* *

SPHEX CLUB PAPERS

of

MR. POWELL GLASS

Subject: The Ethics of Neutrality

15 May 1936

* *

THE ETHICS OF NEUTRALITY

In its article on "Neutrality", the International Encyclopedia makes this statement: "Neutrality is as old as war itself."

To the extent that neutrality means merely not participating in a war the statement quoted is correct; but to the extent that neutrality means more than mere non-participation, to the extent that it implies a course of conduct upon the part of the non-participating state based upon conceptions of duty, neutrality is a product of recent centuries.

Lawrence, an English authority on international law, states that the nations of classical antiquity had in their vocabularies no word synonymous with neutrality, and he points out that the publicists of the Seventeenth Century, who wrote in Latin, had some difficulty when discussing neutrality in making their meanings exact. Where the word did not exist, the idea is not likely to have existed.

In the early part of the Sixteenth Century, when "he who is not for me is against me" seems to have been the rule, Machiavelli advised his ideal Prince as follows: "Supposing two of your powerful neighbors come to war, it must be that you have, or have not, reason to fear the one who comes off victorious. In either case it will always be well to declare yourself, and join in frankly with one side or the other. For should you fail to do so you are certain, in the former of the cases put, to become the prey of the victor to the satisfaction and delight of the vanquished, and no reason or circumstance you may plead will avail to shelter you; for the victor distrusts doubtful friends, and such as will not help him in a pinch; and the vanquished will have nothing to say to you, since you would not share his fortunes sword in hand.

"In the second case, namely, when both contestants are of such limited strength that whichever one wins you have no cause for fear, it is all the more prudent for you to take a side, for you will then be ruining the one with the help of the other, who were he wise would endeavor to save him . If he whom you help conquers, he remains in your power, and with your aid he can not but conquer."

Machiavelli is regarded as a cunic, yet it is unlikely that the statecraft he advised was so much the product of his cynicism as a reflection of his times. There was no idea in that day of neutrality as we today think of neutrality, and if a state refrained from participation in it's neighbors' wars it was presumed to be actuated either by weakness or by cowardice. To belligerent states there seemed to be no reason whatever for thinking that either the weak or the craven had rights which should be respected. Consequently a non-belligerent's territory was freely trespassed upon by belligerents, supplies were requisitioned by its neighbors' armies, and not infrequently its citizens were pressed into the armies of its more bellicose neighbors.

Since non-participation in neighboring wars entailed many of the penalties of war, while offering no chance for sharing in possible spoils of war, Machiavelli's advice might seem to be more the product of realism than of cynicism.

Long before Machiavelli's day commerce had made itself felt. There were maritime codes dealing with the rights of seaborne private property. And commerce was growing all the while. A century after Machiavelli, though the political prince still controlled the destinies of nations, the merchant prince was not without influence. When the Seventeenth Century had arrived, states had found, that,

unless their essential political interests were involved, it was frequently better to stay out of neighbors' quarrels because it was more profitable to invest in the commerce of peace that to speculate upon possible war spoils. Such was the situation early in that century when a Dutch publicist, Grotius, wrote his "Laws of War and of Peace," in which he held: "It is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war.

From Machiavelli's advice that a state not immediately concerned with the causes of a war at once take a side according to where its political interests lay, to Grotius' advice that states not immediately concerned adopt a policy of aiding that belligerent fighting in a just cause, is a big step; and the doctrine thus laid down by the Dutch publicist marks the beginning of the application of ethical principles to neutrality. It does not matter that had states followed the Grotian rule confusion probably would have been worse confounded; his rule is important as giving birth to a world public opinion demanding that as between neutral nation and belligerent nation relations be placed upon some other basis than solely that of selfish interest.

It should be noted that Grotius made one exception to his rule, saying: "In a doubtful case, act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged." This was of no importance as indicating any idea of a duty upon the part of non-participating states to treat both sides to a war fairly and equally; it is of interest as indicating that despite his consideration of war and of neutrality from the ethical standpoint, Grotius did not think of questioning the propriety

of a non-belligerent, in its capacity as a state, supplying belligerents with munitions of war, including troops, and permitting the use of its territory to one or both belligerents.

