WORLD WAR I NEUTRALITY, 1914-1918: 
A STUDY IN INTERNATIONAL LAW 
AND 
AMERICAN FOREIGN POLICY 

by

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INTRODUCTION

The history of American neutrality from the time of the birth of the new Republic until the beginning of the twentieth century has come to be generally known as the "traditional period". It was during this century or so of existence in the life of a new and dynamic nation that through successive administrations the American Government formulated, enunciated and placed into comparatively consistent practice a policy of neutrality in harmony with the modest role which the United States saw fit to play in world affairs.

A new era in American neutrality dawned with the advent of World War I. During the neutral period, 1914-1917, the foreign policy of the American Government underwent a basic change which culminated in the United States assuming a major part in the struggle to defeat the Teutonic governments of Central Europe. A new concept in foreign policy of necessity required a revision in the traditional concept of American neutrality.

The object of this study is to present the rules of international law relating to neutrality as interpreted and applied by the United States in each of the two periods of its neutrality history under consideration and to compare the policies and practices entertained during the World War I period with those of the traditional period.

Inasmuch as this study relates dominately to the legal aspects of American foreign policy in the neutral period, 1914-1917,
no justification or condemnation of foreign policy, as such, is intended. It should be kept in mind that no evaluation is made of the foreign policy of the period under discussion in items of being right or wrong, good or bad, but where a critical attitude is taken it is done solely within the frame of the law of neutrality as it existed at the outbreak of World War I.

No attempt has been made to deal with the minutiae of rules and regulations involved in the concept of neutrality. Attention has been devoted solely to those principles and rules which constitute the basic structure of any neutrality policy and from which the minutiae stem, and to those principles and rules which constitute important factors relative to controversial issues in which the United States has been engaged concerning neutral rights and duties.
Chapter I

TRADITIONAL NEUTRALITY, 1790-1914

When the United States was in the process of formation, in 1776, the concept of strict impartiality, as applicable in all cases to the "neuter" or neutral power, was not pressed to extremes.¹ It was by no means agreed internationally that a neutral state which, pursuant of an existing treaty, lent military assistance to a belligerent nation was necessarily guilty of improper conduct. Treaties were, however, being concluded which forbade either contracting party to so aid an enemy of the other in case of war.² The United States early espoused this principle as is evidenced by its assent to the principle by treaty with Prussia on September 10, 1785.³ Then came American and eventually general international acceptance of the concept of a neutral which implied by the very name "two nations at war, and a third in friend-

The neutral came to officially appear to recognize the cause of both parties as perhaps equally just or to avoid all formal concern with the merits of the case.

President Washington reiterated on numerous occasions that the United States should "have nothing to do with the political intrigues, or the squabbles of European Nations; but on the contrary to exchange commodities and live in peace and amity with all . . . ." From President Washington's time until the end of the nineteenth century this principle of non-entanglement or "isolation," as it has more recently been known, was usually followed with but few exceptions. A concomitant outgrowth was the establishment of the tradition of neutrality --- the abstention from involvement in conflicts outside the Western Hemisphere.

Expediency probably dictated the espousal of the policies of non-entanglement and neutrality. The very weakness of the new Republic made imperative the need of avoiding the wars which harassed Europe. This circumstance, together with the unfortunate

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4 The Resolution (1781), 2 Dallas 19; J. B. Moore, A Digest of International Law, vol. VII, p. 860. (Hereafter cited as Digest.)


6 For an examination of the policy of isolation see J. M. Mathews, American Foreign Relations; Conduct and Policies, p. 25 et seq.

7 Cf. N. Politis, Neutrality and Peace, p. 57.
implications and results of the treaty with France, on February 6, 1778, produced a readiness to embrace principles which a powerful state might not have been disposed to advocate.

The American Republic was but ten years old when war broke out between Great Britain and France in 1793 and thereupon in pursuance of a desire to avoid possible involvement in the hostilities, President Washington, with the concurrence of his cabinet, enunciated a strict policy of non-entanglement in the form of a neutrality proclamation. The Proclamation of Neutrality of April 22, 1793, "was momentous for it fixed what seemed until recent times the immutable policy of the United States toward European wars." The proclamation merely stated the simple maxim that the conduct of the United States should be "friendly and impartial toward the belligerent Powers," and admonished American citizens to refrain from illegally assisting the belligerents under pain of prosecution.

Yet within the space of a few months after the issuance of the proclamation, the United States experienced a marked illustration of the disregard of belligerents for the neutral rights of a new weak nation in the conduct of M. Genêt, the newly arrived French minister to the United States. He issued letters of marque

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9 E. Borchard and W. P. Lage, Neutrality for the United States, p. 27.
10 11 United States Statutes at Large 753.
to American merchantmen in order that they might prey upon British ships and proceeded to institute French prize courts in connection with French consulates in the United States. In response Thomas Jefferson, Secretary of State, asserted that such conduct was "incompatible with the territorial sovereignty of the United States," that it was "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 acts as would injure one of the warring Powers as against the other."

In his annual message of December 3, 1793, President Washington, advertting to the difficulty experienced by the United States as a neutral (as, for example, in the Genêt case), recommended the enactment of laws that would simplify the task. As a result, Congress by an Act of June 5, 1794, "made the notable beginning of a series of enactments which took permanent form and became known as the neutrality laws of the United States."

11 T. A. Bailey, A Diplomatic History of the American People, ch. VI. (Hereafter cited as Dipl. Hist.)
12 Mr. Jefferson, Sec. of State to M. Genêt, June 5, 1793; Moore, Digest, vol. VII, p. 886.
13 J. D. Richardson, A Compilation of the Messages and Papers of the Presidents, vol. I, p. 132.
14 1 Stat. at L. 381.
This act was subsequently renewed, in 1797, and with the Act of April 20, 1818 became the basis of the neutrality practice of the United States, at least until World War I.

Essentially, then, the basic and general principles of America's traditional neutrality policy had been formulated, established and put into practice by 1818. With this point in mind, an inquiry can now be made into the rules and practices of neutrality as evidenced by the conduct of the Government of the United States in following its traditional neutrality policy.

The nature of the obligation imposed by neutrality involved, fundamentally, complete formal impartiality toward the belligerents. The idea of a neutral nation implies belligerency on the part of two nations while a third remains in friendship with both. In the maintenance of this position of friendly impartiality the neutral apparently "recognizes the cause of both parties to the contest as just --- that is, it avoids all consideration of the merits of the contest."  

This principle has been emphasized in all the neutrality proclamations of the United States. In the first neutrality pro-

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16 1 Stat. at L. 520.
17 3 Stat. at L. 447.
19 Mr. J. Q. Adams, Sec. of State, to Mr. Gallatin, May 19, 1818; Moore, Digest, vol. VII, p. 860.
proclaimed "the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers." 20 President Jefferson asserted July 2, 1807, that the disposition of the United States was "to maintain with all the belligerents their accustomed relations of friendship, hospitality, and commercial intercourse; taking no part in the questions which animate these powers against each other . . . ." 21 Even more forcefully did President Wilson attempt to assert this principle; in an address of August 19, 1914, supplementing the neutrality proclamation of August 4, the President reiterated the principle that "The United States must be neutral in fact as well as in name." But he also enjoined the American people to be "impartial in thought as well as in action," and to curb their sentiments "upon every transaction that might be construed as a preference of one party to the struggle before another." 22

A negation of these principles of an "honest neutrality" or a "fair neutrality" as Jefferson called it would have been "to take

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20 American State Papers 140; Deák and Jessup, op. cit., vol. II, p. 1172.
22 United States, Department of State, Papers Relating to the Foreign Relations of the United States, 1914, Suppl., p. 551. (Hereafter cited as For. Rel.)
on the character of an enemy while seeking to retain the guise of a friend and the privileges and immunities attaching to friendship."

Until the theory of collectivism came into vogue, beginning in some American circles as early as the 1890's, the Government of the United States studiously attempted to avoid any acts which might have had a nugatory effect upon its neutrality policy — neutrality being necessarily "incompatible with the . . . theory that peace can be produced by coalitions of the worthy 'peace-loving' nations against an 'aggressor.'"

The duties of neutrality as imposed upon governments by international law and recognized by the United States can not be either expanded or contracted by national legislation. The United States, for instance, may, in excessive caution, require from its citizens duties more stringent than those imposed by the law of nations /as was done in the cases of the neutrality laws of 1935, 1937 and 1939/; but this, while it may make them finally liable in their own land does not by itself make them or their government extra-territorially liable for this action in disobeying such local legislation. On the other hand, a government can not diminish its liability for breach of neutrality by fixing a low statutory standard.

Hence arose the need for, and the adoption of, legislation fixing penal liabilities for acts on the part of persons contrary to the international laws of neutrality. A need arose also for the exer-

23 Borchard and Lage, op. cit., p. 6.

24 Ibid., p. vii.

25 Mr. Bayard, Sec. of State, to Mr. Smithers, charge in China, June 1, 1885; Moore, Digest, vol. VII, p. 878.
cise of due diligence on the part of the neutral government to maintain its position of neutrality with respect to the prevention and suppression of acts which compromise its position of neutrality by private citizens and to prevent violations of the nation's neutral position by the belligerent governments or their instrumentalities. "Every neutral nation has a right to exact by force, if need be, that belligerent powers shall not make use of its territory for the purposes of their war." 26

A necessary obligation arising out of the duty of friendly impartiality on the part of the neutral was embraced in a class of acts which the government of the neutral power itself must uncompromisingly abstain from performing. The neutral state was bound not to supply armed forces to a belligerent, and not to grant passage to such forces; likewise, the rules of international law forbade a neutral government, under the penalty of being considered hostile, to supply arms, ammunition and implements of war to either belligerent even when the sale took place in the ordinary course of getting rid of superfluous or obsolete equipment. 27 Furthermore, it was implicitly understood that neutral governments, as such, could not supply any commodities to a belligerent, 28 nor was it admissible to lend the belligerent government money. "With reference to a loan of money which was solicited from the United

27 Ibid., p. 863.
28 Borchard and Lage, op. cit., p. 7.
States by the French Government, in 1798; ... The United States took the ground that such a loan would be a violation of neutrality." It was also "a grave offense against the law of nations for a neutral government to sell a man-of-war to a belligerent."  

The American Government, in connection with its strict observance of impartiality, in 1904, "took an ... advanced step in regulating by presidential proclamation the conduct of national civil, military and naval officials as regards their relations to belligerents." President Roosevelt at that time directed "All officials of the Government, civil, military, and naval ... not only to observe the President's proclamation of neutrality in the pending war between Russia and Japan, but also to abstain from either action or speech which can legitimately cause irritation to either of the combatants."  

Although strict impartiality may be imposed by the government upon its officials, it "has no power, under our constitution and laws, to interfere with publications in the States criticizing

30 Mr. Porter, Ambas. to Fr., to Mr. Day, Sec. of State, June 7, 1898; Moore, Digest, vol. VII, p. 868.  
31 G. G. Wilson, Handbook of International Law, p. 394.  
32 For Rel., 1904, p. 185.
foreign governments or encouraging revolt against such govern-
ments."33 Nor can the national government constitutionally re-
strain the sentiments and opinions of the private citizen concern-
ing his evaluation of the belligerents.

Certain acts, however, if committed by the individual within
the jurisdiction of the United States are deemed to compromise the
nation's neutral position. And since the United States, under the
law of nations, may be held liable for such acts as are executed
within its territory or jurisdiction, the policy has developed of
enumerating these acts in our neutrality proclamations and of im-
posing penal liabilities on persons perpetrating any such acts.
The following acts were forbidden under severe penalties within
the territory and jurisdiction of the United States in the pro-
clamations of neutrality in the Franco-Prussian War, 1870,34 the
Russo-Japanese War, 1904,35 and the First World War, 1914,36 to-
wit:

1. Accepting and exercising a commission to
serve either of the ... belligerents by land or by
sea against the other belligerent.

2. Enlisting or entering into the service of
either of the ... belligerents as a soldier, or as a
marine, or seaman on board of any vessel of war ... .

33 Mr. Case, Sec. of State, to Mr. Molina, Costa Rican min.,
November 26, 1860; Moore, Digest, vol. VII, p. 980.
34 16 Stat. at L. 1132.
35 33 Stat. at L. 2332.
3. Hiring or retaining another person to enlist or enter himself in the service of either of the belligerents as a soldier, or as a marine, or seaman on board of any vessel of war.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who is transiently in the United States.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent, that such ship or vessel shall be employed in the service of either of the belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the belligerents, or belonging to the subjects or citizens of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of larger calibre, or by the addition thereof of any equipment solely applicable to war.

11. Beginning or setting foot on or providing or preparing the means for any military expedition or en-
terprize to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the ... belligerents.

International law imposes only limited duty upon the neutral nation to restrict the trade of its citizens with the belligerent nations. A neutral government is bound to use due diligence to prevent the building or sale of ships designed for use by a belligerent government. In addition, there are "but two exceptions to the rule of free trade by neutrals [i.e., neutral persons] with belligerents: the first is that there must be no violation of blockade or siege; and the second, that there must be no conveyance of contraband to either belligerent." Yet in both instances no rule of international law requires the neutral government to forbid the sale or transport of contraband by private citizens, nor their attempt at blockade running. The liability for such action rests with the individual so engaged, and subjects him, if captured by the offended belligerent, to a confiscatory penalty. In a circular issued by the United States Department of State, August 15, 1914, the Department adequately summarized the American position relating to commercial intercourse in time of war and to contraband of war:

... The existence of war between foreign governments does not suspend trade or commerce between this country and those at war. This right to continue trade with belligerents is upheld by the well-recognized principles of international law, subject to the exceptions herein noted.

37 The Peterhoff (1866), 5 Wallace 28; L. B. Evans, Leading Cases in International Law, p. 658.
1. The sale or shipment of contraband of war by citizens of the United States to citizens or subjects of any of the belligerent powers, in course of commerce, is not prohibited by the neutrality laws or the President's proclamation. But contraband, whether shipped in vessels of the belligerents or neutrals, is subject to seizure and confiscation by the belligerents, and when so seized is not entitled to the protection or intervention of this Government.

2. Contraband of war is ranked under two heads, namely, absolute and conditional.

Absolute contraband includes those articles which are peculiarly adopted to war, such as arms and ammunition and military and naval equipment. When absolute contraband is destined to one of the countries at war, whether to the government or to an individual of that country, it is subject to seizure and confiscation by any of the opposing belligerents when beyond the territory of the neutral government from which it is shipped.

3. The nationality of the vessel in which contraband of war is shipped is immaterial; it is subject to capture and destruction whether shipped in a neutral or enemy vessel.

4. Conditional contraband consists, generally speaking, of articles which are susceptible of use in war as well as for purposes of peace; in consequence, their destination determines whether they are contraband or non-contraband.

Articles of the character stated are considered contraband if destined to the army, navy, or department of government of one of the belligerents or to a place occupied and held by military forces; if not so

38 The Declaration of London of 1909 (Article 22) lists items which may be treated as absolute contraband. J. B. Scott, ed., The Declaration of London, p. 117.

39 The Declaration of London of 1909 (Article 24) lists items which may be treated as conditional contraband. Scott, op. cit., p. 118.
destined they are not contraband, as, for example, when bound to an individual or private concern.\textsuperscript{40}

The legitimacy of the principle of blockade, in contra-distinction to the "paper blockade," the United States has never contested, but it has insisted that a blockade in order to be legitimate must be binding and effective. To be binding a blockade must be known and the blockading force must be present. "Blockades in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."\textsuperscript{41} In the case of The \textit{Olinde Rodrigues}, the Supreme Court defined a legitimate blockade as "... a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law."\textsuperscript{42}

During the American Civil War, as a military expedient the United States adopted two new doctrines of blockade. "Neutral vessels were captured on their way to neutral ports lying off the Confederate coast and were condemned on the ground that the neutral
ports were only stopping-places and that the final destination of the vessel was a blockaded port."^3 This doctrine, already applied by British courts in conjunction with the Rule (of the War) of 1756, was known as the doctrine of "continuous voyage." In the case of The Circassian, decided in 1864, this doctrine was affirmed by the Supreme Court which held that "A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination."^4

The second innovation applied where the vessel itself had a bona fide neutral destination, but its cargo, after deposit at the neutral port, was to be transhipped to a vessel to be used as a blockade-runner. The cargo, whether contraband or not, was made liable to seizure. The term "continuous transports," or the doctrine of "ultimate destination," was applied to this rule. In the leading case of The Springbok, decided in 1866, it was held by the Supreme Court, that

Upon the whole case we cannot doubt that the cargo of the Springbok was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in reach-

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^4 2 Wallace 135 (1864); M. O. Hudson, *Cases on International Law*, p. 462.
ing safely a blockaded port of the Confederacy than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability of condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing. 45

The same court held, a short time afterward, in the case of The Peterhoff that "an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade." 46 The application of this doctrine brought forth sharp criticism from neutral states, and, finally, the Declaration of London rejected it in laying down the provision that "whatever may be the ulterior destination of a vessel or of her cargo, she can not be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port." 47

As to the carriage of non-contraband to belligerents the United States since its advent had maintained that "free ships make free goods." After much persuasion on the part of the United States this position was finally accepted by the major powers and embodied

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45 5 Wallace 1 (1866); Evans, Cases, p. 733.
46 5 Wallace 28 (1866); Evans, Cases, p. 657.
47 Article 19. The Declaration of London never came into legal effect, but the Senate advised and consented to ratification on April 24, 1912, although the President did not ratify the Declaration.
in the Declaration of Paris.\(^48\) The relative provisions stated that "The neutral flag covers enemy's goods, with the exception of contraband of war."\(^49\) And further that "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."\(^50\)

Also to be found in the neutrality proclamations of the United States are comprehensive and detailed provisions respecting neutral rights and duties in naval war.\(^51\) Basically the provisions of these proclamations conform to those contained in the Hague Convention (VIII) relating to "The Rights and Duties of Neutral Powers in Naval War."\(^52\) Belligerents are bound to respect the rights of neutral governments and nationals and neutral governments are bound to prevent "any act which would . . . constitute a violation of their neu-

\(^{48}\) Pfankuchen, op. cit., p. 980. The United States did not accede to the Declaration of Paris as it further believed that the Declaration should have exempted even private property of belligerents (except contraband). But it observed the principles of the Declaration. With the outbreak of hostilities in the Spanish-American War the American Secretary of State announced that the United States would pursue policies which conformed to the principles of the Declaration.

\(^{49}\) Article 2.

\(^{50}\) Article 3.

\(^{51}\) See the neutrality proclamations in the Franco-Prussian War (1870), 16 Stat. at L. 1135; in the Russo-Japanese War (1904), 33 Stat. at L. 2332; and in the First World War (1914), 38 Stat. at L. 1999.

\(^{52}\) J. B. Scott, ed., The Hague Conventions, pp. 204-219.
This precluded the commission of a belligerent act in neutral territorial waters; the use of neutral ports and waters as a base of naval operations, by one belligerent against the other; and the establishment of belligerent prize courts on neutral territory. A neutral government was forbidden to supply to a belligerent war material of any kind whatsoever and to prevent the fitting out or arming of any vessel reasonably believed to be intended for use by a belligerent in hostile operations against the other. Finally the neutral power must apply impartially "to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes."

An additional general principle of international law recognized by the United States regarded the non-existence of any obligation on the part of the neutral state to protect its citizens from the operations of warfare while such citizens were within the operational area of combat. "The citizen of a neutral state while within a belligerent's territory, is in general immune from injury to person or property, except so far as the operations of warfare

53 Article 9.

54 The Alabama Claims Award (1872) clarified the obligation of the neutral power to prevent the use of its territory as a base of belligerent naval operations.

55 Article 9.
under military necessity subject him to the same risk and regulation to which the belligerent's citizens are subject."56

The same principle was applicable to the neutral person sailing on a belligerent vessel. "A person sailing under a foreign flag takes his legal position and protection from that flag and cannot look to his own country to protect him from risks of his location on belligerent's territory."57

By way of general summarization, reiteration may be made of the situation which existed at the outbreak of World War I with regard to the rights and duties of neutrals. "As a result largely of the efforts of the United States, culminating in the Geneva arbitration and reinforced by the Hague Conventions, it was generally agreed that a neutral government must use the means at its disposal to prevent its territory from being used as a base of operations by one of the belligerents."58 A neutral government was recognized as being bound not to make loans or sales of ships, munitions, or other military supplies to belligerent governments. On the other hand, it was admitted that a neutral government was under no obligation to prevent its citizens from carrying on trade with the belligerent countries. There was no contesting the general proposition that neutral individuals had the right to con-

57 Borchard and Lage, op. cit., p. 116.
tinue their normal trade; and by virtue of the Declaration of Paris, the only non-contraband property confiscable at sea was the property of a belligerent in a belligerent ship, and ships and cargoes attempting to run a legitimate blockade.
When World War I broke out in August, 1914, America seemed definitely disposed toward the pursuance of its traditional role of an impartial neutral. The first apparent reaction of both the people of the United States and those whom they had placed in governance was to remain aloof from this "senseless" European conflict. "Peace-loving" America appeared fully cognizant of its historical policy of isolation, non-entanglement and non-intervention in European affairs, in a word, traditional neutrality. The Literary Digest thus measured the tenor of public opinion at the outset of the war: "Our isolated position and freedom from entangling alliances inspire [us]... with the cheering assurance that we are in no peril of being drawn into the European quarrel."1

In turn, the Government, under the executive leadership of Woodrow Wilson, seemed no less determined to maintain peace and neutrality for the United States. In a statement presented to the Senate August 19, 1914, the President admonished the public that

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"The effect of war upon the United States will depend upon what American citizens say and do. Every man who really loves America will act and speak in the true spirit of impartiality and fairness and friendliness to all concerned." Further, President Wilson enjoined his countrymen to be neutral in thought and feeling as well as in outward act.\textsuperscript{2} In conformity with past policy, proclamations of neutrality were issued by the United States announcing the existence of a state of war between the various belligerent parties and proclaiming America's intention to remain neutral in the ensuing hostilities. In all, twelve such proclamations were issued, the first on August 4, 1914, as between Austria-Hungary and Serbia and the last on November 6, 1914, as between Great Britain and Turkey, each identical to the other in content and basically similar to the neutrality proclamations of the United States in the Franco-Prussian and Russo-Japanese Wars.\textsuperscript{3}

This auspicious beginning in the direction of true impartiality and traditional neutrality was soon to dissipate; for, from within and from without came factors --- emotional, cultural, economic and political --- which predisposed the American people and the officials of their government in favor of the Allied cause. Then, when this predilection had consumed the spirit of impartial-

\textsuperscript{2} \textit{For. Rel.}, 1914, Suppl., pp. 551-552.

\textsuperscript{3} \textit{Ibid.}, pp. 547-551
ity, from a practical point of view, neutrality in the traditional American sense rapidly became a dead issue.

President Wilson soon found himself entangled in the emotional drift toward intervention in the war. On August 19, 1914, the President, it will be remembered, had solemnly urged "every man who really loves America" to "act and speak in the true spirit of neutrality" and had warned against "partisanship" and "taking sides." Yet, only eleven days thereafter, he is recorded as telling Colonel House "that if Germany won, it would change the course of our civilization and make the United States a military nation." 4

Mr. Tumulty, the President's secretary, recounts that "shortly before the Congressional elections [In the fall of 1914] when the President's political enemies were decrying his kind treatment of England and excoriating him for the stern manner in which he was holding Germany to strict accountability," he had had a long conversation with the President about the matter. The President, according to Mr. Tumulty, approved Sir Edward Grey's statement that "Of course, many of the restrictions we [the British] have laid down and which seriously interfere with your trade are unreasonable. But America must remember that we are fighting her fight, as well as our own, to save the civilization of the world. You dare not press us too far!" Thereupon President Wilson adopted

4 Ibid., pp. 551-552.
this idea as his own, stating to his secretary that Sir Edward Grey was right. "England is fighting our fight and you may as well understand that I shall not, in the present state of the world's affairs, place obstacles in her way . . . . No matter what may happen to me personally in the next election, I will not take any action to embarrass England when she is fighting for her life and the life of the world. Let those who clamour for radical action against England understand this!"

The submarine campaign initiated by Germany in February, 1915, seems to have deeply offended the President's sensibilities. However, even before the sinking of the Lusitania in May, 1915, the President's sentiments appear to have crystallized into informal policy. This may be evidenced by Attorney General Gregory's description of a Cabinet meeting held prior to the Lusitania sinking.

