

WORLD LAW

THE FACTS, THE LAW, AND THE CONNALLY AMENDMENT

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THE STRENGTHENING of the rule of law in international affairs through repeal of the Connally Amendment is, as major issues go, a relatively new one. In the space of a year or two, lawyers, Senators, and the general public are being expected to pass judgment on a set of international institutions, procedures, and problems—including the World Court, international law, distinctions between domestic and international jurisdiction, and distinctions between the judicial and the political process—that until recently have had little public discussion. The unfortunate result has been that the basic facts, law, and record on which a momentous decision of this kind should firmly rest have all too often been slighted. Indeed, the Senate hearings on this subject, as well as various circulars, speeches and articles supporting the Connally Amendment, are studded with wild misstatements of fact and law which the most rudimentary investigation would quickly clear up.

For this reason, the present statement will concentrate on setting forth provable facts, demonstrable law, and documented evidence from the record.

THE ISSUE

The issue is whether the United States should accept the jurisdiction of the World Court over questions of international law and international obligations, free of the Connally Amendment. In its declaration of acceptance of the Court's compulsory jurisdiction, the United States stated:¹

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¹ 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9. (Emphasis added.) This declaration has been in force since August 26, 1946.

this declaration shall not apply to

. . . .

disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*

The Connally Amendment consists of the words "as determined by the United States of America." This is sometimes called the "self-judging clause," because it purports to confer upon the United States the unreviewable power to decide, in a case in which it is an interested party, whether the World Court legally has jurisdiction over the case.

It is important at this point to stress that the issue is not whether the Court should take jurisdiction over domestic questions. Opponents of repeal often talk about the "Connally Reservation" rather than the "Connally Amendment," and then cite the entire domestic jurisdiction reservation as if this were the "Connally Reservation." This creates a misleading impression. The true fact is that, with the Connally Amendment deleted, the United States' declaration would still exclude "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America." Indeed, in addition to this continuing reservation in the declaration, there are at least two other specific guarantees that the Court's jurisdiction will be confined to questions of international law. One is article 2, paragraph 7, of the United Nations Charter, which states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter

Moreover, the Statute of the International Court of Justice² limits the Court's jurisdiction to "international legal disputes" in four named categories: international treaties, international law questions, breach of international obligations, and remedies for such breach. The Court's jurisdiction is not a sweeping one limited only by the operation of negative reservations. On the contrary, the Court possesses jurisdiction only over areas affirmatively entrusted to it by its Statute, and these areas are confined to the four international categories just cited.

The main practical consequence of the Connally Amendment, then, is not to change the boundaries of the Court's jurisdiction, which will be limited to international law questions whether there is a Connally

² Art. 36, para. 2.

Amendment or not. The real consequence of the Connally Amendment is to create a two-way veto power over the Court's jurisdiction. This two-way veto comes about as follows. First, the United States can prevent adjudication in any case brought against it under the declaration by stating that in the opinion of the United States the matter is essentially within its domestic jurisdiction. Second, because of the principle of reciprocity, any other country can similarly prevent adjudication in any case brought by the United States by stating that in that country's opinion the matter is essentially within its domestic jurisdiction. The authority for the second statement is the *Case of Certain Norwegian Loans* (France v. Norway).³

Before going further, it might be well to set forth a few facts about the World Court itself. The World Court is the "principal judicial organ of the United Nations."⁴ Its official title is the International Court of Justice. It was created in 1945 in connection with the creation of the United Nations. However, except for some changes in membership, such as the addition of the United States and the Soviet Union, it is essentially a continuation of the Permanent Court of International Justice, which was founded in 1920. The Court has fifteen judges elected by the General Assembly and Security Council for nine-year terms. Its headquarters are at The Hague. The Court and its predecessor have dealt with sixty-seven contentious cases.⁵ The present Court has dealt with twenty-nine separate contentious matters⁶ and has

³ [1957] I.C.J. Rep. 9 (Judgment of July 6, 1957); *The Norwegian Loans Case*, 1960 DUKE L.J. 416.

⁴ U.N. CHARTER art. 92.

⁵ Hudson lists 65 "new cases" dealt with by the P.C.I.J., but 27 of these were requests for Advisory Opinions. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE: 1920-1942*, at 779 (1943). The twenty-nine separate contentious matters dealt with by the present I.C.J. are set forth *infra* note 6. The total for both Courts, therefore, is sixty-seven.

⁶ The following sixteen contentious matters have resulted in twenty-three Judgments of the Court: (1) The Corfu Channel Cases (United Kingdom v. Albania): Preliminary Objection of Albania, [1947-48] I.C.J. Rep. 15 (Judgment of March 25, 1948); Merits, [1949] *id.* 4 (Judgment of April 9, 1949); Compensation, [1949] *id.* 244 (Judgment of December 15, 1949). (2) The Asylum Cases (Colombia/Peru): Merits, [1950] *id.* 266 (Judgment of November 20, 1950); Request for Interpretation of the Judgment of November 20th, 1950 in the Asylum Case, [1950] *id.* 395 (Judgment of November 27, 1950); Haya de la Torre, [1951] *id.* 71 (Judgment of June 13, 1951). (3) Fisheries Case (United Kingdom v. Norway), [1951] *id.* 116 (Judgment of December 18, 1951). (4) Ambatielos Case (Greece v. United Kingdom): Preliminary Objection, [1952] *id.* 28 (Judgment of July 1, 1952); Merits: Obligation to Arbitrate, [1953] *id.* 10 (Judgment of May 19, 1953). (5) Anglo-Iranian Oil Company Case (United Kingdom v. Iran): Preliminary Objection, [1952] *id.* 93 (Judgment of July 22, 1952). (6) Case Concerning Rights of Nationals of the United States

four now pending.⁷ The sort of cases handled by the Court have included disputes over territory, fisheries, the rights of nationals in other

of America in Morocco (France v. United States of America), [1952] *id.* 176 (Judgment of August 27, 1952). (7) The Minquiers and Ecrehos Case (France/United Kingdom), [1953] *id.* 47 (Judgment of November 17, 1953). (8) Nottebohm Case (Liechtenstein v. Guatemala): Preliminary Objection. First Phase, [1953] *id.* 111 (Judgment of November 18, 1953); Admissibility. Second Phase, [1955] *id.* 4 (Judgment of April 6, 1955). (9) Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), (Italy v. France, United Kingdom, and United States of America), [1954] *id.* 19 (Judgment of June 15, 1954). (10) Case of Certain Norwegian Loans (France v. Norway), [1957] *id.* 9 (Judgment of July 6, 1957). (11) Case Concerning Right of Passage over Indian Territory (Portugal v. India): Preliminary Objections, [1957] *id.* 125 (Judgment of November 26, 1957); Merits, [1960] *id.* 6 (Judgment of April 12, 1960). (12) Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), [1958] *id.* 55 (Judgment of November 28, 1958). (13) Interhandel Case (Switzerland v. United States of America): Preliminary Objections, [1959] *id.* 6 (Judgment of March 21, 1959). (14) Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria): Preliminary Objection, [1959] *id.* 127 (Judgment of May 26, 1959). (15) Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands), [1959] *id.* 209 (Judgment of June 20, 1959). (16) Case Concerning the Arbitral Award Made by the King of Spain on December 23rd, 1906 (Honduras v. Nicaragua), [1960] *id.* 192 (Judgment of November 18, 1960).

The following thirteen separate contentious proceedings resulted in final and dispositive Orders of the Court: (17) Case Concerning the Protection of French Nationals and Protected Persons in Egypt (France v. Egypt), [1950] *id.* 59 (Order of March 29, 1950). (18) Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People's Republic), [1954] *id.* 99 (Order of July 12, 1954). (19) Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Union of Soviet Socialist Republics), [1954] *id.* 103 (Order of July 12, 1954). (20) "Électricité de Beyrouth" Company Case (France v. Lebanon), [1954] *id.* 107 (Order of July 29, 1954). (21) Aerial Incident of March 10th, 1953 (United States of America v. Czechoslovakia), [1956] *id.* 6 (Order of March 14, 1956). (22) Aerial Incident of October 7th, 1952 (United States of America v. Union of Soviet Socialist Republics), [1956] *id.* 9 (Order of March 14, 1956). (23) Antarctica Case (United Kingdom v. Argentina), [1956] *id.* 12 (Order of March 16, 1956). (24) Antarctica Case (United Kingdom v. Chile), [1956] *id.* 15 (Order of March 16, 1956). (25) Case Concerning the Aerial Incident of September 4th, 1954 (United States of America v. Union of Soviet Socialist Republics), [1958] *id.* 158 (Order of December 9, 1958). (26) Case Concerning the Aerial Incident of July 27th, 1955 (United Kingdom v. Bulgaria), [1959] *id.* 264 (Order of August 3, 1959). (27) Case Concerning the Aerial Incident of November 7th, 1954 (United States of America v. Union of Soviet Socialist Republics), [1959] *id.* 276 (Order of October 7, 1959). (28) Case Concerning the Aerial Incident of July 27th, 1955 (United States of America v. Bulgaria), [1960] *id.* 146 (Order of May 30, 1960). (29) Case Concerning the "Compagnie du Port, des Quais et des Entrepôts de Beyrouth" and the "Société Radio-Orient" (France v. Lebanon), [1960] *id.* 186 (Order of August 31, 1960).

⁷ *Viz.*: (1) Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Court's General List No. 41. (2) Case Concerning the

countries, interference with rights of passage of ships, nationalization of foreign-owned industries or investments, the shooting down of aircraft, and business, property, or financial rights of nations, individuals, or corporations.

The law applied by the Court is international law.⁸ This is an extensive body of rules and principles developed through international treaties, practice, decisions, and other sources over a period of several centuries. Article 38, paragraph 1 of the Court's Statute states that the Court must decide in accordance with international law, and shall apply international conventions, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and, as subsidiary sources of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations. The Court's Statute also states that the decisions of the Court are binding only between the parties and in respect of the particular case.⁹

WHAT THE UNITED STATES WOULD GAIN BY REPEAL

When a change is being advocated, it is a fair question to ask: What will the United States gain by making the change?

The concrete gains can be stated under four main headings:

A. Under the reciprocity principle, the United States gains the right to vindicate its own legal rights in circumstances under which it could now be thrown out of court.

B. The United States gains freedom from the legal uncertainty, as well as the embarrassment, of trying to operate under a declaration which is apparently illegal.

C. The United States gains a great advance toward effective settlement of international disputes, including some that seriously threaten the peace, by peaceful legal means.

D. The United States gains the right and the ability to assume a position of effective leadership in the promising peace through law program which is now surging forward all over the world.

Temple of Preah Vihear (Cambodia v. Thailand), *id.* No. 45. (3) Case Concerning the Southwest Africa Mandate (Ethiopia v. Union of South Africa), *id.* No. 46. (4) Case Concerning the Southwest Africa Mandate (Liberia v. Union of South Africa), *id.* No. 47.

⁸ See STAT. INT'L CT. JUST. art. 38, para. 1.

⁹ STAT. INT'L CT. JUST. art. 59.

