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NEUTRAL CONVOYS IN LAW AND PRACTICE

Benjamin Akzin*

The following study, based on law and past practice, aims at clarifying the status of neutral convoys in relation to the problem of convoying American supplies to Great Britain in the present war as it stood under the Neutrality Act of 1939. The question at issue touches both upon international law and American constitutional law. Both these aspects are investigated in the following pages.

I

CONVOY IN INTERNATIONAL LAW AND PRACTICE

A. Past Practice

CONVOY, as the term is used in connection with maritime warfare, is broadly defined by Hyde as referring "to the case where one or more vessels are escorted by a public ship, which is commonly a vessel of war." The escorting, or convoying, of belligerent merchant vessels by warships of their own nationality is an obvious measure of protection against attack by hostile warships, and is designed to increase the chances of successful resistance to search or attack, rather than to preclude search or attack under international law; as against this increased protection, sailing under such belligerent convoy entails the risk of immediate attack by hostile warships, without benefit of the special procedure provided for the capture of enemy merchant vessels.

The question that has aroused special interest in international law does not concern these belligerent convoys, but refers to convoys of merchant vessels of neutral registry. The use of convoys in this connection had arisen, several centuries ago, as a means of safeguarding

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1 Hyde, International Law 457 (1922). Cf. the clearer definition in 1 Bouvier, Law Dictionary, 8th ed., 673 (1914): "A naval force, under the command of an officer appointed by the government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection."

2 Oppenheim, International Law, 6th ed. (Lauterpacht), 716 (1940); Vanselow, Voelkerrecht, § 226h (1931).
neutral merchant vessels which do not carry contraband against abuses of the belligerent rights of visit, search and capture. The practice grew up at a time when contraband lists were limited in scope, and was designed to substitute the guarantee of the convoy's commander as to the innocent character of the cargo and its destination for the procedures of visit and search. The use of convoys in this sense grew after 1680, and formed, throughout the eighteenth and early nineteenth centuries, an essential part of the so-called state of "armed neutrality." The matter was not entirely free from controversy: Great Britain, the leading maritime power, long maintained that despite neutral convoying, belligerents may exercise the right of visit and search; in 1909, on the occasion of the London Maritime Conference, she rallied to the generally held view concerning neutral convoys, but in July 1916 she went back to her traditional policy. However, the practice of other States, incorporated in treaties and naval instructions and upheld by authoritative writers, has become conclusive upon the point that, unless grounds exist for serious suspicion, the belligerent warship's commander must accept the convoy's commander's assurance as to the convoyed ship, in lieu of visit and search.\(^8\)

Prevailing opinion holds that a neutral merchant vessel, to be exempt from visit and search by a belligerent, must be under the convoy of a warship of its own nationality. There is no prohibition in international law against the convoying of merchant vessels of a different nationality, but assurance of the convoy commander as to the character of the vessels of a nationality other than his own is not considered a sufficient guarantee, and still exposes the vessels thus convoyed to search and capture.\(^4\)

Convoying neutral merchant vessels by belligerent warships is, of

\(^8\) A full history of neutral convoys in recent times will be found in STOEDTER, Flottengeleit im Seekrieg (1936), and in Gordon, "La visite des convois neutres," 1934 Revue Générale de Droit International Public 566. For early instances of convoys, see Jessup and Deak, "The Origins," 1 Neutrality 200 and passim (1935). For convoy as part of armed neutrality, see Scott, The Armed Neutralities of 1780 and 1800 (1918). For a history of convoy emphasizing the British viewpoint, see Hall, International Law, 6th ed., 723-730 (1909). For a brief history of convoy, see 2 Oppenheim, International Law, 6th ed., 708-710 (1940). For a statement of the law relating to convoys as formulated by American authorities, see 7 Moore, Digest of International Law, § 1204 (1906); and 2 Hyde, International Law 457-458 (1922).

course, no guarantee at all as far as the opposing belligerent is concerned. On the contrary, prevailing opinion holds that a neutral merchant vessel accepting belligerent convoy places itself thereby in the position of a belligerent merchant vessel. However, the United States in 1810 maintained its right to have its merchant vessels convoyed by belligerent British warships, free from capture by belligerents hostile to Great Britain. A treaty concluded in 1830 even acknowledged the American claim to compensation arising out of the capture by Denmark of American vessels thus convoyed, but a stipulation was made that the solution then adopted could not be invoked as rule or precedent for the future.

The all-inclusive character of modern contraband lists has deprived the question of neutral convoys of much of its traditional meaning. The aim of the belligerents in 1914 and now is no longer that of preventing certain articles specified as contraband from reaching the enemy, but of interrupting the entire flow of sea-borne commerce between the enemy and third countries. With the consequent reduction of the scope of noncontraband goods, convoys as a means of protecting noncontraband commerce have been deprived of their former importance. A further complicating factor was the extension of “blockaded” zones to include the entire coastlines of the belligerents and a large portion of the high seas forming the approach to them. Convoys were never held to be applicable to blockaded zones; hence, again, their effectiveness diminished. And finally, the entire character of naval war was changed in 1914-1918 by the German practice of destroying merchant ships instead of capturing them and bringing them to port under a prize crew. In face of British naval superiority and in view of the limitations of the submarine and the airplane—the main instruments of German naval war—destruction of vessels has become the prevailing German practice, replacing the orderly procedures of search and capture, to cope with which convoys had been previously in use.

