THE UNITED STATES AS A NEUTRAL

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I

BEFORE the close of the eighteenth century, the United States was confronted with a problem, the solution of which was fraught with momentous consequences. The question was how it should comport itself in the course of the wars which were afflicting Europe and in which Great Britain and France were engaged. If the United States deemed itself to be truly independent, rather than under the suzerainty or wardship of a European power, and claimed supremacy over territory acknowledged to be its own, could it properly permit the French Government to fit out and commission privateers in its territory or to hold prizes therein? . Conversely, was there a duty on the part of a belligerent towards the United States to desist or refrain from such conduct? It fell to Washington and his Cabinet to steer a straight course, and to Jefferson, in particular, to make it known. The views that Jefferson then expressed have not ceased to be significant. He took a simple stand; and his taking it made a lasting impression abroad. He informed the French Minister in 1793 that such conduct was "incompatible with the territorial sovereignty of the United States," declaring it to be

> the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country; that the departure of vessels, thus illegally equipped, from the ports of the United States, will be but an acknowledgment of respect, analagous to the breach of it, while it is necessary on their part, as an evidence of their faithful neutrality.[1]

Jefferson thus disclosed the root of a neutral's obligation. If the United States, as a neutral, failed to exercise exclusive control over its own domain by permitting acts contemptuous of that control to be committed therein in behalf of a belligerent country against its enemy, there was a manifest failure in the performance of an American obligation towards the latter. Moreover, that failure would impose upon the United States the further duty of making amends to the belligerent

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1. Communication to Mr. Genet (June 5, 1793) AM. STATE PAPERS, FOREIGN RELATIONS, I 150; also Same to Mr. Morris, American Minister to France (Aug. 7, 1793) id. at 167; Mr. Jefferson, Sec'y of State, to Mr. Hammond, British Minister (Sept. 5, 1793) id. at 174. See documents in VII MOORE, INTERNATIONAL LAW DIGEST (1906) § 1295.

which had suffered through its neglect.[2] The underlying principle, suggested by the publicists of an earlier period, such as Bynkershoek and Vattel, and to which Jefferson was giving practical application, was that what a neutral State claims the right exclusively to control, such as its own territory, it must undertake so to control as to prevent it from being a source of direct aid to one belligerent and of injury to its enemy.[3] The first enactment of Congress in relation to the matter of neutrality, passed in 1794, was a significant assertion of the duty of prevention which Jefferson had enunciated.[4] The Act forbade numerous activities within the territory or jurisdiction of the United States, which the United States, as a neutral, felt bound to prevent.[5]

It is not sought to trace the development of American neutrality from 1794 to 1936, or the influence of it upon the practices that developed during that interval. It suffices here to observe that neutral States did not, for a variety of reasons, exhibit a common desire to pay complete respect to all that the principle of neutrality seemed to require. Statesmen found it a difficult task to take cognizance of the exact relation to a conflict of acts committed within neutral territory which, although not necessarily subversive of the prerogatives of the sovereign, served, nevertheless, by whomsoever committed, to furnish direct aid to a belligerent cause. This may have been due to the tendency to disclaim responsibility for acts committed by private individuals in contrast to those committed by governmental agencies, and also to the failure to perceive or admit the logical consequence of the possession by a neutral State of power to control occurrences within its own domain. Increased realization and acknowledgment of the duties of neutrals were, however, manifested in the nineteenth century, as exemplified by the so-called Neutrality Rules incorporated in the treaty between the United States

2. See Mr. Jefferson, Sec'y of State, to Mr. Morris, American Minister to France (Aug. 7, 1793) AM. STATE PAPERS, FOREIGN RELATIONS, I 167; MOORE, op. cit. *supra* note 1, at 837.

Declared the eminent English publicist, W. E. Hall, in his work on INTERNATIONAL LAW (5th ed. 1904) 593, quoted in VII MOORE, op. cit. *supra*, at 888: "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

See, also, JESSUP AND DEÁK, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1935) C. I.

