

in national systems, prevent the rise of new ideologies, and hinder progress in the science of government. The exception of public order is not to be regarded as an undesirable manifestation of national sovereignty, but rather as showing that the growth of international government has reached such a point that it becomes necessary to distinguish more clearly between the powers "delegated" to the international government and those reserved to the "sovereign" states. Attempts have been made at such a differentiation, but no satisfactory answer appears yet to have been found.<sup>7</sup> It is a problem to which international lawyers must devote attention.

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THE RECONSIDERATION OF "NEUTRALITY" LEGISLATION IN 1939

When the so-called "Neutrality Act" of May 1, 1937, was passed by Congress, the divergence of views which has been in evidence since 1935,<sup>1</sup> prevented a final agreement upon certain basic propositions. The result of the lack of unanimity was recorded in Section 2 of the 1937 Act which adopted the "cash and carry" plan but only for two years, that is, until May 1, 1939. Instead of allowing ample time for the consideration of the problem in 1938, Congress waited until the spring of 1939 to begin its restudy of this legislation. As could have been foreseen, the time was too short to make it possible for an agreement to be reached, and Section 2 of the 1937 Act expired by its own terms on May 1 of this year. Meanwhile both the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs had been holding hearings and numerous bills were before both committees.<sup>2</sup>

Although the whole process can scarcely be cited as a shining example of the efficiency of democratic government, it is encouraging to find that the false basis laid by the popular labels of the Acts of 1935, 1936 and 1937 was, at least in part, swept away. Senator Pittman, the Chairman of the Senate Committee on Foreign Relations, very properly entitled his bill (*S. J. Res. 97*) the "Peace Act of 1939." The fact that it was not really "neutrality

<sup>7</sup> See the article by Habicht to which reference has been made above.

<sup>1</sup> See this JOURNAL, Vol. 29 (1935), p. 665; Vol. 30 (1936), p. 262; Vol. 31 (1937), p. 306.

<sup>2</sup> *Neutrality, Peace Legislation, and Our Foreign Policy*, Hearings Before the Committee on Foreign Relations, U. S. Sen., 76th Cong. 1st Sess., April 5, 1939–May 8, 1939; *American Neutrality Policy*, Hearings Before the Committee on Foreign Affairs, House of Rep., 76th Cong. 1st Sess., April 11–May 2, 1939. The bills considered in the hearings are conveniently found in the combined Committee Prints entitled "[Committee Print] March 31, 1939, Text of Legislation Relating to Neutrality, Peace, and Our Foreign Policy, Pending in the Committee on Foreign Relations, United States Senate, Printed for the use of the Committee on Foreign Relations," and "[Committee Print] April 8, 1939, Text of Present Neutrality Law (Printed in Bill form), Proposed Amendments Thereto, and Related Legislation Affecting the Foreign Policy of the United States, Pending in the Committee on Foreign Affairs, U. S. House of Representatives, Printed for use of the Committee on Foreign Affairs." Two additional bills not included in the House Committee Print are Mr. Fish's *H. R. 3419* and Mr. Tinkham's *H. J. Res. 295*.

legislation" which was being considered, was clearly brought out by Mrs. Quincy Wright testifying before the Senate Committee on behalf of a group of women's organizations. "The recent neutrality acts, therefore," Mrs. Wright stated, "were definitely an attempt to establish by legislation the foreign policy of the United States."<sup>3</sup> "I agree with you," Senator Pittman replied, "that none of the proposed bills may be termed 'neutrality legislation' unless it be the repeal of the entire Act, to go back to the rights of neutrals under international law."<sup>4</sup> Much popular confusion would be avoided if this important fact is kept in mind. The bills before the committees may now be briefly analyzed.

*The Pittman bill, S. J. Res. 97, known as the "Peace Act of 1939."* Section 1 of this bill distinguishes between declared and undeclared wars. If the war is declared, the President issues a proclamation naming the states involved. In regard to "an undeclared state of war," either the President or the Congress by concurrent resolution may find that such a state of war exists. This latter provision, which is found in other bills also, is obviously inspired by the criticism of the failure of the President to find, under the 1937 Act, that a state of war exists between China and Japan. In regard to declared wars, the phraseology is rather curious; it reads: "Whenever any foreign state or states declare a state of war to exist between or among two or more foreign states, . . ." From the wording it would appear that if Great Britain should now issue a neutrality proclamation based on a finding of the British Government that war exists between China and Japan, this would require the President to issue his proclamation naming the states involved in the war. The meaning which the bill apparently wished to convey would have been clearer if the phrase read "Whenever any foreign state or states declare a state of war to exist with one or more other foreign states."

