

Opinion on Exchange of Over-Age Destroyers for Naval and Air Bases

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UNITED STATES ATTORNEY GENERAL

OPINION ON EXCHANGE OF OVER-AGE DESTROYERS FOR NAVAL AND AIR BASES

OFFICE OF THE ATTORNEY GENERAL

Washington, D. C., August 27, 1940.

The PRESIDENT,

The White House.

MY DEAR MR. PRESIDENT: In accordance with your request I have considered your constitutional and statutory authority to proceed by executive agreement with the British Government immediately to acquire for the United States certain off-shore naval and air bases in the Atlantic Ocean without awaiting the inevitable delays which would accompany the conclusion of a formal treaty.

The essential characteristics of the proposal are:

- (a) The United States to acquire rights for immediate establishment and use of naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, St. Lucia, Trinidad, and British Guiana; such rights to endure for a period of 99 years and to include adequate provisions for access to, and defense of, such bases and appropriate provisions for their control.
- (b) In consideration it is proposed to transfer to Great Britain the title and possession of certain over-age ships and obsolescent military materials now the property of the United States, and certain other small patrol boats which though nearly completed are already obsolescent.

© Upon such transfer all obligation of the United States is discharged. The acquisition consists only of rights, which the United States may exercise or not at its option, and if exercised may abandon without consent. The privilege of maintaining such bases is subject only to limitations necessary to reconcile United States use with the sovereignty retained by Great Britain. Our Government assumes no responsibility for civil administration of any territory. It makes no promise to erect structures, or maintain forces at any point. It undertakes no defense of the possessions of any country. In short it acquires optional bases which may be developed as Congress appropriates funds therefor, but the United States does not assume any continuing or future obligation, commitment, or alliance.

The questions of constitutional and statutory authority, with which alone I am concerned, seem to be these:

First. May such an acquisition be concluded by the President under an executive agreement or must it be negotiated as a treaty subject to ratification by the Senate?

Second. Does authority exist in the President to alienate the title to such ships and obsolescent materials, and if so, on what conditions?

Third. Do the statutes of the United States limit the right to deliver the so-called mosquito boats now under construction or the over-age destroyers by reason of the belligerent status of Great Britain?

I

There is, of course, no doubt, concerning the authority of the President to negotiate with the British Government for the proposed exchange. The only questions that might be raised in connection therewith are (1) whether the arrangement must be put in the form of a treaty and await ratification by the Senate or (2) whether there must be additional legislation by the Congress. Ordinarily (and assuming the absence of enabling legislation) the question whether such an agreement can be concluded under Presidential authority or whether it must await ratification by a two-thirds vote of the United States Senate involves consideration of two powers which the Constitution vests in the President.

One of these is the power of the 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. 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. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.

The second power to be considered is that control of foreign relations which the Constitution vests in the President as a part of the executive function. The nature and extent of this power has recently been explicitly and authoritatively defined by Mr. Justice Sutherland, writing for the Supreme Court. In 1936, in *United States v. Curtiss-Wright Export Corp., et al.* (299 U. S. 304), he said:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations--a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

The President's power over foreign relations while "delicate, plenary, and exclusive" is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on

the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The executive agreement obtains an opportunity to establish naval and air bases for the protection of our coast line but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation.

There are precedents which might be cited, but not all strictly pertinent. The proposition falls far short in magnitude of the acquisition by President Jefferson of the Louisiana Territory from a belligerent during a European war, the Congress later appropriating the consideration and the Senate later ratifying a treaty embodying the agreement.

I am also reminded that in 1850, Secretary of State Daniel Webster acquired Horse Shoe Reef, at the entrance of Buffalo Harbor, upon condition that the United States would engage to erect a lighthouse and maintain a light but would erect no fortification thereon. This was done without awaiting legislative authority. Subsequently the Congress made appropriations for the lighthouse, which was erected in 1856. Malloy, *Treaties and Conventions* (Vol. 1, p. 663).

