperating with her.
other foreign ships (the "carry" feature). In this way Congress expected to eliminate the possibility that American ships, American seamen, or American property might come into dangerous contacts with belligerent vessels engaged in the business of intercepting contraband goods. Since all connection with the transactions would cease at the ports, Americans could feel little concern over the ultimate fate of ship, crew or goods. At the same time trade with belligerents would not be wholly cut off, and American manufacturing and commercial interests would therefore purchase peace as cheaply as possible.158

It must be admitted that the plan is not without ingenuity, but the ingenuity is perhaps more in a surface cleverness of mechanism than in an adaptation of new devices to any underlying wisdom. Even with respect to mechanism there is at least one obvious defect. How can the "cash-and-carry" provisions be applied effectively in cases of carriage to neutral ports for transshipment to belligerents? At no time did the control of continuous voyage prove easy, and continuous transportation presents an infinitely more difficult problem, since the goods themselves, as distinguished from the carrier, must be kept distinct from the general mass intended for neutral consumption. Presumably a check might be made if belligerents were permitted to station in neutral ports observers who were given free access to neutral trade statistics and customs records, and broad powers to inspect imports.159 But it is scarcely for the United States, in the enactment of domestic legislation, to anticipate that such international arrangements can or will be made.

The objection most frequently taken to the cash-and-carry plan is its frank discrimination in favor of the strong naval powers. Those states which possess the merchantmen to carry goods and the warships to protect them will be at a great advantage in the American market, for it may be assumed that there will be some

158 Cf. Senator Borah's remark: "We seek to avoid all risks, all danger, but we make certain to get all the profits." Congressional Record, March 1, 1937, p. 2099; and Senator Bone, "We know full well that this resolution is designed to protect war trade," Congressional Record, April 29, 1937, p. 5155. Quoted by Buell, The Neutrality Act of 1937, (1937) 13 Foreign Policy Reports No. 14. p. 172.

159 Such administrative machinery has been suggested by Professor Jessup for use with a plan of restricted neutrality which will be noticed below (p. 659 and note 175). See his Neutrality, Its History, Economics, and Law, Vol. 4, Today and Tomorrow, ch. VI, The Revision of Neutrality. Also, Turlington, Security Through Neutrality? in Peace or War? A Conference, Ed. by H. S. Quigley (University of Minnesota, Day and Hour Series, 1937), pp. 179-192.
correlation between purchasing power and ability to maintain a considerable fleet. Obviously, Great Britain would completely dominate American exports in any war in which she participated. Perhaps this result may produce discriminations no more artificial than those which resulted from the application of neutrality law. But those inequalities at least resulted from adherence to a generally recognized body of law; they were not deliberately adopted as a national policy for admittedly selfish ends, as the present law will doubtless appear to disgruntled states. It is not impossible that resentment might lead to counter discriminations or reprisals. Even if it did not, there is much to be said for reserving some freedom of choice which would permit the United States to make its influence felt along lines consistent with its permanent foreign policy. Among states it may not always be wise to become a fixed factor in the calculations of others.

The relation of the cash-and-carry plan to the law of contraband is a problem which has not received the attention it deserves. For the first time a neutral power is undertaking to stipulate for itself what articles it will treat as contraband, but the president's list of articles in which trade is restricted must approximate the contraband lists of belligerent states if the plan is to accomplish its purpose. During the World War the contraband lists grew until they included not only key products like scrap iron, oil and cotton, but also foodstuffs, clothing and consumers' goods, generally—everything, it has been said, but ostrich feathers. If the cash-and-carry plan is to be extended to all articles in which trade with belligerents would produce dangerous contacts, then it appears inevitable that it will cover in a major war the whole range of American exports. What experience the United States has had with embargoes and non-intercourse seems to indicate that such a program could not long withstand the political pressure of

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160 The law of contraband has developed coordinately with the law of neutrality; in fact, the former has been a constantly changing factor of the latter. Since neutrality involves the right of belligerent interference with contraband, the definition of the latter really determines whether neutrality is a fair compromise between the claims of the neutrals and the belligerents, or is weighted so heavily in favor of one or the other that the situation is inevitably unstable. With the steady expansion of the contraband list there has been corresponding diminution of the real rights of neutrals, until they reached the vanishing point during the World War, for the British contraband list of April 13, 1916 enumerated about one hundred and seventy groups of articles, in alphabetical order from acetates and acetic acid to zinc. See Pyke, The Law of Contraband of War (1915); United States, Naval War College, International Law Documents for 1915-18 (1916-19); 2 Hyde, International Law (1922) 572-646.
shippers who were forced to stand by while foreign vessels carried the major part of American commerce.

