SOME CONSIDERATIONS GOVERNING TITLE VI OF THE ESPIONAGE ACT

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Title VI of the *Espionage Act* [1] makes liable to seizure, detention, and forfeiture "arms or munitions of war or other articles" about to be unlawfully exported or shipped from or taken out of the United States, or,

> ". . . whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States in violation of law. . . ."

The closing paragraph of Title VI declares:

> "Except in those cases in which the exportation of arms and munitions of war or other articles is forbidden by proclamation or otherwise by the President, as provided in section one of this title, nothing herein contained shall be construed to extend to, or interfere with any trade in such commodities, conducted with any foreign port or place whatsoever, or with any other trade which might have been lawfully carried on *before* the passage of this title, under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof." [2]

The first section of Title VI provides that in the event of an attempt to ship, export, or take out of the United States arms or munitions or other articles "in violation of law," or in the event that there is reasonable or probable cause to believe that such shipment, exportation, or removal from the United States is being made or is contemplated "in violation of law," that

> ". . . the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of

[1] 40 STAT. 223, § 1 (1917), 22 U. S. C. A. § 238 (1926).
[2] 40 STAT. 225, § 6 (1917), 22 U. S. C. A. § 243 (1926).

> the United States, and every other person duly authorized for that purpose by the President may seize and detain. . . ." [3]

The availability of the recourse given by Title VI in time of peace, when there is no recognized state of foreign belligerency, no conditions internal or external to this country which might be deemed to constitute a national emergency, to restrain and punish the exportation of arms and other munitions of war, *animo belligerandi,* in violation of the law of nations and treaties of the United States stipulating upon its peaceful sanctions, is a subject which commands thoughtful consideration. The silence of Title VI, as to when it is operative by reason of Presidential proclamation as alluded to in Section 6 thereof, has created some doubt whether the remedy it gives is ever available when the United States is neither a neutral nor a belligerent, except as consequent upon some proclamation of the President or executive decree in pursuance thereof, forbidding a traffic in arms otherwise lawful, or except as the intended shipment may be in aid of, or in furtherance of a hostile expedition, prepared or fitted out in American territory, against a people with which the United States are in amity. This latter construction of Title VI, very narrowly limiting its practical utility as a measure designed to maintain the peaceful intercourse of the United States with foreign countries, would appear to rest upon a misconception, not only of the general purpose of the *Espionage Act of June 15th, 1917,*[4] but as to the situation which existed prior to its enactment. The early neutrality laws, while expressly imposing no restraint upon a commerce wholly free and justifiable by the law of nations, were so restricted in their application that many transactions, violative of the law of nations and treaties of the United States, escaped their operation, and very especially in time of peace unaccompanied by a state of recognized belligerency in foreign countries with which the United States was in amity. The case was one of frequently violated public rights as to which there was no available remedy; and from this the conclusion has

[3] *Supra* note 1.

[4] 40 STAT. 217 (1917).

been not infrequently drawn, that what was without remedy was *per se* lawful. Thus a trade lawful prior to the enactment of Title VI of the *Espionage Act* is to be sharply contradistinguished from one violative of the obligations of the United States under the law of nations, treaties and conventions thereof, though not comprehended within the offenses contemplated by the early neutrality statutes, or, prior to the Act of June 15, 1917, referred to by statute as an offense against the United States. In this light, it is submitted that Title VI has a very broad application, and one in large measure independent of a political discretion whose clear object in all cases where conferred has been to permit the embargo of a commerce otherwise lawful by the law of nations.

The wording of Title VI leaves no room for doubt that it is the *unlawfulness* of the intended, attempted, or probably contemplated or designed shipment, exportation, or removal from the United States, which is the condition precedent to the recourse *in rem* given, as against the articles described. Certain enumerated officers of the United States are expressly given a discretionary authority to make a provisional seizure and sequestration of these articles, and to pursue thereafter the procedure indicated. Other persons, it is true, may be authorized by the President to do these things; but if the unlawful character of the acts or contemplated acts set forth in this title is in any degree dependent upon executive proclamation, evidence thereto must be sought elsewhere than in the express language used therein. Title VI is, as has been stated, cryptic in its own allusion as to what may, by executive proclamation, be made illegal, in respect to that which by the law of nations, treaties, and laws of the United States is *per se* lawful, and as to which Title VI may not apply *ex proprio vigore.*

