

# **Edwin M. Borchard, John Bassett Moore, and Opposition to American Intervention in World War II\***

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## **I**

Historians have examined many factors concerning American isolationism in the years 1939 to 1941. They have delved into action groups, prominent personalities, and economic and strategic rationales.<sup>1</sup> Surprisingly little research, however, has been done on the role that international law played in the effort to avoid intervention.<sup>2</sup> Yet here arguments on both sides were often tightly drawn and claims heavily documented, hence involving a level of debate not often seen in this period.

On the anti-interventionist side, two figures were particularly prominent. One was John Bassett Moore, whose name was almost synonymous with scholarship in this field. The editor of countless histories of international law, Moore served on the Columbia faculty from 1891 to 1924. Moore's *Digest of International Law* (1906) was undoubtedly the most important American work on international law early in the twentieth century. Moreover, he had an outstanding record of public service, crowned by his participation in the Hague Tribunal from 1912 to 1938 and his position as the first United States judge on the Permanent Court of International Justice. Other posts, public and private, included assistant secretary of state during the Spanish-American War, counselor of the State Department early in the Wilson Administration (and occasionally acting secretary of state), and president of the American Political Science Association.<sup>3</sup>

The second prominent figure was Edwin M. Borchard, who was Moore's most prominent pupil. From 1917, when he was hired at Yale University Law School, until his retirement in 1950, Borchard wrote prolifically on

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various aspects of international law. In addition, he served on a host of international boards and tribunals.<sup>4</sup> Because Borchard was thirty-four years Moore's junior, and therefore more involved in contemporary debate, this essay will devote far more space to his views. Borchard maintained correspondence with several anti-interventionist legislators, including Gerald P. Nye, Robert A. Taft, John A. Danaher, and George Holdam Tinkham. Close ties to William E. Borah and Hiram Johnson went back to the fight over the League of Nations. James A. Shanley, a Democratic congressman from Connecticut, was his former student, and Borchard boasted that his pupil knew more about international law and neutrality policy than almost any other member of the House.<sup>5</sup> For many years Borchard exchanged letters with Moore, doing so on the average of twice a week. In keeping with an era in which scholars were also gentlemen, the letters invariably began "Dear Mr. Moore" and "Dear Mr. Borchard." (Moore would end with the words: "Believe me to be, Ever faithfully yours"). "I should say," wrote Borchard in 1940, "that I have learned more international law from him [Moore] on long walks and across the table than I have from any books."<sup>6</sup>

Borchard's high standing among legal colleagues was based upon his expertise in such matters as the diplomatic protection of citizens abroad, declaratory judgments, and alien property holdings. At least part of his reputation among the public, however, was rooted in his critique of United States entry into World War I, an event that he called "a mistake—perhaps the greatest in American history." By this action, "we did Europe no good at all and ourselves even less, if that is possible," he said in 1940.<sup>7</sup> In 1937, with the aid of attorney William Potter Lage, he wrote *Neutrality for the United States*. Here Borchard claimed that President Woodrow Wilson and Secretary of State Robert Lansing, by refusing to press impartially for neutral rights, had made war with Germany inevitable.

When such interventionist leaders as Senator Key Pittman claimed that it was German submarines, not Wilson's folly, that had brought the United States into war, Borchard was quick to retort. For example, American citizens travelling on the *Lusitania* had no right to their nation's protection, for "it is elementary that everything on board a ship—passengers, cargo, crew—take their protection from the national flag of the ship on which they sail." In addition, the *Lusitania* was a ship in the British naval reserve, was legally a potential transport, and was carrying explosives, possibly in violation of American law.<sup>8</sup>

In fact, there was hardly a move made by the United States during World War I that Borchard did not attack. The Wilson administration refused to associate itself with other neutrals in defense of neutral rights and secretly permitted the floating of loans to the Allies. It vigorously fought the Gore-McLemore resolution that would have forbidden American citizens from taking passage on belligerent vessels. On February 22, 1916 it permitted Wilson's chief lieutenant, Colonel Edward M. House, to tell the

Allied leaders that, if Germany refused a "reasonable" settlement, the United States would probably intervene. Moreover, the United States acquiesced in the extension of contraband lists, the application of the doctrine of continuous voyage, and the establishment of unenforceable commercial blockades. Before March 12, 1917, when Wilson authorized the arming of the United States merchant ships, only one American ship had been sunk. This was the *Gulflight*, in which three lives were lost when, on May 15, 1915, the Germans torpedoed it.<sup>9</sup> Borchard was quite aware that interventionists often pointed with alarm to the Zimmermann note, in which the German foreign minister promised Mexico the return of territories lost in 1848 in return for a mutual alliance. Borchard called the note "silly," claimed that it was "evidence of the panic that prevailed in Berlin," and stressed that it was contingent upon Germany's failure to keep the United States out of war.<sup>10</sup>

Given his attitude towards the war, it is hardly surprising that Borchard had little respect for Woodrow Wilson. The United States entered the war, so Borchard wrote Hiram Johnson in 1935, not because of the munitions trade or even because of loans to the Allies, but because "the Executive did not at critical times wish to remain neutral, and in the brief periods when he did, did not know how to make American neutrality."<sup>11</sup> In comparing Wilson to Franklin D. Roosevelt, Borchard wrote in 1941 that Wilson was "a far more determined peace man than the present incumbent, and he had some general ideas of what war would do."<sup>12</sup> Most of the time, however, Borchard meted out much more severe treatment. "Woodrow Wilson," commented Borchard to Moore, "cost the United States not only the 50 billions and the loss of life of the last war, but by impressing romantic minds with the validity of his League theories he has plunged us into all the wars of the future until perhaps we bleed to death."<sup>13</sup> Indeed, the president "did more to ruin this country than any single person that has entered on the political stage."<sup>14</sup> In reference to Wilson's leadership in the movement for collective security, Borchard simply wrote, "Woodrow Wilson's greatest offense, I feel, is that he made so many people crazy."<sup>15</sup>

Early in his career, Borchard was optimistic enough to believe that war itself could be limited. The carnage that had been initiated with the breakup of the Holy Roman Empire, he wrote in 1913, could finally be ended. Social and commercial intercourse, scientific discoveries, the extreme mobility of capital—all had created an interdependent world, one whose conflicts would be resolved by such devices as arbitration, mediation, and commissions of inquiry. Since war was rooted in such emotional factors as ignorance and resentment, an enlightened public opinion could bring about its demise, so much so that "enormous armies and navies are no longer necessary."<sup>16</sup>

After World War I, however, Borchard was something of an economic determinist. Differences that led to war could no longer be defined in legal

terms, much less settled by judges. In fact, wars in general had not centered on questions of right and wrong, but rather conflicts of interest, such as the slavery question in the United States.<sup>17</sup> War was rooted in the quest for markets and raw materials, and in the investment of surplus capital. One protectionist state after another sought to enhance its holdings at the expense of its neighbor. "The world is now, more than ever before, a house of cards," he wrote in 1921.<sup>18</sup> With no legal machinery or international trade agency to adjust these conflicts, each imperialist nation was of necessity forced to engage in unregulated and unfair competition. They safeguarded their interests first by diplomacy, then by force of arms.<sup>19</sup>

Borchard had his own solution for the world's ills. President Warren G. Harding, he wrote in 1921, should call a series of international conferences promoting cancellation of war debts, the financial restoration of Europe, tariff reduction, and armament limitation.<sup>20</sup> Two years later, he added to his hypothetical agenda such matters as distribution of foreign markets and the world's raw materials, new forms of currency (including domestic bimetalism), and the internationalization of cables. He saw such domestic agencies as the Interstate Commerce Commission and the Federal Trade Commission as models of what he wanted overseas.<sup>21</sup> By 1930, Borchard was recommending "the possible creation of organs of conciliation and appeasement which can hear and remove moral grievances, even to the point of readjusting boundaries."<sup>22</sup>

Yet, despite such schemes, both Borchard and his mentor Moore saw little hope for permanent peace. "Humankind," said Borchard, "is so constructed that occasionally he will break his bonds and rush into an orgy which we call war."<sup>23</sup> Moore concurred, writing, "There will never be permanent peace in the world. Human nature, with its passions, prejudices, and acquisitive propensities, does not admit of it." The best that can be hoped for, Moore went on, is to limit the conflict.<sup>24</sup>

No peace system could last, claimed Borchard in 1936, that was based upon the permanence of the status quo. Millions of people, humiliated and desperate, were driven to extreme measures. Such activities were not surprising, for "the life of nations is not static." Sounding a bit like John Foster Dulles in *War, Peace and Change* (1939), Borchard wrote that to hold down an unhealthy status quo was "like sitting on a safety valve—hence, a direct incentive to explosive revolt." Europe's territory must be redistributed corresponding to "the natural strength of peoples." Without this redistribution, so much political and psychological hostility would be engendered that the social structure of all countries would be undermined, leading to a "dangerous psychosis."<sup>25</sup>

Like all living organisms, nations—so Borchard argued—were subject to laws of evolution: "At any given time, some will flourish, others decay." If a nation is "virile and prolific," but finds doors to emigration shut and raw materials and markets lacking, "the urge to expansion becomes irresistible—even though expansion be unwise and unprofitable." Given such

biological considerations, ethics played a minor role. True, this practice might be unfortunate, but it had always been the traditional method of "readjusting the tenure of the earth's crust, and until we find a better method, the old one will be completely hard to outlaw."<sup>26</sup>

The United States' best chance of survival in this Darwinistic world, argued Borchard, lay in adherence to traditional concepts of neutrality. To Borchard, neutrality was a legal status. It controlled action, not thought, and for the most part the action controlled was government action. What was crucial in such a doctrine of neutrality was that the neutral power treat all belligerents equally, that is without favor or discrimination. The neutral, he emphasized, was not "a sort of referee having the privilege of pronouncing moral judgments" or of appraising good and evil. Borchard conceded that such a doctrine of neutrality usually favored one side over another, but this inequality was not the neutral's concern. Borchard often offered two examples of what he meant: the French Revolution, during which—so he claimed—both Thomas Jefferson and Alexander Hamilton had distinctive leanings but did not attempt to manipulate their nation's neutrality; and the American Civil War, in which the British did not abandon their legal neutrality in order to pursue their pro-Confederate sympathies.<sup>27</sup>

Both Moore and Borchard argued that such neutrality was not obsolete. Moore challenged the claim that a "world war" spanning continents had eliminated this concept. In fact, total war was no new innovation. It had a long ancestry stemming back to the first Persian war and including the Thirty Years' War and the war of the Spanish succession. Indeed, it was because of this very carnage that rules were established.<sup>28</sup> Borchard found the modern concept of neutrality originating in the seventeenth century, although it was apparently known to the ancient Greeks. Maritime law alone had some 700 years of steady development. Even after the First World War, no nation had suggested any departure from international law, much less repealed its neutrality laws.<sup>29</sup>

It is hardly surprising that a man of Borchard's views would want to keep a wary eye on presidential powers. Two days after Roosevelt gave his famous 1937 Chicago bridge speech, one that called for quarantining the aggressors, and one day after the administration endorsed the League Assembly's denunciation of Japan, Borchard commented that "in the field of foreign affairs, certainly, we are under as complete a dictatorship as Germany or Italy."<sup>30</sup> He was particularly distressed by the decision rendered by Supreme Court Justice George Sutherland in the Curtiss-Wright case (1936). Although Sutherland confined his most sweeping remarks to the particular question of "inquiry" and "negotiation," proponents of presidential power had construed his dictum as leaving the president's powers unlimited in the field of foreign affairs. Sutherland's ruling, said Borchard, "would present the President as a veritable dictator, which certainly the Constitution did not intend him to be."<sup>31</sup>

Borchard was also concerned over defenses of presidential powers given

by historians Charles Warren and Henry Steele Commager. Challenging the claims of both scholars, Borchard argued that presidents in the past had only ordered the United States navy into action when American lives or interests were in immediate danger. In the case of important moves, such as Vera Cruz, he had obtained congressional approval.<sup>32</sup> Commager in particular, claimed Borchard, was attempting to "deceive the American people into the belief that acts of war and a state of war can be produced by presidential action alone, and that this exertion of force lies within the framework of the Constitution."<sup>33</sup> It is hardly surprising that Borchard favored a war referendum amendment to the Constitution.<sup>34</sup>