It took another century to develop the idea that when a state declared itself neutral it was morally obligated to treat both belligerents alike. In 1737, another Dutch publicist, Bynkershoek (bin-kers-hook), gave expression to a very advanced conception of what was encumbent upon a non-belligerent. He wrote:

"I call those non-enemies who are of neither party in a war, and who owe nothing by treaty to one side or the other. If they are under any obligation they are not mere friends but allies, x x x The enemies of our friends may be looked at in two lights, either as our friends, or as the enemies of our friends. If they are regarded as our friends we are right in helping them with our counsel, our resources, our arms and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give preference to one party over the other, inconsistent with that equality in friendship which is above all things to be studied. It is more essential to remain in amity with both than to favor the hostilities of one at the cost of a tacit renunciation of the friendship of the other."

The idea of exact treatment of belligerents was growing. Bynkershoek takes issue with his fellow-countryman as to the duty of a non-belligerent to act as judge of its neighbors' actions, but in so doing he does not reject the proposition of Grotius that neutral action should be predicated upon ethics. He applies the ethics differently. It is plain, however, that Bynkershoek, like Grotius, saw no impropriety in a neutral state giving aid to

belligerents. He advocated only that such aid be given in equal measure to both sides.

Twenty-one years after Bynkershoek took his stand for impartiality, a Swiss jurist, Vattel, went a step further, and proclaimed the doctrine, later universally accepted, that a neutral state should, in its corporeate capacity, give no aid to either belligerent. Wrote he:

"I say that they (neutrals) must abstain from giving help, and not that they must give it equally. x x x It would be impossible to do so equally; the very same things - the same number of troops, the same quality of arms, of munitions, etc - furnished under different circumstances, are not equivalent succor."

It will be observed that Vattel found nothing reprehensible in the mere fact of a neutral state selling munitions of war or hiring soldiers to a belligerent. His objection was to the pretense of equality where the impossibility of rendering equal assistance existed. Vattel might have added that the practice of neutrals furnishing assistance to belligerents opened the door wide for a state to pretend an equality of treatment while deliberately engaging in a thoroughly inequitable practice, thus perpetrating a fraud which the victim would have difficulty in detecting.

It did work out just that way in practice. An English historian, Burnet, is quoted in Hall's "International Law" as saying of conditions in Great Britain in 1677, that complaint was made in parliament "of the regiments that the King kept in the French army." By way of explanation Burnet adds: "It is true the King suffered the Dutch to make levies. But there was another sort of encouragement given to the levies of France, particularly in Scotland; where it looked liker a press than a levy. They had not only the public gaols given them to

keep their men in, but when these were full, they had the Castle of Edinburgh assigned to them, until ships were ready for their transport."

Dissatisfaction with this condition of affairs grew until the Powers accepted the principle that neutrality demanded not the giving of equal assistance to both sides, but the giving of assistance to neither side. However, in the acceptance there was a "joker" which practically vitiated the principle. There a neutral nation rendered assistance to a belligerent by virtue of a treaty obligation incurred prior to the war, no breach of neutrality toward the other belligerent was held involved. At the time most nations had such treaties, so that the doctrine of non-assistance was given lip service but no practical observance.

The first protest against this state of affairs was made by Sweden in 1788. War having broken out between that country and Russia, assistance was given the latter by Denmark because of a treaty obligation, although Denmark claimed to be on terms of friendship with Sweden. Sweden acquisced in this arrangement as a matter of convenience, but registered a formal protest, asserting that the Danish course was not justified by the Law of Nations. Hall says that Sweden "stood almost alone in her view as to the requirements of neutral duty." Certain it is that the Swedish view was not shared in that new western nation, the United States of America.

After the establishment of our independence, the United States entered into a treaty with France under the terms of which the asylumn of our ports was to be given French privateers and denied to any nation with which France might be at war. War broke out in Europe in 1793 and Great Britain protested that the United States was not acting

fairly. The American government felt it was a complete answer to point out that the privileges given French privateers and denied the British was a treaty obligation incurred prior to the war. The practice of that day revered the sancity of treaties more than the duty of impartiality.