Finally, the plan has to be read in the light of section 3 of the Law of 1937 which prohibits American loans and credits to belligerents after the president has applied the arms embargo. To this two important exceptions are made: the adjustment of indebtedness existing on the date of the prohibition; and, in the president's discretion, "ordinary commercial credits and short-time obligations in aid of legal transactions and of a character customarily used in normal peacetime commercial transactions," when he believes such exemptions "will serve to protect the commercial or other interests of the United States or its citizens." During a foreign war there would inevitably be an enormous increase in the demand for American supplies, but it is absurd to suppose the belligerents could meet from their domestic gold reserves the sums required for cash payments in gold for the goods they required. Indirectly, they might obtain considerable credits by acquiring the American credit balances of neutrals or preempting American securities held by their nationals, for there seems to be no prohibition in the Act against such practices. Actually, there is in the United States today foreign capital amounting to nearly $8,000,000,000 which, if available, would finance a war trade as great as that from 1914 to 1917. But is is likely that belligerents would find it impossible to obtain control of considerable portions of these credits; hence, the pressure to obtain direct credits might become very great.

In that case the second exception would put the presidential discretion to a severe strain. By a liberal interpretation of "ordinary commercial credits and short-time obligations" he might enable American producers to sell at high prices stocks which the loan embargo had tied up. Pressure on him would unquestionably be great, particularly if restrictions had diminished foreign trade to the point of causing a depression. Nor would precedents be unfavorable to liberal interpretation. The Export-Import Bank has extended commercial credits for a term of five years. And President Wilson ruled in 1914 that bank credits might be granted without violation of the injunction against foreign loans imposed in that year. If the experience of the World War can be taken as indicative, the whole loan embargo might well collapse, for

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repeal of the 1914 prohibition was forced before the end of the following year.\textsuperscript{162} If either indirectly or directly large belligerent credits should be established, there would be the same community of financial interests which some persons are convinced led us into the World War.\textsuperscript{163} On the other hand, if the present embargo on credits should withstand political pressure, if the president should narrowly construe his power to grant exemptions, and if the war should be so protracted that adequate credits could no longer be obtained indirectly, then virtual restriction to cash sales would very materially reduce the "cash-and-carry" trade, and the cost of peace would become correspondingly great. The practical effect of the plan would then approximate the root-and-branch isolation which a few persons have urged,\textsuperscript{164} but which members of Congress generally thought to be impracticable.

The remaining sections of the 1937 Act strengthen the impression of a swing toward isolation. Section 7 is intended to prevent the use of American ports as bases from which either American or foreign vessels could supply "fuel, men, ammunition, implements of war or other supplies" to belligerent warships, tenders or supply ships. Curiously enough, this provision applies only to supplying such belligerent vessels at sea; there is nothing to prevent them from entering the ports, subject to the usual regulations of neutrality law, and there supplying themselves directly with such goods in any quantity. Yet such use of neutral ports in the past has been a source of most flagrant abuses,\textsuperscript{165} and the United


\textsuperscript{164}See especially the works of Charles A. Beard: The Idea of National Interest; an Analytical Study in American Foreign Policy (1934); The Open Door at Home, a Trial Philosophy of National Interest (1934).

\textsuperscript{165}Article V of Hague Convention No. XIII laid down the rule that "belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries." See 2 Oppenheim, International Law (5th ed. by Lauterpacht) 569-574, who formulates eight specific rules on the basis of this principle. Among them is the rule that neutrals must prevent belligerent men-of-war from taking in such a quantity of provisions and coal, or making such repairs or additions to armament, as would enable them to continue naval operations. Chile experienced great difficulty in enforcing this during the World War, partly from reasons of geography; provisions sufficient to carry warships from Chile to a home port in Europe will sustain lengthy operations in the Pacific. In 1915 the German cruiser Dresden asked permission to remain eight days in Chilian waters to effect repairs. The request was refused and she was ordered to leave within
States, as a signatory of the Convention on Maritime Neutrality, adopted at Havana in 1928, is under international obligations to impose restrictions upon such use of its neutral ports.\textsuperscript{166}

Section 8 of the Act follows the 1935 law in authorizing the president to prohibit foreign submarines from entering or leaving territorial waters of the United States except under such conditions as he may prescribe. Under the 1937 law the prohibition may now be extended to armed merchant vessels. But battleships, cruisers, destroyers, airplane carriers, etc. continue free to make use of our ports even though the privilege may operate to the distinct advantage of one belligerent as against another.\textsuperscript{167}

Nor did Congress follow the suggestion of Mr. Warren that the United States exclude ships of a belligerent which permitted its vessels to use the American flag for purposes of deception.

