EDITORIAL COMMENT

THE LEND-LEASE BILL AND INTERNATIONAL LAW

The Defense Act, introduced as House Resolution 1776 on January 10, 1941, and popularly referred to as "The Lend-Lease Bill" was approved with amendments by the House on February 8, 1941, and by the Senate with additional amendments on March 8, 1941. It became law with the President's signature on March 11, 1941.*

The Act was opposed by a minority in both houses on the ground that it would dangerously augment the President's powers in the conduct of military and foreign affairs, that it would permit departure from the duties of the United States under international law, and that it would involve the country in war.[1] The defenders of the bill contended that it would not add to the President's constitutional powers, that it was in accord with the requirements of international law in the abnormal situation which exists, and that failure to enact it promptly might result in an augmentation of the power of the despotisms dangerous to the peace of the United States.[2] This discussion will not deal with the political problem, it will consider the constitutional and international law issues.

The powers which flow from the President's constitutional position as the executive department of the Government, the Commander-in-Chief of the Army and Navy, and the representative authority in international affairs are very great.[3] The Act does not add to or subtract from these powers. It does affect the President's freedom in the exercise of certain of these powers. Certain laws which have qualified that freedom are amended.[4] Congres-

* The Act is printed in the Supplement to this JOURNAL, p. 76.

[1] See especially remarks of Senator Burton K. Wheeler, of Montana, Cong. Record, March 1, 1941, daily edition, p. 1647.

[2] See especially remarks of Senator Alben Barkley, of Kentucky, *ibid.*, Feb. 17, 1941, p. 1080.

[3] It has been held that the President has authority to direct the armed forces in time of peace and war (*Ex parte* Milligan, 4 Wall. 2, 1866); to utilize these forces for the protection of citizens abroad (Durand *v.* Hollins, 4 Blatch. 451, 454, 1860; Fed. Cas. No. 4186); to recognize a state of war against the United States by the act of another power (The Prize Cases, 2 Black, 635, 638, 1862); to recognize the existence of foreign war (The *Divina Pastora*, 4 Wheat. 52, 1819); to dispose of military and naval material in the interest of American defense (Op. Att. Gen. Jackson, August 27, 1940, this JOURNAL, Vol. 34 (1940), p. 731; James G. Harbord, The American Army in France, 1917–1919 (Boston, 1936), p. 536; Act March 2, 1919, 40 Stat. Pt. 1, 1273, Sec. 3); to be the sole agency of official communication with foreign governments (United States *v.* Curtiss-Wright Corporation, 299 U. S. 304, 1936); and to recognize foreign states and governments (Rose *v.* Himely, 4 Cranch, 239, 272, 1808; Kennett *v.* Chambers, 14 How. 38, 1852; J. B. Moore, Digest of International Law (Washington, 1906), Vol. 1, p. 243). See also, Q. Wright, The Control of American Foreign Relations (New York, 1922), pp. 267 ff., 285–319.

[4] Particularly statutes imposing certain restrictions in regard to the disposal of army and naval material (Act of March 3, 1883, Sec. 5, U. S. Code, Tit. 34, Sec. 492; Act of June 28,

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sional appropriations necessary for the exercise of certain of the President's powers are assured.[5] The Act also imposes new legislative restrictions upon the exercise of certain powers.[6]

It cannot be said that the debate has greatly clarified the controversial questions concerning the functions of Congress and the President in the conduct of military and foreign affairs. The controversy has arisen in part because of careless use of words by which three different legal conceptions—"a power," [7] "a freedom," [8] and "a right" [9]—are referred to by one or the

1940, Sec. 14 (a)) and to the construction for a belligerent of military or naval material in the United States. (Act of June 15, 1917, 40 U. S. Stat. 221; U. S. Code, Tit. 18, Sec. 33; Deák and Jessup, Neutrality Laws, Regulations and Treaties (Washington, 1939), Vol. 2, p. 1092.) See Q. Wright, "The Transfer of Destroyers to Great Britain," this JOURNAL, Vol. 34 (1940), p. 680 ff.

