Marquette Law Review

Volume 43
Issue 3 *Winter 1960*

Article 3

1960

Proposed Repeal of Connally Reservation - A Matter for Concern

Howard H. Boyle Jr.

PROPOSED REPEAL OF CONNALLY RESERVATION-A MATTER OF CONCERN

HOWARD H. BOYLE, JR.*

Our Constitutional protections can most effectively and abruptly be lost by surrender of judicial authority to a supreme supranational juridical body which is neither bound by nor in sympathy with concepts which underlie that Constitution. Although it is not generally publicized, such surrender is now being arranged. The supreme supranational juridical body to which our Constitution would be subordinated has already been set up and is ready for business. It is the United Nation's International Court of Justice. The surrender device is Senate Resolution number 94 which would repeal the "Connally Reservation."

BACKGROUND OF CONNALLY RESERVATION

Chapter XIV of the UN Charter set up the so-called "International Court of Justice," but under Article 36 of the court statute, which was appended to the charter, such court's compulsory jurisdiction was made dependent on voluntary submission by member nations. In 1946 the United States submitted to such compulsory jurisdiction through the Morse Resolution (S. Res. 196). In the form presented to the Senate the Morse Resolution excepted from the jurisdiction therein granted "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." In order to give practical assurance that the International Court would not assume jurisdiction over matters essentially domestic, the Senate, on August 2, 1946, by a vote of 51 to 12, added to this exception the following words: "as determined by the United States."[1] These six words are known as the "Connally Reservation"—after Senator Tom Connally of Texas who sponsored the amendment.

PROPOSED REPEAL OF CONNALLY RESERVATION

On March 24, 1959 Senator Hubert Humphrey of Minnesota intro-

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[1] The "Morse Resolution" as finally passed by the Senate in 1946 reads as follows: *"Resolved (two-thirds of the Senators present concurring therein),* that the Senate advise and consent to the deposit by the President of the United States with the Secretary General of the United Nations of a declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Internatonal Court of Justice in all legal disputes hereafter arising concerning—

(a) The interpretation of a treaty;

duced into the Senate S. Res. 94 to repeal the Connally Reservation.[2] In June 1959 Representative McDowell of Delaware introduced into the House of Representatives H. Res. 267 in support of S. Res. 94.[3] At this writing S. Res. 94 is before the Senate Foreign Relations Committee awaiting further action after reports have been received from

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(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature or extent of the reparation to be made for the breach of an international obligation: *Provided,* That such declaration shall not apply to—
  (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future;
  (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States; or
  (c) disputes arising under a multilateral treaty, unless
    (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or
    (2) the United States specially agrees to jurisdiction:
  Provided further, That such declaration shall remain in force for a period of 5 years and thereafter until the expiration of 6 months after notice may be given to termnate the declaration."

[2] Senate Resolution 94 reads as follows: *"Resolved (two-thirds of the Senators present concurring therein),* that Senate Resolution 196 of the 79th Congress, 2d session, agreed to August 2, 1946, is hereby amended to read as follows:
Resolved (two-thirds of the Senators concurring therein), That the Senate advise and consent to the deposit by the President of the United States with the Secretary General of the United Nations, of a declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning—
a. The interpretation of a treaty;
b. Any question of international law;
c. The existence of any fact which, if establshed, would constitute a breach of an international obligation;
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[3] House Resolution 267 reads as follows: *"Resolved,* That it is the sense of the House of Representatives that the determination of whether the United States is a party involves matters which are essentially within the domestic jurisdiction of the United States ,and is therefore not within the compulsory jurisdiction of the International Court of Justce, should be made by the Court itself rather than by the United States; and that any provision of law or resoultion to the contrary should be repealed or otherwise nullified."

executive agencies. The chances of such resolution passing must be considered excellent.[4]

REPEAL OF CONNALLY RESERVATION AS SURRENDER OF JUDICIAL AUTHORITY TO WORLD COURT

It is likely that should power to decide whether a matter is essentially within the domestic jurisdiction of the United States be passed over to the International Court—*i.e.* should the Connally Reservation be repealed, such court would assume jurisdiction over essentially domestic matters. Modern international thinking of the World Government persuasion, which is fast coming into predominance, holds that there is no difference between domestic and foreign affairs—that any matter of substance has international implications. An official statement by the United States State Department in September 1950, with a foreward by President Truman, declared "There is no longer any real difference between domestic and foreign affairs."[5] The UN representative of the Consultative Council of Jewish Organizations has stated:[6] ". . . once a matter has become in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly or by convention between member states at the instance of the United Nations, that subject ceases to be a matter 'essentially within the domestic jurisdiction of the member states'." Mr. Charles S. Rhyne, Chairman of the Special ABA World Peace Through Law Committee, and a leading proponent for repeal of the Connally Reservation states: "What happens anywhere affects men everywhere."[7]

