PROHIBITING ALIENS FROM FISHING IN WATERS OF ALASKA.

HEARINGS

BEFORE THE

COMMITTEE ON THE TERRITORIES

OF THE

HOUSE OF REPRESENTATIVES.

STATEMENT OF

HON. F. W. CUSHMAN, M. C.

FEBRUARY 12, 1906.

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PROHIBITING ALIENS FROM FISHING IN WATERS OF ALASKA.

Committee on the Territories,
House of Representatives,
Monday, February 12, 1906.

STATEMENT OF HON. F. W. CUSHMAN, M. C.

Mr. Cushman. Mr. Chairman and gentlemen of the committee, the first bill to which I want to call your attention is H. R. 10850, which is "A bill to prohibit aliens from fishing in the waters of Alaska." There are a number of bills pending before this committee in reference to the fisheries in Alaska, but this is the only bill upon this subject. There was a prior bill introduced by myself, and at a later date this bill H. R. 10850 was introduced as a substitute measure. So, while there are two bills here pending, they are in reality one bill, and I therefore consider that there is no impropriety in my proceeding with a brief statement in relation to this bill at this time, because I understand that no one has any objection to it.

Under the present laws in relation to fishing in Alaska there are certain rules and regulations, certain limitations prescribed under which fishing may be carried on in the waters of Alaska; but what law there is upon the statute book to-day in reference to this subject applies to all people. It applies with equal force to citizens and aliens, and the law makes no discrimination between citizens and aliens. There is no doubt about the power and authority of the Congress to enact legislation excluding aliens from the rights of fishery in the waters of Alaska for a distance of at least one marine league (three marine miles) from the shores of inlets and bays. Yet, although this is a subject upon which we have a right to legislate, no legislation has been enacted thereon.

The Chairman. What has been the policy of other nations in reference to confining the use of their waters for fishing purposes to their own citizens?

Mr. Cushman. In the first place, in answer to the question of the chairman, I will say that it has been decided as a principle of international law that fish are property, and that fish in adjoining waters along the shores of a nation are the property of that nation out to the limit of the authority of that nation, and that limit has for many years been established at 3 miles. I believe it is said that it was first established by reason of the fact that the range of a cannon in old days was 3 miles, and that a nation was supposed to have jurisdiction from the shore line out as far as the range of a cannon.
The Chairman. That is, as far as it could protect its jurisdiction.

Mr. Cushman. Yes, sir. As far as the nation could protect its authority. I am not entirely familiar with the subject to which the chairman alludes—that is, as to how far the nations of the world have endeavored to enforce their right of ownership over the fish.

The Chairman. I referred to the principal nations.

Mr. Cushman. I understand that the principal nations, and particularly England, have exercised this right, limiting the right of fishery in the waters adjacent to their territory to citizens of their own nation.

The Chairman. What action have we taken for the protection of the fur-bearing seals?

Mr. Cushman. Mr. Chairman, that is a subject that is very intricate and very lengthy. I do not know that I could give you a complete history of it. I know that it has been a subject of friction, and, for instance, the catching of the seals in the Pribilof Islands, Alaska, has been a subject of international trouble and legislation for a good many years.

The subject of this bill was first brought to my attention last summer by Americans who had placed a large amount of capital, running away up into millions of dollars, in fishery plants and canneries in Alaska, and the fact was brought to my attention that Japanese were coming into the waters of Alaska with ships from their own country, and being expert fishermen, were capturing a large number of salmon, often running up into hundreds of thousands of fish, salting them, and returning with them, and sometimes not even paying the tax thereon. They were in the line of independent fishermen, or poachers, one might say. I brought the matter to the attention of the Secretary of Commerce and Labor, and when I did so he informed me that the Department had already been investigating that, and they made me a rather lengthy and interesting report.

I will first refer to this bill. It is not lengthy, and its sole object is to prohibit aliens fishing in Alaska. Under date of July 3, 1905, the Secretary of Commerce and Labor wrote me the following letter, addressed to me at Tacoma, State of Washington:

DEPARTMENT OF COMMERCE AND LABOR,
OFFICE OF THE SECRETARY,
Washington, July 3, 1905.

Sir: Referring to your letter of May 22, 1905, addressed to the Secretary of State, inclosing a communication addressed to you by the Kelley-Clarke Company, of Seattle, Wash., relative to a Japanese fishing expedition bound for Alaskan waters, which has been referred to this Department for proper action, I have the honor to say:

The attention of the Department has already been called to the encroachment of Japanese fishermen upon the salmon fisheries of Alaska, and the situation has been given exhaustive attention.