## II

Hence, as we have seen, Moore and Borchard offered a general analysis by which they would evaluate Versailles and its aftermath. To both men, the fruits of the Versailles treaties were particularly destructive. Moore quoted with approval the British general J.F.C. Fuller, who called the treaties "the most dishonest peace in history, a peace as full of turmoils as the Hydra was full of heads." "The lowest stage in American history was reached," declared Moore, when American diplomats signed the accord.<sup>35</sup> Borchard noted that the treaties Balkanized eastern Europe, authorized the wholesale confiscation of private property, and fostered innumerable irredenta.<sup>36</sup> Commenting on Hitler's rise to power, Borchard said in 1941, "An armed revolt against those treaties was bound to come, and it was not illogical that those who had temporarily profited by them should wish to help them keep what they had got."<sup>37</sup> Hitler, in short, had a definite case in destroying the agreements. "Against that reconstruction," Borchard wrote Borah, "it would be futile and foolish to go to war."<sup>38</sup> Yet, though the revolt against the agreements was bound to come, "it is unfortunate that it came under the leadership of a psychopath."<sup>39</sup>

Versailles was only one aspect of the new order that Borchard found repellent. The League of Nations was another. Borchard conceded that the League's ability to convene at short notice in the midst of crisis might make it indispensable for Europe.<sup>40</sup> However, there was one fact that was unmistakable: it served essentially as a military alliance of the victor nations, acting to preserve the status quo and branding as immoral all those who spoke against it.<sup>41</sup> Since the League system prevented adjustment, "explosions were thereby invited, and Hitler and Mussolini are the consequences of the underlying evils that war created in Europe."<sup>42</sup> For example, it was League pressure on Mussolini that threw the Italian dictator "into the arms of Hitler." "Italy," Borchard continued, "will not for generations get over the attempt to starve her into submission in 1935."<sup>43</sup>

The Kellogg Pact of 1928, in which some sixty-two powers agreed to renounce war as an instrument of national policy, did not meet with Borchard's approval. In an address given at the Williamstown Institute of Pol-

itics, Borchard noted that the pact's reservations—exempting all wars fought for defensive reasons—in reality sanctioned all wars. “We are now,” he said,

about to sign a treaty in which we expressly recognize the right of other signatories to make war upon anybody, including ourselves, for the purpose of enforcing, even against us, their mutual obligations under the Covenant of the League of Nations, not to mention individual undefined national interests in any part of the world. They alone will determine the occasion of such action, without our participation.<sup>44</sup>

Fearing that the agreement was the first step in the League doorway, Borchard wrote, “The sooner the Kellogg Pact is repealed, the better for us. It is literally for us a ‘snare and a delusion.’”<sup>45</sup> Indeed, it was being used “to drive the first nail into the coffin of American independence.”<sup>46</sup>

Borchard was even suspicious of the World Court. He claimed in 1934 that seven of its fifteen judges were partisans of France. Moreover, the three Latin Americans on the bench had “little love for the United States”; one had “attacked the United States rather viciously.”<sup>47</sup> Evidence of the political character of the court was revealed in a ruling made in 1931, one that prohibited the customs union between Germany and Austria. Hence, to Borchard, reservations insisted upon by the United States Senate were quite justified. The United States was merely asking for privileges that every European power already possessed. Borchard did not object to international courts per se, though he claimed that the Permanent Court of Arbitration was sufficient for most of his nation's needs. He also recommended an inter-American court to handle hemispheric matters, and even favored United States participation in a Hague tribunal, provided that this tribunal had no connection with the League.<sup>48</sup>

Borchard took a major part in the debates over neutrality legislation during the 1930's, serving as a close advisor of Senator Hiram Johnson. He reluctantly favored a mandatory ban on the export of arms and munitions, but insisted that it be applied equally to all belligerents.<sup>49</sup> He warned that presidential discretion, cash-and-carry, and discriminatory embargoes could involve the nation in conflict.<sup>50</sup> His colleague Moore compared such practices to encouraging “fornication in the hope that it might reach the stage of legalized prostitution.”<sup>51</sup>

Unlike Senator Gerald P. Nye, an exponent of neutrality so rigid that he would bar much trade, Borchard found commercial rigidity destructive. Moreover, America did not enter World War I because of its extensive commerce with the Allies. Rather, “it was personal weakness and deficiencies that marred our policy and made us stumble on the path of neutrality and turn instead to the road to war.”<sup>52</sup> The existing rules of international law, if adequately enforced, were sufficient to protect the United States against undesired involvements.<sup>53</sup> Noting in 1939 that Senators Hiram Johnson and J. Hamilton Lewis favored repeal of the newly-passed neutrality acts, Bor-

chard commented that "if we had an administration that was interested in neutrality, that would probably be the sound course to pursue." However, as the Roosevelt government chafed under neutrality, having no use for it either as a philosophy or practice, some legal restriction might still be necessary.<sup>54</sup>

Particularly alarming to Borchard were possible restraints on trade. Senator Nye especially, Borchard feared, "would embargo all or most of our trade."<sup>55</sup> Acknowledging in 1935 that United States trade with belligerents could be almost completely severed, he said that he saw "no reason for thus surrendering American rights in advance."<sup>56</sup>

When, in October and November of the same year, Secretary of State Cordell Hull declared a moral embargo on those commodities—such as oil and copper—that buttressed the Italian campaign in Ethiopia, Borchard called the measure unneutral. In addition, it lacked legal warrant, violated an 1871 commercial treaty with Italy, and made a new enemy for the United States. "We seem now to specialize in killing our foreign trade," he wrote in January 1936. "By reducing our income and increasing our outgo we may in time land in the position somewhat analogous to that of Turkey or China or other impecunious governments that no longer know how to take care of themselves."<sup>57</sup> Borchard also reacted scornfully to Roosevelt's rationale, as stated on October 30, 1935, that certain kinds of trade prolonged the conflict: "The defeat of Italy was apparently regarded as the best means of 'shortening' the Ethiopian War."<sup>58</sup>

Borchard sought to continue trade with Russia as well, and vigorously opposed the plea of Matthew Woll, vice-president of the American Federation of Labor, that the United States should ban Soviet products in protest of its dictatorship and forced labor practices. "Non-intercourse means war," he remarked concerning the matter.<sup>59</sup>

Borchard's comments on the Ethiopian War went beyond commercial matters and, in some ways, reached to the heart of his anti-interventionism. When Italy invaded Ethiopia on October 3, 1935, Borchard saw British hostility rooted in commercial jealousy.<sup>60</sup> Britain, he claimed, was "crushing" the Italian people, although he asserted that he had "no opinion on the desirability of such a political objective."<sup>61</sup> He expressed strong opposition to Mussolini's dictatorship and his invasion, but asked, "What earthly interest have we in the Italian-Ethiopian quarrel?"<sup>62</sup> By 1938, he had found wisdom in the Hoare-Laval agreement, by which the emperor of Ethiopia would have been obligated to cede two-thirds of his land to Italy.<sup>63</sup>

Other international events of the thirties received less attention from Borchard, undoubtedly because they did not affect domestic legislation.<sup>64</sup> In March 1938, just before Hitler's annexation of Austria, he called Neville Chamberlain's diplomacy "at least an honest attempt to recover some of the mistakes of the past and make peace where it can still be made if that is possible."<sup>65</sup> The British prime minister had "the temerity to wish to save his

own country from war. By doing the only sensible thing available—making peace with the dictators—he is denounced by the theorists as a terrible person.”<sup>66</sup>

On March 31, 1939, Chamberlain pledged British support if Poland resisted any threat to its independence, and within a week, his pledge was extended into a guarantee of mutual assistance. Following Italy's coup in Albania—long a veiled Italian dependency—on April 7, Chamberlain extended the guarantee to Greece and Rumania. Hitler, however, kept pressing Poland to cede Danzig and the Corridor: Danzig, populated predominantly by Germans, was a free city within the Polish customs union; the Corridor too had many German nationals. Borchard found that “the new British diplomacy” involved “a promiscuous distribution of unasked promissory notes, and then the assumption of a high moral insistence on the honoring of such notes. If war is to be avoided,” he said on August 30, 1939, “I think England will have to submit to more humiliation, for Danzig and the Corridor can hardly remain in their present status.” “Morally,” he continued, “Hitler has a good cause.”<sup>67</sup>

### III

Once Hitler invaded Poland and World War II began, Americans started to debate various degrees and forms of intervention. Borchard, as one might expect, remained one of Roosevelt's strongest critics. Before discussing any of his reactions (and occasionally Moore's) to specific measures, some observations concerning his general views on the conflict are in order.

Borchard always denied that his position was an isolationist one, preferring the term “non-interventionist.” His school of thought, he said soon after the war broke out, was “willing to entertain the widest possible commercial relations with foreign countries, but not get mixed up in their politics.”<sup>68</sup> Knowing that the “isolationist” label hurt his case, he wrote that such opprobrium was reserved for people who “have the misfortune of thinking of their own country first before they try to make the world safe for democracy or end war.”<sup>69</sup> Still more serious to Borchard was the characterizing of Roosevelt's critics as “members of the Fifth Column, and therefore presumably in the pay or beholden to the Nazi regime.”<sup>70</sup> Because, so he believed, the bulk of the country opposed Roosevelt's interventionist measures, the administration would probably “use drastic repressive measures, so that the great defender of civil liberties is likely to become their executioner.”<sup>71</sup>

Because the State Department occasionally called upon Borchard for legal work, such as representing the United States at the Lima conference on international codification in 1938, he usually kept his distance from anti-interventionist action committees. Yet, while not joining the America First Committee, he expressed total sympathy with its work, contributed a modest

sum, and helped to sponsor chapter meetings.<sup>72</sup> He told Socialist party leader Norman Thomas that while he was not strictly a Socialist, he always supported Thomas's presidential bids.<sup>73</sup> Borchard greatly admired the anti-interventionists' leading spokesman, Colonel Charles A. Lindbergh: "We had thought that he was only a flyer, but he appears to be a man of instinctive judgment and with a great capacity to express himself."<sup>74</sup>

Borchard showed his contempt for interventionists, be they policy-makers or professors. A Roosevelt speech was "sophomoric," "not dignified, coherent or worthy of a President," only credible to "those who appreciate and encourage its rabble-rousing potentialities."<sup>75</sup> Hull, though "a fine old gentleman," "indulges rather promiscuously in his favorite pastime of denouncing pirates, barbarians, world invasion and world conquest."<sup>76</sup>

Comments on interventionist scholars were even more biting. Charles G. Fenwick of Bryn Mawr "has not much intellect" and "is no lawyer at all."<sup>77</sup> Clyde Eagleton of New York University "is not intellectually honest." Quincy Wright of the University of Chicago was ignorant but "means well," while H. Lauterpacht of Cambridge, though "deeply wedded to the theories of sanctions and boycotts," was "a scholar."<sup>78</sup> Sometimes a whole region would come under attack, as when Borchard claimed in October 1941 that the American South had "carried the bills that have brought us to the brink of war." Had the South won the Civil War, it later would have begged for readmission to the Union and might, as a section, have been "less bellicose and irresponsible."<sup>79</sup>

Moore too could be biting. He asserted that the ignorance of Wendell Willkie, Republican presidential candidate in 1940, was "as appalling as it was comprehensive."<sup>80</sup> Upon reading some speeches of Henry L. Stimson endorsing collective security, Moore claimed that Herbert Hoover's secretary of state was showing that "either personal pique or mental incapacity may, when one's emotions are stirred, make one dangerous to the community as well as to himself." Stimson was "especially subject to fits of this kind."<sup>81</sup> Interventionist columnist Walter Lippmann, said Moore, was "beyond the pale of digestion, and much less of nutrition. I do not at the moment recall anyone who so fluently fuses all sorts of views, whether consistent or inconsistent, in the phrases that glitter one way today and another way tomorrow."<sup>82</sup>