But if the United States was reactionary in its view of the requirements of neutrality under those particular circumstances, the very same European war brought this country to take a stand which was far in advance of the practice of the times. Genet, the French Minister to the United States, upon landing at Charleston, issued commissions in the French navy to Americans and caused them to fit out privateers in American ports and dispatch them against British commerce. Genet also set up prize courts in French consulates in the United States, and these courts tried and condemned British vessels brought into our ports by French cruisers.

Upon complaint of Great Britain, the Washington administration decided that the complaint was a just one, and Jefferson, then Secretary of State, wrote Genet that his conduct was "Incompatible with the territorial sovereignty of the United States," and asserted that it was "the right of every nation to prohibit acts of sovereignty being exercised by any other nation within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting of military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duty they owe their own country."

Encouraged by the weakness of the new government and the absence of the laws necessary for the federal administration to carry out its policy effectively, Genet paid little attention to Jefferson's communication and even went to the point of attempting to stir up internal dissention. But Washington was firm. He succeeded in having Congress enact the first Foreign Enlistment Act, making it unlawful for Americans to accept commission in foreign navies or armies, and made such vigorous protests to France that Genet was called home in disgrace.

It is to be observed that the stand taken by the United States was based not alone upon its right as a matter of national pride to prohibit a foreign nation infringing its sovereignty but also upon its duty not to permit such infringement as would injure a third party.

No part of the diplomatic history of our country has more effected international law, better stood the test of time or received wider recognition for its soundness than this chapter written during the administration of our first President. I think the surrounding circumstances are important to recall. The United States had but recently emerged from war with England and the latter was far from popular with our citizenry. We had emerged from that war successfully because of the assistance rendered by France, which fact endeared France to us. If more were needed to make American public opinion anti-British and pro-French, that more was to be found in the fact that France had become the exponent of the republican form of government in Europe as the United States was in America, and sympathy naturally lay with a republic as against a monarchy. The Washington administration, in consequence of these circumstances, was

forced to act contrary to the popular will. Despite the fact that Washington knew his action would again bring him that unpopularity which he had already experienced during the Revolution, that, as an American writer has put it: "All the honor he had gained could not protect him from the hasty wrath of a people dissatisfied with his policy toward England," our first President did not pause to ask himself what was popular but concerned himself only with what was right.

For the Nineteenth Century little was left to do in the way of developing the idea of the duties of neutral states toward belligerents. True it is that when the century began it was still the practice to render assistance to one belligerent and not to the other if there were a prior treaty engagement to do so; but opinion was against the practice and as treaties containing such provisions lapsed they were not renewed. The question in that manner settled itself.

Before discussing the diplomacy of the present century as effecting neutrality, or mentioning that side of neutrality having to do with the citizens of neutral states, I wish to give briefly the duties, according to Lawrence, which rested upon neutrals and upon belligerents when the Twentieth Century Began. The duties of neutrals he sums up as follows:

(1) - Not to give armed assistance to either belligerent or allow to one side privileges denied to the other.

(2) - Not to supply belligerents with money or instruments of warfare.

(3) - Not to allow belligerents to send troops through their territory or levy soldiers therein.

(4) - Not to permit belligerent agents or their own subjects to fit out warlike expeditions within their dominions, or increase therein the warlike force of any belligerent ship or expedition.

(5) - To make reparation to belligerents who may have been seriously and specifically injured by failure on their part to perform their neutral duties.

The same authority gives the following as the recognized duties of a belligerent state toward neutrals:

(1) - To refrain from carrying on hostilities within neutral territory.

(2) - To abstain from making on neutral territory direct preparations for acts of hostility.

(3) - To obey all reasonable regulations made by neutral states for the protection of their neutrality.

(4) - To make reparations to any state whose neutrality it may have violated.

Possibly to these two lists of duties there should be added that because of the community of interests between neutral states each neutral state owes it as an obligation to all other neutral states to insist upon reparations from any belligerent who has violated its neutrality, no matter how slightly. Jefferson pointed out to Genet that a neutral state had no right to permit one belligerent to violate its sovereignty to the injury of the other. It is conceivable, however, that a belligerent might violate the sovereignty of a neutral state without doing material hurt to the other belligerent. Nevertheless the temptation to which belligerents are subject is so great, that it seems to me each neutral state is under an obligation to other neutrals states to scrupulously insist upon respect for its

sovereignty, since otherwise the rights which neutrals now enjoy at the hands of belligerents might soon become impaired.

