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The Capper Resolution

Nicholas Murray Butler

Hans H. Wolff

The Capper Resolution

tion as properly demanding high academic requirements as a prerequisite for admission to the Bar. Mr. Strawn defended such a policy not only in point of theory but also by reference to instances within his own experience.

He concurred in the view of Mr. Rogers with reference to the intensive growth of legal specialization and the increasing importance of legal education through law schools as necessitated by that condition. He paid a compliment to the toastmaster and Mr. Rogers in their capacity of professional men who had dedicated themselves to educational work.

He referred with great complacency to the enlightened and prosperous economic condition of this country in comparison with other nations of the world which had come within his personal observation and attributed its favorable aspects, in part at least, to the basic beneficence of a favorable form of government.

He addressed an appeal to the members of the Bar to remain steadfast in their support of American Constitutional polity.

In conclusion he recalled (not uninterruptedly) and delivered the inspiring lines of the two odes on "Opportunity".

The Capper Resolution

(Correspondence Between Dr. Nicholas Murray Butler and Mr. Hans H. Wolff, Civil Engineer of Denver, an Alumnus of Columbia University.)

Editorial Note: A large number of the members of the Denver Bar had the privilege of hearing one or both of the addresses recently delivered here by Dr. Nicholas Murray Butler. Because of the legal and international aspects of the Capper Resolution, the correspondence herewith published should prove of interest.

1515 East Ninth Ave.
Denver, Colorado,
December 17, 1927.

Dr. Nicholas Murray Butler,
President, Columbia University,
New York, N. Y.

My dear Dr. Butler:—

It was my privilege to hear the extremely interesting addresses which you delivered under the auspices of the Foundation for the Advancement of the Social Sciences of the University of Denver at the luncheon in the Cosmopolitan Hotel and at the Denver Auditorium on December 12th.

In both of these addresses you called upon the audience to use their influence with their Senators and Representatives in Congress toward the passage of the so-called Capper resolution of which copies were furnished.

I feel that I have a very clear understanding of what you said, of what the resolution involves, and of what will be the consequences of our entering into the proposed compacts. Yet in discussing these matters with others I find that they have taken a very different meaning, and it is for the purpose of securing an authoritative interpretation, which I may present and publicly cite, that I take this liberty of writing to you for certain specific information of importance. I am sure that you feel with me that so momentous a change in policy as the step proposed should be undertaken only with eyes open and as clear an estimate as possible of what we may be called upon to face.

The Capper resolution reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it be declared to be the policy of the United States:

"I. By treaty with France and other like-minded nations formally to renounce war as an instrument of public policy and to adjust and settle its international disputes by mediation, arbitration and conciliation; and

"II. By formal declaration to accept the definition of aggressor nation as one which, having agreed to submit international differences to conciliation, arbitration or judicial settlement, begins hostilities without having done so; and

"III. By treaty with France and other like-minded nations to declare that the nationals of the contracting governments should not be protected by their governments in giving aid and comfort to an aggressor nation; and

"Be it further resolved, That the President be requested to enter into negotiations with France and other like-minded nations for the purpose of concluding treaties with such nations, in furtherance of the declared policy of the United States."

"To adjust and settle its international disputes by mediation, arbitration and conciliation."

No exceptions. You emphasized that there are to be no exceptions because to allow any would means to allow every question to be excepted and render the pact meaningless. Any nation may, therefore, begin a dispute on any subject and it must be settled by arbitration if insisted upon. To this the contracting parties are bound. Furthermore, the nation which declines arbitration, *not the one which causes the dispute*, becomes the aggressor if war ensues.

The five countries with which it is proposed to enter into such compacts are France, Great Britain, Germany, Italy and Japan. At the present time there is no question of major importance in which the United States wants anything from any one of these countries. One or more of these countries do, however, object to one or more of the following: the debt settlements, our tariff, the Monroe Doctrine, prohibition, our immigration laws.

All of these subjects are international questions since all of them have been internationally disputed. Let us take some hypothetical, but entirely possible, cases. Assuming that we have entered into the proposed compacts with the five nations, that Japan objects to our exclusion law as applied to herself on the ground that it is insulting, discriminatory and a possible cause of war, that Japan demands a change in that law and, conciliation and negotiation having failed, insists upon arbitration or judicial decision.

Similarly, suppose France and subsequently, Germany, Italy and Great Britain express dissatisfaction with the debt settlements and demand that this question be reopened and left to international adjudication, suppose that one or more of the five nations object on economic grounds to the exclusion of their wines and that strained relations develop similar to those that were brought about by similar circumstances not so long ago between Norway and Portugal, suppose our tariff again arouse antagonism as it has so frequently done in the past, and, perhaps, above all, suppose our Monroe Doctrine is again challenged in a manner that we believe will jeopardize our national security, as for instance through the colonization by one of the five nations of a large tract of land with a good harbor in a neighboring country close to our border, such as was indeed at one time re-

ported to have been attempted and to have been prevented only by the potential and implied threat of war.