In so far as neutral countries were concerned, these new conditions confronted them with the task not only of preventing visit and search, but of preventing attack and destruction of their merchant vessels. Neutral convoy, with its traditional procedure of assuring the belligerents of the innocent character of ships and cargo, while still admis-
sible under international law, was no longer equal to the situation. In the war of 1914-1918, it was attempted only twice, and both times with indifferent success.\textsuperscript{7} The United States, though invited by the German government to convoy its merchant vessels proceeding to England, made no use of this procedure.\textsuperscript{8}

Instead of convoying, neutral countries adopted other devices: when induced to submit to the conditions of naval war imposed by the belligerents, they permitted their merchant vessels to be inspected in port previous to sailing by belligerent consular authorities, who would provide them with "navicerts"\textsuperscript{9}; \textit{in the case of the one neutral in the last war that opposed the new conditions of naval warfare—the United States—the arming of merchant vessels was resorted to as alternative to convoy.}\textsuperscript{10}

\textsuperscript{7} Gordon, "La visite des convois neutres," 1934 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 566 at 577-585.

\textsuperscript{8} PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1915 Supp., 115 (1928) (German note of February 16, 1915): "In order to meet in the safest manner all the consequences of mistaking an American for a hostile merchant vessel the German Government recommended that (although this would not apply in the case of danger from mines) the United States convoy their ships carrying peaceable cargoes and traversing the English seat of maritime war in order to make them recognizable. In this connection the German Government believe it should be made a condition that only such ships should be convoyed as carry no merchandise which would have to be considered as contraband according to the interpretation applied by England against Germany. The German Government are prepared to enter into immediate negotiations with the American Government relative to the manner of convoy."

\textsuperscript{9} 2 OPPENHEIM, INTERNATIONAL LAW, 6th ed., 714 (1940).

\textsuperscript{10} The reasons for this preference are explained by Secretary of State LANSING, WAR MEMOIRS 223-224 (1935):

"There were two principal methods that could be employed in warding off submarines. One of these was by naval convoy, and the other by arming the merchant vessels for defense. Both might be employed if it were expedient to do so. The convoying of cargo-bearing vessels passing through the danger zones was strongly opposed by the chief officers of the Navy for the following reasons: The number of vessels engaged in trade with the Allies was so large that it would have been impossible to furnish enough cruisers and destroyers to convoy all vessels of American registry clearing from American ports even if the entire naval force were employed for that purpose. The result would be that many of the vessels would lack protection. A convoyed neutral vessel would not be subject to visit and search within or without the German war-zones, because the presence of a neutral naval ship would operate as a guarantee that the vessel was not carrying contraband goods. In view of the extensive lists of contraband issued by the belligerents, no American merchant vessel sailed for a European port which did not have in its cargo articles liable to seizure as contraband of war. A convoy in these circumstances would be ineffective because the naval commander would be in honor bound and compelled to disclose the nature of the cargo if interrogated by a submarine commander, and in practically every case part or all of the cargo and in most cases the vessel itself would be liable to seizure on account of the character of the trade
B. Position of the United States in the Present War

While the extension of contraband lists has deprived the institution of neutral convoy of its traditional meaning, a new purpose may have been found for it by reason of the substitution by Germany of the procedures of attack and destruction for the former procedures of visit, search and capture, under which destruction of the vessels was permitted only after all crew and passengers have been brought in safety.\textsuperscript{11} A neutral is undoubtedly entitled to regard attack on and destruction of its merchant vessels, even of its contraband-carrying and blockade-running merchant vessels, as violation of international law, and may, if it wishes, employ convoys to prevent the belligerent from engaging in these practices.\textsuperscript{12} In the circumstances of the present war, it is not likely that either the employment of such convoys or the arming of nonbelligerent merchant vessels, whether American or other, would induce Germany to re-adopt search and capture and to cease attack and destruction of nonbelligerent vessels. At any rate, in resisting attack and destruction, the convoying ship or the armed merchant vessel would be acting within its rights under international law.\textsuperscript{13}

In accordance with these new conditions, current discussions of convoying, without going into the matter very deeply, do not envisage convoy as a means of safeguarding noncontraband carrying vessels but rather consider it as a means of securing unhindered passage to vessels carrying war material and other articles that undoubtedly con-

in which it was engaged. Another reason which influenced the Navy to oppose convoying was the imminence of war with Germany and the possibility that the beginning of hostilities would find the Atlantic fleet scattered over the ocean instead of being mobilized and prepared to defend the coast cities of the United States from attacks by German cruisers or submarines.

"The other method suggested was the arming of merchant ships proceeding to waters where they were liable to be attacked by German U-Boats without an attempt at visit and search, as mere passing through those waters had been declared to be an evidence of wrongful purpose and a sufficient ground for such attack. This method was the one approved by officials expert in naval operations and conversant with the laws of naval warfare and the rights of neutrals on the high seas. In accordance with their decision and after an independent study of the question by the law officers of the Department of State, I issued on February eighth a public notification to the masters of American merchant vessels that they might arm their vessels to resist submarine attacks but that no naval convoy would be furnished them."

\textsuperscript{11} 2 Fauchille, Traité de droit international public, 8th ed., § 1415 (1921).

\textsuperscript{12} This is the basis of Professor Seavey's suggestions, reported in the Christian Science Monitor, March 11, 1941, p. 11.

\textsuperscript{13} See, on this point, the letter by Professor Sack, in the New York Times, April 27, 1941, § 4E, p. 10:5.
stitute contraband. Taking a strictly legalistic view of this situation, one would say, with Professor Seavey, that such convoys, under the traditional rules of neutrality, would not be entitled to resist search and capture of the convoyed vessels, but would be entitled to resist attack and attempts to sink them. Taking a realistic attitude, one would say that as long as the sea is dominated by Britain, the procedure of search and capture would not be generally adopted by Germany, and that, therefore, Germany would have the choice between letting the convoyed vessels pass unhindered and braving armed conflict with the convoy.