A. Effect of Reciprocity on American Rights

The United States, by repealing the Connally Amendment, would gain the ability to obtain satisfaction in the World Court of its legal claims, and those of its citizens and corporations, against other countries which can now throw it out of court because of the reciprocal effect of the Connally Amendment.¹⁰

Although a country might state that it would never invoke the reservation except in genuinely domestic cases, there is nothing the United States can do if the reservation is invoked against it even in obviously international disputes. The net effect, therefore, is that the United States can now be blocked as to any case whatever that it might attempt to bring against any country under the general jurisdiction of the Court. This is such an important and little understood fact that it is worth stating again in the bluntest terms: The Connally Amendment destroys, by the United States' own act, absolutely and without exception, every conceivable right that the United States might have in any circumstances to enforce any legal claim under the general jurisdiction of the Court against any country on earth. No matter how fully the other country might have accepted the International Court's jurisdiction, under the principle of reciprocity it has only to say, when sued by the United States, "We think this case is domestic," and the United States is out of court without any recourse whatever.

The principal authority for this holding of reciprocity is the *Norwegian Loans Case*.¹¹ In that case, Norway had issued a large quantity of bonds in France payable in gold. Then Norway went off the gold standard and refused to service or pay these bonds in gold. France brought an action on behalf of its citizens in the World Court demanding payment in gold. Norway had accepted the World Court's jurisdiction without reservation. France had a "Connally Amendment" similar to the United States'.¹² The Court held that Norway could invoke against France France's own "self-judging" clause, on the principle of reciprocity. Norway, therefore, merely stated that in its opinion the question of payments on its bonds issued in France was

¹⁰ Cf. *Case of Certain Norwegian Loans (France v. Norway)*, [1957] I.C.J. Rep. 9 (Judgment of July 6, 1957).

¹¹ *Ibid.*

¹² ". . . This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." Quoted in *id.* at 21.

essentially a domestic Norwegian matter, and France's claim had to be dismissed.

Result: Financial loss in cold cash to hundreds of thrifty Frenchmen. Cause: A supposedly protective clause interposed by the supposed guardians of French self-interest. Sequel: France repealed its "self-judging" clause.¹³

The opponents of repeal of the Connally Amendment have had surprisingly little to say about this vital issue bearing on American self-interest and the rights of American individuals and corporations. The only reply they have advanced that has any legal pretensions is the conjecture that France probably would have lost the case anyway, on a theory that Norway's refusal to pay its bonds in gold in France was indeed a domestic issue.¹⁴ Of course, even if this argument were correct—which it is not—it would be beside the point. The point of the *Norwegian Loans Case* is that it unmistakably established the principle of reciprocity, and no matter who might have won in the case, the decision served notice for all future time that the self-judging clause is a boomerang. However, since the legal point has been raised, it is worth taking a moment to point out what the rule of international law on this subject really is. In Charles Cheney Hyde's standard treatise on international law,¹⁵ this respected authority sums up the law as follows:¹⁶

. . . If one may conclude, as does the Supreme Court of the United States, that a bond-issuing State is competent to enter into binding obligations that pledge its credit, it can not modify or destroy them without having recourse to conduct which the State of the obligee may fairly regard as amounting to internationally illegal conduct and as constituting the breach of an international obligation toward itself. Moreover, modification or destruction is believed to be apparent when the obligor State, through the exercise of its sovereign power to regulate the value of money renders it impossible for the alien obligee to enjoy the benefits of payments in the particular currency (such as gold) which it agreed to pay.

In addition, France contended that Norway was practicing discrimination between bondholders of different countries. This in itself would probably be a breach of international law, apart from any claim of

¹³ For the text, see [1958-1959] I.C.J.Y.B. 212; 1960 DUKE L.J. 85.

¹⁴ See, e.g., Schweppe, *The Connally Reservation Should Not Be Withdrawn*, 46 A.B.A.J. 732, 735 (1960).

¹⁵ INTERNATIONAL LAW (2d rev. ed. 1947), 3 volumes.

¹⁶ 2 *id.* 1005-06. (Footnotes omitted.)

economic necessity for going off the gold standard in relation to other countries generally.¹⁷

Moreover, the *Norwegian Loans Case* is not the only authority for the reciprocity principle. In the *Interhandel Case (Preliminary Objections)* (Switzerland v. United States of America),¹⁸ the Court stated:¹⁹

. . . Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party.

It has sometimes been argued that the self-judging clause is unimportant because it is never invoked. This is the exact opposite of the true fact. Since the *Norwegian Loans Case* called attention to this reservation, the self-judging clause has been invoked either directly or reciprocally in every case in which it was available. There have been three such cases. The first was the *Norwegian Loans Case* itself, in which the reservation was invoked reciprocally.²⁰ The second was the *Interhandel Case*, in which the United States itself invoked its own self-judging clause as to one of the issues.²¹ The third is the case of the *Aerial Incident of July 27th, 1955* (United States v. Bulgaria).²² This was a claim brought by the United States arising out of the shooting down of an Israeli plane by Bulgaria, with the result of loss of lives of American passengers. As to the United States, Bulgaria interposed three defenses, of which the second was that Bulgaria was entitled to invoke the Connally Amendment on the basis of reciprocity and that the matters in controversy in the case were essentially within the domestic jurisdiction of the People's Republic of Bulgaria, as determined by the People's Republic of Bulgaria.²³

The argument is also sometimes made that American individuals and corporations are not threatened with loss because only states can be parties to the proceedings before the International Court. This overlooks the fact that in a large proportion of cases the state appears as

¹⁷ Cf. opinions of Judge Basdevant, [1957] I.C.J. Rep. 71, at 78, and Judge Read, *id.* at 79, 88-89.

¹⁸ [1959] I.C.J. Rep. 6 (Judgment of March 21, 1959).

¹⁹ *Id.* at 23.

²⁰ See [1957] I.C.J. Rep. 9, at 22-26 (Judgment of July 6, 1957).

²¹ See the Fourth Preliminary Objection, paragraph (a), of the United States of America, quoted in [1959] I.C.J. Rep. 6, at 11 (Judgment of March 21, 1959).

²² [1960] I.C.J. Rep. 146 (Order of May 30, 1960).

²³ *Ibid.*

party of record, while the real party in interest is an individual or a corporation. The state acquires a cause of action because its citizen or corporation has been aggrieved through failure to obtain justice in the local courts. Note that in all the cases just mentioned there were individual or corporate rights at stake: the rights of French investors in the *Norwegian Loans Case*, the ownership of General Aniline and Film Corporation in the *Interhandel Case*, and the compensation of the next of kin of the nine United States citizens killed in the aerial incident in the *Aerial Incident of July 27th, 1955*.

The other principal argument made by opponents of repeal to offset the self-interest argument is that American corporations and individuals would prefer to press their claims in local courts rather than in the International Court anyway. This misses the point. Of course local remedies must be pursued first. This is not only good policy for reasons of local good will; it is indeed mandatory under international law that local remedies be exhausted, as has been held most recently in the *Interhandel Case*. But the argument stops short of the main issue. Once local remedies have been exhausted unsuccessfully, what then?

Once local remedies have been exhausted by American individuals or corporations, the claim becomes that of the United States. The availability of a final showdown before an international tribunal will not only undo injustice in the particular cases that come before the tribunal; it will also have the effect of raising the standards of local justice and making resort to the International Court unnecessary in many cases by decreasing the number of instances of claimed local injustice.

A curious inconsistency in this argument by opponents of repeal is that in one breath they tell us that judges from foreign countries—even the outstanding experts chosen for the International Court—cannot possibly understand the American concept of justice, and in the next breath they insist that American corporations and individuals are happy to entrust their fortunes to whatever judges might preside over foreign local courts, and hence do not need the ultimate protection of the International Court.

The arguments against this demonstration of American self-interest, then, are wrong on the law, deeply inconsistent, and ultimately based on the grotesque assertion that the country whose national, corporate, and individual rights are many times more deeply involved and more subject to possible harm in other countries than those of any potential

opponent in court really has no interest in having an authoritative legal forum in which to vindicate those rights. After all, American citizens have 29.7 billions of dollars of direct private investment in other countries.²⁴ This does not include investment in bases, governmental installations, and public programs such as economic and technical aid. There are almost 500,000 Americans resident abroad, and 730,000 tourists and travellers per year.²⁵ All these persons and property rights are exposed to both personal and property damage for which ordinarily a legal claim would be the remedy. As a matter of simple arithmetic, therefore, since the Connally Amendment at one stroke destroys both the United States' right to sue and its obligation to accept suit, it is clear that the United States loses many times as much as it gains, since the United States has many times more legal interests in need of legal protection.

A specific application of this self-interest point to a type of case of lively current importance is the protection of American business interests and investments abroad. We have been witnessing a wave of expropriations in such countries as Indonesia and more lately Cuba. These expropriations are only the most conspicuous examples of a problem of interference with foreign business interests which ranges all the way from outright confiscation to various subtle kinds of discrimination. It is true that neither Cuba nor Indonesia happen to have a declaration accepting the compulsory jurisdiction of the International Court, and consequently the repeal of the Connally Amendment would have no particular effect one way or another on American rights in relation to these countries as long as their position remains unchanged. However, there are at present thirty-nine countries that have made declarations,²⁶ and of these only four in addition to the United States have self-judging clauses. These four are Liberia, Mexico, The Sudan, and the Union of South Africa.²⁷ This leaves thirty-four countries that have made declarations recognizing the compulsory jurisdiction of the Court without self-judging clauses.

These countries are:

²⁴ Survey of Current Business, Sept., 1960, p. 20.

²⁵ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 8, 9 (1960).

²⁶ [1958-1959] I.C.J.Y.B. 38 lists thirty-eight, and India deposited its declaration of acceptance after publication of that Yearbook. (For its text see 1960 DUKE L.J. 86-87). (In late 1960, Pakistan withdrew its self-judging clause).

²⁷ See [1958-1959] I.C.J.Y.B. 215, 216-17, 221-22, 224-25, respectively.

Australia	The Netherlands
Belgium	New Zealand
Cambodia	Nicaragua
Canada	Norway
China (Nationalist)	Pakistan
Colombia	Panama
Denmark	Paraguay
Dominican Republic	Philippines
El Salvador	Portugal
Finland	Sweden
France	Switzerland
Haiti	Thailand
Honduras	Turkey
India	United Arab Republic
Israel	United Kingdom of Great Britain and Northern Ireland
Japan	Uruguay
Liechtenstein	
Luxembourg	

The repeal of the Connally Amendment would result in a concrete change and gain in American rights in relation to these countries. In circumstances under which they now could throw the United States out of court by the reciprocal effect of the Connally Amendment, the United States could hereafter invoke the compulsory jurisdiction of the World Court to vindicate its legal rights.

It is true that, as to the other countries of the world which have filed no declarations at all, including all the Communist countries, the repeal of the Connally Amendment would not affect American rights. That is, the United States' ability to sue a Communist country would be no greater than before. However, it should be clearly understood that, contrary to some of the implications left by the opponents of repeal, the repeal of the Connally Amendment would also not have the slightest effect on the ability of Communist countries to bring the United States into court. Since the Communist countries have not accepted the Court's jurisdiction on any terms, by reciprocity the United States can continue to block any case brought by a Communist country against it if it chooses to do so.

There is one special application of the damage to American self-interest which is so poignant and paradoxical that it deserves separate mention. When the United States first went into the economic and technical aid program, the guardians of American self-interest insisted

that we reserve the right to have legal claims growing out of this program adjudicated in an impartial tribunal. Accordingly, the legislation itself requires that a clause be inserted in all economic and technical aid agreements under which the other country agrees to accept determination by the World Court or other tribunal of claims of Americans growing out of economic and technical aid programs.²⁸ However, the Connally Amendment is incorporated by reference in these treaties, together with its reciprocal effect. The result is that the privilege of requiring impartial adjudication of claims, which this legislation and these agreements attempted to confer on American citizens, has been wiped out by the Connally Amendment. The repeal of the Connally Amendment, therefore, would not only restore the general rights of the United States to invoke the jurisdiction of the International Court, but would also restore the specific rights which the Congress so painstakingly attempted to confer upon Americans under the economic and technical aid program.