[5] The Act is somewhat inconsistent. Article 6 (a) "hereby authorizes to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act." This would permit expenditures to be contracted to be later met by deficiency appropriations. Article 3 (a), however, permits the manufacture and procuring of war supplies for foreign governments only "to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both." A $7,000,000,000 appropriation bill to implement the Act was introduced on March 12, 1941, and approved on March 27.

[6] Especially provisions requiring certain conditions in the contracts for disposing of materials (Secs. 4, 7); requiring reports by the President at least every ninety days on the operations under the Act, Sec. 5 (b), and providing for termination of the exercise of the powers dealt with in the Act by June 30, 1943 or earlier if so ordered by "concurrent resolution" of Congress. The latter provision appears to be unconstitutional because the President cannot be deprived of the veto given him with respect to all Congressional "orders, resolutions or votes" by Art. I, Sec. 7, Cl. 3 of the Constitution, and Congress cannot delegate legislative power. Congress can provide for the termination of legislation at a future date or on the occurrence of an event of a type other than a political decision. It appears, however, that a "declaration that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States" is not a finding of fact but a political decision. Power to make such a decision belongs to the President or to Congress and cannot be delegated by Congress to a body unknown to the Constitution such as the two Houses of Congress acting in a manner not permitted by the Constitution. See Q. Wright, "The Power to Declare Neutrality under American Law," this JOURNAL, Vol. 34 (1940), p. 307 ff. It was probably because it realized the unconstitutionality of this provision that the Senate added an amendment providing: "If any provision of this act or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of the act and the applicability of such provision to other circumstances shall not be affected thereby" (Sec. 11).

[7] If an act changes the legal position of others in accordance with the intention of the actor, the actor has exercised a legal power.

[8] If an act is not in violation of any legal obligation of the actor and the actor does not incur any legal liability, the actor has exercised a legal freedom or liberty. This conception embraces both legal privileges and legal immunities.

[9] If others are obliged not to interfere with an act, the actor has a legal right. The meaning of these terms is discussed by Hohfeld, Fundamental Legal Conceptions, New Haven, 1923; Kocourek, Jural Relations, Indianapolis, 1927; Q. Wright, Mandates Under the League of Nations, Chicago, 1930, p. 286 ff.

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other of these terms without proper discrimination. While the possession of a power often implies a freedom and a right to exercise it, this is not always the case. The exercise of powers may be qualified by legal responsibilities and legal duties.[10]

The problem has often been stated: What are the respective rights of Congress and the President in this field? It should be stated: To how great an extent does Congress have the power to limit the President's freedom in the exercise of his military and diplomatic powers?

It seems clear that Congress and the treaty-making authority can limit the President's freedom in the exercise of these powers by making laws defining what are American interests to be defended,[11] and by deciding what sums of money, what material and what forces shall be available to the President.[12] Congress cannot, on the other hand, limit the President's freedom to utilize whatever appropriations, materials, and forces have been made available in order to fulfill his constitutional duty to see that "the laws are faithfully executed" and to defend the national interests defined by the Constitution, legislation or treaty.[13] To fulfill this duty the President must decide when action is necessary,[14] and Congressional encroachments upon this right of decision and action would be void.[15]

There is, therefore, no question of Congress delegating power to the President in the field of foreign and military affairs. Under the Constitution the President has the power to direct the forces and the diplomacy of the country. Congress does not have these powers. It can neither delegate them to the President nor take them away from the President. It can, however, determine the instruments which the President shall have to direct and, within the limits of the Constitution, the objects for the defense

[10] A landlord, for instance, has under common law the power to revoke a license to use his land but he is not free to exercise this power if it would be in breach of a contract. In that case the license would be ended, but the licensee would have an action for damages. (See J. W. Salmond, Jurisprudence, London, 1902, p. 234; Kerrison *v.* Smith (1897), 2 Q. B. 445; Wood *v.* Leadbetter (1845), 13 M. and W. 855.

