

## MR. BROWNELL'S OPINION ON U. S. BASES

Following is the full text of the legal opinion of U.S. Attorney General Herbert Brownell Jr., advising the United States has title to naval and military bases in the Philippines. It was submitted to the Secretary of State on August 28, 1953.



MR. BROWNELL JR.

The Honorable

The Secretary of State

My dear Mr. Secretary:

This is in response to the request of your legal adviser, dated April 17, 1953, for an opinion respecting title to United States military bases, including naval reservations and fueling stations, in the Philippines. The request is apparently joined in by the secretaries of the navy and air force and the director of the budget bureau, who are represented with you in an inter-departmental committee considering the Manila joint staff committee report (August 15, 1952) for the settlement of United States property rights and related problems in the Philippines. Accompanying the request for an opinion is a memorandum of the legal adviser, which the navy and air force consider to be a fair and full statement of the legal issues, together with a considerable number of supporting classified documents.

The principal question is whether the United States retains title—the proprietary interest as distinguished from sovereignty—in the lands or areas in the Philippines comprising the military and naval bases, reservations, and stations which it held as such immediately prior to Philippine independence, achieved July 4, 1946. (There is, of course, no issue as to the parts of such lands or areas which have since been conveyed by express, formal grant of the United States to the Philippine government.) If the answer is that the United States continues to own the base lands or areas, the further questions are whether the United States is under obligation to transfer them to the Philippine government presently without compensation, or if there is no such obligation, whether the President is authorized to make such a transfer.

### I.

The problem begins with the Philippine Independence act—also known as the Tydings-McDuffie act—of March 24, 1934. In preparation of Philippine independence, provision was made for a commonwealth government as a bridge to complete independence, and for complete independence on the fourth day of July following a ten-year period of commonwealth government. The commonwealth government came into existence on November 15, 1935, so the contemplated and actual date of independence became July 4, 1946.

The Philippine Independence act, in section 5, transferred to the commonwealth government all the property and rights acquired in the Philippine Islands by the United States under the treaties of 1898 and 1900 with Spain, "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," and except such land or property as may have been sold. Previous acts of congress had placed under the control of the then governments of the islands all property acquired by the United States under the treaties with Spain, except such land or property as might be designated by the President for military or other reservations. Section 12 of the Act of July 1, 1902, (32 Stat. 691, 695) substantially reenacted by section 9 of the Act of August 29, 1916, (39 Stat. 545, 547) and, from time to time by executive orders of the President, certain

areas were designated as military or naval reservations. Exercise of the authority granted to the President to designate land for military and other reservations vested title to the designated land in the United States until otherwise disposed of by the President (28 Op. A.G. 262, 1910).

Section 10 (a) of the Philippine Independence act provided for the recognition of Philippine independence and the withdrawal of American sovereignty. On the specified fourth day of July, (1946) the President of the United States by proclamation was to 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 reservation and fueling stations as are reserved under Section 5)," and was to recognize the independence of the Philippine Islands as a separate and self-governing nation. Under section 10 (b), the President was authorized to enter into negotiations with the government of the Philippine Islands not later than two years after his proclamation recognizing independence, 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 the matter of naval reservations and fueling stations shall remain in its present status." Under section 2 (b) (1) and (5) it was required that the Philippine Constitution provide, effective upon independence, that the property rights of the United States and the Philippine Islands shall be promptly adjusted and settled; and that by way of further assurance the Philippine government would embody the foregoing provision, and certain others, in a treaty with the United States.

The words of section 10 (a) on their face appear to be a relinquishment to the Philippine Republic of sovereignty over the Philippine territory, including military and other reservations of the United States but excluding United States naval reservations and fueling stations, and not a relinquishment or conveyance of title or proprietary right, such as was made in the language of section 5 to the commonwealth government. Except for the military and other reservations, this phraseology of section 10 (a) was entirely consistent with section 5. There was no ambiguity since the commonwealth government was vested with title to public property to which the independent republic would succeed, and it need only the session of sovereignty to complete its absolute control. But the military and other reservations designated by the President of the United States had not been conveyed to the commonwealth government by section 5. Hence, without a further explanation, it would seem that the force of section 10 (a), insofar as United States military reservations were concerned, was a grant of sovereignty to the Philippine Republic but leaving title to the fee in the United States.