Assuming the latter, would the resulting situation be compatible with neutrality? The answer is in the affirmative, even if neutrality is understood in the sense of "impartiality" as between belligerents, a sense given to it in the last two centuries. The procurement of war supplies for Great Britain by the government of the United States cannot be reconciled with this concept of neutrality, but the use of convoys to safeguard American shipping can easily be justified, provided, of course, that convoys would not be used to prevent search and capture, or to prevent sinking after the crew has been put in safety, but merely to resist attempted destruction without search or without having brought the crew in safety. It should be noted, however, that it would be for Germany to decide whether she prefers to consider such resistance a casus belli, to regard it as a justifiable action in defense of neutral rights, or to consider it a violation of neutrality which she chooses to ignore.

Still, arguing within the terms of "neutrality" as it was understood in the last two centuries, the question arises how far away from her shores the United States, as a neutral, may send convoys to protect her merchant fleet against unwarranted attack. Neutral convoys of the old variety, aiming at safeguarding noncontraband-carrying vessels against visit and search, could exercise their functions anywhere on the high seas, except within the zone of effective blockade.14 What constitutes effective blockade is, however, a point that has not been quite settled.15 But even should the entire area announced by Germany and Italy as being blockaded be considered such, it is doubtful whether the restriction that applied formerly still applies. For the penalty of blockade-running, under international law, is capture and confiscation.

14 See 7 Moore, Digest of International Law, § 1204, p. 493 (1906).
of vessel and cargo, whereas the present German practice is that of sinking the boat without placing its crew in safety. To protect one's boats and crew against sinking, it may be argued that a neutral is entitled, under international law, to send convoying vessels even into the zone of the blockade.

The implications of the "neutral" status of the United States in the present conflict are not quite clear. The repeatedly declared policy of the United States in this war is to give all aid to the countries "whose defense the President deems vital to the defense of the United States," rather than to observe an attitude of "impartiality" as between rival belligerents. And while the United States is neutral under the Neutrality Law of November 4, 1939 and the Presidential neutrality proclamations, the meaning of this neutrality has been considerably altered by the legislative and executive acts of the United States.

Under the circumstances, the question whether convoying of war supplies to Great Britain is compatible with "neutrality" as it used to be understood for the last two centuries, is perhaps not entirely relevant. It may be considered, indeed, that in following its conception of the correct attitude of a nonbelligerent in the face of a war of aggression, the United States is performing acts which are called for by the very spirit of the law of nations. Germany and Italy, the countries affected by these acts, might choose to regard these acts as violations of law or as contrary to their interests, and to treat them as a casus belli. But as long as this has not been done, and even the affected belligerents regard our attitude as not inconsistent with the maintenance of diplomatic relations, there is no ground for challenging their legitimacy under international law. In the scale of the acts whose compatibility with neutrality might have conceivably been questioned by Germany and Italy, procuring war material for Great Britain out of the public funds of the United States is certainly far more weighty an act than

17 "Lend-Lease" Law, Act of March 11, 1941, Pub. L. 11, 77th Cong., 1st sess. (1941), 22 U. S. C. A. (Supp. 1941), §§ 411-419. This emphasis has been further strengthened in the Joint Declaration of the President of the United States and the Prime Minister of the United Kingdom, of August 1941.
18 See, for an attempt to justify this changed concept of neutrality, commonly referred to as "nonbelligerency," the speech by Attorney General Jackson of the United States at the First Conference of the Inter-American Bar Association, Havana, Cuba, March 27, 1941, published in 27 A. B. A. J. 275 (1941).
19 Cf. Memorandum inserted by Senator Taft in 87 Cong. Rec., No. 61, p. A1596 (1941): "Any objection to such convoy, however, cannot be based upon the ground that it is unneutral or illegal. . . . If the lease-lend bill be passed, it is the established policy of the United States declared through Congress to be unneutral."
the sending of convoys to protect American vessels against sinking and destruction of life.

An additional question would be raised, if American convoys were to be used not merely to prevent indiscriminate sinking, but even further to prevent visit, search and capture of contraband-carrying or blockade-running vessels. Such a procedure would be clearly incompatible with "neutrality" in the old sense of the term. Whether it would fall within the framework of "nonbelligerency" as practiced in this country at present is a matter of opinion. From a formal point of view, any act of a third power is consistent with nonbelligerency, as long as neither this power, nor the power unfavorably affected, chooses to declare it an act of war.

All above considerations refer to the convoying of American merchant vessels by American warships. The convoying of merchant vessels of another neutral nationality by American warships would raise no appreciable additional questions. While the neutral convoy of old was understood to offer to the belligerent a sufficient guarantee against contraband only if the convoying and the convoyed vessels were of the same nationality, the question does not arise in the present circumstances. Just as several neutrals may combine their efforts to safeguard their rights and interests by jointly protecting their territory, so also may they combine to safeguard their ships and crews, either by placing them under a mixed convoy, or by letting the warships of one of them convoy merchant vessels of another. The belligerent affected would not be likely to regard this case in any different light than a convoy restricted to merchant vessels of the warship's own nationality.

A rather novel situation would occur should American warships be detailed to convoy British merchant vessels. Convoying belligerent merchant vessels by a neutral or nonbelligerent warship is a situation without precedent, and any armed conflict between such warships and belligerent forces, outside the neutral's territorial waters (or, perhaps, outside of the "Safety Zone" proclaimed by the American republics) would certainly be inconsistent with traditional neutrality. Whether it would be considered an act of war depends, of course, on the attitude of the belligerent affected.

