

MR. RECTO STATES THE PHILIPPINE CASE

Memorandum of Senator Claro M. Recto to the Secretary of Foreign Affairs in reply to the United States claim of ownership over its naval and military bases in the Philippines. It was dated March 3, 1954, and incorporated points mentioned in an earlier memo written by Mr. Recto.

Dear Secretary Garcia:



MR. RECTO

My attention has been called to the opinion dated August 23, 1953 of Mr. Brownell, the incumbent attorney general of the United States, on the question of whether the United States has retained the "proprietary interest or title as distinguished from sovereignty," in the "lands or areas in the Philippines comprising the military and naval bases, reservations, and stations" notwithstanding the grant of independence.

His opinion is that the United States retained, after the grant of independence, the title of proprietary interest to the base lands, that is to say, that the Republic of the Philippines is

not the owner of the lands where the United States military bases, reservations and fueling stations are presently located.

The argument supporting Mr. Brownell's opinion may be summarized thus:

That under section 5 of the Tydings-McDuffie Law the Commonwealth government acquired all the property and rights which the United States acquired from Spain, except military and other reservations; that under section 2(a)(12) and section 5, title to said reservations was retained during the Commonwealth period; that under section 10(a) of the same law, it was originally intended to transfer to the Philippines the title to military reservations upon the proclamation of independence; that under section 10(b) all questions relating to naval reservations and fueling stations would be adjusted and settled within two years after the proclamation of independence, in negotiations between the President of the United States and the Philippine government; that under section 10(c), added to the law in 1939, the United States would retain title to its properties used for diplomatic and consular establishments in the Philippines after the grant of independence; that Joint Resolution 93 of the United States Congress dated June 29, 1944 changed the policy of the United States with respect to military reservations by providing in effect that, instead of transferring title to said reservations upon the grant of independence, as originally intended, the title to such reservations would be retained even after the grant of independence; that such change of policy is also evidenced by the Philippine Property Act of 1946, passed by the United States Congress on July 3, 1946, one day before the proclamation of independence, which provided that title to all United States properties in the Philippines would remain vested in the United States even after independence and such properties included military and other reservations; that there has been no adjustment of the property rights of the United States in the Philippines as contemplated in section 2(b) (1) of the Tydings-McDuffie Law, as shown by article VI of the Treaty of General Relations; that the proclamation of Philippine independence was subject to the reservations contained in the Tydings-McDuffie Law and other laws of the United States Congress; that the Bases Agreement concerns the use of the bases and did not settle directly the title to military and naval bases; that, therefore, the titles to all

the bases still remain in the United States, there having been no transfer thereof to the Philippines; and that, finally, the President of the United States has complete discretion to decide whether the titles to such bases would be transferred to the Philippines and whether the transfer should be with or without compensation.

I have carefully read Mr. Brownell's 21-page opinion, and I have found no justification for changing my stand that the so-called "base lands or areas" (as distinguished from the improvements thereon in the form of buildings and other types of real property) are now owned by the Republic of the Philippines and not by the United States.

My stand is supported by the provisions of the Tydings-McDuffie Act, and the stipulations of Treaty of General Relations entered into between the Philippines and the United States on July 4, 1946 and the bases agreement between the two countries executed on March 14, 1947. The implications of the two treaties on the question of title to the base lands were not fully considered in Mr. Brownell's opinion.

The Tydings-McDuffie Law of March 24, 1934 provides that "the Philippine Islands recognizes the right of the United States . . . to maintain military and other reservations"; that "all the property and rights which may have been acquired in the Philippine Islands by the United States . . . except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the government of the United States" are granted to the Commonwealth government; that upon the proclamation of Philippine Independence on July 4, 1946 "the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under section 5)"; and that "the President of the United States is hereby authorized and empowered to enter into negotiations with the Government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement of the matter of naval reservations and fueling stations shall remain in its present status."