Section 2 of the bill covers the subject matter contained in Sections 1 and 2 of the 1937 Act as well as parts of Sections 6 and 9, but the rule is substantially changed. In the first place, as soon as the President proclaims the existence of a state of war it becomes automatically unlawful "for any American vessel to carry any passengers or any articles or materials directly or indirectly to any state named in the proclamation." Under paragraph (b) of Section 2 of the bill, immediately upon the President's proclamation the cash and carry idea becomes automatically applicable to the export or transport of any articles or materials. The fundamental change effected by this provision is to put the export of arms, ammunition and implements of war on a cash and carry basis instead of on a basis of a total prohibition as under Section 1 of the 1937 Act. Moreover, under the 1937 Act it was left to the discretion of the President to invoke the cash and carry provision as to other articles; the provision now applies automatically.

<sup>3</sup> Senate Hearings, p. 86.

<sup>4</sup> *Ibid.*, p. 101. See also testimony of Mr. Breckinridge Long, *ibid.*, p. 212.

Section 3 of the Act revives an idea suggested in bills offered in earlier years. The President in his discretion, upon finding that "the protection of citizens of the United States so requires," may designate areas defined as "areas of combat operations," and it thereupon becomes unlawful for citizens of the United States or vessels flying the flag of the United States to proceed through any such area regardless of the ship's destination. As has been pointed out,<sup>5</sup> the limitations in the earlier Acts concerning the voyages of American vessels and of American nationals were by no means adequate to guard against loss of American life and property through belligerent operations at sea. Section 3 of the Pittman bill properly tightens up this provision. At the same time, it gives the United States a solid basis for applying different rules in different areas of the world without being chargeable with a breach of neutral duties of impartiality. For example, if warfare were confined to the Atlantic, the President could permit American citizens and American vessels to travel freely in the Pacific regardless of their destination. This provision of the Pittman bill is supplemented by Section 4, which says that Sections 2 and 3 "shall not apply to travel and trade on or over lands, lakes, rivers, and inland waters bordering on the United States where no armed conflict exists as herein defined." The drafting of this provision leaves its meaning in doubt. Grammatically, the phrase "where no armed conflict exists" would refer to the United States, a meaning which is obviously not intended. Presumably the intention is to refer to bordering lands and waters where no armed conflict exists. That is, if there is no actual armed conflict on the Rio Grande or on the Great Lakes or the St. Lawrence, or on the "lands" of Mexico or Canada, neither the cash and carry provision nor the restriction on American vessels is applicable. If that is the meaning, it is doubtful whether its operation would meet the test of the duty of neutral impartiality, assuming a case in which Canada is a belligerent. In regard to the drafting, it may also be noted that the phrase runs "where no armed conflict exists as herein defined"; the bill contains no definition of "armed conflict" or of its existence. This Section 4 of the bill also contains an exception for the Red Cross.

Section 5 is substantially the same as Section 9 of the 1937 Act continuing the prohibition on travel of American citizens on belligerent vessels.

Section 6 is substantially the same as Section 10 of the 1937 Act forbidding American vessels to be armed or to carry arms, ammunition, etc., but the new Section 6 extends that ban not only to American vessels engaged in commerce with any foreign state but also to any American vessel engaged in commerce "in any combat area." In case of a war in which Japan was a belligerent, for example, the President might proclaim a combat area in the Pacific which would make this section applicable to voyages between two American ports, *e.g.*, between San Francisco and Honolulu or Honolulu and Manila. Since the Pittman bill retains the existing definition of vessel as

<sup>5</sup> *Neutrality, Its History, Economics and Law*, Vol. IV, "Today and Tomorrow," p. 146.

including aircraft, this might have real significance for the established commercial air lines of the United States in the Far East.

Section 7 of the Pittman bill is substantially the same as Section 3 of the 1937 Act in prohibiting loans and credits to belligerent governments. Section 8 prohibits the solicitation of funds for belligerents except for relief purposes.

The bill retains in Section 9 the present Latin American exception in Section 4 of the 1937 Act; renews in Section 10 the old Section 7 on the use of an American port as a base of supplies; renews in Section 11 the provisions of existing Section 8 relative to submarines and armed merchant vessels; and renews substantially, by Section 12 of the bill, Section 5 of the existing law providing for the National Munitions Control Board. It should also be pointed out that the Pittman bill contains no reference to civil strife, which omission is a welcome indication that the experiment in the Spanish civil war will not be repeated.