In response to my request for an opinion as to the authority of the Department in the premises, the Solicitor of the Department advises me that a careful reading of the Alaskan salmon fisheries act and other laws defining the jurisdiction, supervision, and control which the organic act transferred to and vested in the Department of Commerce and Labor fails to disclose any authority to prohibit aliens from taking fish in Alaskan waters.

The provisions of law which authorize this Department to establish and enforce such regulations and surveillance as may be necessary to secure compliance with the laws relating to the salmon fisheries of Alaska are general in their application and do not distinguish between aliens and citizens of the United States. It appears, therefore, that the Department is without authority...
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to establish and enforce regulations applicable only to Japanese fishermen for the purpose of excluding them. Regulations prohibiting fishing in certain waters or at certain times would include and be operative against citizens as well as aliens.

I am advised further that while it is clearly competent for Congress, by appropriate legislation, to exclude aliens from fishing in Alaskan waters, it has not yet done so, and until it acts this Department is without authority to prevent the encroachment of Japanese fishermen upon the salmon fisheries of Alaska.

In my opinion this is a matter which might very properly be called to the attention of the next Congress, and preparatory to such action the officers of this Department charged with the enforcement of the Alaskan salmon fisheries act have been instructed to give the matter their closest attention, and they are now making a careful investigation of the encroachment of the Japanese fishermen complained of. In compliance with the request of this Department the officers of the Revenue-Cutter Service stationed in Alaska have been informed of the situation and instructed to gather information and make a full and complete report on the situation.

I inclose herewith a copy of an opinion of the Solicitor of this Department in regard to the matter.

Respectfully,

V. H. Metcalfe.
Secretary.

Hon. Francis W. Cushman, M. C., Tacoma, Wash.

If I am not wearying the gentlemen of the committee, I would like to read that opinion also, as it goes somewhat into the legal phase of the matter and is of some importance. The letter from the Solicitor of the Department of Commerce and Labor, under date of March 31, 1905, is as follows:

DEPARTMENT OF JUSTICE.

OFFICE SOLICITOR OF DEPARTMENT OF COMMERCE AND LABOR.

Washington, March 31, 1905.

The Secretary of Commerce and Labor.

Sir: In reply to your request for my opinion as to the authority of this Department to prevent the encroachments of Japanese fishermen upon the salmon fisheries of Alaska, I have the honor to say:

It appears from the petitions and protests which have been filed with you that the business of catching, curing, and canning salmon and other fish products of the waters of Alaska and of the States of Washington, Oregon, and California has developed into an industry of great promise. The value of the property now employed in the prosecution of this industry is $20,000,000; the number of men and women employed is 40,000, and the total value of the annual product is about $28,000,000. It is estimated that there are 500,000 Japanese engaged in fishing the business, a great many of whom have for many years been engaged in importing salt salmon, which is a favorite necessity, from the Siberian coast. Three years ago they came into the American markets, and now that they are losing their foothold on the Siberian coast, it is claimed that they will swarm into Alaskan waters if some preventive action is not immediately taken. Their advent in American waters, it is alleged, will be a menace to the business interests of Washington and Alaska, and the action of this Department is urged.

It is well settled that fish in their natural element, unconfined, are public property. They are the property of the nation. The right of a nation to appropriate its marginal seas and to reserve exclusively to its citizens the right to take fish in such marginal seas is a well-recognized principle of international law. (Hall on International Law, p. 158, 4th ed.; Halleck on International Law, p. 165; 3d ed.; Taylor on International Public Law, p. 296.)

It is also well settled that the right of a nation to exercise sovereignty and jurisdiction over its marginal seas extends for a distance of at least 1 marine league from shore. This principle was recognized by the Supreme Court in the case of Manchester v. Massachusetts (139 U. S., 258), in which case the court said:

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory not exceeding 2 marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries.
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whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

This distance (1 marine league from the shore) was fixed by the supposed range of a cannon in position. The more recent extension of the power of artillery would suggest that the distance might properly be increased from time to time with the increased range of guns. The United States has, however, generally recognized this distance in its negotiations with other nations, and the rule seems to be so far fixed that a nation is bound by it in the absence of express notice that a larger extent is claimed. (Hall on International Law, par. 41, 4th ed.)

It clearly appears, therefore, that Congress by appropriate legislation, subject, of course, to treaty rights, may exclude aliens from fishing in Alaskan waters, at least within 1 marine league of the shore, as above defined. It only remains to be considered, therefore, whether or not Congress has so exercised this power as to authorize the Department of Commerce and Labor to grant the relief sought by the petition.

Section 3 of the organic act provides:

"That it shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law."

