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The Present World Court Situation

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United States Senate

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THE PRESENT WORLD COURT SITUATION

The league is established on an enduring basis. Its activities widen with the passing years. Despite internal strife naturally to be expected, with occasional manifestations of petulance, it acquires vigor, its deliberations become more and more significant.

The annual meetings of the assembly, generously attended by premiers and ministers of foreign affairs, promote those intimacies so important in crises in international relations; they afford a forum for the discussion of international problems in which every speaker is perforce obliged to profess the attachment of his country to the cause of peace. The small nations, equally with the great, may be heard. Their statesmen have made notable contributions to the work of that branch of the league.

The council already assembled whenever conferences of the leading powers seem advisable, is performing its functions in the delicate task of keeping the world at peace. The peace-loving, warweary nations of Europe are enamored of the league. Whether it will go to smash some day when controversies between two or more of the great powers defy adjustment, no man is sufficiently gifted to say.

That it is a powerful agency for peace none not warped by inveterate prejudice or ignorant of its history will deny. It is getting along nicely without the support of the United States. It is doubtful if it would have functioned more effectively or successfully had our country been a member from the beginning. As most of the problems threatening world peace are European or involve the European powers, it is quite likely that had America been a member she would have studiously held aloof from them, at least as far as conditions would permit, engaging actively in the humanitarian work of the league and in its efforts to secure general recognition of the principles of international law.

The loss flowing from our policy of isolation has been ours, not the league's. We have been playing and are doomed to play a secondary and subordinate part in all movements for world betterment—arresting the spread from one country to another

of contagious diseases and suppressing or controlling the traffic in opium, in women and children and in obscene literature, regulating the traffic in arms, codifying international law and above all, the institution of a permanent court of international justice.

It is quite to be expected that the proponents of any project requiring the co-operation of the nations generally will envoke the league as the most convenient and expeditious method of securing the necessary assent and equally to be expected that when secured the league will be empowered to carry it out, the organization for setting it on foot being at hand in some of the activities of the league of the nature indicated we have grudgingly participated for very shame at having no hand in world enterprises approved by the common opinion of mankind.

There are reasons other than our insistence on the payment of loans made during and since the war to the nations associated with us in it for the hatred exhibited toward us among them, notwithstanding the relief so lavishly extended by our people to those suffering from the devastation wrought by that cataclysm in the causation of which we had no part either near or remote.

How can we expect to be regarded with any warmth of friendliness by the people of Europe when we maintain a position of aloofness while they set on foot a plan to establish and maintain a permanent international court, an institution repeatedly extolled by our statesmen and by the leading jurists of the world as a most desirable, if not an indispensable agency for the preservation of peace, our attitude, as in the case of other equally commendable enterprises to which we contribute nothing, having no better basis than that it was inaugurated under the auspices of the league. It is deeply to be regretted that the effort to give to the tribunal thus set up and which has not functioned successfully for four years the prestige of the moral support of the United States has apparently come to an impasse.

I trust it will not seem inappropriate to this occasion to elucidate the situation with respect to the effect concerning which there is no little confusion in the minds of many, even among those who might be expected to be quite thoroughly informed.

Pursuant to the injunction of the covenant the Council of the League of Nations, calling to its aid a committee of experts—international jurists of renown—prepared a statute or constitution for a permanent court of international justice which, after being approved by the assembly, was submitted to the various powers for their indorsement to be expressed by signing a protocol or treaty through which those thus assenting became sponsors of the court.

After approximately fifty nations had so become participants in the establishment, and maintenance of the court, President Harding in February, 1923, asked the Senate to advise and consent to the United States becoming a signatory to the protocol with four reservations or upon four conditions proposed by Secretary of State Hughes, as follows:

First. That the United States should, by signing, assume no relationship with the League of Nations or any obligation under the covenant thereof.

Second. That the United States should be entitled to participate in the election of judges of the court.

Third. That it should pay its fair share of the expenses of maintaining the court, and that the United States might at any time withdraw its adherence.

Fourth. That the statute of the court should not be amended without its consent.

The senate advised and consented to the signing of the protocol with the Hughes reservations, and another, for convenience numbered five, which reads as follows: "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."

As this reservation has proven the chief obstacle to an unqualified acceptance by the other signatories to the treaty, of the conditions upon which the United States proposed to join them, a study of its provision is essential to an understanding of the case as it stands.

