

International law also requires that revolutionists receive no aid or comfort from the United States. During the ten years of the Cuban insurrection, from 1868 to 1878, and during the three years from 1895 to 1898, the United States strictly observed its obligations to Spain and treated the rebels in such a manner as to avoid giving offense to the Spanish Government. At the beginning of the American Civil War, several of the important arsenals were located in the South. Had England or any other foreign country undertaken to embargo arms to both the North and the South, the North might easily have lost the Civil War.

The Pittman Spanish Civil War Resolution reversed this legal order by placing unrecognized rebels and the constituent government in Spain on the same footing. The Pittman and McReynolds Neutrality Resolutions of 1937, designed as more permanent legislation, while automatically imposing an arms embargo when the President finds and proclaims the fact that an international war exists, authorizes the President to impose such an embargo in civil wars, only when he considers that they have reached "a magnitude or [are] being conducted under such conditions" that the export of arms, ammunition and implements of war would, in his opinion, "threaten or endanger the peace of the United States."⁶ This is a curious provision. Apparently arms and ammunition may be freely exported to a country in civil war until, perhaps by the use of arms shipped from the United States, the faction beaten at the polls will have given the insurrection a "magnitude" or "conditions" which might "threaten . . . the peace of the United States." Thereupon, the further export of arms is prohibited. The insurrectionists then receive the assurance that the President will treat both constituent government and rebels on an equal footing. This is an encouragement to violence. Thus, the executive discretion involved in determining when the embargo—mandatory on arms but discretionary as to commodities permitted to be carried in American vessels—shall be imposed, gives the President the opportunity, possibly neither sought nor intended, to determine the outcome of foreign civil wars and to impair the independence of weak states. It is understood that in January, 1937, the belligerency of the Franco faction in Spain had not been recognized by the United States, and recognition of belligerency appears not to be the test for the application of embargoes. That, at least, would help to regularize the policy.

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NEUTRALITY LEGISLATION—1937

The neutrality laws of 1935 and 1936 have already been discussed in this JOURNAL.¹ Since the latter act will expire by its own terms on May 1, 1937, the Congress has necessarily considered its reënactment and its modification.

As this comment is written, a bill has passed the Senate and another bill

⁶ S. J. Res. No. 51, Sec. 1-a, 75th Cong., 1st Sess. (Jan. 22, 1937), passed the Senate March 3, 1937; H. J. Res. 242, *ibid.*, H. Rep. 320, passed the House March 18, 1937.

¹ Vol. 29 (October, 1935), p. 665; Vol. 30 (April, 1936), p. 262. See also Dumbauld, "The Neutrality Laws of the United States," *supra*, p. 258.

with slightly different provisions is about to be passed by the House. It is anticipated that the two bills will be reconciled in conference and a single bill enacted. There is little likelihood of important modifications being introduced.² The purpose of this comment is to trace the legislative development up to March 10, 1937. It will be convenient to consider the several proposals submitted in both houses according to the subject matter involved. First, it may be noted that the bill reported out by the Senate Foreign Relations Committee on February 23³ was the Pittman bill⁴ which had been substantially amended by its author and by the Committee since he introduced it on January 22, 1937. This bill with minor amendments was passed by the Senate on March 3, 1937, by a vote of 63 to 6.⁵ The Committee on Foreign Affairs of the House reported out on February 25, 1937,⁶ the McReynolds bill⁷ which was introduced in the House on January 25 in substantially the same form.

The issue of presidential discretion

In 1935 and 1936 opinion was sharply divided between those who wished to give the President power to discriminate between or among belligerents and those who wished to ensure impartiality which is the legal essence of neutrality. The former group desired to make possible the coöperation of the United States against a state which might be considered an "aggressor," particularly in cases where the members of the League of Nations were applying sanctions. In 1937 that issue was practically dead. Even the Administration abandoned the hopeless effort to secure such discriminatory authority. Of the thirteen bills introduced in the House and of the five bills introduced in the Senate which have been examined, no one is based on the discriminatory policy.