[11] As, for instance, by defining the territorial limits of the United States, by determining who are American citizens, by declaring war against another country, or by enacting laws concerning interests abroad or on the high seas.

[12] Congress alone can appropriate money, raise, organize and regulate the army and navy, and provide for calling out the militia.

[13] Art. II, Sec. 3. It is the President's constitutional duty to protect the rights of citizens abroad (The Slaughter House Cases, 16 Wall. 36, interpreting XIVth Amendment) and to defend the territory against invasion or dismemberment (The Prize Cases, 2 Black (1862), pp. 535, 638. See *In Re* Neagle, 135 U. S. 1 (1890) and, *supra*, note 3.

[14] Durand *v.* Hollins, 4 Blatch. 451, 454 (1860); Martin *v.* Mott, 12 Wheat. 19 (1827).

[15] "The President is made Commander-in-Chief of the Army and Navy by the Constitution, evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for any of these purposes, the action would be void." William Howard Taft, Our Chief Magistrate and his Powers (New York, 1916), pp. 128–129.

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of which they shall be directed.[16] In the Lend-Lease Act it has increased the resources available to the President and has defined a new object—assistance in the defense of certain foreign governments—as a national interest.

From the point of view of international law the Lend-Lease Act is of importance in that it asserts the freedom of a non-belligerent to discriminate between the participants in foreign hostilities under the present circumstances. The juridical justification for such discrimination is not clear in the text of the Act, which authorizes the President to give various forms of aid to "the government of any country whose defense the President deems vital to the defense of the United States." The reports of the House Foreign Affairs Committee and the Senate Foreign Relations Committee, however, clarify the theory justifying this departure from impartiality. According to the latter committee:

> The doctrine of mutuality prevails in international law as in equity and clearly proscribes the attempt by any sovereign to sin with the one hand and admonish with the other. In line with that doctrine, the Kellogg-Briand Pact is recognized by eminent scholars of international law to give any signatory the power, where the Pact's provisions are violated by another nation, to cease to abide by the neutrality laws which govern in normal times, and to "supply the State attacked with financial or material assistance, including munitions of war." [17]

The House Committee expressed the same principle somewhat more concretely:

> In the first place, it is a firmly established principle of international law that a nation is justified in acting in its own self-defense. Secondly, mutuality is an accepted principle of international law as well as of equity, and a nation which violates the basic rules of international law is not in a position to claim that another nation, in the interests of its own defense, is not complying with the less basic rules of international law. Furthermore, the Kellogg-Briand Pact, which is a part of international law, not only was intended to outlaw force as a means of resolving international disputes, but its violation has also been regarded by many distinguished international lawyers as giving any signatory the power:
>
> "To decline to observe toward the state violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent: (and to) supply the state attacked with financial or material assistance, including munitions of war."
>
> Germany, Italy and Japan are parties to the Pact. So, too, are China, Ethiopia, Austria, Czechoslovakia, Poland, Norway, Denmark, Netherlands, Belgium, Albania, and Greece. The United States is also a party to the Pact. The Pact is consistently interpreted by distinguished international law experts to mean that a violator of the Pact, such as Germany, cannot legally renounce the Pact by its violation.[18]

[16] Q. Wright, Control of American Foreign Relations, p. 375; "The Transfer of Destroyers to Great Britain," this JOURNAL, Vol. 34 (1940), p. 681; J. B. Moore, Proc. American Philosophical Society, Minutes, Vol. 60, p. lx.

[17] 77th Cong., 1st sess., Sen. Rep., No. 45, p. 4.

[18] 77th Cong., 1st sess., H. of R. Rep., No. 18, pp. 5–6.