If there was ever a *bête noire*, it was the Carnegie Endowment for International Peace, a well-financed institute headed by Nicholas Murray Butler, president of Columbia University, and James T. Shotwell, a prominent Columbia professor. Borchard attacked it at every opportunity. It was "continually working against the United States," with its extensive college projects "subverting the youth of this land."<sup>83</sup> Borchard wanted Congress to investigate its activities, for it was plotting to fulfill Andrew Carnegie's dream of having the United States rejoin the British Empire.<sup>84</sup> Borchard also sought a Senate inquiry into the financing of Clarence Streit's Union

Now group, which he called "a program for a political alliance with Great Britain and its dominions."<sup>85</sup> He praised Congressman Stephen Day for introducing a resolution calling for an investigation of "this treasonable activity."<sup>86</sup>

Borchard condemned the Nazi regime and frequently expressed his sympathy for the Allies. At one point, he called Hitlerism "a terrible scourge."<sup>87</sup> At another, he said, "there is horror in the thought of the Nazis running Europe or any other part of the world." Furthermore, "some of their domestic policy is atrocious."<sup>88</sup> At still another, he claimed, "It is hard to see the British people suffer as they now are, and I wish there were some practical way to ease their danger."<sup>89</sup>

Borchard nevertheless feared British tentacles. In 1937, Borchard saw the Roosevelt administration as being so pro-British that "the Tories of 1776 seem at last to have won out."<sup>90</sup> In October 1939, Congressman Jacob Thorkelson of Montana claimed that twenty years earlier Colonel House offered David Lloyd George a detailed program for making the United States a British colony. The letter was instantly exposed as bogus, but to Borchard, "There is altogether too much truth in it for comfort. It was too bad that Mr. Thorkelson tried to convey the impression that he thought that Colonel House had really signed it."<sup>91</sup>

Moore concurred with Borchard's overall view, writing that "the only way in which the United States could preserve a measure of independence would be to resume its place in the British Empire as a self-governing dominion." Canada, Moore maintained in 1941, was far more independent than the United States.<sup>92</sup> In June 1939, King George VI and his wife visited the United States, munching hot dogs with the president at Hyde Park on the 11th. Moore suspected a secret informal alliance, which he nicknamed "the hot-dog pact."<sup>93</sup>

Throughout the conflict, Borchard attacked Allied war aims. "The defeat of Hitlerism," he wrote in October 1940, "is not really an intelligible war aim, for to make conditions much worse in Germany would, even if Hitler were removed, leave the basis for some new Hitler, possibly even worse than the present one." Borchard predicted that the German dictator would seek peace. German continuation of the war effort would inevitably lead to ruinous inflation, followed by "some form of communism." According to Borchard, Hitler realized that the economic prognosis was poor and therefore was willing to make peace on the basis of a truncated Poland and possibly some restoration of Czechoslovakia. Perhaps the restoration of former German colonies could be traded for a German agreement to limit submarine and aircraft production.<sup>94</sup> Eastern Europe, Borchard predicted, would inevitably come under German domination. For Britain "to risk the fate of the Empire in order to retain a voice in eastern Europe seems like a tenuously practical objective when the cost is considered."<sup>95</sup> Late in 1941, Borchard found the tenacity of Germans under-

standable: "they consider themselves the victim of conspiracy to keep them down."<sup>96</sup>

Borchard often spoke in favor of a negotiated peace. He blamed Roosevelt for what he saw as Britain's obstinacy.<sup>97</sup> He also opposed Roosevelt's war aims. When the president proclaimed the Four Freedoms in his State of the Union address, delivered on January 6, 1941, Borchard replied, "At least the crusades of a thousand years ago had a more limited objective."<sup>98</sup> The Atlantic Charter, drafted by Roosevelt and Churchill in August 1941, met with a similar response. "The eight points," he wrote, "were in effect a proclamation that the United States and Great Britain would control the world by reason of their superior virtue."<sup>99</sup> In addition, he suspected secret commitments, for Churchill did not cross the ocean "merely to give utterance to the eight platitudes."<sup>100</sup>

The United States, Borchard believed, could always hold out against the Germans. Early in 1940, Judge Learned Hand asked him whether a German conquest of Britain and France, and the capture of their navies as well, would cause him to abandon his rigid neutrality. Borchard dismissed the question in public, but inwardly remained an isolationist.<sup>101</sup> He soon claimed that military authorities were denying that Hitler had the potential to invade the continent. Moreover, for the indefinite future, Germany's forces would of necessity be confined to Europe. Then there was always the threat that war might again break out on the continent. Even should they take over France's African empire, they would be too busy to expand.<sup>102</sup> Nor, to Borchard, did Germany pose any economic threat. While admitting that it might be difficult to get along with a victorious Reich, he said, "I think the continent's need for capital will make Germany pliable."<sup>103</sup>

If the United States entered the war as a full-scale belligerent, reasoned Borchard, it was by no means assured of victory. Though the United States could probably bring economic chaos to its opponents, it would merely insure the victory of communism.<sup>104</sup> He wrote the interventionist Senator Tom Connally a month and a half before Pearl Harbor, "To enter the war now is to enter under the worst possible conditions, with war on two fronts extremely probable, with the chances of early success relatively small and the chances of anarchy immense."<sup>105</sup>

Borchard had little respect for Roosevelt's diplomacy in Latin America. Back in 1928, Roosevelt had justified the sending of United States marines to Nicaragua by claiming that their presence was necessary to protect the nation's special interests there.<sup>106</sup> Under the Good Neighbor policy, Borchard argued, the administration had permitted such nations as Mexico and Bolivia to confiscate United States property without compensation. Indeed, Roosevelt was seeking to reward them by additional government loans, to be ultimately paid for by the taxpayer; private investors would never put up more money, for they were fully aware of Latin America's record of seventy-six percent default. Borchard did not accept the argument that such loans

were needed to keep Latin America independent of a German-dominated Europe, for "you win neither respect nor favor by attempting to win good will by bribery."<sup>107</sup> In fact, Borchard opposed any effort to have Latin America break commercially with Europe, its natural market. "If Europe is not to be allowed a natural trade with Latin America, it will either mean war with us or a possible attempt to absorb Russia," he wrote in January 1941.<sup>108</sup> United States policy rather should be "directed toward promoting education and health among the underprivileged, for a country is no stronger than its population."<sup>109</sup> Though the hemisphere had any number of "potential Hitlers" who would seize upon the Nazi victory abroad to dominate their own countries, each nation must deal with that problem itself. True, it is easy for the United States to send troops into such countries, but it is difficult to remove them.<sup>110</sup>

War also had certain domestic consequences, all of them bad. If the United States entered the conflict, the costs—claimed Borchard—would be ruinous, with no assurance that the effort would ever succeed. The nation's debt was already so great "that entrance into war will raise it to astronomical heights and eventual repudiation," causing in turn "a social upheaval the consequence of which no man can foresee." Indeed the conflict might last until "the last vestige of western civilization had disappeared. Under such a program, private property might easily become a thing of the past."<sup>111</sup>

#### IV

Given this framework, Borchard soon found plenty to criticize in American diplomacy. Almost from the moment Germany invaded Poland on September 1, 1939, the Yale professor attacked one administration act after another. To Borchard, most Roosevelt measures were illegal, and some were downright acts of war. On more than one occasion, Borchard was backed by his mentor, John Bassett Moore.

On October 2, 1939, twenty-one hemispheric nations announced the Declaration of Panama and affirmed that, as "a measure of continental self-protection" and of "the inherent right of neutrals," an area ranging from 300 to 1,000 miles off the Atlantic coast south of Canada must be "free from the commission of any hostile act by any non-American belligerent." Aside from a pledge of mutual consultation in case of violation, no provision was made to enforce the declaration. The nations, however, agreed to keep watch over the areas by coordinated air patrols.<sup>112</sup> Within the administration, Hull criticized the Declaration, fearing that overt efforts to prevent belligerent action would result in American involvement in hostilities. The Navy Department too opposed the manifesto, as it doubted whether such a vast area could be patrolled.<sup>113</sup>

Several legal scholars approved the Declaration, declaring that every nation had the right to defend its security against threatened violations.<sup>114</sup>

Borchard and Moore, however, found the American powers acting most irresponsibly. "If they enforce it they would be committing acts of war," Borchard wrote Moore. "If they do not enforce it they will be humiliated." Dangers to the United States were compounded, as the several British bases falling within the neutrality zone were "presumably to be kept immune from attack by England's enemies."<sup>115</sup> Concurring, Moore wrote, "As regards the inhibition of war at sea within 300 miles of countries professing to be neutral, I can think of nothing comparable with it since King Canute seated himself on the sands and ordered the sea to recede. If the American countries have a right to make such an inhibition, on what ground can we deny the right of countries in Europe, in Africa and in Asia to do the same thing?" In addition, Moore noted, British cruisers were firing upon German ships to the very verge of the three-mile limit, and doing so without any protest.<sup>116</sup>

The Panama Declaration also contained another provision that outraged the two scholars. It provided that merchantmen should not be regarded as warships, and hence excluded from American ports, if they carried no more than four six-inch guns on the stern. To Moore, the United States was reviving the very illegal claims that had carried it into World War I.<sup>117</sup> Furthermore, Borchard saw the Roosevelt administration turning the nation into a base of naval supply, although British merchant ships could easily put into Halifax, unloading and reloading their guns there.<sup>118</sup> Borchard recalled that on January 18, 1916, Robert Lansing, Wilson's secretary of state, found the distinction between offensive and non-offensive ships legally unfounded.<sup>119</sup>

Even before the arms embargo was repealed, Roosevelt had proclaimed a barter agreement by which the United States would exchange some 600,000 bales of raw cotton for British rubber.<sup>120</sup> Borchard contended that the cotton could be used for war purposes and that the United States, as a neutral, could not legally ship it.<sup>121</sup>

At the outset of the war, Borchard and Moore saw the Allies violating the United States' neutral rights. Britain and France, Borchard noted, were confiscating, without administration protest, mail sent to Germany. Under the Hague Convention of 1907, he went on, such mails were immune to seizure.<sup>122</sup> He also opposed submitting to British blacklists.<sup>123</sup> Moore noted that in violation of international law, Britain insisted that American ships receive "navicerts" (British consular certificates) before beginning their voyage; violators were subject to blockade.<sup>124</sup>

Even more disturbing to Borchard was the lifting of the arms embargo and the sale of all goods to belligerents on a cash-and-carry basis, a measure that passed the Senate on October 27 and the House on November 2. "The real issue, I am convinced, is the maintenance of the independence of the United States," he wrote Borah just after the bill was passed. "I am afraid the campaign to get us into the war is now on."<sup>125</sup> Roosevelt, in his message to Congress, had claimed to be returning to established principles of inter-

national law.<sup>126</sup> Borchard challenged this assertion. The relaxing of a nation's neutrality, with the motive or even the effect of aiding one belligerent, was a distinct violation of international law and a hostile act as well. The only changes that could be made during wartime were those in the direction of tightening a nation's neutrality.<sup>127</sup> Borchard had his own substitute, one that involved American arms sales to neutral powers, said arms then being resold to the belligerents.<sup>128</sup>

After cash-and-carry was passed, the administration—in Borchard's eyes—was acting illegally by sending planes to the Allies. By the end of 1939, the British had ordered some 1450 planes and received 650. Similarly the French had ordered 2095 and received 617.<sup>129</sup> Borchard cited Article 46 of the Hague Draft Convention of 1923, which provided that military aircraft in a position to make an attack could not be dispatched from neutral territory. Although the Hague convention was not ratified, Borchard declared that it merely codified already existing law.<sup>130</sup>

When the United States Maritime Commission sought—unsuccessfully at first—to grant Panamanian registry to United States ships, and thereby to evade the cash-and-carry provisions, Borchard was particularly sarcastic: “We might tell the Administration that the thousands of American seamen who are thus threatened with unemployment might also become naturalized as Panamanians. A little coconut oil would make their skins darker, and two or three words of Spanish could easily be taught to them. They would then sail as Panamanian citizens, and thus our trade would go on.”<sup>131</sup>