The covenant of the league in its provisions directing the initiation of proceedings for the establishment of the court declared that, in addition to hearing and deciding controversies which might be submitted to it by the nations involved, it should have power to give advisory opinions on request to either branch of the league, and in general terms, the court was, by its organic statute, invested with such authority.

The power thus reposed in the court was made the basis of attack upon it—perhaps the main basis—in the debate in the Senate on the resolution of ratification. Some few American courts of last resort are authorized by the constitutions under which they exist to render such opinions, upon the request of the legislature or governor, to aid or guide in the discharge of their or his duties.

The prevailing American opinion, however, as indicated in constitutions, state and federal, is against reposing such power in courts, an inherited prejudice, no such practice being known in the English system. It is argued that it is the function of attorneys-general to advise the executive or the legislature, and that courts ought not to commit themselves, either as to the validity or the construction of statutes or to express an opinion on the law unless in bona fide cases before them.

It is said that it is difficult, indeed, impossible to anticipate the infinite variety of circumstances under which the principle involved may be presented, and that contentions made concerning it are much more safely tested when the facts to which it is to be applied are before the court.

Moreover, and this perhaps constitutes the most forceful ground of objection to such a grant of power, the court might and often would be unaided by the discussion of opposing counsel, each diligently advancing every consideration favorable to his contentions, ingenious in meeting the argument of his adversary. Indeed under the system in vogue in some states the court hears no argument.

So strong are the predilections of the American bar touching the exercise of such a power by the courts that both Senator Root, in the discussions before the committee of experts, of which he was a member, which framed the statute of the court, and Honorable John Basett Moore, a member of the court since its institution, in the exchanges occurring in connection with the

preparation of its rules, expressed misgivings as to the wisdom or propriety of investing the international court with authority to render advisory opinions to the league.

It should, however, be stated that both acquiesced, realizing that some concessions must be made in such a work of statesmanship, and both have been reassured by the manner in which the power has been exercised by the court. And it may be added that the system, whatever may have been its origin, has vindicated itself. It has been proven that it may be a valuable aid to the resolution of a dispute involving, often as a controlling element, a question of international law, the determination of which may render comparatively easy an amicable adjustment.

The court might conceivably respond to a request for an advisory opinion without giving interested parties an opportunity to be heard or without publicity, in camera as it is expressed on the continent, but its rules provide that notice must be given to all members of the league and to all other nations that may appear to be interested, implying a right on their part to be heard, and that its opinions must be publicly announced.

Those rules, however, are subject to change and the opponents of ratification did not omit to call attention to the fact that it was advanced by one of the judges when they were being prepared that a situation might arise when it would be in the interest of peace that the determination of the court should not be made public, at least at the time it was reached. Though this suggestion appears to have had scant support it was thought best, at least to still apprehensions in this country, to crystallize the rule through a reservation which on being accepted by the other signatories would have the force and effect of a statute of the court.

Hence the first paragraph of the fifth reservation, as follows:

"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."

The second paragraph thereof, reads as follows:

"Nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute of question in which the United States has or claims an interest."

Four of the leading powers, Great Britain, France, Italy and Japan have permanent places on the council on which it was contemplated in the covenant the United States should likewise always be represented. Remaining outside the league our country has no seat therein. It was understood at the time reservation V was proposed and adopted that unanimity in the council is necessary to the adoption of a resolution to submit to the court a request for an advisory opinion, the covenant providing that questions of procedure before the council or the assembly may be determined by a majority vote, on all others unanimity being required.

In this view it may be said there was general concurrence in the Senate. It may have been advanced that a contrary view was arguable, but the opposition, fertile in objections to the plan under which the court was organized, offered none in seriousness based upon a doubt as to whether a bare majority of the council may call for an opinion from the court.

It will, then, be realized that if a unanimous vote in the council is requisite that a request for an advisory opinion be submitted to the court, any nation represented thereon may impose a veto. If it is proposed to submit a question the determination of which might for any reason be embarrassing to Great Britain or to France or Italy or Japan, or even to one of the lesser powers holding temporary membership in the council, it may offer a forbidding nay, though every other nation votes contrarywise.

It was thought that the United States should be equally privileged, indeed, that it would otherwise be in on a footing of inequality. But it refrained from asking as much, contenting itself with reserving the right to object only in case it should be proposed to submit a question in which it had or claimed an interest.