Because only naval reservations and fueling stations were provided for in the Tydings-McDuffie Law, the right of the United States to negotiate for additional bases was implemented in the Joint Resolution of the United States Congress of June 20, 1944. In concurrence with this action of the U.S. Congress, the Congress of the Philippines approved Joint Resolution No. 4 on July 28, 1945 authorizing the President of the Philippines to negotiate with the President of the United States the establishment of the aforesaid bases, so as to insure the territorial integrity of the Philippines, the mutual protection of the Philippines and the United States, and the maintenance of peace in the Pacific.

On July 4, 1946, President Truman proclaimed the independence of the Philippines. Pursuant to the provision of section 10(a) of the Tydings-McDuffie Law, he withdrew and surrendered "all rights of possession, supervision, jurisdiction, control or sovereignty of the United States of America in and over the territory and people of the Philippines except certain reservations therein and thereafter authorized to be made."

Under article I of the Treaty of General Relations the United States withdrew and surrendered to the Republic of the Philippines "all right of possession, supervision, jurisdiction, control or sovereignty existing and exercised by the United States in and over the territory and people" of the Philippines, "except the use of such bases, necessary appurtenances to such bases, and the rights incident thereto, as the United States of America by agreement with the Republic of the Philippines, may deem necessary to retain for the mutual protection" of the two coun-

tries. I have underscored the word "use" because it discloses the nature of the interest retained by the United States in the bases and it implies that the title to the bases is in the Republic of the Philippines as the sovereign grantor of their use to the United States.

It is inferable from article I of the treaty that there had already been a grant or surrender to the Philippines of the title held by the United States to all the base lands at the time of the proclamation of Philippine independence.

The subsequent agreement referred to in the said treaty of General Relations is the Bases Agreement concluded between the two countries on March 14, 1947.

The treaty uses the word "bases" without qualification, thus indicating that it refers indiscriminately to military, naval and other kinds of bases.

The Bases Agreement, as an implementation of the Treaty of General Relations and as the culmination of negotiations for bases in the Philippines after the withdrawal of American sovereignty, unreservedly confirms the view that the Philippines owns the lands or areas where the bases are situated. The subject of the Bases Agreement according to its preamble is the "*grant to the United States of America by the Republic of the Philippines, in the exercise of its title and sovereignty, of the use, free of rent, in furtherance of the mutual interest of both countries, of certain lands of the public domain.*" It may be noted that the preamble recognizes that the "title" to the bases is held by the Philippines and that the United States acquires only the "use" of certain lands of the public domain. The juxtaposition of the words "title" and "sovereignty" signifies that these two concepts are inseparably linked.

Article I, paragraphs 1 and 2, of the Bases Agreement provides that the "Government of the Philippines grants to the Government of the United States of America the right to *retain the use* of the bases in the Philippines listed in Annex A attached hereto"; and to *use* the bases listed in Annex B. Under Article XXI the United States retains the right to *occupy* temporary quarters and installations existing outside the bases. The duration of the use and occupancy is 99 years.

Article XVIII specifically assumes that the bases will be relinquished and turned over by the United States to the Philippines upon the termination of the agreement, or at any earlier date chosen by the United States.

Other provisions of the Bases Agreement indicate that the United States has merely the use, possession, and occupancy, but not the ownership of the base lands. Indeed, the Bases Agreement contains several stipulations, which are premised on the assumption that upon the proclamation of independence there had been a transfer to the Republic of the Philippines of all the title and proprietary interest previously held by the United States in the base areas. The same assumption is made by the Philippine secretary of foreign affairs in his notes to the American Ambassador, relative to the transfer to the Philippine government of Fort Mills, Mariveles quarantine reservation, Nichols Field and the Zamboanga Pettit barracks. The secretary of foreign affairs in his notes clarified that the transfers were a "*formalization*" of the withdrawal of United States sovereignty over said bases as effected in the Treaty of General Relations. The stand of the secretary of foreign affairs is consistent with his note of March 14, 1947 (upon the signing of the bases agreement) wherein he did not concede the existence of any rights or titles of the United States to the real property in the bases.