However, most of the bills would give the President more or less discretion as to the application, extension and withdrawal of various measures designed to safeguard American neutral interests. In the Senate the Clark-Bone-Vandenberg-Nye group were opposed to presidential discretion, but an amendment proposed on the floor by Senator Vandenberg with the purpose of limiting such discretionary power was lost by a vote of 24 to 48.⁸ On the other hand, an amendment offered by Senator Borah to enhance presidential discretionary power in one particular was lost 31 to 43.⁹ Detailed reference to the points at issue will be made later.

² The McReynolds bill passed the House 374 to 12 on March 18 with minor amendments. The most important one would limit the operation of Sec. 4 to a two-year period. On the issue of presidential discretion, discussed hereafter, the views of the Senate and House seem to be wide apart.

³ Senate Report No. 118, 75th Cong., 1st Sess.

⁴ S. J. Res. 51.

⁵ Cong. Rec., Vol. 81, p. 2260.

⁶ House Report No. 320, 75th Cong., 1st Sess.

⁷ H. J. Res. 242.

⁸ Cong. Rec., Vol. 81, p. 2251.

⁹ *Ibid.*, p. 2255. As the debate opened on the floor of the House on March 12, it was reported that sentiment was generally in favor of the discretionary provisions. *New York Times*, March 13, 1937.

The question of embargoes

The 1935 Act, by Section 1, called for a mandatory embargo on exports of arms, ammunition and implements of war. The 1936 Act added a mandatory embargo on loans and credits, subject to the President's power to make exceptions for "ordinary commercial credits" and "short-time obligations." These provisions were retained in the Pittman bill and in the McReynolds bill. The Thomas bill¹⁰ would have given the President discretion to apply or withhold the application of the arms embargo and, consequently, of the financial embargo which is made contingent thereon. The Lewis bill¹¹ would have left the President the broadest possible discretion as to time and extent of any embargoes. No other bill examined sought to alter the existing law in these respects.

In 1935 and 1936 there was considerable debate on the question of providing for embargoes on articles other than arms, ammunition and implements of war.¹² That debate has continued with widespread approval of the general idea of permitting increased restrictions. Three principal ideas have been advanced: one, grant the President authority to add other articles to the list; two, provide for limiting other exports to a quota basis; three, deal with other commodities on a cash and carry basis or restrict their transportation in American bottoms. Under the existing law, it is already unlawful for any American vessel (aircraft is now added) to carry arms, ammunition or implements of war to or for a belligerent. The Pittman bill contains in Section 2(a) a new provision that when the President finds it necessary to "promote the security and preserve the peace or neutrality of the United States" etc., he shall enumerate additional articles or materials and thereafter such articles or materials may not be carried in an American vessel or aircraft to a belligerent destination. In regard to the application of this rule, and the enumeration of the commodities covered, the President has discretion. The provision in the McReynolds bill (Section 4(a)) is similar. On the floor of the Senate this discretionary feature was unsuccessfully attacked by Senators Vandenberg and Nye.¹³

Subsequent to the introduction of his first bill, Senator Pittman added a provision taken substantially from the Clark-Bone-Vandenberg-Nye bill¹⁴ and embodying the so-called "cash and carry" plan. In one form or another, this plan appeared also in the McReynolds bill, the Luckey bill,¹⁵ the Maverick bill¹⁶ and the Voorhis bill.¹⁷ In the Pittman bill, as reported out

¹⁰ S. J. Res. 47, introduced on Jan. 19, 1937.

¹¹ S. 1249, introduced on Feb. 1, 1937.

¹² For definition of the terms see this JOURNAL, Supp., Vol. 30 (1936), pp. 112-113, and Supplement to this number, p. 103.

¹³ Cong. Rec., Vol. 81, p. 2251.

¹⁴ S. J. Res. 60, introduced on Feb. 1, 1937.

¹⁵ H. J. Res. 233, introduced on Feb. 18, 1937.