It restricted itself in accordance with its policy of not interfering in the controversies of European powers, the fruitful source, as heretofore remarked, of business for an international court. The reservation carried an implication of perfect willingness on the part of the United States to let the other powers represented on the council submit to the court, or not to submit, as they saw fit, a question of law involved in a controversy, for

instance, between Italy and Jugo-Slavia, or between Germany and Poland.

Some criticism has been directed against the Senate by Americans emotionally attached to the cause of the court for having imperiled adherence by offering Reservation V, but among them are few, I venture to say, who understand its purport or the conditions giving rise to it.

The action of the Senate was regularly communicated to the powers signatory to the protocol with a view to elicit their assent to the conditions under which the United States proposed to adhere. Several small nations have signified their acceptance of the terms, but the remainder withheld any official expression to await the result of a conference at Geneva looking to unanimity among them in their replies, or at least to an exchange of views concerning the proposed American reservations.

The conference was called by the council of the league to which Secretary Kellogg had transmitted information of the action taken by the Senate, on the proposal to adhere and of his having sought the assent of the governments of the countries involved.

At the meeting of the council following the receipt of the letter of Secretary Kellogg referred to, the British Foreign Minister, Sir Austen Chamberlain, remarked that Reservation V was susceptible of an interpretation which would hamper the work of the council and prejudice the rights of members of the league, though he expressed the conviction that it was not intended it should bear any such meaning.

He suggested that the correct interpretation of the reservation be made the subject of discussion and agreement with the United States. The Secretary of the league, presumably at the direction of the council, sent an invitation to our government to participate in the conference, taking pains, doubtless in view of his experience and in recognition of some sensitiveness of which he could not be unaware, to explain that it was not to be a league conference, but a conference of the powers signatory to the protocol.

The invitation was declined, the President through the secretary of state saying that the "reservations are plain and un-

equivocal" and that he had no authority to "modify" or "interpret" them.

It is, of course, quite true that the President has no authority to modify a draft of the treaty as it had the approval of the Senate, or to interpret it, if by interpretation is meant to give it a construction of binding force and effect. But undeniably he has plenary power to negotiate with a view to either a modification or an interpretation, using the term in the sense indicated, which was the limit of what he was asked to do.

It did not follow that the conference would result in any proposal either to change or to "interpret." All hesitancy about accepting the reservations might have been removed by a frank exchange of views and a free discussion of the reservations. To say the least the reply betrayed no warmth of desire to see the United States a supporter of the court.

The conference unaided by any one speaking from the standpoint of the United States recommended the unconditional acceptance of the first three reservations and of the first part of the fourth, according to the United States liberty to withdraw its adherence at any time. As to the second part of the fourth reservation, to the effect that the statute of the court should not be amended without the consent of the United States, it was proposed as a substitute that the statute be amended so as to provide that no amendment thereof should be made without the consent of all the signatories, that all might in that regard be on the same footing.

In the debate in the Senate it was advanced that the clause in question was unnecessary, the protocol being a multiparty treaty which, under universally accepted rules, can not be changed without the consent of all signatories. This view was expressed with out dissent in the conference, but to remove all doubt and to dispel even the appearance of a favored position on the part of the United States, the alternative was proposed to which there can, of course, be no possible objection, though a resubmission of the protocol to the Senate would be imperative that its assent to the substitute might be secured.

Reaching the fifth reservation, the conference assented to the first part thereof, heretofore quoted as follows: "Fifth— 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;" proposing to add: "The court shall render advisory opinions in public sessions," apparently overlooking the fact that the reservation so provides.

The second part of the fifth reservation gave rise to not a little discussion before the conference. Misgiving concerning it was assigned as a reason for calling the same. It reads, to repeat, as follows: "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 propriety of according to the United States the same right as that enjoyed by other signatories represented on the Council or in the Assembly, for that matter, should it be asked to request an advisory opinion, was recognized, but it was advanced that it had never been decided whether unanimity is required in order that such a request may be submitted to the court or whether a bare majority vote suffices.

If, it was argued, a majority vote only is required, the United States would, were the reservation accepted, occupy a position denied to other signatories. Reciting that it was realized that the United States was seeking only equality of right, it was proposed in effect, that if unanimity is required, if any nation represented on the Council or in the Assembly, as the case may be, may veto the submission of a request for an advisory opinion, the United States should be accorded such right, but that if a majority vote only is required, it should be entitled to a single but not necessarily determinative vote.

