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A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941

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A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941

Aaron Xavier Fellmeth[†]

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"To be neutral and unneutral at one and the same time is a legal monstrosity."

— Edwin Borchard and William Potter Lage, 1940¹

"If neutrality means a crushing of world morality it is better that we take sides and fight."

— Senator Elbert Thomas, 1939²

I. INTRODUCTION: AN INTERNATIONALIST IN ISOLATIONIST TIMES

Franklin Delano Roosevelt grew up in Europe and in many ways identified profoundly with the Old World. Former Under Secretary of State Sumner Welles, a great friend of Roosevelt, wrote "I doubt whether any American President since John Quincy Adams has been so well versed in the diplomatic history of his own country or so thoroughly familiar with the modern history of Europe or of Asia. His knowledge of geography was exceptional and his grasp of the principles of geopolitics almost instinctive."³ As a leader of international upbringing⁴ who worried intensely about the fate of Europe and China and considered their strength an extension of American national security, the strong isolationist sentiment in the United States during the 1930s and early 1940s inspired in Roosevelt both sympathy and frustration. While personally deploring the horrors

¹ EDWIN BORCHARD & WILLIAM POTTER LAGE, *NEUTRALITY FOR THE UNITED STATES* 6 (2d ed. 1940).

² *Id.* at 397 (quoting Sen. Elbert Thomas of Utah, author of the failed Thomas Amendment of 1939).

³ SUMNER WELLES, *SEVEN DECISIONS THAT SHAPED HISTORY* 66 (1951).

⁴ According to one author, Roosevelt had been to Europe eight times by his fifteenth birthday, spoke French, German, and some Italian and Spanish, and had historical family business ties with China. ROBERT SHOGAN, *HARD BARGAIN* 26, 38 (1995).

of war, Roosevelt attempted to modernize the armed forces and punish the increasingly outrageous aggressions of the Axis powers, but recurrently encountered public or congressional opposition at every turn.⁵ Letters and petitions demanding noninvolvement and nonshipment of arms from college students, youth groups, and ladies societies rained on the White House. For example, in May 1940, one thousand Dartmouth undergraduates sent a wire to the White House demanding: "Keep the U.S. out of war!"⁶ Roosevelt privately called the vocal young Americans "shrimps" for their unwillingness to sacrifice in a noble cause, but he refused to take to the bully pulpit.⁷ Henry Kissinger has incisively described the national mood: "Americans were still incapable of believing that anything outside the Western Hemisphere could possibly affect their security. The America of the 1920s and 1930s rejected even its own doctrine of collective security lest it lead to involvement in the quarrels of distant, bellicose societies."⁸ Roosevelt made no decisive attempt to encourage interventionist sentiment. Instead, the men of Roosevelt's largely internationalist administration fed on each other's frustration with ignorant and parochial public opinion. Then-Secretary of State

⁵ See, e.g., ROBERT A. DALLEK, *FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932-1945*, at 87-90, 101 (1979); John T. Flynn, *Whom Are We Getting Ready to Fight?*, *THE NEW REPUBLIC*, Jan. 22, 1940, at 115; Letter from Samuel McCrea Cavert, General Secretary, Federal Council of the Churches of Christ in America, to Roosevelt (Oct. 5, 1935), reprinted in 3 *FRANKLIN D. ROOSEVELT AND FOREIGN AFFAIRS* 17, 17 (Edgar B. Nixon, ed., 1969) [hereinafter *FDR & FOREIGN AFFAIRS*]; Letter from Walter W. Van Kirk, Director, National Peace Conference, to Roosevelt (Mar. 3, 1936), reprinted in *id.* at 230.

⁶ T.R. FEHRENBACH, *F.D.R.'s UNDECLARED WAR, 1939 TO 1941*, at 59 (1967).

⁷ See JAMES MACGREGOR BURNS, *ROOSEVELT: THE LION AND THE FOX* 422 (1984). Even as late as April 1941, Secretary of State Cordell Hull's speech proposing to repeal the 1939 Neutrality Act elicited 600 letters in favor, but 1,100 opposing repeal.

⁸ CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 943 (1948).

⁸ HENRY KISSINGER, *DIPLOMACY* 372 (1994).

Cordell Hull spoke for most of the administration when he likened isolationists to "the somnambulist who walks within an inch of a thousand-foot precipice without batting an eye."⁹

While the will of citizens of the United States to stay out of the war fell only slightly between 1934 and 1941,¹⁰ their opposition to aiding Britain — that is, the desire for United States neutrality — plummeted after Hitler invaded Poland and continued to fall until the Pearl Harbor attack plunged opposition to its nadir.¹¹ This does not mean that a majority of Americans ever desired active participation in the war. The American public sympathized with the plight of the Allies and Chinese, but feared that only neutrality would keep the United States clear of foreign entanglements.¹² On the internationalist side of the ledger, many citizen groups lobbied for aid to countries fighting fascists. The Committee to Defend America by Aiding the Allies, for instance, sent twenty-two petitions to Congress with 659

⁹ 1 HULL, *supra* note 7, at 667.

¹⁰ See DALLEK, *supra* note 5, at 203. A 1937 poll found 95% opposition to the United States ever entering another world war. BURNS, *supra* note 7, at 399. Polls in autumn 1940 indicated 86% of those questioned opposed American entry into war. See WILLIAM L. LANGER & S. EVERETT GLEASON, *THE UNDECLARED WAR* 200 (1953). A mid-January 1941 poll still showed that a very large majority of Americans opposed entering the war directly. *Id.* at 254. In September, 1941, the polls still showed 75-80% opposition to war. *Id.* at 732.

¹¹ See LANGER & GLEASON, *supra* note 10, at 257, 291; WARREN F. KIMBALL, *THE MOST UNSORDID ACT* 126, 191 (1969) (noting that in December 1940, as much as 60% of Americans questioned favored aid to Britain even at risk of war); LANGER & GLEASON, *supra* note 10, at 254 (noting that by mid-January 1941, 70% of Americans questioned favored aid to Britain even at risk of war); see also Letter from Alan Barth to Henry Morgenthau, Jr., Secretary of the Treasury (April 4, 1941) (on file with Franklin Delano Roosevelt Presidential Library [hereinafter FDR Lib.]) ("Behind the continuing popular support of aid to Britain there still lies a twofold motivation: The American people desire the defeat of the Axis. And they desire to stay out of the war.").

¹² See generally ROBERT A. DIVINE, *THE ILLUSION OF NEUTRALITY* 21 (1962).

signatures each in favor of "giving all possible aid short of war to those who are now fighting the Dictators."¹³ Others, including celebrities like Douglas Fairbanks, sent letters, petitions, and telegrams urging similar measures.¹⁴ The vast majority of Americans, including Roosevelt, believed in the effectiveness of a foreign policy holding that — from the first loosening of the restrictions of the Neutrality Acts until the freezing of Japanese assets in July, 1941 — the United States could fight wars and successfully defend democracy in Europe and Asia without the loss of a single American life. The compromise wrought by these conflicting sentiments, unofficial aid coupled with official neutrality, finally resulted in inadequate aid and unneutral neutrality.

Between 1934 and 1941, Congress passed several joint resolutions designed to curtail the President's powers to send aid to victims of fascist aggression. Roosevelt publicly supported the early Neutrality Acts over the objection of the Secretaries of State and Treasury in order to please the many isolationist democrats in Congress.¹⁵ The New Deal required constant pressure and advocacy; like Göring, Roosevelt was reluctant to begin a war on two fronts. The Great Depression forced Roosevelt to concentrate his energies on domestic affairs at the expense of foreign policy. In fact, Roosevelt sometimes admitted that the American foreign policy was being decided on a twenty-four hour basis.¹⁶

Meanwhile, Roosevelt privately tried to weaken the neutrality laws through his main congressional ally in foreign affairs, Key

¹³ Letter from Conyers Read, Chairman, the Committee to Defend America by Aiding the Allies to Roosevelt (Dec. 3, 1940) (on file with the FDR Lib.).

¹⁴ See, e.g., Telegram from Douglas Fairbanks, Jr. to Roosevelt (Dec. 31, 1940) (on file with the FDR Lib.).

¹⁵ BURNS, *supra* note 7, at 249.

¹⁶ See, e.g., A. WHITNEY GRISWOLD, *THE FAR EASTERN POLICY OF THE UNITED STATES* 456 (1962).

Pittman of Nevada, Chairman of the Senate Foreign Relations Committee. Unfortunately for Roosevelt, the alcoholic Senator Pittman did not always reliably advance the President's interests in the legislative arena. Beginning in 1939, Roosevelt stopped relying on Pittman and began voicing his fears in public that legislation limiting his powers might have the effect of dragging the country into war rather than keeping it out.¹⁷ Late in 1939, Roosevelt publicly addressed Congress on the Neutrality Act: "I regret that the Congress passed that act. I regret equally that I signed that act."¹⁸ Roosevelt also feared that neutrality would indirectly aid aggressors,¹⁹ a fear that Winston Churchill shared.²⁰ Churchill, however, was not afraid to pressure Roosevelt into changing his aid policy when British funds began to run low.²¹

Although Roosevelt remained skeptical of Britain's claims that they were unable to pay for arms, he remained personally dedicated to helping the Allies by any means possible.²² In late 1940 he realized that Britain had exhausted its gold and foreign reserves.²³ He then

¹⁷ DALLEK, *supra* note 5, at 110; NATHAN MILLER, *FDR: AN INTIMATE HISTORY* 440 (1983).

¹⁸ Franklin D. Roosevelt, Message to Congress in Extraordinary Session Regarding the 1939 Neutrality Act (Sept. 21, 1939), *reprinted in* FRANKLIN D. ROOSEVELT, *ROOSEVELT'S FOREIGN POLICY, 1933-1941*, at 194 (1942) [hereinafter ROOSEVELT].

¹⁹ *Id.* at 179, 183.

²⁰ See Telegram from Winston Churchill [alias "Former Naval Person"] to Roosevelt (June 15, 1940), *reprinted in* 3 U.S. DEPARTMENT OF STATE, *FOREIGN RELATIONS OF THE UNITED STATES, 1940*, at 53, 53-54 (1957) [hereinafter FOREIGN RELATIONS].

²¹ See, e.g., *id.* at 54-55; Telegram from Winston Churchill [alias "Former Naval Person"] to Roosevelt (May 20, 1940), *reprinted in id.*, at 51, 51; Telegram from Winston Churchill to Roosevelt (June 11, 1940), *reprinted in id.* at 52, 52; Telegram from Winston Churchill [alias "Former Naval Person"] to Roosevelt (July 13, 1940), *reprinted in id.* at 57, 57-58.

²² See KIMBALL, *supra* note 11, at 29-30.

²³ See *id.* at 9-10.

redoubled his efforts to aid them — and succeeded. Often, Roosevelt's personal desire to aid the languishing Allies resulted in clear violations of the federal neutrality laws. This Article analyzes how Roosevelt violated the Neutrality Acts and the Constitution prior to the implementation of the 1941 Lend-Lease Act. While historians typically assume without close examination that Roosevelt violated national or international laws, this Article is the first comprehensive attempt to analyze the legality and constitutionality of Roosevelt's foreign affairs policy. It is not, however, this Article's purpose to portray FDR as a lawless dictator, as did so many of his histrionic contemporaries.²⁴ Yet, the fact remains that Roosevelt was no stickler for inconvenient legality; he had nothing but contempt for laws that impeded his version of justice.²⁵ As he quipped in a September, 1940 press conference: "I stopped being a lawyer twelve years ago."²⁶ The upshot of the clash between public or congressional shortsightedness on the one hand, and Roosevelt's almost clairvoyant understanding of the intentions of the fascists and his irreverence for the law on the other hand, was that Roosevelt did not consistently obey either the

²⁴ *E.g.*, 86 CONG. REC. 7657 (June 6, 1940) (statement of Sen. Schwollenbach). After Roosevelt announced the destroyers-for-bases deal, the St. Louis *Post-Dispatch* called Roosevelt "...America's first dictator..." BURNS, *supra* note 7, at 441. During the Lend-Lease Act hearings, several congressmen and senators labelled Roosevelt a would-be "dictator." *See, e.g.*, KIMBALL, *supra* note 11, at 163, 171 (quoting repeat charges by Rep. Hamilton Fish, Republican of New York), 176 (quoting charges by House and Senate minority reports), 179 (quoting charges by Sen. Carter Glass, Democrat of Virginia).

²⁵ *See, e.g.*, Letter from Roosevelt to King George VI (Nov. 22, 1940) *cited in* SHOGAN, *supra* note 4, 259 (deriding "legalists" in connection with destroyers-for-bases deal).

²⁶ SHOGAN, *supra* note 4, at 239.

letter or spirit of American neutrality laws and the Constitution.²⁷ His obedience to either letter or spirit was largely contingent upon the tension between the relative isolationism of the national mood and Roosevelt's perception of the necessity to aid the victims of fascist aggression. Of course, history seems to have exonerated FDR, but there is some question whether the repeated violation of the neutrality laws and the Constitution in service of Roosevelt's worthy goals was in any sense inevitable.

The vital issues raised by Roosevelt's conduct of foreign affairs recur frequently — almost annually, in fact — in United States political and constitutional debates. These issues include the President's constitutional power to dispose of military arms and vessels; the relative control under the Constitution of Congress and the President over foreign relations (embracing commerce, foreign aid, recognition of foreign belligerency, neutrality, and war); the status of American neutrality legislation and policy; and the issue of proper statutory interpretation. There are also significant historical issues at stake, including Roosevelt's honesty in his dealings with the American public and Congress, and with foreign states; and how Roosevelt's actions illuminate his personality as a leader. This Article examines these issues in detail by reviewing Roosevelt's implementation (or nonimplementation, as the case may be) of United States neutrality law from 1935 until 1941.

²⁷ In fact, the whole question of whether Roosevelt obeyed the letter of the neutrality laws may be moot considering the President's claim to have plenary powers in the foreign relations sphere. In other words, I will discuss below the question of whether Congress' attempts to bridle the President's powers over foreign commerce were unconstitutional.

II. THE LAW OF NEUTRALITY IN THE UNITED STATES BEFORE
WORLD WAR II

The United States has a long history of neutrality dating back to only a few years after the nation's founding. Demands for neutrality intensified after the tragedy of World War I. The accelerated development of neutrality statutes in that period came partly from a desire to avoid repeating what some saw as Woodrow Wilson's mistaken foreign entanglements, and was partly a response to the industrial revolution and its corresponding increase in transnational trade. During a war, Congress believed, a nonparty that trades with one belligerent could provoke the other. In the years between the world wars, Congress passed several neutrality statutes with the intention of avoiding being dragged into war through trade.²⁸ Major neutrality laws were passed or amended in 1935, 1936, 1937, and 1939. In addition, earlier neutrality statutes (such as the 1917 Espionage Act) were still in on the books in the 1930s and early 1940s, and Congress passed other laws with neutrality provisions (such as the Act of June 28, 1940).

²⁸ Neutrality Act of 1939, 54 Stat. 4, 4 (1939) (stating in preamble desire of United States to preserve neutrality and avoid involvement in foreign wars); *see also* Divine, *supra* note 12, at 76-77; *cf.* *Suspine v. Compania Transatlantica Centroamericana*, 37 F. Supp. 268, 272 (S.D.N.Y. 1941) ("[T]he very purpose of [The 1939 Neutrality Act] is to preserve the neutrality of the United States and avert the risks which brought us into [World War I]."); Memorandum from Cordell Hull, Secretary of State, to Roosevelt 3-4 (Dec. 11, 1937) (on file with FDR Lib.) (purpose of 1937 Neutrality Act is *inter alia* to avoid entanglement in foreign war).

A. The 1917 Espionage Act

Congress did not discuss the 1917 Espionage Act²⁹ in the 1930s beyond passively listening to expert testimony. However, that Act was still valid until 1941, and parts of it continued in effect well beyond 1941. Although the Espionage Act was originally drafted to apply to World War I, it had two provisions relevant to Roosevelt's actions prior to American entry into World War II. Title V of the Act, entitled "Enforcement of Neutrality," states:

SEC. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.³⁰

Section 6 of Title V provides for criminal penalties for any violation of Section 3.

Worth noting is Section 3's passive wording. Because of the lack of grammatical subject, Title V, Section 3 causes it to apply to

²⁹ Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917). Congress amended the 1917 Espionage Act in 1940 to provide for stiffer penalties. Amendment to 1917 Espionage Act, ch. 72, 54 Stat. 79 (1940).

³⁰ Espionage Act of 1917, ch. 30, 40 Stat. 222 (1917).

any individual, corporation, or government agency or official. The Act makes it unlawful for *anybody or anything* to "send out of the jurisdiction of the United States any vessel" This includes the President or the Departments of the Navy and War. The effect of Section 3 is to completely bar the sale, loan, or gift, direct or indirect, of any ship or vessel by anyone in the United States to any belligerent. Although at the time the Espionage Act was passed the word "vessel" probably was not contemplated to include airplanes, the sale, loan, or transfer of airplanes would at least seem to violate the spirit of the Act.

B. The 1934 Johnson Act

The year 1934 was a busy one for foreign policy legislation. Among the laws passed to preserve American neutrality was the Johnson Bill,³¹ which made it a crime for any person to make loans or sell bonds to governments that had defaulted on prior loans to the United States. Defaulting countries included France, England, and Greece, but not Finland, China, or the USSR. Roosevelt supported the Bill, at the time, to strengthen his political backing among Republicans.³² This would prove cumbersome when World War II erupted, as it prevented the President from allowing private loans that would let Britain or France buy American arms. Section 2 of the Act excluded United States government corporations, including those created by special authorization of Congress, from the definition of parties forbidden to make loans. Thus, government-to-government loans were still possible if Congress would allow them.

A few weeks after the passage of the Act a number of problems arose in interpretation, and Treasury Secretary Morgenthau

³¹ ch. 112, 48 Stat. 574 (1934).

³² See DALLEK, *supra* note 5, at 74.

arranged a conference between himself, Senator Johnson, Attorney General Robert Jackson, and Secretary of State Cordell Hull on April 27, 1934. At that meeting, Senator Johnson specified that the statute was not meant to apply to quotidian commercial instruments such as time drafts or banker's acceptances.³³ Thus, the Johnson Act only prohibited large scale private loans; ordinary international commercial instruments and government loans remained legally possible.

C. The Neutrality Acts, 1935-1939

1. The 1935 Neutrality Act

Throughout 1935 Italy was preparing to invade Abyssinia in full view of the League of Nations and the rest of the world. Fearing that the country could be dragged into war by arming the belligerents,³⁴ Congress passed the first Neutrality Act by joint resolution, which Roosevelt signed on August 31.³⁵ The 1935 Neutrality Act gave the President for the first time a legal basis to institute a general system for controlling arms exports.³⁶ Specifically, it required that "upon the outbreak or during the progress of war between, or among, two or more states," the President must proclaim the state of war and "it shall thereafter be unlawful to export arms,

³³ Memorandum from E.H. Foley, Acting General Counsel to the Treasury Department, to Henry Morgenthau, Secretary of the Treasury, attachment at 3 (Dec. 12, 1940) (on file with FDR Lib.).

³⁴ DONALD F. DRUMMOND, *THE PASSING OF AMERICAN NEUTRALITY, 1937-1941*, at 44 (1955).

³⁵ Neutrality Act of 1935, ch. 837, 49 Stat. 1081 (1935).

³⁶ The law did have a recent precedent. In 1934, Congress had passed a joint resolution designed to allow the President to prohibit arms sales to countries involved in the Spanish conflict if in his opinion such an embargo would help establish peace. ch. 365, 48 Stat. 811 (1934).

ammunition, or implements of war from any place in the United States, or possessions of the United States, to any port of such belligerent states" or to the port of a neutral state for transshipment.³⁷ It also established the interdepartmental National Munitions Control Board under the chairmanship of the Secretary of State, who was to administer the arms export control provisions of the Act. To implement these regulations, the Act required all persons engaged in the business of manufacturing, exporting, or importing arms to register with the Secretary of State; it authorized the Secretary of State to promulgate rules and regulations to administer and enforce the new arms export controls and authorized the President to designate a list of articles subject to these controls; and it established universal licensing requirements for all arms imports and exports.³⁸ Although the State Department had sought such statutory authority for arms export control independent of neutrality legislation, it moved quickly to establish a control regime under its new mandate. On September 19, 1935, Secretary of State Hull established the Office of Arms and Munitions Control to exercise the functions vested in him under the law.

Although the Act required, in mandatory language, that the President "shall" proclaim a state of war between two or more countries where such a state exists, he "may" extend the resulting embargo to any belligerents who entered after the war had erupted.³⁹ Moreover, Congress left it up to the President's judgment to determine when to withdraw the embargo.⁴⁰ But the President's discretion to determine which exports were subject to embargo was limited by the terminology, "arms, ammunition, and implements of

³⁷ Neutrality Act of 1935, ch. 837, 49 Stat. at 1081.

³⁸ *Id.* §2, 49 Stat. at 1082-83.

³⁹ *Id.* at 1081.

⁴⁰ *Id.* at 1082-83.

war.” This list did not include the wider term “munitions of war” and, as a result, Secretary of State Hull informed Roosevelt that he had no legal discretion to embargo processed metals, raw materials, petroleum products, or foodstuffs.⁴¹ Roosevelt pursued a policy consistent with this interpretation.⁴²

While Roosevelt did not resist the passage of the 1935 Neutrality Act, he did privately oppose its limitations. His words at the signing were mostly conciliatory; he approved of the legislation’s goal of keeping the United States out of war. Roosevelt said. “[t]he purpose is wholly excellent, and this joint resolution will to a considerable degree serve that end.”⁴³ On the other hand, he warned prophetically that limiting the President’s flexibility could have unforeseeable consequences. “It is conceivable that situations may arise in which the wholly inflexible provisions of Section I of this act might have exactly the opposite effect from that which was intended. In other words, the inflexible provisions might drag us into war instead of keeping us out.”⁴⁴

2. The 1936 Neutrality Act

The 1936 Neutrality Act⁴⁵ essentially re-enacted the 1935 Act with added provisions prohibiting loans or security sales to

⁴¹ Radiogram from Cordell Hull, U.S. Secretary of State, to Roosevelt (Oct. 11, 1935), *reprinted in* 3 FDR & FOREIGN AFFAIRS, *supra* note 5, at 19.

⁴² See Letter from Roosevelt to Rev. W. Russell Bowie, Rector, Grace Church (Oct. 30, 1935), *reprinted in id.* at 43; Letter from Roosevelt to J. David Stern, Publisher, *The New York Post* (Dec. 11, 1935), *reprinted in id.* at 121.

