DISPOSAL BY TREATY OF UNITED STATES PROPERTY RIGHTS IN PANAMA

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I. Introduction

The United States has negotiated three interlocking treaties with the Republic of Panama concerning the future operation of the Panama Canal, its defense and neutrality, and a future sea-level canal. The treaties would transfer to Panama certain property interests of the United States.

The question arises whether the property may be transferred to Panama by treaty alone or whether action by both Houses of Congress is necessary to effect the transfer.

This paper will explore the constitutional issues involved.

II. Provisions of proposed Panama treaties relevant to the transfer of United States property

The first treaty would terminate present arrangements for the administration of the Panama Canal and establish an international juridical entity to be known as "The Joint Administration of the Panama Canal" to operate the Canal and its supporting facilities and to administer the Canal Area. The Canal Area would be smaller than the present Canal Zone. The governing body of the Joint Administration would be a Board of nine members, five appointed by the President of the United States and four by the President of Panama.

Article III of the first treaty provides that

> (2) The [Joint] Administration shall have and enjoy, subject to the terms of this Treaty, the use of the Panama Canal, of the Canal Area and of all of the property which, on the date the Administration assumes its full responsibilities and functions under this Treaty, is being administered or used by the United States of America, through its agencies the Panama Canal Company or the Canal Zone Government.
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> (3) The [Joint] Administration shall assume, as of the date it assumes its full responsibilities and functions under this Treaty, all of the assets, liabilities and commitments of the Panama Canal Company and Canal Zone Government as reflected in the final financial statements for the Panama Canal Company and the Canal Zone Government. The unrecovered investment of the United States of America in the Panama Canal shall not be included in the liabilities assumed by the Administration under this paragraph.

Article XXXVIII of the same treaty provides that

> (1) Upon the entry into force of this Treaty, all rights of the United States of America to real property in the territory which constituted the Canal Zone but which is not included in the Canal Area and in the areas described in Annex A of the Treaty of Defense of the Panama Canal and its Neutrality, signed on this date by the Republic of Panama and the United States of America, and those areas outside the Canal Zone which are listed in paragraph (6) of Annex I of this Treaty, shall become the exclusive rights of the Republic of Panama, without cost. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to such real property, including the transfer of such rights to such real property in the Republic of Panama.

Upon termination of the treaty,[1/] any rights of the United States and of the Joint Administration to real property within the Canal Area

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1/ The treaty would remain in force until December 31, 1999; if United States has commenced construction of a sea-level canal in Panama before that date, treaty would expire 1 year after the opening of the sea-level canal to traffic or on December 31, 2009, whichever occurs first (Article XLI).

would become the exclusive rights of the Republic of Panama, free of cost (Article XXXVIII).

III. Extent of treaty-making power

A. Constitutional provision

Article II, Sec. 2, cl. 2 of the United States Constitution gives the President the power "by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

But the Constitution does not define the scope of the treaty-making power. In this regard, Story commented (vol. 3, Sec. 1503):

> The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce...It is difficult to circumscribe the power within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The constitution has, therefore, made it general and unqualified.

A later source, American Jurisprudence (52 Am. Jur., Treaties, Sec. 8) states:

> Inasmuch as the treaty-making power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty.

B. Historical debate over prerogatives of the House of Representatives

The Constitution also delegates to the Congress numerous powers which impinge on the conduct of foreign relations. For example, the Constitution provides (Article I, Sec. 8) that Congress shall have the power

to lay and collect taxes, duties, imposts, and excises (cl. 1); to borrow money on the credit of the United States (cl. 2); to regulate commerce with foreign nations (cl. 3); to establish an uniform rule of naturalization (cl. 4).

The framers of the Constitution may well have intended, as Am. Jur. notes, that the treaty-making power "should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty." But the Constitution is silent on what course to follow in the event of a conflict between the treaty-making power and Congress' enumerated powers.

Since the early history of the United States under the Constitution there has been sharp debate over the extent of the rights and duties of the House of Representatives with respect to treaties. The House has frequently maintained that the powers conferred upon it by the Constitution cannot be taken from it by the treaty-making power; on the other hand, it was argued that any requirement that the House of Representatives sanction treaties would be a usurpation by the House of the powers of the President and the Senate.

The first such controversy revealed deep uncertainty with respect to the dilemma among even the framers of the Constitution. In the Jay Treaty with Great Britain, ratified in 1795, the United States agreed to indemnify the expropriated loyalists. Since Article I, §9, cl. 6 of the Constitution provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law," the

President communicated the treaty to both the House and the Senate in 1796 in order that the moneys called for might be appropriated.