Equally hypocritical, Borchard believed, was administration protest concerning the American freighter *City of Flint*, seized by the Germans on October 9, 1939, while en route to Britain carrying contraband cargo. When Britain seized several ships and kept them in detention until their commercial value was destroyed, the Roosevelt administration made no public protest. “Whatever my sympathies may be,” Borchard said, “and they are certainly against the Nazi government, it is wrong to administer neutrality in such a way as to get the United States into trouble.”<sup>132</sup>

For Borchard, and for Moore as well, an even greater mark of concern was the *Altmark* incident. On February 16, 1940, the British destroyer *Cossack* entered Norwegian territorial waters to remove 326 British sailors from the German prison ship *Altmark*. “The British act forcing her [the *Altmark*] into the Fjord, there attacking and boarding her and taking out the seamen, was an unjustified invasion of Norway's neutrality,” Borchard wrote Moore.<sup>133</sup> In his reply, Moore claimed that no belligerent ship, be it man-of-war or merchantman, was subject to capture in neutral waters, even if it entered those waters for purposes of safety: “On this theory [i.e., the British claim] I suppose a man-of-war of one belligerent might follow a man-of-war or merchantman of the other belligerent all the way up the Chesapeake Bay to Baltimore, or up the Delaware Bay to Philadelphia, and capture or sink her, at any rate before she had got to the wharf or dropped

anchor in the stream. Then, according to the new reasoning, it would, I suppose, be our duty to capture her and turn her over to the innocent belligerent that had assumed to exercise supra-sovereign powers in our waters; and if we should fail to do this, we should, I suppose, expose ourself to a claim for damages, if not to a specific bombardment."<sup>134</sup> It was not long before Borchard challenged a defense of the British action made by James W. Ryan, a prominent maritime lawyer. At the request of the Norwegian government, Borchard wrote the *New York Times*, denying that Norway—by originally permitting the Altmark to enter its territorial waters—was derelict in its duty.<sup>135</sup>

On November 30, 1939, the Soviet Union invaded Finland. Russia had demanded Finnish territory close to Murmansk and Leningrad as well as certain islands in the Gulf of Finland. It offered Finland 2,134 square miles in return for the 1,066 that Russia would gain. Roosevelt, in an effort to aid the Finns, arranged a ten million dollar loan through the Export-Import bank. In addition, he refused to proclaim a state of war and thus permitted Helsinki to borrow American funds. Borchard said that he did not consider the Russian territorial demands excessive, called the Export-Import bank "a political agency to help the countries with which the Administration sympathizes," and labelled the loan "an act of intervention against the Soviets." Russia, he declared, did not want to end Finland's independence; rather it hoped to keep Finland from being used as a base by its enemies. He feared "a large-scale Soviet crusade the outcome of which cannot be calculated."<sup>136</sup>

Moore sympathized with the Finns, and both he and his wife contributed privately to their cause. However, the jurist feared that Roosevelt's loan was inspired by a desire not so much to aid the Finns as to act as a precedent for later help to the Allies.<sup>137</sup>

The two scholars also commented on Russia's annexation of the Baltic states. When Acting Secretary of State Sumner Welles denounced Soviet annexation of Latvia, Lithuania, and Estonia, Borchard noted that the three nations had for years been under Russian sovereignty, being released only by the Versailles treaty. Moore pointed out that Kerensky's own ambassador to the United States, in an aide memoire dated June 30, 1921, claimed that Russia would not recognize their independence.<sup>138</sup> (Despite the Bolshevik Revolution, the United States had continued diplomatic recognition to the Kerensky government.)

During much of 1940, Borchard had relatively little to say about events in Europe. When on April 9, 1940, Germany invaded Norway, Borchard accused Britain of taking the initiative in violating Norwegian neutrality, although the British were warned that in that event Germany might intervene. He did challenge Germany's claim that Britain plotted to invade Norway in order to attack Germany. Perhaps, he mused, the British might better have done so, for by mining Norway's territorial waters, they gave Hitler the excuse he was looking for.<sup>139</sup> When, in June 1940, France's sit-

uation was obviously desperate, Borchard denied that the United States could come to her rescue. France was simply paying the price for its policies of the twenties, which did so much to enable Hitler to rise to power.<sup>140</sup> Borchard felt less deeply about conscription than about what he saw as *fundamental departures from traditional neutrality*.<sup>141</sup> In a letter to the coauthor of the selective service bill, Senator Edward R. Burke, he said that perhaps conscription was necessary, although he feared that it could limit many freedoms. In addition, "to get into another European war simply because we hate Nazism and all its works does not seem to me very intelligent."<sup>142</sup> When the Germans released a White Book, supposedly revealing that the United States was already committed to Poland before the Danzig incident broke out, Borchard claimed that the documents bore "every evidence of authenticity." If American ambassadors stationed in Europe were deep in negotiations that led to war, this was almost a basis for Roosevelt's impeachment.<sup>143</sup>

The *destroyer-bases deal*, however, was a very different matter, and both Borchard and Moore were adamant in their opposition. Early in September 1940, the White House announced that the United States was sending fifty over-age destroyers to Britain. In return, it would receive ninety-nine year leases for the immediate construction of military bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua, and British Guinea. During the negotiations conducted in the previous month, *four prominent lawyers*—including Dean Acheson—wrote to the *New York Times*, claiming that American statutes permitted the sale on the grounds that the ships had not been specially built for Great Britain. Attorney General Robert H. Jackson, in a much-publicized opinion, offered similar reasoning.<sup>144</sup>

Such cooperation made Borchard apprehensive. Either Newfoundland and the West Indies should be transferred directly to the United States or, less preferably, the bases should be totally retained by Britain. "Otherwise," he wrote Senator Nye, "we are in a military alliance without realization of the dangers involved."<sup>145</sup> Borchard claimed that Jackson was probably correct in saying that a naval base might be acquired by executive agreement, as was Horseshoe Reef, but that the attorney general had not shown how such an agreement could justify the sale of fifty destroyers. In addition, as Jackson ignored the Hague conventions and relevant international law, his opinion was "really disgraceful and abandons, as I believe, all vestiges of respect for law." "It would have been much more honest," he went on, "to say that we are in a state of limited war and that under such circumstances military aid to our ally must be permitted."<sup>146</sup>

Moore commented that the reasoning of Acheson and his associates, if given to a personal client, "would have destroyed their reputation as lawyers." He continued, "It would be nothing less than grotesque to say that, while a neutral might not, during a war, build ships for a belligerent, it

might turn over to the belligerent its entire army and navy, as far as the ships were built and the army created before the war began."<sup>147</sup> As for the attorney general, "Nothing too unfavorable could be said of Jackson's opinion. . . . His so-called opinion was no opinion at all."<sup>148</sup>

On March 11, 1941, Roosevelt signed the lend-lease bill, an act that gave him extremely sweeping powers. By its terms, the chief executive could authorize the head of any government agency to: (1) manufacture any defense article for the government of any country that the president deemed vital to national defense; (2) sell, transfer, title to exchange, lease, lend, or otherwise dispose of any such article, provided that the top military figures were first consulted and provided that the value of such articles procured from funds already appropriated did not exceed \$1.3 billion; (3) test, inspect, prove, repair, outfit, and recondition any defense article, including warships, of any country designated by the president; and (4) communicate any defense information to any country designated by the president.

The sweeping powers contained in the bill shocked both Moore and Borchard. Moore claimed that the bill assumed "to transfer the war-making power from the Congress, in which the Constitution lodges it, to the Executive." "The tide of totalitarianism in government which has swept over many other lands," he continued, "has not only reached our shores but has gone far to destroy constitutional barriers, which, once broken down, are not likely to be restored."<sup>149</sup> Borchard found it "a charter for the termination of American independence."<sup>150</sup> "That bill," he wrote Robert M. Hutchins, president of the University of Chicago, "enables him [the president] to make military alliances with any nation or nations, at any time for any purpose and on such terms as he considers fitting. And the entire military establishment of the United States is at his disposal and theirs for sale, exchange or gift. Such a thing has never been proposed in any country I know of, and certainly no previous President has ever demanded such power."<sup>151</sup>

Borchard opposed the administration's blocking of food shipments to occupied Europe. He accused Washington of collaborating with London in preventing a private relief committee, headed by Herbert Hoover, from making serious progress. The United States' policy of "starving" France, he went on, helped to throw her people into the arms of Germany, "the only reed on which France can lean."<sup>152</sup>

Roosevelt also drew fire from Moore and Borchard concerning Iceland. On July 7, the president announced that the United States navy would keep open the sea lanes to Iceland, doing so in order to prevent threats to Greenland and to the northern part of the American continent, and to protect the flow of munitions to Great Britain. Early in July, an American marine brigade of about four thousand men arrived in Iceland to share occupation responsibilities with British and Canadian troops. Iceland's prime minister, Hermann Jonasson, had cabled Roosevelt that Iceland was ready to entrust

its protection to the United States if American forces withdrew upon the conclusion of peace.

To Borchard, the occupation was "an act of war, since it was made in alliance with Great Britain against what is now called the common enemy."<sup>153</sup> The Roosevelt administration, Borchard said, assumed that Iceland had achieved its independence from Denmark. (Iceland had been a sovereign state in personal union with Denmark, but the German occupation of Denmark in 1940 had given the Icelandic parliament an opportunity to control its own foreign affairs.) Borchard denied having seen any document in which Iceland had professed to secede from Denmark, and he assumed that Denmark had never recognized any such secession. Borchard argued that Roosevelt had probably committed an offense to Denmark in undertaking to do independent business with Iceland, that is unless he claimed that an official secession had taken place.<sup>154</sup> Moore also denied that the Icelandic officials had the authority to make any such arrangement. If the Senate had exerted its jurisdiction, it might have thrown the agreement out on that ground, not even going into the merits of the question.<sup>155</sup>

In a major address delivered on May 27, 1941, Roosevelt declared a national emergency, announced that he was adding ships and planes to a patrol of American shipping, and invoked the doctrine of freedom of the seas. Borchard found Roosevelt's use of the latter doctrine most inappropriate, for freedom of the seas classically meant "the right of neutrals to trade not only with neutrals but with belligerents in non-contraband material."<sup>156</sup>

When the Germans sank various American ships, Borchard usually found his own nation in the wrong. On May 21, a German submarine sunk an unarmed American merchant ship, the *Robin Moor*, travelling from New York to Capetown. The attack took place in the middle of the South Atlantic, far outside any war zone proclaimed by belligerent or neutral. The crew and passengers were allowed to take open lifeboats, and, after many days, they were rescued by friendly vessels. The United States demanded full reparation, and Roosevelt claimed that the sinking violated international law at sea. Germany did not reply.