⁴³ Franklin D. Roosevelt, Statement of the President on Signing the 1935 Neutrality Act (Aug. 31, 1935), *reprinted in* FRANKLIN D. ROOSEVELT, ROOSEVELT’S FOREIGN POLICY, 1933-1941, at 76 (1942).

⁴⁴ *Id.*

⁴⁵ Neutrality Act of 1936, ch. 106, 49 Stat. 1152 (1936).

belligerents, regardless of whether they were in default of a war debt.⁴⁶ In addition, through its influence on the drafters of 1936 Act, the Roosevelt Administration managed to engineer a minor change in wording, from the 1935 Act's mandate that "upon the outbreak of war . . . the President shall proclaim" a state of war, to the 1936 Act's softer mandate that "[w]hensoever the President shall find that there exists a state of war . . ." he must apply an embargo. This change in wording seemed to grant the President some unspecified (but probably small) amount of discretion in determining when a state of war existed. Beginning in 1936, Roosevelt would intentionally misconstrue this wording as granting him literally unlimited discretion in determining whether two or more states were at war.

The new Act also stated that the President "shall," as opposed to "may," extend the embargo to any states that enter the war, and "shall" again revoke the proclamation when he judges that a state of war no longer exists.⁴⁷ The provisions expanded the principle of neutrality well beyond what international law or American traditions required;⁴⁸ the new law really amounted to an abrogation of United States participation in punishing violations of international law, and of any responsibility to help victims of unjust hostilities. "As the aggressors bestrode Europe, America abolished the distinction

⁴⁶ *Id.* §1a, 54 Stat. at 1153.

⁴⁷ *Id.* 54 Stat. at 1152.

⁴⁸ See 2 OPPENHEIM'S INTERNATIONAL LAW 543 (Hersh Lauterpacht ed., 5th ed. 1935) ("[I]t does not, according to the International Law of the present day, constitute a violation of neutrality for a neutral to allow his subjects to supply either belligerent with arms and ammunition in the ordinary way of trade."); CHARLES G. FENWICK, AMERICAN NEUTRALITY: TRIAL AND FAILURE 115 (1940) ("[T]he neutrality legislation of the United States has on the whole been stricter in its prohibitions than the international law of neutrality has required."); *cf. id.* at 122-23 (reciting neutrality in American history that permitted sales of arms to both belligerents). For an excellent discussion of the historical tradition of American neutrality, see generally DIVINE, *supra* note 12, chs. 1 & 2.

between aggressor and victim by legislating a single set of restrictions on both.”⁴⁹ Like the 1935 Act, the 1936 Act did not grant the President discretionary power to embargo munitions of war (petroleum products, processed metals, machinery, etc.) other than arms. This would have been useful in the Italian-Abyssinian conflict where United States companies were supplying Mussolini with much of the manufactures and raw materials other than arms that he needed to wage war.

Because of the wording of the 1936 Act, its provisions did not apply to internal wars. Thus, when “civil war” broke out in Spain in the summer of 1936, the President had a free hand under national and international law to aid the democratically-elected Spanish government against Franco’s fascist-backed insurgents. He did not. Instead, he sought and received from Congress a statute that made it a crime to export arms, ammunition, or implements of war to Spain, directly or indirectly.⁵⁰ The purpose of this Act⁵¹ was to prevent U.S. involvement in the war that would, Congress thought, inevitably spread abroad since foreign powers were aiding both sides. Senator Pittman, the Chairman of the Committee on Foreign Relations — with the backing of the Roosevelt administration — declared that “both forces are receiving arms, without blockade of their ports, from various powerful countries of the world. Both forces are being augmented by the soldiers of other powerful European countries.”⁵² Strictly speaking, Pittman’s assertion was not true; no European “soldiers” entered into the Spanish civil war on the side of the Republican government. Some civilian volunteers — American as

⁴⁹ KISSINGER, *supra* note 8, at 378.

⁵⁰ See DRUMMOND, *supra* note 34, at 45. In fact, this embargo constituted an interference with Spain’s internal affairs in that it directly aided the insurgents. Such an embargo arguably violated international law.

⁵¹ Neutrality Act of 1937, 50 Stat. 3 (1937).

⁵² See 81 CONG. REC. 74 (1937) (statement of Sen. Pittman).

well as European — did fight in support of the Republican government, but they hardly qualified as “soldiers of . . . powerful European countries.” Actually, Pittman and the Roosevelt Administration made these arguments to create an excuse for their morally and legally questionable policy of allowing Germany and Italy a free hand to flout international law and wage undeclared war on Spain.

3. The 1937 Neutrality Act

Congress passed even stronger legislation in 1937 that the New York *Herald Tribune* mockingly called “An Act to Preserve the United States from Intervention in the War of 1914-18.”⁵³ The lengthy 1937 Neutrality Act amended the 1935 Neutrality Act to include countries engaged in civil strife (targeted obviously at Spain).⁵⁴ Like the 1936 Neutrality Act, the 1937 Act required the President to extend the embargo to states engaged in war, and to revoke the proclamation where a state of war no longer existed. This provision was softened by a change that kept the sale by private companies of goods other than implements of war on a “cash-and-carry” basis legal until the President determined that such sales would endanger peace in the United States.⁵⁵ However, this provision did not allow government arms sales under any circumstances. For the sake of clarity, the Act explicitly stated what the 1935 Act implied — that the President’s power to determine which goods constitute

⁵³ SHOGAN, *supra* note 4, at 45.

⁵⁴ Neutrality Act of 1937, ch. 146, §1, 50 Stat. 121, 121 (1937). Several members of the Senate, including Pittman, had expressed a desire to generalize the 1936 embargo against Spain to apply to all countries engaged in a civil war. 81 CONG. REC. 74-79 (1937).

⁵⁵ Neutrality Act of 1937, ch. 146, 50 Stat. at 122.

munitions did not apply to sales of raw materials,⁵⁶ thereby clearly denying that the President had any discretion to declare oil, food, steel, and other raw materials to be "implements of war."

Like the 1936 Act, the 1937 Act forbade loans and security sales to belligerents, granting the President power to make certain exceptions.⁵⁷ The Act also contained several important new provisions. It forbade American ships from transporting arms of any state to a belligerent⁵⁸; it forbade the use of American ports and territorial waters by belligerent submarines or armed merchant vessels where the President has deemed such use threatening to American peace; and lastly, it forbade American merchant vessels engaging in trade with belligerents to arm themselves.⁵⁹

The 1937 Act, like its immediate predecessor, granted the President some small discretion in determining when a state of war existed, although once he had determined that a state of war existed he was bound to apply the statute. Unlike the 1935 Neutrality Act that it amended, the 1937 Neutrality Act's embargo on arms, ammunition, and implements of war did not expire the following year. Congress evidently intended the provisions of Section 1 to endure in the absence of renewing legislation. On the other hand, Section 2, which gave the President discretion to restrict the shipment of other goods not qualifying as implements of war, did self-terminate on May 1, 1939.⁶⁰ In order to prevent the President's cash-and-carry discretion from expiring, Senator Thomas of Utah compromised by

⁵⁶ See *id.*, at 121-22.

⁵⁷ See *id.*, at 123-24.

⁵⁸ See *id.*, at 126.

⁵⁹ See *id.*, at 127. Actually, this provision is quite weak considering that the United States was required to forbid belligerent vessels from entering U.S. ports under the 1907 Hague Convention. Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, art. 6, 1 Bevans 723, Oct. 18, 1907.

⁶⁰ See NEUTRALITY ACT OF 1937, § 2(e), ch. 146, 50 Stat. at 123.

introducing an amendment of Section 2 in early 1939 that added a blanket provision making the export of "essential war materials" unlawful.⁶¹ However, the Thomas Resolution also gave the President enough discretion to exempt a state that had been attacked by a treaty violator so long as that state had not itself violated a treaty. In other words, it gave the President discretion to punish states that violated international law, potentially provoking retribution. A majority in Congress rejected the Thomas Amendment on those grounds.⁶²

4. The 1939 Neutrality Act

Although he never abandoned his public commitment to the policy of neutrality Roosevelt was actively and publicly opposing the continuance of the 1937 Neutrality Act by the time the Act came before Congress for renewal.⁶³ Roosevelt's weak position on the subject of neutrality presented no obstacle to Congress, which renewed the Act anyway. Not entirely defeated, Roosevelt signed it into law. Compared to the 1937 Neutrality Act, the 1939 Neutrality Act⁶⁴ seemed stricter but actually had few canines. While substantially similar to the 1937 Act,⁶⁵ the 1939 Act changed the "cash-and-carry" provision to forbid any American vessel (including airplanes) to carry

⁶¹ See Borchard & Lage, *supra* note 1, at 396.

⁶² See *id.* at 396, 398.

⁶³ See, e.g., Franklin D. Roosevelt, Message to Congress Regarding the 1939 Neutrality Act (July 14, 1939), *reprinted in* ROOSEVELT, *supra* note 18, at 173, 173-78; Franklin D. Roosevelt, Message to Congress in Extraordinary Session Regarding the 1939 Neutrality Act (Sept. 21, 1939), *reprinted in id.* at 192, 193-98.

⁶⁴ NEUTRALITY ACT OF 1939, ch. 2, 54 Stat. 4 (1939) (codified as amended at 22 U.S.C. § 441 *et seq.* (1995)). Portions of the 1939 Neutrality Act are still valid law today.

⁶⁵ For example, the 1939 Act had the same provisions as the 1937 Act relating to the prohibition on loans and sales of securities, the submarines and armed merchant vessels, and the National Munitions Control Board.

any materials, articles, or passengers whatever to belligerent states, although Americans could still market to belligerents through foreign shippers.⁶⁶ The effect of the law was to forbid United States merchant ships from risking being sunk by belligerents. Congress knew that the sinking of a harmless American ship could force the United States to confront the responsible belligerents and, as a result, potentially involve the nation in war. However, Roosevelt managed to convince Congress to also alter the "cash-and-carry" provision to allow the sale of arms for cash by private companies.⁶⁷

Congress loosened other provisions of the 1939 Act as well. The Act required the President to issue a proclamation of neutrality only when "it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States."⁶⁸ Thus, when the President deemed that American neutrality might damage peace or American security by allowing fascist forces to win an important battle, the Act implicitly authorized him to allow sales of arms to the nonfascist state. This gave him a great deal of latitude in applying the Act, especially considering his views, examined below, that neutrality could drag the United States into a much more serious war than selling armaments to one side. On the other hand, the 1939 Act required, in mandatory language, that whenever the state of war "shall have ceased to exist" the President must revoke the proclamation.⁶⁹

In addition, the 1939 Act continued the loan and securities ban of the 1937 Act, but made an exception for ordinary commercial credits and short-term obligations.⁷⁰ Because the Treasury had

⁶⁶ NEUTRALITY ACT OF 1939, ch. 2, § 2(c), 54 Stat.at 4.

⁶⁷ For a good general discussion of Roosevelt's efforts to repeal or relax the restrictions of the Neutrality Act in 1939, see Divine, *supra* note 12, at 286-335.

⁶⁸ NEUTRALITY ACT OF 1939, ch. 2, § 1(a), 54 Stat. at 4.

⁶⁹ *Id.*

⁷⁰ *Id.* § 7(a), 54 Stat.at 8.

recorded a statement of Senator Johnson clarifying this aspect of the Johnson Act,⁷¹ there was no serious question of whether the ordinary commercial credits provision of the 1939 Act conflicted with the Johnson Act.

The 1939 Act repealed the 1937 Neutrality Act, but did not itself have any provisions for self-termination.⁷² Congress intended the Act to continue until it purposely chose to repeal it, which in some respects it did in 1941. By joint resolution of November 17, 1941, Congress repealed all the major substantive limitations on the President's power instituted by the 1939 Neutrality Act⁷³ in order to give him more room to implement the Lend-Lease Act. However, some provisions of the 1939 Act remained in place even after 1941, such as the Section 7 prohibition on private loans and securities sales.

D. The Walsh Amendment

Congress passed one final act relevant to neutrality in 1940. The Act of June 28, 1940, entitled "An Act to Expedite National Defense, And for Other Purposes," was originally drafted to fund increased naval shipbuilding. However, Senator David Walsh of Massachusetts tacked on Section 14 (subsequently called the "Walsh Amendment"). While the Act of June 28, 1940 mainly provided for advanced payments to defense contractors,⁷⁴ the Walsh Amendment added:

⁷¹ See *supra* text accompanying note 33.

⁷² NEUTRALITY ACT OF 1939, ch. 2, § 19, 54 Stat. at 12.

⁷³ Joint Resolution to Repeal Sections 2, 3, and 6 of the Neutrality Act of 1939, and For Other Purposes, 55 Stat. 764 (1941).

⁷⁴ 54 Stat. 676 (1940) [hereinafter I will refer to § 14 of this Act as the "Walsh Amendment"].

(a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title . . . shall hereinafter be exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.

(b) The Secretary of War and the Secretary of the Navy as the case may be are hereby requested and directed to furnish or cause to be furnished to the respective chairmen of the Committees on Military Affairs and the Committees on Naval Affairs of the Senate and house of Representatives a copy of each contract, order, or agreement covering exchange of deteriorated, unserviceable, obsolescent, or surplus military or naval equipment, munitions, or supplies exchanged for other military or naval equipment, munitions or supplies, and a copy of each contract, order, or agreement shall be furnished regarding any other disposition of military or naval equipment, munitions and supplies by which the title passes, either *de jure* or *de facto*, from the United States, or by which delivery of material thereunder is deferred, where the original cost of such military or naval equipment, munitions or supplies exceeded or exceeds \$2,000. The copies of each contract, order, or agreement herein referred to shall be transmitted to the respective chairmen of the committees not later than twenty-four hours after such contract, order or

agreement is made, and the chairman of each committee shall consider such contracts, orders or agreements confidential unless a majority of members of his committee shall direct the particular transaction to be made public.

(c) Nothing herein shall be construed to repeal or modify Sections 3 and 6, Title V of the Act approved June 15, 1917 (40 Stat. 222; U.S.C., Title 18, Secs. 33 and 36).⁷⁵

In summary, the Amendment first requires the Chief of Staff of the Army and the Chief of Naval Operations to certify that any weapons, ships, aircraft, munitions, or supplies leaving possession of the United States in any manner are, indeed, surplus and obsolete. The Amendment next requires the Secretary of Navy or Army Chief of Staff to expeditiously furnish Congress with a report of any transactions that fit the above description. Finally, the Act specifically denies any construction that would amount to a repeal or modification of the Title V provisions of the 1917 Espionage Act that outlawed sending out of the United States any vessel of war with the intent or knowledge that a belligerent would receive that vessel.⁷⁶

E. Analysis of American Neutrality Law and Legislative Intent

As the President correctly interpreted the legislative intent, Congress passed the various Neutrality Acts in response to public fears of American involvement in foreign wars. Indeed, during 1930s and early 1940s politicians rarely mentioned the word "neutrality" without in the same breath including a reference to "keeping us out of

⁷⁵ *Id.* § 14, at 681 (emphasis added).

⁷⁶ *Id.* § 14(c), at 681.

war.” Even where Congress allowed the President some modicum of discretion in the Acts, the prevention of American involvement in war motivated the changes. The 1939 Neutrality Act, for example, only allowed the President the discretion “necessary to promote the security or preserve the peace of the United States.” Congress probably relied on public opinion to keep Roosevelt’s use of discretion in check. It would have been naïve, however, for Congress to assume that either itself or the public could adequately monitor Roosevelt’s compliance with the laws. Moreover, Congress could not have entrusted Roosevelt with such discretion, and expect him to comply, if it had understood the intensity of his desire to help Great Britain resist the Nazis.

Just as one can distinguish between immediate intent (the intent to walk) and ultimate intent (the intent to get to work by walking) in a human being, one can theoretically distinguish between the intent of a statute and Congress’ ultimate goal in passing the statute. Congress’ immediate intent in passing its neutrality laws from 1917 to 1939 was the preservation of American neutrality,⁷⁷ but the ultimate goal was to avoid entanglement in foreign wars.⁷⁸ However, in drafting the Neutrality Acts, Congress misunderstood how foreign trade and aid might lead to American involvement in foreign wars.

⁷⁷ See Letter and Enclosure from R. Walton Moore, Acting Secretary of State, to Roosevelt (Dec. 15, 1936), *reprinted in* 3 FDR & FOREIGN AFFAIRS, *supra* note 5, at 539, 543-44 (stating Senate’s and public’s obsession with “real neutrality” to exclusion of consideration of best method to create peace).

⁷⁸ See H.R. REP. NO. 320, 75th Cong., 1st Sess. 3 (1937) (discussing 1937 Neutrality Act, H. Res. 242); *cf.* 1 HULL, *supra* note 7, at 415 (quoting his draft of President’s press statement after 1935 Neutrality Act: “I have approved this joint resolution because it was intended as an expression of the fixed desire of the Government and the people of the United States to avoid any action which might involve us in war.”). Moreover, the 1939 Neutrality Act was entitled “Joint Resolution to Preserve the Neutrality and the Peace of the United States and To Secure the Safety of Its Citizens and Their Interests.”

Congress ignored two ways in which American neutrality can ultimately lead to prolonged involvement in foreign wars. The first way is that an American declaration of neutrality and its resultant embargo might provoke a hostile nation into attacking the United States. For example, even if the United States had embargoed oil to China and Japan neutrally, Japan might have attacked United States territories or bases in 1941 in its quest to secure an oil supply elsewhere. Understanding the second way requires more foresight. The United States had already acquired enormous industrial potential by the 1930s. By applying an impartial embargo, as Roosevelt later argued, neutrality "may operate unevenly and unfairly — and may actually give aid to the aggressor and deny it to the victim."⁷⁹ If the victims were to lose to ruthless aggressors, the victorious belligerents could gradually gain the industrial power — by supplementing their own production with the production of conquered states — and geographical positioning — by occupying strategic bases previously controlled by the conquered states — that would allow them to attack and overwhelm the neutral United States.⁸⁰ Thus, Roosevelt warned Congress and the country when signing the 1935 Neutrality Act that the application of inflexible rules of foreign policy might "drag us into war instead of keeping us out."⁸¹ In July 1939, regarding the forthcoming review of the 1937 Neutrality Act, his words were much

⁷⁹ SELIG ADLER, *THE ISOLATIONIST IMPULSE, ITS TWENTIETH-CENTURY REACTION* 248 (1957) (quoting FDR).

⁸⁰ See Letter from Frederick H. Allen to Roosevelt (Jan. 3, 1936), reprinted in 3 *FDR & Foreign Affairs*, *supra* note 5, at 156, 157 (arguing to Roosevelt: "is it not better to give power to the President to try to prevent a war, than to give him the right to exercise certain powers to prevent the war from spreading to our own shores and so disturbing our peace and safety?"); cf. FENWICK, *supra* note 48, at v-vi (arguing that attitude of neutrality might prevent a state from preparing for its own defense were it attacked by "law-breaking" state).

⁸¹ See *supra* text accompanying note 44.

stronger: "Those who urge the retention of the present embargo continue to advance the view that it will keep this country out of war — thereby misleading the American people to rely upon a false and illogical delusion as a means of keeping out of war."⁸² At least by 1940 the public appears to have understood why, as a Gallup Poll indicated. Over sixty percent of the American people believed that Germany would eventually fight the United States if it beat the Allies.⁸³

Thus, because declaring neutrality could lead to prolonged involvement in foreign wars more quickly than early intervention, the Neutrality Acts created a fundamental tension between the stated intent of the Acts — to preserve American neutrality, and Congress' ultimate intent — to avoid American entanglement in foreign wars. By equating neutrality with noninvolvement in foreign wars, Congress made it impossible for the Executive to fulfill both the stated intent of the Neutrality Acts and the ultimate goals of Congress and the American public. This tension, in turn, gave Roosevelt a ready justification for either invocation or noninvocation of the Act when undeclared war or other hostilities broke out. If he decided that invoking a Neutrality Act would primarily hurt the aggressor (for example, if the United States only traded with the aggressor and not with the victim state), he could use his statutory discretion to proclaim that the parties had entered a state of war — albeit undeclared — and cause an embargo. Alternatively, if he decided that invoking a Neutrality Act would prevent American trade from aiding a victim of aggression, he could claim that if he proclaimed the existence of a state of war in the absence of a declaration by either party, it might

⁸² Franklin D. Roosevelt, Message to Congress Regarding the 1939 Neutrality Act (July 14, 1939), *reprinted in* Roosevelt, *supra* note 18, at 173, 174.

⁸³ *Gallup and Fortune Polls*, 4 PUB. OPINION Q. 101, 101-102 (1940); SHOGAN, *supra* note 4, at 22.

provoke one of the parties. Such a declaration, Roosevelt could argue, would conflict with Congress' intent of keeping the United States out of foreign wars. As I will show, Roosevelt used the laws for both these purposes to very unneutral effect.

III. ROOSEVELT'S FOREIGN POLICY, 1935-1939

From early in his first term, President Roosevelt had promised the country that the United States would remain neutral in and uninvolved with any foreign wars.⁸⁴ When general war broke out in Europe on September 3, 1939, Roosevelt addressed the public by radio that same night, declaring the neutrality of the United States while subtly trying to encourage interventionist sentiment. "At this moment there is being prepared a proclamation of American neutrality. This would have been done even if there had been no neutrality statute on the books, for this proclamation is in accordance with international law and in accordance with American policy. This [speech] will be followed by a proclamation required by the existing Neutrality Act. And I trust that in the days to come our neutrality can be made a true neutrality."⁸⁵ Roosevelt thereby acknowledged his duty to call a spade a spade, to recognize publicly a state of war when it was too overt to deny and to preserve the "true" impartiality of the United States. In fact, this was the first time since Italy invaded Abyssinia that the President had declared the existence of a war despite the obvious fact that various wars had been raging in Spain, Italy, and Germany; China and Japan; and the Soviet Union, the Baltic states, Poland, and Finland at various periods during the previous six

⁸⁴ See, e.g., Franklin D. Roosevelt, Address at the San Diego Exposition (Oct. 2, 1935), reprinted in Roosevelt, *supra* note 18, at 78, 79; *supra* text accompanying note 43.

⁸⁵ FDR'S FIRESIDE CHATS 149 (Russell D. Buhite & David W. Levy eds., 1993).

years. It is particularly ironic that Roosevelt used the phrase “a true neutrality,” since those are precisely the words in which Germany demanded in 1915 that the United States stop its “one-sided [trade] supply” of arms to Great Britain⁸⁶ — a one-sided supply with which, as I will relate, the United States was in 1940 to unapologetically provide Britain. Indeed, “a true neutrality” was the last thing Roosevelt wanted, for it would prevent American aid to the outgunned Allies. He betrayed his true wishes in persuading Congress to progressively loosen the Neutrality Acts, and by using his recovered trading authority to assist Great Britain and other victims of aggression.