Having lost its former significance as a safeguard of noncontraband-carrying vessels, convoying has become nothing more than a means to ensure the safety of merchant vessels and their crews and passengers against attack and sinking. Viewed in this light, convoying in the nar-

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20 See infra, note 58.
row sense of the word, i.e., the escorting of merchant vessels by warships, is only one of several possible devices. Another device to the same effect is "patrolling," i.e., the stationing or cruising of warships along a certain sea-area, such as seems to have been practiced of late by naval and air units of the United States.

Strategically, patrolling may appear preferable to convoysing where the movement of ships along a given route is very frequent, as it allows the preventive supervision and clearance of sea-lanes. From the point of view of international law, patrolling in such conditions will appear mainly as an extension of the well-known type of operations undertaken in certain dangerous areas to insure the safety of sea-borne commerce and for humanitarian purposes. Its best-known previous applications are those undertaken in Chinese waters to guard against piracy and in the Atlantic and Caribbean to prevent slave-trade. Contrary to the convoy of old, patrolling operations are not specifically concerned with dangers arising out of war. If anything, the adoption of patrolling as a specific means to safeguard sea-lanes from wartime dangers is an innovation.

Viewed from the municipal angle, the ordering of the navy on patrol duties is as much within the scope of the Commander in Chief's authority as is convoysing, except that the Navy Regulations do not mention patrolling as a routine function of the navy. An important point is that in patrolling sea-lanes, warships do not restrict their protection to merchant vessels of their own nationality as in the case of the convoy of old, but clear the lanes for the benefit of vessels of all nationalities which might desire to use them.

II

CONVOY IN LAW AND PRACTICE OF THE UNITED STATES

A. Scope of Executive Power

It remains to consider the status of naval convoy under the domestic law and practice of the United States. Convoy in the old sense of safeguarding noncontraband-carrying vessels against visit and search, while less used in the United States than abroad, was nevertheless generally regarded as a proper exercise of executive authority, and not in need of congressional authorization. Section VII of the Naval Instructions of June 1917\(^{21}\) fully recognizes convoy as a standing in-

\(^{21}\) Instructions for the Navy of the United States Governing Maritime Warfare, June 1917, § VII, arts. 51-54 (1924).
stitution in international law and instructs American naval officers on the attitude to be taken toward convoys of foreign nations. The use of convoys by the United States was also taken as a matter of course. Its use and misuse were abundantly discussed in American diplomatic correspondence, and Secretary of State Forsyth, in a note to Mexico of May 18, 1837, declared convoy to be not merely a neutral right, but even a neutral duty:

"It is an ordinary duty of the naval force of a neutral during either civil or foreign wars, to convoy merchant vessels of the nation to which it belongs to the ports of the belligerents."  

Under the circumstances, convoy is regarded so much of a routine function of the navy that it was incorporated into the Navy Regulations as a standing duty of American naval officers, without even the requirement of an order by the President or the Secretary of the Navy, as a condition preliminary to undertaking specific convoy operations. Indeed, chapter 18, section 2, of the Navy Regulations deals with convoy operations both in war and in peace. Regarding war-time convoy, the Regulations specify:

"The Commander in chief shall afford protection and convoy, so far as it is within his power, to merchant vessels of the United States and to those of allies."

Regarding convoy during a war between foreign nations, the Regulations state in more general terms, leaving large scope to the discretion of the individual commanding officers:

"During a war between civilized nations with which the United States is at peace, the commander in chief and all under his command shall observe the laws of neutrality and respect lawful blockade, but at the same time make every possible effort that is consistent with the rules of international law to preserve and protect the lives and property of citizens of the United States wherever situated."

The expression "wherever situated" is of special significance. Taken at its literal meaning, it apparently means that the duties of naval

22 7 Moore, Digest of International Law, §§ 1204, 1205 (1906).
23 Id., § 1204, p. 492.
24 United States Navy Regulations of 1920, c. 18, § 2, art. 714.
25 The "commander in chief" referred to here is not the President, but a naval officer designated as such by the Navy Department. Cf. id., art. 679.
26 Id., art. 715.
officers are not restricted to high-sea convoying, but may even call them to intervene in blockaded zones and in foreign territorial waters.27

The same implication of extending convoy and protection to foreign ports and territorial waters is found in article 726 of the Regulations, dealing with the Navy's peace-time duties, and the context of which lays down rules of behavior in foreign ports:

"So far as lies within their power, commanders in chief, division commanders, and commanding officers of ships shall protect all merchant vessels of the United States in lawful occupations, and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations."39

This clearly indicates that convoy was never regarded as a matter calling for Congressional legislation, but was left in its state of a matter within the purview of the President and his subordinates in the Executive branch.28 In fact, of all the powers which the President has wielded as organ of foreign relations and as Commander in Chief, and of which many gave occasion to protracted disputes, none was ever so little questioned as his power to order American warships to convoy duty.

Is the situation different when it comes to convoying vessels carrying war-supplies to Great Britain in the present war? At first glance, it appears that two significant distinctions could be made between the convoy-project under discussion, and former convoys. One distinction consists in the character of the cargo of the vessels to be convoyed. Convoys of old were intended to safeguard vessels not carrying contraband, or at least, the contraband character of whose cargo was a matter of dispute; in the present case, the contraband character of the supplies is not contested. The other ground for distinction, frequently mentioned in the course of Congressional and public discussions and set out at length in an interesting memorandum submitted by Senator

27 Regarding the qualifying clause which requires that the efforts be consistent with international law, cf. supra, p. 10.