B. Is the Connally Amendment Valid?

The second tangible gain that would flow from the repeal of the Connally Amendment would be to get rid of both the uncertainty and the embarrassment of having a declaration which is probably invalid.

Article 36, paragraph 6, of the Statute of the International Court of Justice provides:

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The United States is a party to the Statute and is legally bound by it. While the World Court has not directly passed upon the question, seven judges in separate opinions have pronounced the Connally Amendment invalid.²⁹ The late Sir Hersch Lauterpacht, a member of the Court and one of the world's leading authorities on international law, stated:³⁰

²⁸ See the Economic Co-operation Act of April 3, 1948, 62 Stat. 137 (1948). For a list of 17 treaties concluded under this clause of the Act, see *Hearings on S. Res. 94 Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess., 22 (1960).

²⁹ *Viz.*, (1) Judge Lauterpacht, [1957] I.C.J. Rep. 34 (concurring opinion) and [1959] *id.* 95 (dissenting opinion); (2) Judge Guerrero, [1957] *id.* 67 (dissenting opinion); (3) Judge Read *id.* 79, at 91-96 (dissenting opinion); (4) Judge Spender, [1959] *id.* 54, at 54-59 (concurring opinion); (5) Judge Klaestad, *id.* 75 at 75-78 (dissenting opinion); (6) Judge Armand-Ugon, *id.* 85, at 93; and (7) Judge *ad hoc* Carry, *id.* 32 (statement concurring in Judge Klaestad's opinion).

³⁰ [1957] I.C.J. Rep. 34, 48 (concurring opinion).

. . . An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance.

Judge Lauterpacht cited *Williston on Contracts*³¹ as one authority for this familiar basic principle.

As every lawyer knows, there is nothing worse in law or business than legal uncertainty. If you know for certain that the law is against you, at least you can start from there and make your plans for the future. But if you are in a state of uncertainty, neither a lawyer nor a businessman knows how to conduct his affairs while the uncertainty remains.

Even if we assume that the Connally Amendment is invalid, there is still uncertainty about the effect of the invalidity. Two judges, Lauterpacht and Spender, and other international lawyers and scholars have concluded that the invalidity renders the entire American declaration a nullity.³² This is on the ground that, as Lauterpacht stated, it creates a document in which one party determines his obligation and which therefore is not cognizable in law. If this is the correct conclusion, the net result of the Connally Amendment is that the United States has lumped itself with the U.S.S.R. and the other countries which have no declaration at all.

Five other judges and authorities have expressed the view that the invalid portion of the declaration is severable.³³ This would result in exactly the opposite effect. The United States would be subject to the compulsory jurisdiction of the Court as if the Connally Amendment did not exist. Out of all this uncertainty, one thing is certain: The United States cannot make its plans for the future with any confidence, and the United States will never know the real answer, until it either repeals the Connally Amendment or waits until there has been a final adjudication in the International Court both on the legality of the declaration and the effect of any illegality. It would be a distinct gain simply to remove this uncertainty so that the United States knows where it stands in relation to the International Court.

There would also be a gain in removing the humiliation and embarrassment that attends this self-judging clause because of its flouting

³¹ 1 WILLISTON, CONTRACTS § 43, at 123-28 (rev. ed. by Williston & Thompson, 1936).

³² See citations to the opinions of Judges Lauterpacht and Spender, *supra* note 29.

³³ See citations to the opinions of Judges Guerrero, Read, Klaestad, Armand-Ugon, and Judge *ad hoc* Carry, *supra* note 29.

of one of the most elementary principles of civilized society: the principle that no man shall be judge in his own case. If any person attempted to assert the right to be judge in his own case in a domestic matter, he would become a laughing stock. The effect is no different on the international scene. If anyone is in any doubt of this, he has only to attend a few international conferences of lawyers and he will discover that the Connally Amendment is constantly thrown up to Americans by lawyers from other countries who are bewildered by the spectacle of such a declaration from a country they have come to think of as a fountainhead of the rule of law.

The United States' position looks particularly bad because the Connally Amendment was the first self-judging clause in the history of International Court jurisdiction. Of course, there have been various kinds of reservations without self-judging clauses interposed to the Court's jurisdiction. But it is wrong to argue, as opponents of repeal argue, that there is no difference between carving out an area by a straightforward reservation, on the one hand, and asserting the self-judging right on the other. If a country, in its declaration, carves out an area, such as a particular boundary or river dispute, no question of legality arises. In such instances, the International Court would be the final arbiter of the question whether under international law the case before it fell within the asserted reservation. It is an entirely different thing to claim the self-judging privilege. The reason is that this does not merely carve out one named area of jurisdiction. It purports to give the claiming country an unreviewable right to make the reserved area as large or as small as it chooses at its own whim. It appears to accept compulsory jurisdiction of the Court with one hand, and snatches it away with the other, not in absolute terms, but in terms that are unpredictable and subject to administrative determination by the country after it has become a party to an existing lawsuit.

Suppose I make a contract with you for personal services. You agree to pay me \$300 a month for a year. I agree to perform personal services as your employee and to do such jobs as you order me to do. However, I insert a clause in this contract saying that I reserve the right to refuse to perform "domestic services" for you. This would undoubtedly be a valid reservation. If you ordered me to go to your residence and scrub your floors for you, and I refused, an impartial tribunal could easily pass on the question whether I had violated my contract of service. But suppose I go on and insert in my reservation a self-judging clause, so that, while you are obliged absolutely to pay me

\$300 a month per year, I have the right to refuse to perform "domestic services as determined and interpreted by me." Would this be a valid contract as it stands? Suppose that every time you ordered me to perform some service, I stated, "In my opinion, this is domestic service, and I refuse to perform." Obviously, only one of two results is legally possible. Certainly no court is going to compel you to pay me \$300 a month for the privilege of listening to me repeat monotonously, "I declare this service to be domestic." Therefore, either the court will hold the entire agreement invalid, or it will hold the self-judging clause invalid and severable and take upon itself the normal court function of deciding whether the particular service was or was not domestic. You can see at once that these are the two positions taken by judges and scholars on the American self-judging reservation. It either makes the entire declaration a nullity, or it simply knocks out the self-judging feature and leaves the United States in the position of being subject to the normal compulsory jurisdiction of the Court as if the self-judging clause did not exist.

Therefore, when opponents of repeal say that, in adhering to the self-judging clause, the United States is doing no more than following the policy which this country adopted fifty or more years ago, that is, the policy of accepting the jurisdiction of international tribunals only on a case-by-case basis,³⁴ they are missing the essence of the self-judging problem. If the United States wanted to pursue a policy of accepting international adjudication only on a case-by-case basis, it should simply file no declaration of acceptance of compulsory jurisdiction at all, and this would leave it in precisely that position. In so doing, the United States would declare to all the world that it is going to copy and follow the Russian example so far as the International Court of Justice is concerned, and abandon the company of the thirty-four countries which have declarations without self-judging clauses.

But certainly it was the intention of this country and of other countries at the time of forming the United Nations and enlarging the membership of the International Court to take a step forward toward settlement of international disputes by peaceful legal means as the normal and regular method. The United Nations Charter makes this clear. The United States did file a declaration. And the object of the present move to repeal the Connally Amendment is to make the substance of

³⁴ Cf. Finch, *United States Policy Regarding International Compulsory Adjudication*, 46 A.B.A.J. 852 (1960).

its action in accepting International Court jurisdiction live up to its apparent purpose.

C. Contribution to World Peace

If the Connally Amendment were repealed, the United States and the world would gain a substantial advance toward the goal of world peace through the settlement of international disputes by orderly legal processes.

Certainly the substitution of law for force and power politics in international disputes will not come about overnight, nor as a result of a single move such as repeal of the Connally Amendment. But repeal of the Connally Amendment has assumed the proportions of a proving-ground on which there will be decided the question whether the use of the International Court and international law will be strengthened in the future, or weakened. Opponents of repeal sometimes make the unsupported assertion that the International Court cannot deal with the important disputes that affect war and peace anyway, and therefore we should not take this problem too seriously.³⁵ This assertion is in defiance of facts that are observable to anyone who reads the daily papers. Most current or recent disputes of major proportions have involved legal questions of a kind which could be handled by judicial and arbitral procedures if the nations of the world including the United States would accept these procedures. This is not to say that, in today's imperfect world, these disputes are in fact going to be settled in court. The point is that, by their inherent quality and nature, they are of a kind which could be handled legally in whole or in part, if the parties would agree to this method of handling. The first step in reaching this kind of agreement is to put one's own house in order by indicating that the United States at least will accept this method of settlement.

Among the disputes which have recently threatened or are still threatening the peace may be mentioned the following:

The Suez dispute centered around the alleged breach of Egypt's agreement with Universal Suez Company and the Convention of Constantinople of 1888.³⁶ This alleged violation of legal rights was the kind of question that could have been appropriately submitted to the Court, just as the nationalization of the Anglo-Iranian Oil Company, an

³⁵ Cf. Seligman, *The World Court Cannot Become a Substitute for War to Remedy Injustice*, 46 A.B.A.J. 251 (1960).

³⁶ Oct. 29, 1888, 79 BRITISH & FOREIGN STATE PAPERS 18.

event which also threatened to precipitate war in the Middle East, was submitted.³⁷

The present Suez dispute, which takes the form of objections by Israel to Egypt's practice of blocking and searching Israel-bound shipping desiring to transit the Suez Canal, consists of a number of questions which are almost all legal in character. All the parties to the dispute, in their presentations to the United Nations, began by invoking their rights under international law. The United Arab Republic accepted the compulsory jurisdiction of the International Court on questions involving the Convention of Constantinople of 1888, and there seems to be no reason why a country which was a party to that treaty (which would not include Israel) should not in an appropriate case take this question to the International Court.³⁸

Another justiciable dispute causing tension in the Middle East is the controversy on whether the Gulf of Aqaba and the Straits of Tiran are legally waters open to innocent passage by Israel-bound cargo.

The Berlin crisis involves several specific legal disputes. The principal legal questions concern rights of access under various agreements and under doctrines such as easement of necessity, and the Soviet claim of right to transfer its obligations under the Four-Power Pact to East Germany,³⁹ as well as the legal effect of any such attempt to transfer on destruction of Western rights of access and of Soviet obligations generally.

It has already been pointed out that claims of expropriations of

³⁷ See *Anglo-Iranian Oil Co. Case (Preliminary Objection) (United Kingdom v. Iran)*, [1952] I.C.J. Rep. 93 (Judgment of July 22, 1952).

³⁸ For the text of the "particular" declaration of the United Arab Republic "inviting" such lawsuits, see [1958-1959] I.C.J.Y.B. 225.

³⁹ Protocol With the United Kingdom and the Union of Soviet Socialist Republics on Zones of Occupation and Administration of the "Greater Berlin" Area, Sept. 12, 1944, with Amending Agreement, Nov. 14, 1944 (both effective Feb. 6, 1945), and with Amending Agreement Between the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, July 26, 1945 (effective Aug. 14, 1945), [1954] 2 U.S.T. & O.I.A. 2078, T.I.A.S. No. 3071, 227 U.N.T.S. 279, 286, 297; Agreement With the United Kingdom, the Union of Soviet Socialist Republics, and France on Lifting of Restrictions Imposed Since March 1st, 1948, on Communications, Transportation, and Trade with Berlin, May 4, 1949, 63 Stat. 2410, T.I.A.S. No. 1915, 138 U.N.T.S. 123. For other relevant documents see U.S. DEP'T OF STATE, PUB. NO. 6959, TREATIES IN FORCE 220 (1960). For a statement of the United States' long-standing position see *The Rights of the United States in Berlin*, 43 AM. J. INT'L L. 92 (1949) (Extract from Dep't of State Release No. 821, Oct. 8, 1948.)

private property and of interference with international investment are intrinsically susceptible of judicial determination.