However, it appears that more was intended. The 1934 Tydings-McDuffie Philippine Independence act, which required and had received the acceptance of the Philippine Legislature, was the reenactment with some few changes of the Hare-Hawes-Cutting Act of January 17, 1933. Like the Tydings-McDuffie Act the 1933 act called for acceptance by the Philippine Legislature but had been rejected by the Philippine Legislature on several grounds, one of which was the issue of military reservations. Under the Hare-Hawes-Cutting Act, the section 5 grant to the commonwealth government of ownership of property except military and other reservations of the United States was the same as appeared in the later act. But while the section 10 grant of sovereignty included military and other reservations of the United States, it permitted the President to redesignate and thereby retain for the United States any or all of the land reserved under section for the United States within two years after the proclamation of independence (47 Stat. 768). As stated by the managers of the bill for the house of representatives:

"The effect of the conference agreement is to reserve to the United States upon final withdrawal of the sovereignty of the United States from the Philippine Islands, such land or other property which has heretofore been designated for military and

other purposes as may be redesignated by the President of the United States within two years after the date of independence."

This retention of military reservations was unacceptable to the Philippine Legislature which, in declining to accept the act, included among its reasons a statement that "the military, naval, and other reservations provided for in the said act are inconsistent with true independence, violate national dignity, and are subject to misunderstanding."

There were other reasons for rejection. But it appeared that the best compromise that the President was able to offer at the time was a request to congress to remove the more objectionable features from the military base provisions and to correct at some later date, after hearings, whatever imperfections or inequalities existed in the sections of the Hare-Hawes-Cutting Act. Accordingly, on March 2, 1934, the President proposed the following changes in the Hare-Hawes-Cutting Act:

"As to the military bases, I recommend that this provision be eliminated from the law and that these bases be relinquished simultaneously with the accomplishment of final Philippine independence.

"As to the naval bases, I recommend that the law be so amended as to provide for the ultimate settlement of this matter on terms satisfactory to our own government and that of the Philippine Islands."

In the support of these recommendations the Tydings-McDuffie act was enacted. It removed from the first paragraph of section 10 of the old act the option of the United States to redesignate and retain any or all of the land or property reserved for military or other reservations, and retained for the United States only "such naval reservations and fueling stations as are reserved under section 5." Also there was transferred from section 10 to section 2 the provisions to be included in the Philippine Constitution, including the provision to be effective upon independence that property rights of the United States in the Philippine Islands shall be promptly adjusted and settled. In their place there was inserted a second and final paragraph:

"(b) The President of 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 the matter of naval reservations and fueling stations shall remain in its present status."

In describing the effect of these changes, the house committee on insular affairs and the senate committee on territories and insular affairs gave identical explanations as follows:

"5. The United States agrees to relinquish all reservations now designated for the use of the United States Army after the institution of the independent government, but reserves the right, at its discretion, to retain and maintain naval bases and fueling stations in the Philippine Islands.

"6. The feasibility of further retaining and maintaining naval bases and fueling stations in the Philippine Islands after the independent government is constituted, will be the subject of conferences between the two governments."

In addition, both reports included the following statement regarding the purpose and intent of the new measure:

"The pending bill (M.R. 8573) is a proposal to reenact the Hare-Hawes-Cutting bill, with the exception that the United States agrees, after the establishment of the independent government, to withdraw its sovereignty and relinquish all lands now constituting reservations for the United States Army in the islands and all other reservations, excepting those which have heretofore been designated for the use of the United States Navy and for fueling stations," (Underscoring supplied.)

It would thus appear that it was intended, after the commonwealth period, that the United States would give up its property and rights in military reservations including the right to maintain them as bases; but that the United States would retain its

property rights in naval reservations and fueling stations and the right to maintain them, subject to further discussions and the changes effected, if any, by a final adjustment and settlement of all questions pertaining to naval bases. The discussions were to be begun within two years after the proclamation of independence, but there would be no change in status of the naval reservations and stations until and unless the final settlement produced a change. The Philippine Independence Act on May 1, 1934, and following the adoption of the Constitution and its approval in a plebiscite in 1935, the Commonwealth regime was inaugurated.