While these conditions existed [i.e., the sinking of ships before the Lusitania] a cabinet meeting was held, at which several of Mr. Wilson's advisors expressed great indignation at what they considered violation [by Great Britain] of our international rights, and urged a more vigorous policy on our part.

After patiently listening, Mr. Wilson said, in that quiet way of his, that the ordinary rules of conduct had no application to the situation; that the Allies were standing with their backs to the wall, fighting wild beasts; that he would permit nothing to be done by our country to hinder or embarrass them in the prosecution of the war unless admitted rights were grossly violated; and that this policy must be under-

6 J. P. Tumulty, Woodrow Wilson as I Know Him, pp. 229-231.
stood as settled.

Like all true hearted Americans, he hoped that the United States would not be drawn into the war; but he was of Scotch and English blood, and by inheritance, tradition and rearing at all times the friend of the Allies.7

Ray Stannard Baker, eminent biographer of Woodrow Wilson, believes that by the time of the Lusitania sinking the President had begun to be swayed by the demands of Page and House for war.8 And, Colonel House records that on September 22, 1915, the President said that "he had never been sure that we ought not to take part in the conflict, and if it seemed evident that Germany and her militaristic views were to win, the obligation upon us was greater than ever."9

Neither can it be said that within the hierarchy of the Wilson administration a true sense of neutrality or of impartial conduct obtained. Initially, "Every member of the Cabinet, except one, had pro-Ally leanings."10 After William Jennings Bryan resigned as Secretary of State, June 8, 1915, there was no longer a single strong, sophisticated and detached mind in the cabinet to resist the pressures and allurements to which the President and his subordinates were subjected.

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7 New York Times, January 29, 1925. (Italics supplied.)
9 Seymour, House, vol. II, p. 84.
10 Bailey, Dipl. Hist., p. 614
Bryan's successor, Robert Lansing, admitted in his *Memoirs* that as early as July, 1915, he had concluded that "the German Government is utterly hostile to all nations with democratic institutions" and that "Germany must not be permitted to win this war or to break even, though to prevent it this country is forced to take an active part. This ultimate necessity must be constantly in our minds in all our controversies with the belligerents. American public opinion must be prepared for the time, which may come, when we will have to cast aside our neutrality and become one of the champions of democracy."\(^{11}\)

The legal positions of the United States in its controversies with the belligerents were highly tainted with this view, to which the Secretary gave repeated expression. Describing his notes to the British Government Lansing says: "The notes that were sent to Great Britain were long and exhaustive treatises, which opened up new subjects of discussion rather than closing those in controversy. Short and emphatic notes were dangerous. Everything was submerged in verbosity. It was done with deliberate purpose. It insured continuance of the controversies and left the questions unsettled, which was necessary in order to leave this country free to act and even to act illegally when it entered the war." Furthermore, Lansing disclosed the reason for his admittedly insincere defense of American neutrality by stating that: "in dealing with the British there was always in my mind the conviction

that we would ultimately become an ally of Great Britain."\(^{12}\)

Conversely, then, it might be said that in dealing with Germany there was the inclination to consider her as the future adversary of the United States.

This attitude on the part of the Wilson administration completely vitiated any possibility of an equitably correct stand upon the legal principles of traditional neutrality. Witness, for example, the agreement between Colonel House and Sir Edward Grey on February 22, 1916, by which President Wilson's personal representative promised that the President at the opportune moment would propose a peace conference, and should the Allies accept this proposal and should Germany refuse, then House virtually pledged American intervention on behalf of the Allies.\(^{13}\) "Such an agreement is unique in the history of 'neutrality'"\(^{14}\) at least in its traditional sense.

The British Ambassador to Washington, Sir Cecil Spring-Rice, appears in some instances to have even been informed in advance that important notes of protest against British violations of American neutral rights were purely formalities. In connection with Secretary Lansing's "emphatic" protest of October 21, 1915, against mandatory routing of neutral merchant ships for the purpose of detention for search, the British Ambassador was requested

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\(^{12}\) Ibid., p. 128.


\(^{14}\) Borchard and Lage, *op. cit.*, p. 39.
to send Sir Edward Grey a cable preparing him for a protest. The British Foreign Office was assured by its ambassador that the only reason for the note was the fact that "... the United States must defend their rights and they must make a good showing before Congress meets, but that the correspondence should not take a hostile character but should be in the nature of a juridical discussion." 15

The American Ambassador to the Court of St. James, Walter Hines Page, was exceedingly pro-British, to a point where it became conjecture whether he represented the United States in England or the British cause to the Government in Washington. 16 Illustrative of Page's "neutral" conduct is Sir Edward Grey's reminiscence: "Page came to visit me at the Foreign Office one day and produced a long dispatch from Washington contesting our claim to act as we were doing in stopping contraband going to neutral ports. 'I am instructed,' he said, 'to read this dispatch to you.' He read, and I listened. He then said: 'I have now read the dispatch, but I do not agree with it; let us consider how it should be answered!'' 17

After the sinking of the Lusitania in May, 1915, most of

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16 Bailey, Dipl. Hist., p. 620.
President Wilson's close advisors either advocated war or considered it inevitable. Colonel House cabled the President to force the issue with Germany so as to obtain an absolute assurance that such an act would not be repeated, otherwise declare war, for, he added, "We can no longer remain neutral spectators." Ambassador Page seems to have regarded the sinking as a godsend for his war policy and expressed the hope that another Lusitania might be sunk to arouse America to the realization of its duty to save civilization. He also urged war on the President so as to give the United States "standing and influence when the reorganization of the world must begin." In Lansing's opinion the war was now a defense of democracy against autocracy.

The very essence of traditional American neutrality --- "honest" and "fair" impartiality --- was thus early abandoned. The concomitant practices, so aptly set forth by John Jay that "As the situation of the United States is neutral, so also should be her language to the belligerent powers," and that it would not be "proper" for the United States "to adopt any mode of pleasing

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20 Ibid., p. 5.
21 Lansing, op. cit., p. 19.
one /belligerent/ party that would naturally be offensive to the other, "22 went unheeded by the President and his assistants. From this point of departure, with facility and inevitability, the United States entered upon a new era in its neutrality history.

In this connection it might be well to note that publicly the appearance assumed by the American Government in its diplomatic relations with the belligerent powers was that of remaining loyally devoted to the old principles of traditional neutrality. The incongruity of this pretense with the actual modes in which the administration dealt with neutrality -- its rights and duties --- evidently escaped the President and his advisors. Besides being the champion of international justice in the general sense, apparently the President conceived of the United States as the leader of other neutral governments in a common battle for neutral rights, presumably, against both sides.23 In his message to Congress, April 19, 1916, he solemnly declared:

But we cannot forget that we are in some sort and by the force of circumstances the responsible spokesman of the rights of humanity and that we cannot remain silent while those rights seem in the process of being swept utterly away in the maelstrom of this terrible war. We owe it to a due regard for our own rights as a nation, to our sense of duty as a representative of the rights of neutrals the world over, and to a just con-


ception of the rights of mankind to take this stand now with the utmost solemnity and firmness. 24

This point of view had been even more emphatically stated in Lansing's apparent protest to London of October 21, 1915, in which the grievances of the United States against British maritime practices were summarized.

This task of championing the integrity of neutral rights, which has received the sanction of the civilized world, against the lawless conduct of belligerents arising out of the bitterness of the great conflict which is now wasting the countries of Europe, the United States unhesitatingly assumes, and to the accomplishment of that task it will devote its energies, exercising always that impartiality which from the outbreak of the war it has sought to exercise in its relations with the warring nations. 25

There can be little doubt but that President Wilson acted in good conscience. The Nye Committee investigation, for instance, repeatedly emphasized that he was high minded and sincerely devoted to peace. 26 Undoubtedly this is a well meant assertion of fact. Be that as it may, it should be pointed out that even in the President's case there was present at times a conflict between his high sense of morality and the realities of the situation. As an example, it will be remembered that just prior to the sinking of the Lusitania in May, 1915, Mr. Wilson had privately informed his cabinet that "he would permit nothing to be done by our

24 Congressional Record, 64th Cong., 1st Sess., vol., LIII, p. 6422.
26 Senate Reports, Investigation of Munitions Industry, 74th Cong., 2nd Sess., no. 944, part 5, p. 9. (Hereafter cited as Munitions Investigation.)
country to hinder or embarrass them /the British/ in the prosecution of the war unless admitted rights were grossly violated."27

Still, in a speech delivered before the Associated Press, April 20, 1915, President Wilson had commented: "If I permitted myself to be a partisan in this present struggle, I would be unworthy to represent you."28

As late as December 1, 1916, the Secretary of State was able to repeat in the form of a memorandum, the maxim forming the basic concept of traditional neutrality; that "It is not the part of a neutral government to sit in judgment or to compare the conduct of belligerents in carrying on hostile operations against one another." Lansing then went on to enunciate, for the benefit of his subordinates in the State Department, the "advanced step" taken by President Roosevelt at the outbreak of the Russo-Japanese War in 1904 concerning the behavior of national public officials of a neutral government.

It is practically impossible for those having the administration of foreign affairs not to make such a comparison /i.e., of the conduct of the belligerents/. . . but it is nevertheless their duty to refrain from giving official sanction to such opinions or from in any way departing from the position of an impartial spectator, who while he may deplore the conduct of one combatant more than that of the other remains silent and strives to keep the official mind of the government

27 Supra, pp. 26-27. (Italics supplied.)

28 J. B. Scott, ed., President Wilson's Foreign Policy, p. 91.
free from prejudice . . . 29

The seeming inconsistency between Lansing's public pronouncements and his private actions will be more clearly understood when the American attempt to secure the adoption of the Declaration of London by the belligerent parties is discussed. But for the present it may be recalled that in his Memoirs the Secretary admitted that by July, 1915, he had espoused the Allied cause and that in dealing with the British government he always retained the conviction that eventually the United States would become her ally. 30

At this juncture it becomes possible to discern the beginnings of some of the characteristics of World War I Neutrality, 1914-1917. There is observable, outwardly, a formal pretense of traditional neutrality. The general appearance of traditional neutral comportment was constantly maintained. The traditional neutrality proclamations were issued at the commencement of the war, and their stipulations regarding the illegality of various acts deemed compromisory of a neutral government's position when committed by private individuals within the neutral's jurisdiction were, by and large, scrupulously enforced by the Government. Formal governmental relations with the belligerents appeared on the surface to be conducted with impartiality, irrespective of the issues involved. Behind these appearances, though, lies an

30 Lansing, op. cit., p. 128.
apparent basic divergence between the traditional and World War I neutrality policies of the American Government.

During the course of the neutral period, 1914-1917, there apparently was a singular disregard for --- or at the very least a lack of judicious insight into --- the fundamental premise of impartiality around which the American Government's neutral policy had formerly been erected. Impartiality in its traditional sense never seems to have been given very serious consideration, for President Wilson and his subordinates were all frankly and avowedly pro-Ally, particularly pro-British, and their private actions, which will later be more clearly understood, negated any possibility of the United States' Government pursuing a traditionally correct stand with regard to the rights and duties of neutrality.

The economic consequences of the First World War, as they affected the American economy, had a direct bearing upon the nature of the observance of neutral duties and the defense of neutral rights by the Government of the United States. On the question of the sale of war material by private business concerns to belligerent governments, the American Government very early took a strictly neutral attitude which was clearly stated in a public circular issued by the Department of State on October 15, 1914.

The Department of State has received numerous inquiries from American merchants and other persons as to whether they could sell to governments or nations at war contraband articles (i.e., war materiel) without violating the neutrality of the Government of the United States...
In view of the number of communications of this sort . . . it seems advisable to make an explanatory statement on the subject for the information of the public.

In the first place, it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he wishes. He is not prohibited from doing this by any rule of international law . . . or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes . . .

Furthermore, a neutral government is not compelled by international law . . . to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.31

Undoubtedly the Government's assertion concerning the right of neutral citizens to trade in war materiel with the belligerent powers was quite in harmony with traditional American neutrality. But at the same time the Government failed utterly in its purported attempt to defend those traditional neutral rights which were violated by the government of Great Britain. In fact, these British violations eventually throttled all American trade directly with Germany, and stringently controlled and rationed all trade with the European neutrals bordering Germany.32 As a result, Allied use of and dependence upon American resources became so great as to render them absolutely necessary in order "to carry on the

31 For. Rel., 1914, Suppl., pp. 573-574.
32 A. M. Morrissey, The American Defense of Neutral Rights, 1914-1917, p. 78 et seq. Specific attention will be given to American defense of neutral maritime rights at a later point.
war at all or with any chance of success." Germany, of course, was cut off from American supplies by the British navy and by the failure of the American Government to insist upon the neutral rights of its citizens and firms with respect to trade with Germany and the neutral countries of Europe. By the end of 1916 the war trade with the Allies had culminated virtually in a mutually dependent economic alliance between the United States and the Allies, particularly Great Britain. The Nye Committee, in investigating the wartime munitions industry, concluded that:

... the development of the exports of war commodities to the Allies resulted in a widespread expansion of almost all the lines of American business ... As a result, by 1916 there was created a tremendous industrial machine, heavily capitalized, paying high wages, and dependent upon the purchasing power of the Allies. The Committee is of the opinion that this situation, with its risk of business depression and panic in case of damage to the belligerents' ability to purchase, involved the administration so inextricably that it prevented the maintenance of a truly neutral course between the Allies and the Central Powers, as such a neutral course threatened to injure this export trade.

The German government specifically declared that her enemies had a right to draw from the United States contraband of war. But it was repeatedly pointed out that the United States had not "succeeded in protecting its lawful trade with Germany," and

35 Munitions Investigation, part 6, p. 77.
therefore the German government unfortunately but necessarily assumed that the United States Government acquiesced "in the violations of international law by Great Britain." Attention was also called to the creation of a new arms industry in the United States with the sole purpose of supplying Allied needs. The German government claimed that "If it is the will of the American people that there shall be a true neutrality, the United States will find means of preventing this one-sided supply of arms or at least of utilizing it to protect legitimate trade with Germany, especially that in food-stuffs." 36

As the war progressed, Allied ability to continue purchasing in the United States came more and more to depend upon the extension of credit facilities by private concerns. The result was that Americans were not only shipping enormous quantities of supplies to the Allies, but were soon advancing the credit for the purchase of these supplies. The Government's part in the extension of these private loans to the Allies throws essential light upon World War Neutrality.

At the outset of hostilities the House of Morgan inquired whether the State Department had any objection to the making of private loans to the belligerent governments (in this instance specific reference was made to France). Secretary Bryan, in communicating his views upon the subject to the President, August 10, 1914, observed that "Money is the worst of all contraband because

36 For. Rel., 1915, Suppl., p. 144.
It commands everything else." Further he alluded to the probability that the financial interests making the loan would use their influence through the newspapers to support the cause of the government to whom the loan had been extended, thus making neutrality more difficult. According, on August 15, 1914, Mr. Bryan telegraphed J. P. Morgan and Company that "... in the judgment of this Government loans by American bankers to the government of any foreign nation which is at war are inconsistent with the true spirit of neutrality." This discountenance undoubtedly represented a logical though advanced position in regard to a neutral government's duties, for private loans to belligerent governments had never been deemed as compromising a neutral government's position. Although there was no real legal objection to such loans, Morgan and Company, probably because they did not regard a loan at this time with too great enthusiasm, decided not to proceed without governmental blessing.

By October, 1914, however, the war trade with the Allies was already reaching such proportions as to require private American

38 Ibid., 1914, Suppl., p. 580.
40 In a memorandum by the Counselor for the State Department, August 18, 1916, it was stated that the Government could not prevent such private loans as they were in violation of no law of the United States. For. Rel., 1916, Suppl., vol III.
41 Munitions Investigation, Ex. nos. 2035 and 2038.
financial assistance. In the same month business pressure was again applied in order to gain governmental support for private loans. On October 23, 1914, in a memorandum to the President, a plausible argument was advanced by Acting Secretary of State Lansing that bank "credits" for the purchase of supplies were distinguishable from "loans" and hence should be exempted from the ban laid down in August by Secretary Bryan. The President thereupon reversed the State Department's original ruling, and, privately and orally, through Lansing as intermediary, informed Morgan and Company on October 24, and the National City Bank on October 26, of the newly contrived distinction. It appears, however, that the artificial distinction between loans and credits was kept a departmental secret (save for J. P. Morgan and Co. and the National City Bank) for five months and when on January 20, 1915, the Department of State replied officially to an inquiry from Senator Stone, chairman of the Senate Foreign Relations Committee, it denied, in effect, that such a distinction had been made or that credits -- whatever they might be -- had

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42 Ibid., part 5, p. 60.
been permitted.  

By August, 1915, the war trade had developed to such proportions that Allied credit facilities from private sources in the United States had been strained to a point bordering on an exchange crisis. Both Secretary of the Treasury McAdoo and Mr. Lansing in long letters to President Wilson discussed the seriousness of this situation and its dire effect upon the American economy if immediate action was not taken. They implored the President for authority to permit the Allied governments to float loans in the United States. On September 8, 1915, the President yielded once more but again not publicly. In October the first large Anglo-French loan of $500,000,000 was floated by a syndicate headed by J. P. Morgan and Company.

The net outstanding indebtedness of the Allied governments in the United States now increased by leaps and bounds. On June 1, 1916, the amount approximated $899,000,000. Six months thereafter this figure had doubled and on December 1, 1916, stood at around $1,794,000,000. Facilitated by these loans from American business firms trade with the Allied countries increased approximately 141 percent from 1914 to 1915 and jumped to a 289 percent

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46 Munitions Investigation, part 5, p. 61.
48 Munitions Investigation, part 5, p. 65.
49 Ibid., p. 15.
increase in 1916 over 1914. On the other hand such trade with the Central Powers had dropped to 0.68 percent of its 1914 figure in 1916.50

Floatation of belligerent government bond issues in the United States through the auspices of private concerns did not, in any strict sense, constitute an impingement upon the neutral obligations of the American Government. But in handling these loans and other credit facilities extended to the Allied governments the American banks discounted collateral which belonged to the belligerent governments. In turn the newly organized Federal Reserve Banks rediscounted the same collateral to replenish the depleted resources of the lending banks. As an example, "French financing during this period was partly carried by the use of acceptance syndicates, which . . . were in fact direct French Government credits disguised as acceptances and therefore, as disguised, eligible for purchase by and rediscount at the Federal Reserve Banks."51

The importance of this tactic seems not to have been in the size of the amount rediscounted by the Federal Reserve Banks, since it appears never to have exceeded $135,000,000 at any one time, but rather in the fact that the credits thus gained by the Allied

50 Department of Commerce Statistical Abstract of the United States, 1921; Munitions Investigation, part 5, p. 55.
51 Munitions Investigation, part 5, p. 661.
governments acted as indispensible stop-gaps during those periods in which Allied exchange rates seemed destined to fall and in which subscriptions to Allied loans were moving too slowly to finance current expenditures in the United States. 52

The eminent international lawyer, John Basset Moore, raised the point of the legality under international law of such rediscounts by the Federal Reserve Banks without passing a definitive judgment upon it, but he warned that a neutral government must abstain from every act that could be considered unneutral. 53 To refute the doubts thus raised, however, the counsel of the Board of Governors of the Federal Reserve System offered an opinion that the Federal Reserve Banks were not governmental agencies. 54 This view has been questioned by many lawyers. 55 If the Federal Reserve System were considered a governmental agency at the time, here then was an instrumentality of a neutral government lending money by indirect means to belligerent governments. Under the duties of neutrality as imposed by international law and recognized by the United States, at least until this time, such conduct

52 Ibid., part 5, pp. 59-77 and part 6, pp. 101-108.
53 Ibid., Ex. no. 2141.
54 Ibid., Ex. no. 2453.
was inadmissible.

Upon the extent of the involvement of the commercial and Federal Reserve banks in financing the Allied war effort, the Nye Committee has made the following assertion:

By January, 1917, the situation as regards our financial and commercial involvements with the Allies had become such that the choice was between bankruptcy and war. The banks were still carrying their subscriptions to the British loans of September and November, 1916, and, with the exception of those banks which had sold out at a loss, were still carrying their subscriptions to the Anglo-French loan of October 1915. By December 22, 1916, the British demand loan at Morgan's amounted to $258,000,000, with Morgan carrying $138,000,000, although back in October Lamont had cabled Morgan and Davison (all were officers of the firm) who were then in London, that with the firm's participation at $98,000,000 they were approaching their proper limit. By January of 1917 they had to go far beyond their proper limit. As to acceptances, of a figure of $137,000,000 held by the Reserve banks, in December 1916, $111,000,000 (cited from the Federal Reserve Bank of New York files) bore the endorsement of only seven banks. The importance of the point here is not the size of the figure but the place of the strain. Most of these acceptances were renewal credits, which were substantially unsecured, the original goods behind them having long since passed into the normal processes of war, and therefore only as good as the endorsement of the accepting or discounting bank. If anything had happened to the Allies, the Reserve Bank of New York, which held the bulk of these acceptances, could not have been paid by the seven banks who had done most of the endorsing. The New York banks could not have stood it.

Another characteristic of World War I Neutrality now becomes apparent. Consciously or unconsciously, the Wilson administration's pro-Allied predilections and policies fostered trade with the

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56 Munitions Investigation, part 5, p. 71.
Allies, placed no obstacles in the way of the Allies, and permitted American financial and commercial interests to become completely involved in Allied success. On the other hand no real effort was made to face the difficult task of keeping open the channels of trade with Germany. Therefore when the Government later attempted to uphold neutral rights infringed upon by the Allies, it found that American prosperity was threatened; a vested interest had been created which was too formidable to be easily tampered with. Hence when retaliatory legislation was finally passed in September, 1916, empowering the President at his discretion to impose what virtually amounted to an embargo in order to secure recognition of American neutral rights, it was found that this "club for Great Britain if they do not give some real relief on trade interference," could not be applied without seriously disaffecting the whole financial and commercial structure of the United States. When, however, the United States vehemently protested against German violations of neutral shipping rights it found no economic impediment debilitating its irritation or humanitarian zeal.


Chapter III

UNITED STATES POLICY TOWARD MARITIME COMMERCE

The commencement of hostilities in Europe occasioned the Government at Washington to request a detailed restatement, as a modus vivendi, by the belligerent governments of the maritime rights of merchant ships and cargoes, in the form of an acceptance of the code of rules adopted by the London Naval Conference of 1908-1909. Although these rules, known as the Declaration of London, had never been officially ratified by any of the great powers, it was generally conceded that they embodied the essential elements of neutral rights and duties in maritime war as they existed to that date. The United States Senate advised and consented to ratification April 24, 1912, but the President had not ratified the convention by 1914. Germany and France had substan-

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2 Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands, and Russia were the signatories of the Declaration. Scott, The Declaration of London, contains the complete text of the Declaration and the related official documents.


ially incorporated the rules of the Declaration in their prize codes. The main obstruction to ratification had been the attitude presented by Great Britain. The House of Commons had assented to ratification but the House of Lords eschewed on the ground that the convention was too favorable to neutrals. This action by the most important maritime power at the time so prejudiced the future of the Declaration that the other signatories were reluctant to ratify it and had left the Declaration without the force of conventional law.

The Department of State doubtless suggested the acceptance of the Declaration of London as the rule of law which should define maritime rights in war because, according to its preamble, "the rules . . . correspond in substance with the generally recognized principles of international law." Among the rules of the Declaration confirming established international law were the requirements that a "blockade must be limited to the ports and coasts belonging to or occupied by the enemy," and that "a blockade in

6 Pfankuchen, op. cit., p. 893.
7 The rules of international law codified at the Hague Conference of 1907 had not covered all questions regarding neutral rights and duties in maritime war and had left in abeyance certain differences between Anglo-American and Continental conceptions of contraband of war, continuous voyage, unneutral service, and other topics. The London Conference was designed to reconcile the divergences and promote accord in preparation for a projected international prize court. Garner, op. cit., vol. I, pp. 27-29.
8 Article 1. Cf. The Peterhoff, 5 Wallace 28 (1866) which contains an exposition of this rule.
order to be binding, must be effective." Provision was also made that "blockading forces must not bar access to the ports or the coast of neutrals;" nor could the ulterior destination of a vessel make it liable to capture for violation of blockade, if at the time the ship was bound for an unblockaded port. Contraband of war was divided into the conventional two categories: absolute and conditional; and a third list of "articles and materials" was enumerated "which are not susceptible to use in war," and could not be declared contraband of war.

Professor Jessup had succinctly incorporated these rules into the following propositions which an international lawyer, in 1914, "might have ventured to advise his neutral client" were law:

1. "Paper blockades" are illegal. A blockade to be binding must be effectively maintained by an "adequate" naval force.