The House of Representatives, seeking to judge for itself the merits of the treaty, requested the President to supply executive department papers relating to the treaty negotiations. This action precipitated a debate, lasting over a month, over the extent of the treaty-making power in view of Congress' delegated powers. The record of the debate covers 386 pages of fine print. A recent commentator who has meticulously examined the records of the controversy concludes that "The Founders were virtually evenly divided on the question of whether the treaty-making agency had exclusive power in all subjects, as opposed to whether action of Congress as a whole was exclusively required respecting those subjects specifically delegated to Congress for legislative purposes."[1/]

Hamilton, Chief Justice Ellsworth, and others advised against the President's complying with the House's request. In a letter, the Chief Justice concluded: "Their obligation to appropriate the requisite sums does not result from any opinion they may have of the expediency of the treaty, but from their knowledge of its being a treaty, an authorized and perfect compact which binds the nation and its Representatives. The obligation is indispensable, as it is to appropriate for the President's salary, or that of the Judges,

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1/ Elbert M. Byrd, Jr. Treaties and Executive Agreements in the United States. The Hague: Martinus Nijhoff, 1960, p. 66.

or in any other cases where fidelity to the Constitution does not leave an option to refuse."[1]

Gallatin, Madison, and Jefferson disagreed. In a letter to Monroe, Jefferson excepted out of the treaty-making power all the delegated powers of Congress, saying:[2]

> We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives to the President and Senate, and Piamingo, or any other Indian, Algerine, or other chief.

President Washington declined to furnish the papers. In his reply to the House of Representatives, he declared:[3]

> Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the Government to this moment my conduct has exemplified that opinion--that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them we have declared and they have believed that, when ratified by the President, with the advice and consent of the

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1/ Quoted in: Crandall, Treaties, Their Making and Enforcement, p. 120.
2/ Quoted in: Willoughby, The Constitutional Law of the United States, vol. 1, p. 549.
3/ Quoted in: Butler, The Treaty-making Power of the United States, vol. I, §293.

Senate, they became obligatory. In this construction of the Constitution every House of Representatives has heretofore acquiesced, and until the present time not a doubt of suspicion has appeared, to my knowledge, that this construction was not the true one. Nay, they have more than acquiesced; for till now, without controverting the obligation of such treaties, they have made all the requisite provisions for carrying them into effect.

There is also reason to believe that this construction agrees with the opinions entertained by the State conventions when they were deliberating on the Constitution, especially by those who objected to it because there was not required in commercial treaties the consent of two-thirds of the whole number of the members of the Senate instead of two-thirds of the Senators present, and because in the treaties respecting territorial and other rights and claims the concurrence of three-fourths of the whole number of the members of both Houses, respectively, was not made necessary.

. . .

If other proofs than these and the plain letter of the Constitution itself be necessary to ascertain the point under consideration, they may be found in the journals of the General Convention...In those journals it will appear, that a proposition was made 'that no treaty should be binding on the United States which was not ratified by law,' and that the proposition was explicitly rejected.

As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light, and as it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

The House finally passed a bill appropriating the money but at the same time adopted a resolution which read:[1/]

1/ Hinds' Precedents of the House of Representatives, vol. II, §1508.

> Resolved, That, it being declared by the second section of the second article of the Constitution, "that the President shall have power, by and with the advice of the Senate, to make treaties, provided two-thirds of the Senate present concur," the House of Representatives do not claim any agency in making treaties; but that when a treaty stipulates by the Constitution to the power of Congress, it must depend on its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.

During the 19th century, discussion whether there are treaty provisions, other than the appropriations clause, that encroach upon the powers vested in Congress by the Constitution centered largely on whether the treaty-making power can modify revenue laws. From an early date, spokesmen for the House of Representatives contended that, since the Constitution stipulates that "All bills for raising revenue shall originate in the House of Representatives" (Art. I, §7, cl. 1), a treaty affecting existing revenue laws cannot, ex proprio vigore, become the supreme law of the land.

C. Partial resolution of the dilemma

Custom, usage, and judicial opinion have somewhat resolved the dilemma of the conflict between the treaty-making power and the powers delegated to the Congress.

It is now universally accepted that, while the House of Representatives has nc voice in the negotiation or ratification of a treaty, where a treaty requires the payment of money by the United States,

the House has discretionary power with respect to voting the necessary appropriations. This doctrine has received judicial sanction, with the Court holding (Turner v. American Baptist Missionary Union, 5 McLean 344, 347, Fed. Cases 14251 [1852]):

> A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the constitution, as money cannot be appropriated by the treaty-making power...As well it might be contended, that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money, is in itself a law.

Insistence by spokesmen for the House of Representatives that that body alone can alter existing revenue laws has been assuaged by accommodation. The Senate has never expressly conceded the "right" of the House in this question, but as a matter of policy, as Willoughby points out, "the Senate has, upon a number of occasions, declared that commercial negotiations affecting revenues should be determined by statutes rather than by treaties, and, upon this ground, has acted adversely upon treaties negotiated by the President and submitted to it for its approval."[1/] Furthermore, in a number of instances, "the treaty-making power has inserted in treaties negotiated by it and affecting the revenue laws of the United States, a proviso that they should not be deemed effective until the necessary laws to carry them

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1/ The Constitutional Law of the United States, vol. 1, p. 559.

into operation should be enacted by Congress, and the House has claimed that the insertion of such requirements has been, in substance, a recognition of its claim in the premises."[1/]

Controversy with respect to whether or not the treaty-making power can modify revenue laws has largely subsided since, currently, commercial agreements are usually executive agreements contracted by authorization of Congress itself.

Thus, two major areas of conflict between the treaty-making power and the powers vested in Congress -- matters touching upon appropriations and revenue laws -- largely have been settled.

D. Exclusive and concurrent jurisdiction

What of the other powers vested by the Constitution in Congress? Can an analogy be drawn between the appropriation and revenue clauses and the other enumerated powers of Congress?