There is one feature of the Bases Agreement which deserves special mention. Although the title of the agreement mentions "military bases" only, in reality it also includes such naval reservations as the Leyte-Samar Naval Base, Subic Bay, Northwest Shore Naval Base, Olongapo Naval Reservation, Baguio Naval Reservation, Tawi-Tawi Naval Anchorage and Naval Base, Cañacao-Sanglei Point Naval Base and certain naval air bases. The Bases Agreement is therefore consistent with the Treaty of General Relations whose article I, as already noted, speaks of the use of "bases," without qualification.

Furthermore, the agreement in a way represents and consti-

tutes the very "adjustment and settlement" of questions regarding naval reservations, which, under Section 10(b) of the Tydings-McDuffie Law, the President of the United States was supposed to negotiate within two years from July 4, 1946. Mr. Brownell's opinion erroneously presupposes that there has been no such adjustment yet.

It appears to me that to resolve the question regarding the title to the base lands there is no need to consult other documents, laws or agreements, nor to consider other antecedent and collateral circumstances, which would only tend to mislead or obscure the issue. The two treaties I have mentioned, viz., the Treaty of General Relations and the Bases Agreement, are covenants which are in full force and effect and have not been modified or altered. They are law-making treaties conclusive on the high contracting parties and are the sole repository and the best evidence of the intention of the two countries with reference to the status of the bases. Their language as to the nature of the United States' interest in the base lands is clear and unmistakable.

In a recent decision the Philippine supreme court categorically ruled that the Republic of the Philippines retains its sovereignty or ownership of the bases held by the United States. Said the supreme court:

"By the agreement, the Philippine government merely consents that the United States exercises jurisdiction in certain cases. This consent was given purely as a matter of comity courtesy, or expediency. The Philippine government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of jurisdiction over offenses committed therein." (People v. Acierto, January 30, 1953.)

The court also noted in the Acierto case the significance of the provision of the Bases Agreement in Article XIII, paragraph 3, that in case the United States renounces the jurisdiction reserved to it in paragraphs 1 and 6 of said article, the American officer holding the offender in custody should notify the corresponding prosecuting officer of that fact. According to the court, said provision "is an emphatic recognition and reaffirmation of Philippine sovereignty over the bases."

I notice that Mr. Brownell's opinion fails to mention the proviso in article I of the Treaty of General Relations that the United States would be allowed only the "use" of the bases. On the other hand, he characterizes as a "difficult-to-explain ambiguity" the statement in the preamble of the Bases Agreement that the Republic of the Philippines, "in the exercise of its title and sovereignty," was granting to the United States merely the "use" of the bases. While he admits that "the purpose of the agreement was to cover the use of the properties (meaning the bases) for military purposes," his opinion misses the significance of the term "use" as employed in the agreement and bypasses those provisions which imply that the title to the base lands remains in the Philippines. Contrary to the Attorney General's insinuation, the title to the base lands is assumed by the two treaties to be held by the Republic of the Philippines and was not left to future determination.

The term "use" in its ordinary and legal acceptance (whether in the common law or civil law) is not synonymous with title or dominion. It connotes a right included in, and therefore inferior to, title or ownership.

I have already stated in a previous communication that the right of the United States in the base lands is only a "jus utendi" and that the transaction covered by the Bases Agreement is a "lease." I said it is a lease because the 99-year term of the use reminded me of the 99-year lease of Atlantic bases obtained during the last war by the United States from Great Britain in consideration for some old destroyers. From the standpoint of our municipal law, however, the right of the United States to use the bases free of rent resembles the contract of *commodatum* or the servitude of use. The comparison might help in understanding the view that Philippine ownership of the bases is not incompatible with the United States right to maintain and operate them.