3. See 2 HYDE, INTERNATIONAL LAW (1922) 794.

4. 1 STAT. 381 (1794).

5. See, in this connection, FENWICK, NEUTRALITY LAWS OF THE UNITED STATES (1913) c. 2.

and Great Britain of May 8, 1871,[6] which were the basis of the award of September 14, 1872, by the arbitral tribunal that adjudicated the so-called "Alabama Claims."[7]

With the beginning of the twentieth century, the duties of prevention generally acknowledged to rest upon a neutral state in a maritime war were not of broad scope. They were regarded as demanding that the neutral use the means at its disposal to prevent the use of its territory as a base of military operations, or as the source of a fresh unit or freshly augmented unit of military strength of direct or immediate value to a belligerent. Thus, the neutral was obligated to endeavor to prevent the fitting out, arming and departure of vessels adapted to hostile uses, as well as the departure of an expedition organized on neutral soil for the purpose of engaging in military operations against a belligerent State.[8] Even within these rather narrow limits, the character and scope of the neutral obligation were in various ways rather arbitrarily restricted. Thus, the Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, concluded October 18, 1907,[9] and to which the United States is a party, permitted a neutral power to yield to belligerent vessels of war various forms of sustenance that under certain conditions rendered the port in which they were acquired a veritable base of operations.[10] Indeed, the convention served in fact, if not by design, to smooth the way for prospective belligerents which sought in future conflicts to gain needed aid from neutral territory. Not only were acknowledged duties of prevention on the part of the neutral sharply, and at times arbitrarily checked, but situations where no duties of prevention existed were also proclaimed and specified. Thus, it was de-

6. 1 MALLOY, TREATIES, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909 (1910) 700, 703.

7. 1 MOORE, INTERNATIONAL ARBITRATIONS (1898) 653.

8. According to Article VIII of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War: "A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war." 2 MALLOY, op. cit. *supra* note 6, at 2359.

9. Id. at 2352, et seq.

10. Thus, according to Article XIX, a neutral state may without violating any acknowledged duty, if its laws so permit, yield to a belligerent vessel of war fuel sufficient to fill its bunkers built to carry fuel, however great may be their capacity. With such augmentation of its strength through the sustenance acquired in a neutral port the vessel may find itself able to take the aggressive against its foe. See, in this connection, Report of M. Renault in behalf of the Third Commission to the Second Hague Peace Conference, *Deuxième Conférence Internationale de la Paix, Actes et Documents,* Ministère des Affaires Étrangères, La Haye, 1908, I, 315-319.

clared that "a neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to any army or fleet."[11]

Accordingly, upon the outbreak of the World War in 1914, the United States, as a neutral, found itself confronted with a body of conventional as well as customary international law, imposing upon it, on the one hand, certain duties of prevention, and on the other, freeing it from any obligation to prevent a wide range of American resources, including financial resources, from being utilized by any belligerent that could command them. Thus, without violating any contractual or other burdens resting upon it, the United States Government was able to assume the rôle of a spectator, and observe with varying degrees of sympathy the success of one group of belligerents in gaining the use of a vast amount of American resources. In no previous war had the assets in the control of a neutral State contributed to a greater degree or in greater value to the aid of a belligerent cause. The temptation is resisted to discuss the extent to which the contribution from neutral America affected belligerent Europe or hastened the entrance of the United States into the conflict. The point to be observed is that a law of neutrality which permitted a State, professing to be a non-participant, to lend substantial assistance to a group of belligerent States in achieving success against others with which the United States was at peace, was grotesque and insufficient. Such a law did not deter war or restrain it after it had begun. Moreover, it proved to be the stalwart abettor of particular belligerents. It is no wonder, therefore, that careful observers in many quarters saw in the law of neutrality no handmaiden of peace, and sought to substitute for it a system designed to check wars by encouraging the use of common sanctions against a so-called aggressor, that is to say, by encouraging the taking of sides in a conflict rather than abstention therefrom.