In this respect the wording of the Constitution must be noted. The appropriation and revenue powers reserved to Congress by the Constitution are clearly exclusive. Article I, §9, cl. 7 states that "No money shall be drawn from the Treasury, but in consequence of appropriations by law." Article I, §7, cl. 1 states that "All bills for raising revenue shall originate in the House of Representatives." (Emphasis supplied.)

Other powers accorded to Congress are not couched in exclusive terms. For example, the Constitution provides that "the Congress shall

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1/ Ibid., p. 558.

have power to regulate commerce with foreign nations..." (Article I, Sec. 8, cl. 3). Nevertheless, treaties of friendship, commerce, and navigation -- a most significant category of treaties -- accord to foreign countries and their nationals rights relating to international trade and customs, shipping, the entry or transit of goods, and the entry of capital, usually in exchange for reciprocal privileges. No implementing legislation has been necessary to execute these provisions.1/

It appears, then, that the wording in the Constitution does not render Congress an exclusive power over foreign commerce, but rather, that Congressional power to regulate foreign commerce is concurrent with the treaty-making power.

On the subject of concurrent jurisdiction, Willoughby stated (op. cit., Sec. 306):

> That the treaty-making power extends to subjects within the ordinary legislative powers of Congress there can be no doubt. That is to say, the treaty-making power is fully competent to enter into agreements with foreign powers in respect to those matters which are binding internationally upon the United States.

A recent statement on this question is found in the American Law Institute's Restatement of the Foreign Relations Law of the United States, at page 435:

1/ In reply to a contention that the most-favored-nation provisions of the commercial treaty of 1923 between the United States and Germany required Congressional legislation to render them effective, so as to overcome provisions of prior tariff acts, the Solicitor for the Department of State (Hackworth) wrote to the Solicitor General (Mitchell), July 19, 1928, "It is not believed that the efficacy of such treaty provisions to secure the rights which they were intended to establish will be seriously contested." (Hackworth, vol. V, p. 181.)

Constitutional limitation on self-executing treaties. Even though a treaty is cast in the form of a self-executing treaty, it does not become effective as domestic law in the United States upon becoming binding between the United States and the other party or parties, if it deals with a subject matter that by the Constitution is reserved exclusively to Congress. For example, only the Congress can appropriate money from the treasury of the United States.

The mere fact, however, that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power. Thus the fact that Congress has power to regulate commerce with foreign nations does not mean that the making of a self-executing treaty dealing with foreign commerce is precluded; in fact, many provisions in treaties dealing with foreign trade and commerce are self-executing.

E. Relevant commentary and judicial interpretations

Article VI, §2 of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Judicial interpretations of Article VI have established certain precedents that are relevant to a discussion of the conflict between the treaty-making power and the enumerated powers of Congress. In order to provide perspective for later discussion, the pertinent interpretations are outlined here.

1) A treaty has the same status as a federal statute. "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation." (Whitney v. Robertson, 124 U.S. 190, 194.)

2) A treaty, to the extent that it is self-executing -- that is, requires no legislation to make it operative -- has the force and effect of a legislative enactment. A treaty must "be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." (Foster v. Neilson, 2 Pet. [27 U.S.] 253, 314 [1829].)

3) A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. When a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. (Turner v. American Baptist Missionary Union, supra.)

4) No paramount authority is given to either a treaty or a statute. "Both are declared...to be the supreme law of the land, and no superior efficacy is given to either over the other." (Whitney v. Robertson, supra.)

5) In the event of a conflict between a treaty and a statute, the one of later date prevails.[1/] "...there is no principle of law more firmly established by the highest court of the land than that, while a treaty will supersede a prior act of Congress, an act of Congress may supersede a treaty. The latest expression controls,

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1/ However, the Supreme Court has held on a number of occasions, as pointed out in 52 AmJur §19, that the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty. "Repeals by implication are never favored, and none will be recognized unless the two expressions -- treaty and statute -- are absolutely incompatible."

whether it be a treaty or an act of Congress." (United States v. Thompson, 258 Fed. 257, E.D. Ark. 1919.) However, as Hackworth has pointed out, "while this is necessarily true as a matter of municipal law, it does not follow, as has sometimes been said, that a treaty is repealed or abrogated by a later inconsistent statute. The treaty still subsists as an international obligation although it may not be enforceable by the courts or administrative authorities." (Vol. V, §489.)

F. Limitations on the treaty-making power

As seen from the foregoing, it is possible for the majority of a quorum of both Houses of Congress, with the President's consent, to override prior treaty provisions of a treaty by refusing to pass implementing legislation. But this cannot be regarded as a limitation on the treaty-making power to conclude international agreements. As Butler has commented (Vol. 1, §318), the possibility of Congressional action overriding or frustrating "the Executive and two-thirds of the Senate, is not to be regarded a limitation upon the power, proceeding from any external or superior force, but only a difficulty in exercising it, owing to disagreement between themselves of the various elements of the Central Government itself."