The contemporary opinion of authoritative sources supported the view that section 10 intended a transfer to the new republic of property rights in United States military reservations, as well as the grant of sovereignty, when independence was to be achieved. For example, the joint preparatory committee on Philippine affairs, created April 14, 1937, pursuant to an arrangement between the President of the United States and the President of the Philippines, included in its report a statement on United States government property in the Philippines. After referring to sections 5, 10, and 2 of the Philippine Independence act, the committee made the following statement:

"After the independent government is established on July 4, 1946, the government of the United States will require, for its official establishments in the Philippines, properties such as a government normally maintains in the territory of a foreign country. For instance, the government of the United States now contemplates the erection of certain buildings on a portion of the Camp John Hay military reservation, near the city of Baguio, for the use of its official representatives in the Philippines during and following the Commonwealth period. Unless some arrangement is made before the independent government comes into existence, this property, as a part of a military reservation, must be surrendered to the independent government. In view of the extensive properties which will be turned over to the independent government under existing law, the committee also recommends, as a matter of equity, that, prior to the establishment of the government, some arrangement be made under which title to such properties as the United States may require for the aforementioned purpose would either be retroceded to the United States without compensation, or be acquired by the United States through an exchange of properties."

This report became the basis for the 1939 amendments of the Philippine Independence Act. Significantly, in regard to the property amendments effected by the 1939 act, it was section 10 of the basic act which was amended. (Act of August 7, 1939, 53 Stat. 1226, 1230-1231.) A new subsection (c) was added to section 10, which authorized the President, among other things, to designate properties of the United States in the Philippines suitable for diplomatic and consular establishments. It was provided that the property so designated "shall continue to be vested in fee-simple in the United States notwithstanding the provisions contained in subsection (a) of this section." Likewise, title to the lands and buildings constituting the official residences of the United States High Commissioner was to continue to be vested in the United States after July 4, 1946, notwithstanding the provisions contained in section 10(a). The senate and house reports indicated that it was necessary to make these provisions, else all properties held or owned by the United States in the Philippines would be transferred to the independent government of the Philippines.

Thus, prior to the war with Japan, contemporary interpretation and expectation was that upon achievement of Philippine independence the United States would relinquish operation and ownership of military and other reservations in the Philippines, retaining only 1) operation and ownership of naval reservations and fueling stations, subject to subsequent negotiations with the Philippine Republic, and 2) ownership of consular and diplomatic properties, including the residences of the former high commissioner. It was also contemplated, pursuant to section 2(b) of the Philippine Independence act and article 16 of the Philippine Con-

stitution, that the property rights of the United States in the Philippine Islands would be promptly adjusted and settled following the recognition of independence of the Philippine Islands; and by way of further assurance, the government of the Philippines would embody this provision in a treaty with the United States.

The advent of war with Japan brought a complete change in the mutual relationship between the United States and the Philippines. The occupation of the Islands by Japan made it necessary for United States forces to drive out the invaders. It was obvious to the people and governments of both the United States and the Philippines that, even after Philippine independence was achieved, there would be need for more adequate military installations in the Philippines than was contemplated by the Independence Act for the protection of the Island. Discussions regarding future American bases in the Philippines arose in 1943 and culminated in the adoption of senate joint resolution 93 of the 78th congress, which became P. L. 380, approved June 29, 1944 (58 Stat. 625. Section 2 provided.)

"After negotiation with the President of the Commonwealth of the Philippines, or the President of the Filipino Republic, the President of the United States is hereby authorized by such means as he finds appropriate to withhold or to acquire and to retain such bases, necessary appurtenances to such bases, and the rights incident thereto, in addition to any provided for by the act of March 24, 1934, as he may deem necessary for the mutual protection of the Philippine Islands and of the United States."

The President also was authorized in section 3 to advance the date for granting independence prior to July 4, 1946, but this was never done.

As noted by the senate and house committees which recommended the adoption of S. J. Res. 93:

"This joint resolution deals with the subject of Filipino independence and the future security of the United States and the coming Philippine Republic. The whole subject of the Philippine matter, both present and future has been considered by President Roosevelt; President Manuel Quezon, of the Philippine Commonwealth, now living in Washington; various departments of our government interested in the Philippines; and by members and committees of congress.\* \* \*

"First, the President of the United States is authorized, after negotiation with the President of the Commonwealth of the Philippines or the President of the Filipino Republic, to withhold or to acquire and retain such bases, necessary appurtenances to such bases, and the rights incident thereto, in addition to any provided by the Tydings-McDuffie law, as he may deem necessary for the full and mutual protection of the Philippine Islands and the United States."