11 Article 19. This embodied the view which the British delegation to the London Naval Conference was instructed to insist upon. Scott, Declaration of London, p. 79.
12 Articles 22 and 24.
13 Article 28.
14 Article 27. The distinctions between absolute, conditional and non-contraband can be discerned in American application as far back as 1816. The Commercen, 1 Wheaton 382 (1816).
2. Even enemy goods are safe on a neutral ship, 

if they are not destined for a blockaded port: "Free 
ships make free goods."

3. Neutral goods are safe even on an enemy ship, 

if they are not contraband and if they are not destined 
to a blockaded port.

4. A fortiori, neutral goods are safe on a neutral 
ship but only if they are not contraband and if they are 
not destined for a blockaded port.

5. Contraband goods are divided into two categories: 

absolute and conditional.

6. Absolute contraband consists of goods exclusively 
used for war and destined for an enemy country, even 
if passing through a neutral country enroute; the rule 
of "continuous voyage" applies.

7. Conditional contraband consists of goods which 
may have a peaceful use but which are also susceptible 
of use in war and which are destined for the armed forces 
or a government department of a belligerent state; the 
rule of "continuous voyage" does not apply.15

Had the Declaration been adopted, obvious commercial advan-
tages would have accrued to ship owners and cargo owners in the 
United States, for Americans could then have shipped large quan-
tities of conditional contraband to the Central Powers through 
border neutrals. Without belligerent acceptance of the Declara-
tion the United States Government was at a disadvantage in contend-
ing that the doctrine of continuous voyage (or ultimate destina-
tion) could not be applied to conditional contraband. The limita-
tion of the doctrine to absolute contraband at the London Confer-

15 E. Turlington, Neutrality, Its History, Economics and 
Law, vol. III (The World War Period), p. x (P. C. Jessup's pre-
face); G. H. Hackworth, Digest of International Law, vol. VII, 
pp. 1-2. (Hereafter cited as Digest.)
ence had been a compromise between Anglo-American practice and Continental objection that the doctrine of continuous voyage was utterly illegal. Though the doctrine had never been invoked by American courts to condemn conditional contraband, it seemed almost certain that the attitude which Great Britain would adopt would correspond to James B. Scott's declaration, made prior to the outbreak of war, that once the doctrine of continuous voyage was admitted there would be no effective legal obstacle to its applicability to conditional contraband.

When the Washington Government proposed that the belligerents accept the Declaration of London, the Central Powers agreed subject to their opponents' reciprocation; France and Russia made their assent contingent upon that of Great Britain; but the British showed a disposition to accept only with the significant modifications contained in the order-in-council of August 20, 1914. They believed the provisions on contraband and continuous voyage far too favorable to their opponents and to neutrals.

The first British contraband list, announced August 5, 1914,

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16 Scott, Declaration of London, pp. 73-80.


18 For. Rel., 1914, Suppl., pp. 218-223. Acceptance with modifications was contrary to the express terms of the Declaration. Article 65.
had "corresponded closely with the provisions of the Declaration of London on contraband of war."\textsuperscript{19} But on August 20 the British government issued an order-in-council which materially modified the Declaration to the disadvantage of neutrals. In particular, the provision prohibiting capture of conditional contraband except upon proof of direct enemy destination\textsuperscript{20} was debilitated so that if an ulterior enemy destination could be "inferred from any sufficient evidence" conditional contraband "is liable to capture, to whatever port the vessel is bound and at whatever port the cargo is discharged."\textsuperscript{21} In other words, the order permitted the seizure of conditional contraband, including foodstuffs, of presumed ultimate enemy destination.

On September 26 the Solicitor's office of the State Department prepared a reasoned presentation of the legal rights of neutrals, especially of citizens of the United States, and of the violations of these rights embodied in the modifications of the text of the Declaration of London which the British government had announced on August 20.\textsuperscript{22} The United States objected to the sub­je­ction of conditional contraband of "inferred" ultimate enemy destination to capture, because "To concede the existence of such

\textsuperscript{19} Ibid., pp. 215-216.
\textsuperscript{20} Article 35.
\textsuperscript{21} For. Rel., 1914, Suppl., pp. 219-220.
\textsuperscript{22} Ibid., pp. 225-232.
a right . . . would be to make neutral trade between neutral ports dependent upon the pleasure of belligerents, and give to the latter the advantages of an established blockade without the necessity of maintaining it with an adequate naval force. The effect of this asserted right suggests the result which was sought by the so-called "paper blockades" which have been discredited for a century, and were repudiated by the declaration of Paris."

Exception was taken to the expression "any sufficient evidence" as being "vague and indefinite," leaving the belligerent government the sole judge of its implications and interpretation. Particular objection was made to the inferences and presumptions permitting the capture of foodstuffs. The American note pointed out that more was at stake than the doctrine of continuous voyage, for the United States had always insisted, and Great Britain had maintained as recently as the Boer War, that destination to an enemy port was not sufficient justification for the seizure or confiscation of foodstuffs. Capture of provisions of "inferred" enemy

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23 Ibid., pp. 228-229.
24 Jay's treaty probably constitutes the sole exception in the American record.
25 The classic statement of Lord Salisbury, in 1900, epitomizes the law on this point: "Foodstuffs, with a hostile destination, can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used; it must be shown that this was in fact their destination at the time of their seizure." Moore, Digest, vol. VII, p. 685.
destination going to a neutral port, therefore, was "inadmissible."

As a reply to the American suggestion that the belligerents accept the Declaration of London, the United States Solicitor declared the British order to be unsatisfactory, because it retained "all the provisions favorable to the belligerents" and recast "other provisions so that they will be less favorable to neutral interests." The modifications proposed would be unacceptable to the United States, even if they were adopted by all the belligerents and the signatories of the Declaration, since it would mark "a manifest failure ... to safeguard the interests of American citizens engaged in legitimate traffic with the subjects of belligerent and neutral nations."26

This reasoned protest based on averred legal rights in international law never reached the British government, for it was immediately negated by informal diplomacy which subordinated the legal contentions of the United States to the fear of jeopardizing Anglo-American amity. Colonel House, upon being shown the protest by the President, immediately objected to it as "exceedingly undiplomatic."27 Even after the President had yielded and a briefer cablegram had been drafted by Mr. Lansing, it was still considered "objectionable" by House.28 Colonel House, then, at

26 For. Rel, 1914, Suppl., p. 230.
his own suggestion, conferred with the British Ambassador, Spring-Rice, with a view of toning down the protest. Mr. Lansing also held a conference with the British Ambassador with the intention "to take up informally and confidentially ... the subject of the order in council modifying the Declaration of London and its menace to the friendly feeling of the American people for Great Britain."  

In consequence of these diplomatic machinations the telegram that was actually sent on September 28, 1914, bore little resemblance to the original protest. Indeed, it was stated that "the President earnestly desires to avoid a formal protest." While mention was made of the fact that the United States was "greatly disturbed by the intention of the British Government to change the provisions of the Declaration of London," of America's "grave concern," and of "the President's conviction of the extreme gravity of the situation," nothing in the note could have been construed as referring to the legal rights of citizens of the United States or those of other neutrals. Instead, it referred to the effect that British violations would have upon American public opinion, the "spirit of resentment" which would be aroused which the American Government "would extremely regret," and which "would furnish to those inimical to Great Britain an opportunity ... they would

not be slow to seize, and which they are already using in the press." The President, therefore, hoped "that the British Government will be willing to consider the advisability of modifying these objectionable features of the Order in Council," and expressed "his earnest wish to avoid every cause of irritation and controversy." Finally, Ambassador Page was told to assure Sir Edward Grey "of the earnest spirit of friendship in which it the note is sent." 31

The coup de grâce was finally delivered to the original protest when, on October 1, 1914, Ambassador Page, who by this time was already arguing the British case, was instructed not to present the note but merely to use it in informal negotiations. 32

American diplomacy in the initial phase of the Anglo-American dispute over neutral rights has been severely criticized for its feebleness and subserviency. 33 During the Lansing-Spring-Rice conference the Ambassador had admitted "that the order in council practically made foodstuffs absolute contraband, which was contrary to the British traditional policy as well as that of the United States." But then Lansing suggested as an alternative that the Netherlands be induced to lay an export embargo upon food.

31 Ibid., pp. 232-233.
32 Ibid., p. 239.
To the Ambassador's intimation that copper and petroleum might be placed upon the absolute contraband list, the Acting Secretary replied that extensions of the absolute contraband list might be preferable to the obnoxious order-in-council. Evidently Lansing had failed to recall that the Declaration of London, which he was presumably defending, had listed petroleum as conditional contraband and copper as a free good. In London the American ambassador was assuring the British government that the United States had no desire "to press the case of people who traded deliberately with Germany." This announcement, meaning that Americans must trade with Germany at their own risk, was tacitly accepted by the Acting Secretary, who by then was simply trying to protect trade between the United States and other neutrals. In return for accommodating American policy to the exigencies of British operations the United States received from Great Britain only a promise to discuss the modification of the objectionable order-in-council.

The United States continued to pursue its new method of protecting neutral rights and trade. In Washington Lansing persisted in pressing for adoption of the Declaration, while in London Page

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34 For Rel., 1914, Suppl., pp. 233-235.
36 Ibid., p. 234.
and Sir Edward Grey deliberated over the draft of a new order-in-council which would placate American public feeling. In both discussions the Americans seemed willing to make concessions. Lansing pointed out that the London Declaration included an article permitting belligerents to add to the absolute contraband list articles "exclusively used for war." He suggested to Spring-Rice that the phrase "exclusively used for war" might be interpreted broadly so as to include items listed as conditional contraband. Would this, then, not "furnish sufficient means to protect the interests of your [the British] Government without modifying the declaration at all?" questioned Lansing. He further queried, "If I understand your main object it is that you are seeking to apply the doctrine of 'continuous voyage' to certain articles now listed as conditional contraband . . . . If such articles can be treated as absolute contraband upon notice, what is the use of modifying the articles of the declaration?" 39

Meanwhile in London the American Ambassador and Chandler P. Anderson, special legal adviser to the American embassy in London, were discussing with the Foreign Office the new order the British proposed to issue. 40 It embodied many significant alterations not

38 Article 23.
40 Ibid., pp. 233, 235 and 243, September 29, to October 3, 1914.
only of the Declaration but also of international law. These changes included the transfer of articles from the free list of the Declaration to the absolute and conditional contraband schedules. Not only was this prohibited by the terms of the Declaration of London, but numerous articles so transferred had never previously been considered contraband in international law. Notwithstanding the provision of the Declaration by which the doctrine of continuous voyage was made inapplicable to conditional contraband, the proposed new order now declared that a vessel bound for a neutral port could be captured if the ship's papers disclosed no consignee of the goods alleged to be conditional contraband. This relieved the captor of the burden of proving hostile destination of suspected goods, as required by the Declaration and by international law, and in practice would prevent shipment "to order," a common procedure. Finally, the unprecedented step was taken of declaring that when the British were "satisfied that the enemy government is drawing supplies . . . for its armed forces

41 Generally speaking, few raw materials, e.g., coal, ore, or provisions, to this time had been considered contraband. C. Savage, Policy of the United States toward Maritime Commerce in War, vol. I, pp. 116-117.

from or through a neutral country . . . a vessel which is carrying conditional contraband to a port in that neutral country shall not be immune from capture."\(^{42}\) By this means the British government subjected to capture a neutral ship carrying conditional contraband to a neutral port, from whence it might be presumed, to British satisfaction, to be ultimately for the use of the enemy's armed forces. This was tantamount to clothing neutral territory with enemy character, for in the past a neutral vessel was not susceptible to capture where it could not be shown that its cargo of conditional contraband was in fact directly destined, at the time of seizure, for delivery to the armed forces or department of government of the enemy.\(^{43}\)

To obtain American consent to these extraordinary proposals Page sent an impassioned plea to the President warning that the "English will risk . . . even war . . . rather than yield," and criticizing the American position as "academic" and jeopardizing friendly relations with Britain.\(^{44}\) Although the President begged Page not to "regard the position of this government as academic," he recommended that Page submit, for the clandestine approval of the British government, Lansing's plan by which "all

\(^{42}\) For. Rel., 1914, Suppl., pp. 245-247, October 9, 1914.
\(^{43}\) Trimble, loc. cit., p. 85.
\(^{44}\) For. Rel, 1914, Suppl., pp. 248-249, October 15, 1914.
the British Government seeks can be accomplished without the least friction with this Government."46

Acting Secretary Lansing had, on the same day, cabled Page the following proposal:

This Government would not feel warranted in offering any suggestion to the British Government as to a course which would meet the wishes of this Government and at the same time accomplish the ends which Great Britain seeks, but you might in the strictest confidence intimate to Sir Edward Grey the following plan, at the same time stating very explicitly that it is your personal suggestion and not one for which your government is responsible.

Let the British Government issue an order in council accepting the Declaration of London without change or addition, and repealing all conflicting orders in council.

Let this order in council be followed by a proclamation adding articles to the lists of absolute and conditional contraband by virtue of the authority conferred by Articles 23 and 25 of the declaration.

Let the proclamation be followed by another order in council, of which the United States need not be previously advised, declaring that, when one of His Majesty's Principal Secretaries of State is convinced that a port or the territory of a neutral country is being used as a base for the transit of supplies for an enemy government a proclamation shall issue declaring that such port or territory has acquired enemy character in so far as trade in contraband is concerned and that vessels trading therewith shall be thereafter subject to the rules of the declaration governing trade to enemy's territory.

It is true that the latter order in council would be based on a new principle. The excuse would be that the Declaration of London failing to provide for such an exceptional condition as exists, a belligerent has a right to give a reasonable interpretation to the rules of the

46 Ibid., pp. 252-253, October 16, 1914.
declaration so that they will not leave him helpless
to prevent an enemy from obtaining supplies for his mil-
titary forces although the belligerent may possess the
power and would have the right to do so if the port or
territory was occupied by the enemy.

When this last mentioned order in council is issued,
I am convinced that a full explanation of its nature and
necessity would meet with liberal consideration by this
Government and not be the subject of serious objection.47

This private proposal that Great Britain adopt and nullify
the Declaration of London was immediately followed by a note list-
ing official objections to the proposed order-in-council. This
note was at least in some respects legally reminiscent of former
traditional neutrality. Objection was made that the proposed or-
der did not accept the Declaration in toto. Therefore, it was
unsatisfactory to the American Government, since "The United States
is bound to recognize the rights of neutrals and to avoid accept-
ing, rules which it considers will place undue restrictions upon
their exercise, not only because by accepting them undesirable
precedents may be created for the future but also because accept-
ance by this Government might be construed by the enemies of Great
Britain to be contrary to the strict neutrality which it is the
earnest wish of the President to preserve throughout the present
war." The proposed subjection of conditional contraband to cap-
ture because of consignment "to order" even when it was to be dis-
charged at a neutral port was declared to "go even further" in

applying the doctrine of continuous voyage to conditional contraband than the previous order-in-council. Vehement disapproval was voiced at the proviso of the order clothing neutral territory with enemy character; "... the proposed order in council introduces a new doctrine into naval warfare and imposes upon neutral commerce a restriction which appears to be without precedent."

Briefly the American case was this:

"... the proposed order appears to declare that articles, listed as conditional contraband, shipped in a neutral vessel to a neutral country make the vessel and its cargo liable to seizure if certain members of the British Government ... are satisfied that supplies or munitions of war are entering enemy territory from the neutral country to which the vessel is bound, even though the consignee is within the neutral country. The effect of this provision would seem to be that a belligerent would gain all the rights over neutral commerce with enemy territory without declaring war against the neutral country which is claimed to be a base of supply for the military forces of an enemy. It seems inconsistent to declare a nation to be neutral and treat it as an enemy; and, if it does so, other neutral nations can hardly be expected to permit their commerce to be subject to rules which only apply to commerce with a belligerent."

Evidently, then, the United States was unofficially suggesting that Great Britain adopt a course of action which was officially declared to impose an unprecedented restriction upon neutral rights. It would appear that "Such diplomacy was obviously lacking in candor both in its method and its purpose, for an honest acceptance of the declaration would have debarred Great

48 Ibid., pp. 250-252, October 16, 1941.
Britain from the course of action suggested.\(^{49}\) Lansing's unofficial proposal was unequivocally rejected by Sir Edward Grey; British acceptance of the London Declaration remained contingent upon their stipulated modifications. But it was hoped, since the British intended issuing the new order-in-council over American objections, that the United States "would not protest against it" and would "be content to declare that we reserve all rights under international law and usage if in its execution any harm be done to our commerce, and that we will take up cases of damage, if they occur, as they arise." Such a course it was hoped would "allay and prevent criticism of the American Government at home.\(^{50}\)

In consequence of the British reply, on October 22, 1914, the United States Government withdrew its proposal for adoption of the Declaration of London and reserved its right to protest under international law when American rights were infringed upon by the British government.\(^{51}\) So ended the diplomatic effort on the part of the United States to secure British recognition of neutral rights contained in the Declaration of London, an attempt which had begun with a reasonable legal presentation of the American case in international law and had terminated in suggested subter-

\(^{49}\) Morrissey, op. cit., p. 33.

\(^{50}\) For. Rel, 1914, Suppl., pp. 253-254, October 19, 1914.

\(^{51}\) Ibid., pp. 257-258.
fuges by the American Government. A week later, on October 29, the British government issued its new order-in-council. The objections of the United States had not even eliminated the provision clothing neutral territory with enemy character.\(^{52}\)

Whatever may have been the broader considerations of policy faced by the American Government in 1914, from the standpoint of traditional American practice in international law, it acquiesced in British policy which did violence to neutral rights. Almost no legalistic attempt was made to secure the British government's adherence to the Declaration of London as a basis of neutral rights. And, where done, legal merits were immediately subordinated to other considerations. Even more important was the lack of use made by the United States of the principles of international law apart from the Declaration. In view of the strong case which might have been made from Anglo-American practice, it is striking that the administration failed persistently to assert, on the basis of international law, the right of Americans to trade in non-contraband goods, to sell articles of conditional contraband to German civilians and to ship foodstuffs to Germany. There was equally sound grounds for demanding respect for the right to trade with neutral countries adjacent to Germany.

\(^{52}\) Ibid., pp. 261-263.
Chapter IV

THE EFFECT OF BRITISH MARITIME PRACTICES UPON NEUTRALITY

Having examined the general attitude of the United States Government of 1914-1917 in regard to maintaining American neutrality and protecting American neutral rights, attention can now be directed to the specific instances in international law in which a deviation may be perceived from traditional policy in maritime war. Particular attention will be given to British maritime practices and the disputes with the United States resulting therefrom, as it was these disputed practices, many of which were eventually acquiesced in by the American Government, and some adopted by it upon entering the war, which failed to coincide, in the main, with traditional American comportment as to neutral rights in war.

In reviewing Great Britain's maritime operations during the war the major problem which appears to have confronted the British government was to discover the most effective means of severing all foreign commerce, direct and indirect, with Germany to the end that Germany's war potential, both civilian and military, could be most drastically reduced. The question was how to effect this end. To condemn shipments of contraband to Germany through near-
by neutral states under the traditional doctrine of continuous voyage or ultimate destination was not enough, for most consignments were not contraband nor destined for the enemy's military establishment or a department of government. The only traditionally recognized legal method by which the British could prevent all sea-borne trade with Germany was by blockade, but since they did not control the Baltic Sea and feared to station vessels off North Sea ports an effective traditional blockade was beyond their power. Furthermore, such a blockade conferred no legal right to interfere with the flow of goods through the neutral states contiguous to Germany. Thus, in order to achieve their objective the British instituted some new methods, unknown in international law at the time, for choking off direct and indirect trade with the enemy, and modified or readapted other means traditionally recognized.¹

Basic to the entire British system were the new, so-called "blockade measures." During the early months of the war neither the British nor the German governments undertook any blockade measures, as such, against the other.² However, on November 3, 1914, the British government took action by an order in council which was intended to regulate all trade with Germany. By this order it was intended to seize all ships bound to or from Germany, unless they carried specific kinds of goods. This measure was intended to prevent the flow of goods to Germany, and it was argued that this was the only effective means of preventing the enemy from receiving supplies. The order in council was challenged by Germany, and the case went to the United States Supreme Court, where it was decided that the measure was invalid because it did not constitute "blockade" in the technical sense of the term in international law prior to 1914. But both Allied and German measures were designed, as were traditional blockades, to cut off commerce with the enemy, and were referred to and argued over as "blockades."³


² The term "blockade measures" has been used rather than "blockades" because the measures taken by the belligerents in the European theater of naval operations did not constitute "blockades" in the technical sense of the meaning of the term in international law prior to 1914. But both Allied and German measures were designed, as were traditional blockades, to cut off commerce with the enemy, and were referred to and argued over as "blockades." Pfankuchen, op. cit., p. 894 et seq.
1914, the British government, alleging that the Germans had scattered mines indiscriminately in the North Sea, announced its determination to mine that body of water and designated it a "military area." In retaliation for the British measure, the German government, on February 4, 1915, issued a decree making the waters surrounding the British Isles a "zone of war" within which all enemy ships, of commerce as well as of war, would be sunk without warning. This war zone designation did not constitute a blockade in the traditional sense, both because it failed to meet the test of effectiveness and because it was not directed against neutral trade with the enemy. On February 10 the American Government, in diplomatic language which could hardly have been any stronger, protested against this "unprecedented" step, and solemnly declared that if American lives or vessels were lost as a result of this, the German government would be held to "strict accountability." Eventually, the German use of submarines in this

3 For. Rel., 1914, Suppl., p. 464.
4 Ibid., 1915, Suppl., p. 94.
6 For. Rel., 1915, Suppl., p. 100. When the British had proclaimed the North Sea a military area -- a restriction of the freedom of the seas comparable with the German war zone -- no protest was lodged, and not until February, 1917, did the State Department even enter a reservation of the right to protest. Ibid., 1917, Suppl. 1, pp. 519-520.
war zone was to be one of the main bases for the American declaration of war against Germany.\(^7\)

On March 1, 1915, the British government, adverting to the German war zone decree as a measure "entirely outside of the scope of international law," announced by way of retaliation that it was henceforth the intention of the Allied governments to seize all ships carrying goods of "presumed enemy destination, ownership or origin."\(^8\) On March 11 an order-in-council gave effect to the policy announced.\(^9\) Actually the British were establishing what was essentially a blockade, without designating it as such and without conforming to the requirements heretofore recognized as necessary to a valid blockade, namely, that the blockade must be effective and that the blockading force must not bar access to neutral ports. This non-conformity to recognized legal requirements was defended as a justifiable exercise of the "unquestionable right of retaliation" against the enemy's violation of the laws of war, and that the measures constituted no more than an adaptation of the old principles of blockade to the peculiar circumstances now confronting Great Britain.\(^10\)

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\(^7\) Seymour, *American Neutrality*, p. 27 et seq.


Since the Allies were not declaring or maintaining a blockade, the term had carefully been omitted from the order. In the note accompanying it, however, there occurred the following interesting passage:

His Majesty's Government have felt most reluctant at the moment of initiating a policy of blockade. In their desire to alleviate the burden which the existence of a state of war at sea must inevitably impose on neutral seaborne commerce, they declare their intention to refrain altogether from the exercise of the right to confiscate ships and cargoes which belligerents have always claimed in respect of breaches of blockade. They restrict their claim to the stopping of cargoes destined for or coming from the enemy's territory.  

Thus the British government presented their new policy as a gracious amelioration of a strict blockade, whereas, actually it did not conform at all to traditionally accepted practices of belligerent interference with neutral trade. Mere enemy origin of goods had never in modern history been a recognized basis for belligerent confiscation or molestation. Mere enemy ownership of goods had not been a recognized basis for belligerent naval molestation in recent wars. Certainly since 1856 the only goods subject to capture because of enemy ownership were enemy-owned goods found on an enemy-owned ship or on a ship with the nationality of the belligerent captor.  

And, traditionally, the only goods subject to belligerent molestation because of their enemy destination were contraband goods and goods running blockade.

This order-in-council elicited from the State Department a

11 Ibid., p. 143. (Italics supplied.)

long protest dated March 30, 1915. It refuted the British claim that illegal acts committed by one belligerent were justification for practices by the other which infringed upon neutral rights. Note was made that the "so-called blockade" included "all the coasts and ports of Germany and every port of possible neutral access to enemy territory," allowing Great Britain "a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area . . ." After defining belligerent rights with regard to blockade -- "It has been conceded to the belligerent government the right to establish and maintain a traditional blockade of an enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade" -- the protest recognized that "the old form of 'close' blockade" was no longer practical, but declared that whatever form of "effective blockade" was used should "conform at least to the spirit and principles of the established rules of war." Therefore, the United States Government took for granted that "... the approach of American merchantmen to neutral ports situated upon the long line of the coast affected by the Order in Council will not be interfered with when it is known that they do not carry goods which are contraband of war or goods destined to or proceeding from ports within the belligerent territory affected." Lastly, it was hoped that the maintenance of the so-called blockade would be no

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more "burdensome" on neutral trade than would be "inevitable when
the ports of a belligerent are actually blockaded by the ships of
its enemy."