Are there, then, any limitations on the treaty-making power? Since no treaty has ever been held to conflict with the Constitution,[1/]

1/ However, Byrd (op. cit., p. 87) points out: "It is quite true that the Court has never yet stated that it was invalidating a treaty or a provision of a treaty because it violated the Constitution, but it has invalidated acts of Congress designed to implement or carry out the provisions of treaties, and as a result the particular treaty provisions could not be effectuated." (New Orleans v. United States, 10 Peters 662 [1836].)

discussions of this aspect of the problem consist only of commentary and dicta. Story declared (vol. 3, §1502):

> But though the power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state. A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede, or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people.

The most explicit expression of the courts, although obiter dicta, with respect to the limitation of the treaty-making power occurs in Geofroy V. Riggs, 133 U.S. 258, 267 (1890), where the Court held:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of any of the States, or a cession of any portion of the territory of the latter, without its consent...But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Accumulated opinion on the limitations of the treaty-making power is summed up in American Jurisprudence (52 Am.Jur., Treaties, §7) as follows:

> It is uniformly conceded...that a treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it the limits of the treaty-making power have been exceeded. While there is no such

> limitation as to subject matter on the treaty-making power as exists in the case of the legislative power, nevertheless, the Federal power does not extend to the making of treaties which change the Constitution or which are inconsistent with our form of government, with the relations of the States of the United States, or with the Federal Constitution, nor does it extend so far as to authorize a cession of any portion of the territory of one of the states without its consent.

In fact, the courts have upheld the validity of treaties dealing with a broad range of matter affecting the foreign relations of the United States, including the protection of property rights of aliens (Geofroy v. Riggs, 133 U.S. 258 [1890]); the protection of commercial activities of aliens (Asakura v. City of Seattle, 265 U.S. 332 [1924]); the protection of birds migrating across international boundaries (Missouri v. Holland, 252 U.S. 416 [1920]); and the acquisition of territory (Wilson v. Shaw, 204 U.S. 24 [1907]).

IV. The property-disposal clause and the treaty-making power

Article IV, §3, cl. 2 of the Constitution of the United States provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;...

Does this delegation of power mean that United States property interests cannot be transferred by treaty to another government without implementing legislation? Or, to put the question another way, does the transfer of United States property interests to a foreign government fall within that category of Constitutional provisions which only Congress can effectuate?

In reaching an answer, several factors will be considered: language and location of the property-disposal clause in the Constitution; judicial decisions; and past practice.

A. Language in the Constitution

Unlike the appropriation and revenue clauses, the wording of the property-disposal provision does not indicate that the power is exclusively reserved to Congress. In this respect, the wording is similar to that of the foreign commerce clause. This suggests that the language of Article IV, §3, cl. 2 does not, of itself, foreclose action in the same sphere by the treaty-making power any more than Congress' power "to regulate commerce with foreign nations" (Art. I, §8, cl. 3) precludes the treaty-making power from concluding commercial treaties. Rather, the language suggests that the property-disposal clause falls into that category of Constitutional provisions in which Congress and the treaty-making power may have concurrent jurisdiction. (See supra., III (D), p. 10.)

B. Location in the Constitution

The property-disposal provision is found in Article IV of the Constitution, which deals purely with state-federal and state-state relationships. Article IV contains the full faith and credit clause (§1); privileges and immunities and extradition provisions, vis-a-vis the states (§2); rules relating to formation of new states, and to claims by the states and by the United States to the territory or property of the United States (§3); and the guarantee by the United States of a republican form of government in every state (§4).

Placement of the property-disposal provision in Article IV rather than in Article I, which contains most of the enumerated powers of Congress, suggests that the provision was intended to distribute power between the state and Federal governments, rather than among the three branches of the Federal Government. Indeed, the authoritative commentaries on the Constitution treat Article IV from the viewpoint of federal versus state jurisdiction, that is, that the Federal Government shall have the sole power to make the necessary rules and regulations respecting public lands, without interference on the part of state or territorial governments.

There is a long line of cases in which the courts have held, based upon Article IV, that Congress has exclusive power to dispose of property in the public domain, but these cases universally involve federal versus state power. Included in this line of cases are: Federal Power Commission v. Idaho Power Company (344 U.S. 17, 21), where the Court held that "the power of Congress over public lands, conferred by Art. IV, Sec. 3 of the Constitution, is without limitations..."; Griffin v. United States (168 F. 2d, 457, 460), where the Court declared that "The power of Congress over the lands of the United States wherever situated is exclusive"; Van Brocklin v. Tennessee (117 U.S. 167, 168) in which the Court said, "...public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make

all needful rules and regulations respecting the territory of other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise."

C. Judicial decisions with respect to disposing of U.S. property by treaty

Cases which have tested the treaty-making power to dispose of U.S. property without Congressional authorization involve treaties with Indian nations. (Until the Indian Appropriation Act of 1871, Indian tribes were recognized as independent nations with whom the United States could contract by treaty. Holden v. Joy, 17 Wall. 211, 242 [1872]; U.S. v. Gallons of Whiskey, etc., 93 U.S. 188, 192 [1876]; Dick v. United States, 208 U.S. 340, 355 [1908].)

In Holden v. Joy (supra) the Court held that the United States could by treaty exchange its lands with Cherokee Indians for lands held by the Cherokees. The Court considered the transfer a sale, "properly made by a treaty." It added:

> It is insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should issue to convey lands which belonged to the United States. On the contrary, there are many authorities where it is held that a treaty may convey to a grantee a good title to such lands without an act of Congress conferring it, and that Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political.