It is an important fact that Title VI of the *Espionage Act* was considered by its framers, not as a war measure, but emphatically one "to preserve peace"; again, that Title VI was debated as a matter of legislation wholly separate and distinct from other titles of the Act of June 15, 1917, having regard to the maintenance of neutrality and the powers of the Executive during a war in which the United States is a party, or during a time of

national emergency.[5] As such, Title VI was enacted under the power of Congress "to define and punish . . . Offenses against the Law of Nations." [6] Its validity, as a measure to restrain and punish such offenses, is not lessened by its omission to specify what is illegal at all times by that general law or treaties stipulating upon it.[7]

Title VI has been construed by the Department of Justice to provide for the seizure of arms and other munitions of war whose export is illegal by force of the statutes or proclamations of the competent authorities.[8] The words "arms and munitions of war or other articles" have been judicially declared to relate to that which is *at all times unlawful,* or is made so by proclamation of the President.[9]

It is further important that Title VI stands unrelated by any express provision therein contained to any criminal proceeding against persons guilty of the unlawful acts or attempted acts for which it provides a remedy; and therefore is independent, for its efficacy, of other recourse under the *Criminal Code* of the United States. In the case of *The Three Friends,*[10] the Supreme Court held that the forfeiture as provided by Section 11 of the Act of 1909,[11] did not depend upon the conviction of a person or persons for doing the act denounced by that section. The Court said:

> "The suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. . . . Indeed forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the identity of the particular person by whom they were committed. . . . The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing, and this whether the offense be *malum prohibitum* or *malum in se.* The same principle applies to proceedings *in*

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[5] 54 CONG. REC. 3417 (1917).

[6] U. S. CONSTITUTION, Art. I, Sec. 8.

[7] U. S. v. Arjona, 120 U. S. 479, 7 Sup. Ct. 628 (1886).

[8] 32 OP. ATT'Y GEN. 132, 134 (1920).

[9] U. S. v. Two Hundred, etc., Gold Pieces, 255 Fed. 217 (W. D. Wash. 1919).

[10] 166 U. S. 1, 17 Sup. Ct. 495 (1897).

[11] 35 STAT. 1090, § 11 (1909), 18 U. S. C. A. § 23 (1926).

rem on seizure in the Admiralty. Many cases exist where the forfeiture for the act done attaches solely *in rem,* and there is no accompanying penalty *in personam.* Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent on each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal procedure *in personam.*" [12]

The application of this principle, *mutatis mutandis,* in construction of Title VI, conclusively demonstrates that this title is wholly independent of the identity of the owner or the shippers of the arms or munitions of war, or other articles prohibited, as indeed it is of any question of their responsibility under other criminal statutes of the United States. It is the shipment, be it *malum prohibitum,* or *malum in se,* which is condemned and made liable to proceedings *in rem* on the instance side of the admiralty court, as distinguished from a forfeiture in prize for violation of the laws of war or of neutrality.

Recurring to other titles of the Act of June 15, 1917,[13] it will be observed that, by Title II thereof, the President is given power, whenever by proclamation or executive order he declares a national emergency to exist by reason of actual or threatened war, insurrection, invasion, or disturbance of the international relations of the United States, to subject all vessels, be they domestic or foreign, within the territorial waters of the United States, etc., to restraints of enumerated character. Section 3, however, of that title [14] provides that *it shall be unlawful* for the owner, master, any member of the crew, or any other person, knowingly to permit any vessel, as above described, to be used as a place of resort for any person conspiring with another, or preparing to commit any offense against the United States, or in violation of the treaties of the United States, or of the obligations

[12] *Supra* note 10, at 49, 17 Sup. Ct. at 497; see U. S. v. La Vengeance, 3 Dall. 297, 301 (U. S. 1796); 1 STAT. 369 (1794).

[13] 40 STAT. 220 (1917).