Borchard wrote, "It is a shocking thing to realize that whenever any American ship is sunk war is threatened. If other countries acted on such a theory they would be in perpetual war."<sup>157</sup> When Hull denied that the ship was carrying contraband, Borchard found the secretary's denial ludicrous: "the very same article may be called contraband by Great Britain but not by Germany."<sup>158</sup> Moreover, on the basis of the *Alabama* claims decision of 1871, Hitler's government "could demand billions of dollars from this country as compensation for the injury we are doing and trying to do to Germany."<sup>159</sup>

The *Robin Moor* incident was just the beginning. On September 4, the United States announced that the destroyer *USS Greer*, while sailing in the North Atlantic, had been attacked by German torpedoes that had missed

their mark. On September 11, Roosevelt told a national radio audience that a German submarine "fired first upon this American destroyer without warning, and with deliberate design to sink her." He failed to mention that the *Greer* had been tracing down a German submarine while a British plane dropped depth charges. Rather he denounced the act as "piracy—piracy legally and morally." Recalling other attacks that Nazi raiders had made on United States and Latin American ships, he called them "acts of international lawlessness" that were part of a "Nazi design to abolish the freedom of the seas." In explaining his orders to shoot on sight, Roosevelt said that "our patrolling vessels and planes will protect all merchant ships—not only American ships but ships of any flag—engaged in our defensive waters."<sup>160</sup>

Borchard had several objections. First, "No one gave the United States and *a fortiori* the President the right to fence off hundreds of thousands of square miles of open ocean and call them defense waters. International law knows no such conceptions." Second, Roosevelt was not giving shooting orders in order to protect innocent commerce. Rather, he was giving them "to protect an alleged right to send munitions of war as a government enterprise to one belligerent in Europe." Roosevelt "threatens the other belligerent if he should interrupt that commerce with treatment as a pirate." Yet the submarine was not a pirate, and was not considered so at the very international conference that took up such matters, the London Conference of 1930. Moreover, even assuming that Roosevelt could by fiat declare a public war vessel to be a pirate, Congress alone has the power to define and punish such an offense. Third, the *Greer* "was engaged in warlike activity as an aggressor—if that chameleonic word may be permitted—and was fired upon with perfect legal right."<sup>161</sup>

Other ship incidents met with a similar response. On September 19, for example, a German submarine sunk the *Pink Star*, a former Danish ship operated by the United States Maritime Commission and flying the Panamanian flag, about 250 miles southeast of Iceland. Borchard again saw subterfuge at work, for by using Panamanian registration for such ships the administration was evading restrictions of the Neutrality Act of 1939 and the Seamen's Act of 1915, and doing so without informing the public. These ships were armed and were sent into war zones with lend-lease materials, thereby engaging in two prohibited activities.<sup>162</sup>

Borchard's opinions were merely fortified by the *Kearny* incident. On the night of October 16–17, a German submarine attacked the destroyer *USS Kearny*, which was en route to Iceland. As the *Kearny's* voyage was for purposes of convoy duty, Borchard claimed that "the indignation at her being torpedoed is nauseating. By her action she invites such reprisal."<sup>163</sup>

It was the *Kearny* incident in particular that caused Congress to repeal the most essential features of the 1939 neutrality law. On November 17, Congress permitted the arming of merchant ships and allowed American ships to enter combat zones. When Roosevelt, on October 9, had asked

Congress to rescind the prohibition against arming these ships, Borchard commented, "In method at least this is something of a return to the Constitution." Yet when Congressman Hamilton Fish, leader of the House anti-interventionist bloc, supported the arming in order to protect such craft as the *Robin Moor*, Borchard found the measure futile. He recalled that in World War I no American cargo ship successfully attacked a submarine: "Armament, far from protecting the ships, will expose them and the people and cargo on board to new dangers."<sup>164</sup> Indeed, such arming made them legally sinkable by submarine.<sup>165</sup>

In addition, Borchard argued, sending such ships into belligerent ports was a further act of war, only serving to make further sinkings inevitable and thereby leading inevitably to full-scale conflict.<sup>166</sup> True, Germany had no legal right to rope off parts of the high seas and call them war zones, but Roosevelt's attack on the German declaration was "considerably weakened by his own illegal claim of a defense zone so wide that no limitations can appear to be placed on it." To Borchard, Roosevelt's ultimatum, that no German ship or airplane could attack any neutral ship carrying munitions to Great Britain or territory occupied by her, had no legal foundation.<sup>167</sup> It was in fact highly improper to suggest that an attack on an American ship was an attack on the United States. No other nation in the world took such a position. During World War I, Denmark, Sweden, and Norway lost infinitely more ships and lives than did the United States, but these neutrals never suggested that they were treated unfairly.<sup>168</sup>

## V

The United States, of course, did not enter a declared war on the Axis over incidents in the Pacific until the Japanese attacked Pearl Harbor. Yet long before the events of December 7, 1941, Borchard and Moore had been much troubled by the United States' Asian policies.

Neither man had much respect for China. Borchard pointed out that in 1899 Secretary of State John Hay could not secure the consent of a single power for his Open Door policy. The Nine Power Pact of 1921 might have pledged various Western powers and Japan to maintain commercial equality and the territorial and administrative integrity of China. However, the "integrity" involved had no legal meaning. The Pact, said Borchard in 1939, might have temporarily stabilized the Pacific, but it could not restrain the ferment that had become indigenous to Asia.<sup>169</sup> "China," wrote Borchard, "has not been a state for many decades, but a mere geographic name."<sup>170</sup> Its people "unfortunately indicate their appreciation of our friendship by murdering American citizens, not with malice but as an incident to a poorly administered country."<sup>171</sup>

Moore was even more acid, referring to "the racial, political and geographical chaos called China." "Our people are professing to love China

because they are professing to have Christianized it, or to be engaged in the process of so doing," he wrote Borchard in 1940. "This is the quintessence of an ignorance and imbecility that may mildly be regarded as imbecile." In fact, he found little intelligent dealing with China since the days of Theodore Roosevelt and Elihu Root.<sup>172</sup>

On December 12, 1937, Japanese airplanes bombed and sunk a United States gunboat, the *Panay*, in the Yangtze River. Borchard opposed Hull's note of protest. If taken literally, "we are asking for an insurance of the safety of all American life and property even in war zones. International law makes no such demand, nor does the Japanese answer concede any such demand."<sup>173</sup> He found Japan obsequious in yielding to America's demand and said that Japan sought to avoid controversy even when it was legally right. Its behavior, Borchard went on, would only encourage the truculent moralism of the Roosevelt administration.<sup>174</sup> Moreover, the United States had no business interfering "with Japan's present enterprise in China."<sup>175</sup>

For Borchard, the *Panay* incident was only the beginning. To lend money to China while discouraging the export of arms to Japan violated the 1911 commercial treaty with Japan and exposed the United States to retaliation.<sup>176</sup> He commented with irony, "We are now expected to believe that an embargo on the Pacific coast will promote peace, but an embargo on the Atlantic coast will promote a general war in Europe."<sup>177</sup> Such moral embargoes, including the one on Russia as well, were "acts of war and justify the countries in question to exert reprisals and declare war if they so desire." Borchard asked, "Who gave the United States the authority to constitute itself a judge of the morality of foreign countries? Who judged the morality of Wilson's invasion of Vera Cruz and the slaughter of 300 people in that city?"<sup>178</sup>

In April 1940, Japan's foreign minister Arita Hachiro expected a German attack on Holland as well as a Dutch request for United States occupation of the Dutch East Indies. Hence he publicly warned against any change in the status of the Indies. Roosevelt and Hull, fearing a Japanese move into this territory, repounded by stressing American dependence upon the Indies for rubber and tin and by declaring that any change in the status quo would be inimical to peace throughout the Pacific.<sup>179</sup>

Borchard objected to the American statements, for he saw his nation again seeking to freeze the status quo. "Apparently," he wrote, "we are getting to the point where no change can be made in the world's political control without offense to the United States." He noted that Hull had apparently stressed the Washington treaties of 1921-1922 in bolstering Holland's permanent possession of the Indies. The twenty-year-old agreement "to respect the rights of the Netherlands" by no means meant that any Japanese attack involved war upon the United States; the United States simply could not be the protector of such possession. Borchard preferred that the Indies remain under Dutch sovereignty, but claimed that such a

condition could not possibly be guaranteed in perpetuity. Although he conceded that the Indies were a source of supply, he asserted that more could have been accomplished by friendly negotiation than by threat of war.<sup>180</sup> In July, he wrote Moore, "While threatening Japan with dire consequences if she touches the Netherlands East Indies, our embargoes force her to look in that direction."<sup>181</sup>

On September 27, 1940, Japan entered into the Tripartite Pact with Germany and Italy. Marked chiefly by an agreement pledging mutual assistance if one signer was attacked by a power not currently fighting, the treaty sought to prevent Washington from joining London against Berlin or directly opposing Japan's creation of an East Asian sphere of influence. Within a week, Borchard noted that the United States was faced with the first military alliance ever formed against it. The pact, he said, was "a perfectly natural response to the underlying error of conducting foreign policy on a basis of denunciation, chastisement, embargo, boycott, threat and an alleged moral superiority." Indeed, any threat to starve a nation merely stimulated war sentiment within it and fostered its desire for conquest.<sup>182</sup>

By mid-summer 1941, Japan was penetrating deeply into Southeast Asia. On July 18, Tokyo demanded Vichy's acquiescence in the occupation of eight air and two naval bases in southern Indochina. Vichy complied within six days, and Roosevelt retaliated by freezing Japanese assets, reducing oil exports to amounts received in past years, and limiting gasoline sales to sixty-seven percent octane or lower. Soon Japan's trade with the United States was terminated, and its leadership was confronted with an unenviable choice: either knuckle to the various demands of the United States or engage in a full-scale Pacific war. Borchard could only query, "If there is a possible enemy to make, trust him [Roosevelt] more than half way—in fact, all the way to Asia and Europe. I wonder what difference it will make to an Indo-Chinese whether a French General or a Japanese General occupies the thatched hut in Cambodia. Because Japan and France make an agreement in distant Asia presumably agreeable to themselves, our noble President is prepared to fight them both, though they are not injuring the United States in the slightest."<sup>183</sup>

Less than two weeks before Pearl Harbor, Borchard spoke out against the diplomacy of the United States. "Washington," he said, "seems to have taken the stand that the Japanese cannot move out of their islands onto the mainland, and it seems to be Washington's self-arrogated duty to stop any expansion. Although this would play right into Hitler's hands they seem to be preparing the public for a conflict with Japan. Nothing seems to me more reckless."<sup>184</sup>

The Japanese attack did not surprise Borchard in the slightest. Although deeply grieved by its success, he denied that it was treacherous. "We should have expected it," he wrote Congressman Danaher.<sup>185</sup> To Borchard, the American secretary of state so combined impossible demands with personal

flare-ups that it “makes one think that Hull hardly knew what he was doing.”<sup>186</sup>

## VI

The reactions of Borchard and Moore reflect the decline in the status of traditional international law. Their world was one of contraband rules, prize courts, arbitration panels, Hague conferences—in short, the world of formal international relations as it existed before World War I.

Their personal background obviously fortified their views, for both men were raised in comfortable middle-class surroundings. Borchard was the son of a prosperous German-Jewish merchant in New York City, Moore the son of a physician and state legislator in Smyrna, Delaware. Both remained personally surrounded in gentility most of their lives, having careers alternating between government and university service.<sup>187</sup> Hence, particularly in their formative years, the values of reason, civility, and respect for the law seemed triumphant, permeating the entire social order and assuring its survival.

In 1937, Borchard listed the virtues that he considered vital to the world's survival: “The cultivation of sagacity in these matters, of detachment, of moderation, of toleration, of the spirit of live and let live, and the renunciation of the psychology and policy of ‘enforcing peace’ by hostile measures probably present the only tangible hope for preserving peace in broad areas of the world.”<sup>188</sup> (One critic responded: “Good advice—but what are the conditions under which these estimable traits will develop among the world's leaders? Can we expect philosopher kings in a jungle world full of war and rumors of war?”)<sup>189</sup>

Yet even in the late nineteenth century, which Moore and Borchard saw as coming closest to a golden age, one saw frequent if minor clashes and an aura of continual crisis that made Sarajevo appear in retrospect almost inevitable. Indeed, much peace was then maintained in Europe not by international law but by the balance of power in the state system. More importantly, mass pressures on statesmen did not make for cautious policymaking, but merely added to visionary or jingoist pressures for intervention. During war itself, a power either allows its neutral rights to be trampled upon, in the hopes that disputes can later be adjudicated, or develops the navy needed to force belligerents to its demands.<sup>190</sup> (Hiram Johnson incidentally sought the latter course.)

The more international law was ignored, the louder the cries of Moore and Borchard became. Franklin D. Roosevelt in particular drew their ire. The president flaunted his violations of the Declarations of Paris (1856) and London (1907), two meetings where—according to Moore and Borchard—laws of contraband and blockade were defined, while all the time declaring that he was returning to “international law” and “freedom of the seas.”

However, to both scholars, World War I was the first real shock. It

forced Borchard, if not Moore, to readjust much of his thinking, replacing a naïve optimism concerning arbitration and public opinion with a "realist" analysis centering on deep-seated imperialist antagonisms. Yet if conflicts were truly inexorable, it is doubtful whether his remedies—e.g., redistribution of foreign markets and raw materials—could bring about peace. Borchard also placed heavy responsibilities on individual leaders, going so far as to claim that Wilson was responsible for American entry into World War I. If, however, impersonal trends ran as deep as he claimed, it is doubtful whether changes in the policy-making elite would have made any difference. Combining what Beard called "the devil theory of history" with economic determinism is always difficult.