It is not believed, however, that it is necessary here to rely exclusively upon your constitutional power. As pointed out hereinafter (in discussing the second question), I think there is also ample statutory authority to support the acquisition of these bases, and the precedents perhaps most nearly in point are the numerous acquisitions of rights in foreign countries for sites of diplomatic and consular establishments--perhaps also the trade agreements recently negotiated under statutory authority and the acquisition in 1903 of the coaling and naval stations and rights in Cuba under the Act of March 2, 1901 (H. 803, 31 Stat. 895,898). In the last-mentioned case the agreement was subsequently embodied in a treaty but it was only one of a number of undertakings, some clearly of a nature to be dealt with ordinarily by treaty, and the statute had required "that by way of further assurance the Government of Cuba will embody the foregoing provisions in a permanent treaty with the United States."

The transaction now proposed represents only an exchange with no statutory requirement for the embodiment thereof in any treaty and involving no promises or undertakings by the United States that might raise the question of the propriety of incorporation in a treaty. I therefore advise that acquisition by executive agreement of the rights proposed to be conveyed to the United States by Great Britain will not require ratification by the Senate.

II

The right of the President to dispose of vessels of the Navy and unneeded naval material finds clear recognition in at least two enactments of the Congress and a decision of the Supreme Court--and any who assert that the authority does not exist must assume the burden of establishing that both the Congress and the Supreme Court meant something less than the clear import of seemingly plain language.

By Section 5 of the Act of March 3, 1883 (C. 141, 22 Stat. 582, 599-600 (U. S. C., Title 34, Sec. 492)), the Congress placed restrictions upon the methods to be followed by the Secretary of the Navy in disposing of naval vessels, which have been found unfit for further use and stricken from the naval registry, but by the last clause of the section recognized and confirmed such a right in the President free from such limitations. It provides:

But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States direct in writing. [*Italics supplied.*]

In *Levinson v. United States* (258 U. S. 198, 201), the Supreme Court said of this statute that "the power

of the President to direct a departure from the statute is not confined to a sale for less than the appraised value but extends to the manner of the sale," and that "the word 'unless' qualifies both the requirements of the concluding clause."

So far as concerns this statute, in my opinion it leaves the President as Commander in Chief of the Navy free to make such disposition of naval vessels as he finds necessary in the public interest, and I find nothing that would indicate that the Congress has tried to limit the President's plenary powers to vessels already stricken from the naval registry. The President, of course, would exercise his powers only under the high sense of responsibility which follows his rank as Commander in Chief of his nation's defense forces.

Furthermore, I find in no other statute or in the decisions any attempted limitations upon the plenary powers of the President as Commander in Chief of the Army and Navy and as the head of the state in its relations with foreign countries to enter into the proposed arrangements for the transfer to the British Government of certain over-age destroyers and obsolescent military material except the limitations recently imposed by Section 14 (a) of the Act of June 28, 1940 (Public, No. 671). This section, it will be noted, clearly recognizes the authority to make transfers and seeks only to impose certain restrictions thereon. The section reads as follows:

SEC. 14. (a) Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.

Thus to prohibit action by the constitutionally created commander in chief except upon authorization of a statutory officer subordinate in rank is of questionable constitutionality. However, since the statute requires certification only of matters as to which you would wish, irrespective of the statute, to be satisfied, and as the legislative history of the section indicates that no arbitrary restriction is intended, it seems unnecessary to raise the question of constitutionality which such a provision would otherwise invite.

I am informed that the destroyers involved here are the survivors of a fleet of over 100 built at about the same time and under the same design. During the year 1930, 58 of these were decommissioned with a view toward scrapping and a corresponding number were recommissioned as replacements. Usable material and equipment from the 58 vessels removed from the service were transferred to the recommissioned vessels to recondition and modernize them, and other usable material and equipment were removed and the vessels stripped. They were then stricken from the Navy Register, and 50 of them were sold as scrap for prices ranging from \$5,260 to \$6,800 per vessel, and the remaining 8 were used for such purposes as target vessels, experimental construction tests, and temporary barracks. The surviving destroyers now under consideration have been reconditioned and are in service, but all of them are over age, most of them by several years.