Strong as the American note appeared it did not positively
demand belligerent recognition of the traditional neutral right
of American ships to carry conditional, as well as non-contraband,
to European neutral ports irrespective of what might be their pos­
sible ultimate destination by inland transportation. That right
had not been encroached upon even during the American Civil War,
nor in any subsequent war. Also, the note appears to contain a
major inconsistency in denying that a belligerent government had
a right to retaliate in a manner that abridged neutral rights and
yet allow that due to the possibility of changed circumstances
Great Britain was justified in modifying the rules of blockade. In the Lusitania dispute with Germany the United States was again
to disallow the belligerent the right of retaliation where the
rights of neutrals were subverted. Had this standard been consis­
tently applied to the British order-in-council it could probably
have been condemned as wholly illegal, for certainly a belliger­
ent government did not have any right, traditionally recognized,
to bar access to neutral ports and coasts for non-contraband goods.

14 See The Peterhoff, 5 Wallace 28 (1866), citing Jonge
Pieter, 4 Robinson 74 (1801).

15 No principle of international law is better established
than the rule that one nation by unilateral action may not change
the law of nations. The Scotia, 14 Wallace 170 (1870).
The British reply to the American note, finally received July 24, 1915, suggested that the right of blockade might be interpreted as the right to cut off the sea-borne trade of the enemy. The claim was made of simply adapting existing principles of law to new conditions, as America had done in the Civil War, without acting extra-legally under the right of retaliation or inflicting loss upon American commerce.16

The precedents alluded to in the British rejoinder related to the leading Civil War cases of the Peterhoff and the Springbok. Both seem inappropriate in this instance. In the Peterhoff17 the Supreme Court held that goods which might pass from Matamoras, Mexico, into Texas could not be condemned for breach of blockade since a neutral port could not be blockaded, and that the then new doctrine of ultimate destination did not apply to non-contraband goods going by inland transportation from a neutral port to a belligerent. Only absolute contraband was condemned. Concerning the absolute contraband abroad the vessel Chief Justice Chase added: "It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability, for even absolute contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade." In the Springbok18 a cargo destined for Nassau had been

17 5 Wallace 28 (1866).
18 5 Wallace 1 (1866).
condemned because there was proof both from the ship's papers and through the known practice of the owner, a notorious blockade runner, that the particular cargo was intended for the Confederate forces. The ground for condemnation was that the goods were intended to be trans-shipped by sea, after stopping at Nassau, to the effectively blockaded ports of Savannah or Charleston. In addition, the goods captured were goods either absolutely contraband or belonging to the owner of the contraband. The combination of facts, therefore, that Savannah and Charleston were under effective blockade, that Nassau was merely a springboard for the Confederate ports by sea with no local trade or stock in trade, that the original voyage was made for the purpose of eluding the blockade, and that the only goods captured were absolute contraband goods, differentiates this case from the Peterhoff, and both markedly from British seizures of goods of presumed enemy destination, ownership or origin destined to or from ports of neutral countries having large populations and definite stocks in trade.

But in any case Sir Edward Grey declared that the British government was "... unable to admit that a belligerent violates any fundamental principle of international law by applying a blockade in such a way as to cut off the enemy's commerce with foreign countries through neutral ports if the circumstance renders such an application of the principles of blockade the only means of making it effective."

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The sense in which Grey used the term "effective" with reference to blockade was not that which connoted the traditional binding blockade, but rather referred to the efficacy of the British attempt to completely sever foreign trade, direct and indirect, with Germany.

No reply to the British note of July, 1915, was made until October 21, 1915. That note sent by Secretary Lansing was a solid legalistic reply reviewing the whole prior protest of the United States against the alleged incursions by Great Britain upon American neutral rights; against the allegedly illegal extension of contraband; against the unprecedented policy of seeking to prevent all trade with neutral neighbors of Germany in goods of "presumed enemy destination, ownership or origin;" against the practice of diverting ships from the high seas into British ports to search for evidence, statistical and inferential, that the cargo might reach Germany; against the long detentions of vessels, injuring American trade; against the condemnation of goods which ultimately were resold by British merchants to neutral countries; against the enlargement of British trade with neutrals from which American shipments were barred; and against the alleged abuses of the British prize courts in rules of evidence, and the resulting condemnations said to be improper.

20 Ibid., p. 578.
With regard to the "so-called 'blockade' measures" imposed by Great Britain, Lansing declared that although assurance had been given that there would be no interference with trade with neutral countries contiguous to Germany, that assurance had meant nothing in the actual operation of the system, which was very seriously interfering with bona fide trade by American citizens with those neutral countries. Under the circumstances which had developed, the Secretary asserted that the United States Government could no longer "view with leniency the British measures," termed a "blockade," nor any "longer permit the validity of the alleged blockade to remain unchallenged."

Attention was called to the fact that the so-called blockade did not conform to the then "universally recognized" rules of blockade. Lansing pointedly maintained that Great Britain's new blockade system failed to meet the requirement of the Declaration of Paris which expressly referred to the element of effectiveness, because "the German coasts are open to trade with the Scandinavian countries . . . and German naval vessels cruise both in the North Sea and the Baltic and seize and bring into German

21 Article 5 of the Declaration states: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Up to this time the Declaration of Paris was generally accepted as correctly stating this rule of international law. Pfankuchen, op. cit., p. 890.
ports neutral vessels bound for Scandinavian and Danish ports." In addition, the Secretary pointed out that a blockade must be applied impartially to the ships of all nations. However, that principle was not being applied in the present situation, for German ports were "notoriously" open to traffic with those of Denmark, Norway and Sweden, and no serious Allied attempt was made to close them. He recalled that so strictly had this principle of impartiality been adhered to in the past that in the Crimean War the Judicial Committee of the Privy Council had held that if ships of the belligerents themselves traded with blockaded ports, they cannot be regarded as effectively blockaded.\textsuperscript{22} This decision was of special significance in the present instance because it was a "matter of common knowledge" that Great Britain, in the current war, was exporting large quantities of merchandise to Norway, Sweden, Denmark and Holland, whose ports, so far as American commerce was concerned, the British regarded as blockaded.

Further, Lansing attested that "there is no better settled principle of the law of nations than that which forbids the blockade of neutral ports in time of war." Sir Edward Grey was reminded that this was the view which he had instructed the British delegates to the London Naval Conference of 1908 to support, and which British, as well as American, prize courts had consistently

\textsuperscript{22} The \textit{Franciska}, 10 Moore P. C. 56 (1855).
Since the government of Great Britain had laid much emphasis on the ruling of the Supreme Court of the United States in the Springbok case,\(^2\) that goods of contraband character seized while-going to the neutral port of Nassau, though actually bound for blockaded ports of the Confederacy, were subject to condemnation, it seemed not inappropriate to Secretary Lansing to direct attention to the British view of this case prior to the current war, as expressed by Sir Edward Grey in his instructions to the British delegates to the London Naval Conference. These instructions, issued in 1908, were quoted as follows: "It is exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly if such was the intention the decision would pro tanto be in conflict with the practice of the British courts. His Majesty's Government sees no reason for departing from that practice and you should endeavor to obtain general recognition of its correctness." It was also appropriately pointed out that the circumstances surrounding the Springbok case were essentially different from those to which the rule laid down in that case was currently being applied by the British. When the capture involved in the Springbok case occurred the ports of the

\(^{23}\) Cf. The Jonge Pieter, 4 Robinson 79 (1801) and The Peterhoff, 5 Wallace 28 (1866).

\(^{24}\) 5 Wallace 1.
Confederacy were effectively blockaded, no neutral ports were closed, i.e., by blockade, and "a continuous voyage through a neutral port required an all-sea voyage terminating in an attempt to pass the blockading squadron."

Lansing concluded with a protest against the blockade as being "ineffective, illegal, and indefensible," and declared that the United States could not submit to the curtailment of the neutral rights of its citizens by these illegal measures.

Apparently because of questions of higher policy this exemplary confutation of the legalities of the British position was never supported by positive action on the part of the United States Government. Indeed, the American position with regard to traditional neutral rights had already been rendered virtually innocuous prior to the dispatch of the protest. As previously observed, by this time Mr. Lansing was committed to a pro-Ally policy and had stated that the United States Government would not take a course "that would seriously endanger our friendly relations with Great Britain." 25 The British ambassador had been consulted in advance concerning the contents of this note of October 21, 1915, and he had been assured that it was simply by way of formality, that the controversy was merely in the nature of a "a juridical discussion." 26

25 Seymour, Colonel House, vol. II, p. 701
26 Lansing, op. cit., p. 128.
Not until April 24, 1916, did the British government make rejoinder to the American protest of the preceding October.\footnote{For. Rel., 1916, Suppl., p. 368.} The reply undertook to justify the new departures in blockade and contraband by alleging that new conditions had arisen, and by statistically showing that the neutral countries adjacent to Germany were receiving so much more goods than they had theretofore that the balance must be going to the enemy. Comparison was again made of the expediencies of the present situation and those evolved in the American Civil War. The note ended somewhat ironically with the statement: "His Majesty's Government have noted with sincere satisfaction the intention contained in the concluding passages of the United States note of the intention of the United States to undertake the task of championing the integrity of neutral rights."

Here the matter rested until February 16, 1917, when, after the German declaration of unrestricted submarine warfare had been issued earlier in the same month, the British blockade was further strengthened by the operation of a retaliatory order-in-council requiring vessels on their way to or from a port in any neutral country affording means of access to enemy territory to call at a British or Allied port for examination, as the only means of escaping a presumption of carrying goods with an enemy origin or
destination otherwise to be raised. The order also provided that goods found during this port examination of any vessel to be goods of enemy origin or of enemy destination should be liable to condemnation, whereas the penalty for non-compliance with the order would be liability to condemnation of the entire cargo.\textsuperscript{28}

No remonstrance was forthcoming from the Washington Government concerning this latest innovation in conduct of blockade. By this time the diplomatic energies of the American Government were almost entirely directed toward the German government because of the re-institution of unrestricted submarine warfare.

As may be perceived, no blockade was ever established by Great Britain in the North Sea and Atlantic areas which can be said to substantially resemble the effective closed blockade of former times. Rather, British blockade measures, by virtue of superior British naval power, consisted in: seizure of all ships carrying goods of presumed enemy destination, ownership or origin; and investment of neutral ports with essentially the element of enemy character and barring access thereto.

In view of the relatively strong stand of the United States Government on this issue, particularly in its note of October 21, 1915, it could hardly be expected that the American Government upon entering the war in April, 1917, would immediately revise its en-

\textsuperscript{28} \textit{Ibid.}, 1917, Suppl. 1, p. 493, February 16, 1917.
tire position on the question. Even in British eyes this was not essential. The important objective was to induce the Wilson administration to establish an export embargo, about which there could be no question of legality, but which would most effectively supplement the British blockade. This the United States did. The licensing of exports by the War Trade Board proved so effective in operation that it was possible to consider the elimination of British letters of assurance.

The British government continued to maintain the "blockade of Germany" while their ally --- the United States --- officially refused to admit its legality in international law, but effectively supplemented it by a quota system which stopped shipments of goods from leaving American ports which might be presumed as destined for ultimate enemy use. These practices, considerably more refined and extended in application, were again employed during the course of World War II.

30 Bailey, U. S. Policy, p. 385. A letter of assurance or "navicert" was a document issued by the British embassy in Washington certifying that a cargo had been found unobjectionable and thus facilitated its passage through the British blockade. H. Ritche, The "Navicert" System during the World War, p. 7.
Equally important in the British system of severing all trade with the enemy, and in actual practice almost inseparable from the blockade measures, was the extended and broadened use made of the doctrine of contraband of war.

By a succession of orders-in-council beginning August 4, 1914, the government of Great Britain announced lists of articles which it proposed to treat as contraband. The first list was identical with that of the Declaration of London, except that aircraft, which was listed as conditional contraband in the Declaration, was put on the list of absolute contraband by the order-in-council. On September 21 various articles, such as unwrought copper, iron ore, lead, glycerine, rubber, hides and skins, which were either on the free list in the Declaration or not mentioned at all, were placed on the British list of conditional contraband. On October 29 this list was withdrawn and replaced by a new one which established as absolute contraband many articles, including other raw materials, which were either on the free list or on the list of conditional contraband of the Declaration of London. This was superseded on December 23 by one which further expanded the list of absolute contraband. On March 11, 1915, raw wool, worsted

33 Ibid., p. 236.
34 Ibid., pp. 261-262.
35 Ibid., pp. 269-270.
yarns, tin and other articles, none of which was used exclusively for war purposes, were declared to be absolute contraband. By a proclamation of May 27, 1915, lathes and other machines or machine tools capable of being employed in the manufacture of munitions were added to the absolute contraband list. On August 21 raw cotton was declared absolute contraband. By an order-in-council of January 27, 1916, cork, soap and vegetable fibres were declared absolute contraband, while casein, bladders, guts and sausage skins were placed on the list of conditional contraband. On April 13, silver, paper money, all negotiable instruments and realizable securities, metallic chlorides, starch, borax and boric acid were declared absolute contraband.

As these various items were added to the British contraband lists, extending the definition of contraband, the United States Government made no protest though it reserved the right to do so. Throughout this period of American neutrality, the United States never took a firm stand on contraband of war nor contested the naming of specific articles as contraband by the British.

36 Ibid., 1915, Suppl., p. 138.
37 Ibid., p. 164.
38 Ibid., p. 174.
40 Ibid., p. 385.
41 Ibid., 1915, Suppl., p. 578.
42 Bailey, U. S. Policy, pp. 382 & 393; Morrissey, op. cit., p. 25 et seq., esp. p. 41.
Exception may possibly be taken in the case of foodstuffs. Yet even here the controversy between the United States and Great Britain was not primarily concerned with the application of the doctrine of absolute contraband to an article formerly subject to less severe treatment, but rather the treatment of cargoes of foodstuffs consigned to neutral ports. 43

It will be recalled from the discussion of the American attempt to obtain adherence to the Declaration of London by the belligerents that to this time foodstuffs had been considered conditional contraband, and therefore not liable to capture except on proof of a direct enemy military or government destination. 44 However, on August 20, 1914, the British government had issued an order-in-council which permitted capture of conditional contraband goods (including foodstuffs) if they were destined to a neutral country under presumption of ultimate enemy destination. 45 A sharp protest by the United States Government, on September 26, 46 to this alleged violation of international law, had almost immediately been devitalized by informal diplomacy which subordinated the legal contentions of the United States to political considerations. 47

By February, 1915, corn, wheat and flour were in effect being

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43 For. Rel., 1914, Suppl., p. 372.
45 For. Rel., 1914, Suppl., pp. 218-220.
47 Borchard and Lage, op. cit., pp. 61-69.
treated as absolute contraband by the British government, and in conformity with their blockade measures the British were seizing food cargoes even when destined for neutral countries. The fact that the German government had, on January 26, placed all German foodstuffs under government control was advanced by Great Britain as a justification for regarding these interdicted foodstuffs as destined for German military use. Thus the jaws of the "starvation blockade," as it was termed by the Germans, were further closed.

The British justification of the seizure of foodstuffs destined to neutral countries whence they might eventually reach Germany was quite similar to the situation in 1793 with respect to France. A comparison of Britain's notes of 1793 and 1915 to the United States will reveal identical lines of argument --- that the enemy government had taken control of the food supplies, that the distinction between the civilian population and the armed forces had disappeared, and that the tremendous organization of the enemy country for war proved that everything would be consumed by the military, if military exigencies so required. The difference

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lies in the attitudes of the United States Government in 1793 and 1915. Whereas Jefferson refused to concede the legality of making foodstuffs contraband, even when destined for French ports, and obtained heavy damages in the arbitral award under Article 7 of the Jay Treaty of 1794, the Wilson administration was apparently unable or unwilling effectively to defend a legally more unassailable American position as to neutral destination.

Instead, in February, 1915, the United States endeavored to reach a mutual understanding with Great Britain and Germany embracing the mode of conducting maritime warfare, and included the matter of foodstuffs. It was proposed as a modus vivendi that Germany comply with the rules of cruiser warfare in the use of submarines, and that Great Britain allow Germany to receive foodstuffs, which would be distributed to the civil population by American agencies. The proposal was declined by both belligerent governments, Germany demanding raw materials also, and Great Britain smothering the proposal in an enumeration of German "atrocities." No concerted attempt was thereafter made to compel Great Britain to conform to the traditional rule in international law respecting the nature of foodstuffs as conditional contraband.

It was on March 11, 1915, that British practice was officially con-

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firmed by the retaliatory order-in-council, already referred to in connection with the "blockade" of Germany, which announced the intention of the Allied governments to interdict "all ships carrying goods of presumed enemy destination, ownership or origin." 55 The American protest to the measures instituted under the March 11 order only incidentally mentioned British violations of the doctrine of contraband, 56 and thereafter no general protest upon the subject was entered by the American Government. 57

By 1916, without objection from the United States, the British government had declared almost every article of human consumption or use to be contraband. In the case of goods on the conditional contraband schedule, however, they still faced the inconvenience of proving destination to the enemy forces. To lesson this burden, it was declared, on April 13, 1916, that the distinction between absolute and conditional contraband had ceased to have any practical value since it was no longer possible to differentiate between the enemy armed forces and the German civilian population. Consequently, a single contraband list was issued on that date eliminating the category of conditional contraband. 58 For six months the United States Government made no pro-

55 Ibid., p. 143.
56 Ibid., p. 152, March 30, 1915.
57 Bailey, U. S. Policy, p. 382.
test, but at length, in November, 1916, it entered "a reservation of all rights . . . which may be adversely affected by the abolition of the distinction between these two classes of contraband."\textsuperscript{59}

When the United States became a belligerent it issued "a general rather than a detailed list of contraband . . . which would not require frequent change," and which covered "all the articles included in the lists issued by the Allies." The American Government also followed the British example of abolishing all expressed distinction between absolute and conditional contraband.\textsuperscript{60} The same practices were employed in World War II.\textsuperscript{61}

\textbf{The third major innovation instituted by the British government involved the use made of the doctrines of continuous voyage and ultimate destination, especially when the final stage of transit was by inland transportation. Taken together the adaptations which were applied to the rules of blockade and contraband and to the doctrines of continuous voyage and ultimate destination formed the primary means by which Great Britain assured the success of her "blockade" of Germany. Because of the complicated nature of}

\textsuperscript{59} Ibid., p. 483.
\textsuperscript{60} Ibid., Lansing Papers, vol. II, pp. 10-11.
\textsuperscript{61} Hackworth, \textit{Digest}, vol. VII, pp. 24-27.
the doctrines of continuous voyage and ultimate destination a brief re-examination of the principles involved seems not inap-
propriate at this juncture.

From an earlier discussion it was brought out that both doc-
trines were introduced during the course of the American Civil War. By the doctrine of "continuous voyage" neutral vessels were cap-
tured while on their way to neutral island ports lying off the Confederate coasts on the ground that the neutral port was but a stopping place before the vessel attempted to reach a blockaded port. In this instance both ship and cargo were subject to con-
demnation.62

Under the doctrine of "ultimate destination" the same basic principle as followed in the doctrine of continuous voyage with respect to the vessel involved was applied only to the cargo. That is, where the vessel itself had a bona fide neutral destina-
tion, but its cargo, after being temporarily deposited at a neu-
tral port, was to be trans-shipped in another craft to enemy ter-
ritory, the cargo, if contraband or if the trans-shipment involved running to a blockaded port, was liable to condemnation upon cap-
ture at any time after leaving the original port of sailing.63

62 Cf. The Dolphin, 7 Fed. Cases 862 (1863) and The Pearl, 5 Wallace 574 (1866).
63 Cf. The Bermuda, 3 Wallace 514 (1865); The Stephen Hart, 3 Wallace 559 (1865); The Springbok, 5 Wallace 1 (1866); and The Peterhoff, 5 Wallace 28 (1866).
Unfortunately, in the Civil War cases the Supreme Court usually referred to the two doctrines by the common term "continuous voyage" and failed to distinguish clearly between them. As a result, during the course of the various controversies between the United States and Great Britain in the First World War, concerning blockade measures and the apparent as contrasted with the real destination of contraband goods, i.e., ulterior destination, the distinction was never clarified in respect to "continuous voyage" and "ultimate destination." Instead, the two doctrines were again discussed synonymously under the single heading "continuous voyage". Thus when reviewing any argumentation involving the subject of "continuous voyage" it is necessary to determine whether the term is being applied primarily with reference to cargo or to vessel and whether principally in connection with breach of blockade or carriage of contraband. To make the situation even more confusing most of the publicists have since continued to discuss the two doctrines as synonymous.

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64 The clearest exposition, which this writer could discover, on the differentiation between the two doctrines is contained in Fenwick, *International Law*, 2nd ed., Ch. XXXI, esp. p. 551 and 3rd ed., Ch. XXXI, esp. pp. 634-635.

65 Cf. Garner, Borchard and Lage, Morrissey, Savage and Hackworth, none of whom makes a clear distinction; also, cf. the articles in the *Am. Jour. Int. Law* by Elliott, Woolsey, Baldwin and Arias concerning "continuous voyage."
However, there was little need to deal with the doctrine of continuous voyage when applied to American merchant vessels attempting to reach German territory after first stopping at a neutral port, since such instances rarely occurred after the first few months of the war. The main difficulty which beset the British government was the question of how to condemn in a legal manner goods which were destined to be sold in the open market of a neutral port, but from whence eventually such goods, or similar domestic goods substituted in lieu thereof, might reach enemy hands, and thus thwart the blockade measures instituted by Britain. In other words the British were primarily concerned with intercepting cargoes having a possible ultimate German destination, but which were being transported on vessels with bona fide neutral destinations.

On August 20, 1914, an order-in-council, previously discussed in connection with the Declaration of London, asserted that henceforth it would be British policy to make conditional contraband "liable to capture, to whatever port the vessel is bound and at whatever port the cargo is to be discharged" where an ulterior enemy destination could be "inferred from any sufficient evidence." Thus, the British government's intentions were to seize

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67 For. Rel., 1914, Suppl., pp. 218-220.
all conditional contraband, including foodstuffs, of presumed ultimate enemy destination, whereas under international law to this time proof of direct enemy military or governmental destination was necessary for condemnation.

The specific protest to this portion of the order-in-council of August 20 was made by the United States Government on December 26, 1914.\(^{68}\) Complaint was directed toward British interference with American vessels and cargoes bound for neutral European states, particularly against the seizure of American cargoes, notably foodstuffs and other articles of common use and ordinarily dealt with as conditional contraband, on mere suspicion that such cargoes might ultimately reach enemy territory. In this connection the note stated: "In spite of the presumption of innocent use because destined to a neutral territory, the British authorities have made . . . seizures and detentions without . . . being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination, as that term is used in international law. Mere suspicion is not evidence and doubts should be resolved in favor of neutral commerce, not against it." But the American note failed to emphasize the fact that condemnation of conditional contraband on mere presumption of ultimate enemy destination was unwarranted by the then ex-

\(^{68}\) Ibid., p. 372.
isting rules of international law.

In response, on January 7, 1915, the British government expressed cordial concurrence in the principle enunciated in the American note that a belligerent in dealing with the trade of neutrals should not interfere unless such action were necessary to protect the belligerent's national safety, and only to that degree necessary to protect her national safety would Great Britain interfere with neutral trade. It was declared that British naval operations had not caused any diminution in the volume of American exports, and that those to neutral countries had increased since the beginning of the conflict, a circumstance which, the British contended, justified the inference that a substantial part of the American trade was really intended for countries hostile to Great Britain.69

Meanwhile, on October 29, 1914, the British government issued an order-in-council, also discussed in reference to the Declaration of London, supplementing the one of August, 1914, which provided that conditional contraband should be liable to capture on board a vessel bound for a neutral port if the goods were consigned "to order," or if the ship's papers failed to show who was the consignee of the goods, or if they showed a consignee thereof in territory belonging to or occupied by the enemy. In each of these cases the burden was placed upon the owners to prove that the des-

69 Ibid., 1915, Suppl., p. 299.
tination of their goods was innocent. The unique aspect of this policy was the placing upon the owner of a cargo consigned to a neutral port the burden of proving the innocence of the transaction, even when no articles of absolute contraband were present, and when those of which the entire cargo was comprised might be capable of use in the neutral country. This novel impediment upon neutral rights elicited no immediate comment from the American Government.