This opinion loses some of its force by reason of the fact that, as the Court indicated, the point was not necessary to decide the question

in the case because the provisions of the treaty had been repeatedly recognized by Congress as valid.

In United States v. Reese (27 Federal Cases No. 16, 137, D. Massachusetts, 472, 474 [1868]), the Court held that the treaty-making power was not limited by a prior act of Congress, "as the authority to make a treaty with the Indian tribes was one which the treaty-making power derived from a source higher than an act of congress, to-wit, the constitution. And by this power the president and senate of the United States could make a treaty with any Indian tribe, extending to all objects which, in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty, if not inconsistent with the nature of our government, and the relation between the states and the United States. This treaty-making power could make a sale or grant of land without an act of congress. It could lawfully provide that a patent should issue to convey lands which belong to the United States without the consent of congress, and in such case the grantee would have a good title. Congress has no constitutional right to interfere with rights under treaties, except in cases purely political."

D. Past practices in disposing of United States property to foreign nations

Do past practices furnish any precedents for delineating the roles of the treaty-making power and of Congress with regard to the transfer of United States property interests to foreign nations?

(1) Indian treaties

In the 19th century, United States lands were often ceded to Indians through treaties, without implementing or authorizing legislation. As noted (supra , p.19-20), some judicial opinion exists to uphold the validity of that type of transfer.

(2) Settlement of disputed claims by treaty

In instances involving disputed claims, United States property interests also have been conveyed to foreign nations by treaty alone. In all the following examples, with the exception of the Austrian Property Agreement, there existed a dispute over the sovereignty of the areas involved, and in some cases property not in dispute was transferred as part of the overall settlement.

(a) 1959 Austrian Property Agreement. By the Agreement between the United States of America and Austria Regarding the Return of Austrian Property, Rights and Interests of 1959, the United States agreed to return Austrian property vested during World War II in the Office of Alien Property. The Agreement was ratified as a treaty, and no legislation was necessary to execute its terms. It was maintained by the Department of State that this property did not "belong to the United States" in the Constitutional sense, but that in any case the treaty-making power had concurrent jurisdiction with Congress in this area.

(b) 1819 Florida Treaty. By the Treaty of Amity, Settlement, and Limits of 1819 with Spain, the United States agreed to "cede...and renounce forever all rights, claims, and pretensions..." to territories

beyond the Sabine River in return for the territories of East and West Florida. It is apparent from Congressional debate (Annals, 16th Cong., 1st Sess. 1726) and from remarks in President Monroe's annual message to Congress on December 7, 1819, that the treaty was considered not merely to be a delineation of a disputed boundary but to be the cession of territory "to which our claim was believed to be well founded" in return for Spanish territory. In 1819 Congress adopted legislation authorizing the President to take possession of the newly acquired territories and to prescribe their government, but no legislation authorizing or ratifying the cessions beyond the Sabine River was adopted.

(c) 1842 Webster-Ashburton Treaty. By the Webster-Ashburton Treaty of 1842, the United States and Great Britain resolved certain disputes over the location of the Northeast border. According to Crandall, "the treaty was not strictly a determination of the actual line but a friendly adjustment of it, in which it was admitted that concessions had been made on the northeastern boundary in consideration of 'conditions and equivalents' elsewhere."[1/] By the terms of the treaty, the states of Maine and Massachusetts were to be paid for their assent to their losses of territory. In 1843 Congress made appropriations for these payments and appointed a boundary commission, but did not otherwise authorize the transfer of lands.

1/ Treaties, Their Making and Enforcement, p. 113.

(d) 1846 Oregon Treaty. By the Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains of 1846, the United States receded from its former claim to all lands south of the 54'40° line and accepted the 49th parallel as its boundary with Britain. Subsequent legislative action was limited to an 1848 Act of Congress providing for the organization and government of the newly-defined Oregon Territory.

(e) 1903 Alaska Treaty. By a decision of the Alaskan boundary tribunal constituted under treaty with Great Britain in 1903, Wales Island was awarded to Great Britain although the United States had exercised continuous jurisdiction over it since the Alaskan purchase in 1867. According to Bemis, "It was a ridiculous and preposterous claim," consented to by President Theodore Roosevelt "as a friendly act to Great Britain, as a means of allowing that government to withdraw gracefully from a difficult and impossible situation."[1/] No legislation authorized the cession of lands under the treaty.

(f) 1933 Mexico Convention. By the Convention for the Rectification of the Rio Grande of 1933, the United States and Mexico agreed to exchange parcels of land on either side of the rectified channel of the river. These parcels were to pass "to each Government respectively in absolute sovereignty and ownership..." No legislation authorized the transfer.

(g) 1963 Chamizal Convention. By the Convention between the United States of America and the United Mexican States for the Solution

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1/ Samuel Flagg Bemis, A Diplomatic History of the United States, fifth ed., p. 425-6.

of the Problem of the Chamizal, the Rio Grande boundary was relocated so that lands within the United States would pass to Mexico "in absolute ownership...." Article 6 provided that "After this Convention has entered into force and the necessary legislation has been enacted for carrying it out...," the United States would complete "the acquisition, in conformity with its laws, of the land to be transferred to Mexico..." The act of Congress implementing these provisions only authorized the Secretary of State "to acquire by donation, purchase, or condemnation all lands required...for transfer to Mexico as provided in said convention..."