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Both reports point out that the XIII Hague Convention of 1907 which prohibits to neutrals some of the acts contemplated by the Lend-Lease Act is not applicable in the present war because some of the belligerents, especially Great Britain and Italy, are not parties to the convention.[19] Some of the articles of this convention are declaratory of customary international law but the customary law of neutrality is not applicable in the existing situation because Germany and her allies initiated hostilities in violation of international obligations owed to nearly all states. The situation is not one of lawful war. Germany and her allies do not enjoy the legal advantages of lawful belligerents.[20]

Discussing the justifiability of the bill before the House Foreign Affairs Committee, Secretary of State Hull referred to the violation by Germany of anti-war obligations and said:

> I am certain that the day will come again when no nation will have the effrontery and the cynicism to demand that, while it itself scoffs at and disregards every principle of law and order, its intended victims must adhere rigidly to all such principles—until the very moment when its armed forces have crossed their frontiers.[21]

Secretary of War Stimson was more explicit. He pointed out that it was not necessary to rely on general principles of self-defense against the illegal behavior of Germany in order to justify the measures contemplated by the legislation. He then expounded the Pact of Paris, especially the interpretation accepted by the jurists at the meeting of the International Law Association at Budapest in September, 1934. He emphasized the clause of these articles of interpretation which stated that a party to the Pact might "decline to observe toward the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent," and that in such circumstances parties to the Pact could "supply the state attacked with financial or material assistance, including munitions of war." [22]

This theory was debated in the Senate in connection with a vigorous attack led by Senator Danaher of Connecticut. He considered the theory of international law offered in the Report of the Foreign Relations Committee a departure from the principles of neutrality incorporated in American practice, treaties and legislation. He disliked the Budapest Articles of Interpretation because most of the participating jurists were foreigners. He interpreted these articles as implying an obligation on the part of the

[19] Art. 28 provides that the convention shall not apply unless "all the belligerents are parties."

[20] Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), p. 401 ff.; "The Transfer of Destroyers to Great Britain," *ibid.*, p. 685 ff.

[21] Lend-Lease Bill, Hearings before the Committee on Foreign Relations, House of Representatives, 77th Cong., 1st sess., on H. R. 1776, Washington, 1941, p. 7.

[22] *Ibid.*, pp. 103–104.

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members of the Pact to take discriminatory measures against the violator.[23] Senator Austin of Vermont pointed out that the Articles of Interpretation referred not to an obligation but to a freedom of parties to the Pact who were non-belligerents. Referring to the preamble of the Pact which stated that a violator "should be denied the benefits" of the Pact, he said this gave the parties freedom to take non-pacific measures against the violator.

> This is an express waiver of any right to make any claim of a *casus belli* for any of the things specified in H. R. 1776, or anything out of it, which would, under normal conditions in international relations, constitute a cause of war.[24]

The issue presented by the Lend-Lease Bill with respect to the proper behavior of a non-belligerent is not a new one. Modern international law began with the medieval distinction between just and unjust wars. The early writers assumed that a non-belligerent should do nothing to hinder the just side or to assist the unjust side.[25]

As the distinction between just and unjust war broke down with the dynastic wars of the seventeenth and eighteenth centuries, and with the increasing interest of non-belligerents in the profits of war trade, the idea of impartiality developed. Text writers, however, continued to admit that the non-belligerent might give aid to either party if provided in a treaty concluded before the war, and might also discriminate if defense of its own interest required.[26]

This was the state of the law when the United States made its treaty with France in 1778 contemplating discrimination in favor of France if that country should get into war in the future. American policy in 1793, however, developed in the direction of complete impartiality even at the expense of failure to fulfill the spirit and possibly the letter of the French treaty.[27] The policy of impartiality, though not generally followed during the Napoleonic Wars,[28] increased in popularity during the nineteenth century when, because of the dominant position of British sea power and the relative freedom of trade, wars were few and localized. Many countries followed the United States in enacting neutrality laws based upon the principle of impartial treatment of belligerents, prevention of the use of neutral territory as a military or naval base, and abstention of the neutral government from aid to either side. The Hague Conventions of 1907 incorporated these

[23] Cong. Record, Feb. 24, 1941, daily edition, pp. 1354–5, 1361.