*The Thomas Bill, S. J. Res. 67.* The essential purpose of this bill is to provide for the possibility of discrimination against an "aggressor." Senator Thomas stated that he followed in part the proposals drafted by the Committee of Experts Appointed by the Committee for Concerted Peace Efforts to Study Revision of the Neutrality Legislation.<sup>6</sup> Apparently recognizing that a bare proposal to authorize the President to discriminate against an aggressor would have little chance of passage, the Thomas Resolution adopts a somewhat subtler form of what is basically the same proposition. The bill first would amend Section 2 of the 1937 Act by giving the President authority in his discretion to list any articles or materials of use in war in addition to arms, ammunition and implements of war, whereafter the export of any such articles would be unlawful. His bill would then also amend Section 3 of the present law by providing that "whenever the President shall find that one or more states signatory to a treaty to which the United States is a party is engaged in war with another state in violation of such treaty, he may, with the approval of a majority of each House of Congress, exempt such other state, in whole or in part, from the provisions of any proclamation issued by him under the authority of this Act, if such other state is not engaged in war in violation of such treaty."

Many of the witnesses before the Senate Committee, particularly those representing "peace organizations," but including also former Secretary of State Stimson, favored the Thomas bill. In the testimony before the Senate Committee, most of the discussion centered on possible violations of the Paris Pact although, in relation to the situation in the Far East, there were also references to the Nine Power Treaty and to a Japanese violation of that agreement. It is particularly with reference to this bill that the fact was recognized that it was a bill for framing a foreign policy and not a bill for a neutrality law.

<sup>6</sup> Text of report in Congressional Record, Feb. 13, 1939, p. 1903.

The other bills before the Senate Committee included *S. J. Res. 106* introduced by Senator Nye for himself and for Senators Bone and Clark. This bill, like the Pittman bill, would permit Congress to find that a state of war exists in case the President fails to find that fact. Section 2 of this bill makes the application of a cash and carry scheme mandatory after a state of war is found instead of leaving it discretionary with the President as under the 1937 law. Section 4 of this bill would amend Section 6 (a) of the 1937 Act so as to make it unlawful for American vessels to carry any articles whatsoever to a belligerent; the existing Act confines this restriction to the carriage of arms, ammunition and implements of war. Section 6 of this bill would amend Section 10 of the existing law so as to make the prohibition on the armament and carriage of arms, etc., on American vessels applicable to all American vessels engaged in commerce and not only those engaged in commerce with a belligerent. Senator Nye also introduced *S. J. Res. 21* which would make unlawful the exportation of arms, ammunition or implements of war in time of peace or in time of war "except to nations on the American continents engaged in war against a non-American state or states."

Senator King (*S. 203*) and the late Senator Lewis (*S. 1745*) both proposed the total repeal of the "Neutrality Acts of 1935-1937." The other bill included in the Senate Committee Print is that of Senator Sheppard (*S. Con. Res. 8*), which contains many descriptive whereases and requests to the Secretary of State that he secure agreement on the restriction of the arms traffic and on the limitation of armaments.

The extensive hearings before both committees cannot be summarized, but attention may be called to a few interesting points which appear in the Senate hearings. Readers of this JOURNAL will be interested to follow Senator Hiram Johnson's reiterated insistence upon the reality and effectiveness of international law. They will be struck by some suggestions concerning the rules of international law made by other persons. For instance, Mr. Baruch remarked: "England searched our ships when the war began. That was a breach of international law. . . ." <sup>7</sup> Senator Connally remarked: "Now, under the old international law, before the World War, the nations insisted on the freedom of the seas and their right to carry on their commerce irrespective of a state of war, but the strong nations came along and said, 'We will make up a list of contrabands [*sic*] which is exempt from the freedom of the seas and we will destroy it,' simply because they were strong enough to do it." <sup>8</sup> Mr. Breckinridge Long, former Assistant Secretary of State, enunciated the proposition maintained by the State Department in the Wilson administration that we could not change our neutrality rules during the course of a war. The unsoundness of this proposition has already been noted in this JOURNAL. <sup>9</sup> Mr. Long also made the astonishing suggestion that in view of the increased speed of ships and of aircraft, he

<sup>7</sup> Hearings, *op. cit.*, p. 68.