Such uncertainty concerning the state of the vote necessary to the submission of a request having been suggested, the representative from Belgium very sensibly proposed that the question be by the Council submitted to the court for determination. The doubt, if there be a doubt arises by reason of the provisions of the Covenant governing the proceedings of the Council and the Assembly that at meetings thereof questions of procedure may be decided by a majority, other decisions requiring the agreement of all members present.

The idea advanced by the Belgian representative, M. Rolin, brought an observation from Sir Cecil Hurst, speaking for Great

Britain to the effect that the proposal to have the doubt removed by an authoritative adjudication in advance, required reflection and careful study.

Continuing in language in which diplomatically an objection is understood to be made without objecting, he remarked that his hesitancy might perhaps be due to his Anglo-Saxon indisposition to be committed to general principles, and to his predilection for the policy of deferring, but to await the decision of any question of law or perhaps of policy until a resolution was required through its involvement in an actual case or controversy demanding determination or solution.

I listened at the meeting of the Assembly in September, 1925, to Sir Austen Chamberlain assigning similar grounds for the declination on the part of Great Britain to subscribe to the Geneva protocol of the year before, and recalled the saying attributed to Talleyrand that language was made to conceal thought, not to express it. It could not have failed to occur to most of Sir Austen's auditors that Great Britain having departed so far from her historic policy, as he outlined it, as to subscribe to the Covenant of the League of Nations, must have had some additional reasons she did not care to avow for rejecting the protocol.

It may be idle to speculate on whether Sir Cecil Hurst disclosed in full the basis of the objections of the government he represented to the perfectly logical course proposed by M. Rolin. However, it proved effective, barring temporarily at least, an accord, and, what is worse, it is impossible to divest the occurrence of a sinister aspect.

If it means anything, it means that Great Britain desired to reserve the right, as the exigencies of the future might suggest, without embarrassment to contend that unanimity is or that it is not essential to affirmative action on a proposal that an advisory opinion be asked of the court, affording its enemies an opportunity to charge that the notion prevails, even among its leading supporters, that it is subject to influence other than such as result from open debate before it.

It is to me an astonishing thing that it should even be proposed that nations deliberately enter into a treaty under which their rights and obligations should be left in doubt. Experience has shown that it is well nigh impossible to frame a treaty, statute or contract over the construction of which controversies

may not arise. It is the business of the lawyer draftsman to anticipate such as to guard against them by appropriate provisions.

In the field of diplomacy it is by some thought to be clever to introduce ambiguity which will permit the assertion of claims that, were they made during the negotiations, would wreck them or be disposed of by the use of unmistakable language. It is charged in the debate on the Panama Canal tolls bill that the Hay-Pauncefote treaty had been couched in language that would not preclude the parties to it from making diametrically opposite claims concerning its construction. It was against the practice advertised to that our hero set his face when he declared in happy phrase for "open covenants, openly arrived at."

The signatories to the covenant and to the protocol are now involved in obscurity, such as it is, as to whether any one of them may or may not veto a request for an advisory opinion by the assembly, or by the council, assuming it is represented therein. Why should the United States not so embarrassed deliberately assume the same position of uncertainty, particularly when that uncertainty may be so easily removed?

The occasion ought to be eagerly seized to dispel whatever doubt there may be rather than to await its presentation in connection with some possibly heated controversy, when through the passions aroused by such the decision of the court might be made the subject of acrid and disturbing criticism. There would be no adversary parties should the council, for the enlightenment of the signatories now considering the American reservations, seek the advice of the court concerning the meaning of the language of the organic law of the league in the particular referred to. Undoubtedly the most eminent international lawyers would, at the request of the court, as *amici curia*, present the opposing views concerning the question at issue.

Our Supreme Court, finding itself recently confronted with a serious question of constitutional law, mooted since the organization of our government, arising out of a conflict between the executive and the legislative branch, the former being ably represented before the court by the solicitor general and the latter only differently by counsel for a private claimant, the chief justice requested the chairman of the Judiciary Committee of the Senate to procure some member equipped for the task to present the argument in support of the authority claimed by the Congress

and denied by the President. Senator Pepper obligingly undertook the work and discharged it with lawyer-like fidelity, and with such ability as to win for him the unusual honor of being complimented in the opinion handed down by the court.