On March 11, 1915, the British government put into effect the order-in-council which, it will be remembered, established a so-called blockade of German territory through neutral as well as direct channels of communication. It was announced that by way of retaliation henceforth it was the intention of the Allies "to seize all ships carrying goods of presumed enemy destination, ownership, or origin." Certainly this was an unprecedented step bearing no relation to the rules of blockade or contraband. In practice the British policy negated most of the basic rights of neutrals in maritime war: that "paper blockades" are illegal; that free ships make free goods; that neutral non-contraband goods not going to a blockaded port are safe even on an enemy vessel; that

70 Ibid., 1914, Suppl., p. 261.
71 Ibid., 1915, Suppl., pp. 127-128 and 143.
72 Morrissey, op. cit., pp. 79-80; Borchard and Lage, op. cit., p. 203.
a fortiori neutral non-contraband goods not destined for a blockaded port are safe on a neutral vessel; that the rule of ultimate destination cannot be applied to conditional contraband except where there is absolute proof that the goods are ultimately for the use of the armed forces or a department of government of the enemy; and that under no circumstances can a belligerent exercise the right to condemn goods going to or from a neutral port, merely because the goods are of enemy origin.\(^73\)

The United States Government made reply to this unprecedented British action chiefly in its notes of March 30\(^74\) and October 21, 1915.\(^75\) But the main concern of the American Government was the nature and scope of the "blockade" established under the British order. Consequently the question as to the propriety of the British application and theory of the doctrines of continuous voyage and ultimate destination with respect to exportations from border neutrals and carriage of contraband ceased to be a distinct matter of discussion. Nevertheless, Secretary Lansing, at this point, did take pains to challenge the legality of the whole British system both of obtaining evidence and of raising inferences of hostile destination. He said:

\(^73\) In reference to the legality of these rules in international law see above, pp. 47-48.
\(^74\) For. Rel., 1915, Suppl., p. 152.
\(^75\) Ibid., p. 578.
When goods are clearly intended to become incorporated in the mass of merchandise for sale in a neutral country, it is an unwarranted and inquisitorial proceeding to detain shipments for examination as to whether those goods are ultimately destined for the enemy's country or use. Whatever may be the conjectural conclusions to be drawn from trade statistics, which, when stated by value, are of uncertain evidence as to quantity, the United States maintains the right to sell goods into the general stock of a neutral country, and denounces as illegal and unjustifiable any attempt of a belligerent to interfere with that right on the ground that it suspects that the previous supply of such goods in the neutral country, which the imports renew or replace, has been sold to an enemy. That is a matter with which the neutral vendor has no concern and which can in no way affect his rights of trade. Moreover, even if goods listed as conditional contraband are destined to any enemy country through a neutral country, that fact is not in itself sufficient to justify their seizure.76

But no concrete action reinforced the American declaration of intent. And, during this period the American Secretary of State was willing deliberately, though privately, to admit:

Sympathetic as I felt toward the Allies and convinced that we would in the end join with them against the autocratic governments of the Central Empires, I saw with apprehension the tide of resentment against Great Britain rising higher and higher in this country due to the restrictions placed on American commerce by the British "blockade" of Germany. It was becoming increasingly difficult to avoid bringing the controversies between our two governments to a head and to keep assuming positions which went beyond the field of discussion. I did all that I could to prolong the disputes by preparing, or having prepared, long detailed replies, and introducing technical and controversial matters in the hope that before the extended interchange of arguments came to an end something would happen to change the current of American public opinion or to make the American people perceive that German

76 Ibid., p. 582.
absolutism was a menace to their liberties and to democratic institutions everywhere. Fortunately this hope and effort were not in vain. Germany did the very thing which she should not have done (i.e., instituted unrestricted submarine warfare, with the resulting Lusitania and Arabic crises). The tide of sentiment in the United States turned, and it was possible to prevent a widespread demand being made that the Allied powers be "brought to book" without further delay for their illegal treatment of our commerce.77

The extended application to which the British were willing to put the doctrine of ultimate destination may be found in the case of The Kim, September 16, 1915.78 A Norwegian ship, the Kim, and three other Scandinavian vessels had been chartered to an American corporation to transport to Denmark meat products signed "to order." After a delay of some ten months between the time of capture and adjudication, the British prize court condemned the cargoes on the ground that the phenomenal increase in Danish imports of meat products created, in the opinion of the court, a presumption that these particular cargoes of conditional contraband were ultimately destined for Germany. The British prize court declared that there seemed to be an absence of logical reason for the exclusion by the Declaration of London of the doctrine of continuous voyage in the case of conditional contraband, and stated that it had no hesitation in applying that doctrine, asserted to be a part of the law of nations, to the cargoes concerned. "The

77 Lansing, op. cit., pp. 111-112.
78 The Kim, L. R. 1915, p. 215.
result is, "it was maintained, "that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen, but is entitled and bound to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and if so, what the real ultimate destination was." Even apart from the operation of the orders-in-council of August 20 and October 29, 1914, the court deemed the cargoes to be confiscable on the basis of traditional practice.

The extreme limits to which this principle laid down in The Kim could be made to apply may be evidenced by the decision reached in The Norne. Here, relative to a cargo of oranges, dealt with as conditional contraband, on a neutral Spanish vessel consigned to Rotterdam the Judicial Committee of the Privy Council found itself unable to hold that the fact that the goods would be offered for sale at the neutral port of arrival was per se conclusive of the innocence of their destination.

It has been previously pointed out that the Declaration of London, and international usage, while sanctioning the rule of continuous voyage generally in respect to the transportation of absolute contraband, even by inland transportation, and also the carriage of conditional contraband in case the enemy had no seaboard, made no such concession with regard to blockade. On the

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79 9 Lloyd's Prize Cases 402.
contrary, the Declaration had expressly stated that "whatever may be the ulterior destination of a . . . vessel, or of her cargo, she cannot be captured for breach of blockade if at the moment she is on her way to a non-blockaded port." This rule had embodied the view which the British delegation to the London Naval Conference was instructed to insist upon. But by an order-in-council of March 30, 1916, this rule was abrogated, and the doctrines of continuous voyage and ultimate destination were made applicable to blockade, as well as to the carriage of contraband. No specific American protest was ever directed against this unprecedented measure.

The final measure, unifying and simplifying considerably the various uses made by the British of the principles regarding continuous voyage and ultimate destination, was contained in the proclamation of April 13, 1916, abolishing the distinction between absolute and conditional contraband. Seven months later the United States Government reserved its right to protest where American interests were adversely affected by these "illegal" incursions, but no detailed rebuttal was made concerning the uses

80 Article 19.
82 For. Rel., 1916, Suppl., p. 361.
83 Ibid., p. 385.
made by the British government of the two doctrines.\(^{84}\)

After the United States became a belligerent it subscribed to
the British practices covering the doctrines of continuous voyage
and ultimate destination.\(^{85}\) Most important was the acknowledge­
ment by the American Government of the applicability of the doc­
trine of ultimate destination to particular articles which hereto­
fore it had always insisted were conditional contraband --- all
kinds of fuel, foodstuffs, feed, forage and clothing and articles
and materials used in their manufacture --- declaring them liable
to capture if destined for use by the enemy government, and an­
nouncing it to be immaterial whether the carriage was direct in
the original vessel, involved trans-shipment or transport overland.
Further, with respect to contraband, and it will be remembered
that the United States issued but a single list of contraband,
a destination to territory belonging to or occupied by the enemy
or to the armed forces of the enemy was presumed to exist if the
contraband was consigned "to order or consigns" or with an un­
named consignee, but in any case going to territory belonging to
or occupied by the enemy, or to a neutral country in the vicinity
thereof.\(^{86}\)

\(^{84}\) Ibid., p. 383.

\(^{85}\) Bailey, U. S. Policy, p. 472.

\(^{86}\) Naval Instructions Governing Maritime Warfare of June
A number of supplemental measures introduced by Great Britain materially added to the efficacy of the major Allied expedients adopted to secure the commercial isolation of Germany.

The first of these was put into effect early in the war. It will be recalled that in August, 1914, the British government accused Germany of scattering mines indiscriminately on the high seas and declared that in view of this circumstance similar action might be necessary on the part of Great Britain. To this announcement the Government of the United States promptly expressed the hope that the British government would not violate the spirit of the Hague Conventions and endanger neutral lives and property.¹ Undeterred the British announced large-scale mine-laying operations in October and on November 3 declared the whole North Sea a military area.² The British action seriously affected neutral rights. To lay mines which endangered the lives of all who crossed

¹ For. Rel., 1914, Suppl., pp. 455-456. The Hague Conventions (VIII) of 1907 forbade the laying of automatic contact mines along the coasts and ports of the enemy, with the sole purpose of intercepting commercial shipping. Scott, ed., The Hague Conventions, pp. 151-152.

² Ibid., pp. 460 & 464.
that portion of the high seas was tantamount to usurpation of an area traditionally free to all. Furthermore, the measure seemed directed as much against neutrals as against the enemy, for it enabled the British to establish control over neutral commerce. The proclamation contained the suggestion that neutral vessels intending to navigate the North Sea should call at British ports for sailing directions. When neutral vessels obeyed this suggestion they were subjected, with increasing frequency, to search, detention and other repressive measures. Yet this restraint on the freedom of the seas elicited no protest from the United States, and when the Scandinavian neutrals asked the American Government to join them in a protest they met with a refusal. Since the British proclamation led to the German declaration of a submarine area around the British Isles, the silence of the United States toward the British contrasts markedly with the immediate and forceful protests to Germany. Not until February, 1917, did the United States take formal notice of British mine-laying practices. And then no protest was sent, but merely a reservation of the right to protest should it be deemed to be necessary sometime in the future.

Upon entering the war the United States took the initiative in pressing the adoption of a proposal to lay an immense mine barrier

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3 Ibid., p. 466.
4 Ibid., 1917, Suppl. 1, pp. 519-520.
across the North Sea, from northern Scotland to the coastal waters of Norway, which would close that exit to German submarines.\textsuperscript{5} Beginning in June, 1918, the area was effectively mined principally by the United States Navy.\textsuperscript{6} Thus, the United States Government took the initiative and played the leading role in controlling one of the world's important channels of commerce. To this time no belligerent right to assert control over definite and substantial areas of the high seas and render them impassable to neutral commerce had been recognized.\textsuperscript{7}

Reference has already been made to the unprecedented extension of the doctrine of ultimate destination by which the British government interdicted all goods of enemy ownership, origin or destination. Yet even by such a thorough application of this doctrine there remained the possibility that certain types of goods, particularly non-contraband, might reach neutral ports, and there be sold on the open market. The larger the volume of supplies which neutral merchants might import, the greater the quantity of


\textsuperscript{6} W. S. Sims, The Victory at Sea, ch. IX.

\textsuperscript{7} Hyde, op. cit., vol. II, pp. 1937-1938. Comment of Charles Warren: "I do not think there can be any doubt but that both the British and German policies as to mining of the seas were utterly without foundation in international law. I could never understand the weak attitude of the United States on this subject from the beginning . . . . I have no doubt that our North Sea mine barrage was equally lawless." C. Warren to T. A. Bailey (December 18, 1941); Bailey, U. S. Policy, p. 411.
domestic produce which could be presumably traded to the enemy. Because of this Great Britain and her allies adopted a system of "rationing" neutral western European states, whereby the British government arbitrarily undertook to determine the needs of the neutral state and to hold that imports in excess of a given amount were to be presumed, either directly or by the method of substitution, to be of ultimate enemy destination and therefore liable to capture and condemnation.\(^8\) This procedure, entirely new and for which no justification existed in international law at the time, was an integral and efficacious part of the British policy of "blockade." Rationing became the basis for interdicting all goods of enemy destination and interdiction the means of enforcing rationing.\(^9\)

Since the greater portion of these goods and supplies came from the United States, the American Government, upon entering the war, placed an embargo on their exportation and initiated a licensing system for exports, after which Great Britain was largely relieved of the arbitrary task of sifting out goods believed to be intended ultimately for enemy use or consumption.\(^{10}\) By the end of

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9 Professor Fenwick states that rationing was the application of the doctrine of ultimate destination in its most rigid form. Fenwick, *International Law*, 2nd. ed., pp. 553 & 557.

war the United States had also concluded rationing agreements with most of the important neutral governments of western Europe. Under their provisions the neutral state generally agreed to important restrictions on its trade with the Central Powers in compensation for rations from the United States.

A discussion of the rationing system leads logically to the British "blacklists." These were British-made lists of persons or firms in neutral countries that in one way or another were known or suspected by the British government of giving aid or sympathy to the enemy, as for example, by the sale of supplies to Germany, by the retention of German employees, or by being otherwise "suspicious." When a neutral firm was once blacklisted all British subjects were statutorily forbidden to trade with it, and within British jurisdiction cable and mail facilities were denied; marine insurance, banking, and credit arrangements were withdrawn; and ships' stores and bunker fuel were refused to vessels transporting merchandise for such a firm. Furthermore, other

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11 Agreements were concluded with: Norway, For. Rel., 1918, Suppl. 1, vol. II, pp. 1170-1181; Sweden, ibid., pp. 1240-1273; Denmark, ibid., pp. 1339-1361; The Netherlands, ibid., pp. 1574-1583; Spain, ibid., pp. 1671-1674; and Switzerland, ibid., 1917, Suppl. 2, vol. I, pp. 404-405.

neutral concerns trading with a blacklisted firm were threatened with blacklisting or denial of any or all of the British economic and maritime facilities refused to blacklisted firms.  

The most obvious feature of the system was a published list which was issued under statutory authority and listed the various publicly proscribed organizations and individuals of each neutral country. A similar but earlier grouping was the confidential list which remained unpublished but was used by British licensing authorities in approving consignees and by customs officials in examining imports. Obviously the economic coercion which could be exerted through the use or threatened use of the blacklist was tremendous upon neutral persons and firms trading with Germany or those dealing with blacklisted organizations.

Following the passage of the British Trading with the Enemy Act of December 23, 1915, which authorized the blacklisting policy, Secretary Lansing served notice to the British government that "this act is pregnant with possibilities of undue interference with American trade," and that the United States Government reserved the right to protest its application to American firms. However, on July 18, 1916, a blacklist of eighty-five American

persons and organizations was announced. The American Government although protesting in a strong tone based its argument on the "higher law" of international morality and fair dealing. A more legalistic approach had been prepared which pointed out that the enforcement of the British act was an invasion of the independence and sovereignty of the United States by an endeavor to enforce indirectly, if not directly, British laws on American soil and to impose restraints upon trade in the United States. This reasoned argument was never sent, due to the President's objection that if sent the note would change "the whole face of our foreign relations." In reply the Foreign Office maintained the equally persuasive view that the blacklist was the result of "purely municipal legislation." After entering the war the United States Government, under authorization of the Trading with the Enemy Act of October 6, 1917, adopted the blacklisting system as perfected by Great Britain with the exception that it did not

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16 Ibid., p. 411.  
17 Ibid., pp. 421-422, July 26, 1916.  
20 40 Stat. at L. 411.
subscribe to the British definition of an enemy which *ipso facto* could embrace anyone residing in a neutral country of enemy nationality; instead, the United States employed the test of commercial activity in the enemy's interest.  

In the matter of British interference with the mails on the high seas the United States had a long list of explicit grievances in addition to a series of precedents established by its own forbearance in the Mexican and Civil Wars with which to make a reasonable case against British policies.  

Despite these circumstances, the United States Government made a seemingly weak defense of neutral rights on this point. Secretary of State Lansing later wrote: "While the United States was bound to protest against this violation by Great Britain of the established international rule in regard to the opening and examining of sealed mail, I confess that it was done half-heartedly as a matter of form and with no intention to force the issue, because the British had strong..."  


22 During the Mexican War the United States allowed British mail packets to pass in and out of the blockaded port of Vera Cruz; while in the Civil War, in accordance with British protestations, the President and Secretary of State overruled American naval authorities by maintaining the immunity of neutral mails. J. P. Baxter III, "Some British Opinions as to Neutral Rights, 1861-1865," *Am. Jour. Int. Law*, vol. XXIII (1929), pp. 525-527.
reasons for their course of action.\textsuperscript{23}

Partially because of this relative quiescence on the part of the United States, the British were able, with little hindrance, to develop an efficient system of censoring neutral mails in direct contravention of the established rules of international law.\textsuperscript{24} Censorship was imposed upon all mail passing through British territory even when bound from one neutral state to another. In cases where neutral mail ships merely touched at British ports, port authorities either removed sealed mails for censoring ashore or censored them on board ship.\textsuperscript{25} Even more unorthodox was the British practice of forcibly diverting neutral vessels carrying mail from the high seas and subjecting them to the stringent municipal statutes of Great Britain.\textsuperscript{26} Furthermore, the rigorous searching of American mail pouches appears to have resulted in the disclosure of American trade secrets to British competitors.\textsuperscript{27}

Even Lansing became perturbed at this latter infringement of Amer-

\textsuperscript{23} Lansing, op. cit., p. 125.

\textsuperscript{24} See Article 1 of the Hague Conventions (XI) of 1907 which embodied what was generally considered to be international law to that time. Scott, ed., The Hague Conventions, p. 182.

\textsuperscript{25} For. Rel., 1915, Suppl., pp. 734 & 738-740.

\textsuperscript{26} Ibid., pp. 731-734.

\textsuperscript{27} Ibid., 1916, Suppl., p. 591; ibid., 1917, Suppl. 1, pp. 520-526.
When the United States joined the Allies President Wilson was at first reluctant to initiate a system of postal censorship under "existing circumstances." But "existing circumstances" soon changed, and under the authority of the Trading with the Enemy Act a system of censoring mails was established. Due to the effectiveness of the British system it was unnecessary for the United States to examine mails on the high seas, nor did the American Government feel inclined to follow the extraordinary British suggestion that diplomatic mail be searched for enemy communications. However, the United States Government did adopt the policy of examining all mail which, even in transit, reached its territorial waters on board neutral ships. Washington also used its control over bunker fuel to coerce neutral vessels to change their routes so as to put in at an American port and consequently come within the jurisdiction of the American Censorship Board. It may be added that the information gained through censoring neutral mails often proved of value in connection with the blacklist.

31 Ibid., pp. 1729-1730.
32 Bailey, U. S. Policy, pp. 428-429.
According to the rules of international law generally recognized in 1914 a belligerent government had the right to stop and search any neutral merchant vessel on the high seas for evidence that the vessel might be carrying contraband, intending to run a blockade or performing unneutral service. But the belligerent government had no right to send a vessel into port for a minute examination in the hope of finding evidence on which to condemn her, and where captured and sent into port the belligerent incurred liability for damages in case the seizure of the vessel was declared unlawful by a prize court. Notwithstanding, the British government showed a disposition to ignore these rules by sending vessels into port without the formality of capture and upon circumstantial suspicion in order to examine thoroughly the cargoes by illegally "breaking bulk."

The United States Government made an elaborate rejoinder to these British practices in which it was shown through the instructions to naval commanders of the United States, Great Britain, Japan, Spain, Germany and France, from 1888 to the existing war, that search in port was not contemplated by the government of any of these states. The opinion of a board of naval experts in the


United States was quoted as declaring that "At no period in history has it been considered necessary to remove every package of a ship's cargo to establish the character and nature of her trade or the service on which she is bound, nor is such removal necessary..."35 Finally, in reiterating its position, the United States contested the rightfulness of the British seizure of vessels at sea upon conjectural suspicion, and the practice of bringing them into port for the purpose of obtaining evidence, by search, in justification of prize proceedings.36

But on this question the British government was as firm in its refusal to relent as was the United States Government in refusing to concede the existence of the right.37 When the United States entered into hostilities against Germany it continued to adhere to its pre-belligerent stand. The American Naval Instructions Governing Maritime Warfare of June 30, 1917, required visit and search to be conducted along lines of traditional international...
al law and usage, and there is no record in the Navy Department of any case of search and seizure of the kind contested in the American protest to Great Britain.

Related to British "blockade measures," particularly blacklisting and search, was the coal policy of Great Britain, commonly known as "bunker control." At first British coal for bunkering neutral vessels was sold to approved coal dealers, but later the supply was administered directly by the government only to neutral shipowners who agreed not to enter into any trade of benefit to Britain's enemies. This meant that ships transporting the goods of a blacklisted firm could not obtain coal from British sources and that steamship companies accepted almost any terms proffered by Great Britain because of the extensive control which the British Empire could exercise over both sea traffic and coal depots. As the system was perfected, the discriminatory use of bunker supplies enabled the British to interfere further with the business of blacklisted neutral establishments.

British control of supplies of bunker coal also compelled neutral ships to put in at control stations where search for contraband could easily be effected. This relieved British naval authorities of many of the onerous and dangerous duties connected

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with mandatory routing and interception or capture of neutral vessels on the high seas and thence of escort into port for search.\(^1\)

While neutral the United States Government protested vigorously the use of this weapon against neutral commerce, but solely on the grounds of inconvenience and loss --- not on the basis of any rule in international law.\(^2\)

This type of control did not become fully effective until the United States entered the war and shut off the only remaining large neutral supply of bunker fuel. It was finally decided, on recommendation of the British government, that since the Allies and the United States would be in control of practically the entire coal supply of the world "any conditions, short of compelling the neutral shipowner to run his ships at a loss, can be imposed as a **quid pro quo** for the supply of coal."\(^3\)

Economic coercion seems to have been applied with a thoroughness and a high degree of organization which had not characterized previous wars. Most of the devices used appear to have been originated by the British government, and justified by averred sovereign, non-belligerent right in the form of municipal legislation.

\(^1\) Savage, *op. cit.*, vol. II, pp. 29-32.

\(^2\) *For. Rel.*, 1916, Suppl., pp. 480 & 489; *ibid.*, 1917, Suppl. 1, pp. 505-509.

Interferences with maritime commerce by sovereign right were used as an instrument of economic warfare both against the enemy and against neutrals. In general they appear to have been developed as part of a program designed coercively or otherwise to compel neutral persons and organizations to avoid giving any economic assistance to the enemy and to redirect their trade and commerce along lines approved by the belligerent governments. Such practices were employed by both the Entente and the Central Powers, but infinitely more effectively by the former. By sovereign right control of bunker supplies for neutral ships, made available only to "friends," enabled the Allies substantially to channel most of the neutral commerce of the world to their liking. What was the presumably incontestable sovereign right of a government to control the commerce of its citizens or subjects constituted the justification of the statutory blacklist whereby neutrals were coerced into complying with Allied policy. Still another asserted sovereign right exercised by the Entente was control of the cables held within their jurisdiction. Cable censorship was of great advantage as a means of persuasion and yielded, besides, valuable business information concerning foreign competitors. 44

However justifiable may be the exercise of sovereign rights by a belligerent state in matters of municipal legislation, the

44 Jessup, Neutrality, pp. 40-52.
United States had never failed in the past to contest belligerent practices, whatever their averred legal source, which measurably infringed on the neutral right to the freedom of the seas. Emphatically upheld prior to this time was the concept in traditional neutrality, succinctly expressed by Thomas Jefferson, that "No nation ever pretended a right to govern by their laws the ship of another nation navigating the ocean." But evidently in the World War I period there was no strong disposition on the part of the American Government to pursue this former policy. Indicative of the reversal in policy was the attitude of the President, as related by Colonel House's biographer:

The President's determination in the defense of American rights against Germany received scant appreciation from the Allies, despite the service which it rendered their cause. Nor did they appear to realize the degree of consideration which he displayed in the dispute raised by Allied interference with American trade on the high seas. It is true that our State Department sent many sharp, perhaps uselessly sharp, protests. But the President never yielded to the constant pressure upon him to take action that might have given effect to such protests. It would have been easy for him to ask for retaliatory measures which would have been immediately approved by a Congress that was in no degree inspired by pro-Entente sentiments. An embargo upon munitions was urged again and again. Wilson, however, did not ask for power to use retaliation until the summer of 1916, and never permitted an embargo, thus permitting the Allies to draw richly upon our munitions factories. . . .

After declaring war on Germany the American Government adopted in wholesale fashion these Allied practices in the field of economic coercion, thereby seemingly abetting the rapid diminution of traditional neutral rights which previous to this war it had strenuously upheld as the "champion of neutral rights."


