EXECUTIVE AGREEMENTS AND EMANATIONS FROM THE FIFTH AMENDMENT

The Court of Claims [1] has now joined the Fourth Circuit [2] in holding an executive agreement invalid for essential statutory conflict. In affirming the Fourth Circuit the Supreme Court did not pass upon the issue whether an executive agreement in conflict with a previous statute was invalid for that reason.[3] In holding an executive agreement invalid for departure from a general statute applying the eminent domain aspect of the Fifth Amendment, the Court of Claims overruled an earlier post-World War II decision [4] that an executive agreement could validly refer a claimant exclusively to another country for compensation for property taken by the United States. Thus the Court of Claims has opened up for further discussion a topic closely related to Senator Bricker's streamlined and renewed proposal [5] for Constitutional amendment of the treaty power. Also, the decision in the *Seery* case seems to present us with problems of some importance from the standpoint of international reclamations in modern American practice.

The Court of Claims decision under reference was on defendant's motion for summary judgment. Judgment against the Government has not been appealed, and trial on the merits is to proceed. The situation in brief is that the plaintiff, a well-known opera singer, became an American national in 1944, and in 1945 her large lakeside house in Austria and its eight-room guest cottage were taken over by the United States Army for an officers' club. Apparently there was considerable damage to the realty, and the furnishings disappeared during the time the officers were in possession. Mrs. Seery brings her claim against the Government for compensation for the taking of her property.

All of the Government's three defenses and the Court's dispositions of each of them are interesting, but only the third concerns us in this comment. They were:

1. The Fifth Amendment does not follow the flag to Austria. The Court of Claims held that it did, citing its own recent decision in another case as its only authority.[6]

[1] Maria Jeritza Seery *v.* U. S., 127 F.Supp. 601 (Court of Claims, 1955); digested *infra*, p. 410.

[2] U. S. *v.* Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), digested in 47 A.J.I.L. 147 (1953); *cert. granted*, 346 U. S. 884 (1953); see Sutherland, "The Bricker Amendment, Executive Agreements, and Imported Potatoes," 67 Harv. L. Rev. 281 (1953).

[3] U. S. *v.* Capps, 75 Sup.Ct.Rep. 326 (1955) at 331: "In view of the foregoing, there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision in this case does not rest upon them."

[4] Etlimar S. A. *v.* U. S., 106 F.Supp. 191 (1952), which had followed Hannevig *v.* U. S., 84 F.Supp. 743 (1949), despite the fact that in the latter case there had been a Senate-consented international agreement, rather than a lend-lease settlement and surplus property settlement not referred to the Senate for approval.

[5] S.J.Res. 1 for the current Congress, unlike its predecessor of the same number in the preceding Congress, does not provide specifically for the regulation of executive agreements by law. But see text, *post*.

[6] *Cf.* Charles Fairman, "Some New Problems of the Constitution Following the Flag," 1 Stanford L.Rev. 587–589, 644–645 (1949).

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2. Mrs. Seery's property is "enemy property" under international law, subject to temporary appropriation and use by the occupying Power. Citing the various quadripartite and American statements regarding the legal status of Austria and considering the circumstances of the taking in 1945 after military necessity had disappeared, the Court found against any customary international law authorization for the taking by the American military authorities. Austria was not, in any event, "enemy territory" at the time of the taking.

3. The United States is not liable to Mrs. Seery, because by an executive agreement between the United States High Commissioner in Austria and the Chancellor of the Federal Government of Austria of June 21, 1947, Austria assumed to settle all claims of all persons owning property in Austria for losses caused by the United States Forces for and in consideration of the transfer by the United States to Austria of one-third of a billion schillings.

The Government relied on the *Pink, Belmont and Altman* cases to support its position as to the effect of the executive agreement, and Mrs. Seery cited the usual authorities for the proposition that even a "formally ratified" treaty cannot accomplish what the Constitution forbids.