Roosevelt was a sly and usually effective leader. He wanted not only to appear to comply with law and echo national sentiment, he desired to shape it as well. He knew that a change in the national mood toward interventionism would help him pressure Congress to abandon a strictly neutral stance and engage in the commercial favoritism characteristic of the Lend-Lease Act. “This nation will remain a neutral nation, but I cannot ask that every American remain neutral in thought as well. Even a neutral has a right to take account of facts. Even a neutral cannot be asked to close his mind or close his conscience,”⁸⁷ he hinted. “When peace has been broken anywhere, the peace of all countries everywhere is in danger. . . . Passionately though we may desire detachment, we are forced to realize that every word that comes through the air, every ship that sails the sea, every battle that is fought, does affect the American future.”⁸⁸ These are not the words of an isolationist or a true neutral.

In fact, if Roosevelt was correct that “an Allied victory was

⁸⁶ FENWICK, *supra* note 48, at 123.

⁸⁷ FDR’S FIRESIDE CHATS, *supra* note 85, at 150-51.

⁸⁸ *Id.* at 149.

essential to the security of the United States.”⁸⁹ By supplying Britain with arms the United States would be indirectly defending itself. Roosevelt personally believed this and, as a Gallup poll demonstrated, so did almost two-thirds of the American public.⁹⁰ In his public addresses, Roosevelt consistently and masterfully redefined the meaning of sending aid to the Allies. Aid to victims of fascist attacks was not only in the interests of charity and justice. It promoted national security. As he declared during a December 17, 1940, press conference, “it is . . . important from a selfish point of view of American defense, that we should do everything to help the British Empire to defend itself.”⁹¹ He failed to mention that this goal conflicted with his earlier declaration that the United States would “remain a neutral nation.” In this contest between the “neutrality” and “linked British–United States self-defense” strains in Roosevelt’s rhetoric, neutrality was sure to lose.

A. The Spanish “Civil War”

Because Roosevelt wished to aid the Allies and China unimpeded, he persistently refused to apply the neutrality laws to Germany, Italy, and Japan. This motive was lacking in the case of the Spanish “Civil War.” The Spanish Civil War gave Roosevelt his first opportunity to apply a neutrality statute. It was common knowledge that Germany and Italy funded Franco’s rebellion in Spain and had even sent troops and ordered ships and planes to attack Spanish cities. In fact, the Japanese Minister said that the United States was

⁸⁹ 1 HULL, *supra* note 7, at 766.

⁹⁰ See 4 PUB. OPINION Q., *supra* note 83, at 101-102.

⁹¹ Franklin D. Roosevelt, Press Conference on Dec. 17, 1940, *reprinted in* FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 604, 604 (Samuel Irving Rosenman ed. 1941) [hereinafter PUBLIC PAPERS & ADDRESSES].

“probably the only nation that is strictly adhering to an honest neutrality” in Spain.⁹² Still, Roosevelt refused to admit that Spain was at war *per se* with Italy and Germany. Because the 1936 and 1937 Neutrality Acts required that the President institute an embargo once he had proclaimed the existence of a state of war, Roosevelt simply declined to declare that Germany and Italy were at war with Spain.⁹³ Such a declaration would have required embargoes against Germany and Italy as well as Spain, thereby opening the possibility of provoking the two aggressors and bringing down the full furor of public isolationist sentiment on the administration. Moreover, private American entrepreneurs would be denied the opportunity to sell arms to the Spanish government. In any case, because Germany and Italy were not fully “at war” with Spain, Roosevelt’s use of his statutory discretion arguably seems justified. Roosevelt also cherished the notion of negotiating a peace in Europe, and he believed that provoking the fascist states would have possibly compromised that end. Of course this did not excuse Roosevelt from applying the law impartially, but the circumstances left enough room for doubt as to whether a state of war between Germany-Italy and Spain existed. In any case, the Neutrality in Case of Civil War Act eventually made clear that Congress intended to avoid involvement in that particular conflict regardless of whether an embargo would discriminate against

⁹² Letter from Claude G. Bowers, U.S. Ambassador in Spain, to Cordell Hull, U.S. Secretary of State, and William Phillips, U.S. Under Secretary of State (Oct. 30, 1936), *reprinted in* 3 FDR & FOREIGN AFFAIRS, *supra* note 5, at 465, 465.

⁹³ DALLEK, *supra* note 5, at 142-43. The United States’s refusal to sell arms to the Spanish government probably violated international law as well. Secretary Hull readily admitted states faced with internal insurgencies had the right to purchase arms from other states without discriminatory embargo, but pleaded weakly that a fear of involvement in war — justified or not — somehow excused the execution of a state’s international obligations. *See* 1 HULL, *supra* note 7, at 513-14.

the Spanish government.⁹⁴ Roosevelt dutifully forbade the export of arms to Spain.⁹⁵ Roosevelt was at least partially to blame for the Spanish embargo, which hastened the downfall of the Republican government and brought Franco to power. Rather than seeking congressional approval to aid the republican government, he instead solicited a law that amounted to an abdication of American responsibility to enforce international law. He thereby contributed to a denial of international law *qua* law and of morality in the world public order, and to the overthrow of the Spanish government, which the United States itself had long recognized as legitimate.

It is noteworthy, though, that Roosevelt *sought* and *obtained* legislation from Congress before implementing any Spanish embargo not authorized, in his estimation, by prior law. Whatever Roosevelt's duties were under international law, he showed respect for Congress' power over foreign commerce in this instance. But this respect for Congress only lasted as long as Roosevelt found it convenient.

B. Italy Invades Abyssinia

Whatever Roosevelt's reasons for his official apathy to the cause of Spanish democracy, he did not repeat his performance when Italy invaded Abyssinia (subsequently renamed Ethiopia) in 1935. The origins of the conflict were supposedly temporally distant. One of the sore spots in Italian history was the devastating defeat of the Italian army by the relatively crude Abyssinian forces in Adowa. Mussolini thought the best way to consolidate his own power would be to play to Italian nationalism by avenging Adowa forty years after the fact.⁹⁶

⁹⁴ See Neutrality Act of 1936, *supra* note 51 and accompanying text.

⁹⁵ Proclamation No. 2236 Forbidding Export of Arms, Ammunition, and Implements of War to Spain 50 Stat. 1831 (May 1, 1937).

⁹⁶ See 1 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR* 149 (1976).

In October, 1935, *il Duce* used a December 1934 border skirmish at Wal Wal as a pretext to wage undeclared war against Abyssinia, and he conquered and annexed it in May 1936.⁹⁷ At the beginning of the attack Roosevelt, knowing that Italy could not retaliate against the United States, announced American neutrality in accordance with the 1935 Act.⁹⁸ He later publicly acknowledged his duty to declare a state of war in spite of the fact neither side had issued a declaration of war.⁹⁹ The major advantage of the 1935 Neutrality Act was that, since Abyssinia could not afford U.S. arms in the first place, the embargo affected Italy alone. The disadvantage was that Italy could still purchase food for troops, steel, oil, and other nonlethal war-related supplies because Roosevelt could not legally include them in the embargo. To ameliorate this effect, Roosevelt tried (unsuccessfully) to persuade American businesses to refrain on moral grounds from doing business with Italy.¹⁰⁰ Secretary of State Cordell Hull reinforced the moral embargo by classifying oil, copper, trucks, tractors, scrap iron, and scrap steel as "essential war materials,"

⁹⁷ See 1 *id.* at 97.

⁹⁸ Proclamation No. 2141 Prohibiting the Exportation of Arms, Ammunition and Implements of War to Italy and Ethiopia, 49 Stat. 3474 (Oct. 5, 1935), *superseded by* Proclamation No. 2159 Prohibiting the Exportation of Arms, Ammunition, and Implements of War to Italy and Ethiopia, 49 Stat. 3498 (Feb. 29, 1936), *revoked by* Franklin D. Roosevelt, Presidential Statement Revoking Proclamation of Neutrality in Ethiopian War (June 20, 1936), *reprinted in* ROOSEVELT, *supra* note 18, at 98.

⁹⁹ Press Conference, Executive Offices of the White House, June 19, 1936, at 10:40 am, *reprinted in* 3 FDR & FOREIGN AFFAIRS, *supra* note 5, at 332.

¹⁰⁰ Franklin D. Roosevelt, Statement Condemning Any Profiteering in War in Ethiopia (Oct. 30, 1935), *reprinted in* ROOSEVELT, *supra* note 18, at 82. The Senate later regretted not having included oil in the embargo so as to further disadvantage the Italian military. 81 CONG. REC. 79 (1937) (statement of Sen. Gerald P. Nye).

eliciting squeals from extreme isolationists.¹⁰¹ The Roosevelt administration knew that freeing up farmers and miners would allow Mussolini to augment his army, the Italian economy being highly agricultural as it was, particularly in the south. Nonetheless, business ethics were not what Roosevelt had hoped, and American exports of raw materials useful for war continued to grow.¹⁰² While the net effect of the application of the 1935 Neutrality Act abroad was to disadvantage Italy, domestically the Act might have relieved moral pressures to commit to stronger measures.

Perhaps because of the moral embargo's impotence, or perhaps because most legislators agreed with the embargo as a policy matter, Congress never actively opposed Roosevelt having announced the moral embargo without congressional approval. Nobody questioned when the President derived the right to attempt to obstruct foreign commerce, a power that the Constitution explicitly delegates to Congress.¹⁰³ Although the embargo was not a legal obstruction to commerce, there is no question that Roosevelt meant to "regulate foreign commerce." The respect that Roosevelt showed for Congress' prerogatives in the Spanish Civil War already seemed on a downward roll.

¹⁰¹ BURNS, *supra* note 7, at 258. For an example of squealing isolationists, see BORCHARD & LAGE, *supra* note 1, at 320-21. For evidence of Borchard and Lage's extreme isolationism and moral relativism, see *id.* at 361 (proclaiming that Japanese aggression and atrocities in China "defy easy analysis" and it is "wise therefore to reserve moral judgments. The complexity of the problem dictates neutrality."); *id.* at 392-93 (condemning Americans who "pronounce a moral judgment" on German annexation of and atrocities in Austria and Czechoslovakia); *id.* at 394-95 (implying that Roosevelt's appeal to Germany and Italy for nonaggression merited "ridicule" for its misguided attempt to morally judge fascist aggression).

¹⁰² BURNS, *supra* note 7, at 258.

¹⁰³ U.S. CONST. art. I, § 8, cl. 3; see also THE FEDERALIST NO. 69, at 354 (Alexander Hamilton) (Garry Willis ed., 1988) ("[The President] can prescribe no rules concerning the commerce . . . of the nation . . .").

C. Japan Attempts to Swallow China

It was clear in the case of Abyssinia and Italy that the two sides were at war; Roosevelt could not pretend otherwise and had no reason for doing so. At the same time Roosevelt ignored Japan's blatant acts of aggression against China for many years without ever invoking any of the Neutrality Acts.¹⁰⁴ Although Japan did not declare war on China¹⁰⁵ (nor did Chiang Kai-Shek declare war on Japan, probably to avoid an American embargo),¹⁰⁶ it was clear by the July 1937 attack on and occupation of Peking (Beijing) that Japan was systematically attempting to take over China and crush any opposition to its imperialist rule. Roosevelt worried greatly about the safety of China and was infuriated with Japan,¹⁰⁷ but refused to proclaim that China and Japan were at war. Senator Pittman continually had to invent excuses for Roosevelt's failure to find a state of war when, for example, the Japanese escalated its bombing of Nanking in September and October 1937 and Congress questioned why the Act had not yet been invoked.¹⁰⁸ The real reason was fairly clear to the Japanese and American public alike. Unlike his decision in the Spanish case, and like his decision for Italy, Roosevelt's use of discretion aided the

¹⁰⁴ Without declaring war, Japan had invaded Manchuria (a northern province of China) in 1931, in violation of the Nine Power Treaty. See FENWICK, *supra* note 48, at 159.

¹⁰⁵ BORCHARD & LAGE, *supra* note 1, at 362.

¹⁰⁶ Cf. 1 HULL, *supra* note 7, at 641 (describing Chinese Foreign Office's worries that 1939 Neutrality Act would force Roosevelt to declare state of war between China and Japan).

¹⁰⁷ See WELLES, *supra* note 3, at 68-69.

¹⁰⁸ At first, Pittman attributed the President's failure to find a state of war to his attempts to negotiate peace and the possibility that an embargo would hinder him in that task. BORCHARD & LAGE, *supra* note 1, at 362-63. He later claimed, confusingly, that Roosevelt did not invoke the 1937 Act to protect Americans in the war zone. *Id.* at 366.

victim and impeded the aggressor.¹⁰⁹ By ignoring the obvious fact of war between the countries, Roosevelt allowed American businesses to profit by gasoline, steel, and other raw material sales to Japan, and to aid China by arms and other sales; Japan depended mainly on the United States for oil, and China depended almost entirely on the United States for its arms.¹¹⁰ Roosevelt did come close to applying the Neutrality Act in September 1937, in order to prevent any "incident" wherein the Japanese naval blockade might sink an American ship carrying airplanes to China. Roosevelt issued a statement that United States government merchant vessels could no longer transport arms or implements of war to Japan or China that were prohibited by his 1937 Neutrality Proclamation, and private merchant ships would do so at their own risk. Roosevelt, however, declined to actually invoke the Neutrality Act, declaring instead that the question of its application would be decided "on a 24-hour basis."¹¹¹ In fact, the airplanes were actually shipped to China through England and its Hong Kong colony.

In justifying the legality of his failure to find a state of war, Roosevelt relied both on his statutory discretion, pointing out that neither China nor Japan had declared war,¹¹² and on his interpretation of the ultimate intent of Congress. In December 1937, Secretary of State Hull drafted a nine-page memorandum for Senator Pittman detailing the rationale for Roosevelt's refusal to invoke the 1937 Neutrality Act against Japan and China.¹¹³ The main reasons

¹⁰⁹ See W.W. Willoughby, *Far Eastern Policies of the United States*, 34 AM. J. INT'L L. 193, 205 (1940).

¹¹⁰ See WELLES, *supra* note 3, at 69.

¹¹¹ Franklin D. Roosevelt, Statement Regarding Shipment of Planes to China (Sept. 14, 1937), *reprinted in* ROOSEVELT, *supra* note 18, at 129.

¹¹² See DRUMMOND, *supra* note 34., at 68-69.

¹¹³ Memorandum from Cordell Hull, Secretary of State, to Roosevelt (Dec. 11, 1937), *in* 7 FDR & FOREIGN AFFAIRS 366 (Donald B. Schewe ed., 2d series 1979).

advanced by Hull were similar to those that Roosevelt himself used; the President had discretion to determine the applicability of the Act and, given this discretion, the President acted reasonably because, first, both countries had refrained from declaring war, and second, the purposes of the Neutrality Act — keeping the United States out of war and avoiding dangers to American citizens and commerce — would not be fulfilled by invoking the Act.¹¹⁴ In other words, Roosevelt feared that invoking the Act would cause a deterioration in U.S. relations with Japan. Hull further argued that fighting between two countries does not necessarily mean they are at war,¹¹⁵ that a determination of a state of war would hinder efforts of the signatories of the Nine Power Pact to reach a peaceful settlement,¹¹⁶ and in light of all these circumstances, for the President to give “an unnecessarily narrow and legalistic characterization to the fighting, regardless of the real objective of the Neutrality Act, would . . . ignore his constitutional responsibilities in the domain of the foreign relations of our Government.”¹¹⁷ Henry Stimson, who in a few years would become Roosevelt’s Secretary of War, also felt that the Neutrality Law usurped the President’s constitutional power to recognize a state of war between foreign governments, although he admitted that his knowledge of the law on that subject was shaky.¹¹⁸

There are strong reasons to question the validity of these justifications. First, Congress had made it plain that, in passing the 1935 and 1937 Neutrality Acts, its purpose was to deny the President

¹¹⁴ 7 *id.* at 367-70.

¹¹⁵ 7 *id.* at 371.

¹¹⁶ 7 *id.* at 374-75.

¹¹⁷ 7 *id.* at 374.

¹¹⁸ See Letter from Henry L. Stimson to Raymond Leslie Buell, President, Foreign Policy Association, Inc., at 1-3 (Nov. 13, 1937) (on file with Yale University Sterling Memorial Library, Manuscripts and Archives, Henry L. Stimson Papers [hereinafter Stimson Papers]).

discretion in singling out aggressor states like Japan for unfavorable treatment.¹¹⁹ Congress could not have been clearer had it mentioned Japan in the statutes themselves. Moreover, the question of belligerent nations having or not having declared war is not legally dispositive of whether a state of war actually exists.¹²⁰ Hull himself admitted that "Japan was factually at war with China, whatever the legal situation."¹²¹ Stimson also conceded that "nearly every man on the street would have a very vigorous view that what Japan is doing in China today is war if there ever was war."¹²² Of course, if Japan was factually at war with China, it was legally at war as well. If Roosevelt refused to acknowledge the state of war, it did not mean Japan was not at war under national or international law, it meant Roosevelt was violating the intent of the 1935, 1936, and 1937 Neutrality Laws. This is particularly true in light of his words and deeds in the Italian-Abyssinian war. In that conflict, Italy had not declared war, but Roosevelt chose to invoke the Neutrality Act because a U.S. embargo could only hurt Mussolini. In a June 1936 press conference: "Our own Neutrality Statute seems fairly clear that when the President finds that a state of war exists he shall . . . issue a proclamation. If you will remember last October — of course there was no declaration of war — but almost as soon as there had been a battle and people were killed, regular troops in action on both sides, we found that a state of war existed."¹²³ Roosevelt had found a state of war to exist between Abyssinia and Italy despite the lack of any declaration of war. "They are dropping bombs on Ethiopia — and

¹¹⁹ See 1 HULL, *supra* note 7, at 229, 410-13, 461-63.

¹²⁰ See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

¹²¹ 1 HULL, *supra* note 7, at 893.

¹²² Letter from Henry L. Stimson, *supra* note 118, at 2.

¹²³ See Press Conference, Executive Offices of the White House, June 19, 1936, at 10:40 am, FDR & FOREIGN AFFAIRS, *supra* note 5, at 332.

that is war," he commented, "[w]hy wait for Mussolini to say so?"¹²⁴ Why, indeed? Declaring war is simply a formality compared to attacking and occupying the territory of another state. While such a thing as hostilities "short of war" exists,¹²⁵ that description would not have fit the situation of one state attacking, bombing, and occupying another for six years, then attempting to conquer it entirely. The same reasoning must apply to the Sino-Japanese War as to the Italian-Abyssinian case. The plain meaning of the 1937 Neutrality Act required the President to apply the Act if a state of war existed — declared or undeclared — as it indisputably did between China and Japan. Nowhere in the statute or records of debate did Congress manifest an intent to give the President unfettered discretion in finding a state of war to exist; quite the contrary, Congress repeatedly rejected Roosevelt's proposed legislation giving him authority to determine whether to apply an arms embargo.¹²⁶ In any case, where the President is given discretion to act or not act by domestic legislation, he must not neglect his constitutional duty to employ his discretion in good faith.¹²⁷

The real reason that Roosevelt failed to follow his own precedent and invoke the Neutrality Act in Japan's case was his desire to continue trade with and aid to China.¹²⁸ While there was no danger of provoking Italy, Roosevelt could not apply strong sanctions against

¹²⁴ BURNS, *supra* note 7, at 257.

¹²⁵ See generally CHARLES G. FENWICK, INTERNATIONAL LAW ch. 23 (2d ed. 1934). But see Letter from Raymond Leslie Buell, President, Foreign Policy Association, Inc., to Henry L. Stimson, attachment at 2-3 (Nov. 10, 1937) (on file with Stimson Papers) (arguing without that President has "widest discretion" to determine that there is no state of war between Japan and China).

¹²⁶ See 1 HULL, *supra* note 7, at 229, 410-13, 461-63.

¹²⁷ Cf. U.S. Const. art. II, § 3 ([The President] shall take care that the laws be faithfully executed . . .) (emphasis added).

¹²⁸ See FENWICK, *supra* note 48, at 145-46; WELLES, *supra* note 3, at 69.

the Japanese from fear of undermining peace negotiations.¹²⁹ Moreover, although public opinion favored an embargo against Japan,¹³⁰ Roosevelt believed that he was ultimately helping the Chinese by not declaring a state of war to exist. In fact, rather than imposing the "impartial" embargo mandated by the 1937 Neutrality Act, Roosevelt attempted to dissuade American arms manufactureres from trading with Japan.¹³¹ Clearly, Roosevelt had his cake and was eating it, too. By not invoking the 1937 Neutrality Act, he benefitted American businesses and Chiang Kai-Shek without seriously risking American involvement in the war. Moreover, by not invoking the Neutrality Act, Roosevelt could — and did — selectively impose effective "moral embargoes" (but not legal embargoes) against certain exports to Japanese in order to punish them for their actions in China.¹³² Professor W.W. Willoughby, writing in *The American Journal of International Law* in 1940, found Roosevelt's failure to find a state of war "perhaps" laudable because he approved of the aid to China.¹³³ He did not, however, discuss the questionable legality of Roosevelt's policy except for noting Roosevelt's evident lack of authority to institute an embargo, moral or otherwise.¹³⁴

As for Stimson's admittedly unresearched assertion that the Constitution confers upon the President alone the power to determine when foreign states are at war, neither the Constitution nor historical precedent offers any clear support. The Constitution does not expressly or implicitly assign this function to the President; the only

¹²⁹ See DALLEK, *supra* note 5, at 194.

¹³⁰ *Id.* at 194-95, 236-37.

¹³¹ BORCHARD & LAGE, *supra* note 1, at 386-87.

¹³² See WILLOUGHBY, *supra* note 109, at 203. These embargoes, which increased with time to eventually stop all trade with Japan, were one of the main causes of Japan attacking the United States at Pearl Harbor.

¹³³ See *id.* at 205.