To keep placing faith in traditional rules of war merely compounded the problem. Occasionally Moore and Borchard sounded like the neo-orthodox theologian Reinhold Niebuhr, with their talk about "the construction of mankind" and "human nature," but they soon reverted to the enlightenment view that rational people follow rational rules and thereby limit any conflict. To both men, international law itself was a science and, as such, capable of yielding truth to which all must assent.<sup>191</sup>

During the twenties and thirties, the two scholars found themselves aligned with the isolationists, although it was often a marriage of convenience. When Borchard saw the direction in which such an extremist as Nye was pushing, he quickly backed off. Indeed Borchard and Moore saw themselves as the true internationalists, for to them a genuine community of nations could not be established by coercive leagues and penalties, but upon impartial tribunals and economic interdependence. Indeed, they placed more blame on the new international system than on rapacity of individual nations. Some critics, such as international lawyer Arthur K. Kuhn and editor Felix Morley, found Borchard particularly frustrating, for he offered no means of enforcement for the law he so fervently propounded.<sup>192</sup>

If Borchard's economic analysis was more attuned to his time than was his legal one, he was still a bit far afield. Few capitalists in 1939, for example, wanted war. In every country, including Germany, they were the ones who sought most avidly to avoid it. Nor in 1939 was Germany overpopulated, short of markets, or lacking essential raw materials. When Britain offered it colonies, Hitler never responded, for he realized that they were a source of expense not profit.<sup>193</sup>

For Borchard, there was never a conflict between his general evaluation of World War II and his faith in traditional neutrality. Even if the Axis triumphed in Eurasia, the United States could survive. At what point, one wonders, would Borchard declare the old rules obsolete and say that the United States could no longer indulge in the luxury of such adherence? It would have been interesting to see Borchard or Moore offering a counter-scenario for either world war, a scenario in which Wilson and Roosevelt held fast to international law. Had the advice of the two professors been followed in 1917 or in 1941, how would the map of Europe and Asia have

been changed? In fact, would the United States truly have been able to avoid war?<sup>194</sup>

Little wonder that most anti-interventionists did not rely heavily on legal arguments, but rather used strategic and economic ones. (Borchard himself used such arguments in discussing the Russian invasion of Finland.) Except for such staunch advocates of traditional neutrality as Senators Borah and Johnson, or such personal students of Borchard as Senator Danaher and Congressman Shanley, international law at best remained a supplementary argument. "A believer in international law has a hard time these days," wrote the anti-interventionist economist Stephen Raushenbush in 1937. "Lady Godiva rode in mailed armor compared to the protection given a neutral nation by a non-obeyed international law."<sup>195</sup> And when the European war broke out in 1939, historian Harry Elmer Barnes marked the end of the century-long crusade for legal protection of neutral shipping.<sup>196</sup> C. Hartley Grattan, a revisionist journalist, personally wrote Borchard, saying, "The belligerents are committed to anarchy, will act as anarchists, will twist the law, cite the precedents which suit them, and otherwise make the law a mare's nest of the first order . . . unlike violators of national law, violators of international law cannot be either convicted or jailed by the good law of the prosecuting party." Given such "anarchy," Grattan saw no reason for the United States to find its refuge in such a chimera.<sup>197</sup> John Foster Dulles writing in a matter-of-fact tone, noted that some countries, such as Russia, had abandoned international law with their departure from capitalistic concepts and practices.<sup>198</sup>

Yet, while it is understandable why doctrines of traditional neutrality were not a linchpin of anti-interventionism, the "realism" of Borchard and Moore remains. The two scholars exaggerated the role of Versailles in creating Hitler, and underestimated the effects of the Great Depression. But their case against the treaty was a telling one indeed. So too was Borchard's claim that the League and World Court served essentially as instruments of the victor powers. Being about as clairvoyant as most of his generation, Borchard could no more comprehend the dynamic of Nazi expansion in the thirties than he could foresee the decline of the British Empire in the forties. We would be mistaken, however, to allow such naiveté to detract from his more general point, namely that no peace system could be built upon a rigid status quo. Borchard's critique of the United States' China policy, stemming back to John Hay's Open Door notes, finds its most popular form in George F. Kennan's *American Diplomacy, 1900-1950* (1951). His indictment of the nation's diplomacy towards Japan has been echoed by a host of historians, including Paul W. Schroeder and Norman A. Graebner.<sup>199</sup>

Admittedly, Borchard was irresponsible in claiming in 1937 that, in the realm of foreign affairs, the United States was as much of a dictatorship as Germany or Italy. Equally irresponsible was his comment, made in 1941, that lend-lease terminated American independence. However, from the

vantage point of later generations, Borchard's suspicions of presidential power possessed much validity. His claim that Roosevelt constantly misrepresented such concepts as international law and freedom of the seas was accurate. And, more importantly, Roosevelt was establishing one precedent after another—the destroyer-bases deal, the occupation of Iceland, the shoot-on-sight orders—that would eventually turn congressional war-making powers into a thing of the past.

## VII

Borchard died in 1951, four years after Moore. In the last decade of his life, he came to consider the United Nations an instrument for domination by the Great Powers, the Nuremberg trials and the Potsdam agreement acts of vengeance, and the Truman Doctrine a commitment to unlimited *intervention*.

Had Borchard and Moore been able to delve forty years into the future, they would have found little left of the tenets they held most sacred. On the one hand, one could argue that the revolution in transportation and weapons made many rules of war obsolete. Now all wars are fought without being declared, and few are ended by a formal peace treaty. Indeed, we live continually with armed truce, guerrilla insurrection, proxy war, wars of national liberation, counter-insurgency, and the status of “no war, no peace.” Revolutionary ideologies challenge the very foundations of Western legal codes, and many non-Western powers refuse to accept traditional postulates of diplomacy and international law. On the other hand, one could argue that it is people who decide whether or not, in the face of change, the rules should still apply. For Borchard and Moore, the problem was always how to get back to a time when people did respect the traditional rules of international law.

The United States itself would continue courses of intervention established by Wilson and Roosevelt. Several times it would violate one of its own fundamental doctrines, freedom of the seas: in June 1950, when President Harry S. Truman ordered the Seventh Fleet to patrol the Formosa strait; in October 1962, when President John F. Kennedy ordered a blockade of Cuba; and in May 1972, when President Richard M. Nixon ordered the mining of North Vietnamese ports.<sup>200</sup> More significantly, it would fight two undeclared wars—in Korea and in Vietnam—and engage in a host of minor interventions without the sanction of Congress.

If international law experiences a revival, it will have to come in some form other than that expounded by Moore and Borchard. Those that plan its future, however, could do far worse than to be governed by the integrity, thoroughness, and moral passion that marked so much of their professional work.

## NOTES

1. For the most recent bibliographical essay, see Justus D. Doenecke, "The Anti-interventionist Tradition: Leadership and Perceptions" *Literature of Liberty* 4 (1981):7-67.
2. For a brief account, see Manfred Jonas, *Isolationism in America, 1935-1941* (Ithaca, N.Y.: Cornell University Press, 1966). Robert A. Divine deals with the concept as it affected the neutrality acts of the 1930's in *The Illusion of Neutrality* (Chicago: University of Chicago Press, 1962).
3. Moore sorely needs a biographer. So far, the best work is Richard Megaree, "Realism in American Foreign Policy: The Diplomacy of John Bassett Moore" (Ph.D. diss., Northwestern University, 1966). See also Megaree, "John Bassett Moore," *Dictionary of American Biography, Supplement IV* (New York: Scribners, 1974), pp. 597-600.
4. For biographical material on Borchard, see Richard H. Kendall, "Edwin M. Borchard and the Defense of Traditional American Neutrality" (Ph.D. diss., Yale University, 1964); and Justus D. Doenecke, "Edwin M. Borchard," *Dictionary of American Biography, Supplement V* (New York: Scribners, 1977), pp. 81-82.
5. Edwin M. Borchard to John Bassett Moore, October 25, 1939, in the Papers of Edwin M. Borchard, Yale University Library (hereafter cited as Borchard Papers).
6. Borchard to George W. Scott, September 26, 1940, Borchard Papers.
7. Borchard to Tom Connally, October 31, 1941, and Borchard to George W. Scott, September 26, 1940, Borchard Papers.
8. Borchard to Lincoln Colcord, April 11, 1936, Borchard Papers. For a debate over responsibilities in the *Lusitania* and *Sussex* cases, see Quincy Wright, "American Neutrality," *Southern Review* 3 (1938):748-750; and Edwin Borchard and William Potter Lage, *Neutrality for the United States*, 1st ed. (New Haven: Yale University Press, 1937), chap. 3.
9. Borchard to William E. Borah, October 3, 1939, Borchard Papers; and Borchard, "Neutrality," *Southern Review* 2 (Autumn 1936):249.
10. Borchard to Key Pittman (copy), June 26, 1937, the Papers of Hiram Johnson, University of California at Berkeley (hereafter cited as Johnson Papers).
11. Borchard, memo to Hiram Johnson, January 13, 1936, Johnson Papers.
12. Borchard to Lincoln Colcord, November 29, 1941, Borchard Papers.
13. Borchard to John Bassett Moore, February 26, 1941, Borchard Papers.
14. Borchard to Hiram Johnson, March 23, 1937, Johnson Papers.
15. Borchard to Hiram Johnson, April 20, 1938, Johnson Papers.
16. Borchard, "The Legal Evolution of Peace," *American Law Review* 45 (September 1911):717.
17. Borchard, "Economic and Political Factors in Foreign Policy," *Institute of International Relations* 6 (1930):355.
18. Borchard, "Common Sense in Foreign Policy," *Journal of International Relations* 11 (July 1920):41.
19. Borchard, "International Relations and the American Citizen," *Institute of International Relations* 6 (1930):347-359; and "Economic and Political Factors in Foreign Policy," *ibid.*, pp. 340-46.
20. Borchard, "Our Foreign Policy," *Yale Review* 10 (April 1921):523-24.
21. Borchard, "The Resurrection of International Law," *Proceedings of the American Society of International Law* 17 (1923):69-70.
22. Borchard, "International Relations and the American Citizen," p. 358.
23. Borchard, "The Various Meanings of International Cooperation," *Annals of the American Academy of Political and Social Science* 186 (July 1936):115.
24. Moore to Hiram Johnson (copy), February 19, 1941, Borchard Papers.
25. Borchard, "The Various Meanings of International Cooperation," p. 116.
26. Borchard, "Neutrality and Unneutrality," *American Journal of International Law* 32 (October 1938):781. Borchard argued that if the United States could realize this necessity for change, a disarmament conference might be successful. (Borchard to C. G. Marshall [copy], February 17, 1938, Johnson Papers.)