[24] *Ibid.*, p. 1360.

[25] T. A. Walker, A History of the Law of Nations (Cambridge, 1899), pp. 135, 196–197; Grotius, *De jure belli ac pacis*, III, c. 17, sec. 3.

[26] Bynkershoek, *Quaestionum juris publici libri duo*, c. 9, Carnegie ed., p. 63; Vattel, *Le droit des gens*, III, c. 7, Secs. 105, 106, Carnegie ed., pp. 268–269.

[27] J. B. Moore, Digest of International Law, Vol. 5, p. 591 ff.

[28] The United States abandoned impartiality in the Non-Intercourse Acts of 1809–1811, Deák and Jessup, *op. cit.*, Vol. 2, p. 1160 ff.

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ideas though with exceptions when necessary "for the protection of the rights" of the neutral itself.[29]

During World War I non-belligerents attempted to act upon the theory of impartiality as developed in the customs of the nineteenth century and the Hague Conventions. Some of the smaller states of Europe succeeded in keeping out of the war. All of the great Powers, however, and many of the smaller states in all continents became active belligerents. After the entry of the United States, several of the Latin American states, which did not enter the war, rejected the idea of impartiality and modified their regulations so as to favor the allied side in the war.[30]

The League of Nations Covenant was in essence a repudiation of the idea that a non-belligerent should be impartial and a reversion to the Grotian idea. The members accepted the obligation to discriminate against the state which initiated war in violation of the Covenant.[31]

The idea of impartiality, however, lurked in the Swiss reservations to the Covenant and was a factor in the rejection of that instrument by the United States. The latter act weakened the faith of League members in the principles of the Covenant and the tradition of impartiality was revived in some treaties, especially among American countries.[32]

The Pact of Paris, ratified in 1928, was widely received as a general acceptance of the non-belligerent's freedom, though not his duty, to refuse to a violator of the Pact the privilege of impartial treatment. This interpretation, expounded by many jurists, was endorsed in the Budapest Articles of 1934 and to some extent in the Harvard Research draft on rights and duties in case of aggression in 1939.[33]

The United States' ratification of the Pact of Paris initiated debate in Congress looking toward legislative authorization of discrimination against violators of the Pact. Congressman Burton of Ohio and Senator Capper of Kansas initiated resolutions authorizing arms embargoes against violators of the Pact. Such a resolution, introduced by Senator Borah of Idaho, passed the Senate by unanimous consent on January 19, 1933, but Senator Bingham of Connecticut succeeded in getting it reconsidered. The House of Representatives approved it on April 17, 1933, but it was de-

[29] See Preamble to XIII Hague Convention, 1907, par. 6, and Harvard Research in International Law, Draft Convention on Rights and Duties of Neutral States in Naval and Aërial War, Arts. 13, 14, this JOURNAL, Supp., Vol. 33 (1939), pp. 316–334.

[30] See Acts of Guatemala, Salvador, and Uruguay, Naval War College, International Law Documents, 1917, pp. 16, 210, 249; Harvard Research in International Law, Draft Convention on Aggression, this JOURNAL, Supp., Vol. 33 (1939), p. 880 ff.

[31] H. Lauterpacht, Neutrality and Collective Security, Politica, 1936, p. 149; Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), p. 391.

[32] P. C. Jessup, The United States and the Stabilization of Peace (New York, 1935), p. 132 ff.

[33] International Law Association, Report of 38th Conference, Budapest, London, 1935, p. 66 ff.; this JOURNAL, Supp., Vol. 33 (1939), p. 823 ff.