¹³⁴ See *id.*; see also *supra* text accompanying note 103.

evident source of such a power would be the legally null dicta of *United States v. Curtiss-Wright Export Corp.*¹³⁵ Quincy Wright attempted to justify that the President alone had the power to recognize when foreign states are at war. His argument relied on an assumption and a supposedly logical inference. The assumption is that the President has vast powers in the field of foreign relations. To support this contention he cited only the legally invalid dicta of *Curtiss-Wright*, an article written by the author of that opinion (Justice Sutherland), an article he had written,¹³⁶ and, in a different article addressing the same subject, the ancient Supreme Court case *The Divina Pastora*,¹³⁷ which he claimed held that the President has authority to recognize the existence of a foreign war, but in reality held no such thing.¹³⁸ From that highly dubious position he inferred that "it may be doubted whether even a joint resolution, passed by two-thirds in both houses over the President's veto, could recognize the existence of foreign war and declare neutrality."¹³⁹ To support this proposition, Wright cited two sources — a private statement by John Quincy Adams when he was Secretary of State and a report from the Senate Committee on Foreign Relations in 1897.¹⁴⁰ Adams's view, which he did not publicly espouse in the first place, can be disregarded as self-serving and completely lacking in supporting evidence. As for the Senate Committee on Foreign Relations, Wright reports it to have said: "In the department of international law, therefore, properly

¹³⁵ 299 U.S. 304 (1936). See *infra* Section IV.D and Part V

¹³⁶ See Quincy Wright, *The Power to Declare Neutrality Under American Law*, 34 AM. J. INT'L L. 302, 308-09 n.37 (1940).

¹³⁷ *The Divina Pastora*, 17 U.S. [4 Wheat.] 52 (1819).

¹³⁸ *Id.* at 54; See Quincy Wright, *The Lend-Lease Bill and International Law*, 35 AM. J. INT'L L. 305, 305 n. 3 (1941).

¹³⁹ See Wright, *The Power to Declare Neutrality Under American Law*, *supra* note 135, at 309.

¹⁴⁰ *Id.* at 309 n.39.

speaking a Congressional recognition of belligerency or independence would be a nullity." While statements against interest should be given heavy weight, isolated statements of a single committee of the Senate during a single year are certainly not dispositive of the allocation of power by the Constitution. Nonetheless, one could seek independent justifications for such a grant of power to the President. After all, the Senate was arguably correct in its assessment of recognition of independence. The Constitution assigns to the President alone the duty (not power, but duty) to receive foreign ambassadors.¹⁴¹ As for the foreign belligerency issue, the Constitution confers no power or duty on the President that could reasonably be applied directly or analogously to recognition of belligerency. Recognizing foreign belligerency does not apply any law already existing and cannot therefore be characterized as "executive." On the contrary, recognition of belligerency is a policy decision that entails either the United States's participation in the war — clearly a congressional prerogative — or a declaration of neutrality with all its attendant alteration of existing laws — also a quintessentially legislative function. Because the Constitution is not clear on the issue, and considering the effects of the power to recognize foreign belligerency, the most probable answer is that the President has power to recognize foreign belligerency *absent legislation to the contrary*. Congress alone may decide final issues of law and public policy, subject to the President's veto. The recognition of foreign belligerency, while certainly involving foreign affairs, more importantly affects issues of public policy and law, and contrary to Wright's contention, the decision of two-thirds of Congress decides the issue. In any case, the legal issue is moot, first because the 1935, 1936, and 1937 Neutrality

¹⁴¹ U.S. Const. art. II, § 3. *But see* THE FEDERALIST NO. 69, *supra* note 103, at 352 (Alexander Hamilton) (arguing that power to receive ambassadors "is more a matter of dignity than authority").

Acts had all been passed by more than two-thirds of Congress and moreover signed by the President (signaling his recognition of Congress' power to bind him and his consent to be bound by the law), but also because nobody in the Roosevelt Administration ever publicly contended that Congress *had no power* to force him to recognize two or more states as being at war.

Finally, Hull argued that if the Neutrality Act were applied strictly, such an application would not necessarily fulfill the intent of the legislature even if it met the professed goal of neutrality. The Roosevelt Administration argued that the Executive has a duty to fulfill *not* the clear intent of the statute (to preserve American neutrality), but the intent of Congress (to keep the United States out of foreign wars). Because the 1936 and 1937 Neutrality Acts's grants of discretion to the President were slightly ambiguous, Roosevelt chose to pursue his interpretation of the intent of Congress (as opposed to the intent of the statute) and to deny the obvious fact that China and Japan were at war. Thus, Kissinger's quip that "[t]he Neutrality acts had lasted only as long as there had been nothing to be neutral about"¹⁴² is incorrect. There was quite a bit to be neutral about if Roosevelt had really wanted "a true neutrality," but Roosevelt chose not to apply the Neutrality Acts. His evident partiality brings into question whether Roosevelt was really following Congress' intent or was simply using the Neutrality Acts as an excuse for advancing his own agenda — namely, aiding victims of aggression. Yet, even if Roosevelt had sincerely pursued what he regarded as Congress' intent in enacting the statute, his duty was to apply the provisions impartially, not to attempt to discern congressional intent by peering

¹⁴² KISSINGER, *supra* note 8, at 385.

into a "mind" that, strictly speaking, Congress does not possess.¹⁴³ In other words, Roosevelt had no legal right to ignore the provisions of the 1937 Neutrality Act merely because he believed, or said he believed, that it might provoke Japan somewhat. To provoke Japan is Congress' prerogative.

D. The "Phony War" Period

Quite apart from the question of violating the neutrality laws overtly, Roosevelt ardently sought ways to covertly evade the 1937 Neutrality Act, thus allowing him to aid the Allies. When Secretary of the Treasury Henry Morgenthau questioned France's ability to pay for American arms in October 1938, Roosevelt considered Jean Monnet's suggestion that he expand aircraft production for France and Britain by setting up a dummy corporation to assemble the planes in Canadian factories, where neutrality laws would not apply. Specifically, Roosevelt hoped to supply American components, which would supposedly not qualify as "implements of war," instead of the

¹⁴³ As early as 1930, Max Radin argued that judges' duty was to interpret the wording of the statute without attempting to guess what legislative intent might be. Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 870 (1930). That view, which would presumably apply to the Executive Branch as well, has been largely accepted by scholars. See generally Jane S. Schachter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. ____ (forthcoming 1995) (arguing that institutional structure of legislature shapes legislative outcomes so that no single intent is discernible); Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that collective action problems render "legislative" or "popular" intent impossible); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087 (1992) (claiming that no qualified scholars accept possibility of discerning legislative intent).

airplanes themselves.¹⁴⁴ Moreover, Roosevelt could loan money to the French through the Canadians because the Johnson Act would not apply — Canada, unlike France, had not defaulted on its World War I debts. Naturally, the hope of escaping detection was a distant one, and Morgenthau opposed the idea.¹⁴⁵ Morgenthau, being a close friend of the President, persuaded him to drop the idea for a while, but one year later the press discovered that the United States was wheeling bombers into Canada for use by the British.¹⁴⁶ Roosevelt eventually used the Canadian route to sell Britain not just planes but half a million rifles, and hundreds of machine guns and field artillery guns.¹⁴⁷

E. War in Europe

Soon after Germany invaded Czechoslovakia in March 1939 Roosevelt, for the first time, identified threats to small countries as affecting American national security.¹⁴⁸ Yet, he again refused to invoke the neutrality laws.¹⁴⁹ “We’ll be on the side of Hitler by invoking the act,” Roosevelt told a senator. “If we could get rid of the arms embargo, it wouldn’t be so bad.”¹⁵⁰ Roosevelt meant that the arms embargo, by shutting Czechoslovakia off from American aid and

¹⁴⁴ See KIMBALL, *supra* note 11, at 6; Lord Elibank, *Franklin Roosevelt: Friend of Britain*, 187 CONTEMP. REV. 364, 364-67 (1955); Henry Morgenthau, Jr., 146 Manuscript Diary 279-82 (Oct. 1939) (on file with FDR Lib.); DONALD CAMERON WATT, *HOW THE WAR CAME: THE IMMEDIATE ORIGINS OF THE SECOND WORLD WAR, 1938-1939*, at 130 (1989).

¹⁴⁵ See KIMBALL, *supra* note 11, at 6.

¹⁴⁶ See BORCHARD & LAGE, *supra* note 1, at 411.

¹⁴⁷ See 1 *id.* at 775.

¹⁴⁸ Franklin D. Roosevelt, 13 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 262 (1939).

¹⁴⁹ See DRUMMOND, *supra* note 34, at 183.

¹⁵⁰ See MILLER, *supra* note 17, at 434.

arms sales, would benefit Germany, which produced its own weapons. Roosevelt's statement demonstrates perfectly his understanding of foreign relations and his disregard for legality. In his foreign relations he was determined to aid the victims of fascist aggression, and he viewed neutrality as an obstacle to that goal. Naturally, the United States would not literally be "on the side of Hitler by invoking the act," but the effect of American neutrality, Roosevelt knew, would be to encourage the Nazis and prevent Czechoslovakia from resisting. Roosevelt did not care about procedural neutrality, he cared about the substantive effect of neutrality. Thus, he was not scrupulous about obeying the letter or spirit of the law if it would hinder his foreign policy goals.

When Germany invaded Poland in September, Roosevelt finally had to invoke the 1937 Neutrality Act because Britain immediately declared war.¹⁵¹ Interestingly, Roosevelt recognized in his proclamation of neutrality the applicability of the 1917 Espionage Act to the war.¹⁵² Yet, when the Soviet Union invaded Poland that same month, Roosevelt refused to invoke the neutrality laws again from fear of antagonizing Moscow.¹⁵³ He also did not publicly recognize the applicability of the 1917 Espionage Act to the Soviet-Polish War despite the lack of any substantial difference between that war and the German-Polish War. Once again, Roosevelt

¹⁵¹ Proclamation No. 2348 Proclaiming the Neutrality of the United States in the War Between Germany and France; Poland; and the United Kingdom, India, Australia and New Zealand, 54 Stat. 2629 (Sept. 5, 1939), *superseded by* Proclamation No. 2374 Proclaiming the Neutrality of the United States in the War Between Germany and France; Poland; and the United Kingdom, India, Australia, Canada, New Zealand, and South Africa, 54 Stat. 2671 (Nov. 4, 1939). Following this proclamation, Roosevelt listed the forbidden exports to the belligerents. Proclamation No. 2349 on Export of Arms, Ammunition, and Implements of War to France; Germany; Poland; and the United Kingdom, India, Australia and New Zealand, 54 Stat. 2635 (Sept. 5, 1939).

¹⁵² Proclamation No. 2348, *supra* note 151, at 2630.

¹⁵³ DRUMMOND, *supra* note 34, at 208.

used the legislative intent to stay out of war as a means to ignore the wording of the Neutrality Act. Yet, he had issued proclamations of neutrality for Canada¹⁵⁴ and South Africa.¹⁵⁵ Roosevelt's inconsistency in applying his discretion under the Neutrality Act would soon turn to consistency — that is, consistent refusal to invoke the Act.

When the Soviet Union attacked Finland, Rumania, and the Baltic states, and was in turn attacked by Germany on June 22, 1941, Roosevelt again ignored the neutrality law in order to provide aid to the Finns and later, the Soviets.¹⁵⁶ As in the case of Japan and China, it seemed absurd for Roosevelt to pretend that the Soviets and the Finns were not at war. On November 28, 1939 Soviet Commissar of Foreign Affairs Vyacheslav Molotov denounced the Finnish-Russian Nonaggression Pact, and two days later Stalin ordered the bombing of Helsinki (Helsingfors) and attempted to invade at eight points along the Russia-Finland border.¹⁵⁷ Roosevelt shared the American friendliness toward the Finns, admired their fierce and skillful soldiers, and appreciated their conscientious payments on United States loans from World War I. Roosevelt could not sit idly through Russia's

¹⁵⁴ Proclamation No. 2359 Proclaiming the Neutrality of the United States in the War Between Germany, on the One Hand, and Canada, on the Other Hand, 54 Stat. 2652 (Sept. 10, 1939); Proclamation No. 2360, Concerning Export of Arms, Ammunition, and Implements of War to Canada, 54 Stat. 2653 (Sept. 10, 1939).

¹⁵⁵ Proclamation No. 2353 Proclaiming the Neutrality of the United States in the War Between Germany, on the One Hand, and the Union of South Africa, on the Other Hand, 54 Stat. 2643 (Sept. 8, 1939); Proclamation No. 2354 Concerning the Export of Arms, Ammunition, and Implements of War to the Union of South Africa, 54 Stat. 2644 (Sept. 8, 1939).

¹⁵⁶ See Memorandum of Conversation by Sumner Welles, Acting U.S. Secretary of State (June 26, 1941), reprinted in 1 FOREIGN RELATIONS, *supra* note 20, at 769, 770 (1958); DRUMMOND, *supra* 34, at 209-10, 278-79; FENWICK, *supra* note 48, at 146.

¹⁵⁷ I CHURCHILL, *supra* note 96, at 539.

"dreadful rape of Finland."¹⁵⁸ Instead of invoking the Neutrality Act, Roosevelt announced another moral (and legal high-octane aircraft fuel) embargo on the Soviet Union and sold much-needed planes to Finland.¹⁵⁹ The Finns had also requested a \$60 million loan, but Roosevelt responded with a \$10 million agricultural credit.¹⁶⁰ He declined to give more: "I may be a benevolent dictator and all powerful Santa Claus and though the spirit moves me at times, I still operate under the laws which an all-wise Congress passes."¹⁶¹ In this particular case, Roosevelt was indeed operating under the 1939 Neutrality Act. American neutrality in the Soviet-Finnish War had no appreciable affect on American security, and Roosevelt therefore had no need to invoke the Act. But he was not operating under the Constitution, as he had no more authority to institute a moral embargo on the Soviet Union than on Japan or Italy.

Also in November 1939, Roosevelt decided to take decisive action to prevent the strangulation of British trade by the massive Nazi sinkings of British merchant vessels. Because Britain could afford to buy few American merchant vessels and the supply of its own was so rapidly diminishing, Roosevelt proposed registering American ships in Panama so they could carry supplies directly to Britain.¹⁶² This would eschew the "carry" prohibition of the 1939 Neutrality Act's "cash-and-carry" provision. Although Hull's opposition to this proposal convinced Roosevelt not to undertake this evasion of the law, the incident demonstrates a willingness to skirt the law that Roosevelt would unabashedly display many times in the coming two years.

¹⁵⁸ BURNS, *supra* note 7, at 415; MILLER, *supra* note 17, at 442.

¹⁵⁹ See Borchard & Lage, *supra* note 1, at 416-19.

¹⁶⁰ MILLER, *supra* note 17, at 442.

¹⁶¹ *Id.*

¹⁶² See 1 HULL, *supra* note 7, at 698.

IV. ROOSEVELT'S FOREIGN POLICY, 1940-1941

As explained in Subsection II.C.4, the 1939 Neutrality Act, while still requiring the President to identify belligerents, at least gave him latitude to aid the antifascist states. The provisions of the 1939 Neutrality Act (enacted on November 9) loosened the commercial restrictions considerably. Yet, the substantive restrictions were not loose enough for Roosevelt. He would bend and break them several times before Japan attacked Pearl Harbor twenty-three months later.

A. The Axis Attacks the Neutrals

When Germany attacked Denmark and Norway in April 1940 Roosevelt quickly proclaimed American neutrality and forbade the use of American ports and territorial waters in accordance with the 1939 Neutrality Act and with international law.¹⁶³ When Nazi forces swarmed into neutral Belgium, Luxembourg, and the Netherlands in May,¹⁶⁴ and when Italy joined the war in June, Roosevelt issued more proclamations.¹⁶⁵ The proclamations brought the 1939 Neutrality Act

¹⁶³ Proclamation No. 2399 Proclaiming the Neutrality of the United States in the War Between Germany, on the One Hand, And Norway, on the Other Hand, 54 Stat. 2699 (Apr. 25, 1940); Proclamation No. 2400 on the Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States, 54 Stat. 2699 (Apr. 25, 1940).

¹⁶⁴ Proclamation No. 2405 Proclaiming the Neutrality of the United States in the War Between Germany, on the One Hand, and Belgium, Luxembourg, and the Netherlands, on the Other Hand, 54 Stat. 2704 (May 11, 1940); Proclamation No. 2406 on the Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerents, 54 Stat. 2705 (May 11, 1940).

¹⁶⁵ Proclamation No. 2408 Proclaiming the Neutrality of the United States in the War Between Italy, on the One Hand, and France and the United Kingdom, on the Other Hand, 54 Stat. 2707 (June 10, 1940); Proclamation No. 2409 on the Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States,

into full effect, and constrained Roosevelt's ability to aid the Allies and neutrals without further legislation.

At the same time, Roosevelt sought ways to give financial and other aid to the nonfascist powers. Roosevelt instructed Secretary Morgenthau not to be excessively strict about making loans to the Allies so long as the money was not used to buy arms. Because the Johnson Act forbade loans to Britain or France, he directed Morgenthau to find a legal basis for making loans to countries in default of their war loans to the United States. The General Counsel of the Treasury Department told Morgenthau, "I believe that there is *legal* authority" to set up a fund under the Gold Reserve Act to stabilize the exchange value of the dollar and make loans to foreign countries through that fund.¹⁶⁶ The General Counsel advised consulting the appropriate committees of Congress on the policy issues involved. Of course, due to the inevitable biased implementation of the stabilizing loans — Roosevelt certainly did not intend to stabilize the dollar against the reichsmark or the lira even though U.S. investment in Germany had grown by 36 percent from 1936-1940¹⁶⁷ — such a use of the Gold Reserve Act might have violated the spirit, if not the letter, of the Neutrality Act. By its letter, Section 7 of the 1939 Neutrality Act forbade "any person" within the United States to make loans to a belligerent state.¹⁶⁸ Whether

54 Stat. 2707 (June 10, 1940); Proclamation No. 2444 Proclaiming the Neutrality of the United States in the War Between Italy on the One Hand, And Greece, on the Other Hand, 54 Stat. 2764 (Nov. 15, 1940); Proclamation No. 2445 on the Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States, 54 Stat. 2764 (Nov. 15, 1940).

¹⁶⁶ See Letter from Edward H. Foley, Jr., Acting General Counsel to the Dept. of the Treasury, to Henry Morgenthau, Secretary of the Treasury (May 2, 1940) (on file with FDR Lib.).

¹⁶⁷ WATT, *supra* note 143, at 258.

¹⁶⁸ ch. 2, § 7, 54 STAT. 4, 8 (1939).

Secretary Morgenthau or the Treasury Department qualified as a "person" are open to debate, but in spirit the law was clearly intended to prevent loans to belligerents that were not authorized by Congress.

As early as March or April 1940 Roosevelt considered evading the 1939 Neutrality Act and the Johnson Act through loans or gifts.¹⁶⁹ He soon changed his mind resolving instead to evade the 1939 Neutrality Act's prohibition on government arms sales by selling "surplus arms" to the Allies. Morgenthau told Roosevelt that, although the government could not sell weapons to belligerents under the Neutrality Act, "[i]t's a question of can we do it *illegally*."¹⁷⁰ Roosevelt then asked his advisor Harry Hopkins "how far" he could go in ignoring the 1939 Neutrality Act despite his having signed it.¹⁷¹ Secretary of the Interior Harold Ickes and Vice President Garner both encouraged him to believe that the President's plenary powers over foreign affairs rendered the neutrality laws inoperative.¹⁷² Roosevelt took their advice to heart, and on June 3, 1940, he approved over the objections of Secretary of War Harry Woodring the sale of almost \$38 million "surplus" government rifles, artillery, antiaircraft guns, and ammunition from World War I to the United States Steel Corporation, which promptly resold them to the Anglo-French Purchasing Commission without profit.¹⁷³ The legal basis upon which Roosevelt rested his authority to sell "surplus" United States military property was a 1919 statute that Attorney General Robert Jackson had

¹⁶⁹ See generally KIMBALL, *supra* note 11, at 36-37.

¹⁷⁰ SHOGAN, *supra* note 17, at 82.

¹⁷¹ DALLEK, *supra* note 5, at 190.

¹⁷² *Id.*

¹⁷³ See 2 BLUM, *supra* note 164, at 149-54; 2 CHURCHILL, *supra* note 96, at 126; DALLEK, *supra* note 5, at 227; 1 HULL, *supra* note 7, at 770; KIMBALL, *supra* note 11, at 44-45.

discovered appearing to authorize such sales.¹⁷⁴ Although the weapons were not "surplus" by any definition of the word, and although the drafters of the statute obviously never contemplated the sale of arms to private individuals or companies for the purpose of resale to belligerents in violation of a different, later statute, Roosevelt plowed ahead with similar sales. On June 6, for example, the Navy Department disclosed a sale of fifty Hell Diver bombers to Britain that were "temporarily in excess of requirements."¹⁷⁵ Two days later, Roosevelt held a press conference. He read aloud Solicitor General Francis Biddle's opinion that the airplanes were surplus and available for sale based on the 1919 appropriations act, but he never mentioned that these bombers the Navy described as "aging" carried two machine guns, 1,000 pounds of bombs, and had in some cases been in service only for three months.¹⁷⁶ Nonetheless, when one reporter asked whether Roosevelt was authorized to sell *new* armaments, Roosevelt responded by joking, "[n]o, not if it is brand new armament, unless it is out of date — and, as you know, a plane can get out of date darned fast."¹⁷⁷ Of course, after the massive American post-World War disarmament and the rearmament of the hostile fascist states, everything that could shoot was necessary to national defense; indeed, by the large scale sales the United States had reduced its equipment

¹⁷⁴ PHILIP GOODHART, *FIFTY SHIPS THAT SAVED THE WORLD* 60 (1965). The statute, an Army appropriations act, authorized the Secretary of War to sell "any surplus supplies including motor trucks and automobiles now owned by and in the possession of the Government . . . to any corporation or individual upon such terms as may be deemed best." 41 Stat. 104, 105 (1919).

¹⁷⁵ See *Help in Washington*, N.Y. Times, June 7, 1940, at 1, 1, 14.

¹⁷⁶ Franklin D. Roosevelt, Press Conference on June 8, 1940, reprinted in 15 FRANKLIN D. ROOSEVELT, COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 541, 543-48 (1972) [hereinafter PRESIDENTIAL PRESS CONFERENCES].

¹⁷⁷ *Id.* at 548.

to the bare minimum required by the Army mobilization plan,¹⁷⁸ and the Army had even been denied its request for one to three squadrons of the Hell Divers not long before the Navy's announcement.¹⁷⁹ Nonetheless, Roosevelt cajoled the Army Chief of Staff, General George C. Marshall, into designating about \$38 million in rifles, artillery, and ammunition as "surplus."¹⁸⁰ The Roosevelt Administration could get away with this subterfuge because Congress was so ignorant of the administration's activities that not only would legislators not have known if administration officials lied about their arms sales, but Congress did not even have the factual background to know the right questions to ask.¹⁸¹ Absent Congress' objections, Roosevelt went ahead with a deal that clearly violated the 1939 Neutrality Act, partly because Roosevelt's advisers led him to believe the law was on his side. If the law was on his side, one wonders why Roosevelt felt the need to lie and hide his actions from Congress. In a blatant example of the Administration's deception, for instance, when questioned on July 25 by reporters about Britain's ability to pay for the massive number airplanes being produced for them, Morgenthau answered "they have plenty of money — plenty."¹⁸² Morgenthau was well aware that Britain had nothing near the estimated \$7 billion needed to pay for airplanes.¹⁸³ With typical understatement, Assistant Secretary of State Breckinridge Long admitted in his diary that Roosevelt's new aid policy was "perhaps not

¹⁷⁸ 2 CHURCHILL, *supra* note 96, at 126.