Under such circumstances are we or are we not, under paragraph I, by treaty, in honor and morally bound to submit to arbitration and to abide by the award? If we decline arbitration, are we or are we not, under paragraph II, the aggressor nation and, if so, subject to the penalty provided under paragraph III?

I can see no alternative to a categorical yes in answer to each of these questions. If my interpretation is correct, are you and are others of your point of view willing to risk the consequences of the decisions rendered by foreign arbiters upon questions of such supreme importance to our country?

I am, my dear Sir,

Very truly yours,

HHW/M (Signed) H. H. WOLFF.

NICHOLAS MURRAY BUTLER
BROADWAY AT 116TH STREET
NEW YORK CITY

December 22, 1927.

H. H. Wolff, Esq.
1515 East 9th Avenue,
Denver, Colorado.

My dear Mr. Wolff:

I am very much interested in your careful letter of December 17 and thank you for writing me. The conversations which you report reflect just the sort of misunderstanding with which we have to deal in trying to make any progress in our international relations.

It has never been proposed by anyone that matters of the internal policy of any nation should be treated as subject to international arbitrament. A nation's immigration laws are its own, as are a nation's tariff duties. No civilized people would think of asking another nation to submit such questions as those to international arbitrament. Japan may feel, and does feel, aggrieved at our exclusion of its people, but it would never enter the head of Japan to ask that the exclusion act passed by Congress be made the subject of arbitration or judicial determination at Geneva or at The Hague. The same is true of such internal questions as tariff duties, rates of taxation, and the like. Great Britain, for example, imposes an income tax on any foreigner, including Americans, who spends more than six months out of twelve in that country. Such a law may or may not seem fair, but it is a domestic British law and that ends it. Our great grandfathers made a strong fight against taxation without representation, but that very principle is now embodied firmly in our legislation, both Federal and State. No man can escape paying an income tax on the plea that he has not the right to vote.

The debt settlements, on the other hand, are international and have been so considered by us from the beginning. They will, one of these days, be readjusted and settled, amicably I feel sure, by methods of diplomatic discussion and perhaps by conciliation.

The Monroe Doctrine is in a peculiar situation, since it is not a domestic policy and has never been accepted as international law. It gives no particular offence in Europe, while it gives great offence in Latin America. In the United States it has been expressed in so many different forms that no one can be sure as to what it really means. In the form in which it was stated by President Monroe it gives no offence and raises no objection anywhere. It is the extensions and applications of the doctrine in the last thirty years that have aroused antagonism in Latin America and brought down ill feeling upon us. Yet the Monroe Doctrine is expressly exempted

from international determination by the statute establishing the League of Nations and therefore would lie outside the scope of any agreement for international arbitration.

When anyone asks us these questions, he must always be prepared to confront the alternative. Suppose, for example, that he is not ready and willing to try to settle any or all of these questions as they arise peaceably. Then do we understand that he is prepared to go to war about it? If the reply is Yes, then let it be made frankly and we all understand each other.

Thanking you for your letter, and with all the compliments of the season, I am,

Faithfully yours,

(Signed) NICHOLAS MURRAY BUTLER.

Dr. Nicholas Murray Butler,
Broadway at 116th Street,
New York, N. Y.

My dear Dr. Butler:—

I thank you for your kind letter of December 22nd, in reply to my letter of inquiry.

In your last paragraph you issue a challenge that anyone asking the questions which I have asked, state his position frankly.

I do so gladly. It is this: That we study carefully every serious proposal for the betterment of international relations and the avoidance of war, but that we do this impartially in order to ascertain latent dangers as well as seeming benefits and that we require the latter safely to outweigh the former. If this is not the case, that we then discard the plan and continue as we have in the past to use our Department of State for negotiations and conciliation, that we arbitrate when possible as we have so often done with Canada and other countries, but that we and we alone remain the judges whether we may safely and honorably entrust any given case to another nation for adjudication and that we do not bind ourselves in advance to a course which might force us either to jeopardize the vital interests of the United States or to break our pledge and in so doing bring upon ourselves the prearranged penalty; that if all the conciliation and negotiation fail in a matter of such supreme importance that we dare not leave it to arbitration, that in that case we bring whatever sacrifice may be necessary to defend the honor, the safety, and the welfare of our country as in the past.

In all the wars in which this country has been engaged, negotiation, conciliation and compromise have preceded the resort to arms, sometimes over a period of many years. There has never been any proposal to diminish these methods. Permit me, therefore, to point out that your assumption that anyone might not be "ready and willing to try to settle any or all of these questions as they arise peaceably" does not apply.

If the Capper resolution means anything other than what has been the long established policy of this country, it means the arbitration of all international disputes in cases when agreement can not be reached by direct diplomatic negotiation or friendly mediation; it means the acceptance of the arbitral award no matter what may be involved, no matter what the consequences to the country, no matter what the influences that caused the award; it means placing ourselves at the mercy of an arbitrator and depending upon his good faith and good judgment, it means an absolute agreement not to wage war. That, or a breaking of the pledge.

All this is stated concisely in paragraph I. There are no reservations, no exceptions, no opportunity to quibble or hedge as in our previous arbi-

tration treaties. It applies to all international disputes with the treaty nations.