Boundary disputes are generally by nature amenable to judicial settlement. The International Court has already handled several such disputes.⁴⁰ In late 1960 a long-standing dispute on the Honduras-Nicaragua boundary was decided by the Court.⁴¹ The boundary dispute between China and India, which has all the potentialities of a major source of tension, could be in this category.

Aerial incidents are amenable to Court treatment, and seven attempts to bring them into court have been made by the United States.⁴² It is true that all attempts to bring such cases against Communist countries have been blocked by the refusal of Communist countries to accept the Court's jurisdiction. However, this does not change the fact that the United States could take a step closer to the judicial settlement of such incidents by removing the additional roadblock in the path of such settlement represented by its own Connally Amendment and its reciprocal effect. As long as the Connally Amendment is in its declaration, the United States is in no position to complain of Russia's refusal to allow these cases to be handled in court, since the United States has reserved the right to do precisely what Russia has done if the positions were reversed.

It is clear, then, that many of the disputes that are threatening world peace today are in whole or in part the kind of disputes that the International Court could help settle peaceably. Sometimes, of course, there are mixed questions of law and diplomacy in a controversy. For example, the Berlin question is a mixture of disputes over present rights under existing agreements, which are justiciable questions, and disputes over what changes should be made in any new regime that might be set up for Berlin and Germany, which questions are obviously political or diplomatic. But this does not mean that the judicial process would not make an important contribution. In such mixed questions, the judicial process could put to rest questions about existing legal rights, and could

⁴⁰ *E.g.*, Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands), [1959] I.C.J. Rep. 209 (Judgment of June 20, 1959). *Cf.* The Minquiers and Ecrehos Case (France/United Kingdom), [1953] *id.* at 47 (Judgment of November 17, 1953).

⁴¹ See Case Concerning the Arbitral Award Made by the King of Spain on December 23rd, 1906 (Honduras v. Nicaragua), [1960] *id.* at 192 (Judgment of November 18, 1960).

⁴² See proceedings numbered (18), (19), (21), (22), (25), (27), and (28), *supra* note 6.

forestall arbitrary one-sided action in disregard of present agreements and rights, such as is often threatened by Premier Khrushchev in the Berlin situation. While peace and order were thus being kept, any needed changes could be worked out by political means. In addition, and in a more general sense, the gradual strengthening of the judicial process in the world would serve to enhance the "habit of law" and the general atmosphere around the world of resort to peaceful settlement of disputes under law, as against impulsive and high-handed disregard of legal rights and procedures. The true measure of the Court's contribution to peace will not be found merely in the number of actual disputes it settles, but also in the general increase in respect for law and the general elevation of the standard of international conduct that would flow from the Court's enlarged role.

It might be thought that in the Congo, for example, at a stage where overcoming sheer physical chaos was the main problem, there would not be a role for the International Court to play. But on September 11, 1960, the President of the Republic of the Congo addressed the following message to the United Nations:⁴³

I have the honour to request the United Nations:

.....

To assist the Congo to reactivate the courts. To this end I, with the Prime Minister, shall request the creation of a pool of jurists which could be drawn on, on the recommendation of the International Court, to fill vacant judicial posts.

.....

[*signed*] Joseph Kasavubu
President of the Republic of the Congo

It is of unusual significance that the Congo, in its darkest hour of lawlessness, searching for some established institution which could be trusted to provide the beginnings of a regime of law and justice, should turn to the International Court of Justice for help. In spite of the fact that there is no one from the Negro countries of Africa on the Court, the Congo has such confidence in the Court that it is willing to give it major responsibility in the reactivating and staffing of its entire court system. Yet the United States, with its long tradition of rule of law, displays so little confidence in the Court that it will not even recognize

⁴³ U.N. Doc. No. S/4500/Add. 1 (Sept. 11, 1960).

the Court's normal right to interpret its own jurisdictional Statute in a particular case.

An important specific relation between increased judicial settlement of disputes and peace lies in the contribution to be made to the prospects of successful disarmament. Secretary of State Herter in his address to the National Press Club, Washington, D. C., February 18, 1960, summarized the United States' current disarmament proposals. These were the proposals that were presented to the Ten-Nation Conference, and which still represent the most advanced official views on how successful disarmament can be achieved. After describing the first stage of disarmament as one in which a more stable military and deterrent environment must be created, Secretary Herter then went on to say:⁴⁴

To assure a world of peaceful change, we should project a second stage of general disarmament. Our objective in this second stage should be two-fold:

First, to create certain universally accepted rules of law which, if followed, would prevent all nations from attacking other nations. Such rules of law should be backed by a world court and by effective means of enforcement—that is, by international armed force.

Second, to reduce national armed forces, under safeguarded and verified arrangements, to the point where no single nation or group of nations could effectively oppose this enforcement of international law by international machinery.

Central to this disarmament scheme is the conviction that you cannot merely remove armaments and leave a vacuum. Armaments were created for a purpose, and a major part of that purpose has been to guarantee that the rights of the arming country will be fairly respected. Before a nation parts with its armaments, it will want to be assured that some other system for guaranteeing fair respect for its rights is in effective operation. There is a direct relation, then, between the rate at which disarmament may be expected to succeed, and the rate at which we simultaneously strengthen the protection of national rights by legal and judicial means. To oppose strengthening of the international judicial process, as by opposing repeal of the Connally Amendment, is also to impede and postpone any possible disarmament program, and thus to impede and postpone the vast economic gains and the relief from fear and tension that disarmament would bring.

⁴⁴ N.Y. Times, Feb. 19, 1960, p. 4, col. 7.

D. Effect on the Over-All Peace Through Law Program

The fourth major gain that repeal of the Connally Amendment would bring would be the restoration to the United States of the ability to undertake a position of leadership in the broad program of achieving peace through law in the world.

Over the past few years, a tremendous momentum has been built up for this promising effort. The American Bar Association's Special Committee on Peace Through Law has obtained financing for four international regional meetings of lawyers for the purpose of stimulating peace through law programs in all countries of the world, and for a global meeting at which, with the assistance of the ideas gained at the regional meetings, a world-wide action program to strengthen the substance, the machinery, and the acceptance of law in international affairs will be undertaken. The Special Committee has also built up contacts with thousands of people around the world, has prepared and distributed a wide variety of useful background materials, and has helped to stimulate the creation of over a hundred state, local, and affiliated committees on peace through law, all of which in turn are engaged in action programs to the same end.

In universities, law schools, and research centers, there has been a distinct upsurge in research, publication, teaching, and clarification of international law, and a similar trend is observable among governmental agencies, the United Nations agencies, and voluntary and professional associations. The President of the United States has for two years had a Special Consultant with the principal responsibility of advising on strengthening international rule of law and recommending appropriate governmental measures. This program has occupied a major place in the President's State of the Union messages, and in repeated speeches by the Vice President, the Secretary of State, the Attorney General, and a number of Congressmen and Senators.

However, with all this heartening groundswell of activity, there is serious danger that the United States will see its best efforts blighted by the charge that its deeds do not match its words. Here again, anyone who attends international conferences or who deals with international lawyers and officials from other countries is acutely conscious of the ever-present problem of how to answer the question, which inevitably comes after a discussion of strengthening international rule of law has been launched: "That is all very well, but what are you going to do about the Connally Amendment?" The following statement by the

Indian Ambassador to the United States, The Honorable Mahomedali Currim Chagla, who is also a distinguished judge, is typical of world opinion.⁴⁵

You will forgive my saying so, but I cannot understand how the United States can justify a piece of legislation which reduces the Court to a mockery and which effectively prevents any rule of law ever being established in the international field. You must not forget that the United States proudly claims to be the leader of the free world. She wants peace, but peace with justice; and how can you ever have justice if the only forum which can settle international disputes is reduced to a humiliating position where it cannot entertain any disputes which ought to be properly decided by it?

It has been a strange and depressing paradox in American foreign policy that many of the finest ideas for progress in international organization and rule of law were contributed by Americans, but that when the brainchild finally came back to America for ratification, it was strangled by its own people and representatives, and in some instances by a minority which was able to block the necessary two-thirds vote in the Senate. People like Elihu Root and Rufus Choate, Frank B. Kellogg and Woodrow Wilson, Charles Evans Hughes, Manley O. Hudson and John Bassett Moore, made important contributions to the concepts of international adjudication and arbitration, and of appropriate tribunals and organizations. But the final action by the United States gave rise to a European wisecrack which used to be heard during the 1930's: "The United States gave two things to the world, the League of Nations and cocktails, and then promptly proceeded to deprive itself of the use of both."

When the United States first passed the Connally Amendment, its lead was followed by seven other countries.⁴⁶ The trend is now definitely away from this kind of clause, but the leadership has been taken by France, India and Pakistan which have repealed their self-judging clauses.⁴⁷ Great Britain also had a self-judging clause applicable to a different reservation,⁴⁸ and it has also abandoned the self-judging prin-

⁴⁵ *Rule of Law and the International Court of Justice*, AM. SOC. INT'L LAW, PROCEEDINGS, 237, 241 (1960).

⁴⁶ *Vis.*, France, Mexico, Pakistan, Liberia, the Union of South Africa, India, and The Sudan. See [1946-1947] I.C.J.Y.B. 220 (France); [1947-1948] *id.* 129 (Mexico); [1947-1948] *id.* 131 (Pakistan); [1951-1952] *id.* 185 (Liberia); [1955-1956] *id.* 184 (Union of South Africa); [1955-1956] *id.* 186-87 (India); and [1957-1958] *id.* 208 (The Sudan).

⁴⁷ See [1958-1959] I.C.J.Y.B. 212 (France) and 1960 DUKE L.J. 84-85 (India).

⁴⁸ See [1956-1957] I.C.J.Y.B. 223-24.

ciple.⁴⁹ The United States is the only major power retaining the self-judging clause.

The repeal of the Connally Amendment, then, is an important move both in the substantive improvement it would work in the settlement of international disputes under law, and in the gain which would result in removing the roadblock that is now threatening the peace-through-law movement in general and America's prestige and leadership in particular.

ANALYSIS OF ARGUMENTS AGAINST REPEAL

As against these documented facts showing the gains that would result from repeal of the Connally Amendment, the objections to repeal that have been advanced in various circulars, speeches, and articles over the past few years are strikingly devoid of solid substance. Although there has been plenty of time to prepare a lawyer-like case for retention of the Connally Amendment, if such a case is possible, the presentations in favor of the Connally Amendment are still largely made up of unsupported fears, inaccurate assertions about international law with no citation of sources, gratuitous suspicions and accusations against the International Court and its members without any reference to the record of either the Court or the individual members, and conjectures about the future performance of the Court and the future nature of international law which assume that individuals, institutions, and even legal systems can overnight turn a 180 degree angle and become the exact opposite of everything they have been since their inception.

In support of this characterization, the arguments against repeal will now be listed, together with the correct facts and law drawn from authoritative sources.