[14] 40 STAT. 220, § 3 (1917), 50 U. S. C. A. § 193 (1926).

of the United States under the law of nations. The first characterization of the offenses as to which the use of the vessel is forbidden to those conspiring or preparing to commit them, clearly comprehends those which are such by the so-called neutrality laws as reenacted, or those which are made criminal by the Act of June 15th, 1917, in a time of war in which the United States is engaged, or which are offenses against the United States within the meaning of other provisions of that act or the *Criminal Code* of the United States. The latter two designations of Section 3, Title VI [15] have clearly to do with the relations of the United States with nations in amity, whether as defined by treaty or subsisting independently of treaty by the law of nations. It is seen that the provisional power conferred upon the President in Section 1 of Title II,[16] is thus aided by penalties, effective, whether in time of peace, of national emergency, of war in which the United States may be a neutral, or of war in which the United States may be a party, and which penalties are clearly designed to prevent and punish that which by its very occurrence might create a national emergency, or give rise to any of the offences enumerated, whether *malum in se* or *malum prohibitum.* Section 3 of Title II [17] is then independent of Presidential proclamation and the general restraints which may, consequent upon it, be imposed by executive order or decree upon all vessels within the territorial waters, etc., of the United States; and may well comprehend that which, by Title VI, is *not* lawful, as therein contemplated, in respect of attempted shipment of arms, etc., whether the illegality thereof flows from the law of nations, treaties and conventions of the United States, the laws thereof, or executive proclamation. If the shipment constitutes an offense against the United States, or an infraction of its obligations under the law of nations or the treaties thereof, Title II, Section 3 applies, and it is enough that the conspiracy or preparation to commit such an offense was knowingly permitted to occur on board. Since such shipments are equally offenses whether designed

[15] 40 STAT. 224, § 3 (1917), 22 U. S. C. A. § 240 (1926).
[16] 40 STAT. 220, § 1 (1917), 50 U. S. C. A. § 191 (1926).
[17] *Supra* note 14.

on board ship, or attempted to be committed on land within the jurisdiction of the United States, it is patent that, neither in one case nor in the other, is the occurrence of those things which Title II, Section 3, and Title VI, Section 1 of the Act of June 15, 1917 designed to preclude and punish in the attempt, dependent exclusively on that which may be made unlawful by Presidential order consequent upon some national emergency of so grave a character as to warrant sweeping and general measures of all-inclusive character. Both sections clearly contemplate the prevention of acts which would be substantive offenses against the United States, its peaceful intercourse with other nations, as well as its rights as a neutral or again as a belligerent, quite independently of any extraordinary executive authority designed to strengthen the national defense, safeguard the public peace, or maintain its peaceful policies.

The Act of March 14, 1912,[18] was repealed by the Act of January 31, 1922,[19] which provides that whenever the President finds that in any American country, or in any country in which the United States exercises extraterritorial jurisdiction "conditions of domestic violence exist, which are (or may be) promoted by the use of arms or munitions of war procured from the United States," the President may by proclamation declare unlawful the exportation of any arms or munitions of war to such places. This discretionary power vested by Congress in the President to forbid by proclamation all export commerce in munitions of war in the case specified, is effective independently of whether the existing conditions of domestic violence have or have not reached a state of recognized belligerency. If these conditions amount to the latter, the act contemplates a conditional restriction on contraband trade, not arising from any obligation of neutrality to be deduced from international law.[20] It contemplates the making unlawful of that which *per se* is lawful; and short of a state of recognized belligerency, it furnishes the Executive with a power to lay a special embargo on all trade in arms with the country or

[18] 37 STAT. 630 (1912).
[19] 42 STAT. 361 (1922), 22 U. S. C. A. § 236 (1926).
[20] FENWICK, NEUTRALITY LAWS OF THE UNITED STATES (1913) 158, 159.

countries to which his proclamation may relate, whether or not such trade be knowingly conducted, *animo belligerandi.* Title VI of the *Espionage Act,* in the light of the aforesaid enactments, is seen to give a recourse in favor of what is thus made illegal consequent upon the President's proclamation; but is not thereby limited.

Wholly apart from these considerations and the interpretations of these statutes, or other sections and titles of the *Espionage Act* and Title VI, the latter bears a marked resemblance to the Act of March 10, 1838,[21] which act expired by limitation two years later. This statute authorized and *required* enumerated officers of the United States and "every other officer who may be specially empowered for the purpose by the President," to seize and detain any vessel, vehicle, or munitions of war, provided or prepared for any military expedition or enterprise against the territory or dominion of any foreign prince or state, or of any colony, district, or people co-terminous with the United States, contrary to the 6th Section of the Act of April 20, 1818;[22] or wherever the character of the vessel or vehicle, and the quantity of arms and munitions or other circumstances furnished probable cause to believe that said vessel or vehicle, arms and munitions of war were intended to be employed by the owner or owners thereof, or any other person or persons, with his or their privity, in carrying on any expedition or operations within the territories or dominions of any foreign prince, or state, etc., co-terminous with the United States, with the proviso that nothing in the act was to be construed

> ". . . to extend to or interfere with any trade in arms or munitions of war conducted in vessels by sea, with any foreign port or place whatsoever, or with any other trade, which might have been lawfully carried on before the passage of this act under the law of nations, and the provisions of the act hereby amended."