It cannot be too strongly emphasized, however, that the weakness of the law of neutrality as an aid to the cause of peace was due chiefly to the fact that States had never been willing to go the whole way and apply the underlying principle that has been noted above, and which was responsible for the duties of prevention in so far as they were developed and applied. There had been no conflict in which a warring State, strong in a financial or naval sense, could not acquire desired sustenance from neutral territory. Moreover, suggestions that such a State should be restricted in this regard were met, and continue to be met, by the argument, among others, that restraints upon the freedom of belligerents to obtain sustenance from neutrals encourage States in

11. 2 MALLOY, op. cit. *supra* note 6, at 2359, Art. VII.

time of peace to become armed camps replete with the means of attack upon a prospective foe.[12]

Speaking parenthetically, a State which failed to use the means at its disposal to prevent what it had the power to control, to wit, its resources, from being used to aid a country at war with one with which that State was at peace, made itself a direct participant in the conflict. Though it might call itself a neutral, it was in truth the ally of the cause which it aided. It could not divorce itself from what it permitted private individuals to do within or with respect to assets within its own domain. The attempt to establish that neutral governmental passivity, which the law of nations did not proscribe, marked no connivance in what took place, and saved contributions from neutral soil to a belligerent cause from constituting a State participation, marked reliance upon a fiction. No State, howsoever described, that fails to prevent what it can prevent, such as the resources of its territory, from being used to further a belligerent cause, is in fact a nonparticipant in the conflict. And no weakness of the law which enables it to pursue a different course without technically changing its status is capable of altering that fact. Hence, it behooves a nation which seeks to avoid war, to consider whether its policy, expressed in statute or otherwise, should not more closely correspond to the facts by enabling it, upon the outbreak of war between other countries, to abstain from all actual participation therein. The United States was giving consideration to that question in the summer of 1935, before the outbreak of the war between Ethiopia and Italy, and it is continuing to do so. Before examining Congressional action on the subject, however, several other aspects of the neutral's obligations deserve attention.

When a State professes to be neutral in a war engaging others, it is burdened not only with certain duties of prevention, but equally with somewhat more comprehensive duties of abstaining itself from participation in the conflict. Thus the law of nations is generally acknowledged to forbid a neutral State to participate through governmental action in the war that engages others. It is not permitted, for example, to sell munitions of war to a belligerent power, or to lend funds or extend credits to it.[13] Nor may it lawfully yield to the temptation to participate

12. See message of Mr. Lansing, Sec'y of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, FOREIGN RELATIONS (Supp. 1915) 794.

13. See, for example, 7 MOORE, op. cit. *supra* note 1, at 973. See, also, Art. VI of the Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, 2 MALLOY, op. cit. *supra* note 6, at 1359. It is not suggested that in the matter of neutral obligations there is a necessary distinction between the burdens resting upon a State as such and upon a government as such. The latter is the instrumentality through which the former must necessarily act. For many purposes it may be convenient to refer to duties that rest upon a State in terms that would indicate that they rest in a peculiar sense upon the agency through which it acts. The burden that rests upon a State with respect to its neighbors in the course of wars that afflict them has reference to the obligation which the State itself is obliged to respect through those who speak for it.

even impartially. In a word, while it retains its neutral status, a State is obliged to take no step that may be fairly construed as constituting public participation in the struggle that is being waged around it. From this obligation no neutral State may free itself. This circumstance has a direct bearing upon one aspect of the general problem to be considered later. It suffices here to note that in the fulfillment of its acknowledged duties of prevention, and in abstaining from all actual governmental participation in the conflict, a neutral State must exercise utmost care lest it deviate, or be deemed by an offended belligerent to deviate, from the duty of non-participation.

The single-minded endeavor of a State to prevent what it controls from adding fuel to the flames of a war to which it is not a party is highly commendable. It involves no necessary violation of international law.[14] A neutral State is not obliged to permit its resources to be drawn upon by a belligerent, thus increasing the latter's power to fight. And although the neutral effort to withhold its resources is likely to affect in differing degrees the various belligerent States to be deprived of such aid, that circumstance does not necessarily weaken, still less invalidate, the propriety of the endeavor to abstain by such means from participation in the conflict.