The policy of the United States toward the protection of neutral rights against British incursions during World War I has been characterized as essentially "the practice of acquiescence" to admitted British illegalities. At the very least it might be said that the American defense of traditionally conceived neutral rights lacked the vigor and forthrightness which characterized that defense in the earlier traditional period of American neutrality history.

Ray Stannard Baker in commenting on the British "blockade" draws a conclusion which might well be applicable to almost the entire British maritime policy and the United States Government's reaction thereto. Baker remarks: "... One cannot avoid the impression, after a careful study... that the [Wilson] administration's defense of American policy was in reality a defense of the British blockade, and furnished the British government with

\[47\] Morrissey, op. cit., p. 204. Borchard and Lage, op. cit., argue with force that "unneutrality" in this respect brought the United States into the war.
a whole arsenal of arguments against our own criticisms of that blockade." Even more conclusive is the candid assertion made by Secretary of State Lansing relative to British maritime practices and the American reaction. Lansing wrote:

Sifted down to the bare facts the position was this: Great Britain insisted that Germany should conform her conduct of naval warfare to the strict letter of the rules of international law, and resented even a suggestion that there should be any variation of the rules to make them reasonably applicable to new conditions. On the other hand, Great Britain herself repeatedly was departing from the rules of international law on the plea that new conditions compelled her to do so, and even showed resentment because the United States refused to recognize her right to ignore or modify the rules whenever she thought it necessary to do so. Briefly, the British Government wished international law enforced when they believed that it worked to the advantage of Great Britain and wished the law modified when the change would benefit Great Britain. There is no doubt that the good relations between the United States and Great Britain would have been seriously jeopardized by this unreasonable attitude, which seems unworthy of British statesmanship, except for the fact that British violations of law affected American property while the German violations affected American lives.

Not only were British innovations in economic warfare amazing in their comprehensiveness, but the changes made in traditional concepts of neutral rights were legalistically little less than revolutionary. The rule of blockade was so extended as to permit capture at almost any distance from the Atlantic coast of Europe. The rule of contraband of war was expanded to such limits that it

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49 Lansing, op. cit., pp. 110-111.
became to practical intents all inclusive, while the distinction between absolute and conditional contraband was rendered inoperative. The doctrine of continuous voyage was so distended as to liable a neutral vessel to capture irrespective of a final neutral destination. The doctrine of ultimate destination was so enlarged as to allow capture of any articles whatsoever presumptively suspicioned of an ulterior enemy destination, directly or by means of substitution. Used in close association with these revolutionary adaptations of existing rules were several new British inventions which found no legal precedence and were in fact direct contraventions of existing rules in international law. No right had existed whereby a belligerent government could, for any reason, clothe neutral ports with enemy character for purposes of "blockade." Nor was there any law permitting the general capture of all goods of enemy ownership whatever the circumstance; to this time free ships had made free goods, if not contraband. Most extraordinary was the British assumption of the right to capture all goods of enemy origin. By this arrogation goods of enemy origin sold in a bona fide manner to neutral business establishments were made liable to capture even upon egress from a neutral port where the goods formed a portion of the stock in trade of the neutral state.

Whatever may have been the questions of higher policy and the motivations behind them, from a legal standpoint relative to neutral rights as claimed and defended by the United States in the
traditional period before World War I, the American Government of 1914-1917 appears to have made little effective attempt to maintain these former rights. Instead, the United States, in its discussions with Great Britain, wasted such neutral assets as its Civil War precedents on neutral mails, or failed to insist upon the traditional requirements for contraband character and other important neutral interests. The procedure of entering a reservation of right while submitting in fact not only gave the British government practical freedom but precedents for similar or even more extreme action in later conflicts. Although on some occasions definite protests were lodged against British excesses, no effect was ever given them by concrete action. Nor was the American Government ever prone to accept the various suggestions made by other neutral governments for cooperation to resist belligerent invasions of neutral rights.

Possibly this practice of acquiescence had a direct bearing on the policy of the United States as a belligerent in 1917-1918; for though the United States did not entirely reverse its position where it had taken a relatively strong stand, it espoused belliger-

50 The United States did retain intact its contentions on visit and search, but this was primarily due to the policy pursued toward Germany.

51 For a statement of the various proposals and the American Government's reaction to them see For. Rel., 1914, Suppl., pp. 465 & 515; ibid., 1915, Suppl., pp. 7, 296 & 303.
ent pretentions in which it had tacitly acquiesced. For example, the United States extended the presumptions of hostile destination until they were almost as inclusive as those of the British; the doctrine of contraband was enlarged to conform with that of the Allies; the American Government also established a rigid censorship of mails touching its ports, took the lead in laying a mine barrage in the North Sea, and encouraged neutral vessels to call at American ports for sailing instructions. And further, as has been noted, the policy of economic coercion was pushed to greater extremes by means of sovereign, non-belligerent rights. Though protesting against blacklisting and the discriminatory use of bunker control, the United States Government speedily employed these and other devices to procure neutral cooperation toward effectuating the policy, instituted by Great Britain, of commercially isolating the enemy.

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Chapter VI

THE SUBMARINE ISSUE

The principal means adopted by the German government to counter the effects of Great Britain's alleged illegal blockade measures and control of the high seas was the submarine. It was the manner in which this weapon was employed that was to produce the acrimonious controversy between the United States and Germany over belligerent and neutral rights and duties, and it was submarine warfare which eventually became the alleged justification for the American declaration of war against Germany.\(^1\) Involved in the submarine issue were three main points of debate from the standpoint of international law as interpreted by the United States: the status of the submarine as a commerce raider in connection with the rules of visit and search, the status of armed merchant ships, and the right of American citizens to travel on board belligerent merchantmen whether armed, carrying contraband, or otherwise.

On February 4, 1915, the German government announced its intention of establishing a so-called "war zone" or "submarine block-

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\(^1\) See the President's message to Congress asking for a declaration of war against Germany. *Cong. Rec.*, 65th Cong., 1st Sess., vol. LV, p. 102.
ade" encircling the British Isles in retaliation for alleged "measures taken by England in violation of international law to stop neutral commerce with Germany." It was declared that German naval forces would "endeavor to destroy every enemy merchant ship" found in the designated war zone. Neutral vessels were enjoined, therefore, to avoid entering this area because, in view of the misuse of neutral flags by British merchant ships, they might become the victims of torpedoes directed against enemy ships. On February 10 the United States strongly protested against the proposed German policy. Germany was categorically denied the legal right to attack and destroy any vessel within the prescribed war zone—without first, through the process of visit and search, ascertaining its belligerent nationality and the contraband character of its cargo. It was declared that if the German government persisted in such an unprecedented measure, and in consequence thereof American vessels or the lives of American citizens were destroyed on the high seas, the United States Government would consider this an "indefensible violation" of neutral rights and would hold the German government to "strict accountability."

Concurrently the status of belligerent armed merchant vessels was resolved by the American Government in such a fashion as to make the submarine vulnerable beyond reasonable use as a commerce

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2 For. Rel., 1915, Suppl., p. 95.
3 Ibid., p. 98.
raider should Germany comply in full with American demands.

As early as August, 1914, Great Britain had commenced arming its merchant ships. But it was solemnly avowed that these vessels would "never be used for the purposes of attack," that they were "merely peaceful traders armed for defense." On this assumption the United States Government, through a circular drafted by Acting-Secretary Lansing in September, adopted the policy that merchantmen "defensively armed" were not ships of war but ordinary merchant ships. Nevertheless, in February, 1915, after submarine warfare had commenced in earnest, the British Admiralty issued instructions that no British merchant vessel "should ever tamely surrender to a submarine," but where escape proved impossible should attempt to ram the submarine. Later in the same month these instructions were amplified: armed merchantmen were ordered when pursued by a submarine to "open fire in self-defense notwithstanding that the pursuing submarine may not have committed a definite hostile act such as firing a gun or torpedo."

Previous to official confirmation of these Admiralty orders through British sources the German Ambassador at Washington had notified the Secretary of State of the offensively hostile methods

4 Ibid., 1914, Suppl., p. 598.
5 Ibid., p. 604.
6 Ibid., pp. 611-612.
7 Ibid., p. 653.
in use by British merchant vessels which in consequence made traditional visit and search at the very least dangerous and impractical insofar as submarines were concerned. The United States remained adamant, insisting that German submarines follow the traditional practice for surface vessels of visit and search before effecting the destruction of a belligerent merchantman.

Had the United States confined its protests to the legality of the German blockade, per se, and to the possible destruction of American vessels and those persons on board, the American position would most probably have been legally unassailable. But American claims were asserted so far beyond this point as to lead the German government to seriously question whether the United States and Great Britain were not in fact allied, informally at least.

The United States categorically insisted that German submarines "use visit and search as an absolutely necessary safeguard against mistaking neutral vessels for vessels owned by an enemy and against mistaking legal cargoes for illegal." At the

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10 Ibid., pp. 160-162, April 21, 1915.
11 Mr. Gerard, Ambas. to Ger., to Sec. of State, undated; Munitions Investigation, Exhibit no. 40. Seymour, House, vol. II, p. 221.
12 Sec. of State to Count Bernstorff, Ger. Ambas., April 21, 1915; Savage, op. cit., vol. II, Doc. no. 69.
same time the American Government exhibited no hesitation in committing the United States to the view that British armed merchant ships were merely peaceful traders entitled to the rights of non-belligerent vessels. In fact the President was willing to go even further, asking: "Is it not the law, and might it not be well to bring sharply out, that vessels bound on normal errands of trade are never transformed into war vessels by attacking everything that threatens them on their way, when the purpose is protection?" By this incongruous standard one belligerent was permitted the liberty of opening fire without question, while the other might not attack without first conforming to the requirements of visit and search under the penalty of "strict accountability."

Interwoven in the submarine controversy was the right asserted by the American Government of its citizens to travel on belligerent, i.e., Allied, merchant vessels. This position had been explicitly presented in the American reply to the German submarine

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14 The President to Sec. of State, April 24, 1916; Savage, op. cit., vol. II, Doc. no. 185.
The United States had solemnly declared it would hold the German government to a "strict accountability" should any American vessel or lives be destroyed in the course of Germany's unprecedented submarine campaign. Under this policy it was contemplated that an American citizen taking passage on a belligerent merchant vessel, whether armed or unarmed, was entitled to rely upon the enemy's war vessel [i.e., submarine] conforming to the established rules of visit and search and of protection of non-combatants."

On March 28, 1915, the unarmed British steamship Falaba carrying passengers and munitions was torpedoed with the loss of one American life. Secretary Bryan questioned the propriety of the Government assuming responsibility for the safety of American citizens while traveling on board belligerent vessels. In counseling President Wilson against sending a proposed protest to Germany over the loss of an American citizen's life incident to the destruction of a belligerent merchantman -- a protest whose language Lansing admitted was "plain almost to harshness" -- the Secretary of State concluded:

As I have not been able to reach the same conclusion to which you have arrived in this case, I feel it is my duty to set forth the situation as I see it. The

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15 For. Rel., 1915, Suppl., p. 95.
16 Ibid., p. 98.
17 Mr. Lansing, Counselor for State Dept. to Sec. of State, April 2, 1915; Savage, op. cit., vol. II, Doc. no. 61.
18 Mr. Lansing, Counselor for State Dept. to Sec. of State, April 5, 1915; Savage, op. cit., vol. II, Doc. no. 66.
note which you propose will, I fear, very much inflame the already hostile feeling against us in Germany, not entirely because of our protest against Germany's action in this case, but in part because of its contrast with our attitude toward the Allies. If we oppose the use of the submarine we will lay down a law for ourselves as well as Germany. If we admit the right of the submarine to attack merchantmen but condemn their particular act or class of acts as inhuman we will be embarrassed by the fact that we have not protested against Great Britain's defense of the right to prevent foods from reaching non-combatant enemies.

We suggested the admission of food and the abandonment of torpedo attacks upon merchant vessels. Germany seemed willing to negotiate, but Great Britain refused to consider the proposition. I fear that denunciation of one and silence as to the other will be construed by some as partiality. You do not allow for the fact that we were notified of the intended use of the submarine, or for the fact that the deceased knowingly took the risk of traveling on an enemy ship. I cannot see that he is differently situated from those who by remaining in a belligerent country assume risk of injury. Our people will, I believe, be slow to admit the right of a citizen to involve his country in war when by exercising ordinary care he could have avoided danger.19

Bryan's advice went unheeded. The President felt it "our duty to make it clear to the German Government that we will insist that the lives of our citizens shall not be put in danger by acts which have no sanction whatever in the accepted law of nations."20

On May 7 the Lusitania was sunk by a German submarine with


20 The President to Sec. of State, April 3, 1915; Savage, pp. cit., vol. II, Doc. no. 63.
The loss of the lives of 128 American citizens. Secretary Bryan had foreseen the possibility of an incident such as this and repeatedly suggested after the Falaba sinking that American citizens be warned that they traveled on belligerent vessels at their own risk. But with the sinking of the Lusitania Lansing considered that it was now impossible for the Administration to adopt the suggestion, for to do so, he thought, "would be to admit that the Government of the United States had failed in its duty to its own citizens and permitted them to run risks without attempting to prevent them from doing so." President Wilson, the final arbiter in the matter, considered Lansing's argument "unanswerable." The result was the despatch of the three Lusitania notes which constituted a virtual ultimatum to Germany to cease her present form of submarine operations.

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22 Mr. Bryan, Sec. of State, to the President, April 2, 1915; Savage, op. cit., vol. II, Doc. no. 62.

23 Mr. Lansing, Counselor for State Dept. to Sec. of State, May 9, 1915; Savage, op. cit., vol. II, Doc. no. 77.

24 The President to Sec. of State, May 11, 1915; Savage, op. cit., vol. II, Doc. no. 83.


26 Secretary of War Lindley M. Garrison considered the first note so uncompromising that he thought war would follow. Baker, Wilson, vol. V, p. 338.
In the first note of May 13, 1915, protest was entered against the torpedoing of an unarmed merchant ship on the high seas, and it was declared that the American Government considered this action to be a violation of the rules of international law and the principles of humanity. The "strict accountability" statement of February 10, 1915, was reaffirmed, and it was demanded that Germany disavow the act, offer an apology, promise to pay a just indemnity and guarantee the abatement of any further such irregular acts.

The second Lusitania note bluntly asserted that "Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew." The third note proclaimed this alleged rule as one of the "immutable" principles upon which the rights of neutrals are based in time of war. In essence the United States was attempting to outlaw the use of the submarine as a commerce raider.

The law as set forth by the American Government at the time seemed to contemplate the existence of several factors not present in 1915. The assumption was made that all Allied merchant ships were either completely unarmed or insufficiently armed for offensive action (the term "unresisting" merchantmen had been used). It was further assumed, as Lansing had observed, that sur-
face vessels were the only warships afloat, this being the basis for the old rule. Now, however, when many merchant vessels were armed adequately enough to successfully engage a surfaced submarine and when the use of neutral flags by belligerent merchantmen was in general practice, it could be contended that all belligerent merchant ships were exposed to the same degree of danger from attack, for a submarine could not afford to surface to inquire whether a particular ship was or was not armed. Furthermore, the United States seemed to take no account of the specific instructions given British merchantmen to ram submarines and, if armed, to fire upon them at sight. It did not appear absolutely correct for the United States to assert that only "forcible resistance" could justify attack. Any indication of resistance, such as arming, accepting belligerent convoy or traveling under orders to commit a hostile act might make a merchantman liable to attack and waive the duty of visit and search. Neither could it be contended that "continued" efforts to escape were necessary to provoke attack. Any attempt to escape justified attack. Finally,

28 This practice was considered a legitimate rouse de guerre under international law.
It would appear that in international law the lives of passengers and crew were not "forfeited" by resistance or flight of the merchant vessel. Persons on board a ship on the high seas merely came under the jurisdiction of the state whose flag the vessel flew as much so as were they actually to be in that state's territory. 31 A neutral person aboard a belligerent vessel, therefore, was exposed to all the dangers to which the vessel itself was liable by virtue of its belligerent character. 32

During the course of the Lusitania discussions there were 10 major passenger ship sinkings. But less than a month thereafter the British steamer Arabic was sunk without warning by a German submarine. The issue had been so framed that a rupture in American-German relations probably would have resulted had the German government failed to restrain the extent of its submarine activities. On the day that the third Lusitania note had been despatched Lansing had advised the German Ambassador to Washington, Count Bernstorff, that war would result should any more American lives be lost. 33 In a letter to the President appraising the Arabic incident Secretary Lansing considered the possibility of severing diplomatic relations with Germany and the resultant danger of war. He concluded, however, that war would "not arouse very much en-

32 The Nereide, 9 Cranch 388 (1815).
33 Bernstorff, My Three Years in America, pp. 140-146.
thusiasm" in the United States. In reply President Wilson stated that this letter "runs along very much the same lines as my own thought."

As a result presumably of the vigorous representations made by the American Government, Germany announced that the orders issued to submarine commanders "have been made so stringent that a recurrence of incidents similar to the Arabic case is considered out of the question." Not until the fall of 1915 did Secretary Lansing appear to awake to the full significance of the American policy toward submarines and armed merchantmen, as possibly brought about by the Lusitania and Arabic crises. Recognizing the "unreasonableness of requiring a submarine to run the danger of being almost certainly destroyed by giving warning to a vessel carrying an armament," he now suggested to the President that merchant vessels discontinue carrying guns. Should they nevertheless continue to arm they were to be classed as "vessels of war and liable to treatment as such by both belligerents and neutrals." Thus Lansing came

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34 Mr. Lansing, Sec. of State, to the President, August 24, 1915; Savage, op. cit., vol. II, Doc. no. 115.
37 Sec. of State to the President, January 2, 1916; Savage, op. cit., vol. II, Doc. no. 149.
to recognize a fact which the neutral Dutch government had real-
ized when issuing its declaration of neutrality in 1914; that "A
belligerent merchant vessel which fights to escape capture or
destruction by an enemy warship commits an act the legitimacy of
which is indeed unquestionable, but which is none the less an act
of war. The Queens Government are of the opinion that it would
be contrary to strict neutrality . . . not to assimilate to a bel-
ligerent warship . . . any belligerent merchant vessel armed with
the object of committing, in case of need, an act of war."38

The inconsistencies of the American claim that an armed mer-
chantman was a peaceful trader even while under orders to attack
and the growing evidence of such encounters39 finally activated the
Department of State. On January 18, 1916, the United States pro-
posed to the Entente Powers, as a modus vivendi, that they make
the following declaration subject to their opponents' reciproca-
tion: (1) submarines should strictly adhere to the rules of inter-
national law as applied to surface vessels in visiting and search-
ing merchant ships; and (2) merchant vessels of belligerent nation-
ality should be prevented from carrying any armament.40 In this
note Lansing dropped the premise that the submarine was an inher-
ently unlawful instrument of naval warfare, contending that the

39 For. Rel., 1916, Suppl., pp. 198-201
40 Ibid., p. 146.
submarine could not be outlawed because of its proven effectiveness and must therefore be brought within what he called the general rules of international law and principles of humanity. Allied acceptance of this proposal and consequent suspension of arming merchant vessels would then be used by the United States as the foundation for any further protests against German submarine operations in violation of the rules of visit and search.

However, the time was evidently past when a change of this nature could readily have been effected. Too many vital interests acquired by the Entente Powers under the shield of American policy enunciated in the "strict accountability" note to Germany of February, 1915, were threatened. The reception of the American note in Allied countries was hardly favorable. Ambassador Page pictured the proposal "as a complete German victory over us in the submarine controversy." Colonel House, who was in Europe at the time as the President's special envoy, was noticeably annoyed at the proposal. He felt that the President and Lansing had jeopardized the success of his "peace mission," observing that "if they had held the situation quiescent, as I urged them to do, I am sure the plan for intervention by the United States to end the war would have gone through without trouble." 

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41 Ibid., p. 149 et seq.
42 Ibid., p. 152.
On his return from England, House presented the President and the Secretary of State with the British position against the disarmament of merchant ships,\footnote{Ibid., p. 199.} and indicated his feeling that irrespective of Allied acceptance of the American proposal Germany would insist on the submarine blockade of the British Isles.\footnote{Ibid., pp. 211-214.} A revision of policy was now in order.

To extricate the United States from a rather embarrassing position Lansing availed himself of the Austro-German declaration of February 10, 1916, that they would no longer consider armed merchantmen as "peaceful vessels of commerce."\footnote{For. Rel., 1916, Suppl., pp. 166-167.} This had been precisely what the United States had so recently suggested. But it was now explained that Germany had misunderstood the American proposal. The United States had not by its proposal repudiated the right of belligerent merchant ships to arm nor the duty of belligerent warships to comply with the rules of visit and search. These were immutable rules of international law. The American Government felt that during the war it could not change or disregard the established rules without the assent of the contending belligerent governments as proposed in its modus vivendi. The proposal had been formally made solely to the Entente Powers and until accepted by them there was no intention on the part of the United
States to submit it to the Teutonic Powers. Therefore, until the
modus vivendi was accepted by the Allies the American Government
would rely on the "rule of international law that merchant ships
are entitled to armament for defensive purposes . . . ." 47

The United States was back to its original and seemingly in-
consistent contention; a German submarine before destroying an ene-
my merchant vessel must conform to the traditional rules of visit
and search, while a British merchantman was privileged to arm and
use such armament at any time for "defensive purposes." Furthermore,
in spite of the arguments Lansing had employed to prove the
inconsistencies of the American position prior to the suggested
proposal, President Wilson apparently declined to draw the natural
conclusion that if armed merchant ships were subject to submarine
attack American citizens on board such vessels were obviously ex-
posed to that same danger. 48

Concurrently there arose in Congress a strong fear that the
President was apparently determined to lead the country into war
if further American lives were lost on belligerent merchantmen as
a result of submarine action. 49 In consequence there were intro-
duced in Congress in February, 1916, the Gore-McLemore Resolutions

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48 Ibid., pp. 177-178.
warning American citizens against travel on belligerent vessels. The two resolutions differed somewhat. The Gore Resolution prohibited issuance of passports to Americans taking passage on belligerent ships and denied protection to those taking such passage without a passport. The McLemore Resolution provided for the issuance of a warning to Americans against traveling on belligerent commercial vessels.

However, the objections which had been raised against Lansing's proposal of January 18, 1916, coupled with President Wilson's decision to nullify that proposal caused the Administration to concentrate its efforts to bring about the defeat of the Gore-McLemore Resolutions which, to some extent, the Administration's own policy in January had brought about. The President summoned Congressional leaders on February 21 and made the defeat of the resolutions a matter of personal prestige. To clarify the stand on the issue sustained by the President, Senator Stone, Chairman of the Senate Committee on Foreign Relations, wrote Wilson on February 24, giving his version of the conference:

I have stated my understanding of your attitude to be substantially as follows:

That while you would deeply regret the rejection by Great Britain of Mr. Lansing's proposal ... you were of the opinion that if Great Britain and her allies rejected the proposal and insisted upon arming her merchant ships she would be within her right under international law.

50 S. Con. Res. 14, 64th Cong., 1st Sess.
51 H. Res. 147, 64th Cong., 1st Sess.
52 W. Millis, The Road to War, p. 267 et seq.
Also that you feel disposed to allow armed vessels
to be cleared from our ports; also that you are not
favorably disposed to the idea of this Government taking
any definite steps toward preventing American citizens
from embarking upon armed merchant vessels.

Furthermore that you would consider it your duty,
if a German warship should fire upon an armed merchant
vessel of the enemy upon which American citizens were
passengers, to hold Germany to strict account.53

To this letter President Wilson replied, in part, as follows:

For my part, I cannot consent to any abridgment
of the rights of American citizens in any respect. The
honor and self-respect of the Nation are involved. We
covet peace, and shall preserve it at any cost but the
loss of honor. To forbid our people to exercise their
rights for fear we might be called upon to vindicate
them would be a deep humiliation indeed. It would be an
implicit, all but an explicit, acquiescence in the vio-
lation of the rights of mankind everywhere and of what-
ever nation or allegiance. It would be a deliberate ab-
dication of our hitherto, proud position as spokesman,
even amid the turmoil of war, for the law and the right.
It would make everything this Government has attempted
and everything that it has accomplished during this ter-
rible struggle of nations meaningless and futile.54

Thoroughly convinced, apparently, that he was on legally sound
ground and that his cause was fundamentally just the President had
elevated the issue to a moral plane from which any other position
could not but perforce be considered nonmoral. However, had the
President been competently advised, and had all emotionalism been
excluded, it could have been shown that Congress did not need to

53 Cong. Rec., 64th Cong., 1st Sess., vol. LIII, p. 3318,
February 29, 1916.

54 For. Rel., 1916, Suppl., p. 177.
pass any new legislation to accomplish its objective; the law on this question had long been in existence,\textsuperscript{55} and only needed enforcement by the Executive to make it effective. The United States was not by domestic law or by international law required to extend its protection to American citizens traveling on board belligerent merchantmen, particularly if armed.