It is to be observed, however, that the section above quoted does not vest in this Department any specific power other than is now or may be prescribed by law. The salmon and other fisheries of Alaska are again referred to in section 7 of the organic act, which is in part as follows:

"The jurisdiction, supervision, and control now possessed and exercised by the Department of the Treasury over the faro, salmon, and other fisheries of Alaska are hereby transferred and vested in the Department of Commerce and Labor."

A careful reading of the Alaskan salmon fisheries act and other laws defining the jurisdiction, supervision, and control, which the foregoing clause of the organic act transferred to and vested in the Department of Commerce and Labor fails to disclose any authority to prohibit aliens from taking fish in Alaskan waters. The provisions of law, which authorize you to establish and enforce such regulations and surveillance as may be necessary to secure compliance with the laws relating to the salmon fisheries of Alaska are general in their application and do not distinguish between aliens and citizens of the United States. You are, therefore, without authority to establish and enforce regulations, applicable only to Japanese fishermen, for the purpose of excluding them. Regulations prohibiting fishing in certain waters or at certain times would include and be operative against citizens as well as aliens.

I am, therefore, of the opinion that while it is clearly competent for Congress, by appropriate legislation, to exclude aliens from fishing in Alaskan waters, it has not yet done so, and until it acts this Department is without authority to prevent the encroachment of Japanese fishermen upon the salmon fisheries of Alaska, as requested in the petitions submitted.

The statement that if the Japanese are allowed to fish in American waters unmolested they will escape the specific tax which others are compelled to bear is doubtful due to a misapprehension of the law. The section in point (see 300, 31 Stat. L. 1273) provides:

"Whoever or persons, corporations, or company pleading or attempting to prosecute any of the following lines of business within the district of Alaska, shall first apply for and obtain license so to do from a district court or a subdivision thereof in said district and pay for said license for the respective lines of business and trade, as follows, to wit:

  "Fisheries:  salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish oil works, ten cents per barrel; fertilizer works, twenty cents per ton."

It is manifest from the foregoing that all persons, corporations, or companies engaged in the business of curing and canning salmon and other fish products within the district of Alaska are required to procure a license and pay a tax.
The law includes aliens as well as citizens. I am informed that in order to conduct profitable fishing operations it is necessary to maintain on shore a cannery or saltery. Assuming this to be the case the Japanese will not escape the payment of the tax if the law is properly enforced.

Very respectfully,

Edwin W. Sims, Solicitor.

Mr. Chairman. I do not wish to weary the committee by reading any further.

The Chairman. We will be glad to hear anything further, if it be as interesting as that opinion which you have just read.

Mr. Cushman. There is on file here at present the report of the Department of Commerce and Labor in reference to this general subject.

The Chairman. Of prohibiting aliens—

Mr. Cushman. Of prohibiting aliens from fishing in the waters of Alaska. Under date of January 4, 1905, the Department of Commerce and Labor’s report upon this subject is as follows. The letter is addressed to the Hon. Edward L. Hamilton, chairman of the Committee on Territories, House of Representatives, Washington, D. C.:

DEPARTMENT OF COMMERCE AND LABOR.
OFFICE OF THE SECRETARY.
Washington, January 4, 1905.

Sir: Referring further to your letter of December 16, 1904, inclosing a copy of H. R. 472, a bill "To prohibit aliens from fishing in the waters of Alaska," introduced by Hon. F. W. Cushman, I have the honor to state:

In my opinion, legislation of the kind proposed is urgently needed. It appears from the records and files of the Department that the business of catching, curing, and canning salmon and other fish products of the waters of Alaska and of the States of California, Oregon, and Washington, has developed into an industry of great promise. It is estimated that the value of the property employed in this business is $30,000,000; that the number of employees is 28,000, and the total value of the annual product is $320,000,000.

Early in 1905 these interests petitioned this Department to take steps to prevent the encroachment of Japanese fishermen on the salmon fisheries of Alaska, but in the absence of a law prohibiting aliens from fishing in Alaskan waters the Department could do no more than investigate the situation. Instructions to this effect were accordingly issued to special agents of this Department and through the Treasury Department to the officers of the Revenue-Cutter Service. Acting under these instructions Capt. W. H. Roberts, commanding the revenue cutter Perry, proceeded to Attu Island, the farthest west of the Aleutian group, where, on June 27, 1905, he discovered four Japanese schooners conducting extensive fishing operations. The vessels carried substantial crews, were equipped with all necessary apparatus for catching, cleaning, and salting, and when discovered had taken about 7,500 salmon. They had observed no customs regulations, were clearly trespassers, and left Seward Bay within twenty-four hours after the arrival of the revenue cutter. The reports received by the Department from its special agents also show that during the season three other Japanese schooners entered regularly at Juneau, Alaska. This latter expedition did not attempt to conduct fishing operations, but bought from American fishermen.