In its decision the Court of Claims carefully skirted between the absolutes argued. It accepted the viewpoint, supported by a Court of Claims decision, that a "formally ratified" treaty assigning liabilities elsewhere, being legislation, amounted to a withdrawal by Congress of consent to be sued. On the other hand, an executive agreement, similar in purpose, not being legislation, could not have the effect of withdrawing Congress' grant of consent to such suits in the Court of Claims. The Court said:

> . . . It would be indeed incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress, consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional right of a citizen. In . . . *Capps* . . . the Court held that an executive agreement which conflicted with an Act of Congress was invalid.

The report of the *Seery* case does not show whether the plaintiff made any effort to collect from the Austrian Government for the damage to her property. It is stated that she filed a claim with the Department of Defense and thereafter brought this action against the United States. Thus, the case will be seen as one having serious implications for all those occupied and liberated area settlements wherein some other country has agreed to accept liability for losses occasioned as a result of the actions of American Forces. There is no reason to suppose that only American citizens may bring such actions.[7]

Admitting *arguendo* that occupation arrangements for the assumption of liability were designed primarily for dealing with the claims of the local

[7] The cases in note 4 *supra* apparently did not involve either citizens or residents of the United States. Moreover, the Fifth Amendment is not limited to citizens but covers persons subject to the jurisdiction of the United States. *Quaere:* including those in occupied areas?

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populace in the occupied area, we should not lose sight of the fact that if the plaintiff wins this case she will be getting compensation in hard dollars for an investment most likely made originally in other currency now depreciated and subject to currency control, but probably adequate to put her property back into its pre-officers' club condition. This consideration leads us on to another situation where this decision may be the source of difficulty: lump-sum nationalization settlements. Under the American contention that international customary law requires prompt, adequate and effective compensation for an alien's property taken into public ownership, compensation in non-convertible local currency has presented a particular difficulty. This difficulty has been resolved in several instances—of which the United States-Yugoslav Nationalization Settlement of July 19, 1948, is typical—by a lump-sum settlement. Under such a settlement a reasonably negotiable figure in dollars is accepted by the United States in full satisfaction of the totality of claims against the nationalizing country, and the particular American claimants are therefore relegated to making their claims *pro tanto* against the lump sum. The lump-sum settlement is by an executive agreement.[8] The effect of the agreement is to cut off the owner from effective legal action in the nationalizing country; internationally, also, the United States can no longer press his claim. He must look to his share in the salvage transaction, the lump-sum settlement.

Let us suppose a case: An American company in 1940 invested a million dollars in a plant in Country X. Eighty other Americans, naturalized after their original investment, but before the taking, used other currencies now greatly depreciated and subject to exchange restrictions, in acquiring property in Country X. All private property in X is nationalized. In order to get dollars now for all the claimants, a lump-sum settlement of $17,000,000 is accepted as against total reported claims of $50,000,000. A fair ratio of recovery out of this sum for the company is $500,000.

If the United States had done nothing, there would clearly have been no taking on the part of the United States, it seems certain. If it does act, we should not expect that due process problems could be avoided by the simple expedient of adverting to the old dogma that the international reclamation is the sovereign's cause of action, not the individual's. Despite this theory, the fact remains that something is being done by executive agreement to diminish or change the citizen's legal relationship to property.

This brings us back to the *Seery* case. What "taking" does the Court have in mind there? The original "liberations" by the careless or light-fingered Army officers, or the executive agreement's shifting of responsibility to Austria? It is not easy to answer this question from the *Seery* case. At best we can distinguish the two situations on the ground that in the *Seery* case agencies of the United States had taken "property" (in the sense of the material things) and thereafter the executive agreement had

[8] It may, however, be in effect ratified by Congress as was the case of the Yugoslav Agreement under the International Claims Settlement Act of 1949 (81st Cong., 1st Sess., 64 Stat. 12).

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purported to take away a Congress-granted cause of action, whereas, in the nationalization case supposed, the United States through the executive agreement does not take away any material thing—the other country did that. However, in the hypothetical case "property" has certainly been affected by the executive agreement. It is submitted, however, that the distinction is entirely valid and should be made.