27. Borchard, "We Can Remain Neutral," *Today* (October 5, 1935), pp. 6, 22; and Borchard to Elbert D. Thomas, October 18, 1939, Borchard Papers. (The quoted phrase is from the latter source.) Jessup challenged Borchard's picture of Hamilton and Jefferson (see Philip C. Jessup, review of *Neutrality for the United States*, by Borchard and Lage, *Columbia Law Review* 37 [June 1937]:1043).
28. Moore, "International Law and Some Current Illusions" (1923), in *The Collected Papers of John Bassett Moore*, ed. Edwin Borchard, Joseph P. Chamberlain, and Stephen Dugan, 7 vols. (New Haven: Yale University Press, 1944), 6:18-21. Moore listed the traditional laws of war: observance of the distinction between combatants and non-combatants; protection of non-combatants against injuries not incidental to military operations against combatants; protection of property not militarily used or in immediate likelihood of being so used; no confiscation of private property; the definite assurance to those states not parties to the conflict of the right to continue commerce with each other and, subject to prescribed limitations, with the varying powers. (*Ibid.*, pp. 14-15.)
29. Borchard to Hiram Johnson, January 24, 1936, and Borchard to Key Pittman (copy), June 26, 1937, Johnson Papers.
30. Borchard to Hiram Johnson, October 7, 1937, Johnson Papers.
31. Borchard to John A. Danaher, December 12, 1941, Borchard Papers.
32. Borchard to Moore, February 26, 1941, Borchard Papers. Warren's letter to the *New York Times* may be found in February 23, 1941, sec. 4, p. 9.
33. Borchard to Moore, October 27, 1941, Borchard Papers. Commager's position may be found in "The War Powers of the President," *New York Times Magazine*, October 19, 1941, pp. 3, 24-25.
34. Borchard to Robert M. La Follette, Jr., May 2, 1939, Borchard Papers.
35. Moore, "The Dictorial Drift" (1937), in *Collected Papers*, 7:139. For other comprehensive essays of Moore, see "An Appeal to Reason," *Foreign Affairs* 11 (July 1933): 547-88; and "What of the Night?" *Virginia Quarterly Review* 17 (January 1941):75-88.
36. Borchard, "Common Sense in Foreign Policy," p. 37; and *idem*, "American Foreign Policy," *Saturday Review of Literature* 5 (February 22, 1928):144.
37. Borchard to Hiram Johnson (copy), February 19, 1941, Borchard Papers.
38. Borchard to Borah, April 18, 1939, Borchard Papers.
39. Borchard to George Norris, February 27, 1941, Borchard Papers.
40. Borchard, "American Foreign Policy," p. 144.
41. Borchard, "Common Sense in Foreign Policy," p. 39; and Borchard to R. Walton Moore, September 23, 1935, Johnson Papers.
42. Borchard to Tom Connally, October 31, 1941, Borchard Papers.
43. Borchard, memos to T. R. Armstrong, October 3 and 12, 1940, Borchard Papers.
44. Borchard, "The Kellogg Treaties Sanction War," *Nation* 127 (September 5, 1928):234.
45. Borchard to Hiram Johnson, October 28, 1935, Johnson Papers.
46. Borchard, "Neutrality," p. 249.
47. Borchard to Hiram Johnson, April 20, 1934, Johnson Papers.
48. Borchard to Hiram Johnson, January 9, 15, 26, and 30, 1935, Johnson Papers. For more scholarly and detached essays on the court, see Borchard, "The Permanent Court of International Justice," *North American Review* 218 (July 1923):1-10; and *idem*, "The 'World Court' and the United States," *Scribner's* 81 (May 1927):470-75.
49. Moore did not favor an arms embargo, for he claimed that such a move favored major powers, who could build great weapons factories. See "Pending 'Neutrality' Proposals: Their False Conceptions and Misunderstandings" (1936), in *Collected Papers* 7:51.
50. Borchard also favored prohibiting: belligerents from floating public loans in the United States; enlistment of American citizens in foreign armies; representatives of belligerent powers making public appeals for support; entrance of belligerent merchant ships and prizes of war into the United States; the supplying of coal and "other equipment" from United States ports to warships at sea; and the travelling of American citizens on belligerent merchant ships. See Borchard, "American Peace Aims May Bring War," *Far Eastern Review* 30 (September 1934):385-88.
51. Letter to *New York Sun*, December 10, 1945, in Moore, *Collected Papers*, 7:44.

52. Borchard to Hiram Johnson, February 14, 1936, Johnson Papers.
53. Borchard to William H. King (copy), March 16, 1939, Johnson Papers.
54. Borchard to William P. Lage, March 13, 1939, Borchard Papers. Even in September 1941, Borchard commented that he would "not object to the scrapping of the so-called Neutrality Act by an administration which had some appreciation of the law on these questions and an interest really to stand up for American rights without the bellicosity and eagerness for war which seems to characterize this administration" (Borchard to John Bassett Moore, September 24, 1941, Borchard Papers). At the time of Borchard's objection in March 1939, American legislation was imposing a mandatory arms embargo on any belligerent, the blocking of all credits to belligerents, prohibition of American citizens from travelling on merchant ships, and a ban on arming neutral United States merchant ships.
55. Borchard, "The Various Meanings of International Cooperation," p. 122.
56. Borchard to Hiram Johnson, July 31, 1935, Johnson Papers.
57. Borchard to Hiram Johnson, January 22, 1936, Johnson Papers. In an essay, Borchard opposed any embargoes beyond those of arms, ammunition, and implements of war. See "Neutral Embargoes and Commercial Treaties," *American Journal of International Law* 30 (July 1936):501-506.
58. Borchard, memo to Hiram Johnson, January 13, 1936, Johnson Papers.
59. Borchard, "Economic and Political Factors in Foreign Policy," p. 343.
60. Borchard to Hiram Johnson, October 8, 1935, Johnson Papers.
61. Borchard to Hiram Johnson, October 28, 1935, Johnson Papers.
62. Borchard to R. Walton Moore (copy), November 2, 1935, Johnson Papers.
63. Borchard, "Neutrality and Unneutrality," *American Journal of International Law* 32 (October 1938):781.
64. During the Spanish Civil War, Borchard wrote that international law required the United States to treat the elected government of Spain as the lawful one and hence the only government entitled to receive United States assistance in suppressing armed opposition. The Roosevelt administration, by placing the unrecognized rebels and constituent government on the same footing, was reversing the legal practice that revolutionaries receive no aid and comfort from the United States. See his "Neutrality and Civil Wars," *American Journal of International Law* 31 (April 1937):304-306.
65. Borchard to Jerome N. Frank, July 16, 1938, Borchard Papers.
66. Borchard to William P. Lage, March 1, 1938, Borchard Papers.
67. Borchard to John Bassett Moore, August 30, 1939, and Borchard to James A. Shanley, August 30, 1939, Borchard Papers.
68. Borchard to J. M. Leighninger, December 4, 1939, Borchard Papers.
69. Borchard to William P. Lage, March 1, 1938, Borchard Papers.
70. Borchard to John Bassett Moore, May 23, 1941, Borchard Papers.
71. Borchard to John Bassett Moore, February 8, 1941, Borchard Papers.
72. Borchard to R. Douglas Stuart, Jr., October 3, 1940, and Borchard to Robert E. Wood, September 24, 1941, Borchard Papers.
73. Borchard to Norman Thomas, September 1, 1938, Borchard Papers. In 1940, he contributed \$4.00 to the Independent Committee for Thomas and Krueger, although he did not want to enroll as a member of the Socialist Party. (See receipt from Lillian Symes, July 29, 1940, in Borchard to Lillian Symes, August 10, 1940, Borchard Papers.) Borchard could not be called a conservative. He testified before the Senate Judiciary Committee on Roosevelt's court-packing plan. While opposing the administration bill, he professed himself in sympathy with Roosevelt's objectives. He wanted government control, under the commerce clause, of competitive conditions extending over state borders, even though the individual business affected might be wholly intrastate in nature (*New York Times*, April 1, 1937, p. 10). He served on the national committee of the American Civil Liberties Union and opposed congressional efforts to deport the radical labor leader Harry Bridges (Borchard to James A. Shanley, June 21, 1940, Borchard Papers). His books *Declaratory Judgments* (rev. ed., 1941) and *Convicting the Innocent* (1932) were landmarks of judicial reform. For his innovative contribution to legal studies, see Charles E. Clark, "Edwin Borchard," *Yale Law Review* 60 (November 1951):1071-72.

74. Borchard to John Bassett Moore, February 8, 1941, Borchard Papers. Among the non-interventionists whose views he particularly respected were Hugh Johnson, Lawrence Dennis, John Foster Dulles, and Porter Sargent. He was particularly struck by Arnold Wolfers's *Britain and France Between Two Wars* (1940), E. H. Carr's *The Twenty Years' Crisis* (1940), Jerome Frank's *Save America First* (1938), and the works of Charles A. Beard, though he dissented from what he saw as an antipathy towards foreign trade on the part of the latter two authors. Borchard was somewhat benign towards the German-American propagandist George Sylvester Viereck, with whom he occasionally corresponded. He wrote in 1941 concerning Viereck, "He is not antagonistic to the United States but does want to keep some sense of balance here. That ambition, I suppose, is now, as in 1916, very unpatriotic" (Borchard to John Bassett Moore, February 4, 1941, Borchard Papers). When Viereck told Borchard that he had a hand in editing *Facts in Review*, a weekly propaganda journal published by the German Library of Information, Borchard called it "a dignified piece of work." (George Sylvester Viereck to Borchard, November 4, 1939, and Borchard to Viereck, March 2, 1940, Borchard Papers.)
75. Borchard to John A. Danaher, January 6, 1941, and Borchard to John Bassett Moore, October 24, 1940, Borchard Papers.
76. Borchard to John Bassett Moore, November 5, 1941, Borchard Papers. When Hull testified once before the Senate Foreign Relations Committee, Borchard claimed that the secretary so lacked a legal grounding that "the result is laughable were it not so tragic. I would almost have wished that this testimony be not published, since it must reduce the prestige of the United States in the eyes of foreign countries" (Borchard to John Bassett Moore, November 11, 1941, Borchard Papers).
77. Borchard to John Bassett Moore, November 24, 1939, Borchard Papers; Borchard to Hiram Johnson, March 23, 1937, Johnson Papers; and Borchard to William P. Lage, October 17, 1939, Borchard Papers.
78. Borchard to Robert M. Hutchins, August 18, 1941, and Borchard to John Bassett Moore, December 17, 1940, Borchard Papers.
79. Borchard to Lincoln Colcord, October 31, 1941, Borchard Papers.
80. Moore to Borchard, October 5, 1940, Borchard Papers. Borchard had a similar opinion (see Borchard to Moore, October 3, 1940, Borchard Papers).
81. Moore to Borchard, February 6, 1941, Borchard Papers.
82. Moore to Borchard, August 4, 1941, Borchard Papers.
83. Borchard to Hiram Johnson, July 6, 1937, Johnson Papers.
84. Borchard to John A. Danaher, March 28, 1940, Borchard Papers. See also Borchard to John Bassett Moore, December 1, 1939, Borchard Papers, where he quotes Carnegie's own works.
85. Borchard to John Bassett Moore, October 24, 1940, Borchard Papers.
86. Borchard to John Bassett Moore, June 17, 1941, Borchard Papers. For Day's resolution, see *New York Times*, June 17, 1941, p. 11.
87. Borchard to James A. Shanley, January 13, 1941, Borchard Papers.
88. Borchard to William P. Lage, May 23, 1940, Borchard Papers. Kendall, "Edwin M. Borchard," notes that Borchard contributed \$2,500 a year towards the support of German refugees (see pp. 159-60).
89. Borchard to Francis T. Maloney, January 6, 1941, Borchard Papers. At some points, Borchard was fatalistic. He wrote in September 1940, "While deploring the horrors that accompany much of the present scene, I am not at all certain that we can do much to scotch these evils. Some of them arise in the minds of evil men; others are created out of conditions. The conditions to which you justly call attention, namely, poverty and hunger and madness in Europe, are calculated to continue some of the evils now prevalent regardless of who the particular administrators of the moment may be" (Borchard to Arthur L. Corbin, September 4, 1940, Borchard Papers).
90. Borchard to Lincoln Colcord, May 18, 1937, Borchard Papers.
91. Borchard to James A. Shanley, November 3, 1939, Borchard Papers.
92. Moore to Hiram Johnson (copy), March 28, 1941, Borchard Papers.
93. Moore to Borchard, September 19, 1939, Borchard Papers.
94. Borchard to Leslie H. Thompson, October 12, 1940, Borchard Papers.