So far as is known the fishing operations of the Japanese have been confined to the expedition of one vessel in 1904 and the expedition of the four reported in 1905. The expedition of 1904 consisted of one Japanese brigantine which sailed away with 200,000 salmon and 30,000 salmon trout.

The American fishing interests fear that unless some preventive action is immediately taken by this Government alien fishermen—especially Japanese fishermen—will swarm into Alaskan waters in large numbers. These fears seem to be well grounded in view of the fact that there are estimated to be nearly 900,000 Japanese families engaged in fishing; that previous expeditions have been successful; that Attu Island, where the Japanese expeditions were discovered last year, is upward of 900 miles nearer to Tokyo than it is to San Francisco, and that salted salmon is a favored food among the Japanese.

The Japanese have for many years been importing salmon from the Siberian coast. Three or four years ago they came into American markets and began
to contract for dry-salted salmon of a cheap grade. The extent of the imports of salted salmon and trout into Japan for the four years beginning with 1901 is as follows:

**Imports to Japan—Salted salmon and trout.**

<table>
<thead>
<tr>
<th>From United States during</th>
<th>Quantity</th>
<th>Value</th>
<th>United States equivalent</th>
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<tr>
<td></td>
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<tr>
<td>1901</td>
<td>2,622,147</td>
<td>896,205</td>
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<tr>
<td>1902</td>
<td>736,700</td>
<td>21,496</td>
<td></td>
</tr>
<tr>
<td>1903</td>
<td>2,900,440</td>
<td>3,463,194</td>
<td>988,923</td>
</tr>
<tr>
<td>1904</td>
<td>1,299,801</td>
<td>3,329,576</td>
<td>100,924</td>
</tr>
</tbody>
</table>

Under existing laws the Department is without authority to prohibit aliens from fishing in Alaskan waters. The provisions of law which authorize the Secretary of Commerce and Labor to establish and enforce such regulations and surveillance as may be necessary to secure a compliance with the laws relating to the salmon fisheries of Alaska are general in their application and do not distinguish between aliens and citizens of the United States. This Department, therefore, is without authority to establish and enforce regulations applicable only to alien fishermen for the purpose of excluding them. The regulations prohibiting fishing in certain waters or at certain times would include and be operative against citizens as well as aliens.

There appears to be no question, however, as to the power of Congress to adopt laws to prohibit aliens from fishing in Alaskan waters. It is well settled that fish in their natural element, unconfined, are public property. They are the property of the nation, and the right of the nation to appropriate its marginal seas and reserve exclusively to its citizens the right to fish in such marginal seas is a well-recognized principle. (Hall on International Law, p. 158; 4th ed.; Halbeck on International Law, p. 167, 5th ed.; Taylor on International Public Law, p. 296.)

It is also well settled that the right of a nation to exercise sovereignty and jurisdiction over its marginal seas extends for a distance of at least 1 marine league from shore. (Manchester v. Massachusetts, 139 U. S., 258.)

The necessity and desirability of excluding aliens from fishing in the waters of Alaska is demonstrated by the experience with the Japanese fishermen herebefore mentioned. During the time these aliens were in Alaskan waters they seem to have met with a fair measure of success, and it is not unreasonable to suppose that not only will they return to these newly discovered fields of profit, but that they will be accompanied by other vessels, and naturally the number traversing Alaskan waters to engage in fishing operations will increase from year to year.

In this connection it may not be out of place to call attention to the fact that the Canadian government already has rigorous antifish fishing laws, applicable to both the Atlantic and Pacific coasts, some of which are to the extreme of forbidding American fishermen from entering Canadian ports for the purpose of procuring bait.

For the reasons above cited I urgently recommend the enactment of a law absolutely prohibiting aliens from fishing in Alaskan waters.

Respectfully,

V. H. Metcalf, Secretary.

Hon. Edward L. Hamilton,
Chairman Committee on Territories,
House of Representatives, Washington.

Mr. Klepper. Then the annual output of fish has been $20,000,000, which is $5,000,000 more than the output of gold from Alaska?

Mr. Cushman. Yes, sir; that is true. The first bill which I introduced was H. R. 10850, and on the same day (January 4, 1906) the Secretary of Commerce and Labor submitted another short letter, which is important. It is addressed to the Hon. Edward L. Hamil-
ton, chairman of the Committee on Territories, House of Representatives, Washington, D. C.