The word "neutral," used as a noun, has two meanings and this fact has caused confusion. I have used the word in this paper as meaning a nation in its corporeate capacity; and I have discussed neutrality solely as applied to the relations between nations. However, during the centuries there has also developed a body of laws of neutrality which concern the relations between belligerent states and the citizens of neutral states. It is to the interests of a belligerent that all trade with his enemy be cut off. It is to the interests of a neutral state that its citizens be permitted to carry on their commerce, both with other neutrals and with the belligerents. The two interests clash and have always clashed in head-on collission.

In practice belligerents have sought to restrain neutral trade with the enemy just as much as they could without bringing neutrals into the war on the enemy side. Neutral states have demanded on behalf of their citizens and subjects just as much freedom of commerce as they felt they could insist upon without becoming involved in war. During the years every nation has occupied first one position and then the other, and doubtless no statesman could with conviction say whether his own nation would have profited more by a complete acceptance of the one view or the other. This and certain other factors have made compromise comparatively easy, and compromise has been the basis of laws as to ordinary neutral commerce. Very little more of ethics has been involved, I would say, than is involved in the swapping of horses at the county fair.

So far as international law applies to neutral commerce, there are only two things which Ishall touch upon. The first is the

principle, until this century accepted by all, that when a belligerent vessel finds it necessary to sink a merchant vessel it should first see to the safety of passengers and crew, this not alone because of the dictates of humanity but because some of them might be citizens or subjects of a neutral state engaged in lawful business or pleasure. There was no friction upon this score until the World War brought the submarine and Germany claimed the right, because of the peculiar nature of the submarine, to disregard established international practice. We all remember the indignant protest that arose, not alone from Germany's enemies but from the neutral world.

It is not to be overlooked, however, that despite the outcry at the time, the nations then so horrified at German insistence that changing weapons of war justified changing the rules of war, have not since then created any international agreement outlawing the submarine as a weapon of war. They could have done so, but instead most if not all of them have gone on building submarines.

The second matter is that of privateering, the commissioning of private citizens to fit out armed ships and prey upon the commerce of the enemy. Largely it is a matter concerning belligerents rather than neutrals; but just so long as neutral passengers and cargoes find places on the merchant vessels of belligerents, or belligerent war vessels enjoy the right of "search and Seizure" to prevent commerce in contraband of war, neutrals must be concerned. It is the habit of writers upon international law to assert that since the Declaration of Paris "privateering is and remains abolished." As a matter of fact privateering has ceased solely because the development of the modern powerfully armed and armored battle ship has made the use of merchant vessels as privateers impossible, and the cost of

fitting out a vessel capable of doing battle under modern conditions is prohibitive for the individual. One should not forget, however, that the United States made effective use of privateers during both the War of the Revolution and the War of 1812, that the United States has never signed an agreement not to make use of privateers if use of them should ever again become practical, and that the United States is a nation so powerful that no treaty entered into by other powers can definitely be said to have the force and effect of international law so long as the United States withholds her consent. In theory the United States is committed to advocacy of privateering until such time as the other Powers agree that private property, other than contraband of war, be completely respected at sea regardless of ownership. Privateering, since the owner and frequently the ship's personnel, have had a pecuniary interest in the venture, partakes somewhat of the nature of piracy. Even if it did not, the correctness of subjecting neutral ships, neutral persons or neutral goods to the inconveniences of war at the hands of persons not in the regular naval establishment of a belligerent is highly questionable.

The story is told of a pugnacious but very polite Irishman, who, coming upon some fellows engaged in fisticuffs, asked: "Is this a private fight, or may anyone join in?"

For a number of decades world public opinion has been coming to the belief that, so far as states are concerned, there is no such thing as private fight; that not only is anyone privileged to join in, but that when war is joined by any two Great Powers it will be very difficult indeed for other states to stay out.