¹⁶ H. J. Res. 202, introduced on Feb. 8, 1937.

¹⁷ H. R. 3875, introduced on Jan. 28, 1937.

by the Committee on Foreign Relations, this provision is in Section 2 (b) as follows: When the President has, under Section 1, proclaimed the existence of an international or civil war, it is unlawful to export or transport in a vessel of any nationality to or for a country named in such proclamation,¹⁸ "any articles or materials whatever until all right title and interest therein" shall have been transferred to foreign ownership. The shipper must make a declaration under oath that no American citizen retains any such right, title or interest, and such declaration is "a conclusive estoppel" against any American claim in the goods covered thereby. American underwriters may insure such goods, but such insurance shall not be deemed an American "interest" in the goods and no insurance policy or a loss thereunder "shall be made a basis of any claim put forward by the Government of the United States." In the debate on the floor, an amendment proposed by Senator Bone was carried so as to make clear that no insurance claim can be made even for the vessel in such cases.¹⁹ Senator Borah objected to this whole section because in his opinion it was an unnecessary retreat from assertion of American rights. He proposed an amendment giving the President discretion as to whether or not to invoke this provision, but his amendment was defeated, 31 to 43.²⁰

In the McReynolds bill as reported out by the House Committee on Foreign Affairs, Section 4 (b) contains a similar cash and carry provision, except that the President is given discretion as to when he will bring the rule into play and to modify or limit it as he finds that American interests require. As explained by Chairman McReynolds in the Committee Report, this would enable the President "to keep our trade, as much as possible, out of war zones, but not to deprive us of trade in those zones where we cannot be involved in such a war." The extent of Presidential discretion is thus squarely in issue between the two houses on this part of the bill.

The quota limitation idea is not found in either the Pittman or the McReynolds bill, although it had been favored by the Administration in 1936. It was included in the Koplemann bill.²¹

Travel of Americans on belligerent vessels

Section 6 of the present law gave the President authority to forbid Americans to travel on belligerent vessels except at their own risk. Section 9 of the Pittman bill makes such travel automatically unlawful when the President issues a proclamation under Section 1, subject to certain exceptions and rules and regulations. By the blanket provision of Section 11, a violation of this provision would make the offender subject to a fine of \$10,000 or im-

¹⁸ In the Clark-Bone-Vandenberg-Nye bill the destination is described as "any port or place which can be reached only by traversing the waters adjacent to a belligerent state which are within the zone of belligerent operations as determined by the President." This idea was rejected in Committee; see Report No. 118, p. 4.

¹⁹ Cong. Rec., Vol. 81, p. 2254.

²⁰ *Ibid.*, p. 2255.

²¹ H. R. 1491, introduced Jan. 5, 1937.

prisonment for five years or both. The McReynolds bill (Section 9) still leaves discretion to the President to invoke this rule, but if he does, the act is unlawful and not merely at the person's risk. The Clark-Bone-Vandenberg-Nye bill was in this respect closer to the McReynolds bill but it added a clause stipulating that no American passport would be valid for such travel. The Thomas bill would have preserved the section of the present law without change. The Kopplemann bill made the provision mandatory but kept the "risk" theory. It barred also travel on any vessel, American or foreign, in war zones. The Voorhis bill kept the "risk" theory, made its application automatic and added the passport clause. The Luckey bill is similar to the Clark-Bone-Vandenberg-Nye bill in this respect.

Application to civil wars

As a result of the Spanish civil war, a Joint Resolution was rushed through Congress on January 8, 1937, making the arms embargo applicable to that particular conflict.²² The Pittman and McReynolds bills both would make the law applicable to civil wars as well as to international wars. They use the term "civil strife" and leave the President power to determine whether the "armed conflict is of such magnitude or is being conducted under such conditions" that the export of arms, ammunition and implements of war would threaten the peace of the United States. If he so finds, he proclaims the fact, and the various provisions of the law then become applicable. Most of the other bills dealt similarly with civil wars. There is no attempt to consider whether the belligerency of the parties has been recognized.