The primary instrument adopted by the Administration to justify its withdrawal from the position taken in January and to provide the legal argument for the defeat of the Gore-McLemore Resolutions was a "Memorandum on the Right of American Citizens to Travel upon Armed Merchant Ships, Transmitted to the Committee on Foreign Affairs of the House of Representatives, March 4, 1916."\textsuperscript{56} The conclusions reached in this memorandum, based on Chief Justice Marshall's opinion in the \textit{Nereide}, were: that a belligerent merchant ship is privileged to arm for the purpose of resisting capture; that in so doing it is within its rights under international law; that a neutral citizen has the right to transport his person and property upon an armed belligerent merchantman; and that under international law a neutral person does not partake of the belligerent character of the vessel by so doing, nor does he sacrifice


\textsuperscript{56} J. B. Scott, ed., \textit{President Wilson's Foreign Policy}, p. 411.
the neutral character of his goods or himself if the armed belligerent merchantman resists attack, unless he actively engages in the hostilities incident to resistance to capture. It was further maintained that if the United States were to admit, by a public warning issued by Congress, that its citizens did not have the right to travel on board armed belligerent merchantmen the United States would contravene its own precedents and commit an unneutral act by consenting to a change in international law in war time which would materially contribute to the advantage of one belligerent government and to the disadvantage of its adversary.

The memorandum denied the right of any belligerent warship to destroy a merchantman without first, according to the law of nations, complying with the formalities requisite to summoning the merchant vessel to surrender, i.e., visit and search, and upon surrender providing for the safety of all persons aboard. Consequently, the use of the submarine wherein it did not or could not comply with these prerequisites of the law was declared illegal. The opinion concluded with the statement that

If, however, they [submarines] cannot, owing to their limitations, observe all the requirements of international law in making captures, neutral governments cannot admit their right to go beyond the act of capture and actually destroy merchant vessels without warning, in disregard of the requirements of international law and especially of the one grounded on decency and humanity -- the safety of innocent life -- without surrendering national self-respect and national sovereignty, which would be a betrayal of the national honor.
The United States Government cannot, without such betrayal, publicly warn its citizens to renounce their rights in the face of a belligerent threat to do an illegal act, for such warning would be in effect an admission of the right of submarines to destroy merchant vessels illegally.

The Gore-McLemore Resolutions were duly removed from further consideration by Congress. 57

The comment elicited by this opinion from a number of prominent sources would make it appear that the argument expounded by the Administration as to the right of American citizens to travel on belligerent armed merchant ships was of dubious legal value. 58 Justice Holmes termed the memorandum, shortly thereafter, a "farrago of irrational irregularities throughout," 59 while John Bassett Moore declared it "practically a forgery" of Marshall's opinion. 60

Insofar as the Administration's memorandum applied Chief Justice Marshall's opinion in the Nereide 61 it was substantively correct. Marshall did say, as was quoted and as provided under international law, that

57 A motion to lay S. Con. Res. 14, as amended, upon the table was adopted, 64 yeas to 14 nays. Cong. Rec., 64th Cong., 1st Sess., p. 3465, March 3, 1916. The House Committee on Foreign Affairs reported H. Res. 147 adversely and the bill was tabled. Ibid., p. 3583, March 4, 1916.

58 Borchard and Lage, op. cit., p. 117 et seq.


60 U. S. Senate, Neutrality, Hearings before the Committee on Foreign Relations on S. 3474, 74th Cong., 2d Sess. (1936), p. 185. (Hereafter cited as: Senate, Neutrality Hearings, 1936).

61 9 Cranch 388.
A belligerent has a perfect right to arm in his own defense and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm -- ought he to be accountable for the exercise of it? By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral.

And,

To the argument, that by placing goods in the vessel of an armed enemy, he connects himself with that enemy, and assumes the hostile character; it is answered that no such connection exists.

Apropos to this last statement of the law the Chief Justice declared it to be "both the right and the duty of the carrier to avoid capture and to prevent search."

In a later passage of the decision Marshall assimilated the status of passengers to the status of the cargo, and acknowledged the right of passengers to their neutral character upon a belligerent armed merchantman. He said, as was also quoted in the memorandum: "If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers also prisoners? That they are not, would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both."

Drawing from these rules of international law, quoted from Marshall's decision in the Nereide, the Administration, in its memorandum, confidently asserted that
... it appears to be incontrovertible that the decision of the Supreme Court of the United States solemnly acknowledges the right of a belligerent to resist attack, and that this right is to be considered not merely as a decision of the United States on this point but as a decision in accordance with the dictates of international law, based upon universal usage and authority, which the Chief Justice applied, and which he was obliged to apply, in a case involving its principles. It also appears to be incontrovertible that the vessel not merely had the right to arm and to resist, but, in the language of the Chief Justice, it was "the duty of the carrier to avoid capture" by the use of such arms and resistance, and, as the Chief Justice said in another passage, "she had a right to defend herself, did defend herself, and might have captured an assailing vessel," and that the neutral citizen has the right to be a passenger and to transport his property on such a vessel, and does not have his neutral character questioned, even though the ship, armed for defensive purposes, exercises the right by resisting capture.

In relying so heavily upon Marshall's opinion, as proving the right of belligerent merchantmen to arm and of American citizens to travel on such vessels with immunity, the memorandum failed to observe the totality of the circumstances and principles involved. The Chief Justice had been dealing with an entirely different situation than the one under consideration. The Nereide was an armed British merchantman which was chartered in 1813 by a Mr. Pinto, a neutral citizen of Argentina, to carry his person and cargo from London to Buenos Aires. During the voyage the vessel became separated from her convoy and thereafter ran in with an American privateer, which after an armed struggle captured the Nereide as a prize of war. When brought to New York for adjudication the question presented was whether the neutral property of the charterer...
is liable to condemnation because of carriage in an armed belligerent ship.

What the Chief Justice had said regarding the immunity of neutral goods to condemnation was conditioned upon the facts in the case. The mere conveyance of a neutral cargo by a belligerent armed vessel did not ipso facto render that cargo liable to condemnation if captured, but it was implicit in Marshall's decision that this rule obtained only where the vessel was captured. Had the ship suffered damage or been sunk in its efforts to escape capture, the passengers and cargo would have been legitimately susceptible to such destruction or damage incurred during the carrier's attempted escape. This condition, together with the only relevant paragraph about the liabilities attaching to the Nereide, its passengers and cargo, was evidently overlooked or omitted by the State Department's advisers in preparing the memorandum and by Mr. Lansing and those who defended the Administration's position. That paragraph reads: "The Nereide has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the live branch of peace. She is not composed in part of the neutral character of her owner. She is an open and declared belligerent, claiming all the rights, and subject to all the dangers of the

belligerent character."\textsuperscript{63}

In speaking of the omissions from the Nereide opinion, John Bassett Moore has said: "Of Marshall's opinion in this famous case a garbled version was got out . . . a version so false as to constitute practically a forgery; but it was widely disseminated, and was used in speeches even in Congress. I repeat that this version practically involved forgery, because it omitted from Marshall's opinion the passage in which it was declared that the ship, by reason of the fact that she was armed, was to be regarded as 'an open and declared belligerent, claiming all the rights, and subject to all the dangers of the belligerent character.'"\textsuperscript{64}

It may be well to add that, relative to the status of a neutral passenger and his cargo on board a belligerent armed ship, the Supreme Court's decision in the Nereide, and later in the case of the Atalanta,\textsuperscript{65} was in direct conflict with the judgment of the English High Court of Admiralty.\textsuperscript{66} The British Court . . . drew a clear distinction between the case of neutral goods on an enemy merchantman and that of neutral goods on an enemy armed vessel. In the former case . . . \textsuperscript{67} it held that the resistance of the master to search did not render the neutral goods liable to capture, for the double reason (1) that the master had the full right to save himself from capture if he could, and (2) that the neutral could not be assumed to have cal-

\textsuperscript{63} Italics supplied.

\textsuperscript{64} Senate, \textit{Neutrality Hearings}, 1936, p. 185.

\textsuperscript{65} 3 Wheaton 409 (1818).

\textsuperscript{66} T. Twiss, \textit{The Law of Nations . . . in Time of War}, p. 188.
notated or intended that the master should resist visit. (The Catharina Elizabeth, 5 c. Rob. 232.) "But," said the same . . . court/" if he (the neutral) puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and so far as he does this he adheres to the belligerent;

"If a party acts in association with a hostile force, and relies upon that force for protection, he is, pro hac vice, to be considered as an enemy."67

but in any case there existed no disagreement that a person traveling on board a vessel on the high seas was expected to seek his protection from the state whose flag the ship flew.68

On March 24, 1916, the unarmed French channel steamer Sussex was torpedoed without warning and several American passengers on board suffered injury.69 The Secretary of State, Lansing, advised the severance of diplomatic relations with Germany,70 while Colonel House again announced the inevitability of war.71

However, in accordance with the President's desires, and after much preliminary consultation, the famous "Sussex Note" was sent to Germany.72 The United States Government referred to the use of the submarine for the destruction of enemy commerce as "utterly in-

67 The Fanny, 1 Dodson 443, 448.
70 Sec. of State to the President, March 27, 1916; Savage, op. cit., vol. II, Doc. no. 176.
compatible" with the "indisputable rules of international law
and the universally recognized dictates of humanity," and em-
hantically declared that unless Germany should "immediately de-
lare and effect an abandonment of its present method of submarine
warfare against passenger and freight carrying vessels, the Gov-
ernment of the United States can have no choice but to sever dip-
losmatic relations with the German Empire altogether."

The extreme tension of the situation began to subside when
the German government indicated a willingness to reach an under-
standing regarding curtailment of the use of the submarine. How-
ever, through a request put to the American Ambassador in Berlin,
the German government asked whether it might not reserve the right
to sink armed merchantmen at sight.73 Lansing thought that the
Government should be "prepared to meet this move at the very out-
set,"74 and therefore prepared the basis of the American position
in a memorandum on the status of armed merchant ships.75 The con-
clusions drawn therein were in part based upon the Nereide opinion
as interpreted in the "Memorandum on the Right of American Citizens
to Travel upon Armed Merchant Ships . . . March 4, 1916." The
memorandum was made public April 26, 1916, and two days later the

73 J. W. Gerard, My Four Years in Germany, p. 324.
The German government was officially notified of the methods of submarine warfare considered legal by the United States:

1. A belligerent warship can directly attack if a merchant vessel resists or continues to flee after a summons to surrender.

2. An attacking vessel must display its colors before exercising belligerent rights.

3. If a merchant vessel surrenders, the attack must immediately cease and the rule as to visit and search must be applied --

(a) by a visit to the vessel by an officer and men of the attacking ship; or

(b) by a visit to the attacking ship by an officer of the vessel attacked, with the ship's papers.

4. An attacking vessel must disclose its identity and name of commander when exercising visit and search.

5. If visit and search disclose that the vessel is of belligerent nationality, the vessel may be sunk only if it is impossible to take it into port, provided that the persons on board are put in a place of safety and loss of neutral property is indemnified.

NOTE -- (a) A place of safety is not an open boat out of sight of land.

(b) A place of safety is not an open boat, if the wind is strong, the sea rough, or the weather thick, or if it is very cold.

(c) A place of safety is not an open boat which is over-crowded or is small or unseaworthy or insufficiently manned.

6. If, however, visit and search disclose that the vessel is of neutral nationality, it must not be sunk in any circumstances, except of gravest importance to
the captor's state, and then only in accordance with the above provisos and notes.\footnote{76}

The American position was clear and unequivocal: Germany must immediately abate its methods of employing submarines against enemy merchant vessels or face a rupture of diplomatic relations with the United States and the possible attendant consequence of war. The German government replied on May 4, promising that "in accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as a naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance." Nevertheless, it could not be expected that Germany, for the sake of neutral interest, would restrict the use of an effective weapon if her enemies were "permitted to continue to apply at will methods of warfare \[i.e., blockade measures\] violating the rules of international law." Should such continue to be the case "the German Government would then be facing a new situation in which it must reserve \[to\] itself complete liberty of decision."\footnote{77}

In reply the American Government noted that former German submarine policy was now "happily abandoned," but felt it incumbent to state that it was taken for granted that the "Imperial Ger-

\footnote{76} Ibid., p. 252. 
\footnote{77} Ibid., p. 263.
man Government does not intend to imply that the maintenance of its newly announced policy is in any way contingent upon the course or result of diplomatic negotiations between the Government of the United States and any other belligerent Government (i.e., Great Britain) . . . "78

The persistency of the Wilson Administration policy had seemingly resulted in a dual standard of conduct expected of the opposing belligerents. On the one hand, Great Britain was permitted, though with protesting acquiescense, various infringements upon neutral rights and the extension of belligerent rights far beyond those previously recognized under international law. Germany, on the other hand, was held to the strict American interpretation of certain belligerent duties under the law with respect to the employment of the submarine as a commerce raider. The precarious juridical balance thus established by the United States could not last indefinitely.

On January 31, 1917, the American injunction against unrestricted submarine warfare came to the critical test. The German government announced that the continued exercise of allegedly illegal (blockade) measures by its enemies served to give Germany that "liberty of decision" reserved in the Sussex note of May 4, 1916. In consequence, after February 1, 1917, "all navigation, that of neutrals included," was forbidden within a designated war

78 Ibid., p. 263.
zone surrounding the British Isles, with certain exceptions involving passenger vessels which the German government would negotiate with the United States. The Wilson Administration now had to take drastic action to uphold the American position or suffer diplomatic defeat and humiliation at the hands of Germany.

President Wilson reported the German announcement to Congress on February 3, 1917, and called attention to prior diplomatic correspondence relating to the question of submarine warfare. Particular emphasis was given to the American statement of April 18, 1916, admonishing the German government that unless it effected immediate abandonment of submarine attacks against passenger and freight carrying vessels the United States Government could have no alternative but to sever diplomatic relations, and to the German reply of May 4. The President advised Congress that in view of the new German declaration, withdrawing the assurance of May 4, the American Government had no choice "consistent with the dignity and honor of the United States" other than to take the course announced on April 18, 1916. To that end the Secretary of State had been directed to inform the German Ambassador of the severance of all diplomatic relations between the United States and the German Empire. Notwithstanding, expression was made of the hope that hostilities might be avoided.

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79 For. Rel., 1917, Suppl. 1, pp. 97-100.
There now evolved the problem of how the Washington Government should advise American citizens and firms respecting transportation through the area delimited by Germany. The solution came in the form of a confidential memorandum of guidance to the Departments of War, Navy, Treasury and Commerce by the Secretary of State. The position was taken that the United States Government could not advise private individuals whether their vessels should pass through the war zone. However, it was asserted that the rights of American vessels to travel on all parts of the high seas remained the same as previous to the German declaration, and "that a neutral merchant vessel may, if its owners believe that it is liable to be unlawfully attacked, take any necessary measures to prevent or resist such attack." No elucidation of what "any necessary measures to prevent or resist such attack" might mean was made, but certainly for neutral vessels to undertake hostile action against belligerent warships was a privilege ordinarily not accorded to neutrals. But then it was the Government's contention that the submarine, as employed by Germany, was an illegal instrument of warfare and outside the realm of law.

On February 26 the President again went before Congress to urge the adoption of a status of "armed neutrality," for which

81 Savage, op. cit., vol. II, Doc. no. 228, February 6, 1917.
82 Mr. Lansing, Sec. of State, to the President, February 21, 1917; Savage, op. cit., vol. II, Doc. no. 232.
there was abundant precedent,\(^{83}\) as no other recourse remained to safeguard alleged American neutral rights against continued German infringement. The President also maintained that there was no contemplation or proposal of war, nor "any steps that need lead to it," and that war could come "only by the willful acts and aggressions of others."\(^{84}\)

The House of Representatives promptly passed a measure authorizing the President to supply American merchant ships with "defensive arms."\(^{85}\) The Senate, however, failed to take affirmative action as the bill did not come to a vote prior to adjournment sine die, March 4, 1917, because of "prolonged debate" by opponents of the Chief Executive's policy.\(^{86}\) Unable to obtain the authority requested of Congress the President proceeded without it, stating in his Inaugural Address of March 5 "we have been obliged to arm ourselves . . . . We stand firm in armed neutrality."\(^{87}\) Previous


\(^{84}\) Cong. Rec., 64th Cong., 2d Sess., vol. LIV, pp. 4326-4327.

\(^{85}\) H. R. 21052 passed the House on March 1, 1917, by a vote of 403 yeas to 14 nays after a motion to recommit the bill was lost 125 yeas to 293 nays. Cong. Rec., 64th Cong., 2d Sess., vol. LIV, pp. 4691-4692.

\(^{86}\) "The Twelve Willful Men" led by Senators Cummins (Iowa), LaFollette (Wis.) and Norris (Neb.) were opposed by seventy-five senators who signed a statement declaring their support of the bill "to authorize the President . . . to arm American merchant vessels and to protect American citizens in their peaceful pursuits upon the sea." Cong. Rec., 64th Cong., 2d Sess., vol. LIV, p. 4988.

\(^{87}\) Scott, Wilson's Foreign Policy, p. 270.
administrations had recognized the efficacy of inter-neutral co-operation against belligerent violations when seriously considering enforcement of neutral rights, but apparently no thought was given to the matter at this time. 88

Three days later Secretary Lansing advised the President that, as the existing state of affairs appeared, the United States should "proceed on the theory that we will in a short time be openly at war with Germany." 89 Then on March 18 and 19 reports were received of the loss of three American vessels and fifteen lives by submarine action. 90 On March 21 the President notified Congress to convene on April 2 in special session.

In his address to Congress, President Wilson alluded to Ger-


90 Prior to this time the only loss of life incurred by an American vessel took place on May 1, 1915, when the Gulflight was torpedoed while proceeding under British convoy. "Diplomatic Correspondence between the United States and Belligerent Governments ..., Am. Jour. Int. Law, Sp. Suppl., vol. XI (1917), pp. 76-78. To the time of rupture of diplomatic relations with Germany, a maximum of six American vessels had been torpedoed with the total loss of the three lives in the Gulflight incident. Three more American vessels were victims of submarine action during the period of "armed expectancy," with a loss of lives totaling Sixty-four of which twenty-five were American nationals. Total American shipping losses from submarine, raider, shelling or bombing during the neutral period amounted to fifteen vessels sunk, one surrendered, four damaged. Lives lost aboard these vessels totaled sixty-seven, twenty-eight being American nationals. Navy Department, Historical Section, American Casualties of the War.
man submarine warfare against commerce as "warfare against mankind ... a war against all nations." Germany's plea of retaliation was rejected. Submarines, it was claimed, "are in effect outlaws when used as the German submarines have been used against merchant shipping . . . ." As a result of continued German depredations Congress was advised by the President to "declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States." After urging full cooperation with and military and financial assistance to the Entente Powers, President Wilson then pictured entering into a state of war as a great crusade; adding

... Our object now, as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power and to set up amongst the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth ensure the observance of those principles. Neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples, and the menace to that peace and freedom lies in the existence of autocratic governments backed by organized force which is controlled wholly by their will, not by the will of their people. We have seen the last of neutrality in such circumstances.  

Congress responded by approval of Senate Joint Resolution 1,

91 It will be noted that no distinction was raised in the President's address between neutral and belligerent merchantmen. This follows the pattern established in the correspondence with Germany.

declaring that as Germany had committed repeated acts of war against the American people and government" ... the state of war between the United States and the Imperial German Government, which has thus been thrust upon the United States is hereby formally declared." 93

93 "Joint Resolution Declaring the Existence of a State of War between the United States and Germany, April 6, 1917." 40 Stat. at L. 1.
Chapter VII

POST WAR DEVELOPMENTS

In the years following World War I the attitude of the United States toward the submarine remained in consonance with the Government policy of 1914-1917. American policy in this period appears directed toward establishment, as accepted rules of international practice relating to the use of submarines, those rules of employment which the United States proclaimed during the submarine controversy with Germany.

By the Treaty of Versailles Germany was prohibited from constructing or acquiring any submarines, and was obliged to turn over existing submarines to the Allies. At the Paris Peace Conference the American delegation was in agreement with the British that the submarine had no peaceful purpose and should be abolished. President Wilson "hoped the time would come when they would be contrary to international law." This humanitarian solicitude was frustrated by the French government which took the position that "the submarine is the only weapon which at present permits a nation

1 Article 191.
scantily supplied with capital ships to defend itself at sea" and would not agree to the destruction of the German U-boat fleet.³

The Washington Conference on the Limitation of Armament, 1921-1922, was the scene of further discussion regarding legal and moral aspects of the employment of submarines for belligerent purposes. At this conference Great Britain submitted for consideration a proposition designed to forbid altogether submarine construction, maintenance or employment.⁴ The proposal again met with serious opposition from France who now received the support of Italy and Japan. The argument continued to the effect that the submarine afforded the only defensive safeguard of nations with small fleets against those with large navies.⁵

Interposed between these extremes was the American position. Evidently realizing the impossibility of agreement upon the abolition of the submarine, which at this conference the American Government was not actively seeking, the United States offered a compromise solution in the form of a proposal to establish certain rules of conduct in the employment of submarines. These rules, as would be suspected, were in complete harmony with previous American

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⁵ Ibid., p. 270 et seq.
neutrality policy. In this respect the American delegation, headed by Secretary of State Hughes, stated

Unlimited submarine warfare should be outlawed. Laws should be drawn up prescribing the methods of procedure of submarines against merchant vessels both neutral and belligerent. These rules should accord with the rules observed by surface craft. Laws should also be made which prohibit the use of false flags and offensive arming of merchant vessels. The use of false flags has already ceased in land warfare. No one can prevent an enemy from running "amuck" but immediately he does, he outlaws himself and invites sure defeat by bringing down the wrath of the world upon his head. If the submarine is required to operate under the same rule as combatant surface vessels no objection can be raised as to its use against merchant vessels.

The Conference was unable either to abolish or to limit construction of submarines, but agreement was reached upon the terms of a treaty "which condemned the abhorrent practices followed in the recent war in the use of submarines against merchant vessels." The treaty laid down rules to control visit, search and seizure, and attacks upon merchant vessels (although no effort was made to deal with the distinction between armed and unarmed merchant vessels) in time of war; stating

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce des-

6 Ibid., p. 813.
7 Ibid., p. 815.
troyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto. 8

Submarines must henceforth conform to the universal practice of surface warships in capturing a merchant vessel or desist from attack.

Undoubtedly had these provisions come into effect among the contracting parties -- the United States, the British Empire, France, Italy and Japan -- the question of principle involved in the wartime controversy between the United States and Germany would have been resolved in favor of the American position, at least so far as the principal Allied powers were concerned. Unfortunately for American diplomacy the treaty was not ratified by France and therefore never came into effect. 9

At the London Naval Conference in 1930 the United States expressed a willingness to abolish the use of the submarine entirely. However, hoping that the American attitude during 1914-1917 toward the submarine as a commerce raider would be formally recognized, Secretary of State Stimson declared: "It seems to the American delegation that we have a common interest in the abolition of the submarine; first of all, for the purpose of suppressing costly weapons which we can forgo by agreement and by the aboli-

8 "A Treaty... in Relation to the Use of Submarines and Noxious Gasses in Warfare;" Ibid., p. 887.

tion of which we reduce our requirements in other classes of ships; and, second, for the purpose of eliminating for the future the dreadful experiences of the past."¹⁰

Although the Conference was unable to accede to the extent desired by the American delegation, the United States policy toward employment of submarines was affirmed in the Treaty on the Limitation and Reduction of Naval Armament, signed April 22, 1930. According to Part IV, Article 22, the following were accepted "as established rules of International Law":

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.¹¹

On this occasion also vindication of the American position was thwarted. France and Italy failed to ratify the instrument.¹²

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¹⁰ Department of State, Conference Series, No. 3, pp. 21-22.
¹¹ U. S. Senate, Limitation and Reduction of Naval Armament, 71st Cong., 2d Sess., Doc. no. 141, p. 30. Note the similarity in text of the treaty with that of the Lusitania notes. See above p. 131 ff.
Prior to the London Naval Conference of 1935, which met to frame a new treaty to replace the unratified one of 1930, the British government invited the United States, France, Italy and Japan to perpetuate, in a separate protocol, Part IV of the 1930 treaty. On November 6, 1936, the Governments of the United States, the British Empire, France, Italy and Japan deposited instruments of ratification of Part IV of the treaty of 1930.13 Invitation was made to all powers not signatory to accede to these rules "definitely and without limit of time." The German government adhered on November 23, 1936,14 as did thirty-four other governments.15

Not only had the United States ultimately won acceptance of its position, respecting the use of the submarine as a commerce raider, by the principal Allied powers, but the former enemy, too, now recognized the validity of American neutral rights against submarine attack. Indeed, forty-seven nations, including the leading maritime powers, had written into conventional law this proposition.