¹⁷⁹ SHOGAN, *supra* note 4, at 83.

¹⁸⁰ See KIMBALL, *supra* note 11, at 44-45.

¹⁸¹ Interview with Myres S. McDougal, Professor Emeritus of International Law, Yale Law School, and former attorney for the State Department and the Lend-Lease Administration, in North Branford, C.T. (Mar. 9, 1995).

¹⁸² KIMBALL, *supra* note 11, at 67.

¹⁸³ See *id.*

entirely open and honestly expressed."¹⁸⁴

These deceptions brought loud objections from several of Roosevelt's cabinet members, most prominently the isolationist Secretary of War Woodring. While the Chief of Naval Operations, General George Marshall, would hem and haw before consenting to participate in Roosevelt's illegalities, he almost always ended up obeying the Commander in Chief. Secretary Woodring was typically more recalcitrant, however, and on June 19, 1940, Roosevelt requested his resignation.¹⁸⁵ Having finally divested himself of opposition to his plans, Roosevelt was free to appoint a more compliant Secretary of War. In a masterful political move, he chose Henry Stimson, a respected Republican internationalist; Stimson's appointment simultaneously moved the cabinet toward intervention in Europe while preempting any really effective Republican criticism of his choice.

B. Aid to China

By July 1940, in the face of continued Japanese aggression in China and Indochina, flagrant disregard for the safety of American residents and their property, and bombing of civilians,¹⁸⁶ Roosevelt decided to stop the export to Japan of aviation gasoline, an act that Japan strenuously protested without changing its policy. Unsatisfied with that response, Roosevelt restricted the export of iron and steel scrap on September 30 and of all iron and steel in December. Each

¹⁸⁴ BRECKINRIDGE LONG, *THE WAR DIARY OF BRECKINRIDGE LONG, 1939-1944*, at 86 (Fred Israel ed., 1966) [hereinafter LONG].

¹⁸⁵ ROOSEVELT, *HIS LIFE AND TIMES* 461 (Otis L. Graham, Jr. & Meghan Robinson Wander eds., 1985); GOODHART, *supra* note 175, at 101.

¹⁸⁶ 1 HULL, *supra* note 7, at 632, 633.

time Japan protested the discriminatory restrictions.¹⁸⁷ After all, if Japan was perpetuating an unjust war against China as the Roosevelt Administration accused, why did Roosevelt not issue the proclamation required by the 1939 Neutrality Act? In an even more clearly biased move in November, he arranged a \$100 million loan and a transfer of one hundred planes to Chiang Kai-Shek.¹⁸⁸ The President had no statutory or constitutional authorization to institute these embargoes or to give away American planes or funds to China. On the other hand, the 1939 Neutrality Act gave him discretion not to label the two states "at war."

C. The Failed PT-Boat Sale and the Destroyers-for-Bases Deal

Meanwhile, Roosevelt was exploring how he might get aid to Britain in response to a May request from the new British Prime Minister, Winston Churchill. German U-boats were sinking British merchant ships more than twice as fast as the British could replace them.¹⁸⁹ Churchill's pleas for aid had reached a desperate and dramatic pitch: "Mr. President, with great respect I must tell you that in the long history of the world, this is a thing to do *now*."¹⁹⁰ At first, Roosevelt had demurred, pointing out that congressional authorization was required before he could dispose of United States property like ships.¹⁹¹ Yet, Roosevelt was sympathetic and eventually tried to send twenty-three new PT-boats (eleven torpedo boats and twelve submarine chasers) without congressional approval. When the Navy's

¹⁸⁷ These protests may be found in 2 FOREIGN RELATIONS, *supra* note 20, at 219-25, 237 (1957).

¹⁸⁸ See DALLEK, *supra* note 5, at 270.

¹⁸⁹ 2 HULL, *supra* note 7, at 935.

¹⁹⁰ Telegram from Winston Churchill [alias "Former Naval Person"] to Roosevelt (July 31, 1940), reprinted in 3 FOREIGN RELATIONS, *supra* note 20, at 57, 58 (1957).

¹⁹¹ See 2 CHURCHILL, *supra* note 96, at 23.

Judge Advocate General (J.A.G.) declared that such a sale would be illegal, Roosevelt branded him "a sea lawyer" and "an old admiral whose mental capacity I know personally."¹⁹² He advised Navy Secretary Charles Edison to send the J.A.G. on vacation and find a more compliant replacement. In response to Edison's repeated objections, Roosevelt told him to forget legality and follow orders.¹⁹³ However, Congress got wind of the deal, and Senator David Walsh — Chairman of the Naval Committee — flew into a rage. No Massachusetts congressman could afford to support aid to Britain from fear of alienating his Irish constituency. When Walsh inquired into the legal basis of the PT-boat sale, Lewis Compton, Acting Secretary of the Navy, weakly responded that the Navy could modify its contracts under general legislation passed by Congress. Walsh's response in the Senate dripped with sarcasm:

Now, Senators, see how careful we shall have to be in our legislation. They have a right to modify or change their contracts. So, all these transactions have been based, not on any legal authority — for they have none — to dispose of any property except surplus, but upon the fact that they have authority to modify or change contracts. Who in God's name, in Congress or in the country, thought, when such a power was given, that these contracts for our own protection would be modified or changed in order to assist one side or the other, or all sides, of belligerents at war?¹⁹⁴

The only reason Roosevelt never consummated the sale was that he

¹⁹² GOODHART, *supra* note 175, at 88.

¹⁹³ *Id.* at 88.

¹⁹⁴ 86 CONG. REC. 13319 (1940) (statement of Sen. David Walsh).

failed to hide the transaction from Congress; when Walsh threatened to cause trouble, Roosevelt had to back down and call off the deal.¹⁹⁵ Three days later, Congress passed the Act of June 28, 1940 with the Walsh Amendment. Significantly, Roosevelt's excuse for canceling the deal was an informal opinion by Attorney General Robert Jackson stating that the sale of ships to Britain would violate the 1917 Espionage Act — an opinion, incidentally, with which the President "concurred."¹⁹⁶ Predictably, the isolationists in Congress were thrilled. One prominent senator commented, "I am glad Bob Jackson looked up the law on the subject."¹⁹⁷

This was a setback to Roosevelt's plans, but not a defeat. In an August 13 meeting with War Secretary Stimson, Navy Secretary Knox, Treasury Secretary Morgenthau, and Undersecretary of State Sumner Welles, the President decided to exchange ships for leases on bases in Britain's colonies without congressional approval.¹⁹⁸ Roosevelt told Churchill that he hoped to send at least fifty "over-age" destroyers, twenty torpedo boats, and several planes immediately in exchange for assurances for sales or leases on bases in seven British colonies.¹⁹⁹ In fact, this was quite an appealing deal for the United States, since the dollar value of the leases far exceeded that of the arms, even if the British needed the destroyers far more than the U.S. needed the bases. From the British viewpoint, Winston Churchill

¹⁹⁵ BURNS, *supra* note 7, at 421-22.

¹⁹⁶ See *Torpedo Boat Sale to British Halted*, N.Y. Times, June 25, 1940, at 10; *Statement on Torpedo Boat Sale Ban*, N.Y. TIMES, June 25, 1940, at 10.

¹⁹⁷ *Torpedo Boat Sale to British Halted*, *supra* note 197, at 10.

¹⁹⁸ See Henry L. Stimson Manuscript Diary (Aug. 13, 1940) (on file with Stimson Papers).

¹⁹⁹ Letter from Ben Cohen, General Counsel to the National Power Policy Committee, U.S. Dep't of the Interior, to Missy LeHand, personal secretary to the President (Aug. 12, 1940) (on file with FDR Lib.); Telegram from Roosevelt to Winston Churchill [alias "Former Naval Person"] (Aug. 13, 1940), *reprinted in* 3 FOREIGN RELATIONS, *supra* note 20, at 65, 65-66 (1957).

preferred to have the bases in American hands so that, if the bases were attacked, the British would not have to defend them.²⁰⁰ Roosevelt tried to hide the details of his negotiations without much success. After announcing discussions with Britain regarding the acquisition of bases, he stated that he did not know what the United States would give Britain in return.²⁰¹ Reporters grilled him about the possibility of exchanging the bases for destroyers, but Roosevelt repeatedly emphasized that destroyers were not involved in the discussions and had nothing to do with the bases.²⁰²

On September 2 Roosevelt, with enormous apprehension, announced the deal publicly and published an exchange of notes that can only be described as deliberately deceptive. In the notes, the British Ambassador to the United States, Lord Lothian, proposed to lease "freely and without consideration," certain naval and air bases to the United States, while leasing others in exchange for naval and military equipment.²⁰³ Hull's public response made it sound as if the subsequent offer of fifty destroyers originated spontaneously from the United States.²⁰⁴ Admiral Harold R. Stark, Chief of Naval Operations,

²⁰⁰ 2 CHURCHILL, *supra* note 96, at 357-58.

²⁰¹ Franklin D. Roosevelt, Press Conference on Aug. 16, 1940, *reprinted in* 16 PRESIDENTIAL PRESS CONFERENCES, *supra* note 177, at 123, 125.

²⁰² *Id.* at 123-26.

²⁰³ The British Ambassador (Lothian) to the Secretary of State (Hull), 54 Stat. 2405, 2405 (1940). The draft note had gone even further, claiming that the lease of the bases was an outright "grant." Draft Note from His Majesty's Ambassador to Mr. Cordell Hull 2 (no date) (on file with FDR Lib.).

²⁰⁴ The Secretary of State (Hull) to the British Ambassador (Lothian), 54 Stat. 2406, 2408 (1940). The draft of this note was even more deceptive. It repeated and emphasized that Britain did not desire compensation, but insisted upon "mak[ing] some contribution towards the security of the United Kingdom" in return, and then stated "[t]he United States Government wish to make it clear that they do not desire any payment in return for this naval and military material." Draft Note from Mr. Cordell Hull to His Majesty's Ambassador 2 (no date) (on file with FDR Lib.).

then sent a memo/press release to the White House declaring that “an exchange of fifty over-age destroyers for suitable naval and air bases on ninety-nine year leases in Newfoundland, Bermuda, the Bahamas [etc.] . . . will strengthen rather than impair total defense in the United States.”²⁰⁵ Stark’s memo released Roosevelt to sell the ships under the Walsh Amendment,²⁰⁶ but did nothing about the provisions of the 1917 Espionage Act.

Roosevelt’s apprehension about the reaction of the public proved unjustified. The public was not unfavorable to the announcement, although isolationists in Congress seethed with spleen. On the other hand, even some of those favorable to the proposal were outraged by Roosevelt’s failure to consult Congress. Wendell Willkie, for example, approved the trade in general but reacted to Roosevelt’s decision to bypass Congress by calling it “the most dictatorial and arbitrary act of any President in the history of the United States.”²⁰⁷ Of course, Willkie was competing for Roosevelt’s job and undoubtedly knew he was exaggerating, but his point was well taken — Roosevelt appeared to be overreaching quite willfully.

There are other reasons to criticize the deal as well. Stark’s assessment of the effect of the destroyers-for-bases deal on the defense of the United States, for example, at least seems questionable. Less than four months earlier, Roosevelt — an expert on naval affairs himself — had stated that: “to me it seems doubtful, from the standpoint of our own defense requirements, which must inevitably be linked with defense requirements of this hemisphere and with our obligations in the Pacific, whether we could dispose even temporarily

²⁰⁵ Western Union Press Message from R.H. Stark, Chief of Naval Operations, to Stephen Early, Secretary to the President (no date) (on file with FDR Lib.).

²⁰⁶ Act of June 28, 1940 § 14(a), 54 Stat. 676, 681.

²⁰⁷ BURNS, *supra* 7, at 441.

of these destroyers.”²⁰⁸ Similarly, in June 1940 Roosevelt telegraphed Acting Secretary of State Sumner Welles: “Our old destroyers cannot be sold as obsolete as is proved by fact. All of them are now in commission and in use or are in process of being commissioned for actual use.”²⁰⁹ Yet, even assuming that the destroyers were surplus, there was still the issue of illegality under laws other than the Walsh Amendment, which did *not* authorize the President to sell, trade, or transfer arms or vessels if the sale, trade, or transfer conflicted with Title V of the 1917 Espionage Act, as Hull recognized at the time.²¹⁰ Even assuming that the destroyers-for-bases deal strengthened the overall long-term defense of the United States in accordance with the terms of the 1940 Act, it was a “decidedly unneutral” deal in Winston Churchill’s words²¹¹ because, although the dollar value of the possessions was higher, Britain needed the destroyers much more than the U.S. needed Britain’s possessions.²¹² Churchill himself later opined that the Germans would have been justified in declaring war based upon commonly acknowledged historical standards.²¹³ Whether or not this assessment of international law is correct (Churchill did not know how much the U.S. Navy Department wanted those bases and was not accounting for their long-term value²¹⁴), the destroyers-for-bases deal certainly raised

²⁰⁸ Telegram from Roosevelt to Winston Churchill [alias “the former naval person”] (May 16, 1940), *reprinted in* 3 *Foreign relations*, *supra* note 20, at 49, 50.

²⁰⁹ Telegram from Roosevelt to Sumner Welles, Acting Secretary of State (June 1, 1940), *reprinted in* CHARLES CALLAN TANSILL, *BACK DOOR TO WAR* 591 (1952).

²¹⁰ *See* 1 HULL, *supra* note 7, at 833.

²¹¹ 2 CHURCHILL, *supra* note 96, at 358.

²¹² KISSINGER, *supra* note 8, at 388.

²¹³ 2 CHURCHILL, *supra* note 96, at 358.

²¹⁴ *Cf.* 1 HULL, *supra* note 7, at 832 (“The Navy had long wanted additional bases along the Atlantic.”); 1 SAMUEL ELIOT MORISON, *HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II* 36 (1988) (citing Chief of Navy Operations Harold R. Stark as saying that destroyers were expendable, bases were not).

issues of illegality under national neutrality laws and constitutional principles.

D. Legal and Constitutional Bases for Destroyers-for-Bases

The President's Legal Adviser, Green Hackworth, had advised Roosevelt that the destroyers-for-bases deal would be illegal under title 18, section 23 of 1917 Espionage Act as well as section 14(a) of the Act of June 28, 1940 (the Walsh Amendment).²¹⁵ He advised the President to seek an amendment of the Act of June 28, 1940.²¹⁶ Assistant Attorney General Newman (Judge) Townsend agreed with this assessment.²¹⁷ A more complete legal opinion came from Ben V. Cohen, then the General Counsel to the National Power Policy Committee, an agency of the U.S. Department of the Interior, who sent a memorandum to Roosevelt stating his opinion that "there is no legal barrier, by reason of our own statutes or the law of nations, which would stand in the way of the release of our old destroyers from our naval service and their sale to the British."²¹⁸

Cohen directly addressed whether the proposed actions violated the 1917 Espionage Act. He argued that because Congress enacted the Espionage Act to provide "for the observance of obligations imperatively imposed by international law on the United States" and "for the fulfilment of the duty owed by the United States

²¹⁵ Memorandum from Green H. Hackworth, Legal Adviser to the President, to Roosevelt (Aug. 2, 1940), *reprinted in* 3 FOREIGN RELATIONS, *supra* note 20, at 59, 59-60 (1957).

²¹⁶ *Id.* at 60.

²¹⁷ Memorandum from Cordell Hull, Secretary of State, to Roosevelt (Aug. 4, 1940), *reprinted in* 3 FOREIGN RELATIONS, *supra* note 20, at 61.

²¹⁸ Memorandum from Ben V. Cohen, General Counsel to the National Power Policy Committee, U.S. Dep't of the Interior, to Roosevelt (July 19, 1940) (on file with FDR Lib.).

to other nations with which it is at peace," the Act did not apply to the destroyers-for-bases deal.²¹⁹ His reasoning was that "it is only reasonable to suppose that the intent of Congress was to fulfil its obligations under . . . Article 8 of the [1907] Hague Convention [XIII]. . . 'to prevent the *fitting out or arming within its jurisdiction* of any vessel . . .'"²²⁰ By construing the Espionage Act in the light of selected legislative history, Cohen arrived at the conclusion that the plain wording of the statute was not as it appeared, but was instead "unclear."²²¹

This reading of the statute both appears contrived and ignores "the duty owed by the United States to other nations with which it is at peace," as stated in the Act. Under international law, that duty is that the neutrality of the United States, in Roosevelt's words, must be a true neutrality. Unequal assistance active or passive (beyond pure "acts of humanity") to either state is clearly prohibited.²²² In particular, the United States could not become a base for the operations of any belligerent. Although the text of the 1917 Espionage Act makes no reference whatever to the 1907 Hague Convention, it is clear from Attorney General T.W. Gregory's statements at the time that Congress' intent was, as Cohen argued, to provide legislation to enforce the United States's international legal obligations arising under the 1907 Hague Convention. Attorney General Gregory cited Rule 1 of the 1871 Treaty of Washington and article 8 of the 1907 Hague Convention XIII to show that neither treaty imposed an obligation on neutral governments to prevent the building of warships for belligerents, although both treaties *forbid the*

²¹⁹ *Id.* at 7-8 (quoting H.R. Rep. No. 30, 65th Cong. 1st Sess., at 9).

²²⁰ *Id.* at 8.

²²¹ *Id.* at 7-10.

²²² 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 48, at 520-21, 523, 542.

delivery of any war vessel to a belligerent.²²³ However, no domestic legislation forbade such deliveries. In discussing title V, section 3 of the Espionage Act, Congress explicitly approved the Attorney General's recommendation to pass legislation enforcing the obligations of the United States under international law.²²⁴ Thus, it appears almost certain that Congress did indeed intend to outlaw the delivery of *any* war vessel to belligerents, whether or not it was built to the order of a belligerent.

In any case, Cohen failed to mention other international laws that Congress had probably considered in passing the Espionage Act. These laws include the 1907 Hague Convention XIII, article 6, which provides that "[t]he supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."²²⁵ Moreover, the destroyers-for-bases deal was illegal under customary laws. Cohen made an arguably passable showing that under customary international law private individuals (including private companies) could sell ships that were not made to order to belligerents.²²⁶ The destroyers in question, in this case, already existed and could therefore perhaps be sold by private individuals *if they owned them*. However, the United States government is not a private individual, and under international law may not sell vessels like its subjects may. Cohen himself admitted that for the sale to be legal Roosevelt would have to sell the ships to

²²³ HERBERT W. BRIGGS, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 576-77 (1940).

²²⁴ H.R. REP. NO. 30, 65th Cong., 1st Sess. (1917).

²²⁵ 36 STAT. 2415, 2428 art. 6 (1907).

²²⁶ COHEN *cited* 2 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 48, at 574-76 to support his position. *But see* Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 695 (1940) (arguing that Oppenheim is wrong; not even private individuals may sell existing vessels to belligerents under international law).

a private individual. Indeed the State Department had come to the same conclusion; it refrained from objecting to the illegal deal on political grounds.²²⁷ Thus, even the President's most ardent advocates admitted that the deal violated customary international law and the 1917 Espionage Act.

The President has a duty to interpret the statute in such a way as not to conflict with international law, if at all possible.²²⁸ By not doing so, Roosevelt violated his own executive duties and infringed Congress' right to interpret legislatively United States obligations under international law.²²⁹ Roosevelt knew that Cohen's legal reasoning was too weak to withstand the close scrutiny Congress would give it. As he commented to the Secretary of the Navy, "I frankly doubt if Cohen's memorandum would stand up Also I fear Congress is in no mood at the present time to allow any form of sale."²³⁰

Roosevelt had other means of combatting legal objections that could allow him to avoid congressional disapproval; he did not act on the advice of Cohen alone. Rather, Attorney General Robert

²²⁷ See 1 HULL, *supra* note 7, at 707; LONG, *supra* note 185, at 125.

²²⁸ See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); 1 Op. Att'y Gen. 566, 570-71 (1822); 4 Alexander Hamilton, *The Works of Alexander Hamilton* 440, 444 (Henry Cabot Lodge ed., 1904); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 55 (1975); 6 JAMES MADISON, *THE WRITINGS OF JAMES MADISON* 159 (Gaillard Hunt ed., 1906); *cf.* *United States v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (judiciary must interpret statutes in such a way as to comply with international law whenever possible).

²²⁹ See Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. Times (WEEK IN REVIEW), Oct. 13, 1940, at 6E, 7E.

²³⁰ Memorandum from Roosevelt to Frank Knox, U.S. Secretary of the Navy (July 22, 1940), *quoted in* GOODHART, *supra* note 175, at 152.

Jackson²³¹ and former Treasury Under Secretary Dean Acheson²³² also gave legal advice. According to Acheson, the President had the power to dispose of naval vessels in any way that caused a net improvement in national security. Yet, Acheson did not dwell on the constitutional issues raised by this contention, as he felt that Roosevelt had sufficient statutory authority to consummate the destroyers-for-bases deal. In his defense of the deal, Acheson relied heavily on the Walsh Amendment discussed in Section II.D. Acheson argued that Congress must have intended the Walsh Amendment to apply to Army as well as Navy equipment, and that the statute therefore constituted an independent source of authority for the President to dispose of weapons so long as he first obtained the approval of the Army Chief of Staff or the Chief of Naval Operations.²³³ Acheson also tackled the 1917 Espionage Act, repeating Cohen's dubious interpretation of statutory intent and his misinterpretation of international law as well. Finally, Acheson pointed out that the 1939 Neutrality Act was no bar to the destroyers-for-bases deal as long as Roosevelt first sold the ships to a private company (which Roosevelt did not subsequently do). Interestingly, despite the Acheson editorial's fairly evident weaknesses, Supreme Court Justice Felix Frankfurter called Secretary of War Henry Stimson to express reserved agreement with the article's conclusions,²³⁴ even though he had suggested that Cohen contact Dean Acheson to gather support from other lawyers in the

²³¹ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), reprinted in 39 Op. Att'y Gen. 484 (1941); 10 PUBLIC PAPERS AND ADDRESSES, *supra* note 91, at 394, 394-405.

²³² Charles C. Burlingham et al., *No Legal Bar Seen to Transfer of Destroyers*, N.Y. Times, Aug. 11, 1940, at E8.