A. The Argument That the Court Does Not Have a Guiding Rule of Law to Determine What Matters Are Essentially International or Domestic

The opponents of repeal constantly make the unsupported assertion that there is no rule of law to guide the World Court in determining what matters are essentially international or domestic. The true fact is that the Court has a clear rule of law which it has laid down on this point. The test is not whether the matter involves more than one country's interests, or geographically transcends national boundaries, or has repercussions in foreign lands. The test is whether the matter is one

⁴⁹ See [1958-1959] I.C.J.Y.B. 225-26.

regulated by international law. This rule was laid down by the Permanent Court of International Justice and has been the guiding rule ever since.

The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law.⁵⁰

In the teeth of this straightforward rule of law, and a straightforward record of its past observance, the opponents of repeal continue to argue that the International Court is somehow going to take over control of vast areas of our domestic life. One of the most widely circulated leaflets, which was one of a number of such circulars put out to stimulate a letter-writing campaign prior to the recent Senate hearings,⁵¹ actually contained the following statement purporting to summarize the effect of the Connally Amendment:⁵²

'This Court, loaded with members of the Communist Party and their dupes, would have jurisdiction over all areas of our lives, for Congress will NO LONGER control our - - - -

<i>Trade and Tariffs</i>	<i>International Bank for Reconstruction and Development</i>
<i>Civil Rights</i>	<i>Mental Health and Birth Control</i>
<i>Economics and Education</i>	<i>Post Offices and Censorship</i>
<i>Foreign Trade</i>	<i>The Military</i>
<i>Immigration and Emigration</i>	<i>Welfare</i>

Another widely circulated newsletter added an even more astonishing question.

What if we tried to discontinue foreign aid to some communist or neutralist nation now receiving it, and that nation sued us in the World Court because we were hurting its economy?⁵³

⁵⁰ Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., ser. B, No. 4, at 23-24 (1923).

⁵¹ See *Hearings on S. Res. 94 Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess. (1960).

⁵² *America's Sovereignty Will Be Lost if the U.S. Senate Votes Away the Connally Amendment*, CIRCULAR OF THE PATRIOTIC LETTER-WRITERS, Box 2003D, Pasadena, California.

⁵³ *The World Court*, 5 *The Dan Smoot Report*, No. 37, at 296 (September 14, 1959). See also *The Connally Reservation*, 6 *id.* No. 5 (February 1, 1960).

And here is an actual quote from an editorial in the *Chicago American*.⁵⁴

If the Connally amendment were repealed, the World court could conceivably order the State of California to set Caryl Chessman free, on the ground that putting him to death might stimulate riots in Uruguay, thus disturbing the peace and tranquility of a foreign nation.

The World court could declare any provision of the United States Constitution invalid if it affected the interests of any foreigner in a way the court considered unfavorable. The court would have the power to destroy all our American institutions.

Of course, none of these allegations ever show the existence of any principle of international law regulating the subject matter which the Court is supposedly going to take over. The writers simply jump to the conclusion that if a particular matter has any kind of effect abroad, the International Court will grab jurisdiction over it. This is precisely what the World Court has already said that it will not do. It explicitly said in the *Nationality Decrees Issued in Tunis and Morocco* opinion⁵⁵ that the mere fact that a certain matter very closely concerns the interests of more than one state is not a reason for its taking jurisdiction. It is difficult to see how the rule could be put in plainer terms. The matter, to come within the Court's jurisdiction, must be one regulated by international law.

In most of the subjects listed in these circulars and editorials, there is no conceivable question of regulation by international law. The administration of domestic justice is the clearest kind of domestic question. The discontinuance of foreign aid would be a simple exercise of the most elementary right under international law to make or not to make such international agreements as a nation chooses. The suggestion that such areas as economics and education, mental health and birth control, post offices and censorship, and the military and welfare within a particular country are regulated by international law is so patently false that if comparable statements were sent through the mail about commercial products they would certainly be considered violations of mail fraud statutes.

There are four areas of domestic policy which have been so frequently brought up that they deserve separate mention. These four are: tariffs, immigration, the Panama Canal, and civil rights.

⁵⁴ *Chicago's American*, Feb. 25, 1960, p. 14, col. 1.

⁵⁵ P.C.I.J., ser. B, No. 4 (1923).

B. Tariff Policy

Ever since Senator Connally first introduced his amendment on the floor of the Senate,⁵⁶ supporters of the Connally Amendment have been making the unsupported assertion that the United States would lose control over its policy of raising or lowering tariffs if the Connally Amendment were repealed.

This charge is not only unsupported, but is in direct conflict with the clear and unqualified body of international law on the subject. All authorities uniformly hold that control of tariff policy is a domestic matter. Indeed, there is no record of any state attempting to assert the contrary. It is sometimes easy to forget that every other country is as anxious as the United States is, some much more anxious, to keep control over tariff policy. International law on the subject is summed up in a standard treatise as follows:⁵⁷

Most States have kept up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture, and, also, their self-sufficiency in the event of war. . . . In thus interfering with the free flow of goods and persons, States do not act in contravention of International Law.

Perhaps the thing which tends to confuse the opponents of repeal is that a country may, of its own free will, voluntarily make a treaty dealing with tariffs. When it does, to that extent it of course intentionally limits its freedom of action. The interpretation of that treaty, like the interpretation of any treaty, becomes a matter of international law. In such a case it is not the presence or absence of the Connally Amendment or an act of the Court that gives international character to the obligation assumed. It is the deliberate choice of the United States or any other country to grant some concession in order to gain a tariff or trade advantage for itself.

C. Immigration Policy

The argument about immigration policy put forward by the opponents of repeal closely parallels the argument about tariffs. The fallacy in the argument, the complete lack of authority supporting it, and the uniform state of international law holding immigration policy to be domestic, also closely parallel the tariff situation. Immigration policy, like tariff policy, is exclusively a matter of domestic concern un-

⁵⁶ 98 CONG. REC. 10624 (1946). For the Senate vote accepting Senator Connally's proposed amendment, see *id.* at 10697.

⁵⁷ I OPPENHEIM, INTERNATIONAL LAW 323 (8th ed. by H. Lauterpacht, 1955).

der all cases and authorities, both national and international. Schwarzenberger states: "It is uncontroversial that every State has absolute discretion over the admission of foreigners."⁵⁸

The domestic judicial decisions of various countries are to the same effect. The rule in the United States is stated in *United States ex rel. Knauff v. Shaughnessy*.

At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government.⁵⁹

The law in other countries is the same.⁶⁰

It is somewhat reassuring to note that, as the overwhelmingly one-sided state of the law on this subject and the subject of tariffs becomes increasingly known, the opponents of repeal are more and more dropping the tariff and immigration arguments and trying to find others to take their place.

D. Panama Canal

The charge that the rights of the United States in the Panama Canal would be endangered by the repeal of the Connally Amendment is, like the other charges, unsupported by law or evidence. The correct fact is that the rights of the United States in relation to Panama would not be damaged or threatened by repeal of the Connally Amendment; on the contrary, the prospects for their protection would be substantially improved.

An analysis of the rights of the United States in relation to the Canal falls into two parts: rights in relation to the Republic of Panama, and rights in relation to all other countries.

As to the Republic of Panama: The rights of the United States are assured in the United States' treaties with Panama of 1903,⁶¹ of 1936,⁶²

⁵⁸ 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 360 (3rd ed. 1957), and authorities collected, n. 28, *ibid.*

⁵⁹ 338 U.S. 537, 542 (1950).

⁶⁰ *E.g.*, United Kingdom: *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272; France: *Marcon*, Conseil D'Etat, Nov. 21, 1952, [1953] *Gazette du Palais* (1st Sem.) 33; The Philippines: see authorities collected in Bautista, *International Law, Annual Survey of 1959 Supreme Court Decisions*, 35 *PHIL. L.J.* 754, 759, nn. 31 & 32 (1960).

⁶¹ *Construction of Ship Canal to Connect Waters of Atlantic and Pacific Oceans, Treaty With Panama*, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431 (effective Feb. 26, 1904).

⁶² *Treaty of Friendship and Cooperation With Panama*, Mar. 2, 1936, 53 Stat. 1807, T.S. No. 945 (effective July 27, 1939).

and of 1955.⁶³ Even if one were to assume the worst, and postulate an attack upon the original 1903 treaty on the ground of alleged duress, there are a number of reasons, each sufficient in itself, why this poses no hazard under international law. For one thing, in international law duress is not a ground for asserting invalidity of a treaty,⁶⁴ even if it existed in this case, which would be problematical. A moment's reflection will show that, if duress invalidated international treaties, there could never be a valid peace treaty.

In any event, once more assuming the worst as to the first point, the basic agreement has been voluntarily reaffirmed by both parties under circumstances where there could be no conceivable claim of duress, in the treaties of 1936 and 1955. This removes any possible doubt as to the validity of the agreement. Under the agreement,⁶⁵

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

In *J. N. Gris v. The New Panama Canal Company*, the Supreme Court of Panama said:⁶⁶

. . . [T]he Republic of Panama agreed that the United States should possess and exercise, to the entire exclusion of the Republic, those rights, powers and authority, that is to say, the rights, power and authority that a sovereign alone can have

As to the United States' rights in relation to other nations of the world: The basic rule was established by a World Court decision, *Case of the S.S. "Wimbledon."*⁶⁷ This case holds that a canal connecting two open seas is not deemed subject to an international regime

⁶³ Treaty of Mutual Understanding and Cooperation With Panama, Jan. 25, 1955, [1955] 2 U.S.T. & O.I.A. 2273, T.I.A.S. No. 3297, 243 U.N.T.S. 211 (effective Aug. 23, 1955).

⁶⁴ See, e.g., 1 OPPENHEIM, *op. cit. supra* note 57, § 499, esp. at 892, n. 3, for a collection of the authorities. For a penetrating analysis of the subject, see BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 108-16 (ed. by H. Lauterpacht and C. H. M. Waldock, 1958).

⁶⁵ 33 Stat. 2234, 2235, art. III.

⁶⁶ Decision of January 20, 1905, quoted in the Note from the United States Secretary of State (Hughes) to the Panamanian Minister in Washington (Alfaro), [1923] 2 FOREIGN REL. U.S. 648, 656 (1938).

⁶⁷ P.C.I.J., ser. A, No. 1, at 15 (1923).

in derogation of the control of the constructing state unless and to the extent that the canal has been "permanently dedicated to the use of the whole world. . . ."⁶⁸ This can only come about by a deliberate act, such as a treaty. The controlling treaty—the Hay-Pauncefote Treaty⁶⁹—was made with Great Britain, and promises that the Canal "shall be free and open to the vessels of commerce and of war of all nations observing these Rules"⁷⁰ This clearly grants a right to Great Britain which the United States is bound to respect. Whether other nations could directly enforce such a right by virtue of a treaty to which they were not a party has never been decided. However, assuming they could,⁷¹ the specific rights so granted to them or to Britain or Panama do not prejudice the essential rights of the United States necessary to its own security. It is now established under customary international law, as the result of accepted practice in relation to this and comparable canals, that in time of war the United States may deny or restrict passage through the Canal to the extent necessary to protect either its defense or its neutrality.⁷²

It is clear, then, that the United States has no cause for concern about the preservation of its rights in the Panama Canal. What is less generally understood is that the United States would actually gain a valuable asset for the improvement and protection of its rights in Panama by the repeal of the Connally Amendment. Panama has accepted the compulsory jurisdiction of the International Court without reservation.⁷³ Panama is therefore one of those countries that, under the reciprocity principle, could now throw the United States out of court under the Connally Amendment by declaring any case essentially domestic.