It should not be inferred from what has been by me said, nor from what has been learned of the discussions before the Geneva Conference, nor from any action taken by it, that the question at issue is particularly intricate or the correct solution open to grave doubt. It turns upon what is "procedure" before the council or the assembly which, it will be recalled may be determined by a majority vote.

Procedure before courts and deliberative bodies comprises that system of rules pursuant to which they discharge their functions, adopted either by the tribunal or body or prescribed for its government and regulation by law. Codes of procedure governing courts provide how causes may be brought before them, whether the claimant may state only his case for which he asks relief or whether he must reduce his claim to a formal complaint in writing; how the party impleaded shall be notified, how and when he shall answer. A multiplicity of details are provided for arising out of the experience of the courts through the centuries.

Similarly in the criminal law the procedure prescribes how the accused shall be charged, whether by indictment, information or informal complaint, how he shall be brought into court and admitted to bail, if the offense charged against him be bailable, how he may attack the accusation whatever form it assumes, what plea he may make and how and when he shall be tried.

So the Senate of the United States has adopted rules for the orderly transaction of its business and reasonably to ensure considerate attention to the legislation to which it is asked to give its approval.

The Permanent Court of International Justice has adopted a code of rules regulating the procedure before it, including rules in relation to requests for advisory opinions, the following being of interest in this connection, namely:

"Art. 72. Questions upon which the advisory opinion of the court is asked shall be laid before the court by means of a written request, signed either by the president of the Assembly or the president of the Council of the League of Nations, or by the secretary general of the League under instructions from the Assembly or Council."

"The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question."

"Art. 73. The registrar shall forthwith, give notice of the request for an advisory opinion to the members of the court, and to the members of the League of Nations, through the secretary general of the League, and to the states mentioned in the annex to the covenant."

I am not advised whether the council of the league or the assembly has established rules governing the procedure before them respectively. Presumably they have, but obviously such rules can not undertake to settle the question as to whether the council shall or shall not, in any particular case, submit to the court a request for an advisory opinion.

The Supreme Court of the United States in the opinion of *Kring v. Missouri*¹ quoted the opinion of a law writer defining procedure as follows: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in."

I dare say the view, if it is seriously entertained by any one, that to request or not to request, is a matter of procedure, arising from attributing undue weight to the fact that such request is not infrequently preferred as an incident to the solution of a controversy of which the council has either by the consent of the parties or otherwise taken jurisdiction.

In such a case it may be assumed that the council reflects on the question, "how shall we proceed? Shall we determine the whole controversy embracing the question of international law involved, resolving it according to our best judgment, or shall we seek first the opinion of the court?"

It must not be overlooked, however, that a request for an advisory opinion may be preferred by the council when there is no general controversy before it. The request is not incidental to any matter upon which the council is deliberating. It is the very thing to be decided and the only thing. If the council were asked by some signatory to the treaty to request an opinion of the court on the question here discussed, not for the guidance of the council, for there is no matter pending before the council with respect to which it needs the guidance which would be afforded by such an opinion, it is difficult, if indeed it is pos-

¹107 U. S. 221, 232.

sible, to conceive of its complying or not complying as being a matter of procedure, which is, in its very nature, incidental.

There was no controversy before the council inducing it to submit any one of the first three requests it sent to the court. They all arose out of controversies before the International Labor Bureau, on whose suggestion they were preferred, and called for the construction or interpretation of certain provisions of the Treaty of Versailles. The fourth advisory opinion was rendered at the instance of two states between which a difference had arisen of which the council had indeed taken notice, tho the submission took place just as if the matter had otherwise been strange to it.

Great Britain and France being at odds concerning whether certain decrees authorized by the French government in Tunis and Morocco affecting subjects of Great Britain were violative of treaty rights of the latter, the powers joined in a request that the council seek the opinion of the court on the question at issue. It was undoubtedly contemplated from the beginning that the court should, through the exercise of this jurisdiction, aid states engaged in an amicable effort through diplomatic channels to settle differences that had arisen between them and which they had neither occasion nor desire to submit to the arbitrament of the council.

The covenant carries no specific provisions for the adjustment or settlement of controversies by or before the assembly, though the council is entrusted with extensive powers in that regard.