More broadly viewed, the *Seery* decision is interesting as another indication from the courts that Senate-consented treaties, "congressional-executive" and "presidential" agreements are not, after all, absolutely interchangeable instruments of national policy.[9] It is the "presidential" or executive agreement that has suffered a loss of face in these decisions. Whereas it still seems to be assumed that treaties are valid unless they violate some specific prohibition of the Constitution, and even though it is arguable that an executive agreement might extend Congress' power to implement it, the purely executive agreement will fail if it contradicts specifically a prior statute, *Capps* case, or if it departs from what the court interprets as the general intent of a prior statute, *Seery* case. The difference can be seen by making one further supposition: An Austrian state treaty, so long delayed, has been signed recently. Suppose that treaty reaffirms the principle of the executive agreement involved in the *Seery* case and the treaty goes into effect after Senate consent. Thereafter another American national or resident alien or non-Austrian anywhere sues in the Court of Claims for an injury to his property in Austria while in the hands of United States agencies. What result? The *Seery* case *dictum* would compel an answer opposite to the holding there.

Perhaps the difference is entirely justified and in fact wise if limited to situations where the original taking is attributable on agency principles to the United States. It is only to be hoped that in the course of the process of judicial inclusion and exclusion with regard to executive agreements, Senator Bricker's new assumption that all executive agreements of all types are so clearly subject to the power of Congress to regulate under the "necessary and proper" clause of Article I of the Constitution as to need no specific coverage in his new proposal for amending the treaty power,[10] does not gain so much ground with the judiciary as to deny to the President and his executive agents the power to give course and direction to American foreign policy.

It is not likely, however, that the cohorts of the Bricker Amendment, Mark II, will let lie the Court of Claim's intimation that "formal treaties" may take property without compensation. The negative pregnant will be no obstacle, we may be assured, to those who have flogged dead decisions, such as the California intermediate appellate court opinion in the *Sei Fujii*

[9] *Cf.* Myres S. McDougal and Asher Lane, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 Yale L.J. 186–189 (1945).

[10] Consult Craig Mathews, "The Constitutional Power of the President to Conclude International Agreements," 64 *ibid. passim* and 387 (1955).

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case, an opinion which in California appellate theory ceased to exist [11] when the Supreme Court of the State took jurisdiction and wrote an opinion basing invalidity on the Fourteenth Amendment, rather than on the general language of the United Nations Charter and the goals (not norms) of the Universal Declaration of Human Rights.

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"TREATY-INVESTOR" CLAUSES IN COMMERCIAL TREATIES OF THE UNITED STATES

The entry of aliens into the United States is the subject of very limited provisions of commercial treaties. Congressional power has, however, found expression in certain legislative provisions establishing permissive bases for useful clauses in such treaties. A recent example of this is that part of the Immigration and Nationality Act of 1952,[1] which excepts from the category of immigrant (for the purposes of the Act):

> an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign country of which he is a national, and the spouse and children of any such alien if accompanying or following to join him (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital. . . .[2]

Three recently signed commercial treaties of the United States (that with Japan, signed April 2, 1953,[3] that with the Federal Republic of Germany, signed October 29, 1954,[4] and that with the Republic of Haiti, signed March 3, 1955[5]) contain wording which is relatable to the statutory provisions quoted above. The German treaty, after a general statement that "Nationals of either Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice," provides in the second sentence of the same paragraph that:

> Nationals of either Party shall in particular be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.[6]

[11] Sei Fujii *v.* State of California, 38 Cal.(2d) 718, 242 Pac.(2d) 617 (1952), 46 A.J.I.L. 559 (1952). See Fairman, "Finis to Fujii," *ibid.* at 682.

[1] P. L. 414, 82nd Cong., 2nd Sess., 66 Stat. 163.

[2] Sec. 101 (a) (15) (e); 8 U.S.C. § 1101 (a) (15) (E).

[3] T. I. A. S. 2863. [4] Sen. Exec. E, 84th Cong., 1st Sess.

[5] Unofficial text in U. S. Dept. of State Press Release No. 117 (March 3, 1955).

[6] The protocol accompanying the treaty contains in par. 2 the following: "The provisions of Article II, paragraph 1 (b), shall be construed as extending to nationals of either Party seeking to enter the territories of the other Party solely for the purpose of developing and directing the operations of an enterprise in the territories of

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