28 Certain parts of the Navy Regulations were passed originally by Congress or were subsequently incorporated into legislative acts. See 34 U. S. C. (1934 and Supp.). These parts of the Regulations cannot be changed without Congressional action. But convoy never belonged to them. The only mention of convoys up to the Lend-Lease Act of March 11, 1941, in any legislative act, occurs in connection with navigation lights of foreign convoys. 33 U. S. C. (1934), §§ 83, 182. United States convoys are not mentioned in any statute. Consequently, all matters regarding convoys may be further determined by the Executive, i.e., by the Secretary of the Navy with the approval of the President, in accordance with the Act of July 14, 1862, § 5, 12 Stat. L. 565; 34 U. S. C. (1934), § 591.
Taft,\textsuperscript{29} concerns the likelihood that the presently discussed convoy would lead to war, whereas—so runs the argument—the convoys of old carried no such implications; hence—it is argued—permitting the Executive to order American warships on convoy duty would amount in the circumstances to an Executive infringement of the constitutional prerogative of Congress to declare war.

The first distinction has not yet been accorded much attention. The Taft memorandum appears to take the view that this distinction alone would not suffice to take the decision as to convoying out of the hands of the Executive. This seems indeed to be the correct view, for the purpose of a convoy is essentially to protect the lawful maritime commerce of a country against foreign armed forces. What constitutes lawful commerce is determined, for all authorities within the United States, by domestic law. As long as the United States is content to remain a neutral impartial as between all belligerents, and is taking its stand on the basis of the rights and duties which such a status entails—convoys may be used within this framework only. But with the change of the neutrality conception of the United States to that of a nonbelligerency which discriminates between rival belligerents and deems the defense of some of them vital to the defense of the United States, convoy rests on as sound a basis, from the point of view of domestic law, in escorting war supplies, as it had rested previously in escorting non-contraband material. To the above should be added the other function of convoys: that of safeguarding American vessels against destruction of the lives of their crews in violation of the procedures of orderly capture which the United States has a right to insist upon as applicable to its merchant fleet, independently of the character of the cargo.

B. Relation of Executive and Congressional Powers

The other ground for distinction is developed at length in the Taft memorandum. The general conclusion reached in that memorandum is that

"each situation must stand alone. If the action to be taken will not result in war, the President's authority as Commander in Chief may be sufficient. . . . On the other hand, if war would be the probable result of the employment of armed forces, Congress must take action. Otherwise, the power conferred upon Congress to declare war is a lifeless and futile thing."\textsuperscript{30}

\textsuperscript{29} 87 Cong. Rec. No. 61, p. A1596-A1599 (1941).

\textsuperscript{30} Id., p. A1599. Before dealing in detail with the arguments of the memorandum, a not unimportant error of fact must be pointed out; the memorandum assumes
The memorandum bases this conclusion on several judicial decisions and on a survey of the practice. A careful perusal of the quoted decisions indicates that only one of them bears on the issue of limiting the President's powers as Commander in Chief: the case of Little v. Barreme.\(^{81}\) The decision in this case, while it does not deal specifically with convoys, deems illegal the seizure of a French vessel by an American warship on the high seas, and the commander is declared answerable for damages arising out of his having obeyed a Presidential instruction not in conformity with an act of Congress. The case is complicated by the fact that the manner of seizure of French vessels at the time was regulated by an act of Congress which Chief Justice Marshall, in his opinion, interprets as having been intended as exhaustive,\(^{82}\) but nevertheless the case affords strong evidence in support of the contention that the Executive cannot go beyond existing Congressional enactments by exercising concurrently his powers of Commander in Chief. Whether the rationale of the decision still holds good in the absence of Congressional enactments, as is notably the case in the convoy contingency, is another question, upon which disagreement is well possible.

The other judicial decisions quoted in the memorandum do not add anything to the weight of its thesis. None of these decisions refers to convoys. None of them involves the question of Presidential powers. In two of these cases, Bas v. Tingy\(^{83}\) and Talbot v. Seeman,\(^{84}\) the decisions merely tell us that Congress may enact measures amounting to "partial war" as well as declare full war, all of which has very little bearing on the question of the scope of the President's powers as Com-

\(^{81}\) 2 Cranch (6 U. S.) 170 (1804).
\(^{82}\) "... the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port..." 2 Cranch 170 at 177-178.

Previously, Chief Justice Marshall remarks: "It is by no means clear, that the President... might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port..." Id. 177. This seems to indicate that a different decision would have been arrived at, had Congress not limited by legislation the scope of Presidential discretion in this instance. Marshall's attitude is particularly interesting in view of the constitutional provision giving the Congress power to "make rules concerning captures on land and water." U. S. Constitution, art. I, § 8.

\(^{84}\) 1 Cranch (5 U. S.) 1 (1801).
mander in Chief. Of the other cases, Fleming v. Page,\textsuperscript{35} which tells us that the President may not extend the boundaries and laws of the United States to new territories, has even less to do with the thesis of the memorandum, whereas Justice Grier's opinion in the Prize Cases,\textsuperscript{86} if anything, might rather be cited in support of vast Presidential powers.

As for the practice of the United States, the memorandum summarizes it as follows:

"... In the many instances where danger of war was minimal, the Executive has acted alone. But when Mexico, a stronger nation, was involved, congressional authorization was obtained. This authorization need not be a formal declaration—it may be authorization only to act in a manner that will probably involve the Nation in a war. This type of authorization was obtained in the Mexican war of 1846. ... The Spanish-American war was initiated in the same manner."\textsuperscript{87}

This statement can be hardly accepted as a fair summary of the practice of the United States, not even of such instances in this practice which have been cited in the memorandum. Regarding convoy proper, there is not a single instance in the history of this country of specific Congressional action having preceded the ordering of warships to convoy duty, though the Taft memorandum itself quotes one instance of convoy which was far from peaceful, having resulted in ships being captured and burned by the convoy,\textsuperscript{38} and though in another instance convoying operations threatened to develop into an armed conflict with the leading naval power in the world.\textsuperscript{39}

But leaving convoys aside, can it be said that preliminary Congressional approval was the rule in those cases where the Executive was about to engage in a hazardous foreign policy likely to result in an armed conflict against a serious rival? Or could it be said, at least, that preliminary Congressional approval was the rule when the Executive was about to take the initiative of using force in foreign territory?