Had the American Government been as diligent and successful in the matter of principle while settling the claims question with

13 Ibid., pp. 691-692.
Great Britain, the United States might have experienced, for the
time at least, complete vindication of its interpretation and ap­
plication of international law as the "champion of neutral rights."

During the neutral period, 1914-1917, the United States Gov­
ernment clearly indicated, in respect to violation of neutral rights
affecting American citizens, that, whereas the German submarine
attacks upon American lives and shipping required immediate vindi­
cation, the property losses caused by Great Britain's "measures
of blockade" could await pecuniary settlement at the close of hos­
tilities.16 Following American entry in the war, officials of the
Government stated on various occasions that the country's partici­
pation as a belligerent in no way constituted a waiver of American
neutral rights.17

Initial inquiry was formally made of the British government
by the State Department on August 18, 1920, as to whether an "ap­
propriate arrangement" could not be reached for the adjustment of
claims growing out of the war.18 No final reply to this inquiry
was ever received from Great Britain. During the next five years,
apparently no further effort was made by the Government of the

16 Cf. Scott, President Wilson's Foreign Policy, pp. 237-
238.
17 For. Rel., 1917, Suppl. 2, pp. 865-866, 875-877; 1918,
United States to press that of Great Britain for settlement of neutral claims.

In the fall of 1925 the matter was again broached, although informally, to the British government. Possibly this action was taken in anticipation of a resolution which the chairman of the Senate Foreign Relations Committee, Senator Borah, advised Secretary of State Kellogg he intended to introduce, requesting the President to inform the Senate of the steps taken to negotiate a claims convention with Britain. 

British reaction was immediate and anything but favorably disposed toward the suggestion of a settlement. In effect the British government informally and vigorously protested against the United States presenting formally, at any future date, claims arising from the war. It was maintained by Britain that the imposition of such a settlement was "morally unjust," particularly as the American claims grew out of the "blockade precedent" which the United States, after entering

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the war, had sustained through cooperation with Great Britain in economically isolating the enemy. It was said that the British had been led to believe by President Wilson at Paris that the blockade claims would be dropped. And finally it was strongly intimated that should the issue be pressed by the United States Government serious repercussions might ensue in that the whole matter of "British naval law" during the war would be involved.\footnote{For. Rel., 1926, vol. II, pp. 214-223.}

Notwithstanding British reluctance to consider the issue, the Department of State persisted in its efforts to arrive at a mutually agreeable understanding with the Foreign Office. By an aide-memoire of April 7, 1926, the State Department proposed through the British Embassy in Washington that the two governments each undertake a "preliminary survey" of all claims on file to determine which claims merited further diplomatic intervention, and thereafter through "informal and friendly consideration" decide upon a convenient procedure for the disposition of those claims that remained outstanding.\footnote{Ibid., pp. 225-226.} Not until the United States Government exerted its powers of diplomatic persuasion to the utmost did the British government finally withdraw its objections, on June 17, to the American proposal. However, the British government made the explicit reservation that the question of the validity of the blockade...
decrees was not regarded as open to discussion. Informal negotiations commenced without discussion of this reservation. The Secretary of State simply advised the British Ambassador in Washington that discussion of reservations at this time would not assist in finding the proper solution of the general problem; that until "blockade claims" had been defined, each government should do no more than reserve its respective position in general terms; and that the present "agreement" should be regarded as purely procedural in nature and as binding on neither government.

It would appear, from the record of events presently available for study, that the State Department gave very little, if any, serious thought to the ramifications of the British reservation. The American Government, during the neutral period, had based its protests against the alleged violations of the neutral rights of its citizens through the operation of the British "measures of blockade" upon the alleged illegality in international law of the orders-in-council establishing this so-called blockade. These decrees -- the controversial orders of 1914, 1915 and 1916 -- were now removed from the realm of discussion insofar as the British government was concerned. Thus the limiting condition to British consideration of American blockade claims was the obviation of the principal component of the law upon which the United States rested

24 Ibid., pp. 238-240.
its case, namely, the question of the legality of the orders-in-council instituting the "measures of blockade" alleged to contravene neutral rights.

Although the United States as a belligerent had diligently assisted in the economic isolation of the enemy, the measures employed to effect this end were based in the main upon sovereign, non-belligerent rights exercised in the form of municipal legislation applicable solely within its territorial jurisdiction. The major exceptions to this policy, it will be recalled, were the extension of the definition of contraband and of the presumption of hostile destination as well as the laying of the North Sea mine barrage. However, on the leading issues of blockade and contraband capture the United States may be said to have maintained unimpaired its traditional views. The American Government had warned Great Britain that "The basis of the cooperation of the United States is not to assist in the blockade of neutral countries, nor to take part in other measures of the Allies which the United States had heretofore regarded as unfounded in international law . . . ."26 A year later, while negotiating for the release of American goods seized under the British order of March 11, 1915, Secretary Lansing had affirmed that

The Government of the United States could not enter into any arrangement for the release of goods which would contemplate any undertaking on its part to

withdraw from its attitude previously expressed with regard to the order of March 11, 1915, or not to raise any question in the future as to the validity of the Order in Council, or to withhold protection of rights of American citizens which may appear to have been infringed by the Order in Council and therefore to warrant espousal by the Government of the United States.  

From the standpoint of neutral rights as previously interpreted and applied by the United States the question logically follows as to why no definitive remonstrance was made to the British reservation.

In September, 1926, after a preliminary investigation of the various claims was almost completed, the Assistant Secretary of State, R. E. Olds, was dispatched to London, as the personal representative of the Secretary, for the purpose of expediting the conclusion of a satisfactory arrangement for disposing of the claims question.  

The initial report of the Assistant Secretary to Mr. Kellogg, transmitted less than two days after his arrival in London, is illuminating in that reflected therein is the first intimation of the policy which the Department of State intended to pursue in order to bring negotiations to a "successful" conclusion and of the climate of thought of the officials within the Department attempting to effectuate this policy.

The problem of a claims settlement, averred Mr. Olds, was


28 Sec. of State to Asst. Sec. of State, July 20, 1926; For. Rel., 1926, vol. II, pp. 244-245.
surrounded by an "atmosphere of optimism" for, as it had long been supposed within the State Department, "the so-called 'war claims' in the aggregate will eventually boil down to a residuum which ought to present few difficulties." He was "becoming convinced" that an ultimate formula could be found which would not compromise the question of principle, but cautioned the Assistant Secretary "The trick will be, through careful consideration of the individual cases left in dispute after examination of facts is concluded, to dispose of them on grounds which will permit us to say that we have waived no question of principle, and at the same time enable the British Government to avoid an acknowledgment on the record that the operations of the British Navy were necessarily invalid." Hence, it was of the highest importance that "these claims be treated in such a way as to prevent political considerations from entering into the negotiations." The Foreign Office, according to Mr. Olds, supported this view, counseling that "... if the claims were not handled with the utmost discretion the two Government's might be brought face to face on certain issues which were vital: on the one hand there was our undoubted interest in maintaining neutral rights and on the other, England was bound to protect its position as a great maritime power." Accordingly, the British government had no expectation that the American Government would waive anything in principle nor was it considered that the United States had "any occasion to try to indict the British Government for violation of the principles of international law."29

In November Spencer Phenix, Assistant to Assistant Secretary of State Olds, submitted to the Secretary of State the completed report "on the subject of the claims and complaints against the British Government." Part one is devoted to a resume of the wartime correspondence between the American and British Governments concerning neutral rights. It was submitted that

... protests by the United States were directed principally against the Orders in Council, whose effect was to extend the doctrine of continuous voyage; to substitute for the recognized belligerent right of visit and search on the high seas a new practice under which neutral vessels were required to enter British ports for examination of their papers and cargoes; to enlarge the scope of contraband lists; to institute a novel form of naval blockade; and to cause great interference with the mails. The Orders in Council against whose strict enforcement the Government of the United States protested most frequently were those of October 29, 1914, (the "Declaration of London Order in Council No. 2, 1914, No. 1614" ...), of March 11, 1915 (the "Order in Council framing Reprisals for Restricting further the Commerce of Germany, 1915, No. 206") and of July 7, 1916 (the "Maritime Rights Order in Council, 1916").

No explicit reference is to be found regarding the extension of the rules of blockade by subjecting neutral vessels to seizure if carrying goods of presumed enemy destination, ownership, or origin and investing neutral ports of countries contiguous to enemy territory with essentially the element of enemy character. Likewise, no mention is made of the broadened application of the doctrines of continuous voyage and ultimate destination to blockade and con-

30 Ibid., pp. 250-287.

31 See above p. 67 ff.
In each instance, it will be remembered, British adaptations involved manifest contraventions of the traditional law to which the United States Government had in one degree or another protested.

The general position of the United States, "with respect to the liability of the British Government for such acts as appeared to be contrary to the then accepted principles of international law," was epitomized by a quotation from a telegram dispatched by the Department of State to the American Ambassador in London, dated October 22, 1914. It was stated therein in relation to British disregard for the Declaration of London, that the Government of the United States "will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London; and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government."

The net result of this correspondence, as adduced by the Phenix report, appears to have been: first, "satisfactory contemporary adjustment of certain specific complaints" (although no particular cases were innumerated); second, enunciation of the principle that the United States reserved its rights as a neutral

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32 See above p. 87 ff.
under international law as they existed prior to 1914; and third, British admission that "they would make due reparation for damage to bona fide neutral interests." However, as if in palliation of any British admission of liability for impairment of bona fide neutral interests, whatever the undefined term might encompass, there followed the statement that "... Had the United States maintained its neutrality throughout the entire period of the war there is no question that the record of its correspondence with the British Government prior to 1917 would afford ample grounds for a demand that there be an adjudication by a competent tribunal of the questions of international law raised by the British Orders in Council."

In the second part of the report there is an attempt to interpret the significance of American belligerency upon prior rights as a neutral. The entry of the United States into the war presented a new situation, it is declared, which was clearly not contemplated in the correspondence of 1914-1916. In its new role as an associate in the war against Germany the United States became a "beneficiary" of the previous policies of the Allies, and

The American Government requisitioned American vessels for Government service and controlled the movements and operations of neutral vessels by rigorous restrictions as to the obtaining of bunkers and stores in American ports; trading with the enemy was prohibited by statute and heavy penalties imposed therefor; exports from, and imports into, the United States were subjected to control, and blacklists were formulated bearing the names of persons and firms suspected of assisting the enemy; the supply of commodities shipped to European neutrals was strictly rationed.
It was brought out that the activities of the United States Navy included planting a mine barrage in the North Sea and endorsing British routing instructions. The fact was emphasized that the Secretary of the Navy in a letter to the Secretary of State on February 20, 1919, was unable to state categorically that "in no instance has a vessel of our Navy taken part, direct or indirect, in any matter of search and seizure of the character discussed in the State Department's note of October 21, 1915, addressed to the British Government." The report stated:

... it does not appear that the Government of the United States failed to adopt measures having the same object as those put into force by the British authorities in 1914, 1915, and 1916, and strongly protested by the United States.

It would seem, therefore, that the right which the United States undoubtedly had prior to its entry into the war on April 6, 1917, to contest the validity of the British Orders in Council, underwent a considerable practical change as a result of our entry into the war, and the policies adopted by the United States Government subsequent thereto. It is not impossible, moreover, that, were the United States to open up for general discussion the question of neutral rights during the World War, certain Governments which remained neutral throughout the entire period of hostilities might be moved to enter claims against the United States for damages alleged to have been caused by American interference with neutral trade and commerce.

In all probability had the report been prepared in anticipation of a concerted effort on the part of the State Department to press the claims issue to a final decision on the question of principle a number of facts would have been brought to light. It might have been pointed out that no question of international law

33 See above pp. 73 ff.
was involved in the requisition of American vessels for government service; that although vigorous protestations were lodged against belligerent bunker controls, it was solely on grounds of inconvenience and loss; that prohibiting nationals from trading with the enemy was the undeniable right of any government; that rationing per se when effected from the point of origin of the commodity was never made a matter of discussion; and that the argument of the "higher law" of international morality and fair dealing was the basis of protest against blacklisting.  

Apparently the Department of State was not greatly concerned over the leading question of whether the United States Navy participated, directly or indirectly, in the plan of search and seizure exercised by the British navy to which the United States so strenuously protested in its note of October 21, 1915. The report stressed the fact that the Secretary of the Navy was unable to state categorically on February 20, 1919, that in no instance had such participation occurred, but this had been over seven years previous and in the intervening period the detailed reports of operations had been received and studied by the Navy Department. No mention is made of any inquiry having been placed with the Secretary of the Navy during the State Department's current investiga-  

tion to ascertain if any further facts had come to light.

In point of fact the Director of Naval History, Office of the Chief of Naval Operations, advises:

... I have found no instance of the U. S. Navy participating in search and seizure activities such as the State Department noted objected to.

Visit and search was carried out by our Navy during World War I but in every case it was accomplished on the high seas in strict accordance with international law, and under the official Instructions for the Navy of the United States Governing Maritime Warfare, June 1917, which was in force at the time.

I have been unable to locate any correspondence indicating that the Navy Department discussed with the State Department after 20 February 1919, the question of search and seizure by ships of the U. S. Navy, nor if the State Department requested any further information.35

In neglecting this aspect of the claims issue the Department of State appears to have lost the only plausible ground for legal complaint against Great Britain. The British "blockade" of Germany was executed pursuant to certain orders-in-council which the United States had claimed contravened international law. The foundation of the "blockade" was composed of: the extension of contraband lists; the interdiction of goods of presumed enemy destination, ownership, or origin; the diversion of neutral shipping from the high seas into British ports to search for evidence, statistical and inferential, that the cargo might reach Germany; and the condemnation by British prize courts of cargoes and vessels in part on rules of evidence authorized under the controversial

35 Rear Admiral Hefferman to Senator Hayden, ltr dtd March 26, 1953; Appendix.
orders-in-council. Aside from the extension of contraband lists the United States while a belligerent at no time compromised its position by becoming a party to those measures of "blockade" which it had protested as illegal incursions upon neutral rights, nor had the United States Navy aided or abetted the British government by assisting their navy in search and seizure of the nature considered illegal by the American Government. The practice of search and seizure as employed by Great Britain afforded the only effective means whereby the other measures of interdiction could be adequately enforced. Had the American Government deemed it politic to press this one point of law it would seem that the case of the United States could have rested on solid legal footing.

The third part of the Phenix report reviews, substantially as outlined hereinabove, the post-war efforts of the State Department to settle the claims question. In addition it is disclosed that Mr. Phenix was

. . . authorized provisionally to withdraw from consideration during . . . the London conferences all cases falling within the following categories, and to state that they would not be presented by the Department if a satisfactory general agreement were reached by the two Governments:

1. Cases involving an actual loss of $500 or less.

2. Cases arising from the inclusion of names in the so-called "black lists" unless special grounds for espousal exist.

3. Cases involving alleged wrongful detention, expulsion or mistreatment of American citizens unless
there is clearly evidence of injustice resulting in substantial loss or injury, or of needlessly harsh or arbitrary action.

4. Cases involving claims for purely speculative profits.

5. Cases involving losses due to British export or import or bunker restrictions or maximum price orders unless there has been discrimination against the American interests involved.

6. Cases where without unreasonable delay or expense the subject matter has been released to the interested party in good condition, of its fair cash value paid over to him.

The joint examination of American and British claims files and the results thereof constitutes the fourth and final section of the report. After an examination of 2658 cases Mr. Phenix was of the opinion that

The most impressive single fact revealed... was the extent to which individual complaints had been settled by the British authorities through one expedient or another. In a great number of cases, for example, the goods, their proceeds or their value were released many years ago to the owners who, it might be mentioned in passing, frequently proved not to be the American complainant whose complaint the Department has on file, but a European vendor or vendee; in other cases a general settlement had been effected...; in still others private agreements were negotiated and the British Government holds the receipts of American complainants expressly stating that full and final settlement had been made of their claims... other cases were disposed of in other ways or are still open to adjustment upon proof of title.

A table showed the number of cases dropped under the six rules provisionally authorized together with those cases dropped under one of nine subdivisions of "Rule 7, the general rule."

1. Those involving an actual loss of $500 or less...

2. Those arising from the inclusion of names in so-called "black lists" and where no special grounds for

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espousal appear .................... 102

3. Those involving alleged wrongful detention, expulsion or mistreatment of American citizens where there is no evidence of injustice resulting in substantial loss or injury or of needlessly harsh or arbitrary action ........... 36

4. Those involving claims of purely speculative profits ...................... 9

5. Those involving losses due to British export, import or bunker restrictions or maximum price orders where there is no evidence of discrimination against American interests ............... 29

6. Those where without unreasonable delay or expense the subject matter has been released to the interested party in good condition or its fair cash value paid to him .................. 838

7a. Those where the owner of the goods has never complained to the Department ........... 237

7b. Those where the goods, their proceeds or invoice value are still in court or in the hands of the Custodian of Enemy Property and available on proof of title ......................... 172

7c. Those where the title to the goods appears to be in aliens ............... 76

7d. Those adjusted by the so-called "Swedish Settlement" ...................... 34

7e. Those adjusted by agreement with the interested parties .................. 175

7f. Those where the goods were condemned and there was no appeal or subsequent complaint to the Department of State .................. 110

7g. Those where no formal claim has been presented and where the complainant has not communicated with the Department in 10 or more years ....... 25

7h. Those where no evidence has been found that the goods were seized by the British authorities .................. 153
Of the 2,658 cases studied 2,501 were found susceptible of immediate elimination by the application of one or more of the above-mentioned rules. Fifty-three of the remaining 157 cases were dropped from further consideration by reason that no complaint had been made to the State Department nor a formal claim filed in the preceding ten years. Of the ninety-five case outstanding only twelve were considered to "possess conspicuous merit."

It is interesting to note that the "most impressive single fact revealed" by this examination was "the extent to which individual complaints had been settled by the British authorities through one expedient or another." A reasonable presumption may consequently exist that such "settlements" were at least in part based upon challenges to the orders-in-council establishing the "blockade measures" alleged by the United States to be illegal under international law.

In December, 1926, preliminary conferences were held in Washington seeking to devise the formula to be used in the claims settlement. This was accomplished as set forth in a memorandum prepared by Assistant Secretary Olds who represented the State

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36 Memorandums by Mr. Phenix, December 8, 14 & 22, 1926; For. Rel., 1926, vol. II, pp. 294-308.
Department in this phase of the negotiations. According to the Assistant Secretary the "problem presented by these so-called war claims has been magnified out of all proportion to its true merit." As the matter turned out to be not nearly as momentous as supposed, the Anglo-American conferees "simply engaged upon an effort to clear away the debris which any war inevitably leaves behind." To this end Mr. Olds was convinced that

If we follow pure theory we should go back to our neutrality notes and insist upon a show-down in principle. The short answer to this program is that there is no way to get such a show-down. England will not concede the invalidity, or even arbitrate the question of the validity of her war measures. This has been declared over and over again with the utmost emphasis ever since her replies to our original notes were made. It is worse than futile to raise that issue. Nothing but increased bitterness without any beneficial results would ensue. Moreover, it is extremely doubtful, even if an arbitration were feasible, whether any tribunal could settle the principles in the way in which we should like to have them determined. Most thoughtful students of international law are coming to feel that the rights of neutrals under these modern conditions must be defined, if at all, by some form of international legislation, rather than by tribunals bound by precedents laid down in circumstances which have little in common with those of the present day. Anyhow, it is clear that whatever issue of principle there may be in this regard between the United States and Great Britain, it is not going to be resolved, either by mutual concession or by arbitration. This being so, there is nothing to do but go around this issue and leave it behind us where it can do no harm. That is precisely what the proposed adjustment attempts to do.

The proposed agreement was, to Mr. Olds' mind, "almost suspiciously simple," with but three main provisions: (1) Two-way cancellation of purely governmental claims; (2) Agreement that no
further presentation be made by either government of claims arising from alleged loss or damage through war measures of the other; and (3) Each government would retain unimpaired its juridical position as taken during the war.

The settlement -- an Executive Agreement -- was placed in effect by an exchange of notes on May 19, 1927.38 By the terms of the arrangement both governments agreed:

(1) That neither will make further claim against the other on account of supplies furnished, services rendered or damages sustained by it in connection with the prosecution of the recent war, all such accounts to be regarded as definitively closed and settled.

(2) That neither will present any diplomatic claim or request international arbitration on behalf of any national alleging loss or damage through the war measures adopted by the other, any such national to be referred for remedy to the appropriate judicial or administrative tribunal of the Government against which the claim is alleged to lie, and the decision of such tribunal or of the appellate tribunal, if any, to be regarded as the final settlement of such claim, it being understood that each Government will use its best endeavours to secure to the nationals of the other the same rights and remedies as may be enjoyed by its own nationals in similar circumstances, and that His Majesty's Government in Great Britain agrees that fullest access to British Prize Courts shall remain open to claimants subject to the right of the British authorities to plead any defenses that may be legally open to them.

(3) That the right of each Government to maintain in the future such position as it may deem appropriate with respect to the legality or illegality under international law of measures such as those giving rise to claims covered by the immediately preceding paragraph is fully reserved, it being specifically understood that the juridical position of neither Government is preju-

38 Ibid., pp. 750-755.
As interpretative of this agreement the American note stated that

... the Government of the United States regards it not as a financial settlement but as the friendly composition of conflicting points of view which seemed to lend themselves to no other form of adjustment... The Government of the United States realizes that by the terms of the agreement His Majesty's Government waive their right to receive a net cash payment on account of certain claims recognized by the United States as just and proper, and also their right to press certain other claims, liability for which has not been formally admitted by this Government, but which involve considerable amounts... that the Government of the United States will recommend such action by Congress as will insure the utilization... of the sums saved to the United States under the provisions of the present agreement, and that it will also safeguard His Majesty's Government against possible double liability by exacting an assignment to the Government of the United States of all of a claimant's rights and interests in the claim in question as a condition precedent to the allowance of any compensation in respect thereof.

As a result of this method of settlement the government of Great Britain paid nothing to the United States in satisfaction for claims arising from the violation of American neutral rights during the first World War. Great Britain graciously waived the collection of certain claims, a goodly portion of which the United States had yet to admit liability for, which could be allocated by the State Department, if Congress passed the required appropriation bill, for the purpose of satisfying those claims "which the Government of the United States regards as meritorious." The State Department was thus placed in the remarkable position of adjudging the validity of American blockade claims, claims based on alleged infringements of neutral rights which the United States had so
recognized but which now, under the terms of settlement, were removed from further consideration so far as the American Government was concerned.

In the matter of principle the two governments merely reserved the right to disagree -- in event of another period of war Great Britain, if belligerent, could renew the measures which the United States had protested as illegal, while the United States, if neutral, could resume its attitude of protest.\(^{39}\)

Honorable Carl Hayden
United States Senate
Washington 25, D. C.

My dear Senator Hayden:

This is in reply to your letter of 12 March 1953 concerning the United States Navy following the British practice in the matter of search and seizure during World War I.

The State Department's note, of 21 October 1915, to the British Government was in protest to the British practice of stopping and forcing into British ports, American ships and cargoes destined in good faith for neutral ports. The note in part made reference to "vessels seized and detained on suspicion while efforts are made to obtain evidence from extraneous sources to justify the detention and the commencement of the prize proceedings". Instances were cited of American ships being detained for periods in excess of a month before being allowed to proceed to their destination. I have found no instance of the U. S. Navy participating in search and seizure activities such as the State Department note objected to.

Visit and search was carried out by our Navy during World War I but in every case it was accomplished on the high seas in strict accordance with international law, and under the official Instructions for the Navy of the United States Governing Maritime Warfare, June 1917, which was in force at the time.

I have been unable to locate any correspondence indicating that the Navy Department discussed with the State Department after 20 February 1919, the question of search and seizure by ships of the U. S. Navy, nor if the State Department requested any further information.

I trust that this information will be of assistance to you.

Sincerely yours,

/s/ John B. Heffernan

John B. Heffernan
Rear Admiral, USN (Ret.)
Director of Naval History (OP-29)
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