In construing this statute in its application to such a situation it is important to note that this subsection as originally proposed in the Senate bill provided that the appropriate staff officer shall first certify that "such material is not essential to and cannot be used in the defense of the United States." Senator Barkley and others objected to the subsection as so worded on the ground that it would prevent the release and exchange of surplus or used planes and other supplies for sale to the British and that it would consequently nullify the provisions of the bill (see Sec. 1 of the Act of July 2, 1940, H. R. 9850, Public, No. 703) which the Senate had passed several days earlier for that very purpose. Although Senator Walsh

stated that he did not think the proposed subsection had that effect, he agreed to strike out the words "and cannot be used." Senator Barkley observed that he thought the modified language provided "a much more elastic term." Senator Walsh further stated that he would bear in mind in conference the views of Senator Barkley and others, and that he had "no desire or purpose to go beyond the present law, but to have some certificate filed as to whether the property is surplus or not" (Congressional Record, June 21, 1940, pp. 13370-13371).

In view of this legislative history it is clear that the Congress did not intend to prevent the certification for transfer, exchange, sale, or disposition of property merely because it is still used or usable or of possible value for future use. The statute does not contemplate mere transactions in scrap, yet exchange or sale except as scrap would hardly be possible if confined to material whose usefulness is entirely gone. It need only be certified as not essential, and "essential," usually the equivalent of vital or indispensable, falls far short of "used" or "usable."

Moreover, as has been indicated, the congressional authorization is not merely of a sale, which might imply only a cash transaction. It also authorizes equipment to be "transferred," "exchanged," or "otherwise disposed of"; and in connection with material of this kind for which there is no open market value is never absolute but only relative--and chiefly related to what may be had in exchange or replacement.

In view of the character of the transactions contemplated, as well as the legislative history, the conclusion is inescapable that the Congress has not sought by Section 14 (a) to impose an arbitrary limitation upon the judgment of the highest staff officers as to whether a transfer, exchange, or other disposition of specific items would impair our essential defenses. Specific items must be weighed in relation to our total defense position before and after an exchange or disposition. Any other construction would be a virtual prohibition of any sale, exchange, or disposition of material or supplies so long as they were capable of use, however ineffective, and such a prohibition obviously was not, and was not intended to be, written into the law.

It is my opinion that in proceeding under Section 14 (a) appropriate staff officers may and should consider remaining useful life, strategic importance, obsolescence, and all other factors affecting defense value, not only with respect to what the Government of the United States gives up in any exchange or transfer, but also with respect to what the Government receives. In this situation good business sense is good legal sense. I therefore advise that the appropriate staff officers may, and should, certify under Section 14 (a) that ships and material involved in a sale or exchange are not essential to the defense of the United States if in their judgment the consummation of the transaction does not impair or weaken the total defense of the United States, and certainly so where the consummation of the arrangement will strengthen the total defensive position of the nation.

With specific reference to the proposed agreement with the Government of Great Britain for the acquisition of naval and air bases, it is my opinion that the Chief of Naval Operations may, and should, certify under Section 14 (a) that the destroyers involved are not essential to the defense of the United States if in his judgment the exchange of such destroyers for such naval and air bases will strengthen rather than impair the total defense of the United States.

I have previously indicated that in my opinion there is statutory authority for the acquisition of the naval and air bases in exchange for the vessels and material. The question was not more fully discussed at that point because dependent upon the statutes above treated and which required consideration in this section of the opinion. It is to be borne in mind that these statutes clearly recognize and deal with the authority to make dispositions by sale, transfer, exchange, or otherwise; that they do not impose any limitations concerning individuals, corporations, or governments to which such dispositions may be made; and that

they do not specify or limit in any manner the consideration which may enter into an exchange. There is no reason whatever for holding that sales may not be made to or exchanges made with a foreign government or that in such a case a treaty is contemplated. This is emphasized when we consider that the transactions in some cases may be quite unimportant, perhaps only dispositions of scrap, and that a domestic buyer (unless restrained by some authorized contract or embargo) would be quite free to dispose of his purchase as he pleased. Furthermore, Section 14 (a) of the Act of June 28, 1940, supra, was enacted by the Congress in full contemplation of transfers for ultimate delivery to foreign belligerent nations. Possibly it may be said that the authority for exchange of naval vessels and material presupposes the acquisition of something of value to the Navy or, at least, to the national defense. Certainly I can imply no narrower limitation when the law is wholly silent in this respect. Assuming that there is, however, at least the limitation which I have mentioned, it is fully met in the acquisition of rights to maintain needed bases. And if, as I hold, the statute law authorizes the exchange of vessels and material for other vessels and material or, equally, for the right to establish bases, it is an inescapable corollary that the statute law also authorizes the acquisition of the ships or material or bases which form the consideration for the exchange.

