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THE SENATE RESERVATIONS IN GENEVA

BY ARNOLD J. LIEN*

Seventy-six to seventeen was the vote by which the Senate reached its decision to make the United States the forty ninth signatory of the protocol and statute of the Permanent Court of International Justice, on the condition that the forty eight other signatories accept the adherence of the United States with five stipulated reservations. President Harding had recommended favorable action by the Senate in February, 1923. President Coolidge added his endorsement in official message delivered in December, 1923, and in December, 1924. In the election of 1924 both the Republican and the Democratic parties had unequivocal planks in their platforms favoring senatorial action in pursuance of the recommendations of the presidents. The House of Representatives early in 1925 by a majority so overwhelming as to be for practical purposes a unanimous vote passed a resolution of approval. The weight of popular opinion, so far as that opinion was organized and expressed, was strongly favorable. The Senate following the tradition of "due deliberation" did not reach a final vote before January 27, 1926. The vote favoring the resolution of adherence was a little more than 4 to 1. The opposition was small but extremely active, energetic, and able. The majority consisted of 40 Republicans and 36 Democrats. The minority had 14 Republicans, 2 Democrats, and 1 Farmer-Laborite.

The five reservations made by the Senate included the four recommended by President Harding and Secretary Hughes. The first provision of number 4 and the whole of number 5 were new. The reservations, now generally familiar, are quoted here for the convenience of the reader:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the council and assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

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3. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the United States may at any time withdraw its adherence to the said protocol and that the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the court shall not render any advisory opinion except publicly after due notice to all states adhering to the court and to all interested states and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

(The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.)

These reservations were accepted without question by seven states and the necessary exchange of notes with Washington was promptly completed. Albania, Cuba, the Dominican Republic, Greece, Liberia, Luxemburg, and Uruguay constituted this roll. Among the others there was hesitation, due primarily to the uncertainty of the exact meaning of some of the reservations. An agreement was reached to convene a special conference of all the signatories and the United States to discuss the reservations and to agree upon a basis of uniform action. The United States, stressing the point that the reservations were clear and final, did not see any sound basis for accepting the invitation to this conference. Close to forty states participated, including the majority of those that had already given the reservations their unconditional acceptance.

The conference opened in Geneva September 1, 1926, in the assembly room of the International Labor Organization—an organization which is largely independent of the League of Nations. The delegates included an impressive array of legal and juristic talent. The conference decided in the first session that the meetings should be open to the public and that the order of procedure should involve the discussion of principles first and, later, the questions of details, technique, administration, and a final draft. In actual fact, when the discussion had resulted in a tentative agreement on the basic principles involved in the reservations, the remaining work was left to a special committee, the final report of which was approved in a full session of the conference.

In the general sessions of discussion, no votes were taken. Views and opinions were expressed and modified. Proposals were made and withdrawn. Summaries and restatements were made by the President. Any tendency to bring in points of detail, of method, of administration, of technique was ruled out of order. As soon as a clear trend of opinion in the direction of a consensus was discernible, the chairman, if there were no objections, announced a tacit agreement on the principle involved and passed on to the next reservation.

Discussion was free and full. Each speech was given in both English and French. The atmosphere was one of sincerity, conciliation, and frankness. The advantages of having the co-operation of the United States were emphasized repeatedly. The attitude towards the United States was even monotonously friendly. There was in evidence a conscious straining to understand the motives and the intent of the United States in order that these might be conciliated. On the other hand, it was clear from the outset that this was not a diplomatic conference. The discussion was legalistic. The analysis was microscopic.

On each of the first three reservations comments and observations were made but no opposition to their principles developed. These seemed to be obviously indispensable to the participation of the United States in the court without membership in the League of Nations. The only questions raised were questions concerning the methods and the procedure necessary to put these reservations into practical operation. How, for instance, could an arrangement be made by which the United States might participate in the election of the judges of the court by the Assembly and the Council of the League of Nations on a footing of equality with the members of the League, when, according to the Covenant of the League, "The Assembly shall consist of Representatives of Members of the League" (art. 3) and "The Council shall consist of Representatives of the Principal allied and associated Powers, together with Representatives of four other Members of the League" (art. 4)? There is involved here a question of the League's constitutional law of major importance. The court statute provides for the election of the judges by the Council and the Assembly of the League of Nations—chambers of which the composition is determined by the Covenant. What, then, would be the legal effect of a vote cast by a state which is not a member of the League of Nations and, consequently, which can not have representation in the Council and the Assembly? The electron-splitting reasoning by which it has been proved in the United States that the Permanent Court of International Justice is not a part of the organization of the League of Nations might readily supply a solution; but in

the Geneva Conference no one was headed in that direction. The delegates, however, did not doubt that a satisfactory plan could be worked out. Practical men with a young and elastic covenant unbound as yet by a maze of precedents probably had no reason for doubt.