The reason for neutral abstention from any participation in a war is, of course, primarily that the neutral so lessens the danger of its being involved in the conflict. Secondarily, there is the consideration that such a self-imposed restraint may encourage other countries to pursue a like course, and by thus diminishing the sources of aid to belligerent States, may hasten the end of wars already begun. It is inconsistent with the primary theory if processes of neutral abstention are employed as a means of intervening in a war, even if with a view to hastening its termination. This is obvious when special abstemiousness through affirmative action is announced in the course of a war in order to assist a particular belligerent at the expense of its enemy. Neutral abstention, when employed for the purpose of taking sides in a conflict, ceases to be a single-minded endeavor, and degenerates into the old-fashioned effort to participate in congenial fashion in behalf of a favored cause. Such con-

14. Declared Judge John Bassett Moore, in a communication to Hon. Hamilton Fish, Jr., member of Congress, March 27, 1933: "If the real purpose back of the pending resolution is simply to prevent the United States from furnishing implements of war to those who are engaged in armed strife, this may readily be done by providing for a comprehensive, nonpartisan embargo on the shipment of arms to all countries engaged in armed strife, whether international or civil. Such an embargo would naturally be announced and imposed by public proclamation. Of this no foreign power could complain. There are already various countries which, in accordance with their laws, impose such a ban. This is entirely proper under international law." 73 Cong., 1 Sess. (1935) 2052, 2054.

See, also, suggestions by Hon. Charles Warren in his notable paper on *Troubles of a Neutral* (April, 1934) 12 FOREIGN AFFAIRS 377, 381.

siderations illustrate the real difficulty encountered in enacting laws designed to enable a State such as the United States, when a neutral, not only to abstain from participation in a war that is waged between other powers, but also to abstain from taking a stand seemingly designed, and believed to be designed, to interfere with the success of one belligerent. It must be constantly borne in mind that a neutral State is not free to relax by its own enactments the obligation resting upon it not to participate, even impartially, in a war between other powers. It may safely indulge in such relaxation only when it has attained the consent of the State or States to be affected adversely by such action. Thus, although members of the League of Nations have by accepting the Covenant agreed in advance to permit the lessening of obligations which international law otherwise imposes upon neutral States in relation to their belligerent neighbors, the United States, while it remains outside of the League, enjoys no such privilege. It therefore cannot, while a neutral, proceed to penalize a belligerent that becomes such in violation of its duties under the Covenant, or even a State that has gone to war in violation of the Kellogg Pact of August 27, 1928, without subjecting itself to the danger of being called upon by the penalized belligerent to make full reparation for the losses attributable to American action. Until, therefore, the United States becomes a party to some multi-partite arrangement applicable to numerous States that entitles it to combine with others in penalizing belligerents whose causes are looked upon with disapproval, it is not justified in taking sides in any conflict in which it is not prepared to intervene itself as a belligerent. This fact is so patent and so thoroughly understood by the Department of State that it is difficult to believe that the United States would consciously ignore it, or even fail to pay due deference to it.

II

It is worth while to observe the extent to which the several foregoing considerations have been, and are being, respected in the new neutrality legislation of the United States. An Act of Congress, approved August 31, 1935, and of which certain portions were not to be effective after February 29, 1936,[15] marked definite progress. Although it is about to be supplanted or superseded by a more comprehensive act, a few of its features deserve attention. It contemplates an embargo on the export of arms, ammunition, or instruments of war from American territory to the ports of belligerent States, or to any neutral port for transshipment to or for the use of a belligerent country, upon the proclamation by the

15. PUBLIC RES. No. 67, 74 Cong. (1935); see in this connection Jessup, *The New Neutrality Legislation* (1935) 29 AM. J. INT. L. 665; Brown, *Malevolent Neutrality* (1936) 30 AM. J. INT. L. 88; Borchard, *Sanctions v. Neutrality* (1936) 30 AM. J. INT. L. 91.