Armed merchantmen

The present law, in Section 5, empowers the President to bar or regulate the entrance of submarines into American waters. The Pittman and McReynolds bills, in Section 8, include armed merchant vessels with submarines. Like provision was made in the Kopplemann bill, the Voorhis bill, the Maverick bill, the Luckey bill, the Clark-Bone-Vandenberg-Nye bill and the Shanley bill.²³ This desirable addition to the law had been strongly recommended by Mr. Charles Warren.²⁴ The subject was discussed in the hearings before the Senate Foreign Relations Committee and the House Committee on Foreign Affairs in 1936 but no action was taken on it at that time.

Sundry provisions

The Pittman bill and the McReynolds bill are similar in making slight amendments to the provisions dealing with the National Munitions Control

²² Pub. Res. No. 1, 75th Cong., 1st Sess. Text in Supplement to this JOURNAL, p. 102. see also this JOURNAL, Vol. 31, p. 74.

²³ H. J. Res. 181, introduced Feb. 1, 1937.

²⁴ "Safeguards to Neutrality," 14 Foreign Affairs, 199 (Jan., 1936).

Board. The principal change is the reduction of the registration fee from \$500 to \$100 for persons doing a business of less than \$50,000 a year.

Both the Pittman and the McReynolds bills retain the provision of the existing law relative to the use of American ports as a base of supply.

The existing law provides that after the President has issued a proclamation under Section 1, it shall be unlawful for any American vessel to carry any arms, ammunition or implements of war to or for a belligerent. The Pittman bill adds a new provision (in Section 10) providing that it shall be unlawful under such circumstances for any American vessel engaged in commerce with a belligerent country "to be armed or to carry any armament, arms, ammunition or implements of war," except small arms authorized by the President to be carried by the officers of vessels for the preservation of discipline. This provision is not found in the McReynolds bill.

Both bills provide for the repeal of the act of August 29, 1916, relating to the sale of ordnance and stores to the Government of Cuba.

Some importance is attached in the Report of the Committee on Foreign Relations to the addition of Section 14 which grants the President power to make necessary rules and regulations not inconsistent with the provisions of the act. Section 12 of the McReynolds bill is similar.

Both bills unfortunately retain the Latin American exception which is contained in Section 1 (b) of the present law.

The McReynolds bill inserts a new provision not found in the Pittman bill, forbidding anyone in the United States "to solicit or receive any contribution" for belligerent governments. Mr. McReynolds explains in the Committee Report that "of course, this amendment does not undertake to prohibit any donations made by any citizens, neither will it interfere with any collections made for the Red Cross." A similar provision was proposed in the Quinn bill.²⁵

One amendment proposed on the floor of the Senate which was accepted was that proposed by Senator Nye to fix the definition of "arms, ammunition and implements of war." The amendment says that "they shall be those enumerated in the President's Proclamation No. 2136 of April 10, 1936." There seems to have been no doubt that the President would have followed this precedent in the sense that the Administration definitely gave up any thought of extending those categories to include raw materials. The crystallization of the list, however, especially in what purports to be permanent legislation, is extremely unwise in view of the fact that technical developments must constantly change items to be included in such a list. Past experience with drawing up detailed lists of contraband should suffice to indicate the unsoundness of this provision.

Both bills now wisely mention aircraft as well as vessels in dealing with the carriage of goods. However, no adequate study has yet been made of the

²⁵ H. R. 3624, introduced Jan. 25, 1937.

problems of air transport of merchandise which will undoubtedly arise in the next war.

It is unfortunate that neither the Pittman bill nor the McReynolds bill embodies the wise proposal contained in Section 8 of the Kopplemann bill and in Section 13 of the Voorhis bill providing that in cases of abuse of the American flag, the vessels guilty of such abuse may be barred from American ports.