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feated by a Senate amendment requiring that embargoes be applied impartially.[34]

Proposals for practical discrimination were supported by the Administration in connection with non-recognition in the Manchurian affair (1932); in the Norman Davis proposal at the Disarmament Conference (1933); and as an aid to League sanctions in the Ethiopian affair (1935). Congress, however, influenced by the investigations of the Nye Commission, turned away from the idea of discrimination or "law and order neutrality" and toward the idea of embargoing arms shipments to all belligerents or "storm cellar neutrality." [35] The latter idea was incorporated in the Neutrality Acts in effect from 1935 to 1939, but was generally recognized as a failure.[36] Many considered that it encouraged the aggressions by Italy, Japan and Germany which occurred during this period. Congress, however, refused to repeal the provision for an impartial arms embargo when earnestly requested to do so by the President and Secretary of State during the spring and summer of 1939.[37] It, however, did so in the Neutrality Act of November, 1939, after the European war had begun. This Act, though repealing the arms embargo, did not depart from the principle of impartiality.

Practical discrimination against aggression, in disregard of the traditional requirement that neutral governments abstain from direct aid to belligerents, was involved in the loans by the Import and Export Bank to China and Finland. War in the legal sense was held not to exist in these cases, and the Neutrality Acts were not invoked. There was also practical discrimination in the application of provisions, enacted in the summer of 1940, requiring licenses for the export of war materials, although ostensibly the purpose was to conserve supplies necessary for defense preparation. The transfer of destroyers to Great Britain in exchange for naval bases in the summer of 1940 was a more open departure from the principles of impartiality.[38] This occurred after the United States and the Latin American countries, in a formal declaration, had recognized the acts of Germany and her allies as illegal aggression. Many other countries had similarly recognized the illegality of German invasion of neutral countries in the spring of 1940.[39]

[34] Q. Wright, The Future of Neutrality, International Conciliation Pamphlet, Sept., 1928, No. 242; E. M. Borchard and W. P. Lage, Neutrality for the United States (New Haven, 1937), pp. 281, 296, 305.

[35] Eugene Staley, Raw Materials in Peace and War (New York, 1937), p. 40; Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940), pp. 393–394.

[36] Francis Deák, The United States Neutrality Acts, Theory and Practice, International Conciliation Pamphlet, March, 1940, No. 358.

[37] Alsop and Kintner, American White Paper (New York, 1940), p. 39 ff.

[38] Q. Wright, "The Transfer of Destroyers to Great Britain," this JOURNAL, Vol. 34 (1940), p. 680 ff.; H. W. Briggs, "Neglected Aspects of the Destroyer Deal," *ibid.*, p. 569 ff.; Edwin Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," *ibid.*, p. 690 ff.; C. G. Fenwick, "Neutrality on the Defensive," *ibid.*, p. 697 ff.

[39] Department of State Bulletin, May 25, 1940, Vol. 2, p. 568; Q. Wright, "The Transfer of Destroyers to Great Britain," *ibid.*, p. 687.

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It was clear that the United States and the other American countries were prepared to depart from the principles of impartial neutrality which they had proclaimed in the Panama Conference in the autumn of 1939.[40] Resolutions of the Havana Conference contemplating American administration of the European possessions in the Western Hemisphere in order to prevent them from getting into the hands of Germany were clearly a departure from the earlier principles.[41]

These discriminations in the treatment of belligerents were effected by executive action. Legislation concerning United States policy as a non-belligerent continued to contemplate impartiality.

The Lend-Lease Act constitutes the first legislative endorsement since the Napoleonic period of measures other than war openly against some belligerents and in favor of others. It authorizes abandonment of impartiality in the interest of American defense but, according to the Congressional reports, only in case of international hostilities initiated in breach of obligations. It, therefore, draws away from neutrality and toward responsibility for world order.[42]

The history of the past twenty-five years in which the principles of isolation, neutrality and impartiality have repeatedly failed to prevent war, to avoid war, or to keep war from spreading would seem to justify a departure from those principles.