President of the fact of outbreak of, or progress of, war between or among two or more foreign States. The articles, the export of which is prohibited, are to be definitely enumerated through Presidential proclamation. The President is, moreover, permitted by proclamation to extend the embargo on the exportation of such articles to other States as and when they become involved in such a war.[16] A National Munitions Control Board is established,[17] designed in part to act as the registrar of persons engaged in the business of manufacturing, exporting, importing, or dealing in implements of war as referred to in the Act, and also to license the exportation of such articles.[18] Upon the President's proclamation, it is to become unlawful for any American vessel to carry arms, ammunition, or munitions of war to any port of any belligerent country named in the proclamation as being at war, or to any neutral port for transshipment to, or for the use of, a belligerent country.[19] In addition, the President is empowered under specified conditions to require the owner, master or person in command of a vessel, before departing from an American port for a foreign port, to give bond to the United States that the vessel shall not deliver the men, or the cargo, or any part thereof, to any warship, tender or supply ship of a belligerent nation.[20] Under specified conditions, the President is permitted by proclamation to render it unlawful, during any war in which the United States is neutral, to permit foreign submarine vessels to enter or depart from American ports or territorial waters, save under such conditions as the President may prescribe.[21] Moreover, upon a presidential proclamation of certain conditions, no citizen of the United States is permitted to travel on any vessel of any belligerent nation except at his own risk, unless in accordance with such rules and regulations as the President may prescribe.[22] Although narrow in scope, and, as to part of it, probably temporary in duration, the enactment is a significant example of self-imposed restraint, which, while not required by the law of nations, is designed to prevent the United States as a neutral from becoming entagled in wars through some forms of American assistance to belligerents.

On January 3, 1936, a Joint Resolution was introduced in the House of Representatives "to maintain the neutrality of the United States in

16. § 1.

17. The Board was to consist of the Secretary of State, who was to be chairman and executive officer, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce.

18. § 2. 19. § 3.

20. § 4. 21. § 5.

22. § 6, which embraced certain limitations in its application. See, in this connection, proclamations by President Roosevelt, of Oct. 5, 1935, upon the outbreak of the war between Ethiopia and the Kingdom of Italy, TREATY INFORMATION BULLETIN No. 73 (Dep't of State, October, 1935) 4, 6.

the event of war or threat of war between or among foreign nations."[23] On the same date, it was introduced in the Senate in the form of a bill.[24] It embodied what was to be known as the Neutrality Act of 1936, an enactment designed to supplant and amend the Act of August 31, 1935. It was sponsored by the Government. In somewhat amended form the resolution was reported by the Committee on Foreign Affairs to the House.[25] At this writing, the Senate bill has not been reported back to that body. Such a stage in the legislative mill of both Houses has, however, been reached that it is possible to discuss the main features of the proposed enactment. It is not easy to approach judicially the question how Congress may most wisely perform the task confronting it. If well performed, it may enable the United States not only to safeguard its own welfare, but also to lead in an intelligent cooperative effort for the advancement of international peace. Congress is, therefore, entitled to both the sympathetic and constructive aid of all who avow interest in the successful conduct of America's foreign relations. No partisanship should divert attention from the consideration of the pertinent facts and the consequences of them.

The proposed law provides for an embargo not merely on munitions and implements of war, but also upon articles and materials used for war purposes (other than food, medical supplies, clothing, and processed or partly processed clothing materials of a distinctively non-military character), and upon certain financial transactions with belligerent governments enabling them to gain fiscal strength in American territory. It ought to be clear that self-imposed restraints along these lines are sound in principle, violate no requirements of international law, and, if reasonably applied, are capable of making the neutrality of the United States a fact rather than a fiction. In dealing with these several categories of resources capable of aiding a foreign belligerent, the proposed law however, applies methods which have aroused sharp criticism. While the embargo on the export of arms, ammunition, and implements of war is to take effect automatically whenever the President, having found that there exists a state of war between two or more foreign States, proclaims such fact, embargoes on the export of other articles and materials used for war purposes await the conclusions of the President concerning the effect of such restrictions upon the interests of the United States as a neutral. Moreover, he is permitted under certain conditions, even

23. The resolution (H. J. Res. 422) was introduced in the House by Mr. McReynolds, Chairman of its Committee on Foreign Affairs. See *Hearings before Committee on Foreign Affairs*, 74th Cong., 2d Sess., Jan. 7, 8, 9, 10, 13, 14, and 15, 1936.