Treaties are long-established means of accomodating international friction, and the transfer by treaty alone of United States property interests to foreign countries as part of overall settlements of disputed claims does not appear to have sparked controversy over the Constitutional prerogatives of the House of Representatives. From the instances cited, it could be argued that the fact that United States property has been transferred by treaties alone indicates that the power delegated to Congress to dispose of property by Article IV, Sec. 3, cl. 2 is not exclusive. Nevertheless, it could be argued that these past practices cannot be considered as clear precedents for the Panama situation since, in the Panama case, there is no dispute over ownership of the property to be transferred by the proposed treaties.

(3) Disposal of United States property by executive agreement

(a) Destroyers for bases agreement with Great Britain, 1940. On September 30, 1940, President Roosevelt announced to the Congress the signing of an executive agreement by which the United States agreed to transfer to Great Britain title and possession of 50 over-age destroyers and some small patrol boats in exchange for 99-year rights to establish and use naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guiana.

The transaction aroused protest in and out of Congress, some of it motivated by fear that the agreement would lead to entry of the United States into the war in Europe. Those who opposed the agreement on Constitutional grounds argued that it circumvented the Senate's prerogative to consummate treaties. The question of the Congress' power to dispose of property does not appear to have been a factor in the controversy.

Obviously anticipating objection, President Roosevelt accompanied his message to the Congress with an opinion by the Attorney General upholding the constitutionality of the procedure.[1/] In answer to the question, "Does authority exist in the President to alienate the title to such ships and obsolescent materials?", the Attorney General first cited the President's power as Commander in Chief of the Army and Navy of the United States "which is conferred upon the President by the Constitution but is not defined or limited." Then he added:

1/ Department of State Bulletin, September 7, 1940, p. 201.

> Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the present proposal.

To uphold the right of the President to dispose of the naval vessels, the Attorney General cited two existing statutes.1/

(b) Overseas defense installations. Since the destroyer-for-bases agreement, executive agreements on national defense matters have become commonplace. After World War II, aggressive Sino-Soviet expansionism led the United States, as the most powerful member of the free world, to undertake numerous defense arrangements calling for the construction of military bases on foreign soil or improvement of existing ones. Probably because of the plethora of such arrangements, as a practical matter they frequently have been concluded by

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1/ Ibid., pp. 203-207.

executive agreements based on broad policy directives set forth in general defense treaties or prior legislation, rather than as formal treaties.[1/]

Construction of base facilities in foreign countries often entails sizable expenditures. The question arises of how these property interests of the United States are disposed of when no longer needed, when the agreements expire, or when host nations request termination (as France has done in the case of the United States NATO support facilities).

1/ The following colloquy between Secretary of State Dulles and Senator Watkins, April 6, 1953, suggests why executive agreements have been resorted to:

"Senator Watkins. Now, I would like to know how many executive agreements have been entered into.

"Secretary Dulles. In relation to that treaty? (NATO)

"Secretary Watkins. Yes.

"Secretary Dulles. I would say about 10,000. Do you want them all down here?

"Secretary Watkins. No, I think the Congress ought to know what has been done under it.

"Secretary Dulles. Do you want those all brought down here? Every time we open a new privy, we have to have an executive agreement. I take it that answers it.

. . .

"Secretary Dulles. I agree that some of them should have been submitted to Congress, but I would suggest that it would help to come to a constructive outcome here if you would try your hand at a definition of the ones that should be submitted, and the ones that do not need to be submitted.

"Senator Watkins. If I knew what they were I probably could start.

"Senator Dulles. I will give you a few hundred to try out.

"SEnator Watkins. That is all I have at the present."

(United States Senate. 83d Congress, 1st Session. Hearings Before a Subcommittee on the Judiciary on S. J. Res. 1 and S. J. Res. 43 Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements. Washington: Government Printing Office, 1953, pp. 877, 881.)

A sampling of this category of executive agreements reveals that the agreements themselves provide for disposal of U.S. property interests by various methods. For example, the Agreement Between the Government of the United States of America and the Government of the French Republic Concerning the System of Communications and Depots of the United States Army in Metropolitan France, signed December 8, 1958, stipulates in Article IV (a):

> All removable facilities erected by or on behalf of the United States Army at the sole expense of the Government of the United States and all equipment and material imported into France or purchased in France by or on behalf of the Government of the United States for the construction, the development, the operation, or the maintenance of the installations and facilities covered by the present Agreement, as well as all supplies obtained under the same conditions, will remain the property of the Government of the United States, which can, at any time before the termination of the present Agreement or within a reasonable time after the date of termination, remove them from France without restriction, after previous notification to the Government of the French Republic, or dispose of them in France under the conditions fixed by the Agreement of January 30, 1954.

With respect to immovable facilities, this Agreement with France provides (Article IV (b)):

> The two Governments will negotiate the method by which the residual value, if any, of the facilities developed or constructed under the present Agreement and not removed or disposed of in accordance with paragraph a) above, will be treated when all or part of these facilities are not needed by the United States Army.