Where such philosophy obtains, what, for instance, would be the position of the International Court on the question of whether matters having to do with immigration, or with the Panama Canal, were essentially domestic to the United States? What would be such a court's position if the question of President Truman's seizure of the steel mills during the Korean War should arise again? Or, to take other situations which are not unrealistic in view of happenings in other countries, suppose the question of silencing a newspaper critical of the UN should come before the International Court—or of quartering UN emergency forces in private United States homes—or of suppressing religious

[4] Attorney General Rogers spoke for the Administration in urging passage of S. Res. 94 at the 1959 convention of the American Bar Association in Miami; two organizations of no little influence, i.e. the United World Federalists and a Special Committee of the American Bar Association called "World Peace Through Law" committee, have put passage of S. Res. 94 at the top of the list; the Senate Foreign Relations Committee numbers among its members Senators J. W. Fulbright (Chairman) and Wayne Morse, both of whom voted against the Connally Reservation in 1946, and Senator Hubert Humphrey who is sponsoring repeal; recently the Special ABA "World Peace Through Law" committee made Senator Fulbright one of its members.

[5] U.S. Dept. of State, Pub. No. 3972, Gen. Foreign Policy Series 26 (Dec. 15, 1959).

[6] Mose Moskowitz in the American Bar Associaton Journal, April 1949.

[7] As quoted in the Washington Post and Times, March 29, 1959.

teachings contrary to UN doctrine? In a World Government atmosphere it is quite reasonable to expect that the International Court would determine such matters not to be "essentially domestic" to the United States, but as having international implications—and would then proceed to decide the same without regard, of course, to United States Constitutional protections.

INTERNATIONAL COURT NOT BOUND BY CONSTITUTIONAL CONCEPTS

Substantially objections to repeal of the Connally Reservation would be greatly reduced if we could be sure that the International Court would decide the merits of "essentially domestic" matters in the same way our United States courts would decide them—that is if the International Court would be bound by the same principles as are found in our Declaration of Independence and Bill of Rights. There is, however, no agreement as to what is, or as to what shall be, the "world law" which the International Court is to apply. The UN World Court statute declaration of what such "world law" is to be is amenable to inclusion of communist doctrine. This statute states at Article 38 thereof:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b) international custom, as evidence of a general practice accepted as law;
>
> c) the general principles of law recognized by civilized nations;
>
> d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Former Secretary of State John Foster Dulles commented on this Article as follows: "Article 38 of the statute goes on to recognize as international law not merely international conventions, but international custom, general principles of law recognized by civilized nations, and the teachings of the most highly qualified publicists of the various nations. If the applicable rule of international law is so uncertain that resort must be had to alleged custom, teachings, etc., then the Court [International Court of Justice] can scarcely avoid indulging in a large amount of judicial legislation or political expediency."[8]

That Natural Moral Law apparently is not envisioned as the basis for such "world law" is indicated in the following statement by The Chairman of the 'World Peace Through Law" committee:

> . . . we must conclude that concepts of the past are no firm foothold for the dynamic present and the uncertain future. . . .

[8] Cong. Rec. of August 1, 1946, p. 10623.

> Religion as a moral basis for peace has strong appeal to those of us who believe in God and the natural law. But there are differences in dogma and belief which have stood as roadblocks to the use of religion [query: Natural Law] as a universal foundation for peace.[9]

Supporters of the World Court movement and of Connally Reservation repeal make no definite declaration as to what is the "world law" to be applied by the International Court. The vacuum in this respect is apparent mostly by implication from their remarks.

> At future World Conferences, through working committees between conferences, spadework on treaties to build new legal rules in many fields could be carried out on an extensive scale . . . building new law in the world community. . . .[10]
>
> A rudimentary system of law, with only a few abstract rules to guide the [international circuit] courts may be said to be complete so long as there is a clear duty incumbent upon the members of a community to submit their disputes to final decisions by the Courts. ("There shall be no violence" is abstract rule mentioned in a preceding sentence).[11]

Inasmuch as communist participation on a voluntary basis is sought in order that the objective of world "peace" might be attained without force, is it likely that the world law which the International Court is finally to apply will be comprised of basic precepts which communism has had a voice in determining—or to which communism finds no objection:

Moreover, judges of the International Court not only do not have a background inimical to State Supremacy and socialism, but probably more important, they are not answerable to the people anywhere.