The "travel at risk" provision of the 1935 Act was not continued in 1937. Instead, section 9 imposes an absolute prohibition against travel by American citizens on the vessels of any belligerent named in the president's embargo proclamation. If the argument for insulation is tenable, this is certainly a logical change, for it eliminates the possibility of loss of American life in situations like the torpedoing of the \textit{Lusitania}. This might do much to reduce the probability of berserk emotion and war hysteria, factors which neutrals have always found it difficult to control. It should not be supposed, however, that the insulation is yet perfect. American vessels are not restricted in their movements except by the prohibition on carriage of munitions and articles twenty-four hours. When she failed to do so, notice was given that she would be interned. Before anything was done two British cruisers came up and opened fire. Under flag of truce she sent word to them that she was in neutral territorial waters. Nevertheless, the British threatened to destroy her unless she surrendered, whereupon her commander ordered her blown up, and she sank. When Chile protested this violation of her neutrality the British Government offered an apology. For the facts and discussion see 2 Garner, \textit{International Law and the World War} (1920) sec. 562.

\textsuperscript{166}Convention of February 20, 1928, incorporated into the Final Act of the Sixth International Conference of American States; 4 Hudson, \textit{International Legislation}, (1931-1935) 2401-2412. Article IX prohibits repairs to belligerent ships in neutral ports beyond those essential to continuance of the voyage; these must be made rapidly and must in no case increase the military strength of the ship. Article X permits provisioning only under the neutral's local rules or the rules obtaining in time of peace. Article XI prohibits renewal of fuel supply in a neutral state's ports more often than once in three months.

\textsuperscript{167}Thus, in the Russo-Japanese War, it was discrimination in favor of Russia that her Baltic Fleet could use neutral ports en route to the Far East. The main part of the Baltic Fleet actually remained in the French territorial waters of Madagascar for several months awaiting the arrival of another squadron.
Legislative Neutrality

enumerated by the president. What is more important, Americans may travel on vessels of other neutrals, even though carrying contraband. It appears to be the intent of sponsors of the present legislation to have distinctive markings placed on the sides of American vessels as they leave port so that belligerent warships may be certain they are not carrying munitions or contraband.¹⁶⁶

In section 10, the arming of American merchant vessels engaged in commerce with belligerents is prohibited for the duration of an embargo. Only small arms sufficient for the maintenance of discipline are permitted. Some doubt exists whether this prohibition is a surrender of a right belonging to neutrals or not. During the World War armed guards were furnished American merchant vessels for defence against submarines, but the right of neutral merchantmen to arm was questioned in Germany.¹⁶⁷ It can at least be said that we have abandoned a practice which we once insisted upon as a right.

In view of the consistent bolstering of isolationist features which is apparent in these provisions, what will be our position toward the discharge of our international obligations? The answer is complicated by section 4, which runs as follows:

"This Act shall not apply to an American republic or republics engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war."

The case which the legislators had in view was presumably that of aggression by European powers against Latin-American republics in violation of the Monroe Doctrine; if so, it is unfor-


"In the event of another war, we having provided that our merchant vessels shall not be armed while engaged in commerce with belligerents, and that notice shall be given to all belligerents that our ships are ordered to stop and yield peacefully to visit and search, and our ships being identified not by a flag, which may be misused, but by markings on the side of each of our vessels as it leaves port, I believe that no submarine will ever again sink an American ship in such circumstances. If that be the case, there would be no necessity for restraining our ships from carrying anything they wanted to carry."

¹⁶⁷President Wilson requested Congressional authorization to supply American merchantmen with defensive arms, but this was not given. See the message to Congress of Feb. 26, 1917. On March 12 the Department of State announced that in view of the resumption of submarine warfare by Germany the United States would place on all American merchant vessels sailing through war zones "an armed guard for the protection of the vessels and the lives of the persons on board." Department of State press release, March 12, 1917. For the German opposition to the legality of this practice see 1 Garner, International Law and the World War (1920) secs. 254-260.
tunate that the provision was not restricted specifically to that contingency. As it stands, a Latin-American state which committed an aggression against a foreign state would be entitled to obtain supplies and credits in the United States which this Government would have to deny to the victim of its aggression. Not only would this be a positive discrimination, but it would clearly constitute unneutral conduct. What is more, a Latin-American state which cooperated with members of the League in the application of military sanctions to a non-American state would be subject to the Act, in contrast to the favored position of the aggressor just mentioned.