24. The bill was introduced in the Senate (S. 3474) by Mr. Pittman, Chairman of the Committee on Foreign Relations. See, also, a bill "to preserve and maintain peace between the United States and foreign nations, and for other purposes," introduced in the Senate by Messrs. Clark and Nye, Jan. 6, 1936.

25. See Report by Mr. McReynolds from the Committee on Foreign Affairs, Jan. 28, 1936.

during the progress of a war to which the United States is neutral, to revoke or modify such embargoes.[26] Again, even with respect to the embargo on munitions of war, there is some latitude yielded to the President, enabling him to revoke the embargo when in his judgment the conditions which caused him to issue the proclamation cease to exist,[27] and power is yielded to the President to make a perhaps minor relaxation of the embargo on financial transactions with belligerents by exempting from its operation ordinary commercial credits and short-term obligations of a character customarily used in normal peace-time commerce.[28]

It is contended in some quarters that the proposed law gives to the executive privileges which, if exercised by him under certain contingencies, might be applied in such a way as to penalize a disfavored belligerent at the expense of its foe, and thus cause the United States to take sides in a war to which it professed to be a neutral. This criticism[29] raises a question not only as to the merit of leaving with one individual the power to determine the country's course as a neutral, but also as to whether the means should be left open to any governmental agency to deviate from the national policy of strict neutrality.

It may be assumed that any proposed legislation should facilitate the effort of the nation to follow a course unceasingly respectful of its duties to belligerent powers. To that end, it is desirable that the United States make appropriate enactment before a conflict begins to cause prospective embargoes to become operative automatically upon official proclamation by the executive of the outbreak of war, and to ensure an unwavering continuance of that policy the duration of the conflict. Affirmative governmental action after the initiation of hostilities is not likely to be regarded by the belligerent which suffers in consequence thereof as a single-minded or high-minded endeavor, but rather as a deliberate effort to hurt its cause. Nevertheless the attitude of the offended belligerent, although an important element of neutral policy, is not the test of a legal right of the neutral State to inaugurate its self-imposed restrictions marking national abstention. But even from a purely legal viewpoint,

26. He is permitted to do so when he finds that the conditions which caused him to issue his proclamation have ceased to exist or have so changed as to justify in his opinion a modification or revocation.

27. Perhaps, however, the latitude thus yielded to the President has reference merely to his conclusion arrived at prior to a final and technical termination of a war, that acts of war have ceased to be committed by opposing belligerents, as in consequence of an armistice.

28. See comment on this point by Hon. Green H. Hackworth, Legal Adviser of the Department of State, before House Committee on Foreign Affairs, January 8, 1936, *Hearings before the Committee on Foreign Affairs on H. J. Res. 422*, 74 Cong., 2 Sess. (1936) 29-30.

29. See, in this connection, criticisms of the proposal by Judge John Bassett Moore, in a communication to Senator Johnson, quoted in part in New York Times, Feb. 3, 1936, col. 2 at p. 12.