The concept of the Tydings-McDuffie Act that the United States would withdraw almost entirely from the giving of military protection to the Philippines was thereby erased, and by mutual understanding. On their part, the Philippine leadership and legislature accepted the spirit and the letter of Joint Resolution 93. Culminating negotiations between President Truman and Philippine President Osmeña, both signed an agreement on May 14, 1945 setting forth a preliminary statement of general principles pertaining to the United States military and naval base system in the Philippines to be used as a basis for detailed discussions and staff studies. Among the provisions of this preliminary statement were the following:

"6. Pending development of the detailed plan, the U.S. will retain all sites which were held by U.S. army as military reservations on 7 December 1941 and by the U.S. navy except at Cavite, and will be accorded rights to sites in the localities shown on the attached appendix.

"7. The U.S. will have the right to retain, or to exchange for sites listed in paragraph 6 above, those sites wherein are located bases, installations, or facilities which have been or may be developed in the course of the present war, to acquire additional sites and to acquire such sites in the future as may be required by changes in the means and methods of warfare, including the development of new weapons. The U.S. will have the right to

acquire sites and install, maintain and operate thereon, the required communication and navigation facilities and radar installations."

In addition, the Philippine legislature acted on the matter when it passed Joint Resolution 4, approved July 28, 1945. Noting that the United States government had enacted joint resolution 93, and that such action had been "concurrent in by the government of the Commonwealth of the Philippines then established in Washington, it resolved "that the congress of the Philippines adhere to the policy and intent" of joint resolution 93. Further:

"That in order to speedily effectuate the policy declared by the congress of the United States and approved by the government of the Commonwealth of the Philippines, the President of the Philippines is authorized 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."

Thus it appears that the intentions of the Philippine Independence act respecting military reservations were mutually altered in favor of a policy looking toward the expansion of military, naval, and air bases in the Philippine—a policy wholly inconsistent with the idea of an automatic transfer of the property constituting the bases upon the achieving of independence. Not only was the President of the United States authorized to withhold and retain or acquire and retain bases in addition to any provided by the Tydings-McDuffie law, but he was authorized to do these things in negotiation with the President of the future Republic of the Philippines as well as the then President of the Commonwealth of the Philippines; making it quite clear that ownership and operation were to continue well after independence was achieved. And this broad pattern for the continuance and expansion of bases was accepted, though no acceptance was technically required at the time, by the President and legislature of the Philippines.

In my view, the change wrought by the joint resolution of June 29, 1944, is decisive of the intention to retain title, and of the fact that title was retained, in the United States, to the property owned and used or reserved by the United States prior to Philippine independence as military and naval reservations, bases, or stations. However, if further evidence of this purpose and fact is needed, it is supplied by the second section of the Philippine Property Act of 1946 (Act of July 3, 1946, 60 Stat. 418).

In addition to the post-war military defense problems there were a host of post-war rehabilitation and restoration problems in which United States help was essential even after independence of the Philippines was achieved. Congress had enacted a Philippine Rehabilitation act providing for the conduct of many federal services in the islands. It was necessary for these agencies to occupy real property and use personal property owned by the United States. Otherwise, the agencies' appropriations would be diverted to the purchase or rental of the needed space and equipment. Our government had brought into the Philippine large stores of supplies and equipment for purposes of the war and rehabilitation. In addition, the alien property custodian held large amounts of property seized from enemy aliens.

In view of all the changes in circumstances and in the nature and extent of United States property holdings, it was deemed "manifestly improper to permit title to pass automatically to the Philippine Republic on July 4 of this year (1946)."

As a consequence, there was enacted the Philippine Property Act of 1946, dealing "only with the proprietary interests of the United States in real or personal property within the boundaries of the Philippines." Section 2 of the act provided:

"There shall remain vested in the government of the United States or its agencies or instrumentalities all the right, title, and interest of the said government or its agencies or instrumentalities to all real and personal property within the Philippine Islands as may now be vested in, or later be acquired by the government of the United States or any of its agencies or instrumentalities."

Sections 3 and 5 dealt with disposition of properties acquired by the alien property custodian, and provided for immediate transfer of agricultural lands and immediate or ultimate transfer of the others of such properties to the Philippine government.