An executive agreement may, by its own terms, disclaim any U.S. proprietary interest in the facilities furnished by the United States under the agreement. Representative of this type of arrangement is the Agreement between the Government of the Kingdom of Saudi Arabia

and the Government of the United States of America concerning Dhahran Airfield (TIAS 2290, June 18, 1951), which provides:

> 6. (a). To assure efficient operation and the furnishing of technical services at Dhahran Airfield to the best possible extent the United States Mission will be permitted to improve, alter, modify and replace buildings and facilities for improvement purposes or, after notifying the Saudi Arabian Government, and obtaining its approval, to construct such buildings and facilities at Dhahran Airfield (including runways, taxiways, parking aprons, weather services, radio communications and navigational aids) as may be deemed necessary for the purpose of this Agreement.
>
> (b). Such installations and constructions will become, as soon as they are established, the property of the Saudi Arabian Government. All fixed properties will also be considered as belonging to the Saudi Arabian Government as soon as they are established. The Saudi Arabian Government will permit such new installations and fixed items to remain at the disposition of the United States Mission during the period of this Agreement.

In negotiating this category of executive agreements, the Executive has sought to provide for the subsequent disposal of U.S. property interests pursuant to legislative authorization. Where the agreement is designed to furnish military assistance to a foreign country (as in the Dhahran Airbase agreement), the Executive appears to rely upon Section 503 of the Foreign Assistance Act of 1961, as amended, which states:

> The President is authorized to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance, by--
>
> (a) acquiring from any source and <u>providing (by loan, lease, sale, exchange, grant, or any other means) any defense article or defense service</u>;... (Emphasis supplied.)

Where the executive agreement covers U.S. property used by United States forces on foreign soil, reliance for statutory authority to dispose of the property is upon the Foreign Excess Property Act (63 Stat. 397).

That conditions may differ substantially from country to country, making impossible any rigid procedure for the disposal of U.S. property interests, is recognized in Department of Defense Directive Number 4165.6 (September 15, 1955) which deals with the acquisition, management and disposal of real property. With reference to the applicability of the policies set forth in the Directive to real properties under the control and/or jurisdiction of the military departments located in foreign countries, section IV (B) states that the policies apply "to the extent possible, in accordance with international law and agreements."

(c) The Philippine Islands. Under several statutes enacted prior to Philippine independence on July 4, 1946, the United States retained title -- proprietary interest as distinguished from sovereignty -- in the lands in the Philippines comprising military and naval bases which it held as such immediately prior to Philippine independence.

On April 17, 1953, the Legal Adviser of the Department of State requested an opinion of the Attorney General as to whether the United States was under obligation to transfer the lands to the Philippine Government without compensation, or if there was no such obligation, whether the President was authorized to make such a transfer. The

Attorney General was of the opinion that the United States was not obligated to transfer the titles without compensation, and that: "Under the Philippine Independence Act[1] and the joint resolution of June 29, 1944, 58 Stat. 625, the President in his discretion and on such terms as he deems appropriate, with or without compensation, may convey to the Philippine Government title to any of the naval reservations and fueling stations in the Philippines, and temporary (military) installations..." (41 Op. A.G. 143.)

Subsequently, the United States transferred some of the property to the Philippine Government by executive agreements (Military Bases in the Philippines: Relinquishment of Olongapo and Adjacent Areas, TIAS 4388, December 7, 1959; and Military Bases in the Philippines: Relinquishment of Certain Base Lands, Use by the United States of Certain Other Areas, TIAS 5924, December 22, 1965).

It has been shown that executive agencies, in transferring United States property interests to foreign governments by executive agreements, rely for their authority upon statutes. Without such legislative authority, the question might arise whether the President could dispose of military properties by executive agreement in the exercise of his Constitutional power as Commander in Chief of the Army and the Navy. Since, in every instance, authorizing legislation has been found to support the transfers by executive agreement,[2] the question is moot. In any case, reliance upon legislative authority to dispose of United

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1/ 48 Stat. 456, March 24, 1934.

2/ Or, at least, the Executive has so construed the legislation as to support its action.

States property by executive agreement does not derogate from the power of the President, two-thirds of the Senate consenting, to accomplish the same end by means of a treaty.

(4) Disposal of U.S. property relating to the Panama Canal

(a) 1942 Executive Agreement. By an Executive Agreement between the United States and Panama, the United States agreed, "when the authority of the Congress of the United States shall have been obtained therefor, "to transfer to Panama all rights, title and interest in the sewer and water networks of the cities of Panama and Colon, and in lands in these cities belonging to the Panama Railroad Company not needed for the operation of the Canal. By Joint Resolution in 1943, Congress authorized these transfers.

(b) 1955 Panama Treaty. Article V of the 1955 Treaty of Mutual Understanding and Cooperation Between the United States of America and the Republic of Panama provided: "The United States of America agrees that, subject to the enactment of legislation by the Congress, there shall be conveyed to the Republic of Panama free of cost all the right, title and interest held by the United States of America or its agencies in and to..." certain lands in Panama and in the Canal Zone. By act of Congress in 1957, the Secretary of State was authorized to convey such lands to Panama.

At the same time, Article VII of the treaty provided for the immediate transfer to Panama of a landing pier upon entry into force of the treaty, and Congressional authorization for the transfer

apparently was not sought. (The landing pier seems to have been singled out in a separate treaty provision because it was necessary to abrogate specifically the second paragraph of Article VII of the 1914 Boundary Convention between the United States and the Republic of Panama by which the United States had agreed to build and maintain the pier to be used as a shelter harbor for small coasting boats of the Republic of Panama, without any wharfage or other landing charges.)