Suppose, for example, that a number of citizens of Panama somehow managed to seize control of the canal or a part of it. What would the United States do? The supporters of the Connally Amendment

⁶⁸ *Id.* at 28.

⁶⁹ Treaty With Great Britain to Facilitate the Construction of a Ship Canal, Nov. 18, 1901, 32 Stat. 1903, T.S. No. 401 (effective date Feb. 21, 1902).

⁷⁰ *Id.* at 1904, art. III.

⁷¹ See, generally, on the conferment of treaty rights upon third nations, LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 306-10 (1958).

⁷² See Proclamation of May 23, 1917, 40 Stat. 1667; Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 BRIT. YB. INT'L L. 187, 205 (1956).

⁷³ See [1958-1959] I.C.J.Y.B. 220.

might answer that the United States should resort to military action. Yet this is precisely what the United States objected to in the case of the British and French action in Suez. Certainly it would be a disaster for the United States to be maneuvered into a position where the only alternatives available to it were loss of control of the canal or military action to regain it. There is another course open, but it is possible only if the Connally Amendment is repealed. This would be the orderly and civilized course of taking the case to the International Court of Justice. As shown above, the law would be overwhelmingly on the United States' side in such a case. But as matters now stand, Panama could merely invoke the reciprocal effect of the Connally Amendment, declare the question to be essentially within the domestic jurisdiction of Panama, and block the United States' legal action.

E. Civil Rights

The control of such matters as internal civil rights, school integration, and other human rights matters, is so obviously a matter of domestic jurisdiction that the books of international law may be searched in vain for any law on the subject. Apparently the only reason the subject has arisen is the action of the United Nations in relation to the Universal Declaration of Human Rights and the Draft Covenant on Human Rights. All that needs to be said about these two documents is that they do not create any law, or any legal rights, or any legal obligations. So far as the Universal Declaration of Human Rights is concerned, this is elementary. Kelsen, in his standard treatise on the United Nations, states ". . . The legal effect of the recommendations made by the General Assembly is . . . that . . . they are not binding. . . ." ⁷⁴

At the time the Declaration was adopted, Mrs. Franklin D. Roosevelt stated on behalf of the United States:⁷⁵

In giving our approval today to the Declaration, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or legal obligations.

As to the Draft Covenant on Human Rights, it creates no legal obligations either generally or in specific relation to the United States. It creates no obligations generally because it was never even adopted by

⁷⁴ KELSEN, *THE LAW OF THE UNITED NATIONS* 459 (1951).

⁷⁵ U.N. GEN. ASS. VERBATIM REC., 1948, 3rd Sess., (A/PV 180) (1949).

the General Assembly. As for the United States, the Draft has never been signed or ratified by the United States and the United States has made it clear that it has no intention of signing or ratifying it.

While on this subject, one should probably take the occasion to deal with one of the more fanciful charges made by the opponents of repeal, which is that individual Americans might be tried criminally by the World Court. The answer to this lies in the Statute of the International Court of Justice, which provides: "Only States may be parties in cases before the Court."⁷⁶

F. "No Distinction Between Domestic and International Affairs"

Having been repeatedly challenged over a period of years to come up with some kind of law or authority or documentation for their charges, the opponents of repeal have finally found one isolated sentence in a State Department bulletin.⁷⁷ The first sentence in this little pamphlet makes the general statement: "There is no longer any real distinction between 'domestic' and 'foreign' affairs."

Read in its context,⁷⁸ this sentence cannot by any stretch of the imagination be found to have a bearing on international law. The context is this: Americans are constantly being told nowadays that anything that happens at home may have repercussions on the American image abroad. This is true of both American successes and American mistakes.

⁷⁶ STAT. INT'L CT. JUST. art. 34, para. 1.

⁷⁷ U.S. DEP'T OF STATE, PUB. NO. 3972, GENERAL FOREIGN POLICY SERIES NO. 26, OUR FOREIGN POLICY (1950).

⁷⁸ It may be worthwhile to quote the entire opening page of this pamphlet:

I

Our Foreign Policy

ITS ROOTS

There is no longer any real distinction between 'domestic' and 'foreign' affairs.

Practically everything we do, the way we tax and spend our national income, the way we run our public and private business, the way we settle the differences among ourselves and with other nations, what we say in our newspapers, over the air and on public platforms, our attitudes toward each other and toward other peoples—all these things affect not only our security and well-being at home, but also our influence abroad.

All these things go into the making of the character, the personality and the reputation of the United States. Out of all these things grow the foreign policies of the United States.

Policies are an expression of the national interests.

That is a way of saying that our policies reflect what we are and what we want.

During the 175 years since we became a nation, our national interests have changed in some ways, but their general character has remained constant. . . .
Id. at 4.

Local strike violence may hurt United States' prestige abroad, just as conspicuous success in labor relations may improve it. A sensational crime may damage United States' reputation abroad; a sensational constructive achievement may help it. A highly publicized local scandal may in some degree discredit the United States internationally; a highly successful cultural or scientific or educational achievement locally will make its stock go up abroad. This has been a major theme for years of those who are trying to make Americans more conscious of their position of world leadership and the responsibilities that go with it.

This is what the State Department pamphlet was concerned with. The most that could be read into the sentence is that almost everything the United States does may concern the interests of more than one state. But the International Court in its *Tunis and Morocco* opinion has said plainly that matters are not removed from domestic jurisdiction merely because they "may very closely concern the interests of more than one State. . . ."⁷⁹

The sentence in this State Department pamphlet does not say that there is no longer any difference between matters regulated by international law and matters regulated under domestic jurisdiction. It does not even come close to saying this. As matters now stand, we see the spectacle of one irrelevant sentence from an ephemeral bulletin placed in the scales to counterbalance almost four hundred years of solid international law made up of custom, treaties, diplomatic usage, decisions, and writings of authorities.

G. The Court's Record on Domestic Jurisdiction

All authorities agree that the Court has taken a conservative attitude toward its jurisdiction. Perhaps the most striking objective evidence of this attitude is the fact that, of twenty-nine separate contentious matters disposed of by the Court since 1945, the Court has dismissed nineteen on jurisdictional or admissibility grounds.⁸⁰ One of the most experienced authorities on international law, Philip C. Jessup, made the following statement in the recent Senate hearings on the subject:⁸¹

⁷⁹ P.C.I.J. ser. B, No. 4, at 23 (1923).

⁸⁰ *Viz.*, proceedings numbered (5), (8), (9), (10), (13), (14), and (17) through (29), note 6 *supra*. See further, LIACOURAS, MATERIALS ON THE RECORD OF THE INTERNATIONAL COURT OF JUSTICE: 1945-1960, pt. IV (World Rule of Law Center, 1961 publication).

⁸¹ *Hearings on S. Res. 94 Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess., 411 (1960).

A study of the jurisprudence of the International Court of Justice reveals that . . . the Court has not showed the slightest inclination to amplify its own authority or to act in any but a judicial and impartial way.

Another of America's most eminent international law scholars, Professor Quincy Wright, as part of his statement at the same hearings offered a specific illustration from an International Court decision:⁸²

I suggest that domestic jurisdiction—a state has domestic jurisdiction in every dispute whatever, except those in which it has accepted an obligation by treaty or in which it is bound by an obligation under general international law, and I want to point out that the International Court of Justice has leaned over backward on the question of jurisdiction.

Let me just give an illustration in the case of the *Lotus*, which is a case where Turkey was claiming jurisdiction over a French officer who was accused of having been negligent and, as a result, had collided with a Turkish vessel on the high seas, with the resulting loss of lives of several Turkish seamen.

Now, France claimed that Turkey had no jurisdiction over this matter. The International Court of Justice said that jurisdiction depends on sovereignty; that it belongs to the state that contests the jurisdiction of a state, to show a positive rule of international law that imposes an obligation upon the state in the circumstances.

It found that France was unable to show that Turkey was bound by any obligation of international law and that, therefore, the matter lay within the domestic jurisdiction of Turkey.

Here again, after a couple of years of being challenged to come up with some kind of law to support their position, the opponents of repeal have finally cited one decision of the International Court, and it turns out to prove the exact opposite of the point for which the opponents of repeal cite it. This is the *Nottebohm Case*.⁸³ The case has been cited by opponents of repeal as evidence that the International Court may expand its jurisdiction unduly by invading essentially domestic areas. However, no party to the proceedings contended that the Court was violating the domestic jurisdiction concept to enlarge its own jurisdiction.⁸⁴ Since the parties themselves did not make this claim, it is rather odd to find the claim now being made by opponents of the Con-

⁸² *Id.* at 113.

⁸³ (Second Phase, Admissibility), (*Leichtenstein v. Guatemala*), [1955] I.C.J. Rep. 4 (Judgment of April 6, 1955).

⁸⁴ See the submissions of Liechtenstein and Guatemala, quoted in [1955] I.C.J. Rep. 4, 6-12.

nally Amendment repeal. The main point of the decision was that an international court is competent to decide the true nationality of the claim on which its jurisdiction depends. This is a recognized principle of international law. The International Court in this instance decided that the country of Liechtenstein was not entitled to appear in the International Court on behalf of Mr. Nottebohm under the procedure in which a nation-state can appear as a party to a suit when the rights of one of its nationals are identified with the nation's rights. Mr. Nottebohm was a German national by birth who had resided in Guatemala for many years, who later was naturalized in Liechtenstein, returned to Guatemala to live, was there arrested during the war, and deported to the United States.

What the Court actually did was to apply the rule on its duty to decide the true nationality of a claim in such a way as to restrict its own jurisdiction rather than to expand it.⁸⁵

H. The Attack on Competence of Judges from Other Countries

One of the most unfortunate features of the debate on the Connally Amendment is that it has led to a number of gratuitous and uninformed attacks upon the competence and judicial integrity of the judges from other countries represented on the Court.⁸⁶ These attacks and insinuations are never supported by reference to the actual background, training, or record of any of the present judges, or by citation of any of their opinions or votes in particular cases. Many of the attacks consist of little more than the rather unworthy assumption that lawyers from other parts of the world with grounding in different legal systems cannot possibly understand basic concepts of law and justice.

The actual record of the background and experience of the judges demonstrates that this is one of the most distinguished and competent courts in the world. The backgrounds of the present judges are:⁸⁷

Dr. Philip C. Jessup (United States of America): Ambassador to the United Nations, lawyer, author of numerous legal works, Professor of International Law at Columbia University.

Sir Gerald Fitzmaurice (United Kingdom): Legal Adviser to the For-

⁸⁵ Cf. Kunz, *The Nottebohm Judgment*, 54 AM. J. INT'L L. 536 (1960).

⁸⁶ See e.g. Schweppe, *The Connally Reservation Should Not Be Withdrawn*, 46 A.B.A.J. 732, 732-33; *Hearings op. cit. supra* note 78, at 124-25 (Statement of George S. Montgomery, Jr.).

⁸⁷ For a citation to more detailed biographical sketches of these judges, see [1959-1960] I.C.J.Y.B. 15; U.N. GEN. ASS./SECURITY COUNCIL OFF. REC. (A/4475, S/4479) (1960); *Id.* (A/4477, S/4483).