Whether the statutes of the United States prevent the dispatch to Great Britain, a belligerent Power, of the so-called "mosquito boats" now under construction or the over-age destroyers depends upon the interpretation to be placed on Section 3 of title V of the Act of June 15, 1917 (C. 30, 40 Stat. 217, 222). This section reads:

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel, built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

This section must be read in the light of Section 2 of the same act and the rules of international law which the Congress states that it was its intention to implement (H. Rept. No. 30, 65th Cong., 1st sess., p. 9). So read, it is clear that it is inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent. If the section were not so construed, it would render meaningless Section 2 of the act which authorizes the President to detain any armed vessel until he is satisfied that it will not engage in hostile operations before it reaches a neutral or belligerent port. The two sections are intelligible and reconcilable only if read in light of the traditional rules of international law. These are clearly stated by Oppenheim in his work on International Law (5th ed., Vol. 2, Sec. 334, pp. 574-576):

Whereas a neutral is in no wise obliged by his duty of impartiality to prevent his subjects from selling armed vessels to the belligerents, such armed vessels being merely contraband of war, a neutral is bound to employ the means at his disposal to prevent his subjects from building, fitting out, or arming, to the order of either belligerent, vessels intended to be used as men-of-war, and to prevent the departure from his jurisdiction of any vessel which, by order of either belligerent, has been adapted to warlike use. The difference between selling armed vessels to belligerents and building them to order is usually defined in the following way:

An armed ship, being contraband of war, is in nowise different from other kinds of contraband, provided that she is not manned in a neutral port, so that she can commit hostilities at once after having reached the open sea. A subject of a neutral who builds an armed ship, or arms a merchantman, not to the order of a belligerent, but intending to sell her to a belligerent, does not differ from a manufacturer of arms who intends to sell them to a belligerent. There is nothing to prevent a neutral from allowing his subjects to sell armed vessels, and to deliver them to belligerents, either in a neutral port or in a belligerent port. . . .

On the other hand, if a subject of a neutral builds armed ships to the order of a belligerent, he prepares the means of naval operations, since the ships, on sailing outside the neutral territorial waters and taking in a crew and ammunition, can at once commit hostilities. Thus, through the carrying out of the order of the belligerent, the neutral territory has been made the base of naval operations; and as the duty of impartiality includes an obligation to prevent either belligerent from making neutral territory the base of military or naval operations, a neutral violates his neutrality by not preventing his subjects from carrying out an order of a belligerent for the building and fitting out of men-of-war. This distinction, although of course logically correct, is hairsplitting. But as, according to the present law, neutral states need not prevent their subjects from supplying arms and ammunition to belligerents, it will probably continue to be drawn.

Viewed in the light of the above, I am of the opinion that this statute does prohibit the release and transfer to the British Government of the so-called mosquito boats now under construction for the United States Navy. If these boats were released to the British Government, it would be legally impossible for that Government to take them out of this country after their completion, since to the extent of such completion at least they would have been built, armed, or equipped with the intent, or with reasonable cause to believe, that they would enter the service of a belligerent after being sent out of the jurisdiction of the United States.

This will not be true, however, with respect to the over-age destroyers, since they were clearly not built, armed, or equipped with any such intent or with reasonable cause to believe that they would ever enter the service of a belligerent.

In this connection it has been noted that during the war between Russia and Japan in 1904 and 1905, the German Government permitted the sale to Russia of torpedo boats and also of ocean liners belonging to its auxiliary navy. See Wheaton's International Law, 6th ed. (Keith), Vol. 2, p. 977.

IV

Accordingly, you are respectfully advised: (a) That the proposed arrangement may be concluded as an executive agreement, effective without awaiting ratification.

(b) That there is Presidential power to transfer title and possession of the proposed considerations upon certification by appropriate staff officers.

© That the dispatch of the so-called "mosquito boats" would constitute a violation of the statute law of the United States, but with that exception there is no legal obstacle to the consummation of the transaction, in accordance, of course, with the applicable provisions of the Neutrality Act as to delivery.

Respectfully submitted.

ROBERT H. JACKSON

Attorney General

Phone:

Toll free:

Fax:

Website: <http://www.roberthjackson.org/>

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