it would seem that a State which, while professing neutrality, takes affirmative steps while a conflict is raging to cast aside restraints of its own making and to allow its embargoed resources to be drawn upon by the belligerents, justifies the complaint of the belligerent which is most hurt thereby, that the neutral has in fact become the ally of its adversary. That belligerent may demand full reparation for the injury sustained by it in consequence of the act of the neutral. It may seek justice by amicable means when they are available; and when they are not, it may even go so far as to have recourse to the sword. In the case of the United States, it is unimportant whether a modification of its neutral obligations in the course of a war is wrought by one agency, such as the President, or by several agencies acting together. If it is effected by the nation, howsoever acting, the harm is done. The special point here to be observed is that neutral governmental action permitting, after the initiation of war, belligerent powers to avail themselves of neutral resources which were not within their reach upon the outbreak of the conflict, constitutes action which it is difficult to differentiate from neutral participation in the conflict.[30] The opening of a door to such conduct by the nation must be looked upon as undesirable. It is difficult, moreover, to visualize a situation where the United States could find it beneficial to its interest at any time during a foreign war affirmatively to proclaim that any American resources previously denied to the opposing States should thenceforth be available to them. The suggestion that flexibility in the operation of a law in this regard is desirable, is equivalent to asserting that the United States may deem it expedient to pursue an unneutral course. For these reasons, it would be unfortunate for an enactment, purporting to respond to a widely-sensed need of assurance of American neutrality in wars to which it is not a party, to facilitate the very means of accomplishing what it purports to forbid.

Further objection is made to the provisions of the Act contemplating the placing of embargoes on the export of articles and material used for war purposes where shipment is made to a neutral country with a view to transshipment thereafter for use in a belligerent country, and in excess of amounts normally exported from the United States to the belligerent country prior to the date of the President's proclamation. It is contended that the neutral rationing of other neutral countries is beset with grave difficulties, affecting uncertainly the economic policies of the nation, and is entwined with the solution of controversial problems per-

30. Perhaps the fact should be noted that there was omitted from the proposed enactment, as reported to the House of Representatives, a recital found in a text of the resolution as introduced therein, that the laying of embargoes might be influenced by the effect thereof upon the prolongation or expansion of a war. The words omitted were "or that to refrain from placing such restrictions would contribute to a prolongation or expansion of the war," contained in § 4 (a) of H. J. Res. 422.

taining to contraband and blockade.[31] Apart, however, from the question of policy involved, it would seem possible for the United States to make appropriate restrictions upon the exportation of such articles designed for transshipment from neutral to belligerent soil, without necessarily violating its obligations as a neutral towards a party to the conflict. To that end, it might be desirable to have appropriate lists of proscribed articles enumerated and defined prior to the outbreak of the war, and automatically and unchangingly applied throughout its course.[32] It may be extremely difficult, however, for Congress to determine wisely at this time what should be the scope of such a list and the detailed conditions under which embargoes should be applied. Hence this feature of the proposed enactment, howsoever drafted, may be expected to call for modification in the near future. Obviously, however, such modifications should not take place in the course of a war to which the United States purports to remain a neutral.

A few other aspects of the proposed enactment deserve attention, such as the provision prohibiting American vessels from carrying arms, ammunition or instruments of war to any belligerent country named in the President's proclamation, or to a neutral country for transshipment to, or for the use of, such belligerent country; the provisions requiring nationals of the United States, under certain circumstances, to assume the risk of commercial transactions with the governments or nationals of belligerent countries, and of traveling on belligerent vessels; the provisions preventing use of American ports as bases of supply for belligerent vessels; the special restrictions on the use of American ports and territorial waters by belligerent submarine vessels; the reenactment and modification of the Act of August 31, 1935, in relation to the National Munitions Control Board. They are subsidiary means by which the nation is called upon to prove its faithfulness to its purpose to remain neutral. It may be observed, in passing, that in the bill as reported by the House Committee, care is taken that the United States, in embarking upon its fresh policy, pay due heed to existing treaty commitments.[33]

It is not sought to predict the form which the Joint Resolution will

31. See memorandum by Prof. Edwin M. Borchard in *Hearings before the Committee on Foreign Affairs on H. J. Res. 422*, 74th Cong., 2d Sess. (1936) 51-70.