In the exchanges of notes between the American Ambassador to the Philippines and the Philippine secretary of foreign affairs,

concerning the transfer of Fort Mills (Corregidor) and islands in the vicinity thereof, Pettit barracks in Zamboanga, the Mariveles Quarantine station, a portion of Nichols Field, and the U.S. armed forces cemetery No. 2 in San Francisco del Monte, the American Ambassador generally declares that the "the government of the United States of America transfers to the Republic of the Philippines all right, or title to or interest in" the aforesaid properties. The implication is that prior to said transfer, the "title to," or ownership of said bases or reservations belonged to the Government of the United States.

However, it will be noted that the above installations are not included in Annexes A and B of the Bases Agreement, as among the military bases whose use is reserved or granted to the United States. Hence, as correctly qualified by the Philippine Secretary of Foreign Affairs in his replies to the aforesaid notes of the American Ambassador, such transfers of "the right, title to or interest" of the United States government in the bases and reservations known as Fort Mills and islands surrounding it, Pettit barracks in Zamboanga, the Mariveles quarantine station, etc., were merely "a formalization of the transfer and surrender of possession, supervision, control or sovereignty over these areas already made by the United States in favor of the Philippines in the Treaty of General Relations" and in the Proclamation of Independence.

The component elements of ownership are the *jus fruendi*, *jus utendi*, *jus disponendi*, *jus vindicandi*, and *jus acutendi*. It is evident from the terms of the Bases Agreement that the United States acquired only the *jus utendi*, which right, in law and jurisprudence anywhere is separable from ownership.

On the other hand, the Act of August 7, 1939, amending section 10 of the Tydings-McDuffie Law, provides that the properties which may be acquired by the United States under this act, as contradistinguished from military bases and other reservations, shall belong in absolute ownership ("shall be vested in fee simple") to the United States.

If it had ever been intended to vest in the United States the ownership of military bases and other reservations in the Philippines, that intention could have been clearly and unequivocally expressed by the United States Congress in the same Tydings-McDuffie Law; in the Joint Resolution of the U.S. Congress of June 29, 1944, authorizing the President of the United States to acquire bases for the mutual protection of the United States and of the Philippines; in the Treaty of General Relations between the United States and the Philippines signed on July 4, 1946, and in the Bases Agreement itself, in the same manner as its intention with respect to the properties contemplated in the Act of Congress of August 7, 1939. Since the Treaty of General Relations and the Bases Agreement merely speak of the grant of the use of the bases to the United States, said grant can by no means be construed as a relinquishment of ownership. In short, the bases were in effect leased to the United States, for 99 years and only their possession was transferred thereby, inasmuch as there is no transfer of ownership in lease.

As I have said, both the Treaty of General Relations and the Bases Agreement are adequate to the resolution of the question of title to the base lands. Nevertheless, I would like to set forth hereunder some additional observations on the points discussed in Mr. Brownell's opinion.

1. It is argued that a distinction should be made between "proprietary interest" and "sovereignty" in the bases, the premise being that while the Philippines has sovereignty over the base lands, the United States has the title. The distinction has no basis because, as has been said, the acquisition of territory by a state "can mean nothing else than the acquisition of sovereignty." (Oppenheim's Int. Law, Lauterpacht, Vol. I, 6th ed., p. 496; I. Hachworth's Digest of Int. Law, p. 395). To concede that the United States retained title to the base lands after the proclamation of independence, is to concede her right to exercise sovereignty over the same to the exclusion of the Philippine government. The result would be a species of obnoxious extraterritoriality, impairing the status of the Republic of the Philippines as a sovereign

state and contrary to the letter and spirit of the independence law and the professed altruistic policy of the United States to the Islands.

2. Mr. Brownell admits that under the Tydings-McDuffie Law, the original intention was to transfer the title to the military bases upon the proclamation of Philippine independence.