But what is an international dispute? Who shall decide? You say that a nation's immigration law is so distinctly its own that no civilized people would think of asking another nation to submit such a question to international arbitrament. Permit me to recall to you that it was the United States which on two occasions made exclusions the subject of international action; one when Japan was opened to foreigners by the American Navy, the other when President Taft ended our treaty of amity with Russia because certain of our citizens were prevented from entering Russia in entire accordance with domestic Russian law. I cannot imagine that Japan would want better precedents than these.

The debt question must, as you say, be re-opened sooner or later. With or without the proposed treaties the final settlement will be made without war. The only difference is that under the treaty we could, apparently, be forced to arbitrate, when we should wish to negotiate.

Of the Monroe Doctrine you say that it was expressly exempted by the statute establishing the League of Nations and that therefore it would lie outside the scope of any agreement for international arbitration. In your lecture you emphasized that there must be no exceptions, the Capper resolution itself mentions no exceptions. Yet now the League of Nations is cited to establish an exception of the utmost importance. Are the proposed treaties with the five nations to come under the rules of the League of Nations? Then why not say so in the resolution? If the Capper resolution does not mean exactly what it says "to adjust and settle its international disputes by mediation, arbitration and conciliation," then what does it mean? You say also that no one can be sure as to what the Doctrine really means in any given case. If that is so, then what is it that is exempted by the League of Nations? If Japan should propose to build an extensive port at Maedalena Bay and to colonize a large tract of land adjacent to it under a perfectly legal treaty with Mexico, both of these nations being sovereign states and competent to make such a treaty, who would decide whether this would fall within the limits of the Monroe Doctrine? The League of Nations, the World Court, an Arbitrator, or we? And if any but the last, then would we relinquish the right to say that we will prevent this even at the cost of war?

In paragraph II there is ambiguity in the words "without having done so". Paragraph I unequivocably eliminates war as between the treaty powers, substituting arbitration and the like. Paragraph II, however, defines an aggressor not as one which begins hostilities, but as one which begins hostilities without having submitted to arbitration, leaving the possible inference that hostilities might be begun thereafter—a palpable contradiction; yet a meaning which I know to have been taken by some.

Together, no doubt, with many thousands of others, I hoped, as I had hoped before, that we might now have a proposal that would lead us forward, only to be again disillusioned, to find again something which upon even cursory examination discloses many contradictions and a probability of bringing nearer rather than of distancing that which it seeks to avoid, something whose uncharted path leads to a stupendous gamble of which the stake is the happiness, the greatness, the power of the people of the United States, something which every son of America who loves his country should

fight to the uttermost of his power.

Please accept my best wishes for this New Year both personally and as the honored President of our famous Alma Mater.

Sincerely yours,

HHW/M (Signed) H. H. WOLFF.

CONCLUDING COMMENTS BY MR. WOLFF—

No further communication has been received from Dr. Butler. It seems regrettable that Dr. Butler lacked time or inclination to explain the apparent contradictions and to elucidate how the proposed treaties would tend to avoid war. On the one hand he tells us that all international disputes without exception must be so subject to arbitration and the resolution itself clearly states the same. On the other hand he writes that disputes arising under the Monroe Doctrine are excepted. May these therefore be handled in the old fashioned way with threats of force when necessary? But he tells me that it is uncertain what comes under the Monroe Doctrine. Some nations might therefore exclude what we include. Is not this in itself a new and very promising source of disputes and likely to produce that very psychology which our pacifists so justly decry?

Dr. Butler excludes, as being domestic, such questions as the tariff and our immigration laws. Yet economic necessities and national affronts have been among the most prolific causes of war, and Dr. Shotwell, his coadjutor, publicly proclaims our tariff as a most probable cause of war with Japan.

The supporters of the Capper resolution, as do pacifists generally, tell us that we must make further treaties to avoid war or face the doom of civilization. Yet, when we ask them specifically to state what type of serious questions should be added to the list of those that are now customarily negotiated and arbitrated, they immediately exclude all that we may name, or they avoid the issue with generalities, or they decline to reply. Why this lack of candor? Is it reasonable to believe that the supporters of this movement go to all this trouble and expense of sending many speakers across the continent knowing that nothing of consequence is to be added to what we now do by way of arbitration? Or do they wish by denial and silence to cover the inclusion of such questions as they are certain that the people of the United States would never knowingly allow to be arbitrated? Or do they wish surreptitiously to put us in a position where we are at the mercy and dependent upon the goodwill of other nations? Or are they actually trying to produce a formula by which both sides concede everything while each retains freedom with regard to its particular needs, by which both sides agree not to wage war under any circumstances, yet each remains free to wage war in all matters sufficiently important to cause war?

Which of these explanations is the correct one? Or is there some other?

H. H. WOLFF.

Lawyers in Maryland Paid $5 Each

In 1810 Martin Luther was stricken with paralysis, and every lawyer in the State was compelled by legislative act to pay a yearly license fee of $5.00 for his support. He died in 1826.

Ben Butler's Funeral

When Senator Geo. F. Hoar was asked if he was going to attend Butler's funeral, he replied: "No, but I approve of it."