Section 4 authorized the President in his discretion, and on such terms as he deemed appropriate, to transfer title to the Philippine Republic of other properties of the United States in the Philippines not within the scope of Section 3. Section 6 provided:

"Nothing contained in this act shall be construed as amending the provisions of the Act of March 24, 1934 (48 Stat. 456), as amended, respecting naval reservations and fueling stations, and diplomatic or consular property, and the property of the high commissioner to the Philippine Islands, nor as amending the provisions of the joint resolution of June 29, 1944 (Public Law 350, Seventy-eight Congress), respecting bases for the mutual protection of the Philippine Islands and the United States."

The only explanation of this provision appears, identically, in the senate and house committee reports, linking section 6 to section 4 in this fashion:

"6. The President of the United States is authorized in his discretion to dispose of all other properties held by the United States government in the Philippines, other than diplomatic and consular establishments and others covered by the independence act, to the Philippine government."

Apropos of the retention of property titles in the United States, as provided in section 2 of the act, the house report said:

"Some have interpreted the Independence act of 1934 as providing for the relinquishment of all property titles now vested in the United States government to the government of the Philippines after July 4, 1946, the date set by law for achievement of Philippine independence. In the minds of others, this interpretation is questioned. Yet it is the feeling of this committee that this legislation is vitally necessary to clarify any doubts as to the present meaning of existing law."

And in regard to the effect of section 2, both committee reports said:

"7. Agencies of the United States government are granted the right to retain title to properties presently owned and to acquire new properties for discharge of Federal functions in the Philippines after the date of independence except in the instances of enemy properties which are otherwise provided for."

In one of this explanation of sections 2, 4, and 6 of the Philippine Property Act does there appear to be any limitation on the sweep of the plain words of section 2 under which there remains vested in the government of the United States, or its agencies or instrumentalities, all right, title, and interest to real and personal property now (July 3, 1946) vested in the government or its agencies or instrumentalities. Plainly, this reservation of title includes real and personal property of the United States used for military and naval purposes. Even applying section 6 to section 2, as we literally must in testing its meaning, section 6 effects no change in the scope and breadth of section 2. For, the provisions of the Independence act as amended, and the provisions of the joint resolutions of 1944, which are named and expressly save from amendment by section 6, are the provisions of those laws which reserve the title of the United States, beyond the independence date, to naval reservations and fueling stations, to diplomatic and consular property, and to base generally.

Thus, section 2 of the Philippine Property act overlaps and has confirmed the reservation of United States title to military and naval bases; and section 6 of the Property act has a limiting significance, as the house and senate committees quite logically indicated, only upon section 4. As a result, section 4 is authority for the disposing of United States property in the Philippines to the Philippine Republic, other than: 1) property acquired by the alien property custodian (covered by section 3 and 5); 2) diplomatic and consular property including property of the high commissioner (excluded by section 6), and, 3) property constituting naval reservations, fueling stations, or military bases of the United States (excluded by section 6). However, as already noted and

as is discussed more fully later, the Tydings-McDuffie act as amended, and the joint resolution of June 29, 1944, already had made provisions for the disposition, after independence, of the second and third categories of property not covered by section 4 of the Philippine Property act.

Events that have transpired since the enactment on July 3, 1946, of the Philippine Property act, add further confirmation to the continuance after Philippine independence of United States title in the base properties. On July 4, 1946, the President of the United States proclaimed the independence of the Philippines as a separate and self-governing nation. The proclamation recites that "in accord with and subject to the reservations provided for in the applicable statutes of the United States" the United States withdraws and surrenders all rights of possession, supervision, jurisdiction, control, or sovereignty in and over the territory and people of the Philippines. (Proclamation No. 2695, 11 F. R. 7517, 60 Stat. 1352).

The treaty of general relations between the United States and the Philippines, signed July 4, 1946 (effective October 22, 1946), (TIAS No. 1568, 61 Stat. 1174) repeats in Article VI the provisions of the Tydings-McDuffie act, section 2(b)(1), that the property rights of the United States of America and the Republic of the Philippines shall be promptly adjusted and settled by mutual agreement. The protocol attached to the treaty says expressly that "this treaty does not attempt to regulate the details of arrangements between the two governments for their mutual defense; for the establishment, termination or regulation of the rights and duties of the two countries, each with respect to the other, in the settlement of claims, as to the ownership or control of real or personal property," etc. Further, "it is understood and agreed that the conclusion and entrance into force of this treaty is not exclusive of further treaties and executive agreements providing for the specific regulation of matters broadly covered herein." The treaty and protocol clearly reserved the question of United States property titles for future settlement.