This conviction has been the stimulus for most of the diplomacy of the present Century. It occasioned the Bryan arbitration treaties,

the World Court, and the Washington Naval Disarmament Conference. To what extent these recent peace moves effect the doctrine of neutrality can not yet be definitely said, but certainly to this extent: That the old idea of the duty of a neutral state to remain absolutely aloof from the quarrels of belligerents has been modified, and the idea is growing that states not immediately concerned in an international dispute have some right to demand that the states which are immediately concerned explore every honorable avenue of peaceful settlement before resort to arms. The way in which that right should be put into effective practice has not been determined. The first effort was of course the League of Nations, which, even its advocates must admit, seems to have come upon very dark days.

Whether the League will or will not survive; whether, if it should not, another similiar organization will be erected upon its ruins; or whether an entirely different plan will be attempted in an effort to compel nations to renounce war as an instrument of national policy - these are questions for the future to answer. For the present it is sufficient to examine the principles of the League as effecting neutrality.

The following summary of the League covenant as it concerns war and neutrality is quoted:

"Members of the League were pledged to submit all potentially dangerous disputes, which could not be satisfactorily settled by diplomacy, either to arbitration or to inquiry by the Council and in no case to resort to war until three months after the award of the arbitrator or the report of the Council. x x x x Members obligated themselves not to go to war with the party to the dispute which accepted the suggestions of the conciliating agency, but any member

resorting to war in violation of its covenants was ipso facto to be deemed to have committed an act of war against all other members, who bound themselves immediately to sever all commercial, financial and personal relations with the nationals of the covenant-breaking state and to prevent any intercourse between that state and any other state whether a member of the League or not. The Council was invested with the duty of recommending what effective contribution each member of the League should contribute to the armed forces to be used to protect the covenants of the League. In event of a dispute between a member of the League and an outside state, or between two or more nonmember states, the League was to offer its services; and if the invitation should be rejected and a member of the League attacked, all other members of were to come to its assistance."

It will be seen that in a limited sense the idea involved in the League plan harks back to Grotius, since both make neutrals into judges of the justness or unjustness of belligerents' war causes. However, where Grotius made each neutral a separate judge and a separate executioner of its own judgment, the League idea makes neutral states collectively into a body of judges, or one might say jury, thereby avoiding a multitude of differing judgments and assuring unified action toward a common end.

Of course the League covenant was drawn upon the assumption that all the great Powers would subscribe to it, and that most of the smaller states also would become members. Since that did not occur, it has never been possible to put the League plan into practice, and as a result there exists a peculiar situation regarding neutrality. Members of the League are pledged to a king of neutrality which they can not practice because certain other Powers declined to accept any

responsibility for the new conception of neutral duty. For instance it is absurd to suppose that any attempt would be made to prevent the United States having relations with a League member deemed by the other members to have broken its covenants.

Nevertheless, though for the present ineffective, the idea exists, is supported by a large body of opinion, and must be regarded as likely to have considerable weight not only upon future conceptions of neutral duty but upon future practice; for it can not be overlooked that the past teaches that every principle of neutrality accepted by nations has existed as an idea before becoming a practice; nor can it be denied that the duties of neutrals and of belligerents as they existed when the present Century began do not seem to meet modern conditions and modern ideas with complete satisfactions.

As the nation most responsible for the fact that the League idea has never been given a trial, the United States may fairly be considered as the leader of if not the spokesman for non-League members. What has the United States given the world in place of the League idea?

There was, of course, the Harding administration's naval disarmament program, which, whatever merits it possessed as "dollar diplomacy" in keeping naval costs down, offered nothing toward world peace or toward amelioration of the inconveniences which neutrals suffer in times of war. Navies are larger now than before the World War, consequently if the instruments of war excite to war, peace is in more danger now than it was prior to 1914. Were disarmament carried to its logical extreme, merchant vessels could again be armed and used for warfare, thereby threatening the return of privateering, which method of warfare has not been renounced by the United States.