²³³ See *id.*

²³⁴ See Henry L. Stimson Manuscript Diary at 2-3 (Aug. 15, 1940), (unpublished manuscript, on file with Stimson Papers).

first place.²³⁵ Roosevelt, on the other hand, professed in a press conference never even to have read the legal opinion.²³⁶

Jackson, unlike Cohen and Acheson, relied mainly on a constitutional basis for Roosevelt's action independent of statutory justifications. While attempting to hurdle the legislative obstacles to the deal in precisely the same terms as Cohen and Acheson, Jackson nonetheless concentrated on the President's power as Commander-in-Chief of the armed forces and as the principal agent of the United States in foreign affairs. Jackson first attempted to find congressional approval for the deal in an 1883 act that did indeed authorize the President to sell Navy vessels.²³⁷ Jackson knew that the 1917 Espionage Act superseded that ancient statute.²³⁸ In order to get around his previous opposition to the nearly indistinguishable PT-boat deal based on the Espionage Act,²³⁹ Jackson essentially repeated Cohen's misinterpretation of the Espionage Act and argued that because the destroyers already existed (unlike the PT-boats, which were made to order) the Act did not apply.²⁴⁰ Jackson also repeated Acheson's argument that the Walsh Amendment authorized the President to dispose of Navy property at will.²⁴¹

Knowing the weakness of his statutory arguments, Jackson had one antidote for all statutory obstacles. He drew support from a

²³⁵ See GOODHART, *supra* note 175, at 160.

²³⁶ Franklin D. Roosevelt, Press Conference on Aug. 16, 1940, *reprinted in* 16 PRESIDENTIAL PRESS CONFERENCES, *supra* note 177, at 123, 127.

²³⁷ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 489. The statute in question was The Act of March 3, 1883, § 5, ch. 141, 22 Stat. 582, 599-600 (1883).

²³⁸ See also Borchard, *supra* note 227, at 690, 692 (arguing that 1883 statute did not authorize exchange for other reasons).

²³⁹ See *supra* text accompanying note 197.

²⁴⁰ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 494-96.

²⁴¹ See *id.* at 492.

recent Supreme Court decision, *United States v. Curtiss-Wright Export Corp.*,²⁴² to argue that Roosevelt's powers as Commander in Chief of the armed forces gave him such authority that Congress could not hope to constitutionally limit his disposal of the ships. *Curtiss-Wright* is a controversial opinion in United States jurisprudence.²⁴³ In 1936, the United States indicted several United States businesses, including the Curtiss-Wright Export Corporation, for violating the 1934 Chaco Neutrality Act. The Chaco Neutrality Act forbade arms sales in any place in the United States to the countries engaged in the Chaco conflict if the President found that such a prohibition would help reestablish peace.²⁴⁴ The indictment accused the defendants, Curtiss-Wright and other arms manufacturers, of conspiring to sell fifteen machine guns to Bolivia, which was involved in the Chaco conflict. The defendants objected to the indictment on the grounds *inter alia* that the Act was an invalid delegation of legislative power to the Executive.²⁴⁵ The Supreme Court held that the resolution concerned the foreign affairs of the United States²⁴⁶ and was therefore well within the constitutional jurisdiction of the President. In the strongest language, the Supreme Court declared in dicta that in the "vast" field of foreign relations, "the President alone has the power to speak or listen as a representative of the nation," and, it mentioned in other, more dubious dicta that the Senate may not interfere with the President's "very delicate, plenary and exclusive power" to conduct

²⁴² See *id.* at 486-87.

²⁴³ See, e.g., Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 Yale J. Int'l L. 5, 11-17 (1988) (For articles criticizing *Curtiss-Wright*).

²⁴⁴ Chaco Neutrality Act, Ch. 365, 48 Stat. 811 (1934); see also Proclamation Prohibiting Sale of Arms and Munitions of War To Countries Engaged in The Chaco Conflict, 48 Stat. 1744 (1934).

²⁴⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 314 (1936).

²⁴⁶ See *id.* at 315.

"foreign negotiations."²⁴⁷ Repeating its holding in an earlier case, the Court emphasized that it "*should hesitate long before limiting or embarrassing such powers.*"²⁴⁸ Finally, the Court in dicta said that not only could Congress delegate such powers to the President, but the President's exercise of his powers in foreign relations "does not require as a basis for its exercise an act of Congress."²⁴⁹

Jackson seized upon this holding to justify the destroyers-for-bases deal. If, after all, the President's power is supreme (or "plenary" in the words of *Curtiss-Wright*) in the foreign relations sphere, Congress may not limit his power to dispose of ships or munitions or make loans to foreign states. Indeed, Jackson asserted, the Walsh Amendment, by daring to check the President's limitless powers to dispose of Navy as he saw fit, "is of questionable constitutionality."²⁵⁰ Jackson's efforts notwithstanding, however, Roosevelt did not personally care much about the legality or the constitutionality of the deal. As he wrote to King George VI, if he had submitted his proposal to Congress as the "legalists" had wanted, "it would still be in the tender care of the Committees of the Congress!"²⁵¹ What he cared about was the public reaction, which was generally favorable.²⁵² For Roosevelt, that settled the issue.

²⁴⁷ *Id.* at 319-20.

²⁴⁸ *Id.* at 322 (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915)).

²⁴⁹ *Id.* at 320.

²⁵⁰ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 490.

²⁵¹ Letter from Roosevelt to King George VI (Nov. 22, 1940), *cited in* SHOGAN, *supra* note 4, 259.

²⁵² However, Wendell Willkie, although uncritical of the deal, told reporters that he thought Roosevelt's decision to avoid Congress was "regrettable." Shogan, *supra* note 4, at 244.

E. Escalating Aid, Vanishing Neutrality

The cancelled PT-boat sale, the Hell Diver sale, and destroyers-for-bases deal were not Roosevelt's only attempts to sell arms to Britain in violation of United States neutrality laws. Britain badly needed bombers as well, and Roosevelt could not convince Army Chief of Staff Marshall to declare any B-17 Flying Fortresses to be unnecessary to national defense in conformity with the Walsh Amendment.²⁵³ In November 1940 Roosevelt decided that the best way to avoid legal obstacles was for American pilots to fly the bombers to Britain for the alleged purpose of testing the planes under combat conditions. Roosevelt declared this to be "the only peg on which we could hang the proposition legally."²⁵⁴ After securing the agreement of Secretary of State Hull, Secretary of War Stimson brought the matter to the attention of the Justice Department,²⁵⁵ but Assistant Attorney General Townsend informed Stimson that Roosevelt's proposal would be illegal and unconstitutional — Congress had "entire dominion" over United States property; United States property "cannot be alienated without the consent and in the manner prescribed by [sic] Congress."²⁵⁶ Instead, Townsend accepted Stimson's proposal to sell B-17s to Britain out of existing stocks and to replenish American defense forces out of the bombers on order by Britain — an idea promptly implemented with the reluctant approval of General Marshall.²⁵⁷ In practice, this course of action amounted to lending Britain bombers from American defense forces while the British orders were being filled. Townsend's proposal seemed not only to violate the Walsh Amendment by rendering American defense

²⁵³ See LANGER & GLEASON, *supra* note 10, at 218.

²⁵⁴ Henry L. Stimson Manuscript Diary (Nov. 12, 1940), *supra* note 235, at 3-4.

²⁵⁵ See *id.* at 4-6.

²⁵⁶ *Id.* (Nov. 13, 1940) at 2.

²⁵⁷ See *id.*; *id.* (Nov. 15, 1940) at 1; Langer & Gleason, *supra* note 10, at 219.

forces temporarily vulnerable, but if Congress indeed had "entire dominion" over United States property, his proposal was as unconstitutional as Roosevelt's.

When the Nazis finally attacked and declared war on the Soviet Union (in that order) on June 22, 1941, Roosevelt agreed with the Soviets not to invoke the 1939 Neutrality Act even though Hitler had indeed declared war on the Soviet Union, so that he could send them Lend-Lease aid.²⁵⁸ He stated publicly that he "did not believe it to be in the interest of the security or the peace of the United States to issue a proclamation of neutrality under the terms of the so-called Neutrality Act."²⁵⁹ Although the Russians were very grateful for Roosevelt's agreement not to invoke the Act, his consent not to invoke the Act demonstrated an evident pro-Soviet partiality that gave the Nazis good reason to attack the United States.²⁶⁰ Because Roosevelt had already provoked the Nazis in many other ways, Roosevelt thought it unlikely that his failure to invoke the 1939 Neutrality Act against the Soviets would cause a Nazi attack. As he said in a 1940 press conference, states do not go to war "for legalistic reasons."²⁶¹ Thus, by aiding the Soviets to defeat the more dangerous Nazis instead of declaring neutrality, Roosevelt considered himself to be fulfilling the terms of the 1939 Neutrality Act: "to promote the security or preserve the peace . . . of the United States."

Roosevelt was almost certainly correct in his assessment of the situation, but there is an element of hypocrisy in his refusal to put the 1939 Neutrality Act into effect. After all, the only reason that refusal to invoke the Act would promote American security and peace was

²⁵⁸ LANGER & GLEASON, *supra* note 10, at 541.

²⁵⁹ Memorandum of Conversation from Sumner Welles, Acting U.S. Secretary of State (June 26, 1941), 1 FOREIGN RELATIONS, *supra* note 20, at 770.

²⁶⁰ *See id.* at 770.

²⁶¹ *See* Franklin D. Roosevelt, Press Conference on Dec. 17, 1940, *reprinted in* PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 604, 609.

because Roosevelt had provoked Hitler so much that this refusal was only another straw on the camel's back. In that situation it would indeed be better to help the Soviets. Roosevelt's numerous previous unneutral and illegal acts had already made an eventual Nazi attack probable. Hitler undoubtedly knew that an unneutral United States would make the realization of his ambitions very difficult; a subjugated United States, however, would present fewer difficulties. Thus, if Roosevelt had not broken the law so many times before and had maintained a "true neutrality," this first evidently unneutral act would certainly provoke Nazi wrath against the United States and might endanger its peace and security. On the other hand, given the boundlessness of Nazi ambitions, an eventual attack on the United States already seemed likely to Roosevelt, the only question being when. Germany had not respected Belgian or Luxembourgish neutrality, why should it respect American neutrality?

Asking this question raises a related question: if Roosevelt felt legally constrained to invoke the 1939 Neutrality Act when Germany invaded Norway, Belgium, Luxembourg, and the Netherlands, why did he not invoke the Act when the Soviets invaded Finland and Poland, or when Germany invaded the Soviet Union? The argument that in the latter situations neutrality would not promote American peace and security, while in the former situations neutrality would promote peace and security, offers little merit. If American aid to England or the Soviets did not provoke the Nazis, American aid to Belgium or Luxembourg certainly would not provoke them either. The only possible conclusion is that the peace and security of the United States as envisioned by Congress were not Roosevelt's only considerations. Comparing his actions with the terms of the 1939 Neutrality Act — which he obeyed even more scrupulously than the earlier Neutrality Acts — it is evident that Roosevelt paid little heed to the spirit of even that comparatively unrestrictive law.

F. An End to The Pretense of Neutrality: The Lend-Lease Act

In December 1940 Secretary of the Treasury Morgenthau made clear to Roosevelt that the British could no longer afford its American arms on order.²⁶² Roosevelt, undoubtedly remembering the success of the destroyers-for-bases exchange, decided to institutionalize a similar arrangement. He concocted the Lend-Lease scheme in his typical style of solving problems as they arose and letting others (in this case the Attorney General and the State Department) worry about how to make it legal, or appear legal.²⁶³ The Lend-Lease Act,²⁶⁴ proposed on January 10, 1941, and passed on March 11 of the same year, allowed the President, "notwithstanding the provisions of any other law," to build and sell arms, ammunition, machinery, aircraft, vessels, or other defense goods to any country whose defense the President deems "vital to the defense of the United States."²⁶⁵ It also authorized him to give freely ("transfer title"), exchange, lease, lend, "or otherwise dispose of" defense goods to any country, but only if, first, the President had consulted the Army's or Navy's Chief of Staff, and second, the value of the articles did not exceed \$1,300 million.²⁶⁶ Moreover, Congress authorized the President to repair or outfit foreign defense goods and to provide foreign governments with defense information "pertaining to any defense article for any such government." Section 2(b) of the Act gave Roosevelt complete discretion to decide the terms of the "aid." Finally, notwithstanding the "notwithstanding" language, section 3(e) stated that "[n]othing in this Act shall be construed to authorize or

²⁶² FEHRENBACH, *supra* note 6, at 196.

²⁶³ See Langer & Gleason, *supra* note 10, at 217.

²⁶⁴ 55 Stat. 31 (1941).

²⁶⁵ *Id.* at 31.

²⁶⁶ *Id.* Another limitation of the Act was that it did not allow American navy vessels to convoy "vessels" sold under the Act. *Id.* at 32.

permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.”²⁶⁷

While in force, the Lend-Lease Act effectively repealed the major provisions (other than section 3 and the section 7 ban on private loans) of the 1939 Neutrality Act, Title V of the 1917 Espionage Act, and the Johnson Act.²⁶⁸ While the Lend-Lease Act seemed an enormous delegation of power to Roosevelt in comparison with the restrictions of the Neutrality Acts, Roosevelt evidently thought his power still too closely regulated. The Roosevelt Administration hid most of its weapons and vessel transfers to the Allies so that Congress would not get suspicious about the value of U.S. aid; when it could not hide its transfers it lied about their value outright.²⁶⁹ Roosevelt feared the repercussions if Congress discovered the level of aid that the U.S. was transferring; he did not want a still largely isolationist Congress to accuse him of using American dollars to fight a European war.

Roosevelt was obviously betting on the passage of the Lend-Lease Act when he introduced it. Without telling Congress, he almost immediately began authorizing orders from Britain for arms purchases, including twenty-three thousand airplanes from November, well beyond their financial means,²⁷⁰ and in February, 1941, rifles and ammunition,²⁷¹ both of which he goaded Marshall into approving. By that point, though, Marshall was so used to giving illegal approval to weapons transfers that he could joke about it — “I might as well be

²⁶⁷ *Id.*

²⁶⁸ Cf. Memorandum from Oscar S. Cox, Legal Counsel to the U.S. Dep’t of Treasury, to Harry Hopkins, Personal Assistant to the President (Apr. 5, 1941), at 1-3 (on file with FDR Lib.)(stating the legal opinion that Lend-Lease Act authorizes shipment of arms by U.S. government vessels to any port in the world).

²⁶⁹ Interview with Myres S. McDougal, *supra* note 182.

²⁷⁰ 2 CHURCHILL, *supra* note 96, at 490.

²⁷¹ See Henry L. Stimson Manuscript Diary (Feb. 5, 1941), *supra* note 235, at 1.

hung for a sheep as a lamb" he told Secretary of War Stimson before signing a transfer.²⁷² Roosevelt even authorized the United States government to purchase munitions manufacturing plants for the United States military but secretly let the British use them instead.²⁷³ In fact, Winston Churchill made this plain by a curious error, if it was an error, in *Their Finest Hour*: "It must be remembered that our munitions effort from the beginning of Lend-Lease in January 1941 was increased by over one-fifth through the generosity of the United States."²⁷⁴ The Lend-Lease Act did not pass in January, of course, it passed in March; the point is that Roosevelt began his program full scale two months before Congress had legalized it. Secretary of War Stimson felt troubled by the illegality and deception, but justified it to himself in an ironically ambiguous phrase that may well summarize the Roosevelt Administration's attitude during the entire course of its statutory and constitutional violations: "I have no doubt that whatever technicalities may intervene the purpose of our action will be appreciated by the people eventually."²⁷⁵

The passage of the Lend-Lease Act legally enabled Roosevelt to "give freely" and unneutrally anything he wished to anyone he wished within the lax requirements of the law. While fifty-four percent of the public favored Lend-Lease after Roosevelt's "Arsenal of Democracy" fireside chat,²⁷⁶ some Senate Republicans virulently denounced the Lend-Lease Act as "a pure grant of power to the President to do as he pleases with any foreign nation, for any purpose on any terms he may see fit, to make available to any nation or nations, any part, or the whole, of the military or naval power of the

²⁷² *Id.*

²⁷³ See 2 CHURCHILL, *supra* note 96, at 506.

²⁷⁴ *Id.* at 7.

²⁷⁵ HENRY L. STIMSON MANUSCRIPT DIARY (Jan. 22, 1941), at 1-2, *supra* note 235.

²⁷⁶ See FEHRENBACH, *supra* note 6, at 199.

United States.”²⁷⁷ Yet, if the President is supreme in the foreign policy realm, as Secretary Hull believed, then clearly the Neutrality Acts could not constitutionally limit his powers in the first place.²⁷⁸ In that case, the Lend-Lease Act could not augment the President’s powers; rather, the Act was a restatement of his powers. The question arises, then, whether Congress had the power to regulate the President in the first place using neutrality legislation.

V. PRESIDENTIAL AND CONGRESSIONAL CONTROL OF FOREIGN RELATIONS

Although Congress retains the power to regulate foreign commerce²⁷⁹ and to support and fund armies and a navy,²⁸⁰ Roosevelt claimed a constitutional right — indeed, a *duty* — to act freely in foreign relations despite the Constitution’s complete lack of direct support for this arrogation of power.²⁸¹ Attorney General Jackson’s interpretation of *Curtiss-Wright* added to his confidence about his constitutional powers to flout congressional limitations on his conduct of foreign relations. Roosevelt may have been influenced by the writings and speeches of the two Presidents he admired most — his cousin Theodore and Woodrow Wilson. Theodore Roosevelt, whom Franklin adulated, envisaged an expansive role for the executive

²⁷⁷ Senate Foreign Relations Comm., Minority view of Promoting the Defense of the United States (Lend- Lease), SEN. REP. NO. 45 pt. 2, 77th Cong., 1st Sess. 2-3 (1941).

²⁷⁸ See 1 HULL, *supra* note 7, at 413.

²⁷⁹ U.S. CONST. art. I, § 8, cl. 3.

²⁸⁰ *Id.* art. I, § 8, cl. 12, 13.

²⁸¹ See *supra* text accompanying note 117. Roosevelt supposedly based his claims upon the Article II, § 2 powers conferred upon the President as Commander in Chief of the Army and Navy, and his power to make treaties and appoint ambassadors. See also 1 Hull, *supra* note 7, at 413 (arguing that 1935 Neutrality Act infringed President’s constitutional power to conduct foreign relations).

branch. He was the first President to assert powers extensively that were not enumerated in the Constitution. His "stewardship theory" of the presidency assumed that the President enjoyed all powers not specifically denied to him. In his own words,

The most important factor in getting the right spirit in my Administration . . . was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . . I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.²⁸²

By claiming that he denied himself powers "forbidden by the Constitution," Theodore Roosevelt was referring to powers *explicitly* forbidden by the Constitution. Both Roosevelts believe that these "specific restrictions and prohibitions" did not always include those appearing in the Tenth Amendment. The foreign policy of both Roosevelts was based on an expansive doctrine that made the President's role more akin to that of the eighteenth-century King of England than the Founding Fathers would have liked.

As for Woodrow Wilson, Bishop G. Ashton Oldham said to Roosevelt in an open letter, "[y]ou were not only the friend but are the

²⁸² THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 371-72 (1913).

heir of Wilson's policies and ideals."²⁸³ Friends and acquaintances were constantly comparing him to Wilson and sending him books by and about Wilson.²⁸⁴ Roosevelt himself agreed that "the problems of American neutrality which confronted Woodrow Wilson at the beginning of the World War were very much like the problems which face the Administration today and are likely to assume increasing gravity in the period just ahead of us."²⁸⁵

In 1908 Wilson set forth his views on the President's constitutional relationship with Congress in the exercise of his foreign relations powers:

One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely.²⁸⁶

Wilson's expansive interpretation of the President's foreign relations power, though later echoed by the *Curtiss-Wright* opinion, floundered in practice. His virile beliefs sunk American ratification of the Treaty of Versailles and the League of Nations Charter by alienating the

²⁸³ Letter from G. Ashton Oldham, Bishop, Diocese of Albany, to Roosevelt (Oct. 31, 1935), *reprinted in* 3 FDR & FOREIGN AFFAIRS, *supra* note 5, at 47, 49.

²⁸⁴ E.g., Letter from William E. Dodd, U.S. Ambassador in Germany, to R. Walton Moore, Assistant U.S. Secretary of State (Aug. 31, 1936), *reprinted in* 3 *id.* at 405, 408 n.8.; Letter from Ray Stannard Baker to Roosevelt (Nov. 1, 1935), *reprinted in id.* at 49, 49-50 & n.1.

²⁸⁵ Letter from Roosevelt to Ray Stannard Baker (Nov. 13, 1935), *reprinted in* 3 *id.* at 60.

²⁸⁶ WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77 (1908).

Senate. Roosevelt seems to have learned a lesson from Wilson's experience — not that, in the exercise of his foreign relations power the President should consult Congress during treaty negotiations, but that when politically feasible the President should neither consult Congress nor negotiate a treaty.

The unqualified and sparsely supported belief in the "very absoluteness" of the President's foreign relations power expressed by Wilson and the *Curtiss-Wright* opinion has little to recommend it. The Court's strong wording finds little support in the Constitution or in historical practice. The Constitution does not confer a "vast" foreign affairs power on the President, and certainly not a "plenary" power. By both custom and necessity the President has plenary *negotiating* power, but he certainly does not have plenary power to *bind* the United States in foreign negotiations. It is indisputable that the Constitution confers considerable foreign affairs powers on the Senate and Congress. Rather, in Edward Corwin's words, "[w]hat the Constitution does, *and all that it does*, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on Congress."²⁸⁷ Similarly, Edwin Borchard argued in 1940 that while "[c]ertainly the President is the 'sole organ of the nation in its external relations and its sole representative with foreign relations,' as [John] Marshall said in 1800. . . . [t]his speaks merely of agency, but not of power to *conclude and bind* the nation in fundamental matters."²⁸⁸ The power to involve the United States in a war (or not, by a declaration of neutrality), to create foreign policy, or to dispose of United States property are among these fundamental matters of foreign relations that the Constitution reserves for

²⁸⁷ EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 171 (1957).

²⁸⁸ BORCHARD, *supra* note 227, at 691.

Congress.