If, as seems to be the case, the International Court is not necessarily to be governed by precepts of the Natural Moral Law—principles which have found expression in our Declaration of Independence and Bill of Rights—, the effect of its decisions on our national institutions and concepts of individual dignity will necessarily be unpredictable. At the very least, should not likely surrender of jurisdiction over matters essentially domestic (repeal or dilution of Connally Reservation) wait until such time as the law then to be governing is certain?

ARGUMENTS FOR REPEAL OF CONNALLY RESERVATION QUESTIONABLE

Why is repeal of the Connally Reservation sought? The principal argument advanced by those who seek repeal is that the Connally Reservation has been responsible for the World Court having only 11 cases

[9] Charles S. Rhyne, Chairman ABA "World Peace Through Law" committee in article entitled "World Peace Through Law" WIS. BAR BULL.

[10] News Release, Committee on World Peace Through Law of the American Bar Associaton, Dallas, Texas, April 29, 1959.

[11] Working Papers on the Rule of Law Among Nations, Regional Conference of Lawyers, Chicago, Illinois, April 17 and 18, 1959, published by Special ABA "World Peace Through Law" committee.

in the past 13 years.[12] This argument has been repeated in numerous newspaper editorials throughout the country at the instance of the Special ABA "World Peace Through Law Committee."[13] Whether or not the inactivity of the World Court is to be deplored is a subject not within the purview of this paper; so far as here material, neglect of the court is the purported purpose behind repeal of Connally Reservation. However, would repeal of the Connally Reservation really lead to an increase in the court's business other than in matters being essentially domestic to the United States? International experts seem to think not. Reasons why the World Court has been neglected have been stated by these experts as follows:

> 1st.—feeling "that law has little relevance to the problems involved in the maintenance of international peace and security under existing conditions."[14]
>
> 2nd.—"Decline of the prestige of law." [note communism, as world power, record in abiding with law].[15]
>
> 3rd.—"The opposition of the U.S.S.R."[16]
>
> 4th.—"The prohibition of resort to force (with the result that international delinquents are free from pressure to submit to adjudication or arbitration)."[17]
>
> 5th.—"The fear (of new States) that judges and arbitrators will apply traditional international law."[18]
>
> 6th.—"The present uncertainty of international law."[19]
>
> 7th.—"The absence of any general desire to organize the world on the basis of respect for law."[20]
>
> 8th.—"The remoteness of the Court from non-European countries."[21]

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[12] News Release, Senator Hubert H. Humphrey, March 24, 1959.

[13] Asbury Park (N.J.) Press May 3, 1959; Asheville (N.C.) Times April 27, 1959; Carlisle (Pa.) Sentinel April 21, 1959; Chicago Daily News April 15, 1959; Chicago Sun Times April 19, 1959; Christian Science Monitor April 13, 1959; Dallas Times Herald April 28, 1959; Evansville (Ind) Courrier June 23, 1959; Evening Star (Wash. D.C.) April 14, 1959; Fresno (Calif.) Bee April 23, 1959; Gary (Ind.) Post-Tribune April 15, 1959; High Point (N.C.) Enterprise June 19, 1959; Life Magazine April 27, 1959; Mankato (Minn.) Free Press May 20, 1959; Mason City (Iowa) Globe-Gazette, July 13, 1959; Modesto (Calif.) Bee, April 26, 1959; Morganton (N.C.) News Herald May 2, 1959; New Haven (Conn.) Journal-Courier April 6, 1959; New York Herald Tribune April 15, 1959; Orlando (Fla.) Star May 1, 1959; Pittsfield (Mass.) Berkshire Eagle March 31, 1959; Portland Oregon Journal April 27, 1959; Quincy (Ill.) Herald-Whig April 20, 1959; Rapid City (S.D.) Journal May 17, 1959; Rutland (Vt.) Herald May 14, 1959; Sacramento (Calif.) Bee April 23, 1959; St. Paul (Minn.) Dispatch April 18, 1959; Sheboygan (Wis.) Press April 3, 1959; Toledo (Ohio) Blade April 3, 1959; Tulsa (Okla.) Tribune April 21, 1959; Washington (D.C.) Post April 1, and May 4, 1959; Wheeling (W. Va.) Intelligence May 16, 1959; Winston-Salem (N.C.) Journal April 19, 1959.