The important contribution of the United States, whether for ill or for good, has been made by the present administration in the passage last year of a temporary neutrality act, which act was given a further lease of life by the present Congress. Among other things this act provides: that Americans taking passage on vessels of belligerents do so at their own risk; that Americans may not export arms, ammunitions or implements of war to belligerents, either directly or through trans-shipment; that American vessels may not carry arms, ammunitions or implements of war from the port of another neutral nation to the port of a belligerent nation.

The first provision of the law here referred to denies to American citizens engaged in a lawful practice that protection of their government which citizenship has always in the past implied. It denies it upon the theory that a citizen so unmindful of the welfare of his fellow citizens as needlessly to endanger his life on a belligerent vessel does not deserve the protection of his fellow citizens. It would be difficult to deny that this is true; yet it is also true that by taking the stand the government of the United States has gone a long, long way toward endorsement of the view put forward by Germany during the World War. If it is unlawful for a submarine to sink a merchant vessel without warning, the assumption is that when a neutral citizen takes passage upon a merchant vessel he is endangering his life only to the extent that sea travel may normally involve some danger; and for a government to take an official action based upon the reverse presumption certainly argues that it has made a distinct consession to the view that the advent of the submarine altered a law of nations of long standing.

The provisions of our law which extend to our nationals the same duty not to sell munitions of war as falls upon the government itself is a complete reversal of our past. Great Britain urged us to take this view as far back as 1793, and Jefferson replied that Americans might sell munitions of war to belligerents at their own risk without infringing their government's neutrality, and that it was no part of the duty of any state to deprive any citizens of their normal and lawful livelihoods because two other states chose to go to war. That position we have held consistently, and it was reaffirmed no longer ago than the Wilson administration when Lansing, replying to Germany's protest, reaffirmed the Jefferson stand.

Every change in the conception of neutral duty has involved reversing past policy, however; and unquestionably there are large numbers of Americans, if not a majority, who view our New Deal in neutrality as finding its paternity in a sincere effort to give the world a better conception of the ethics of neutrality; as being our answer to the challenge to show the way by example. On the other hand there are many who believe that the new neutrality laws are born of the demagoguery of ignorant and scheming politicians. Very likely the event is too close for proper perspective or unbiased opinion, but already in the application of the new policy, which is supposedly to be replaced by permanent laws, there have been events which suggest that certain features of the existing act are not altogether wise.

The provision of the act which requires the President to warn Americans not to take passage upon the merchant vessels of a belligerent nation finds its justification, if it be justified, in danger to their lives. But what American life, on what Italian merchantman,

was in danger from what Ethiopian submarine? The complete absence of an Ethiopian navy and the fact that Congress displayed haste, if not unseemly haste, in passing this act so that it would become law before hostilities began in Africa necessarily create the suspicion that it was intended as a deliberately hostile gesture toward Italy, perhaps in the hope of making Harlem safe for Democracy. If not that, it was at least unwise, and the President himself has suggested more latitude for the execution.

In his proclamation of neutrality upon the outbreak of the Italio-Ethiopian conflict, the President - going beyond the law it seems to me - said: "I desire it understood that any of our people who voluntarily engage in transactions <u>of any nature</u> with either of the belligerents do so at their own risk." Mind you this was not a warning that trade in contraband of war was at the owner's own risk. It was a warning against the absolutely peaceful trade normally engaged in and quite as lawful during war as during peace.

Our trade with Ethiopia is very small. Italy is not by any manner of means our largest customer. But another war may come, and the belligerents may be states with which we do a very considerable part of our export business. Are we called upon to give up that normal commerce to the necessary great distress, not, as the President put it, "to a comparatively small number of American citizens," but to the entire body of American citizens, poor as well as rich, and more harmful to the former because they are less well prepared for adversity than the latter.

I think it very likely is our duty to be willing to forego in the interests of neutrality any of the so-called war profits, not only for great corporations but for $8.00 a day laborers who demand $24.00

during war time, and for farmers who insist that wheat worth $1.00 get a wartime price of $2.00; but doesn't the government's duty to its citizens demand that it stop there; that it demand that belligerents not interfere with our normal peace time commerce upon which millions of our citizens depend for a livelihood; and that it make it plain that we have not yet become so craven as to desire neutrality at any price.

#