<sup>8</sup> *Ibid.*, p. 70.

<sup>9</sup> *Ibid.*, p. 214. See this JOURNAL, Vol. 30 (1936), pp. 263-64.

could "see no reason why our territorial waters should not be extended—even to 300 miles from the shores of continental United States."<sup>10</sup>

Professor Fenwick fortunately cleared up one prevalent misunderstanding concerning the operation of the cash and carry provisions. It has been commonly assumed that if the 1937 Neutrality Act had been applied to the current situation in the Far East, only Japan could take cargoes from American ports since China has no merchant marine. Professor Fenwick called attention to the fact that under the law China could make use of the merchant marine of any other neutral state, just as the Scandinavian and Dutch merchantmen carried goods for Germany while England had control of the seas during the World War.

A considerable number of bills were before the House Committee. Mr. Hennings introduced *H. R. 5575*, which is identical with the Pittman Peace Act of 1939.<sup>11</sup> Mr. Ludlow introduced *H. J. Res. 3*, which is substantially the same as Senator Nye's *S. J. Res. 21*. To like effect is the Fish bill, *H. J. Res. 113*. Mr. Guyer of Kansas introduced *H. J. Res. 7* "to implement the Kellogg-Briand Pact for world peace" by defining an aggressor and by asking the President to convene a conference which, among other things, would enact a code of international laws, stabilize exchanges, rectify international wrongs brought about by the Treaty of Versailles, provide equal access to all colonies and bring about disarmament. Mr. Knutsen offered *H. J. Res. 16*, which simply provides for a ban on the export of arms, ammunition, implements "or materials" of war whenever the President finds that a state of war exists. The Faddis bill (*H. J. Res. 44*), like the bill of Senator King in the Senate, provides for the repeal of the Neutrality Act of 1935 as amended. To the same effect is *H. R. 79* introduced by Mr. Maas. The Guyer bill, *H. J. Res. 226*, is the counterpart of the Thomas bill in the Senate.

Mr. Fish also introduced *H. J. Res. 254* which follows the model of the existing law. It speaks of "declared or undeclared war" and would allow the Congress as well as the President to find the existence of war. When the state of war is proclaimed, the export of arms, ammunition and implements of war is illegal as under the present Act. Like the Nye-Bone-Clark bill in the Senate, the Fish bill also makes the cash and carry provision automatically applicable. Section 3 of the Fish bill is different in that it provides that any American vessel which transports any cargo whatever to a belligerent shall do so at its own risk. The bill substantially reenacts the provisions of the existing law relative to loans and credits and to travel by American citizens on belligerent vessels.

Mr. Ludlow introduced an additional bill (*H. R. 163*) which is very simple in form. Upon the outbreak of war, the President issues a proclamation forbidding exports of all kinds and loans and credits to the belligerents. No American vessel can be chartered or used to transport any goods to a belliger-

<sup>10</sup> Hearings, *op. cit.*, p. 217. <sup>11</sup> This bill modified Mr. Hennings' earlier bill, *H. R. 5223*.

ent. Travel by American citizens on belligerent vessels is at the traveller's risk. There is a limitation upon alien propaganda seeking to enlist American support for one belligerent's side. There is also a prohibition on recruiting in the United States in behalf of a belligerent; this point would seem to be adequately covered by earlier laws. There is also an interesting administrative provision providing penalties for anyone who "disguises the identity of the consignor" or "camouflages the nature or the destination of goods intended for ultimate delivery to a belligerent nation or to nationals of a belligerent nation."

*H. R. 4232*, introduced by Mr. Voorhis, would make it unlawful to sell arms, ammunition or implements of war or airplanes or parts of airplanes or scrap iron to any foreign nation found by the President to have engaged in aerial bombing of civilian populations.

Mr. Coffey of Washington introduced *H. R. 5432*, which is entitled "The Japanese Embargo Act of 1939" and which, in general, follows the 1937 Act except that in place of all general reference to belligerents the name of Japan is inserted.