But it is contended that Joint Resolution 93, adopted by the United States Congress on June 29, 1944, wrought a change in the policy of the United States with respect to the bases. Said resolution authorized the President of the United States to negotiate with the President of the Philippines for additional bases. The Philippine congress in its Joint Resolution No. 4, dated July 28, 1945, assented to the Joint Resolution 93. The attorney general claims that said Joint Resolution 93 is "decisive of the intention to retain title, and of the fact that title was retained," in the bases after the grant of independence.

The contention is not well-taken. Section 5 of the Tydings-McDuffie Law, in providing for the grant or transfer to the Commonwealth government of all the property and rights acquired by the United States from Spain, may be construed as a complete conveyance of whatever title or proprietary interest was held by the United States in Philippine territory. The proviso, excepting military bases and naval reservations from the grant, may be construed as allowing the retention by the United States of the *use, possession or occupancy* of said military and other reservations, but *not of the ownership or title*.

This interpretation is in harmony with section 10(a) which speaks of the relinquishment of "possession" (not title) of military bases upon the proclamation of Philippine independence, the implication being that during the commonwealth period, the United States retained only the *possession or occupancy* of the bases and that their ownership had become vested in the Commonwealth government, as contemplated in Section 5.

There is one practical consideration justifying the above interpretation. It is that, in order to maintain and operate military bases and other reservations during the commonwealth period and after independence, it was not, and it would not be necessary for the United States to retain the title or ownership of the base lands. Possession or control thereof is sufficient for the purpose, so it is improper to assume that more than this right was conveyed. The principle of *in dubio mitius* is applicable to the problem at hand, if there is at all a problem of construction involved in this case. This rule of interpretation holds that if the meaning of a stipulation is in doubt, that meaning is to be preferred which would be less onerous for the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party.

There is nothing in Joint Resolution 93 which directly supports the theory that the United States retained ownership of the lands. On the contrary, the resolution should likewise be construed as entitling the United States to retain merely the *use and possession* of additional base lands, in view of the fact that the Bases Agreement itself which defines and limits the nature of United States interest in the base lands, makes specific reference to Joint Resolution 93.

In a comparatively recent book on American foreign policy, the authors, in citing Joint Resolution 93, describes it as reserving to the United States "the right to 'use' sites for military, naval, and air bases in the Philippine Islands after July 4, 1946, when they would have gained their freedom and would be able to negotiate as an independent nation."

Had it been the intention of the United States to retain the ownership of the base lands after the recognition of independence, that intention could and should have been clearly stated in section 10 of the Tydings-McDuffie Law, in Joint Resolution 93, and in the two treaties already cited. The United States would not have left the matter to inference or interpretation. In its Act of August 7, 1939, amending section 10 of the Tydings-McDuffie Law, there is a specific and categorical provision that the properties in the Philippines acquired by the United States for diplomatic or consular establishments "shall continue to be vested

in fee simple in the United States" notwithstanding the grant of independence. The absence of a similar provision with respect to lands indicates that it was never intended to vest title to them in the United States after July 4, 1946.

3. The attorney general, in further justification of his theory, cites the Philippine property act of 1946, passed by the United States congress on July 3, 1946. The avowed purpose of the 1946 law is "for the retention by the United States government or its agencies or instrumentalities of real and personal property within the Philippines x x x subsequent to independence." Sections 2 to 5 of the law describe the properties embraced in the provisions of said law, as those held by the President of the United States, the Alien Property Custodian, or any such officer or agency as the President of the United States may designate under the Trading with the Enemy Act, as amended. Nevertheless, the Attorney General argues that title to the base lands remained in the United States subsequent to independence by reason of section 2 of said law.

This argument is manifestly untenable. Not only because it has been shown in the preceding discussion that under the Tydings-McDuffie Law and Joint Resolution 93 only the use or possession of the bases has been retained by the United States, but also because the Philippine Property Act itself, in its section 6, expressly provides that it shall not affect the disposition of the bases held by the United States under the Tydings-McDuffie Law and Joint Resolution 93.