The two occasions in which United States property interests relating to the Panama Canal were conveyed to Panama do not help to clarify the dilemma. The 1952 Executive Agreement itself stipulated that the property would not be conveyed to Panama until authorization had been obtained from the United States Congress. This is another example of the President's choosing to accomplish the disposal of property by means of executive agreement, based upon legislative authority, rather than by treaty.

On the other hand, the 1955 Panama Treaty also contained a stipulation making the transfer of the specified United States properties to the Republic of Panama "subject to the enactment of legislation by the Congress." Does this represent a recognition that Congressional action is required, at least with respect to the transfer of United States property interests connected with the Panama Canal?

An explanation for the inclusion of the stipulation in the 1955 Panama Treaty could not be found in the public documents of the period. Hence, it is not known whether at that time the Department of State regarded the provision as constitutionally necessary, or whether it

was incorporated in the Treaty for other reasons, for instance, to ward off possible public uproar by obtaining approval of the House of Representatives for the transaction.

Inclusion of the provision made the 1955 Treaty non-self-executing with respect to the transfer of United States property to Panama. But the fact that the treaty-making power chooses to make the conveyance of property contingent upon Congressional action does not, of itself, diminish the power of the President, two-thirds of the Senate concurring, to conclude a treaty providing for transfer of United States property without such a provision.

V. The House of Representatives and the Panama treaties: some observations

From the foregoing discussion, it is apparent that if the proposed treaty provisions that would transfer certain U.S. property rights to Panama are valid and self-executing, then that transfer will be effected upon ratification of the treaties and appropriate executive action.

Since the provisions deal with a proper and usual subject of international negotiation, the adjustment of property rights with a foreign country, it would appear that they fall within the broad scope of the treaty-making power, and are therefore valid questions for settlement by treaty. The question remains, however, whether the provisions are self-executing or require legislative enactment to put them into effect.

The following is the official Department of State position on the matter:[1/]

> Concerning the question of whether or not the treaties would be sent to the House of Representatives for approval, the Constitution provides that a treaty is ratified with the Advice and Consent of the Senate. Consequently, treaties are not sent for Advice and Consent to the House. A subsidiary issue is whether, in view of Article IV of the Constitution, a treaty alone could dispose of the property rights of the United States in the Canal Zone or whether the implementing legislation would be necessary. While we have not reached a final conclusion on this issue, we believe that a number of considerations support the conclusion that no implementing legislation is necessary. These considerations include most authorities, and the Supreme Court, who have stated that the treaty power is unlimited except where a power is expressly denied to the Federal Government or expressly reserved to the Congress alone by the Constitution. A further consideration is precedent; there are numerous instances where the treaty power alone has been used to transfer property of the United States.

After lengthy examination of the question, it is tempting to conclude with Devlin's comment (Treaty Power of the United States, §143): "All that can be safely said is that the treaty power is broad and comprehensive, and extends to all matters of governmental concern that do not conflict with the Constitution, which after all is not saying much, as it still leaves open the question of what is a conflict."

Above all, hypothetical discussion of Constitutional questions is fraught with danger. The Panama situation is unique. While the Congress has made "all needful rules and regulations" (Article IV,

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1/ Letter from Richard A. Frank, Assistant Legal Adviser, Department of State, October 2, 1967, to Rieck B. Hannifin, Analyst in Latin American Affairs, Legislative Reference Service, Library of Congress.

§3, cl. 2) for governing the Panama Canal Zone and for the operation of the Panama Canal, the Canal Zone is not a "territory" of the United States in the usual sense, in that Panama's "titular sovereignty" has been repeatedly recognized by the United States. Butler summed up the peril when he cautioned (v. 2, §377), "in view of the oft repeated notice of the Supreme Court that its decision on constitutional points must be confined to the exact state of facts as presented in the case decided, and cannot be inferentially extended, it is impossible to express an authoritative opinion as to the exact classes in to which treaty stipulations can be divided in regard to the necessity for congressional action..."

Moreover, assuming arguendo that some uncertainty exists that the treaty-making power can dispose of the properties to Panama, it is highly unlikely that the courts could or would take cognizance. It is true that since a statute and a treaty have the same status under the Constitution, a treaty could be unconstitutional in the same respect a statute could be. But only when a law is administered so that the rights of an individual are denied and abridged may it be subject to legal assault. Thus, it is difficult to see how an action brought by an individual with respect to the proposed Panama treaties could be heard since an individual could not contest the constitutionality of the arrangement unless he could show that he was injured more than any other individual taxpayer.

Furthermore, the courts have exhibited great reluctance to intervene in the conduct of foreign affairs. Elaborating on the necessity for

judicial abstinence in this area, the Supreme Court declared (C. & S. Airlines v. Waterman Corp., 333 U.S. 103, 111[1948]):

> The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

If there be merit to the argument that the treaty-making power cannot dispose of United States property without Congressional authority, yet the case is not justiciable, what recourse remains? This would seem to be one of those areas which will have to be settled by practice and accommodation, with each side acting in good faith and relying on the other's restraint.

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