On March 14, 1947, there was signed the agreement between the United States and the Philippines concerning military bases in the Philippines, which entered into force March 26, 1947.

The tenor of this fairly detailed agreement was that the Philippine Republic granted to the United States the right to retain the use as bases of some 16 bases or military or naval reservations listed in Annex A (in general descriptive terms, not by metes and bounds), and agreed to permit the United States, upon notice, to use some seven additional bases similarly listed in Annex B, as the United States should determine to be required by military necessity. It was further agreed that the United States might expand such bases, exchange them for other bases, acquire additional bases, or relinquish rights to bases, as the military exigencies require.

One of the recitals of the preamble to the Military Bases Agreement might have raised a difficult-to-explain ambiguity regarding the title were it not for the surrounding circumstances. The clause stated that the two countries were desirous of cooperating in their common defense, "particularly through a 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."

An exchange of notes between the United States and the Philippines, simultaneous with his signing of the agreement, makes clear that this reference to Philippine title is not to all of the lands comprising the bases and temporary installations, but is to the parts of those lands and any additional lands that the United States might require in expansion or exchanges, which happen to be undisputed Philippine public lands. The American ambassador's note of March 14, 1947, said:

"I have the honor to state, in signing the agreement of March 14, 1947, between the United States of America and the Republic of the Philippines concerning military bases, the understanding of my government that the question of the adjustment of any rights and titles held by the United States pursuant to the provisions of the act of congress of March 24, 1934 as amended, specifically section 10(b) thereof, the joint resolution of the congress of June 29, 1944, and the act of congress of July 3, 1946, and treaties and agreements heretofore entered into between the United States and the Philippines, 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 in accordance with the terms of the acts and joint resolution of the congress mentioned above."

The acknowledgment of the same date by the Philippine secretary of foreign affairs set out the United States note in full and then said:

"I have the honor to state that, without conceding the existence of any rights or titles to the real property herein referred to, my government concurs with the understanding above set forth."

So that again the matter of the United States title in and to military base land and military or naval reservations or fueling stations was not settled directly or indirectly in the military bases agreement, and the titles remained in the United States subject to future negotiation and settlement.

Nowhere in this background of conduct and transactions is there any basis for as much as implying a general passage of the title of the United States to the Philippine government in and to the properties comprising the United States military and naval bases in the Philippines. Even if some basis could be developed for implying a grant, it would be of no legal consequence in the face of the well-established principle of law concerning grants of



land by the sovereign, that a grant of the sovereign must be explicit and nothing passes by implication. *Northern Pacific Railway Co. v. Soderberg*, 138 U.S. 526, 534 (1903) *Great Northern Railway Co. v. United States*, 315 U.S. 262, 272 (1942).

Indicative of the clear understanding regarding the actual state of facts, and possibly the law, were the express, formal conveyances to the Philippine Republic in 1947 and 1949, following the execution of the Military Bases agreement, of the title of the United States to some 30 or more military reservation or properties deemed to be in excess of United States military requirements. The transfers were effected by notes from the United States embassy at Manila and accepted by the Philippine Department of foreign affairs in reply notes. The notes referred explicitly to each property conveyed, and accompanying the United States notes were lists of executive orders and Torrens certificates of title under which the United States had claimed title to the military reservations conveyed.

A subsidiary question has been raised regarding title to the areas embraced in the temporary installations provided for by Article XXI of the Military Bases agreement. Most of these properties apparently have already been conveyed to the Philippine government by the specific conveyances referred to above. However, the legal adviser's memorandum indicates that there remain two such properties held by the United States, the Fort McKinley reservation and the Port of Manila Reservation.