95. Borchart to John Bassett Moore, July 27, 1941, Borchart Papers.
96. Borchart to John Bassett Moore, November 11, 1941, Borchart Papers.
97. See, for example, Borchart to John Bassett Moore, November 19, 1941, and Borchart to Lincoln Colcord, November 7, 1941, Borchart Papers.
98. Borchart to John Bassett Moore, January 13, 1941, Borchart Papers.
99. Borchart to John Bassett Moore, September 17, 1941, Borchart Papers.
100. Borchart to John Bassett Moore, August 15, 1941, Borchart Papers.
101. Borchart to John Bassett Moore, January 30, 1940, Borchart Papers.
102. Borchart to Arthur L. Corbin, September 4, 1940, Borchart Papers.
103. Borchart to William J. Baxter, May 6, 1941, Borchart Papers.
104. Borchart to James A. Shanley, July 27, 1940, Borchart Papers.
105. Borchart to Tom Connally, October 31, 1941, Borchart Papers. Borchart saw the outcome of the Russian war as decisive. If Russia were defeated, Churchill could well be ousted. His successor, who perhaps would be Lloyd George, would enter into negotiations with Hitler, who would give the British generous terms (Borchart to John Bassett Moore, October 10, 1941, Borchart Papers).
106. *New York Times*, August 11, 1928, p. 24.
107. Borchart, memo to T. R. Armstrong, October 10, 1940, Borchart Papers. Early in 1941, Borchart thought it proper for the United States to tide the Latin Americans over the war period with government loans (Borchart to Hubert C. Herring, January 13, 1941, Borchart Papers).
108. Borchart to Hubert C. Herring, January 13, 1941, Borchart Papers.
109. Borchart to Alberto Ulloa, November 17, 1941, Borchart Papers.
110. Borchart to Arthur L. Corbin, September 4, 1940, Borchart Papers.
111. Borchart, memo to T. R. Armstrong, October 10, 1940, Borchart Papers.
112. *New York Times*, October 3, 1941, p. 8.
113. William L. Langer and S. Everett Gleason, *The Challenge to Isolation: The World Crisis of 1937-1940 and American Foreign Policy* (New York: Harper, 1952), p. 212.
114. Philip M. Brown, "Protective Jurisdiction," *American Journal of International Law* 34 (January 1940):112-16; C. G. Fenwick, "The Declaration of Panama," *ibid.*, pp. 116-19; Charles Warren, "Lawless Maritime Warfare," *Foreign Affairs* 18 (April 1940):424-41.
115. Borchart to John Bassett Moore, January 3, 1940, Borchart Papers.
116. Moore to William L. Rodgers (copy), December 21, 1939, Borchart Papers.
117. Borchart, "Armed Merchantmen," *American Journal of International Law* 34 (January 1940):107-12.
118. Borchart to James A. Shanley, October 25, 1939, Borchart Papers.
119. Borchart to Bennett C. Clark, September 27, 1939, Borchart Papers.
120. *New York Times*, September 7, 1939, p. 37.
121. Borchart to William E. Borah, October 17, 1939, Borchart Papers.
122. Borchart, memo to George Holden Tinkham, December 23, 1939, Borchart Papers.
123. Borchart to James A. Shanley, October 6, 1939, Borchart Papers.
124. Moore to Borchart, December 6, 1939, Borchart Papers.
125. Borchart to William E. Borah, November 3, 1939, Borchart Papers.
126. *New York Times*, September 22, 1939, p. 14.
127. Borchart to William E. Borah, September 20, 1939, Borchart Papers. As authorities Borchart quoted the British delegate to the Hague Conference of 1907 and statements made by two secretaries of state, William Jennings Bryan and Robert Lansing (Borchart to William E. Borah, September 29, 1939, Borchart Papers).
128. Borchart to William E. Borah, September 29, 1939, Borchart Papers.
129. Langer and Gleason, *The Challenge to Isolation*, p. 290.
130. Borchart to William P. Lage, October 17, 1939, Borchart Papers.
131. Borchart to John Bassett Moore, November 8, 1939, Borchart Papers.
132. Borchart to James A. Shanley, October 25, 1939, Borchart Papers.
133. Borchart to John Bassett Moore, February 22, 1940, Borchart Papers.
134. Moore to Borchart, February 24, 1940, Borchart Papers. Philip C. Jessup, professor of international law at Columbia University School of Law, concurred. He denied that the British were privileged to effect a rescue, as a belligerent may not commit any act of

- hostility in neutral waters. The presence of prisoners of war on board did not affect the *Altmark's* status. Jessup wrote, "Our sympathies for the Allied cause against the Nazis should not blind us to the just rights of a small neutral (letter to *New York Herald Tribune*, February 22, 1940).
135. Ryan, *New York Times*, February 25, 1940, sec. 4, p. 8; Borchard, *ibid.*, March 10, 1940, sec. 4, p. 8. See also Borchard, "Was Norway Delinquent in the Case of the *Altmark*?" *American Journal of International Law* 34 (April 1940):289-94.
  136. Borchard to John Bassett Moore, December 1 and 12, 1939, Borchard Papers; and Borchard and Lage, *Neutrality for the United States*, 2nd ed. (New Haven: Yale University Press, 1940), p. 414.
  137. Borchard to James A. Shanley, April 10, 1940, and Borchard to John Bassett Moore, August 8, 1940, Borchard Papers.
  138. Borchard, memo to T. R. Armstrong, October 10, 1940, and Moore to Borchard, December 6, 1939, Borchard Papers.
  139. Moore to Hiram Johnson (copy), January 18, 1940, Borchard papers.
  140. Borchard to John Bassett Moore, June 14, 1940, Borchard Papers.
  141. Borchard to Eugene Davidson, July 17, 1940, Borchard Papers.
  142. Borchard to Edward R. Burke, August 30, 1940, Borchard Papers.
  143. White Paper, *New York Times*, March 30, 1940, p. 1; and Borchard to William P. Lage, March 30, 1940, Borchard Papers. The only document whose authenticity was questioned by Borchard was one dated January 12, 1939, in which Count Jerzy Potocki, Polish ambassador in Washington, told his foreign office that a "Jewish international" controlled the president and the media.
  144. Lawyers' letter, *New York Times*, August 11, 1940, sec. 4, p. 8; and Jackson opinion, *ibid.*, September 4, 1940, p. 1.
  145. Borchard to Gerald P. Nye, July 14, 1941, Borchard Papers.
  146. Borchard to John Bassett Moore, September 4 and 28, and October 3, 1940, Borchard Papers. See also Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," *American Journal of International Law* 34 (October 1940): 690-97.
  147. Moore to Borchard, August 26, 1940, Borchard Papers.
  148. Moore to Borchard, October 5, 1940, Borchard Papers.
  149. Moore, quoted by Fish over NBC on January 21, 1941, *Congressional Record*, p. A273. See also letter to Hiram Johnson, February 25, 1941, in U.S. Senate, *Hearings before the Committee on Foreign Relations*, 76th Cong., 1st Sess., on S. 275 (Washington: Government Printing Office, 1941), pp. 652-53 (hereafter cited as *Hearings*).
  150. Borchard to James A. Shanley, January 13, 1941, Borchard Papers.
  151. Borchard to Robert M. Hutchins, January 27, 1941, Borchard Papers. See also letter to Senate Foreign Relations Committee, January 25, 1941, *Hearings*, pp. 653-54. Secretary of War Henry L. Stimson, in testifying before the Senate Foreign Relations Committee, claimed that the Kellogg Pact had given the United States legal authority to pass lend-lease. As part of his argument, he cited the International Law Association's so-called Budapest resolutions of 1934, which authorized reprisals against a nation that had violated the Kellogg Pact. Borchard denied that such resolutions had any authority whatsoever; the United States was not placed under any legal obligations (Borchard to John Bassett Moore, February 4, 1941, Borchard Papers).
  152. Borchard to John Bassett Moore, June 6, 1941, Borchard Papers.
  153. Borchard to Gerald P. Nye, July 14, 1941, Borchard Papers.
  154. Borchard to John Bassett Moore, July 21, 1941, Borchard Papers.
  155. Moore to Borchard, July 19, 1941, Borchard Papers.
  156. Borchard to John Bassett Moore, May 30, 1941, Borchard Papers.
  157. Borchard to Robert A. Taft, June 13, 1941, Borchard Papers.
  158. Borchard to John Bassett Moore, July 1, 1941, Borchard Papers.
  159. Borchard to John A. Danaher, July 1, 1941, Borchard Papers.
  160. *New York Times*, September 12, 1941, p. 3.
  161. Borchard to John A. Danaher, September 15, and October 29, 1941, Borchard Papers.
  162. Borchard to Herbert Hoover, October 31, 1941, Borchard Papers.

163. Borchard to John A. Danaher, October 23, 1941, Borchard Papers.
164. Borchard to John Bassett Moore, October 10 and 17, 1941, Borchard Papers.
165. Borchard, memo to Ralph O. Brewster, November 4, 1941, Borchard Papers.
166. Borchard to Tom Connally, October 31, 1941, Borchard Papers.
167. Borchard to Robert E. Wood, September 24, 1941, Borchard Papers.
168. Borchard, memo to Ralph O. Brewster, November 4, 1941, Borchard Papers.
169. Borchard to William E. Borah, July 13, 1939, Borchard Papers.
170. Borchard to Hiram Johnson, October 7, 1937, Johnson Papers.
171. Borchard to George Holden Tinkham, December 6, 1941, Borchard Papers.
172. Moore to Borchard, October 1, 1940, Borchard Papers.
173. Borchard to Robert M. La Follette, Jr., December 27, 1937, Borchard Papers.
174. Borchard to William P. Lage, March 1, 1938, Borchard Papers. In claiming that the Japanese bore no responsibility for damage to American civilians in a war zone, Borchard cited the Supreme Court rule in the *Juragua Iron Company* case, 212 U.S. 297 (1909).
175. Borchard to Robert M. La Follette, Jr., February 9, 1938, Borchard Papers.
176. Borchard to William H. King (copy), February 15, 1939, Johnson Papers.
177. Borchard to William E. Borah, July 17, 1939, Borchard Papers.
178. Borchard, memo to George Holden Tinkham, December 23, 1939, Borchard Papers. Borchard's comments were in response to a *New York Times* editorial, "The Moral Embargo," December 22, 1939, p. 18.
179. *New York Times*, April 18, 1940, pp. 1, 6, and April 19, 1940, p. 6.
180. Borchard to George Holden Tinkham, April 30, 1940, Borchard Papers.
181. Borchard to John Bassett Moore, July 26, 1940, Borchard Papers.
182. Borchard, memo to T. R. Armstrong, October 3, 1940, Borchard Papers.
183. Borchard to Eugene Davidson, July 28, 1941, Borchard Papers.
184. Borchard to Lincoln Colcord, November 29, 1941, Borchard Papers.
185. Borchard to John A. Danaher, December 12, 1941, Borchard Papers.
186. Borchard to John Bassett Moore, December 12, 1941, Borchard Papers.
187. Borchard served as law librarian of Congress from 1911 to 1913, and from 1914 to 1916. In the years between, he was assistant solicitor of the State Department.
188. Borchard and Lage, *Neutrality for the United States*, 1st ed., p. 350.
189. Wright, "American Neutrality," p. 754.
190. Rupert Emerson, review of *Neutrality for the United States*, by Borchard and Lage, *Harvard Law Review* 51 (December 1937):384-85.
191. The author is indebted to Kendall, "Edwin M. Borchard," for this and several other points made earlier in this discussion.
192. Commentary of Arthur K. Kuhn, *Proceedings of the American Society of International Law*, 1923, p. 71; and conversation with Felix Morley, September 27, 1979.
193. A. J. P. Taylor, *The Origins of the Second World War* (New York: Atheneum, 1962), p. 106.
194. Harry Elmer Barnes, review of *Neutrality for the United States*, by Borchard and Lage, *Columbia Law Review* 37 (June 1937):1042, asks these questions concerning World War I.
195. Stephen Raushenbush, review of *Neutrality for the United States*, by Borchard and Lage, *Nation* 144 (May 22, 1937):595.
196. Harry Elmer Barnes, *New York World-Telegram*, December 26, 1939, p. 16.
197. C. Hartley Grattan to Borchard, October 30, 1939, Borchard Papers.
198. John Foster Dulles, *War, Peace and Change* (New York: Harpers, 1939), p. 38, n. 1.
199. Paul W. Schroeder, *The Axis Alliance and Japanese-American Relations, 1941* (Ithaca, N.Y.: Cornell University Press, 1958); and Norman A. Graebner, "Hoover, Roosevelt, and the Japanese," in Dorothy Borg and Shumpei Okamoto, eds., *Pearl Harbor as History: Japanese-American Relations, 1931-1941* (New York: Columbia University Press, 1973), pp. 25-52.
200. Armin Rappaport, "Freedom of the Seas," in Alexander DeConde, ed., *Encyclopedia of American Foreign Policy: Studies of the Principal Movements and Ideas*, vol. 2 (New York: Scribners, 1978), p. 396.