4. The rest of the opinion of the Attorney General is devoted to a discussion of the power of the President of the United States to deliver to the Philippine government the title to the base lands and base properties with or without compensation.

He says that there is nothing in the Bases Agreement making provision for the conveyance of title because the agreement is concerned only with the use for military purposes of the bases rather than their ownership.

However, it should be evident from what has already been stated, that the omission or failure of the Bases Agreement to include provisions for the conveyance of title to the base lands is due precisely to the simple reason that such title is deemed to be in the Philippines, as the sovereign grantor of the use of the base lands. The Philippines could not have granted the use of the base lands if it were not in the first place, the owner thereof. Under a well known principle of the law of lease, the United States government as the lessee or beneficiary of the use, is estopped to deny the title of the lessor or grantor.

I have refrained from discussing the point raised by the Attorney General regarding the adjustment of the property rights of the United States, as contemplated in section 2(b)(1) of the Tydings-McDuffie Law, which is paragraph (1), section 1, Article XVII of our Constitution. He says that there has as yet been no adjustment of the property rights of the United States in the Philippines, and cites as evidence thereof, the note of the American Ambassador, dated March 14, 1947, announcing that it was "the understanding of my government x x x in signing the agreement of March 14, 1947, x x x that the question of the adjustment of any rights and titles held by the United States x x x to real property in any of the bases covered by the aforementioned agreement or any naval reservations or fueling stations not so covered is reserved and will be settled subsequently x x x." He advances this conclusion to synchronize with his theory that the title to the base lands, being a United States property right, has not been transferred to the Philippines.

It should be observed, however, that the note of the American Ambassador reserved the right to adjust and settle the "rights and titles of the United States to real property in any of the bases," but not its title to the base lands themselves. The base lands should not be confused with the improvements and other forms of real property installed or constructed therein at the expense of the United States for military and naval purposes.

As repeatedly stated, the Bases Agreement correctly assumes that the title to the base lands had become vested in the Philippines, if not upon the inauguration of the Commonwealth Government in 1935, then as a direct and immediate consequence of

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the grant of independence and the total withdrawal of American sovereignty in the Philippines on July 4, 1946. There has, however, been no formalization of the transfer in the sense that the muniments of title to the bases if any, have not been actually delivered to the Philippine government.

I have also refrained from discussing the fundamental question of whether, as between the United States and the inhabitants of the Philippines, the former, in strict legal theory, really acquired any absolute proprietary title to the Philippine territory which Spain ceded to her under the Treaty of Paris. This point was touched upon, but not definitely resolved by Justice Holmes in the case of *Cariño v. Insular Government*. It is tied up with the doctrine of the insular cases to the effect that the Philippines was an unincorporated, as distinguished from incorporated, territory of the United States, and was foreign to the United States in a "domestic sense," although a part thereof in the "international" sense.

I would like to venture a final observation, by way of conclusion, that the belated assertion by Federal officials of the retention of title by the United States in the base lands after the recogni-

Bases Agreement, but is irreconcilable with the traditional American policy toward the Philippines. That policy found vivid expression in Taft's announcement of "the Philippines for the Filipinos." It was reiterated in the preamble of the Jones Law wherein the United States Congress clarified that the acquisition of the Philippines was not "for territorial aggrandizement" and that it has always been the purpose of the American people to withdraw their sovereignty over the Islands and to recognize their independence. The policy culminated in the recognition of independence on July 4, 1946, an independence which is supposed to be full and complete.

The claim of title to the base lands, after the recognition of independence, would make that same independence incomplete, and impair the territorial integrity and sovereignty of our Republic.

The retention by the United States in the Philippines of the use and possession of military and naval bases is a matter of expediency, dictated by the needs of the two countries for mutual defense and protection, not to serve and foster any other interest of the United States. For the attainment of that objective,

tion of independence is not only in plain contravention of the unambiguous terms of the Treaty of General Relations and the

it is wholly unnecessary for the United States to have title of ownership to or proprietary interest in the base lands.