\textsuperscript{35} 9 How. (50 U. S.) 603 (1850).
\textsuperscript{36} 2 Black. (67 U. S.) 635 at 668 (1862).
\textsuperscript{37} 87 Cong. Rec., No. 61, p. A1599 (1941).
\textsuperscript{38} See the incidents of Miconi and Andros Islands, in Greece, October 1827, in Offutt, Protection of Citizens Abroad by the Armed Forces of the United States 17-20 (1928). These incidents were also interesting as precedents for American warships convoying British vessels while the United States was at peace.
\textsuperscript{39} See infra, at note 43, for President Buchanan's action in 1858.
Offutt,\textsuperscript{40} in his study of the use of armed force abroad, also cited in the Taft memorandum, enumerates seventy-six instances, not of a hazardous policy that might lead to armed conflicts, but of actual use of force in foreign territory—by far the most serious procedure imaginable—with hardly any instances of preliminary Congressional approval.

But if it is not the likelihood or the reality of an armed conflict in itself that makes Congressional approval necessary, could it be that the importance of the prospective antagonist makes a difference? This view appears rather unusual: that the scope of the respective powers of Congress and of the President in the field of foreign relations should depend on the size or the strength of a prospective enemy is a somewhat novel conception, difficult to explain in terms of constitutional theory. However that may be, let us examine the practice. In support of this conception, the Taft memorandum cites two cases: that of the Mexican war of 1846, and that of the Spanish-American war of 1898, both growing out of the use of armed force by the Executive with Congressional approval. It should be noted that in either case, the use of force involved actual penetration of foreign territory by American armed forces. But even in this limited field, the practice is not conclusive: far later than the Mexican war of 1846 occurred the incident of Vera Cruz in 1914,\textsuperscript{41} in which President Wilson, even after having asked for Congressional approval for his intended use of force against Mexico, did not wait for the decision of Congress, but had American troops land in Mexico and overcome active opposition before Congress had passed its resolution. This procedure clearly indicates that in the opinion of President Wilson the approval of Congress, while desirable in connection with a political action of this magnitude, is not constitutionally required.\textsuperscript{42}

But the most interesting cases were those two in which the United States authorities took action that involved a risk of war with really first-class powers. In both cases action has been taken without any resort to Congressional authorization. They involved, respectively, the British Empire and the Empire of Austria-Hungary, and are therefore con-

\textsuperscript{40} Offutt, Protection of Citizens Abroad by the Armed Forces of the United States (1928). See also the list contained in 87 Cong. Rec., No. 128, p. 6056 (1941).

\textsuperscript{41} Id. 118 ff.

\textsuperscript{42} The Taft memorandum cites this case in support of the theory of a need for Congressional approval, and solves the difficulty by explaining that a resolution justifying the use of force was passed, and adding: “It appears that the armed forces landed the day before.” 87 Cong. Rec., No. 61, p. A1599 (1941).
clusive evidence that the powers of the Executive were not, in law, regarded as varying with their application to weaker or to stronger nations, and that the Executive's power to conduct foreign relations is not subject to the reservation of refraining from acts which may conceivably lead to war. The two cases are of particular interest in this connection, because one of them involves the use of convoys and illustrates the difference between naval convoys and landing of forces abroad, while the other has given occasion to a judicial pronouncement regarding the extent of Executive power.

The one case is that of President Buchanan, who, after a protracted controversy with Great Britain over the latter's practice of searching American vessels in time of peace, ordered, in 1858, a naval force to the Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation." This action was undertaken without Congressional authority and a conflict was only avoided by Britain's abandonment of her practice.

The particular importance of this precedent lies not only in the fact that the convoy of 1858 was designed to stop an unfriendly practice of a leading Great Power, and must have been undertaken, therefore, in the knowledge that war might follow, but also in the personality of James Buchanan. Indeed, President Buchanan was particularly cautious in exercising his powers; in a message to Congress he stated:

"... Without the authority of Congress the Executive can not lawfully direct any force, however near it may be to the scene of difficulty, to enter the territory of Mexico, Nicaragua, or New Granada for the purpose of defending the persons and property of American citizens, even though they may be violently assailed whilst passing in peaceful transit over the Tehuantepec, Nicaraguan or Panama routes. He can not, without transcending his constitutional power, direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property. . . ."

Whilst imposing upon himself these scrupulous restrictions regarding the use of force in foreign territory, restrictions which other
Presidents, Congress and the Courts failed to maintain, President Buchanan nevertheless thought it in order to undertake convoying movements on the high seas which might have conceivably led to war.

The other significant incident demonstrates the extent to which not only the President, but even subordinate executive officers, possess the power to use force in defense of American interests, even though this use of force may involve the country in a war against a Great Power. This is the instance of Captain Ingraham’s intervention in favor of Martin Koszta, in 1853. Captain Ingraham’s action, far from being criticized as ultra vires, subsequently received Congressional commendation and was cited with approval by Justice Miller, speaking for the Supreme Court in *In re Neagle*, as follows:

“One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?”