Among other rejected proposals are the following: limitation of alien propaganda, in the Ludlow bill;²⁶ the provision for expatriating any American who serves in foreign forces unless expressly authorized to do so by the laws of the United States;²⁷ the Fish proposal²⁸ asking the President to call a conference of the signatories of the Briand-Kellogg Pact "to consider a practical method of carrying out the underlying purposes" of that treaty, "to discuss the causes and cure of war" and to conclude new international agreements defining neutral rights and duties and to promote peace.

Summary

The Pittman bill as passed by the Senate has the following principal provisions:

Automatic embargo on arms, ammunition and implements of war when international or civil war is proclaimed. However, the President has discretion in regard to civil wars so that he need not make such a proclamation in a conflict which does not affect the United States.

Provisions for registration and licensing through the National Munitions Control Board.

Once the Presidential proclamation is issued, it becomes unlawful for any American vessel to carry arms, ammunition or implements of war to or for a belligerent.

When the Presidential proclamation is issued, it is unlawful to ship any articles whatever out of the country to or for a belligerent until all American interest therein has been divested.

The President, exercising his discretion as to the necessity for such action, may place an embargo on other articles in addition to arms, ammunition and implements of war, and it is thereafter unlawful for any American vessel to carry such articles to or for a belligerent. This section, however, does not forbid the export of these commodities.

The existing ban on loans and credits is continued.

The existing provisions regarding the use of American ports as a base of supply are continued.

The existing provisions regarding restriction on the entry of submarines

²⁶ H. R. 4555, introduced Feb. 9, 1937.

²⁷ Phillips bill, H. R. 4710, introduced Feb. 12, 1937. This is a modification of Mr. Phillips' earlier bill, H. R. 2002, introduced on Jan. 6, 1937.

²⁸ H. J. Res. 179, introduced Feb. 1, 1937.

into American waters are continued. In this section armed merchantmen are now included.

It is made automatically unlawful for American citizens to travel on belligerent vessels after the President has proclaimed the existence of war.

A new provision is added prohibiting the arming of American merchantmen.

The Latin American exception is retained.

The only substantial differences in the McReynolds bill are the following:

First, the cash and carry provision providing for the divestment of American interest before goods are shipped out of the country is not made automatic but may be applied by the President in his discretion.

Second, the provision making it unlawful for American citizens to travel on belligerent vessels is not made automatic but may be invoked by the President in his discretion.

It is on this discretionary question that the two houses will need to reach some compromise agreement. It is to be hoped that, as in the last two years, the need for compromise will induce the insertion of a provision limiting the period during which the act is to remain in force. On March 10, Representative Shanley announced that he would introduce such a proposal.²⁰ This provision, however, will be of no avail unless, in the meantime, a thorough study of the numerous unsolved problems is made either by an official government commission (by analogy to the official group now considering revision of the nationality laws) or by an outside group of experts (by analogy to the method used in studying the administrative reorganization of the government).

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"NON-INTERVENTION" AND PERSONAL FREEDOM

The State Department has recently announced its decision not to issue passports to Americans wishing to travel abroad unless they take an oath not to visit Spain, and this restriction was at first extended even to members of hospital units desiring to assist the Spanish Government or the forces in insurrection against it.¹ This latter prohibition has recently been rescinded so that Americans bent upon the humanitarian purpose of aiding the wounded may proceed to Spain and undertake their philanthropic work.²

This control of the movements of an American citizen abroad through the effect of the issuance of a conditional passport, presumably with the penalty of refusal of a renewal of the passport should the prohibition be violated, certainly constitutes a serious interference with the liberty of the individual, and can only be justified if it is shown to be necessary for the conservation of the superior interests of the citizens of the United States as a whole. This step is along the same line as that taken by the Department of State when American residents of Spain were notified that they must withdraw from that coun-

²⁰ New York Times, March 11, 1937. Mr. Fish was in accord; *ibid.*, March 13.

¹ Dept. of State Press Releases, March 13, 1937, p. 139.

² *Ibid.*, March 20, 1937, p. 154.