Apart from section 4, there are likely to be instances in which application of the Act, will be inconsistent with the treaty obligations of the United States.\textsuperscript{170} Under the Convention of Rights and Duties of States in the Event of Civil Strife, adopted at Havana in 1928,\textsuperscript{171} the United States undertakes to prohibit shipment of arms and war material to rebels whose belligerency has not been recognized, but to allow them to the government. But under the Neutrality Act the arms embargo, if used, must apply to both government and rebels. The United States is also a signatory of several multilateral pacts, such as the Argentine Anti-War Pact of 1933, the Montevideo Convention on the Rights and Duties of States of December 26, 1933, and the Buenos Aires conventions of December 23, 1936,\textsuperscript{172} All these are inter-American agreements outlawing aggressive wars and interventions, limiting settlement of disputes to pacific means, and binding signatories to consultation as to common policy in the event of international disturbances. In the Nine-Power Agreement of February 6, 1922 the United States bound itself in the same way to consult with other states in the event of situations in which the sovereignty, independence and territorial integrity of China may be threatened.\textsuperscript{173}

\textsuperscript{171}U. S. Treaty Series, No. 814; 4 Hudson, International Legislation 2416-2419.
Since it cannot properly be assumed that Congress intended, in enacting the Neutrality Act, to abrogate its treaty obligations, it may be that the United States has today a duty to consult with other powers with a view to common action before it can apply the Act. Whether the uniform application of the embargoes and the "cash-and-carry" plan to both belligerents, irrespective of which one is the aggressor, would be consistent with our condemnation of aggressive wars as a signatory of these pacts, is also doubtful. All that can be said is that the Neutrality Law is out of harmony with the spirit and purpose of our previous commitments; if pursued to its logical conclusion, it will greatly diminish our effectiveness in the processes of international conciliation to the development of which we have made such substantial contributions. It is not impossible that an isolation policy might be administered in such manner as to reinforce other agencies of peace, but the substitution of automatic, arbitrary and uniformly applied embargoes for executive discretion has removed all prospect of such cooperation.\footnote{On the question of executive discretion see Professor Garner's note in (1937) 31 Am. J. of Int. L. 289-293.}

It would be ingenuous to expect a legislative compromise upon so debatable a subject to exhibit complete clarity of purpose or consistency of method. Much of the Act is frankly experimental, and will be reshaped in the light of experience. But it is a matter for some concern that the United States may find its bridges burned behind it if it has occasion to retreat from the present position. To rely upon isolation as an end in itself, ignoring every moral issue which a war presents, is to deal a body blow to the principles upon which neutrality and collective security are founded; they at least postulate justice as the condition of security. By our insulation against every claim of justice, we may do much to encourage the growth of international lawlessness.

IV. The Immediate Problem

No one who has followed the course of the preceding analysis to this point will expect an easy transition from history to prophecy. What has been said is perhaps more explanatory of the road over which we have come than indicative of the way in which we should go. The facts of history may speak for themselves, but they speak chiefly with reference to the context in which they belong. It cannot be expected that history will furnish...
clues to the legislative vagaries of even the near future, nor can it map the terrain over which we shall have to advance. Nevertheless, an effort must be made to mobilize experience in the formulation of policy. What, then, are the impressions which emerge from this review?

It seems probable that collective repression of war is not today an institution to which the United States can afford to commit itself unreservedly. This is so because collective security is not yet really an institution; it is only a concept. So long as it is identified with the objectives and psychology of security by balance of power, and remains an instrument in the hands of one group of powers for the repression of another, it is futile to suppose that participation in it will be anything more than war waged in the name of peace. This is not to say that the concept of collective security is in itself unsound; on the contrary it is a conception of solid merit and great vitality, which may yet find effective institutional form. What is suggested here is only that the immediate opportunity for its successful application has slipped through our fingers, and with it, apparently, has gone the will to succeed. Until the United States and the major states of Europe and Asia are prepared to take what the late Ramsey MacDonald once called the "risks of peace," we shall make little progress along this route. Meanwhile, it would be a mistaken policy not to cooperate with other states in every way which offers promise of averting wars. The processes of conciliation and consultation ought not to be discarded with the collective security system, nor should the United States enact legislation which interferes with the effective application of such processes.