Abandonment of inadequate principles, however, will not prove satisfactory unless more adequate principles are substituted. It is believed that the Grotian principles deriving the obligations of a non-belligerent from the conception that there is a community of nations may prove more adequate. International law, like any system of law, can only exist within a jural community. A community of nations, however, cannot exist unless each of the members recognizes that it has a concern in the observance of the common law by all the others. Impartial treatment of the law observer and the law violator is a repudiation of such concern. Therefore, impartiality, in the presence of hostilities undertaken in violation of international obligation, is a denial of the existence of a community of nations and a repudiation of international law.[43]

It is to be hoped that the enactment of the Lend-Lease Bill by a large

[40] This JOURNAL, Supp., Vol. 34 (1940), p. 1 ff.; Q. Wright, "Rights and Duties under International Law," *ibid.*, p. 245 ff.

[41] Act of Habana on administration of European colonies, this JOURNAL, Supp., Vol. 35 (1941), p. 18 ff.

[42] The Acts of 1912 and 1922 permitted discrimination in the application of embargoes in cases of domestic violence in American countries and countries in which the United States enjoys extraterritoriality. Discrimination between a recognized government and insurgents has, however, been the usual practice.

[43] Q. Wright, "The Present Status of Neutrality," this JOURNAL, Vol. 34 (1940); International Law and the World Order, in W. H. C. Laves, *ed.*, The Foundation of a More Stable World Order (Chicago, 1941), p. 107 ff.

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majority in both houses of Congress and its approval by general public opinion will mark a renewed determination on the part of the United States to restore respect for international law by assuming the responsibilities of a good citizen in the community of nations.

QUINCY WRIGHT

THE NATIONALITY ACT OF 1940

The growth of the statutory law of the United States in relation to nationality has been slow and until 1940, has failed to respond to obvious needs of the nation. Real progress has, however, been made in the enactment of the Nationality Act of 1940, approved by the President on October 14 last.[1]

The Act, following a chapter embodying definitions, pertains chiefly to "Nationality at Birth," "Nationality through Naturalization" and "Loss of Nationality." Certain miscellaneous matters are also dealt with.

With respect to nationality at birth, the Act is assertive of the claim of the United States, on the theory of *jus soli*, to the nationality of persons born within its domain under circumstances when they are to be deemed also citizens of the United States,[2] and under circumstances when they are not to be deemed to possess that status. In the latter situation the claim is rather narrowly asserted. Thus, while the United States might well claim as a national at birth a person born within an outlying possession as defined in the statutory law, regardless of the nationality of either parent, it makes a modest and perhaps inadequate claim in regarding as a national (but not a citizen) of the United States at birth, "a person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States."[3]

[1] Public No. 853, 76th Cong., 3d Sess., Ch. 876; printed in the Supplement to this JOURNAL, p. 79.

See in this connection George S. Knight, Assistant to the Legal Adviser of the Dept. of State, "Nationality Act of 1940," American Foreign Service Journal, Nov., 1940, p. 605.

[2] Thus, according to Sec. 201 (a), "a person born in the United States and subject to the jurisdiction thereof" is declared to be a national and citizen of the United States. A like declaration is made with respect to "a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person." Sec. 201 (e). Likewise, with respect to "a child of unknown parentage found in the United States, until shown not to have been born in the United States." Sec. 201 (f).

[3] Sec. 204 (a).

Obviously the claim here asserted purports to be by right of blood as well as by right of place.

It will be recalled that in the Advisory Opinion given by the Permanent Court of International Justice on Sept. 15, 1923, on the question concerning the "Acquisition of Polish Nationality," the tribunal found occasion to declare: "The establishment of his parents in the territory on this basis creates between the child and his place of birth a moral link which justifies the grant to him of the nationality of this country; it strengthens and supplements the material bond already created by the fact of his birth." (Publications, Permanent Court of International Justice, Series B, No. 7, p. 18.)

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