It was apparently not designed that the assembly should sit as a tribunal before which specific disputes should be heard. Yet under Article XIV, imported into the statute of the court, the assembly may request its opinion as well as the council. It is indisputable that a request for an opinion may be preferred quite apart from any proceeding pending before either the council or the assembly, the sole question before either being whether the request shall or shall not be submitted. In such a situation the determination can not possibly be with respect to a matter of "procedure."

In the views here expressed I am able to say that ex-Senator Elihu Root concurs. Of the contention which gave rise to hesitancy in accepting unqualifiedly the American reservations

David Hunter Miller remarked, "It seems to me to be in principle wholly unfounded; certainly authority is lacking." If the question should be submitted to the court, and it should adopt the view in the light of which the reservations were proposed, unconditional acceptance by the signatories might be looked for, the other suggestions of the conference offering no serious obstacles to complete agreement.

It is unnecessary to speculate on what course the President ought to take or the Senate would take in the event the court held unanimity is not required. It is easily conceivable that a question might be submitted to the court by a majority of the council, the determination of which, were the United States one of its sponsors, would cause it some embarrassment, as for instance whether the acquisition of territory by another power, such as that the report of which gave rise to the Magdalena Bay incident, is forbidden by international law.

Perhaps it would be equally embarrassing to Great Britain to have submitted the question raised by an Irish representative at the meeting of the Inter-Parliamentary Union in 1925 as to whether, if she became involved in a war, any of the other autonomous units of the British empire, being members of the League of Nations, and maintaining diplomatic relations with other governments, might proclaim their neutrality, and enjoy the rights and privileges of neutrals.

The suggestion of the Geneva conference to put the United States on a footing of equality with a vote in the council on a proposal to submit an inquiry to the court, with whatever force a vote by any member may have, is by no means as just as it might seem, assuming a majority only to be required for action.

The association of the representatives of the State's members of the council in its work, the obligations arising out of controversies in the past and the hope of favors earned or unearned in the future of actual understandings with reference to the same would operate altogether to the disadvantage of the United States in a contest for votes in the council. It is in the last degree doubtful that its responsible agents would care to enter into an agreement through which our government might be driven to such a disagreeable necessity.

The Conference prepared a draft of a protocol which it proposed, as it is understood, should take the place of the Ameri-

can reservations, expressing in lieu thereof the conditions and agreements under which the United States adheres to that by virtue of which the Court exists. It fails in a number of particulars to meet the situation as it arises from the assent of the Conference to certain of the American proposals, a discrepancy that need occasion no concern, though it might, were there no more substantial differences, result in some delay. The paragraph dealing with advisory opinions widens the gap, as it appeared from the discussions and conclusions of the Conference. It as follows:

"Should the United States offer objection to an advisory opinion being given by the Court, at the request of the Council or the Assembly, concerning a dispute to 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 attaches to a vote against asking for the opinion given by a Member of the League of Nations either in the Assembly or in the Council."

This paragraph would deny to the United States a vote on the submission of a dispute to which it is a party. If that dispute turned upon or involved a question of international law which the United States declined to submit to the Court, it could nevertheless be submitted by the council at the instance of the other party in the form of a request for an advisory opinion. Doubtless this opinion was inserted in view of the rule in the Mosul case, in which the Court held that though unanimity is required in reaching the final result before the Council, the votes of state parties to the dispute cannot be counted. As heretofore explained, the United States, not being entitled to participate in the debates of the Council, would be at a disadvantage under such a rule, a constituency that might vote, but could not speak in a parliamentary body would be only half represented. It would be still further handicapped were it entitled to vote on only one question. In the second place under the proposed protocol, the United States would have no vote in the case of the submission of a question over which two or more states dispute. Nothing in the discussions before the Conference seems to warrant any such restriction on the rights of the United States, denied to no state represented on the Council. Generally speaking, the draft accords to the United States rights it has not asked and does not care to exercise, and withholds the very privileges the Senate deemed essential to safeguard

the interests of our country in view of its position outside the League.

It is quite likely that the presence of some one competent to speak the views of the reflecting friends of the Court in the United States at the Conference, though he occupied no official position would have results in the dissipation of all minor differences. It seems altogether probable that an accommodation cannot be reached on those of a graver nature, in the absence of a determination by the Court of the legal question heretofore herein canvassed.

Washington, D. C.

THOMAS J. WALSH,
United States Senator from Montana.