Upon the conclusion of the hearings before the Senate and House Committees, a stalemate seemed to have been reached. Up to this point the Administration had not publicly announced its views. On May 27, Secretary Hull sent a letter to the chairmen of the two committees in which he adverted to antecedent private conversations with them and other members of the committees.<sup>12</sup> He asserted the impossibility of the United States disassociating itself from world events and the common agreement upon the need for assuring the security of the country. He reiterated President Roosevelt's prior position that it was not possible to foresee all possible future situations. He believed that neutrality legislation "should conform so far as possible, to traditional concepts of international law adhered to by this government. International law requires that the domestic measures adopted by a neutral shall be impartially applied to the contending parties in conflict. It does not require that a neutral nation shall embargo any articles destined for belligerents." He touched upon the expansion of contraband lists and noted that complete and rigid embargoes would be ruinous to our economic life. He disapproved an embargo on the export of arms. He advocated keeping our nationals and ships "out of areas in which there is special danger. The rights of our nationals under international law may properly be restricted by our own legislation along certain lines for the purpose of avoiding incidents which might involve us in a conflict. In indicating certain restrictions upon the exercise of our rights as a neutral I do not wish to be considered as advocating the abandonment of these, or indeed of any, neutral rights; but there is reasonable ground for restricting at this time the exercise of these rights." He endorsed the cash and carry principle for exports to belligerents, the continuation of existing legislation on loans and credits to belliger-

<sup>12</sup> Department of State, Press Releases, June 3, 1939, p. 475.

ents, the functioning of the National Munitions Control Board and a ban on solicitation of funds for belligerents.

The Bloom bill (*H. J. Res. 306*) introduced on May 29 was apparently intended to give effect to Secretary Hull's proposals so far as the existing feeling in Congress would permit. This bill became the basis for detailed consideration by the House Committee. At the time of writing this comment, the final outcome is still undisclosed.

The Bloom bill is prefaced by the sound and illuminating assertions that the policy of the United States "in foreign wars not affecting the defense of the United States is a policy of neutrality in accordance with the rules of international law"; that "the United States stands for restating and strengthening the rights of neutrals at the earliest practicable time," and that "it seems advisable, until these rights can be restated, to diminish the risk of this nation becoming involved in foreign wars by restricting the exercise of certain neutral rights of our citizens." This is the first formal recognition since the debates were opened in 1935 that rules of neutrality depend on international agreement and can not be created by legislative acts of a single state.

Section 1 of the Bloom bill introduces an important limitation on existing legislation and prior bills; all the provisions are dependent not on the mere Presidential finding that a foreign war exists, but also on the Presidential finding that it is a war which "endangers the lives of citizens of the United States, and threatens the peace of the United States." The bill thus leaves a substantial measure of discretion to the President. The bill does not include the possibility of an alternate finding by the Congress. After the President proclaims his finding, it is automatically unlawful (a) for a citizen to travel on a belligerent vessel; (b) for a citizen or American vessel to travel through an area defined by the President as an area "of combat operations"; (c) to provide loans or credits for belligerents; (d) to solicit funds for belligerents except for humanitarian relief; (e) to export any article to a belligerent "directly or indirectly" until title has passed to an alien. It should be noted that the "cash and carry" provision becomes simply a "cash" requirement, save as combat areas may be proclaimed and limit the voyages of American vessels. The Latin American exception (Section 6) is absolute and is freed from its existing proviso about cooperation with a non-American state. The National Munitions Control Board is continued, as are the sections dealing with American ports as belligerent bases and with submarines and armed merchantmen.

There can be little doubt that the proposals to eliminate the embargo on exports of arms and munitions are inspired by the argument that the continuation of such a provision would definitely assist "aggressor states" by hampering Great Britain and France. Should the existing embargo be repealed during the course of a war for the reason indicated, the United States would clearly be guilty of a breach of neutrality—because of the motive, not

because of the bare fact of change. Since, however, the imposition of the embargo does not reflect a neutral duty under international law, its repeal at this time involves no breach of an international duty even though designed to assist certain states in case of war.

The Bloom bill in many respects is an improvement on the existing law, but it represents a partial withdrawal from the prevalent theory of 1935 which sought to free the United States from economic and psychological ties with either party to a war. That theory is, however, partially maintained by the new form of the cash and carry provision and the ban on loans, credits and solicitation of funds.<sup>13</sup>

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<sup>13</sup> On June 6, Mr. Corbett introduced *H. R. 6689*, providing for the creation of a National Neutrality Commission composed of six members of the House, six members of the Senate, and the Secretaries of Commerce, State, War, the Navy and the Treasury. They would be authorized to appoint expert counsel, advisers and employees. Although the commission would be authorized to make suggestions for enactment of neutrality legislation in general, the functions envisaged for them do not seem to contemplate the kind of continuing and thorough study of neutrality legislation which is needed. None the less, the bill proposes a move in the right direction.