32. It has been suggested that the National Munitions Control Board might well be empowered to designate a list of articles to be enumerated and defined as contraband of war in addition to those embraced in the section of the Act pertaining to munitions of war. Were the United States to attempt to prevent what it deemed to be contraband from being traded in and exported for belligerent purposes, it would be taking a stand in harmony with what would be its position if it were itself a belligerent. See memorandum by the writer on H. J. Res. 422, of Jan. 13, 1936, *Hearings before House Committee on Foreign Affairs on H. J. Res. 422*, 74th Cong. 2d Sess. (1936) 80.

33. Thus it is declared, in § 16 of H. J. Res. 422, as reported, that "If the President shall find that any of the provisions of this Act, if applied, would contravene treaty provisions

assume if enacted into a law. Its value, if it becomes a law, in keeping the United States out of wars to which it is not a party, will depend upon the degree to which it discourages and even restricts the nation from taking sides in a conflict between other powers. If the duties of the United States as a neutral are to be enlarged, they should become operative automatically upon the outbreak of war, and never be relaxed until the termination of hostilities. They should not permit the nation by affirmative governmental action to make itself a participant in the conflict. Moreover, it may be desirable that any enlargement upon restrictions laid down in the Act of August 31, 1935, should be confined in its operation to future conflicts when, and as, it afflict the world, *after* the enactment of the proposed law.

From many quarters comes the suggestion that the United States should not through legislative enactment accentuate its detachment from foreign wars, and that it should at least leave open a door by which it may participate therein to the extent of taking sides affirmatively against a belligerent whose conduct is deemed to be reprehensible. As has been noted above, however, unless the belligerent has definitely and appropriately consented by a previous agreement to which the United States is a party, the United States cannot relax its legal obligation as a neutral toward that State. The United States is not, however, likely to embark upon a campaign designed to entitle it through a multi-partite treaty to penalize belligerent powers of whose causes it may disapprove. Difficulties in the exercise of such a right, howsoever acquired, involving a determination of whether a particular belligerent has become such without cause and the jeopardizing of the peace of America by affirmative participatory action, present obstacles which still loom large.

It seems to be of the utmost importance, however, to note that avowal by the United States of its determination to follow a course which full respect for the principles of neutrality logically demands, does not betoken American isolation, other than isolation from participation in war. Nor is that policy inconsistent with American leadership in international cooperative efforts to deter the outbreak, and even smother the continuance of war. Wide-spread observance of neutrality could not fail to be a powerful deterrent of conflict in any quarter. It would mark both a reckoning with the fact that the success of a belligerent usually depends upon the aid which it procures from foreign soil, and a logical determination that no victory should be won through such aid. More-

in force between the United States and any foreign country before such provisions shall become applicable as to such foreign country or countries, he shall enter into negotiations with the government of such country for the purpose of effecting such modification of the treaty provisions as may be necessary, and if he shall be unable to bring about the necessary modifications, he may in his discretion, but before such provisions shall become applicable as to such foreign country or countries he shall give notice of termination and terminate the treaty in accordance with the terms thereof."

over, the resourcefulness of States united in a common endeavor to contribute no fuel to the flames of war could be counted upon, to some extent at least, to provide against subversive measures taken by a disaffected State in time of peace to frustrate the common end.[34]

Thinking has not, however, been focused on the feasibility of cooperative achievements along such lines. It has been directed rather to the formulation of plans devised to punish an aggressor or covenant-breaking belligerent. Yet it is not too late to press the question whether the maintenance of peace is not better safeguarded by the withholding of aid from a warring State. The possible readiness of the United States to agree with other powers to withhold such aid may be the basis of an intercontinental barrier that has never been utilized. The matter deserves most faithful study. If the United States is determined wholeheartedly to withhold American resources from belligerent powers in need of them, may it not wisely invite the other members of the international society to unite with it in a common endeavor to prevent what each has the power to control from being used to sustain the wagers of war and the prolongers of conflict?

34. In a word, it might be regarded as highly desirable to incorporate in a general agreement provisions designed to prevent a State that was bent on war from gaining in time of peace a stock of military supplies that would enable it to vanquish a prospective foe. The problem is capable of solution in practical fashion. It calls, however, for most careful consideration.