In fact, although Jackson and Acheson relied heavily on *Curtiss-Wright*'s legally feeble dicta,²⁸⁹ one court, albeit a district court, cited *Curtiss-Wright* to limit the President's power. The court in *Suspine v. Compania Transatlantica Centroamericana* held that the 1939 Neutrality Act was a constitutionally valid exercise of Congress' power over foreign commerce.²⁹⁰ The *Suspine* court repeated *Curtiss-Wright*'s holding that a congressional practice evidenced by over a century of repetition "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice."²⁹¹ The practice in *Suspine*'s case was Congress' control over the foreign arms trade. The district court correctly held that only Congress controlled foreign commerce. Moreover, the Supreme Court's holding in *Curtiss-Wright* emphasized the President's power to conduct foreign negotiations,²⁹² not his power to *actually dispose of* arms, funds, planes, or vessels. Commerce in weapons — even by barter, loan, or exchange²⁹³ — is foreign commerce by any definition.

On the other hand, outright transfers, loans, sale, or barter at

²⁸⁹ Ironically, when confronted with *Curtiss-Wright* as a precedent for broad presidential powers, Robert Jackson as Chief Justice dismissed the argument, pointing out that "much of the opinion is dictum." *Youngstown Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952).

²⁹⁰ *Suspine v. Compania Transatlantica Centroamericana, S.A.*, 37 F. Supp. 268, 272 (S.D.N.Y. 1941); see also HENKIN, *supra* note 229, at 95 (President has no power to regulate commerce with foreign nations).

²⁹¹ *Id.* at 315 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322, 327, 328 (1934)).

²⁹² See *United States v. Curtiss-Wright*, 299 U.S. at 319-20 (referring to President's power to "speak or listen" as representative of nation).

²⁹³ Economically, foreign commerce must ultimately amount to barter in any case.

rates more favorable than the market might qualify as foreign aid,²⁹⁴ the control of which Presidents have, since the 1960s at least, claimed control. This claim, however, is misguided. While the President might feel free to *negotiate* foreign aid agreements, Congress retains ultimate control of foreign assistance for several compelling reasons. One is that Congress holds the purse strings, and foreign aid is almost always a budgetary matter. Another is that foreign aid is closely related to commerce, which Congress controls by explicit constitutional authority. A final reason is that nowhere does the Constitution even hint that the President can dispose freely of United States property, a quintessentially congressional power as discussed below.²⁹⁵

Returning to a more detailed consideration of the destroyers-for-bases deal, Acheson's arguments can be easily disposed of. First, it seems obvious that Acheson misread section 14 of the Walsh Amendment to *confer* authority on the President to transfer arms when in reality the Amendment simply added an obstacle to any authority the President might previously have possessed.²⁹⁶ The Amendment did not say that the President may transfer, exchange, sell, or otherwise dispose of military weapons and vessels with the approval of the Army Chief of Staff or Chief of Naval Operations.²⁹⁷ The Amendment stipulated that "[n]otwithstanding the provision of any other law, *no military or naval weapon, ship, boat, aircraft, munitions, supplies or equipment*" owned by the United States may be sold by the President absent consent by the appropriate

²⁹⁴ See Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 Yale J. Int'l L. 69, 71 (1988).

²⁹⁵ See *infra* notes 302, 303 and 307-311 and accompanying text.

²⁹⁶ For a summary of Acheson's argument, see *supra* text accompanying note 325.

²⁹⁷ See BRIGGS, *supra* note 224, at 574.

aforementioned officials.²⁹⁸ Thus, only if the President had some other statutory or constitutional power could he dispose of the equipment and vessels; the Walsh Amendment granted him no such authority. The Walsh Amendment was a restriction on the President's power, not a grant of authority. Moreover, the Walsh Amendment only authorized the *sale* of the ships, not their *barter*.

Acheson also argued that as long as the ships were sold to private companies first, the 1939 Neutrality Act was no obstacle to the transfer. Putting aside any academic cavil about how this course of action would violate the spirit of the 1939 Act, the point is moot because Roosevelt never sold the destroyers to a private company. The transfer therefore violated the provisions of the 1939 Neutrality Act as well as title V, section 3 of the 1917 Espionage Act.

Jackson's argument presents a somewhat more convincing justification, yet it too is deeply flawed. While admitting that the *Curtiss-Wright* decision did not confer "unlimited" power on the President in foreign relations, Jackson argued that because destroyers-for-bases deal was an exchange not requiring an allocation of funds, Congress did not need to approve the deal.²⁹⁹ Jackson knew that Congress appropriates funds for the Navy under its Article II, Section 8 powers, and he tried to get around that fact by combining a national security argument with an argument that the destroyers-for-bases transfer did not require an *immediate* allocation of funds. The main error in this argument is that there is no legal difference between a past congressional allocation of funds and a future one. The trade or transfer of destroyers *in the past* required Congress to allocate funds for their construction, maintenance, and improvement. Moreover,

²⁹⁸ ACT OF JUNE 28, 1940, ch. 440, § 14(a), 54 Stat. 676,681 (1940) (emphasis added).

²⁹⁹ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 487.

United States acquisition of the bases would require *future* financial allocations for upkeep and adaptation to American purposes. The President may not exchange or transfer Navy vessels or agree to buy naval bases without congressional approval merely because the President believes that such an exchange or transfer improves national security. That view may lead to absurd and very dangerous consequences; indeed, by this logic the President would be constitutionally authorized in some circumstances to give the entire Navy to a foreign government, and any legislation attempting to prevent the transfer would be "unconstitutional."³⁰⁰ Such a result is, of course, constitutionally unthinkable. Roosevelt himself proclaimed, after a Nazi submarine attacked the U.S.S. *Kearny*, that American military vessels do not only belong to the Navy, they "belong to every man, woman, and child in this Nation."³⁰¹ Nowhere does the Constitution state or imply that the President may freely dispose of the property of the federal government. Implicit in Congress' power to provide for and maintain the Navy is Congress' power to keep the President from giving it away. It is emphatically the province of Congress, and of Congress alone, to regulate foreign commerce and to acquire *and dispose of* United States property.³⁰² This principle follows not only from Congress' commerce power, but from its war power as well. As the Chief Justice John Marshall noted, the commerce power "may be, and often is, used as an instrument of war."³⁰³ The Justice Department gave Roosevelt precisely this

³⁰⁰ CORWIN, *supra* note 230, at E6.

³⁰¹ FRANKLIN D. ROOSEVELT, NAVY AND TOTAL DEFENSE DAY ADDRESS, OCT. 27, 1941, *reprinted in* 4 DOCUMENTS ON AMERICAN FOREIGN RELATIONS 27, 27 (Leland M. Goodrich ed., 1942) [hereinafter DOCUMENTS ON AMERICAN FOREIGN RELATIONS].

³⁰² See HENKIN, *supra* note 229, at 77, 95, 99.

³⁰³ *Gibbons v. Ogden*, 22 U.S. (9 WHEAT.) 1, 190 (1824). In further support of this point, in 1868 the Senate considered whether to allow the President power to suspend commercial relations with a country for wrongfully detaining an American citizen.

conservative advice in response to the President's proposal to use American bombers in the British war: Congress has "entire dominion" over United States property and commerce.³⁰⁴ The provisions of the Constitution could not be clearer on this point: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"³⁰⁵ If the Constitution forbade the President to give away public property, as Roosevelt admitted it did,³⁰⁶ then Congress' "entire dominion" also forbade the President to sell or trade away public property without congressional approval. Indeed, Roosevelt explicitly recognized Congress' authority in his initial reply to Churchill's request for destroyers³⁰⁷ and in a telegram denying a similar request for aid in weapons in June 1940, from the French: "These statements carry with them no implication of military commitments. Only Congress can make such commitments."³⁰⁸

Congress had already made manifest its opinion on the unconstitutionality of Roosevelt disposing freely of American

Although the Senate passed the statute then under consideration (which is still effective today), it denied the President this power after a speech by Senator Charles Sumner. In that speech, Sumner excoriated the embargo clause: "Here is a way to make war easy. To the President is given this alarming power. . . . By the Constitution of our Republic it is Congress alone that can declare war. And yet by this bill One Man, in his discretion, may do little short of declaring war. He may hurl one of the bolts of war, and sever the commercial relations of two great Powers." See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 37 (1995).

³⁰⁴ Henry L. Stimson Manuscript Diary (Nov. 13, 1940), 2 (on file with Stimson Papers).

³⁰⁵ U.S. CONST. art. IV, § 3, cl. 2.

³⁰⁶ See 1 HULL, *supra* note 7, at 835-37 ("[T]he President had no authority to give away Government property. . . . Mr. Roosevelt at once agreed with me.").

³⁰⁷ See *supra* text accompanying note 192.

³⁰⁸ Telegram from Roosevelt to Sumner Welles, Acting Secretary of State (June 1, 1940), *quoted in* Tansill, *supra* note 210, at 591.

munitions. Two weeks prior to Roosevelt's June 3, 1940 sale of arms to Britain and France through a front corporation, Senator Claude Pepper of Florida had introduced a bill in Congress that would have allowed the President to sell for cash any planes to Britain that the United States could replace from current orders.³⁰⁹ He further introduced a concurrent resolution to allow the President to use his "full authority . . . under existing laws to sell or transfer airplanes and war material not at present needed in the national defense to any foreign country"³¹⁰ Both proposals were defeated in the Foreign Relations Committee, the latter after a lengthy debate in which several senators denied that the President could give away or sell government property on his own authority and claimed that the proposed bill would violate international law.³¹¹

Another dangerous consequence is the negation of the President's constitutional obligation not to provoke probable war. The Constitution assigns to Congress alone the authority to declare war³¹² and to *authorize* war;³¹³ it follows inexorably that the President

³⁰⁹ S.J. Res. 259/263, 76th Cong., 3d Sess., 86 Cong. Rec. 6768-70 (1940).

³¹⁰ S. Con. Res. 49, 76th Cong., 3d Sess., 86 Cong. Rec. 7649 (1940).

³¹¹ *Id.* at 6769-70 (statement of Sen. Claude Pepper), 7649-64 (statements of Sens. Josiah Bailey, Homer Bone, and Schwellenbach); Kimball, *supra* note 11, at 46.

³¹² U.S. CONST., art. I, § 8, cl. 11; *see also* *Holtzman v. Schlesinger*, 414 U.S. 1316, 1317-18, 1319-20 (1973) (President may not initiate war or bomb foreign country on sole authority); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("By the Constitution, Congress alone has the power to declare a national or foreign war. . . . [The President] has no power to initiate or declare a war . . . against a foreign nation.").

³¹³ While this conclusion follows logically from the text of the Constitution and the lack of any assignment of power to initiate war to the President, the conclusion also finds support in the Constitution's delegation to Congress alone (as opposed to the executive, which was the British practice) of the power to issue letters of marque and reprisal and to make rules concerning captures on land and sea. U.S. Const., art. I, § 8, cl. 11.

must take reasonable precautions within his constitutional and legal authority to avoid gratuitously provoking another state to declaring war,³¹⁴ particularly if such war would violate the will of Congress as it clearly did from 1935 until 1941. Secretary of State Cordell Hull flatly contradicted this principle in the Senate hearings on the Lend-Lease Bill, stating matter-of-factly that

[T]he President or even any naval officer in command of a ship could commit an act of war any hour or any day in the year in normal times under all the general authority that [the President] has there is every kind of way to commit an act of [war] if the Executive desires to do it.³¹⁵

Yet, this was a description of the President's factual abilities, not his legal powers. In 1935 John Bassett Moore set forth his views:

I have occasionally heard the suggestion that there can be no objection to conferring on the President dictatorial powers as regards peace and war because, forsooth, he can, in the exercise of his constitutional power as Commander in Chief of the Army and the Navy, or in the conduct of diplomatic intercourse, at any moment plunge the country into war. I utterly deny this. There is only one case in which the President is empowered to use the military forces for purposes of war without the express authority of

³¹⁴ See CORWIN, *supra* note 230, at 7E.

³¹⁵ Lend-Lease Bill: Hearings before the Comm. on Foreign Aff., House of Reps. (H.R. 1776, Public Law No. 11), approved Mar. 11, 1941, at 24.

Congress, and that is to repel invasion. The use of any of his powers so as to plunge the country into war would be a palpable violation of the Constitution and of his oath of office.³¹⁶

Moore's view agrees not only with the crystal-clear provisions of the Constitution, but with the records of the Constitutional Convention³¹⁷ and the weight of historical custom.³¹⁸ The Supreme Court took the President's duty in this regard for granted in *The Prize Cases*, noting that the President "has no power to initiate or declare a war."³¹⁹ The principle at issue here is the separation of powers, namely, the sword and the purse.³²⁰ As James Madison wrote:

³¹⁶ 7 JOHN BASSETT MOORE, *THE COLLECTED PAPERS OF JOHN BASSETT MOORE* 53-54 (1944) [hereinafter MOORE].

³¹⁷ See FISHER, *supra* note 304, at 4, 6.

³¹⁸ To take two of many possible examples, President George Washington refused to engage in any offensive operations against the Creek Nation in these terms: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure." 33 George Washington, *The Writings of George Washington* 73 (John C. Fitzpatrick ed., 1939). Similarly, President William Taft refused to intervene in Mexico to protect American lives and property without congressional approval. He "seriously doubt[ed]" that he had the power "under any circumstances" to send troops to Mexico without congressional approval. See FISHER, *supra* note 304, at 49-50.

³¹⁹ *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (emphasis added); see also *The Chinese Exclusion Case*, 130 U.S. 581, 591 (1889) (holding that President has no authority to order "aggressive hostilities"); 5 MOORE, *supra* note 317, at 29, 30-31 (1944) (contradicting Corwin's 1917 contention that Congress has less than exclusive power to declare war).

³²⁰ At the Constitutional Convention, George Mason advocated that the "purse & the sword ought never to get into the same hands." 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 139-40 (Max Farrand ed., 1937).

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.³²¹

Absent a congressional declaration of war, the sole power and duty conferred upon the President as Commander-in-Chief of the armed forces is to repel sudden attacks.³²²

Not only does Congress alone have the power to declare war, but since the first neutrality law in 1794,³²³ Congress has held the corollary power to determine that the United States will remain neutral in a conflict.³²⁴ In debates over the interpretation of the Constitution in *The Gazette of the United States*, both Hamilton and his opponent Madison (backed by Jefferson)³²⁵ disagreed upon this

³²¹ 6 MADISON, *supra* note 229, at 148 (emphasis in original).

³²² See FISHER, *supra* note 304, at 4, 6, 11-12.

³²³ Act of June 5, 1794, *reprinted in* 2 FRANCIS DEAK & PHILIP C. JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 1079 (1939).

³²⁴ See CORWIN, *supra* note 288, at 181; HENKIN, *supra* note 229, at 85, 99, 106 ("[S]ince President Washington's day neutrality has been determined by Congress . . ."). See generally FENWICK, *supra* note 48, at 15-25 (describing first United States neutrality law).

³²⁵ Cf. Letter from Thomas Jefferson to James Madison (July 7, 1793) (urging Madison to "take up [his] pen" against excesses of Pacificus's "most striking heresies"), *reprinted in* 6 Thomas Jefferson, The Writings of Thomas Jefferson 338, 338-39 (Paul Leicester Ford ed., 1895). Madison responded that, although he was in no mood to take up the debate, Pacificus's argument "excites equally surprise & indignation, and ought certainly to be taken notice of by some one who can do it justice." Letter from James Madison to Thomas Jefferson (July 18, 1793), *reprinted*

limitation to the President's powers. Hamilton, writing as "Pacificus" in favor of extensive presidential power, argued that the President has the authority to declare neutrality.³²⁶ Congress may not declare neutrality:

The legislative department is not the *organ* of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties. It is therefore not naturally that member of the government which is to pronounce on the existing condition of the nation with regard to foreign powers³²⁷

According to Hamilton, the constitutional limitations on the power to make treaties and declare war — both "executive" in character in Hamilton's view — are exceptions to the general rule that the President retains all executive authority. The power to declare neutrality, Hamilton said, is an executive power not explicitly delegated to Congress and therefore must be undertaken by the President.³²⁸ He argued that although Congress alone may declare war, it is "the duty of the executive to preserve peace till the declaration is made."³²⁹ Even if this were not true, Hamilton argued, the President still has *concurrent* power with Congress to judge whether the legislature is under an obligation to declare neutrality and war.³³⁰ On the other hand, the President may "affect the exercise of

in 6 MADISON, *supra* note 229, at 135. About one month later, that "some one" turned out to be himself.

³²⁶ 4 HAMILTON, *supra* note 229, at 436.

³²⁷ *Id.*

³²⁸ *See id.* at 439.

³²⁹ *See id.*

³³⁰ *See id.*

the power of the legislature to declare war” through his executive function, yet “the executive cannot thereby control the exercise” of the legislature’s power to declare war. “The legislature is still free to perform its duties, according to its own sense of them It is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war.”³³¹

Hamilton misinterpreted the Constitution’s grant of power for several reasons. First, he was incorrect in asserting that the legislature does not make treaties. The President may negotiate treaties, but only the Senate may “make” a treaty the law. Hamilton’s expansive interpretation of which powers are “executive” in character, which by his account included the treaty making power, simply is not justified. In addition, Hamilton failed to recognize the distinction between declaring neutrality and remaining nonbelligerent. If neither Congress nor the President declares neutrality, yet the government of the United States refrains from any action that would justify a belligerent declaring war on the United States, the United States remains in a *de facto* state of neutrality. The President’s duty to preserve the peace in the absence of a congressional declaration of war does not therefore require the President to proclaim United States neutrality. The records of the Constitutional Convention make clear that many the delegates were concerned that the powers of peace and war would not be in the hands of the President.³³² Yet, even if the President did have this power, Congress would also have a concurrent power to declare neutrality that could override the President’s decision not to declare neutrality.

Madison, publishing under the name “Helvidius,” pointed out different but equally important flaws in Hamilton’s arguments.

³³¹ *Id.*

³³² See FISHER, *supra* note 304, at 4, 6.

Madison interpreted the Constitution to confer the foreign policy power mainly upon the Congress by virtue of its power to declare war. He denied Hamilton's argument that declarations of war or neutrality are executive acts.

A declaration that there shall be war, is not an execution of laws: it does not suppose pre-existing laws to be executed: it is not, in any respect, an act merely executive. It is, on the contrary, one of the most deliberate acts that can be performed; and when performed, has the effect of *repealing* all the *laws* operating in a state of peace, so far as they are inconsistent with a state of war; and of *enacting*, as a *rule for the executive*, a new code adapted to the relation between the society and its foreign enemy. In like manner, a conclusion of peace *annuls* all the *laws* peculiar to a state of war, and *revives* the general *laws* incident to a state of peace.³³³

Madison used Hamilton's own earlier words against him, citing Hamilton's arguments in *The Federalist* to the effect that treaties were laws that the legislature should review and enact.³³⁴ As for Hamilton's

³³³ 6 MADISON, *supra* note 229, at 145.

³³⁴ See *id* at 151. Specifically, Hamilton said:

[I]f we attend carefully to [the nature of the power to make treaties], it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. . . . [T]he vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them.

argument that the President had concurrent power to declare neutrality or war, Madison had nothing but scorn.

Observe, how he struggles in his toils. He had before admitted, that the right to declare war is vested in the legislature. He here admits, that the right to declare war includes the right to judge, whether the United States be obliged to declare war or not. Can the inference be avoided, that the executive, instead of having a similar right to judge, is as much excluded from the right to judge as from the right to declare?

...

The power of the legislature to declare war, and judge of the causes for declaring it, is one of the most express and explicit parts of the constitution. To endeavour to abridge or *affect* it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.³³⁵

The President cannot in any circumstances “lay the *legislature* under an *obligation* to decide in favour of *war*,” as Hamilton argued. In essence, Madison pointed out, *Pacificus* was simultaneously arguing that the legislature is constitutionally free to decide when to declare

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, in would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration. The Federalist No. 75, *supra* note 103, at 379-80 (Alexander Hamilton).

³³⁵ *Id.* at 152-53.

war, yet constitutionally bound by the judgment of the President.³³⁶ The Constitution could contemplate no such self-contradiction. Rather, the power to declare war or neutrality “is *fully* and *exclusively* vested in the legislature.”³³⁷

Madison viewed the President’s powers in foreign relations as decidedly limited, but Madison’s interpretation logically and historically fit the architecture of the Constitution much better than Hamilton’s. Because the President retained initiative in the foreign relations sphere, subsequent practice showed Presidents to be in an advantageous position to advance Hamilton’s less persuasive interpretation to their own benefit. Insofar as Presidents have historically felt free to declare neutrality during insurrections and civil wars in neighboring countries, Hamilton’s position that the President had *concurrent* (though not exclusive) power to declare neutrality (but not war) has prevailed *de facto*.³³⁸ Nonetheless, Congress’ power to determine neutrality and to force the President to enforce it has gone unquestioned since the Pacificus–Helvidius debates. By committing blatantly unneutral acts — like the destroyers-for-bases deal and his failure to declare neutrality in the Sino-Japanese war despite a clear statutory mandate — Roosevelt infringed both Congress’ right to determine the United States’s neutrality and Congress’ right (on which both Hamilton and Madison agreed) to declare war “according to its own sense.” Roosevelt also thereby failed in his Article II, Section 3 duty to execute faithfully the laws of

³³⁶ See *id.* at 170–71.

³³⁷ *Id.* at 174.

³³⁸ In 1940, Quincy Wright argued without qualification that “[i]n fact, Hamilton’s view, insisting that [the power to declare neutrality] belonged to the President, has prevailed . . .” Wright, *supra* note 135, at 304. Wright was incorrect insofar as no constitutional authority has ever denied Congress’ power to declare neutrality, even against the wishes of the President, or to declare war in the face of the President’s proclamation of neutrality.

the United States. Certainly, insofar as the 1937 Act was a valid limitation on the President's powers to conduct foreign relations, Article II, Section 3 of the Constitution required Roosevelt to interpret and apply the provisions of the 1937 Neutrality Act in good faith. Roosevelt acknowledged publicly that if "war breaks out we have perfectly definite legislation covering the subject. Simply a question of following the legislation."³³⁹ Thus, when reasonable doubt existed as to whether a war had begun, ended, or spread to new countries, the President retained discretion. He was constitutionally obliged to apply that discretion "faithfully" — i.e., consistently with the letter and spirit of the law.³⁴⁰

When questioned by reporters, Roosevelt eschewed discussion of legal technicalities and relied on different historical precedents to justify the constitutionality of the destroyers-for-bases deal. He repeatedly compared the destroyers-for-bases deal to the Louisiana Purchase,³⁴¹ although when he mentioned that the Purchase was negotiated without congressional approval, he did not label it an unconstitutional act. Instead, he repeated that "there was nothing said about it in the Constitution."³⁴² He did mention that Jefferson requested Congress' blessing and appropriations *ex post facto*, but he incorrectly stated that the Louisiana Purchase was never submitted to or ratified by the Senate as a treaty. In fact, Jefferson drafted a treaty and submitted it to the Senate after negotiating and signing the

³³⁹ Franklin D. Roosevelt, Press Conference of Sept. 13, 1935, *reprinted in* 3 FDR & FOREIGN AFFAIRS *supra* note 5, at 7.