- eign Office, Member of International Law Commission, author of *The Law and Procedure of the International Court of Justice*.
- Dr. Paul Kotaro Tanaka (Japan): Chief Justice of the Supreme Court, Dean and Professor of Law of Tokyo University, author of various legal works.
- Dr. Abdel Hamid Badawi (United Arab Republic): Roman and Islamic law scholar, author of numerous books on international law.
- Dr. Jules Basdevant (France): Professor of International Law, author of various legal works, Legal Adviser to Ministry of Foreign Affairs.
- Roberto Córdova (Mexico): Member of International Law Commission, Legal Counselor of Embassy, Washington.
- Dr. Jose Luis Bustamante y Rivero (Peru): President of Peru, Professor of Law, author of several legal works.
- Dr. Vladmir M. Koretsky (Union of Soviet Socialist Republic): Professor of Legal History and International Law, Member of International Law Commission, author of various legal works.
- Dr. V. K. Wellington Koo (China): Prime Minister, President of League of Nations Council.
- Dr. L. M. Moreno Quintana (Argentina): Judge in Civil and Commercial Courts of Argentina, Professor of International Law, author of various legal works.
- Sir Percy C. Spender (Australia): lawyer, Cabinet Member, Ambassador to the United States, legal author.
- Dr. Jean Spiropoulos (Greece): Professor of International Law, Member of International Law Commission, Legal Adviser to Ministry of Foreign Affairs.
- Dr. Bohdan Winiarski (Poland): Dean, University of Poznan Law School and Professor of International Law.
- Dr. Ricardo J. Alfaro (Panama): President of Panama, Minister of Justice, legal author, Chairman of International Law Commission.
- Dr. M. Gaetano Morelli (Italy): Professor of International Law, co-editor of the *Revista di diritto internazionale*, Legal Adviser to Ministry of Foreign Affairs, author of numerous legal works.

Here, again, having for several years been confronted with this factual record, and having been repeatedly challenged to bring forward some evidence to support their attacks, the opponents of repeal have finally produced one such attempt. It occurs in Mr. Loyd Wright's dissent to the report of the Special Committee on World Peace Through

Law.⁸⁸ In this dissent, Mr. Wright cites an obituary of Judge Alvarez in a London paper.⁸⁹ Judge Alvarez was a Judge of the International Court until about five years ago. The obituary mentioned that Judge Alvarez took quite a broad view of the power of the judge to change the law and believed that law was ultimately related to politics.

The appraisal of Judge Alvarez' reputation respresented by this obituary is factually correct. This is something that international lawyers and scholars have known for many years,⁹⁰ just as an occasional judge will be found in domestic courts who takes an unorthodox view of the judicial function. But here, once again, the citation proves the opposite of the point intended. For one thing, in order to find an individual for specific attack, the opponents of repeal continue to disregard all the present members of the Court and have to direct their fire at a man who has not only been off the Court for five years but who is also dead. More significantly, Mr. Wright overlooks the fact that the very obituary which he cites as authority states that the unorthodox views of Judge Alvarez actually set him apart from his colleagues. The obituary says: "His opinions . . . were highly individual. . . . [H]e was prepared to take—indeed could not be restrained from taking—a bolder line than his colleagues"⁹¹ The net effect of the obituary, therefore, is not to support the conclusion which Mr. Wright draws—that all the members of the Court are suspect—but rather to prove the opposite, that the other members of the Court were quite unlike Judge Alvarez.

So far as the quality and integrity of the Court's decisions are concerned, it is generally agreed that they are excellent. Of course, it is always possible to disagree with particular decisions, and it is difficult to apply objective standards to the performance of any court. However, the World Rule of Law Center has made an exhaustive analysis over a period of two years of all the individual votes and opinions of the judges of the International Court of Justice, and has reached the conclusion that there is no noticeable difference in their votes or opinions on particular issues attributable to differences in the legal systems of the judges' countries.

⁸⁸ See *Minority Report of the A.B.A. Special Committee on World Peace Through Law* (Aug. 12, 1960) (unpublished).

⁸⁹ *Id.* at 5-6.

⁹⁰ See, e.g., Samore, *The New International Law of Alejandro Alvarez*, 52 AM. J. INT'L L. 41 (1958).

⁹¹ See *Minority Report* at 5, *op. cit. supra* note 88, at 5.

I. Judicial Integrity

It is sometimes alleged or implied that judges on the International Court will act as politicians rather than as judges, and will vote according to national interest and party line.⁹² This implication can be refuted by objective evidence from the record. The record shows that judges from different countries have voted against the position of their own countries in a remarkable proportion of cases. To get the actual figures on this point, the 53 separate issues have been examined on which judges have voted when their own countries were parties in Judgments before the International Court. These 53 separate issues have resulted in 108 votes by these "national judges." (This is because there are usually two national judges, one on each side, voting on each issue, and in addition there happened to be one case in which the dispute was among four countries.)

The significant fact is that the national judge voted against the position advocated by his own country in 24 of 103 votes.⁹³ This means that the national judges have voted against their own countries' contentions in about one-fourth of all occasions to vote, because the judge thought his own country was wrong on the law. Even in those cases when a national judge voted for his own country's position, he was with the majority of the Court forty-three out of the seventy-nine times, and consequently the vote could hardly be necessarily attributed to considerations other than the merits.⁹⁴

J. The Judges from Communist Countries

Some of the more extreme opponents of repeal of the Connally Amendment have tried to make much of the fact that there are two judges from Communist countries on the Court.⁹⁵ As a matter of simple arithmetic, this leaves the Court with a thirteen-to-two majority of nationals from non-Communist over Communist countries. Somehow, however, the extremists manage to convert even this one-sided lineup into a Communist-dominated Court. The circular of the Patriotic Letter-Writers, Inc., may be recalled, which stated that the Court is

⁹² E.g., Schweppe, *op. cit. supra* note 86, at 733.

⁹³ LIACOURAS, *op. cit. supra* note 80, pt. VI. In 5 of the 108 instances in question, it was impossible to ascertain how the national judge voted. See *id.* at 2-3, 44a, 71a, and 87b.

⁹⁴ *Ibid.* Moreover, on 11 of the occasions in which a national judge voted against his country's position, other judges on the Court actually voted in favor of that position! See *id.* at 16, 25, 51, 71, 133, 165, 167, and 241.

⁹⁵ See commentators, *supra* note 86.

“loaded with members of the Communist Party and their dupes.”⁹⁶

It would not be difficult to imagine that the Communist countries might be somewhat unhappy about the ratio between Communist and non-Communist countries whose nationals are on the Court. But the fact that opponents of repeal are afraid of the Court because it has two nationals of Communist countries out of fifteen judges is harder to understand.

To make these fears even less understandable, it is only necessary to point out that a study of all Judgments shows no distinctive Communist party line in the votes of the judges from Communist countries. Judge Winiarski of Poland has voted with the majority thirty-three times and with the minority five times.⁹⁷ Combining the votes of two successive judges from the Soviet Union, Krylov and Kojevnikov, we find that the Soviet judge voted with the majority twenty-two times and with the minority thirteen times.⁹⁸ The next earlier judge from a Communist country, Zoričić of Yugoslavia, whose term expired in 1958, voted with the majority twenty-six times and with the minority four times.⁹⁹ There are more than a dozen instances in which the votes of judges from Communist countries have contradicted one another.¹⁰⁰ In the only case involving a Communist country in which the International Court has acquired jurisdiction, the *Corfu Channel Case (Merits)*,¹⁰¹ three judges from Communist countries, Zoričić, Winiarski, and Judge *ad hoc* Ečer, the national judge of Albania, voted against a Communist country, Albania, and in favor of Great Britain, on one of four issues decided by the Court.¹⁰² In a recent case involving the United States, the *Interhandel Case*,¹⁰³ the Soviet judge, Kojevnikov, voted in favor of the United States' position in 3 of 5 issues decided by the Court.¹⁰⁴ On one of these issues, the United States national

⁹⁶ *Supra* note 52.

⁹⁷ LIACOURAS, *op. cit. supra* note 80, pt. V. Seven of his 45 votes are not determinable. See *id.* at 44, 51, 71a, 164, 192, 194, and 196.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* Six of his 36 votes are not determinable. See *id.* at 44, 71a, 86, 87, 87b, and 164.

¹⁰⁰ *Id.* at 9, 16, 19, 25-26, 51a, 164, 165, 166, 189, 241, and 242.

¹⁰¹ [1949] I.C.J. Rep. 4 (Judgment of April 9, 1948).

¹⁰² LIACOURAS, *op. cit. supra* note 80, at 15-16.

¹⁰³ *Interhandel Case (Preliminary Objections) (Switzerland v. United States of America)*, [1959] I.C.J. Rep. 6 (Judgment of March 21, 1959).

¹⁰⁴ *Viz.*, on Preliminary Objections 3, 4(a), and 4(b). See LIACOURAS, *op. cit. supra* note 80, at 240-42.

judge, Hackworth, voted against the United States' position while Kojevnikov voted for the United States' position.¹⁰⁵

K. The Fear of Future Change

When an examination of the present law, the present facts, and the present composition of the Court has been completed and found to contain no support for the position of the Connally Amendment defenders, they fall back upon the argument that, regardless of the present state of affairs, there is always the danger that the Court and the law may change.

As to a change in the Court, we have again a matter of simple arithmetic. The judges hold office for nine years. Five judges are elected each three years. Any change sufficient to alter the character of a majority of the fifteen judges would thus take at least six years. The United States' present declaration is terminable on six months notice.¹⁰⁶ Of course, this kind of change is simply not going to happen as a matter of realistic fact. No such change has been perceptible in the last forty years. The judges are elected according to an elaborate procedure designed to bring forward the finest possible judges and to preserve the standards and traditions of the Court. It is fantastic to suppose that suddenly this same procedure is going to place fanatical politicians on the bench who are committed to a conspiracy to injure the United States.

However, although no radical change in the Court's attitude is foreseeable, and although the present state of international law poses no threats to American interest, there is still encountered the argument that international law itself may change from its present position to one which would be harmful to the United States. This contention betrays a misconception of the sources and nature of international law. Changes in international law that affect the United States cannot generally come about against its will. The two major sources of change are treaties and practice. As to treaties, no treaty binding the United States can be changed or created without its consent. As to practice and customary international law, in view of the dominant place occupied by the United States in international affairs and practices, a practice or

¹⁰⁵ *Viz.*, on Preliminary Objection 4(b). *Id.* at 241.

¹⁰⁶ ". . . *Provided further*, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration." 61 Stat. 1218, T.I.A.S. 1598, 1 U.N.T.S. 9 (in force since August 26, 1946).

custom rejected by the United States would not be considered to be a general one generally acquiesced in by states.¹⁰⁷ And as to a particular or regional custom relied on by a party, the International Court has said in the *Asylum Case (Merits)*:¹⁰⁸

But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Convention

The arguments that have been dealt with so far constitute the main points that involve the facts and law about the relation of the United States to the International Court. Several miscellaneous arguments may now be briefly touched upon.

L. Is Military Strength Enough?

One of these arguments is that we do not really need the Court because we are militarily strong and can always rely on our power to protect our rights. This conception is out of date. There may have been a time when, if an Englishman's hat was knocked off in Rangoon, the British Navy moved in. Two developments have not only changed this situation but actually reversed it. The one development is the outlawing of force in international affairs except in self-defense and authorized collective action.¹⁰⁹ The other is the building up of force so devastating that it simply cannot be used in the situations where force was once relied on. It used to be that the small and weak countries were the most eager to rely upon international law, because it was one way in which to offset superior military power. The situation now seems to be reversed. The great powers, for all their military might, are so muscle-bound by unusable power that they sometimes find themselves standing helplessly by while some smaller nation expropriates their investments and abuses their citizens. The attempted British-French action in Suez was considered by practically everyone to be an anachronistic throwback to a past era, and the action of the United States

¹⁰⁷ See LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 368-93, esp. at 369 (1958); 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 39-43, esp. at 40 (3d ed. 1957).