Under Article XXI it was agreed that the United States would retain the right to occupy temporary quarters and installations existing outside of the bases listed in Annexes A and B, for a reasonable time not exceeding two years as might be necessary to develop adequate facilities within the bases for the United States armed forces. It was provided that the temporary period might be extended by mutual agreement, and there has been one such extension for three years from March 26, 1949. There is no express agreement for transferring title to these properties, and there has been no blanket transfer of the United States title in such temporary installations to the Philippine government. However, there have been the specific transfers of most of the properties individually, as indicated. The suggestion is offered in the legal adviser's memorandum that possibly the exchange of notes, which took place concurrently with the signing of the Military Bases agreement, purported to reserve only the adjustment of titles to those properties listed as Annexes A and B bases and naval reservations and fueling stations, thereby excluding Article XXI temporary installations and implying an obligation to transfer them to the Philippine government. The history of the negotiations underlying the agreement and the simultaneous exchange of notes, which is set out in detail in the state department research project No. 319 of February 1953 (The negotiation of the United States-Philippines Military Bases agreement of 1947) negate this speculation. It is quite clear that the purpose of the agreement was to cover the use of the properties for military purposes, and the purpose of the notes was to leave open for future settlement the rights and titles to real property. Thus, no fine or technical distinction between Annexes A and B bases and any other type of military installation was intended in reserving for the future the issue of title.

I therefore am of the opinion that, except for such military or naval properties as the United States has expressly and formally conveyed to the Philippine Republic, as in the exchange of notes contained in TIAS 1963 and TIAS 2406, the United States now has whatever title it had prior to July 4, 1946, in the land or areas comprising the bases listed in Annexes A and B of the Military Bases agreement of March 14, 1947, in the naval reservations and fueling stations not so listed in that agreement, and in the areas covered by Article XXI of the agreement.

Furthermore, I am of the view that there has been no adjustment and settlement of the property rights of the United States in the Philippines within the meaning of the Tydings-McDuffie Act. The matter has been reserved for future disposition several times and remains yet to be adjusted and settled.

## II.

You have also asked whether, under our agreements with the Philippines and our statutes, the United States is obligated to transfer presently without compensation any of the titles to Annexes A and B bases of the 1947 agreement, to naval reservations and fueling stations, and to Article XXI (1947 Agreement) temporary installations; and if there is no obligation, whether the President of the United States is authorized by law to make such a transfer.

I believe there is little question from the history already reviewed, that the congress which enacted the Tydings-McDuffie Act in 1934 intended that title to, and any further operation of, the military reservations of the United States in the Philippines, except naval reservations and fueling stations, should pass to the new Philippine Republic upon its establishment in 1946. Conversely, as to naval reservations and fueling stations, it was contemplated that title in the United States, as well as operation by the United States, would be continued for at least two years; and thereafter, pending the conclusion of negotiations begun in that period by the President, title and operation would remain with the United States for such time as would be agreed upon by the adjustment and settlement between the President of the United States and the government of the Philippines. Nothing in the statute precluded the making of an arrangement for either permanent retention or complete transfer of the naval properties by the United States, or for some intermediate solution.

As to the naval reservations and fueling stations, there has been no change in the law or their status as United States property. Subsequent acts and agreements of the United States and the Philippines have reserved the issue for the future. The President of the United States continues to be authorized to make the final settlement with the Philippine Republic which will decide for how long and upon what conditions the naval reservations and fueling stations, reserved under the Tydings-McDuffie Act, will remain the property of the United States or be transferred to the Philippine Republic. The President is under no obligation to give these properties to the Philippine government, or to transfer them for compensation. He is vested with complete discretion in the matter.

If he concludes that it is in the interest of the United States to convey to the Philippine government title to any of the naval reservations and fueling stations in the islands, with or without compensation, he enjoys complete authority to make the conveyance under section 10 (b) of the Tydings-McDuffie Act, 48 Stat. 463. His authority extends to "the adjustment and settlement of all questions relating to the naval reservations and fueling stations." The word "settlement" in its general sense signifies "the act of conferring anything in a formal and permanent manner; a bestowing or granting under legal sanction." (80 C.J.S. 125). Since a settlement of the questions under section 10(b) might well include relinquishment of titles, the President has obviously been authorized to make any necessary conveyances. The reference in section 10(b) to his entering into negotiations with the Philippine government in no wise detracts from this full authority. The language is significant only in the matter of time (i.e., he is to commence negotiations within two years after independence), since as this government's organ in foreign affairs the President is authorized by the Constitution to negotiate on any appropriate subject for negotiation with a foreign government.

Moreover, as noted at a later point in this opinion, I am of the view that the authority conferred upon the President by the joint resolution of June 29, 1944 tends to confirm, if not augment, his discretionary authority to agree with the Philippine government and convey to it any of the naval reservations and fueling stations in the Philippines.