³⁴⁰ See *supra* text accompanying note 127.

³⁴¹ E.g., Franklin D. Roosevelt, Press Conference of Sept. 3, 1940, *reprinted in* PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 375, 376, 378, 380-81; Franklin D. Roosevelt, Message to Congress Regarding the Destroyers-for-Bases Deal (Sept. 3, 1940), *reprinted in* ROOSEVELT, *supra* note 18, at 273, 274.

³⁴² Franklin D. Roosevelt, Press Conference of Sept. 3, 1940, *reprinted in* PUBLIC PAPERS & ADDRESSES, *supra* note 91, at 381.

Purchase. Roosevelt, by contrast, never asked Congress at all, even after the deal was consummated. When asked about Jackson's opinion on the relevancy of the Louisiana Purchase, Roosevelt told reporters that he thought Jackson had also mentioned the Purchase in his brief supporting the deal.³⁴³ Jackson had actually written that the Louisiana Purchase was not "strictly pertinent" as a precedent.³⁴⁴

As for Jackson's national security nuance, it seems hard to believe that Roosevelt's powers as Commander-in-Chief can justify an otherwise unconstitutional action in the absence of a clear threat to the safety of the state. True, the foreign affairs power is a delicate one that requires the President to balance the public's interest in open and honest government with the need to accommodate the peremptory necessity of maintaining national security. The force of this objection cannot be denied, and the Roosevelt Administration repeatedly announced its belief that the security of Britain was necessary for the defense of the United States. In Roosevelt's publicly expressed view, so long as Britain would fight Germany, American weapons were as good or better in British hands as in American hands. Yet, broad interpretations of what improves "national security" or "self-defense" as history has recurrently shown, are rife with potential for fantastic abuse.³⁴⁵ In fact, in 1966 a legal adviser to the U.S. Department of

³⁴³ *Id.*

³⁴⁴ Letter from Robert Jackson, U.S. Attorney General, to Roosevelt (Aug. 27, 1940), *reprinted in id.* at 487-88.

³⁴⁵ A case in point is President George Bush's 1989 decision to invade Panama. The U.S. Ambassador to Panama justified the invasion on grounds of self-defense. According to his theory, the fact that the Panamanian government allowed or assisted the smuggling of drugs to the United States constituted "aggression" against the United States and therefore justified invasion in "self-defense." See FISHER, *supra* note 304, at 147-48 (1995). President William Clinton provided another example when he ordered the firing of missiles into the capital of Iraq to punish the Iraqi government for an alleged attempt to assassinate George Bush. Needless to say, "calling the U.S. bombing of Iraq an act of self-defense for an assassination plot that

State publicly characterized the United States' right of self-defense (and the President's right to use armed forces without congressional approval) in these terms: "An attack on a country far from our shores can impinge *directly* on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet-Nam would endanger the peace and safety of the United States."³⁴⁶ Needless to say, no reasonable definition of the President's duty of self-defense goes so far. In a democratic society with a Constitution that speaks as clearly on the issue of checks and balances as the United States Constitution does, the "national security" power must be narrowly construed. In this light, considering the lack of immediate threat to the United States at the time; Roosevelt's knowledge and belief that arms shipments and transfers to Britain seriously impaired the ability of the United States Army and Navy to defend itself against a potential attack;³⁴⁷ and the fact that Roosevelt's unneutral actions

had been averted two months previously is quite a stretch." Michael Ratner & Jules Lobel, *Bombing Baghdad: Illegal Reprisal or Self-Defense?*, LEGAL TIMES, July 5, 1993, at 24.

³⁴⁶ LEONARD C. MEEKER, 54 DEP'T OF ST. BULL. 474, 484 (1966) (emphasis added).

³⁴⁷ See SHOGAN, *supra* note 4, at 76, 87. Despite widespread public support for increasing the United States armed forces, see *Stronger Defense Backed by Voters*, N.Y. TIMES, Nov. 12, 1940, at 30, it was the Roosevelt Administration's policy to improve not the national security of the United States, but the security of Britain *even at the expense of American defense needs*. Secretary of the Navy Frank Knox told the *New York Times* on November 15, 1940, that the Roosevelt Administration's policy was to give Britain "every possible degree of aid short of leaving ourselves defenseless." LANGER & GLEASON, *supra* note 10, at 221. In reality, the Roosevelt Administration was redirecting American arms to Britain on such a scale that, had Germany or Japan launched a full-scale attack against the United States at the time Knox made that statement, the United States would have in fact been virtually defenseless. Cf., e.g., 2 CHURCHILL, *supra* note 96, at 126 (redirecting arms production to Britain left U.S. Army with minimum equipment required for national defense); KIMBALL, *supra* note 11, at 44-45 (describing Army reluctance to sell arms to Britain due to shortage in United States); LANGER & GLEASON, *supra* note 10, at

themselves helped to provoke the Axis powers into attacking in the first place, it seems highly doubtful that national security considerations would have justified many or even any of Roosevelt's violations of the neutrality laws and the Constitution, unless Britain were considered one of the American states.

The destroyers-for-bases deal did not only infringe on Congress' commerce and war powers, as explained above it also violated the 1917 Espionage Act and the 1939 Neutrality Act as well and thereby infringed on Congress' constitutional prerogatives in another way. Because destroyers-for-bases violated existing neutrality laws, Roosevelt needed prior legislative approval for the deal, which he did not seek until 1941. Given the many ways in which the deal infringed upon Congress' constitutional prerogatives, the only correct

215, 218-20, 736 (describing Army reluctance to sell B-24 and B-17 bombers to Britain due to shortage in United States); *id.* at 228 (after destroyers-for-bases deal American stocks of planes and destroyers were "dangerously low"); 1 MORISON, *supra* note 215 ("During the U-boat blitz off our Atlantic Coast early in 1942, one of the high-ranking admirals in Washington wrote to Stark saying he wished we had those fifty destroyers and ten cutters."); SHOGAN, *supra* note 4, at 80-81; Telegram from Roosevelt to Winston Churchill (May 16, 1940), *reprinted in* 3 FOREIGN RELATIONS, *supra* note 5 (Roosevelt claims United States cannot even spare old ships). As the *New York Times* pointed out, bases are not very useful to national defense in the absence of planes and ships. SHOGAN, *supra* note 4, at 250.

The massive American shipping losses in 1942 in the Caribbean and Bermuda exemplify well that the United States needed the vessels and weapons it was transferring to the Allies for its own defense. *See generally* MORISON, *supra* note 215, at 413-14. Indeed, German U-boats even managed to lay mines off of Boston, Delaware, Chesapeake Bay, New York, and elsewhere. *See id.* at app. IV. Yet, knowing that the Navy was spread dangerously thin, Roosevelt nonetheless continued to transfer ships to Britain. For example, in March 1941 Roosevelt gave ten Coast Guard cutters to Britain when Secretary Knox insisted that the Navy could give up no more destroyers. *See* LANGER & GLEASON, *supra* note 10, at 424.

For a summary of comparative naval strengths in late 1939, *see generally* 1 CHURCHILL, *supra* note 7, at app. F.

procedure to implement the destroyers-for-bases deal would have been for Roosevelt either to draft a treaty, which in turn requires senatorial approval, or simply to request legislative approval from Congress.

Roosevelt knew of his duty to consult Congress, and communicated to Winston Churchill in a telegram on May 16, 1940: "As you know a step of that kind [i.e., lending or selling destroyers to Britain] could not be taken except with the specific authorization of the Congress" ³⁴⁸ The only reason that Roosevelt did not finally seek a bill was, of course, because he knew Congress would not approve of the exchange. ³⁴⁹ Indeed, before announcing the deal publicly on September 2, 1940, Roosevelt himself twice admitted that he "might get impeached for what he was about to do." ³⁵⁰ Indeed, if Roosevelt really had believed the destroyers-for-bases deal to be within his constitutional power there would never have been any legal need for the Lend-Lease Act. ³⁵¹

VI. ROOSEVELT'S DELICATE BALANCE

Winston Churchill quoted Roosevelt as telling him: "I may never declare war; I may make war." ³⁵² This disrespect for his constitutional duties typifies Roosevelt's pre-World War II behavior and explains the fears of his contemporaries that he was usurping

³⁴⁸ Telegram from Roosevelt to Winston Churchill [alias "Formal Naval Person"] (May 16, 1940), *reprinted in* 3 FOREIGN RELATIONS, *supra* note 5 at 49, 49-50 (1957).

³⁴⁹ *See id.* at 49-50; Memorandum by President Roosevelt (Aug. 2, 1940), *reprinted in id.* at 58, 58-59.

³⁵⁰ 1 DAVID E. LILIENTHAL, THE JOURNALS OF DAVID E. LILIENTHAL 209 (1964).

³⁵¹ *Cf.* HENKIN, *supra* note 229, at 77 ("[Congress'] power to acquire and dispose of property has supported lend-lease and other arms programs . . .").

³⁵² 3 CHURCHILL, *supra* note 96, at 528.

power from Congress in a "dictator-like" fashion. Roosevelt seems to have consistently, even deliberately overestimated the extent of his constitutional authority as President. To achieve his foreign policy goals, he claimed powers that were clearly not his and neglected his Article II duty to ensure that the laws are faithfully executed. He repeatedly infringed upon Congress' exclusive power to determine the neutrality of the United States,³⁵³ to regulate commerce,³⁵⁴ and to dispose of United States property.³⁵⁵ In a disgraceful failure of leadership and moral vision, he not only let Congress pass neutrality legislation allowing fascists to take over Spain, he encouraged it. Meanwhile, he abused his duties under the other neutrality acts. It must have been difficult for him to make sound legal judgments when his legal advisers — Edward Foley and Oscar Cox (Treasury), Green Hackworth (State), Ben V. Cohen (Interior), Francis Biddle (Solicitor General), Robert Jackson (Attorney General), even the comparatively objective Newman Townsend (Justice) — were so often "yes-men." He and his legal advisers consistently "adopted the easy amorality of the end justifying the means."³⁵⁶ As Harry Hopkins put it, "I want to

³⁵³ See *supra* text accompanying note 324.

³⁵⁴ See generally HENKIN, *supra* note 229, at 95 (President "cannot unilaterally regulate commerce with foreign nations").

³⁵⁵ See generally *id.* (President "cannot . . . dispose of American territory or property").

³⁵⁶ MILLER, *supra* note 17, at 327. The salty Henry Stimson, then Secretary of War, attended a meeting of Frank Knox, Sumner Welles, Robert Jackson, himself, and several lesser officials and legal advisers on August 21, 1940, wherein they discussed means of implementing the destroyers-for-bases deal. During the discussion, an unidentified official suggested transferring the destroyers to Canada instead of Great Britain as a subterfuge — an idea that gained enough support to irritate Stimson into vocal opposition. The fact that the suggestion should even have been advanced, Stimson wryly commented in his diary, "was an evidence of how technical stupidity can get into these pleasant people." Henry L. Stimson Manuscript Diary (Aug. 21, 1940), *supra* note 235, at 2.

assure you that we are not afraid of exploring anything within the law, and we have a lawyer who will declare anything you want to be legal.”³⁵⁷ In fact, they usually arrived at their legal conclusions long before doing any research at all.³⁵⁸

Yet, regardless of what his advisers told him, he was *not* legally free to violate the national laws of neutrality, and he was not free to lie to Congress about the level of aid he gave to the Allies. His refusal to recognize obvious wars in violation of the spirit of the neutrality laws; his unauthorized destroyers-for-bases exchange; his unneutral aid in cash and planes to China, Britain, Finland, and other states; his rerouting airplanes to Britain via Canada; his “currency stabilizing” loans to belligerent states; his willful deception of Congress and the public; and his many lesser unneutral acts of economic or actual warfare³⁵⁹ violated international and national laws of neutrality in a manner that showed nothing less than disrespect for Congress and, in its worst manifestations, the American public and the Constitution. In these fragile moments Roosevelt shed his leader’s mantle and donned the costume of a politician, in the pejorative sense of the word.

There can be no question that, all told, Roosevelt’s devious circumvention of the neutrality laws and his disregard for international law seemed prudent at the time. Strict neutrality was morally out of

³⁵⁷ MILLER, *supra* note 17, at 327.

³⁵⁸ Interview with Myres S. McDougal, *supra* note 182; *see also* DEAN ACHESON, MORNING AND NOON 161-88 (1965) (describing Roosevelt’s ignoring Acheson’s sound legal advice for political purposes).

³⁵⁹ According to T.R. Fehrenbach, for example, before declaring neutrality in the German-British war, the Roosevelt Administration instructed U.S. Customs to delay the departure of the German liner *Bremen* to allow a British cruiser, *Berwick*, to intercept it. FEHRENBACH, *supra* note 6, at 32.

the question for Roosevelt, except apparently with regard to Spain.³⁶⁰ Roosevelt identified the fate of China and Europe — particularly Britain — as tightly knotted with the fate of the United States. The fall of Britain and the other democracies would leave the United States alone to defend freedom of the seas and the safety of the western hemisphere. He could not reconcile the larger goals for which he quested — justice and peace in Eurasia and their friendly international relations with the United States — with the isolationist sentiment of the times. Legally or not, he felt he would have to persuade the American public to see how wrong isolationism was, for he believed “the values for which, under his leadership, the United States stood and which he advocated were those most conducive to the advancement of peace and the general interests of humanity.”³⁶¹ Selfish isolationism was not among these values. As he told Congress in his heartfelt annual message of 1941, “principles of morality and considerations for our own security will never permit us to acquiesce in a peace dictated by aggressors and sponsored by appeasers. We know that enduring peace cannot be bought at the cost of other people’s freedom.”³⁶² On the other hand, the Roosevelt administration had no real option to enter the war “cold turkey” given the isolationist national mood, and little incentive to do so given the early administration’s limited knowledge of the extent of Nazi and Japanese brutality and its belief that Britain and France could win without the American troops. Had Roosevelt followed the strict dictates of American law and historical constitutional practice, Europe would almost certainly have succumbed to Hitler before Congress took any action. Congress’ unwieldy and uninformed grip on foreign

³⁶⁰ Secretary Hull held the same contempt for the abdication of moral responsibility that strict neutrality entails. See 1 HULL, *supra* note 7, at 408, 417.

³⁶¹ WATT, *supra* note 143, at 125.

³⁶² Franklin D. Roosevelt, Annual Message to Congress of Jan. 6, 1941, *reprinted in* PUBLIC PAPERS & ADDRESSES, *supra* note 91 at 663, 667.

policy impeded the government's intelligent and effective action and finally brought the "survival of modern democracy into question."³⁶³

It would be easy to exonerate Roosevelt given the difficulties of the situation and the comparatively brilliant way he handled it. As Dean Acheson remarked: "At the top there are no easy choices. All are between evils."³⁶⁴ Roosevelt was a man in an exceptionally serious dilemma who nonetheless "refused to concede that any problem was insoluble."³⁶⁵ Likewise, it would be easy to take a simplistic, legalistic view like Borchard and Lage did,³⁶⁶ and condemn Roosevelt for intentionally or knowingly violating the laws of neutrality, both national and international, while maintaining immaculate rhetoric. The fair judgment is subtler. The ends do not always justify the means, but in Roosevelt's case they sometimes did. By declaring war earlier he would have averted the deaths and destruction of the Pearl Harbor massacre and perhaps have saved many lives and much priceless property by winning the war earlier, but could he have salvaged his reputation from the scorn of future generations as Wilson managed to do only much later in history? Roosevelt valued his reputation, political stature, and public support too much to let this happen.³⁶⁷ Conversely, by maintaining a strict neutrality the United States would have washed its hands of all allies except the militarily feeble Latin American countries, and might have isolated itself in the stranglehold of a triple fascist victory in Europe, Asia, and Africa. Roosevelt managed to avert both catastrophes quite imaginatively without major permanent damage to the traditions of democracy or the rule of law in the United States. On the other hand, many of the painful no-win dilemmas Roosevelt faced could have been prevented had he planned

³⁶³ FEHRENBACH, *supra* note 6, at 163.

³⁶⁴ DEAN ACHESON, *PRESENT AT THE CREATION* 22 (1987).

³⁶⁵ WELLES, *supra* note 3, at 77.

³⁶⁶ *See generally* BORCHARD & LAGE, *supra* note 1.

³⁶⁷ *Cf.* SHOGAN, *supra* note 4, at 177-78.

more effectively and given strong leadership earlier. In the mid-1930s, Roosevelt failed to answer effectively the harangues of the isolationist minority and failed to educate the public about the real danger of the fascists and the proposed isolationist response to their aggressions.³⁶⁸ Had he opposed the unnecessary neutrality in Spain, continually educated the public, and used the bully pulpit like his Uncle Theodore, he probably would have rendered much of his later deceptions unnecessary.

Thus, he can be faulted for a tendency toward excessive subterfuge and dishonesty, and for an unwillingness to take a principled stand early enough and often enough. Despite a very loud minority opposing all involvement with Europe, a majority of the American public was willing to risk war in order to aid Britain even in 1940.³⁶⁹ A number of people, including some of Roosevelt's intimates, advised him to go ahead with war much earlier and lead public opinion rather than following it. General Robert E. Wood, Acting Chairman of the Committee to Defend American by Aiding the Allies, offered this honorable advice in an October, 1940 speech:

We have the anomalous situation of the polls showing a majority of the people favoring a course that is bound to get us into the war (increased aid to Britain), while the same polls show 86 per cent of the same people oppose actual entry into war. . . . The issue should be honestly presented to the people. If we aid Britain, short of war and beyond the limits of the Neutrality Act, it ultimately means war and should mean war. If we enter the war, we must enter it with all our strength in men and money. That is the only

³⁶⁸ See BURNS, *supra* note 7, at 255.

³⁶⁹ See KIMBALL, *supra* note 11, at 126, 191-92.

way to win a war.³⁷⁰

Winston Churchill warned rather testily in a September, 1941 speech that:

Nothing is more dangerous in wartime than to live in the temperamental atmosphere of a Gallup poll, always feeling one's pulse and taking one's temperature. . . . There is only one duty, only one safe course, and that is to try to be right and not to fear to do or say what you believe to be right.³⁷¹

Secretary of War Henry Stimson, a trusted adviser and elder statesman, relentlessly urged Roosevelt to provide leadership and declare war, or at least to make clear to the public that war was inevitable.³⁷² He even sent Roosevelt "a rough imaginary resolution" to send to Congress that would authorize the President to defend American interests against aggressor nations using military force.³⁷³ Roosevelt always listened but never acted. Respected diplomat and former Assistant Attorney General William J. Donovan publicly urged Roosevelt to take a tough stand against the fascists: "In an age of bullies we cannot afford to be a sissy."³⁷⁴ Grenville Clark chided him not to wait for an "incident" but to go directly to Congress to seek

³⁷⁰ LANGER & GLEASON, *supra* note 10, at 200 (quoting General Robert E. Wood).

³⁷¹ Speech to Parliament on Sept. 30, 1941, *reprinted in* WINSTON S. CHURCHILL, *THE UNRELENTING STRUGGLE* 272 (Charles Eade ed., 1942).

³⁷² Henry L. Stimson Manuscript Diary (Aug. 28, 1941; Sept. 25, 1941), *supra* note 235.

³⁷³ Letter from Henry L. Stimson, U.S. Secretary of War, to Roosevelt (May 24, 1941) (on file with Stimson Papers).

³⁷⁴ *We May Send Men, Says Col. Donovan*, N.Y. TIMES, Nov. 12, 1939, at 41.

authority for belligerent acts: "it is unworthy of a great nation to go into a great war on . . . any basis except the decision of Congress, or at least after placing the issue of active belligerency before Congress and giving them the *opportunity* to pass on the issue."³⁷⁵ A host of congressional representatives, diplomats, and scholars continually mounted convincing attacks against Roosevelt for his deceptiveness and waffling; if the United States was going to take sides, they justifiably claimed, a congressional declaration of war was in order.³⁷⁶ In the end, they were right. Instead of deceiving the public and Congress, Roosevelt should have taken early principled stands. Then, if he lost anyway, when the isolationist predictions about "phony wars" and harmless Nazis proved wrong, he could have used their mistakes effectively to guide public sentiment. Instead, he compromised first and deceived later. We may agree that the difficulties of the moment excused his conduct, but we cannot say the difficulties justified his conduct.

As Senator William Fulbright concluded in 1971, Roosevelt's success in leading the nation into a successful and by all accounts just war does not exonerate him from the harmful example he set.³⁷⁷ His dishonesty in a good cause was a precedent for the dishonesty in bad causes and flouting of the Constitution exhibited by later Presidents,

³⁷⁵ Letter from Grenville Clark, Partner, Root Clark Buckner & Ballantine, to Roosevelt (July 3, 1941), attachment, at 3-5 (on file with Stimson Papers).

³⁷⁶ See KIMBALL, *supra* note 11, at 129, 154-55, 178-79; see, e.g., 86 CONG. REC. 7651(1940) (statement of Sen. Homer Bone); SHOGAN, *supra* note 4, at 62 (quoting Michigan Republican Senator Arthur Vandenburg); *Destroyer Sale Attacked by Nye*, N.Y. TIMES, Sept. 2, 1940, at 6 (quoting Sen. Gerald P. Nye as saying sale of destroyers was equivalent to waging war); cf. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 29 (1947) (stating that Lend-Lease Act was at very least "a qualified declaration of war.").

³⁷⁷ JOSEPH P. LASH, *ROOSEVELT AND CHURCHILL, 1939-1941*, at 421 (1976).

from Truman to Clinton.³⁷⁸ Roosevelt also worsened the imbalance of powers between Congress and the Executive that the Founding Fathers sought so ardently to avoid. In the crucible of twentieth century political conflict, the President has too often emerged with his feet firmly planted on territory allocated to Congress by the Constitution. Roosevelt contributed more to that imbalance than perhaps any other President in the history of the United States. Then again, it is easy to lay blame on one so constantly under public scrutiny even a half century after his death. Perhaps one should absolve Roosevelt and blame the shortsightedness of his contemporaries and the American public, who forced a great man pursuing worthy ends to use less than noble — and less than legal — methods.

³⁷⁸ Specifically, Clinton has been convincingly accused of unconstitutionally usurping the powers of Congress by sending troops to Haiti — and thereby risking war — without congressional approval. See Fisher, *supra* note 304, at xi, 154-57; Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995). He has also been accused of using troops in Somalia for combat and attacking Bosnian Serbs without congressional approval. See FISHER, *supra* note 304, at xi, 153-54, 159-60.