[14] Goodrich and Simons, *The United Nations and the Maintenance of International Peace and Security.*

[15] Professor Emile Giraud, *Annuaire de l'Institut de Droit International,* 1957, Vol. 1, pp. 260-264.

[16] *Supra.* [17] *Supra.* [18] *Supra.* [19] *Supra.* [20] *Supra.*
Professor Louis B. Sohn, *International Trade Arbitration,* Domke ed. pp. 63-76.

9th.—"The cost of transportation to The Hague of agents, lawyers, experts and witnesses."[22]

10th.—The feeling in some quarters that the Court as a whole does not have sufficient understanding of the special problems and the diverse systems of international law of the various regions of the world."[23]

11th.—"Some of the members of the Court are not qualified by experience for effective service as judges."[24]

All the above questions were taken from the Chapter entitled "Reasons for Neglect of the Court" in Working Papers compiled by the Special ABA World Peace Through Law Committee[25] and in the order given. Compilers of such working papers mention repeal of the Connally Reservation only in conclusion to the above points, and then only as a matter of speculation. It would seem, therefore, either that criticism of the Connally Reservation is not well placed or that there is some other purpose behind repeal.

Further the World Peace Through Law Committee has caused to be printed and distributed a misleading circular from which it appears that Cardinal Cushing spoke in favor of repeal of the Connally Reservation. [See Exhibit "A"]. Cardinal Cushing did not speak the words seemingly attributed to him by this circular. The misleading impression was created solely by clever arrangement of the newspaper clippings involved. The Cardinal's short speech referred to in the newspaper articles was devoted to urging recognition of the natural Moral law—"There is a further bond which I must mention which transcends national borders and to which both men and nations are subject and this is the moral law itself."[26]

Proponents of the Connally Reservation repeal dismiss the dangers attendant on such repeal by arguing that the World Court statute as presently set up provides: "Only states may be parties in cases before the Court";[27] and that in past decisions jurisdiction has not been assumed over domestic matters. These arguments are not deemed reassuring.

Not only would action against an individual in the name of the state to which he was subject be justifiable to the earnest World Government advocate, but it is definitely intended that the scope of the International Court's power be expressly enlarged to cover disputes arising "in relationships between man and man and between man and govern-

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[22] *Supra.*
[23] *Supra.*
[24] *Infra,* note 25.
[25] "Working Papers on the Rule of Law Among Nations", American Bar Association Special Committee on World Peace Through Law, Regional Conference of Lawyers, Chicago, Illinois, April 17 and 18, 1959, pp. 28-30.
[26] Richard Cardinal Cushing, Archbishop of Boston at meeting of "World Peace Through Law" committee, Statler Hotel, Boston, March 28, 1959.
[27] World Court Statute, Article 34.

ment."[28] Moreover, it is entirely possible that under the General Assembly "Uniting for Peace" resolution of November 3, 1950 conventions of the Human Rights and Genocide type could be passed, without the concurrence of the United States, which would empower the World Court to try individuals. As to the matter of the World Court not presently exhibiting a direction toward ignoring the "essentially domestic" features of matters before it, such is not surprising. If it be intended that the United States be deprived of jurisdiction over matters essentially domestic, it would hardly do to reveal such intent before the people of the United States repealed their Connally Reservation.

Although to date most activity in connection with the Connally Reservation has been toward repeal, as more and more people learn about the movement, opposition is developing. The two veterans organizations which have had the matter before them, the American Legion[29] and the Wisconsin Department of Catholic War Veterans,[30] have gone on record opposing repeal of the Connally Reservation. The subject is deemed sufficiently vital to merit everyone's consideration.

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[28] Charles S. Rhyne in article "World Peace Through Law" Wis. B. Bull. December 1958, see also footnote 11, *supra* at pages 2 and 34; and remarks made in Digest of Proceedings of Regional Conferences of Lawyers, American Bar Association Special Committee on World Peace Through Law.

[29] Text of resolution number 462 adopted as part of report by the Foreign Relations Committee of the American Legion at National Convention in Minneapolis on August 27, 1959 reads: "WHEREAS, It is desirable that the United States maintain an independent judiciary system, and

WHEREAS, The International Court at The Hague may render useful international services by issuing advisory opinions upon request by other nations; now, therefore, be it

RESOLVED, That the International Court should restrict its jurisdiction to cases only presented by petition and refrain from involving itself in domestic litigation, and we request that the Senate of the United States reject emphatically all efforts aimed at the impairing of the Sovereignty of the United States through abandoning the present power of the American Government to limit the jurisdiction of the World Court to purely international affairs."