46 Berdahl, War Powers of the Executive in the United States 50 (1920).

47 135 U. S. 1 at 64, 10 S. Ct. 658 (1889).
C. Use of Convoys in the Present Crisis

In the light of the practice of the United States, thus reviewed, it seems that the Executive possesses full powers of using the armed forces of the nation in the interests of the United States for actions short of war, and that such actions include not only the procedure of convoy, which, after all, entails no initiative of force and no interference with foreign territorial sovereignties, but even procedures that go further, entail the initiative of force and constitute interference with foreign territorial sovereignty. This conclusion as to the practice does not necessarily imply that the practice is very wise or satisfactory. In those foreign countries where the Executive is politically responsible to the Legislature, the dangers inherent in too drastic a foreign policy and too drastic a use of armed force on the part of the Executive are reduced to a minimum by the weapon of interpellation and the risk of a vote of nonconfidence. Under the separation of powers doctrine prevailing in this country, there exists no such remedy, and, whatever the voluntary limitations which a cautious President will impose upon himself, law and long practice leave him free to use force in the interests of the United States as long as he does not qualify this use of force as an act of war.

This conclusion is also shared by Berdahl and the numerous writers cited by him, by Corwin, and—with particular appositeness in view of the reliance which the Taft memorandum places upon him—by Offutt. A series of judicial decisions confirm this conclusion, with

48 BERDahl, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 43-77 (1920).
50 OFFUTT, PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES 4-6 (1928):

"... Congress alone, of course, has the right to declare war under the Constitution, but interposition for the protection of citizens is not essentially war; and although such interposition may easily lead to war, in the experience of the United States it has seldom done so. So long as the use of the army and navy of the United States for the protection of citizens resident in foreign countries does not amount to a recognized act of war, it seems to be an established fact that the President does, constitutionally, possess the power to make such use of those forces, and that Congress, except indirectly, as by disbanding the army and navy, may not prevent or render illegal his action..."

"As it is obvious that the use of force for the protection of citizens abroad may easily involve the United States in a situation destructive to its prestige among other powers, or one from which it may extricate itself only by war, and since the President, as commander-in-chief of the army and navy, is responsible for the behavior of those forces, it would seem that the burden of responsibility for such situations as might arise must fall upon him. What has generally happened in the past is that naval officers..."
the matter being most comprehensively dealt with by Justice Nelson, in
Durand v. Hollins. And, finally, this view underlies articles 722 to
724 of the Navy Regulations, in which the duties of naval officers
involving the use of force abroad or against foreign countries are speci-

fied, as well as articles 679, 714 and 715, quoted above. In none of
these cases can a distinction be found that would be based on the greater
or lesser likelihood of war, or on the greater or lesser strength of the
prospective adversary. Obviously, such distinctions are important po-

litical considerations which any Executive will do well to take into
account, either in determining whether or not to use force, or in de-
ciding whether or not to strengthen his hands by obtaining Congres-
sional approval. But the contention that either of these factors con-
stitutes a distinction in law cannot be substantiated.

For the sake of completeness, and without necessary bearing on
the question of convoys, it should be pointed out, however, that two
pronouncements by Presidents of the United States lend support to
the thesis that certain acts of force or of policy that might lead to war
may not be carried out without Congressional approval. The first of
these pronouncements, by President Buchanan, concerning the occu-
pation of foreign territory, has been quoted above. The other one, while
not cited by any one in the present discussion, is somewhat akin to the
reasoning of the Taft memorandum and supplies it with the strongest
support yet adduced. It is a letter by President Wilson to Secretary of
State Lansing, of February 15, 1917.

commanding ships or squadrons on foreign stations have taken such action as they
believed necessary for the protection of American lives and property, and have re-
ported their action to the Secretary of the Navy after their government has been com-
mitted to their procedure.

Offutt seems to go so far as to deny the opportunity for Congress to limit Presi-
dential freedom of action in this direction, by legislating on the issue. In the light of
the constitutional provision authorizing Congress "to make rules for the government and
regulation of the land and naval forces" (art. I, § 8) and of Chief Justice Marshall's
opinion in Little v. Barreme, 2 Cranch (6 U. S.) 170 (1804), discussed supra at note
32, he takes a rather debatable stand.

51 4 Blatchf. 451, 8 F. Cas. 111 (1860). This decision, as well as other decisions
of a similar character, deal with the use of force for the specific purpose of protecting
citizens, but it seems correct to follow the Taft memorandum in not distinguishing
between the occasions for the use of force by the Executive on the basis of their specific
purpose. What matters is that the force be used in the protection of the lawful interest
of the United States, of which the protection of its citizens is the most usual instance.
Cf. also The Prize Cases, 2 Black (67 U. S.) 635 at 668 (1862); In re Neagle,
135 U. S. 1 at 64, 10 S. Ct. 658 (1889); and the quotation supra, note 32.

52 1 Lansing Papers, 1914-1920 (Papers Relating to the Foreign Relations of the United States) 607 (1939). Senator Saulsbury had introduced a
Two obstacles to convoying American vessels to belligerent countries are raised by the Neutrality Act of November 4, 1939, as at present applied. This act, as currently interpreted, does not preclude the freedom of movement of convoying warships, but rather that of the merchant vessels to be convoyed. One of the provisions of that act prohibits, with certain reservations, transportation of men and material to belligerents, admits of no exceptions and is to end only after the State in question shall have been announced by Presidential proclamation to be a belligerent no longer:

"Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful for any American vessel to carry any passengers or any articles or materials to any state named in such proclamation."

"Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation."