As to the military reservations of the Tydings-McDuffie act, there has been a complete change in the law and status as provided for in 1934. In place of their passage to the Philippines upon the achievement of independence the President has been authorized under the joint resolution of June 29, 1944, after negotiation with the President of the Philippine Commonwealth or the President of Philippine Republic, to withhold and to retain as bases,

(Continue on page 159)

MR. BROWNELL'S . . .

(Continued from page 120)

in addition to the naval reservations and fueling stations, any and all reservations of the United States as he may deem necessary for the mutual protection of the Philippine Islands and the United States, and by such means as he finds appropriate. In addition, he has been authorized by the same joint resolution to acquire bases and to retain them for the same purpose and by the same means. As a result, the President was and is vested with complete discretionary authority to retain or convey to the Philippine government the title in and to any military bases of the United States in the Philippines.

The language of the joint resolution of June 29, 1944, 58 Stat. 625, referring to "bases" without qualification and "in addition to any provided for by the Act of March 24, 1934," is comprehensive enough to include the naval reservations and fueling stations as well as military reservations, so that the President's earlier authority as to naval reservations and fueling stations is reinforced by the joint resolution.

Again, as in the case of the naval reservations and fueling stations, there is no obligation on the part of the President to transfer title to the bases without compensation. Likewise, there is no obligation on the part of the President to demand compensation in connection with a transfer. His discretion is complete.

A further question has been raised in regard to those properties of the United States which have been or are being used as "temporary installations" under Article XXI of the Military Bases Agreement in contrast to the Annexes A and B bases under that agreement. It is said that because of their temporary nature it might be implied that upon termination of their use the temporary installations would be conveyed to the Philippine government without compensation. But there is nothing in the agreement making provision for such conveyance of title; and as noted earlier in this opinion, the contemporaneous exchange of notes accompanying the Military Bases agreement was intended to reserve the whole issue of title to properties involved in the bases agreement for future settlement in accordance with the acts and joint resolution of the congress. Article XXI, like the rest of the agreement pertaining to the Annexes A and B bases, is concerned with the use for military purposes of the property involved, rather than its ownership.

The memorandum of the legal adviser points out that the number of temporary installations has been greatly reduced by the specific, formal conveyances to the Philippine government of most of the United States military properties coming under the head of temporary installations. In the category of real property constituting a temporary installation there remains, he says, only the Fort McKinley reservation, and the Port of Manila reservation as

to which Article XXI makes special provision. The past conveyances of almost all of temporary installations without compensation in 1947 and 1949 might be claimed to be some evidence of a "moral obligation" to convey the remainder of the temporary installation without compensation. I do not find any legal obligation requiring the United States to convey title to the remainder of the temporary installations; nor is there any provision of law or agreement dealing differently with those titles than is provided in the case of the Annexes A and B bases and the naval reservations and fueling stations. If in the past the President was moved to convey to the Philippine government title to the military installations which were surplus to the United States needs, without compensation, he was well within his authority, as has been already described. As the history of the period indicates, he may well have been motivated by the desire to obtain Philippine cooperation in supplying other properties or facilities for United States use. Equally, the President may find today that those expectations have not been realized, in view of the fact that at the present time the United States is having difficulty obtaining property from the Philippine government needed for expansion of the bases. But these are reasons of policy, calling for the exercise of the discretion vested in the President. They do not constitute legal obligations.

I therefore conclude that there is no different law governing the disposition of United States titles to properties comprising the Article XXI temporary installations than is provided for disposition of the titles to the Annexes A and B bases of the Military Bases Agreement.

As to all three categories of base property, viz., Annexes A and B bases, naval reservations and fueling stations, and Article XXI installations, there is no obligation on the part of the United States to transfer presently to the Philippine government title to any such properties, with or without compensation. However, the President is authorized in his discretion, to make transfers of such base property as he deems to be in the interest of the United States on such terms and conditions as he may deem advisable, in agreement with the government of the Philippine Republic.

In view of the possible negotiations with the Philippine government, which lie ahead, it is my understanding that you do not want this opinion to be published. Therefore, for the present, I am maintaining the same classification for this opinion as has been assigned to be the incoming material.

I am sending copies of this opinion to the director of the bureau of the budget, the secretary of the navy, and the secretary of the air force.

Sincerely,  
HERBERT BROWNELL, JR.  
Attorney General