The last part of reservation number 4 involved essentially the same problems as that discussed under the second reservation. Again, no objection was made to the principle involved in the American attitude. It was rather here as in number 2 a question of the procedure and the method of putting the provision into practical operation.

Thus it appears that all of the reservations recommended by President Harding, President Coolidge, and Secretary Hughes were accepted without qualification and without much hesitation. Reservation number 5 and the first part of reservation number 4, which were added by the Senate and finally approved by President Coolidge, were the parts that had made the calling of the Conference necessary. That these would constitute obstacles to a ready acquiescence in the American terms by the other signatories had been foreseen by not a few interested students. The public discussion in the Conference centered on these. The draft committee found these its most stubborn proposition.

The first part of number 4 was discussed at considerable length. It involved the question of the right of withdrawal. The Court statute does not cover this point. The unrestricted right of withdrawal would obviously involve chaotic uncertainty. Since the right of the existing signatories to withdraw was by no means established, should approval be given to such a right for the United States? In pure theory and abstract law obviously every state has by virtue of its sovereignty the right to withdraw from any agreement whatsoever. But in practical ventures of international co-operation, are not certain (possibly self-imposed) restrictions and limitations indispensable? After a thorough exploration of the invisible territory of this reservation, it was agreed (as in all the cases, without a vote) that the principle involved was not objectionable to the extent of making an agreement impossible. The details could be worked out in committee.

The first half of reservation number 5 was found to be simply a statement of the practice already well established and in large measure incorporated in the rules of the Court. This part, consequently, was accepted without much discussion. The second half, on the other hand, proved to be the least clear in its intent and the most disturbing in its possibilities of all the reservations. And when this one had been reached there could be more of a general discussion of the sum total of reservations. The President of the Conference, Professor van Eysinga, of

the Netherlands, more than once emphasized the importance of considering the reservations which followed number 1 in the light of the main and central objective which the United States had made clear in number 1. All the others were intended to fortify and make certain this first fundamental objective. The guidance of the presiding officer had noticeable effects.

The quintessence which the delegates tried to extract from this part of the reservations was the intent of the United States. Was it the intention of the United States merely to secure a guarantee of a position of equality with the members of the League of Nations represented in the Council and in the Assembly? The Senate debates were quoted in support of an affirmative answer. (The White House Spokesman apparently answered it in the same way.) The change in the wording of the reservation before its final adoption by the Senate was pointed to for a negative answer. Did the United States desire a position of special privilege in this matter, leaving the members of the League in a position of fewer privileges and all the responsibilities? There was much speculation. The adhesion of the United States to the Court was earnestly desired. The compacts and responsibilities under the Covenant could not be disregarded lightly. To reconcile the adhesion of the United States on special terms with the maintenance of a Covenant, a League, and a work in which the delegates had faith—that was the final task of the Conference.

Much was made naturally by the delegates of the last four words in the fifth reservation, "or claims an interest." But when the objectionable points were reduced to those of fundamental importance, this was not one of them.

Suggestions were made at every stage of the discussion. Professor Rostworowski, of Poland, proposed that the reservations be accepted in their entirety and that later a series of conferences be held with an American delegate present to work out the administrative details. Mr. Rolin, of Belgium, recommended, and several others agreed with him, that the question of the majority required in the Council and in the Assembly for submission of a case to the International Court for an advisory opinion be submitted to the Court and that the final action on the reservations be delayed until the opinion of the Court was received. This point was of vital importance in its bearing on the second half of the fifth reservation. If the reference of a question to the Court for an advisory opinion could be regarded as a matter of "procedure" a decision, according to the Covenant, could be reached in the Council or the Assembly by a majority vote. In such a case, the power of veto asked by the United States would constitute a special privilege not pos-

essed by any state in the League. If, on the other hand, the submission of a question to the Court could not be regarded as a matter of procedure, a unanimous vote would be necessary and the privilege asked by the United States would be only the privilege of equality. To Mr. Rolin's proposal the objectors were many.