This early statute plainly did not purport to change the existing neutrality laws of the United States or to restrict any com-

[21] 5 STAT. 212 (1838).
[22] 3 STAT. 449 (1818), 18 U. S. C. A. § 25 (1926).

merce, lawful *per se*; but while aiding the enforcement of Section 6 of the Act of April 20, 1818, in making liable to seizure and condemnation munitions of war provided or prepared for any military expedition or enterprise originating in the United States and punishable under said section of the Act of 1818, the statute went further and included the case of an intended shipment of arms, made *animo belligerandi* for the purpose of carrying on a hostile expedition or *operation* within the territory of a foreign state, etc., co-terminous with the United States, a traffic plainly deemed by the statute inimical to the peaceful intercourse of the United States with such foreign state and in contravention of the obligations of the United States under the law of nations.

These obligations have been defined in comprehensive terms by the Supreme Court of the United States and its decision thereon has the force of supreme law. In the case of *Kennett v. Chambers*,[23] Chief Justice Taney, delivering the unanimous opinion of the Court, declared:

> "The intercourse of this country with foreign nations, and *its policy* in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the law of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friend-

[23] 14 How. 38, 49 (U. S. 1852). Italics are the author's.

> ship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. *And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace,* without a breach of duty as a citizen and the breach of faith pledged to the foreign nation."

It is further significant that the early American treaties of amity, commerce and navigation, stipulated for *perpetual peace,* and the majority of them in order "to make as durable as possible the relations which are established" provide that:

> "If one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizen shall be held personally responsible for the same, and harmony and good correspondence between the two nations shall not be interrupted thereby, each party engaging in no way to protect the offender or sanction such violation." [24]

It may be doubted whether this obligation can be said to have expired with the expiration of these treaties, or have been more than suspended in case of war.[25] The treaty has stipulated in perpetuity on the superintending sanctions of the law of nations.[26]

A trade in arms such as that inhibited by Section 2 of the Act of March 10, 1838,[27] is not dependent in respect of its illegality upon any proclamation of the President. Indeed the duty of the executive branch of the government to restrain it would seem to be independent of any statutory enactment. The Supreme Court of the United States has declared:

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[24] See, for example, 1 MALLOY, TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909 (1910) 124, treaty with Bolivia, concluded May 13, 1858, art. XXXVI.

[25] 5 MOORE, INTERNATIONAL LAW DIGEST (1906) § 779.

[26] 1 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW (3d ed. 1879) § 219.

[27] *Supra* note 21.

> "The law of nations requires every national government to use *due diligence* to prevent a wrong being done within its own dominions to another nation with which it is at peace, or to the people thereof." [28]

Such a trade is then to be deemed unlawful within the meaning of Title VI of the Act of June 15, 1917,[29] as an act done to promote or encourage revolt or hostilities against the territories of a nation in amity with the United States, and this whether or not connected with an expedition or enterprise of military or naval character commenced in the United States against such foreign state, and though the hostile enterprise, operation, or expedition to which the shipment contributes originates on the high seas or in foreign parts.

The similarity in the general wording of the Act of 1836 and that of Title VI, and very especially the omission in the latter of any allusion to Section 6 of the Act of 1818 [30] as amended and embodied in Title V of the *Espionage Act,*[31] or indeed as to shipments of munitions of war of the character described in Section 2 of the Act of 1838, is deemed significant.