DEPARTMENT OF COMMERCE AND LABOR.

OFFICE OF THE SECRETARY.


Sir: In reply to your letter of December 16, 1905, inclosing a copy of H. R. 472, a bill "To prohibit aliens from fishing in the waters of Alaska," introduced by Hon. F. W. Cushman, and requesting suggestions with reference thereto, I have to state that the bill introduced by Mr. Cushman conforms substantially to the ideas of the Department on the subject. The bill in question was prepared in this Department, but the draft was submitted before the conclusion of its consideration of the subject, and consequently a few minor changes from the original draft are now regarded as desirable and necessary. I have the honor, therefore, to submit herewith a draft of a bill, which, in all essential particulars, represents the ideas of the Department with reference to legislation on this subject.

It will be noted that section 2 has been changed so as to subject vessels used or employed in violation of the act to a fine in addition to that provided for in the case of individual offenders. There is also added a provision making the possession by an alien of fresh or cured fish and apparatus and implements in the waters of Alaska prima facie evidence of a violation of the provisions of the act.

With these exceptions and one or two other changes, which it has been deemed advisable to make, the draft of the bill inclosed is the same as that introduced by Mr. Cushman.

The urgent necessity of effective legislation on this subject at an early date is clearly shown by the statements on page 39 of my annual report for 1905, a copy of which is herewith inclosed, and also by statements contained in a letter treating of the subject generally, which I am sending you at this time.

Respectfully,

V. H. Metcalf, Secretary.

Hon. Edward L. Hamilton.
Chairman Committee on Territories,
House of Representatives, Washington.

Now, Mr. Chairman, there is only one further report upon this subject that I would like to call to the attention of the committee, and that is from the State Department. It occurred to me that, perhaps, in legislating upon a subject of this kind in reference to other nations, we might be trespassing somewhat on the jurisdiction of the State Department. It is proper that I should state at this time that while this bill is general in its scope, prohibiting all aliens from fishing in the waters of Alaska, it was aimed primarily at the Japanese who, by reason of their proximity to these waters, are the nation which is at present most extensively engaged in fishing therein. Therefore the chairman of this committee, at my suggestion, wrote the Secretary of State, and under date of January 25, 1906, the Department replied as follows:

DEPARTMENT OF STATE.

Hon. E. L. Hamilton.
Chairman Committee on the Territories, House of Representatives.

Sir: I have the honor to acknowledge the receipt of your letter of the 16th instant, with which you inclose a copy of the bill H. R. 10850, "To prohibit aliens from fishing in the waters of Alaska." You state that the bill has the approval of the Secretary of Commerce and Labor, who states that there is urgent need of legislation in the direction suggested by the bill, and that the committee would be glad to have any suggestion which I may desire to offer in relation to the provision of the bill as affecting existing treaty stipulations.

There are two aspects in which the matter would present itself to this Department:
1. Our treaty relations with Japan.
2. Our treaty relations with other countries.
I have examined the bill in connection with our treaties with Japan. I find no provision therein giving Japanese the right to fish in American waters. If any such treaty provision existed, it would defeat the purpose of the proposed law, as the latter includes a proviso declaring that nothing contained therein shall be construed as affecting any existing treaty or convention between the United States and any foreign power.

As to the effect of the bill on our treaty relations with countries other than Japan, the proviso quoted above guards against possible conflict with any treaty provision on the subject with other countries.

As to whether or not it is expedient to prevent Japanese from fishing in Alaskan waters, I should be disposed to give weight to any statements made by the Department of Commerce and Labor concerning the effects of Japanese fishing in Alaskan interior waters, and the detriment which may have been caused thereby to our own people.

I have the honor to be, sir, your obedient servant,

Elihu Root.

I think that these comprise all of the official reports upon this subject in relation to the bill in question. Perhaps I have taken more time in presenting the subject than I should, but I consider it an important one. If there are any special provisions of the bill upon which the committee would like to be informed, I will be glad to explain them as far as possible. The bill is very brief, and I will read it if the committee will permit.

Mr. Powers. How do you like that second clause, "or has not declared his intention to become a citizen of the United States?"

Mr. Cushman. I do not like it very well. It is easy for any man to declare his intention to become a citizen of the United States.

Mr. Powers. I think that there should be an addendum as follows: "Who has become a citizen of the United States, and who is an actual resident thereof."

Mr. Cushman. That is a very good suggestion. Mr. Lloyd, does that not strike you as a very pertinent suggestion?

The Chairman. That is a matter that may very properly be taken into consideration by the subcommittee.