¹⁰⁸ (Colombia/Peru), [1950] I.C.J. Rep. 266, 277-78 (Judgment of November 20, 1950).

¹⁰⁹ For a discussion of the authorities see Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT'L L. 514, esp. 526-32 (1956). Compare Wright, *Intervention*, 1956, 51 *id.* 257 (1957), with Wright, *United States Intervention in Lebanon*, 53 *id.* 112 (1959).

and of the United Nations in demanding cessation of the Suez action put an end once and for all to this means of protecting national rights. The net result is that the great powers, with their many interests in other countries in need of protection, are realistically more in need of a working system of adjudication than any other countries, to protect themselves from the tyranny of the weak.

M. Enforcement

Another argument sometimes heard is that the International Court cannot be effective because it does not have enforcement sanctions comparable to those in a domestic legal system.

The best answer to this argument is, once more, the actual record of compliance with the decisions of this Court and other international tribunals. This record has been summarized by Oscar Schachter, Director, General Legal Division, United Nations, as follows:¹¹⁰

The record of international adjudication reveals relatively few cases of non-compliance. In the Permanent Court of International Justice, as has often been noted, there was no case of a refusal to comply. In the International Court of Justice there has been only one case of non-compliance, the failure of Albania to pay the damages awarded to the United Kingdom in the *Corfu Channel Case*. In arbitration, too, non-compliance has been comparatively rare; there are not more than a few cases out of many hundreds which have involved the refusal by the losing party to give effect to an award rendered.

Even the one exception, that of Albania in the *Corfu Channel Case (Compensation)*,¹¹¹ is a rather shaky one. Albania insisted throughout the case that, for various technical reasons, it had not submitted to the jurisdiction of the Court on the issue of determining monetary damages.¹¹²

N. World Government

Occasionally the opponents of repeal will say that repealing the Connally Amendment implies favoring world government. This is not true. Repealing the Connally Amendment would affect only the

¹¹⁰ *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1-2 (1960). (Footnotes omitted.)

¹¹¹ (United Kingdom v. Albania), [1949] I.C.J. Rep. 244 (Judgment of December 15, 1949).

¹¹² *Id.* at 248; see also e.g., *The Corfu Channel Case (Merits)*, [1949] *id.* 4, at 57 (dissenting opinion of Judge Winiarski), and 66-67 (dissenting opinion of Judge Badawi).

judicial side of international activity, and would do so not by changing the nature of the Court but by increasing the effectual use that the United States could make of it. The legislative or executive side of international activity would remain unaffected.

O. Sovereignty

Another rhetorical device quite common in the Connally Amendment discussion is the charge that greater use of the World Court is a sacrifice of American "sovereignty." This is a misleading use of the term "sovereignty." An international dispute necessarily involves the rights of two countries. While one country may claim to have sovereignty over its own rights, it obviously does not have sovereignty over the other country's rights.

What really happens when the United States accepts international adjudication is not that it diminishes its sovereignty but that it uses its sovereignty to obtain something of value. In the loose use of the term, one could just as well say that a nation sacrifices its sovereignty every time it makes a treaty. It would be nearer the mark to say that the nation uses its sovereignty by putting it to work to obtain values that can be had in no other way. If a country has only one major product, such as coffee, and would also like to have automobiles, refrigerators, and shoes, it will probably make an international trade agreement under which it gives up its right to bar the entrance of these automobiles, refrigerators, and shoes into its country in return for the privilege of sending its coffee into another country. It would make little sense to sum up this transaction as a sacrifice of sovereignty. Similarly, if the United States uses its sovereignty to create an efficient dispute-settling system, it has used its power to gain something of value—something, indeed, that ultimately is of much greater value than automobiles, refrigerators, and shoes.

P. Voluntary Restraint in Use of the Self-Judging Clause

It has sometimes been argued that the Connally Amendment is not really objectionable because the United States would never invoke it except in bona fide cases of genuinely domestic jurisdiction.

There are several answers to this argument. The first is that, even if it makes this assertion, the United States cannot realistically expect all the other countries of the world to take its word for it. To the other countries of the world, the Connally Amendment stands as an outright veto power. The question whether the United States invoked

it in improper cases could never really be settled anyway, because the invocation of the self-judging clause is not subject to review by any impartial tribunal.

In a recent case involving the self-judging clause, the *Interhandel Case*,¹¹³ the United States invoked the domestic jurisdiction reservation under circumstances which brought criticism not only from people in other countries but from many leading American authorities on international law.¹¹⁴ Without going into the merits of this particular use of the Connally Amendment, one is on solid ground in stating at least that there are people in the world who would cite this as one instance of an improper use of the self-judging clause. This is as far as one can go, since, as noted above, the decision is under present circumstances unreviewable.

A more practical objection to this argument is the fact that, even if the United States could assume that it itself would never use the reservation except in proper cases, the United States has by reciprocity handed thirty-four other countries the power to invoke the reservation against it. Is the United States also sure that these other thirty-four countries will never invoke the reservation except in proper cases? In view of the deep suspicions of foreign concepts of justice that pervade the arguments of the opponents of repeal, it is a safe assumption that they would be the last to make such a statement. Surely they would not agree that Bulgaria was correct in invoking the Connally Amendment against the United States, by saying that the shooting down of an Israeli plane at a disputed point near an international boundary with loss of Israeli, British, and American lives is a matter of essentially Bulgarian domestic jurisdiction.¹¹⁵ This merely underlines the fact that, if it is not prepared to concede this amount of infallibility to the thirty-four other countries, the United States can hardly expect them to concede this amount of infallibility to it.

There is one final argument that discredits the suggestion of taking the United States' restraint in the use of the self-judging clause as a matter of faith. The defenders of the Connally Amendment have themselves discredited their own position on this point by their attempts to push the self-judging principle too far. When the Geneva Conventions

¹¹³ *Supra* note 103.

¹¹⁴ See *e.g.*, Briggs, *The United States and the International Court of Justice: A Re-examination*, 53 AM. J. INT'L L. 301, 307-13 (1959); McCLURE, WORLD LEGAL ORDER 278-81 (1960).

¹¹⁵ See further text at note 13, *supra*.

on the Law of the Sea were before the Senate for advice and consent to ratification on May 26, 1960, the Senate refused to approve the Optional Protocol referring disputes of interpretation to the World Court unless a Connally Amendment was attached.¹¹⁶ The Conventions on the Law of the Sea are by definition international treaties, and the interpretation of an international treaty is by definition a matter of international law. The Senate action, backed to a considerable degree by the opponents of repeal of the Connally Amendment, thus in effect demands the right to declare issues to be domestic which are by definition matters of international law. How then can the defenders of the Connally Amendment seriously contend that they are only interested in having the United States under this reservation reserve from the International Court's jurisdiction those questions that are clearly and purely domestic? What answer do they have when people from other countries ask, "If you say you would invoke the Connally Amendment only in genuinely domestic matters, why do you insist on inserting it into exclusively international treaties such as the Conventions on the International Law of the Sea?"

Thus it is that extreme advocates of a position will sometimes damage their case by trying to carry it too far. It reminds one of a statement made in one of A. P. Herbert's fictitious *Misleading Cases*. The judge, who thought that the defendant had made one argument too many, characterized the argument as follows: "It is like the thirteenth stroke of a crazy clock; it discredits not only itself but everything that went before."

Q. Is American Opinion Ready for this Move?

A final argument sometimes heard is that, whatever the intrinsic merits of the case for repeal of the Connally Amendment, the American public is not yet ready for such a move. This assertion is belied by objective facts contained in two public opinion polls.

The first was a poll taken by Elmo Roper and Associates,¹¹⁷ dated September 1959, of leaders in the legal profession (all the members of the American Bar Association House of Delegates plus presidents of all state and major local bar associations). It showed the following response to question 4:

¹¹⁶ 106 CONG. REC. 10385 (daily ed. May 26, 1960).

¹¹⁷ The Public Pulse, Sept. 1959, p. 2-3.

- a. I believe we should modify the U.S. reservation and leave it to the International Court of Justice to decide whether a particular dispute is within the domestic jurisdiction of the U.S. 67%
- b. I do not believe we should modify this reservation 19%
- c. I have not reached a decision on this matter 14%

A poll of a nationwide cross-section consisting of 1,050 prominent Americans listed in *Who's Who*, and 244 persons from selected occupations, taken by Columbia University Bureau of Applied Social Research in 1959, asked whether the United States should accept compulsory jurisdiction of the Court in relation to named groups of countries—if these countries were willing to do the same. The response was “yes,” by a simple majority in the case of Communist countries, by a three-to-one majority in the case of NATO countries, and by a two-to-one majority in the case of other countries.¹¹⁸

The American Bar Association went on record for repeal of the Connally Amendment in 1947, and reaffirmed that position by votes of both the House of Delegates and the Assembly in 1960.¹¹⁹

The ultimate test is whether the American public is ready to accept the prospect of losing as well as winning cases in an international tribunal. Once more we have only to look at the record. The United States has won many cases in international tribunals, such as the famous Alabama Arbitration.¹²⁰ But it has also lost some cases. The significant fact is that, while the United States may have objected violently to the outcome of the case and may have felt strongly that it was right all along, it has complied with the award and the American public has accepted this as the right thing to do. This was true of the \$5.5 million award against the United States in the fisheries concession case made by the Halifax Commission in 1871.¹²¹ It was also true when a tribunal overruled the United States' claim to police the high seas for the protection of seals in 1892,¹²² and when, in 1922, an arbitration resulted in an award requiring the United States to pay \$12.2 million for ships requisitioned in World War I.¹²³

¹¹⁸ Bureau of Applied Social Research, Columbia University release, April 4, 1960.

¹¹⁹ See N.Y. Times, Sept. 1, 1960, p. 1, col. 2.

¹²⁰ 1 MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, H.R. MISC. DOC. NO. 212, 53rd Cong., 2d Sess. 653 (1898) (Award of Sept. 14, 1872).

¹²¹ *Id.* at 745 (Award of Nov. 23, 1877). *Cf.*, Statement Accompanying Payment of the Award, John Welsh to Lord Salisbury, [1878] FOREIGN REL. U.S. 334 (1878).

¹²² 1 MOORE, *op. cit. supra* note 121, at 945 (Award of Feb. 23, 1892).

¹²³ S. Doc. No. 288, 67th Cong., 4th Sess. 1 (1923) (Award of Oct. 13, 1922). *Cf.*,

Why have the United States and other nations generally complied with the awards of international tribunals in spite of the absence of an international policeman with power to compel compliance? There are many reasons, but undoubtedly one of the most fundamental is a simple conviction that the values they gain by complying are much greater than the temporary and limited values they might gain by refusing to comply. This reason is summed up in President Eisenhower's statement at the University of Delhi in 1959.¹²⁴

One final thought on the rule of law between nations: we will all have to remind ourselves that under this system of law, one will sometimes lose as well as win. . . . [I]f an international controversy leads to armed conflict, everyone loses; if armed conflict is avoided, everyone wins. It is better to lose a point now and then in an international tribunal and gain a world in which everyone lives at peace under the rule of law.

Letter from the Secretary of State (Hughes) to the Norwegian Minister (Bryn), [1923]
2 FOREIGN REL. U.S. 626 (1938).

¹²⁴Remarks Upon Receiving an Honorary Degree of Doctor of Laws at Delhi University, Dec. 11, 1959, in N.Y. Times, Dec. 11, 1959, p. 15, col. 5.