Title V, Section 8, of the *Espionage Act* [32] amends and broadens, by including naval expeditions, Section 13 of the Act of March 4, 1909,[33] which corresponded to Section 6 of the Act of April 20, 1818.[34] It however limited the offenses disjunctively enumerated to those knowingly committed. This title is expressly declared to relate to the enforcement of neutrality, and the first four sections deal with executive powers and neutral obligations "during a war in which the United States is a neutral nation." Whether or not, in its amended form, it was intended to be operative only when this country is a neutral, has been deemed open to question. This being true, however, Title V, Section 8, would fail to give a recourse against a shipment of

[28] U. S. v. Arjona, *supra* note 7, at 484, 7 Sup. Ct. at 630.
[29] *Supra* note 1.
[30] *Supra* note 22.
[31] 40 STAT. 221 (1917).
[32] 40 STAT. 223, § 8 (1917), 18 U. S. C. A. § 8 (1926).
[33] 35 STAT. 1090, § 13 (1909), 18 U. S. C. A. § 25 (1926).
[34] *Supra* note 22.

arms in aid of a hostile expedition when no recognized state of belligerency obtained in the foreign state in amity, against which such expedition was organized within the United States.

The Act of April 20, 1818, embracing the so-called neutrality laws of the United States, as embodied in the *Criminal Code of 1909*, Sections 9 to 13,[35] made no mention of the word neutrality, and has been repeatedly enforced for the purpose of preventing hostile expeditions from the United States against friendly nations attempting to suppress insurgents not recognized by the United States as belligerents.[36] This is consistent with the contention that:

> "If . . . the persons supplying or carrying arms and munitions from a place in the United States are in any wise parties to a design that force shall be employed against '(a foreign nation in amity with this country, and which is endeavoring to put down an unrecognized insurrection)' . . . the enterprise is not commercial, but military, and is in violation of international law and of our own statutes." [37]

If there be existing a state of recognized belligerency, Title VI, while the United States is a neutral, and in the absence of a proclamation forbidding the exportation of arms, would admittedly not give a recourse against a contraband trade, lawful by the law of nations, or one not inconsistent with the neutrality of the United States. Shipments of contraband are, however, remitted to the laws of prize, and are liable to seizure and condemnation by the offended belligerent. In time of peace, however, if there be existing no state of recognized belligerency in a foreign state in amity with the United States, or indeed of any civil strife in such foreign country, unless Title VI be deemed to give a recourse, the occasion of an attempted shipment of munitions of war, made with hostile intent against such foreign sovereign, and unconnected with a military expedition or enterprise originating or organized and set on foot within the United States, would

[35] 35 STAT. 1089, §§ 9-13 (1909).
[36] Hyde, *The Espionage Act* (1918) 12 AM. J. INT. LAW 143.
[37] 31 OP. ATT'Y GEN. 271 (1918).

seem to escape the punitive and preventive processes of the laws. This would be to say that acts done knowingly within the United States, with deliberate intent to subvert the peace of a foreign state in amity with it, do not constitute violations of the obligations of the United States, and offenses no less against its sovereignty than that of the foreign sovereign, and are not preventable and punishable, although a conspiracy alone to disturb the peaceful intercourse of the United States with foreign nations is a crime under its statutes, and as such an offense against the United States.[38]

The Supreme Court of the United States, in construing the conspiracy clauses of the *Espionage Act* and the criminal laws, has held that the question in every case was as to whether the acts, or words, or conspiracies were such as to create a clear and present danger, likely to bring about the substantive evils that Congress had a right to prevent.[39] The act, then, in its totality, must be construed to forbid, or to provide the means to restrain and punish, whatever, through a combination of actors, would be at once productive of serious international complications, or violative of the policy of the United States, no less than of its obligations under the laws of nations and treaties. In like sense, and by its very consistency with the law of nations, Title VI must be deemed broadly applicable to all trade in munitions of war not lawful by the law of nations or treaties of the United States, and as such deemed to provide measures preventive of a traffic in arms which would threaten the peaceful intercourse, the neutrality, or the security of the United States, be the traffic *malum in se,* or *malum prohibitum.*

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[38] See 35 STAT. 1096, § 37 (1909), 18 U. S. C. A. § 88 (1926); see Ford v. U. S., 273 U. S. 593, 618-624, 47 Sup. Ct. 531, 539-541 (1927).

[39] Hyde and Schneider v. U. S., 225 U. S. 347, 32 Sup. Ct. 793 (1912); Brown v. Elliot, 225 U. S. 392, 32 Sup. Ct. 812 (1912); Schenck v. U. S., 249 U. S. 47, 39 Sup. Ct. 247 (1919); Pierce v. U. S., 252 U. S. 239, 40 Sup. Ct. 205 (1920); Milwaukee Pub. Co. v. Burleson, 255 U. S. 407, 41 Sup. Ct. 352 (1921).