Sir Cecil Hurst of England proposed that the delegates agree to give to the United States a position of equality with the members of the Council and the Assembly. Mr. Uden of Sweden recommended that the Conference accept the Senate reservations with a counter reservation allowing the signatories to withdraw their acceptance by a two-thirds majority. Others who were prominent in making or seconding suggestions were Sir George Foster, of Canada; Mr. Fromageot, of France; Mr. Pilotti, of Italy; Sir Francis Bell, of New Zealand; Judge Negulesco, of Rumania; Mr. Osusky, of Czecho-Slovakia; Mr. Buerro, of Uruguay, and Mr. Denichert, of Switzerland.

The Draft Committee proceeded in the light of the consensus reached through the general discussion. The result was a new protocol embodying the essence of the American reservations and providing a plan for putting them into operation. This must be ratified by the signatories and by the United States before it becomes effective. Since it is not likely that this particular method of meeting the American reservations will be regarded as satisfying the inhibition placed upon the President by the Senate in the paragraph following the fifth reservation, the plan will probably necessitate, so far as the United States is concerned, a further vote in the Senate and a further approval by the President. Delay is inevitable. The final outcome is unpredictable. A less cautious president might see his way clear to accept the new protocol, not as a new instrument to be dealt with by the Senate *de novo*, but as the old protocol (with the American reservations incorporated) already ratified by the Senate and needing only the presidential signature.

Reservations 1, 2, 3, the second part of 4, and the first part of 5 are accepted virtually without condition. The first part of 4 is accepted with two conditions: (a) if the United States withdraws, the new protocol is automatically terminated (and the old protocol is restored); (b) by a two-thirds majority vote the other signatories may withdraw their acceptance of the adherence of the United States. The second half of reservation number 5 is accepted substantially in the following terms:

"The manner in which the consent provided for in the second part of the fifth reservation is given will be the subject of an understanding to be reached by the United States and the League

Council. Should the United States offer objection to an advisory opinion being given by the Court at the request of the Council or Assembly concerning a dispute in which the United States is not a party, or concerning a question other than a dispute between states, the Court will attribute to such objection the same force and effect as attach to the vote against asking the opinion given by a member of the League either in the Assembly or in the Council."

It was the prevailing conviction that advisory opinions in which the United States might be involved would be governed by the ruling of the Court in the Eastern Carelia case. That case involved a controversy between Russia and Finland. The Council asked the Court for an advisory opinion. The Court ruled that, since Russia was not a member of the League of Nations and was not willing voluntarily to accept the jurisdiction of the Court, the Court was without jurisdiction in the case. Since this ruling was regarded by the Conference of signatories as an established precedent, the provision of the new protocol relating to the second half of the fifth reservation was made to cover only cases in which the United States is not a party. In all of these cases the vote of the United States is to be counted on a basis of equality with the vote of any member of the League. But the United States is not given the special privilege of an absolute veto on the combined votes of all the other states. If the reference of a question to the Court for an advisory opinion will ultimately be regarded as a matter of procedure and consequently as a point to be decided by majority vote, the United States will have one vote and no more. If such a reference to the Court is not a matter of procedure (and this alternative is the more probable one) the United States will still have a single vote, but that vote will be an effective veto since unanimity is essential to a decision.

As a result of comparing all the reservations made by the United States with the provisions of the new protocol, this conclusion appears: If it was the intention of the United States to secure only the privilege of becoming a signatory on an equal footing with the other signatories without assuming a share of their obligations under the League of Nations, all that was asked for was granted; if the United States intended to secure special privileges beyond a position of equality, what was asked for was not given, and probably never would be given.

For more than a quarter of a century, the United States has been prominently and actively interested in a permanent world court to supplement the temporary tribunals of arbitration. No other stage of this long development has revealed as clearly as has the present post-war period the complex of political, personal, international, legal, and traditional obstacles that block the way.