The other restriction concerns the sailing of American vessels into combat areas and is susceptible of regulation by Executive authority:

"Whenever the President shall have issued a proclamation under the authority of section 1 (a), and he shall thereafter resolution authorizing the President to discriminate by proclamation in favor of certain belligerents by allowing them full use of the ports of the United States. The President, asked to comment on this resolution, wrote as follows:

"My dear Mr. Secretary: The proclamation by the President here contemplated would, in effect, be a proclamation of outlawry against the naval representatives of a Government with which this Government would be at peace, and would beyond all doubt be considered so unfriendly an act as virtually to amount to a declaration of war. To vest such power in the President would, therefore, be in fact (whatever the theory or intention of the Act) to depute to him the power to declare war. That would clearly be unconstitutional, virtually if not technically, and I think very much better and more direct ways of bringing on war would be preferable to this..."

As can be seen, President Wilson imposed upon himself a limitation far more strict than that advocated in the Taft memorandum, and declined to make use of a resolution which, if passed, would have amounted to the kind of "authorization" recommended in the memorandum. This scrupulous respect for the rights of Congress only serves to emphasize President Wilson's conviction that, in ordering the armament of the merchant fleet by simple executive order, he acted within the scope of his constitutional authority. It will be noted that the arming of merchant vessels is, in effect, an alternative for convoying them and that, intrinsically, it is by far the more radical alternative, for virtually it increases the armed forces of the United States beyond the volume authorized by Congress. Compared to this procedure, convoy by regular armed forces of the United States is by far a minor matter.

58 54 Stat. L. 4 (1939), § 2 (a), (e); 22 U.S.C. (Supp. 1939), § 245j-1 (a), (e).
find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area. The combat areas so defined may be made to apply to surface vessels or aircraft, or both."

This latter restriction opposes no absolute bar to the sailing of vessels to Great Britain and other belligerent countries, for the "rules and regulations" may always make provision for vessels proceeding under convoy; but the prohibition contained in the section first quoted would still apply, and this prohibition cannot be repealed save by a Presidential proclamation announcing that the foreign State is no longer in a state of war, or by legislative action.

Lastly, what would be the status, under American law, of American armed forces ordered to convoy vessels of British and other foreign registry?

The Navy Regulations in force at present, and serving as standing instruction for naval commanders in the absence of specific directions by the President or the Secretary of the Navy, do not contemplate the convoying of foreign vessels except in the case of "allied" vessels when the United States is at war. Therefore, convoying foreign vessels would require an order by the President or the Secretary of the Navy. This order could be given either as a specific instruction, or it could be incorporated in the standing Regulations, under the procedure outlined in the Act of July 14, 1862.

Would the issuance of such instructions be ultra vires of the Executive? It does not seem so. Aside from the precedent of convoying a British vessel in 1827, we must realize that the reason for convoying is the defense of the lawful interests of the convoying country. Protection of the citizens' lives and property is the most important and

54 Id., § 3 (a).

55 Requested by the Secretary of State to pass on the scope of the Presidential Proclamations issued under § 1 (a), the Attorney General, in an opinion dated August 29, 1941, held that the Proclamation stating that a state of war exists between the United Kingdom and Germany is "to be construed as including only England, Wales, Scotland and Northern Ireland and not the overseas territories and possessions of the British Empire." This opinion, based on arguments referring to the internal law of the United Kingdom, does not pay sufficient attention to the specific connotation of the term "United Kingdom" in connection with the relevant issue of belligerence.

56 See supra, note 28.

57 OFFUTT, PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES 19 (1928).
most frequent interest involved, but by no means the only one. It would be quite in order, for instance, to go back to the practices of early "armed neutrality" and to have an arrangement between several neutral nations, e.g., between several American republics, regarding mutual convoying.58 In view of recent precedents regarding international agreements bearing on defense matters, such an arrangement would seem to lie within the scope of matters open for regulation by Executive Agreement.

On the other hand, the defense of certain belligerent countries in the present war, including Great Britain, having been pronounced "vital to the defense of the United States" by an Act of Congress, the protection of the shipping of these belligerents seems to constitute a sufficiently important interest to the United States to warrant, in law, the use of convoys to assure its success, provided convoying appears advisable from a political and military point of view.

The above does not imply that a decision to convoy vessels of a belligerent country should be treated in every respect on the same footing as a decision to convoy vessels of other nonbelligerents. As stated before, important consequences may be attached, by foreign nations affected by this measure, to a decision of a nonbelligerent to convoy vessels of a belligerent hostile to these nations. Should the nations affected choose to declare that this decision, or any armed conflicts resulting from this decision, renders the convoying country a hostile belligerent, their contention may have good grounds in international law. What should be noted in this connection is merely that the domestic law of the United States does not oppose any objection to a decision of this nature, if either Congress or the Executive should desire to make it.

The Lend-Lease Act of March 11, 1941,59 does not in any way add to or detract from the previously existing authority to order the armed forces of the United States to convoy duty. Section 3 (d) of the act states:

"Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States."

The Taft memorandum, commenting upon this provision, correctly explains:

"Such language merely indicated that Congress was content to allow matters to rest in its present condition under the regulations of the Secretary of the Navy and the power of the President as Commander in Chief." 60

To this it is merely necessary to add that all considerations applicable to the use of the Navy for convoy duty would seem equally to apply to the use for the same purpose of the air forces of the United States, over which the President, deputed respectively by the Secretaries of War and of the Navy, holds the same powers of Commander in Chief.

The above study does not purport to pronounce on the desirability or otherwise of convoying supplies to Great Britain, nor does it intend to convey an opinion as to whether the issue of convoying may be better decided by the Executive alone or form the subject of legislative action. It is the sole aim of this study to analyze the convoy issue, as it presents itself under the conditions of the present war, and to determine its status under the law of nations and of the United States.

60 87 Cong. Rec., No. 61, p. A1598 (1941).