[30] Text of resolution adopted by Department of Wisconsin, Catholic War Veterans, State Convention assembled in Wisconsin Rapids, Wisconsin, on May 24, 1959 reads:

"WHEREAS, through a Senate Resolution, the United States has submitted to the compulsory jurisdiction of the International Court of Justice (U.N. World Court), and

WHEREAS, there was an exception to this jurisdiction over matters *'essentially within the domestic jurisdiction of the United States,'* and,

WHEREAS, in order to protect our national institutions and Bill of Rights there was added to this exception the words *'as determined by the United States'*, and

WHEREAS, there are movement today which seek to repeal the words, 'as determined by the United States', known as the Connally Reservation, therefore the Catholic War Veterans assembled in state convention May 22-24, 1959, Wisconsin Rapids, do hereby instruct our state officers that they contact at once by telephone or mail, United States Senators Alexander Wiley and William Proxmire that we want the Connally Reservation kept in the law and that they vote against SR94 that would repeal it.

Also, that our state officers contact at once our National Department so that all United States Senators be contacted and immediately instructed to vote the same."

NEW YORK TIMES, SUNDAY, MARCH 29

CUSHING ACCLAIMS BAR'S PEACE WORK

He Tells Special Committee It Can Set the Pattern for Future of World

BOSTON, March 28 (AP)—Richard Cardinal Cushing today told the American Bar Association Committee on World Peace Through Law that its work might well be the most significant of our times.

"It can set the pattern of the future of the world," he declared, "and it indeed may decide whether or not this civilization of ours will survive at all."

The head of the Roman Catholic Archdiocese of [illegible] addressed the [illegible] ed a [illegible]

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"The very first thing that needs to be done," he said, "is to enlarge the jurisdiction of the World Court so it will be able to decide international controversies from which it is now excluded."

The action of Congress thirteen years ago in limiting the cases America would submit to the world court led to similar action by other nations, he declared.

"We need to amend the resolution by which the United States restricts our own recognition of the court," he added.

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WASHINGTON POST AND TIMES HERALD

Sunday, March 29, 1959

Cardinal Cushing Hails Work of Bar Peace Unit

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Addressing a group of about 75 lawyers the Cardinal said: "It is impossible to separate the world of the spirit from the realities which take [illegible]

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Rhyne spoke at a dinner meeting attended by lawyers from 11 Northeast states attending the 2-day session.

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The head of the Roman Catholic Archdiocese of Boston addressed the committee as it ended a two-day meeting in the Statler Hilton Hotel.

"It is impossible to separate the world of the spirit from the other realities which take up your deliberations," he asserted. "We can set up the most elaborate machinery for peace that the world has ever known, but unless men seek peace in their hearts the machinery will never work and the peace we seek will be elusive."

"Humanity is not composed of collections of nations but of a community of individuals bound together by common perils and by the stronger bond of being members of the same family."

The Cardinal said that the committee's invitation to him to speak had come in the busiest week of the ecclesiastical year, Holy Week.

"But," he commented, "it could not fail to respond and to be with you for at least a short while because I feel in my heart the grave importance of your long range efforts.

"If from your efforts the harvest you seek is forthcoming, generations of peaceful peoples will raise their voices in your praise and the Lord of the World will cause His benediction to descend upon you all."

He declared that the general welfare of humanity had such a right of precedence that "no national communities can in their political vindications seek settlement of their mutual differences without bringing the particular good of their own nations into harmony with that higher good which is that of the great community of mankind [illegible]."

J. Wesley McWilliams of Philadelphia, former president of the Pennsylvania Bar Association, urged repeal by Congress of limits on cases to be submitted to the International Court of Justice.

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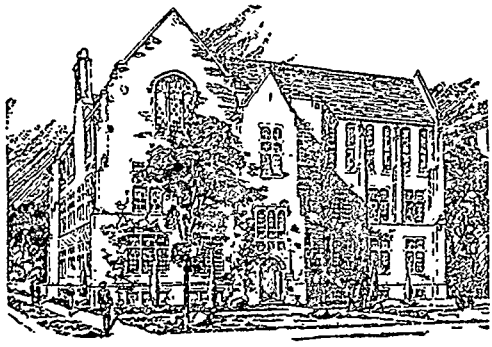
MARQUETTE LAW REVIEW



Vol. 43 WINTER, 1959-1960 No. 3

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