If we cannot have collective security, are we then to return to neutrality? In the form which the latter assumed in the nineteenth century, the primary objective was protection of the rights of neutrals desiring to trade with belligerents. It must be conceded that the experience of the United States in the World War does not encourage further reliance upon neutrality as it was then conceived and administered. Nor does American opinion support the demands of those who desire freedom of the seas merely to profit by the expanded war trade. What we do desire is freedom to pursue normal trade and assurance of protection for our nationals. It may be that in the law of neutrality there is a sufficient basis for securing these objectives. Two things would be required: (1) international agreements by belligerents to permit neutral
trade with other belligerents within peace-time quotas, adequate administrative machinery being provided to assure observance of these quotas; (2) international agreement among neutrals to cut off all supplies from belligerents which interfere with neutral commerce not in excess of peace-time quotas. This device might secure freedom of the seas for such commerce as a neutral is justified in expecting to continue. It would be a restricted type of neutrality, built upon the experience of the older law but adapted to worthier ends.

Isolation is a device which may have utility when used in moderation and coupled with administrative discretion. Probably the arms embargo should be retained, preferably in the form of the 1935 Act. If the plan suggested in the last paragraph were employed, it should secure most of the benefits expected from present isolationist legislation with far less cost to our commerce and industry. Isolation of course remains always as an ultimate resort if nothing can be accomplished by common action. But it ought not to be arbitrarily imposed by mandatory legislation. Against isolation there is always the impelling argument that it may concede to the belligerents more than is necessary. Rights ought not to be sacrificed to wrongdoers if other procedures offer equal promise of success.

Finally, it should not be expected that salvation is to be found in legislation alone. Much depends upon intelligent, alert administration. Congress may mark out objectives and formulate policies, but it should not assume that it possesses omniscience. It is doubtful if the persistent conflict between the interests of belligerents and of neutrals, shifting as it does with every change in the conditions of warfare, can ever be brought completely within the compass of legislative rubrics. It is a serious fault in the Neutrality Act of 1937 that executive discretion is reduced almost to the vanishing point, for it is perfectly certain that Congress has not foreseen, and in the nature of things cannot foresee, all the situations which may arise. A due regard for realities would indicate flexible administrative power within broad lines of legislative policy as the most effective arrangement.

Whatever the course which we adopt there can be little assurance that it will preserve us from participation in the event of a

These are substantially the recommendations of Professor Jessup, which he has elaborated in Neutrality, Its History, Economics and Law, Vol. 4, Today and Tomorrow, especially ch. VI. See also his International Security (1935). His proposals appeal to the present writer as the most valuable practical contribution to the problem.
great war in the near future. In such an event we shall purchase peace only at a heavy price in wealth, and perhaps also in flagellation of spirit, whatever the legislative formula upon which we rely. Nor will it be easy even to keep the ideal of peace steadily before us if such a war presents itself as an attack upon institutions or ideologies which we prize; there may then be few voices to remind us of the "great illusion." We must chart our legislative course in terms of long-range policy and be prepared to persist in it despite early disappointments and failures. Only by such persistence can we hope to secure for our program that general recognition by other states which is the only firm ground upon which we can rest. In the light of our experience in introducing the law of neutrality to a hostile world it would be rash freely to predict that we can obtain recognition for any novel position without a display of such vigorous and persistent determination that our intention to support the principle at any cost is never in doubt. The initial advantage of such a display of determination supported the law of neutrality for many years; that advantage was forfeited by our failure during the World War to sustain our original position. Now we must begin again the tedious but inevitable process of constructing foundations of international acquiescence and recognition for a new program. To suppose that we can by mere domestic legislation assure international security is folly. Important as it is to formulate wisely our legislative course, to advance a platform upon which we are prepared to stand permanently, yet the task will be only half completed until we obtain such general adherence by states to our position that it is lifted from the status of foreign policy to that of international law. To that ambitious end it seems necessary, first, to formulate a security program which will so commend itself to the sense of fairness and equity of all states that substantial international support for it can be expected even in time of war; second, to advance this program with persistent but tactful determination until general acceptance is assured.

Amid the uncertainties which beset our course it is disappointing to find some of our ablest authorities in the field of international law adopting uncompromising and dogmatic positions. What is vitally needed at present is open-minded, objective study of the whole problem in all its ramifications. It is not important that the personal convictions of anyone be rationalized; it is only important that every avenue which might lead to sound public policy be carefully explored.