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THE PANAMA CANAL TREATY—CONSTITUTIONAL AND LEGAL ASPECTS OF THE RATIFICATION PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE PANAMA CANAL TREATY—CONSTITUTIONAL AND LEGAL ASPECTS OF THE RATIFICATION PROCESS

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Senator LAXALT. I thank the chairman. I will have to leave around 11 because I am scheduled to testify on the House side after 11, if I may be excused then.

Senator EAST. Certainly, the Senator will be free to come and go as he wishes, and we will be happy to hear him at any time he wishes to be heard.

So I would like to turn then to Dr. Breecher. He has already had a very fine introduction here by Senator Laxalt. He is former Director of the Office of Programing, Planning and Budget, Securities Assistance Bureau, Agency for International Development and, as Senator Laxalt has indicated, an expert on international law, and particularly the treaty dimension of international law.

Dr. Breecher, we welcome you this morning and look forward to receiving your testimony.

STATEMENT OF CHARLES H. BREECHER, FORMER DIRECTOR, OFFICE OF PROGRAMING, PLANNING AND BUDGET, SECURITIES ASSISTANCE BUREAU, AGENCY FOR INTERNATIONAL DEVELOPMENT; ROBERT E. DALTON, ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS, OFFICE OF THE LEGAL ADVISER, U.S. DEPARTMENT OF STATE; HERBERT W. DODGE, FORMER SPECIAL ASSISTANT TO THE DIRECTOR OF PERSONNEL, AGENCY FOR INTERNATIONAL DEVELOPMENT; AND PHILLIP HARMAN, CHAIRMAN, COMMITTEE FOR BETTER PANAMA AND U.S. RELATIONS

Dr. BREECHER. Thank you, Mr. Chairman. Mr. Chairman, I would first like to thank Senator Laxalt for his kind words of introduction, and I would say that the Senator is always too modest because had it not been for his encouragement and friendship, I would never be here today or would have pursued this matter the way I have. So, very great credit is due to Senator Laxalt and, may I add, to yourself and your committee for having called this hearing on what I hope you will consider a matter of great national importance.

Senator EAST. Thank you.

Dr. BREECHER. Mr. Chairman, I would ask your permission to insert my sworn deposition of March 17, 1983, to Dr. Francis of your staff in the record; to consider it read and to allow me to sum it up briefly.

Senator EAST. We will certainly do that and, without objection, hearing none, it is so ordered that your written statement will be made a permanent part of the record.

Dr. BREECHER. Mr. Chairman, I make two flat assertions which I made under oath at the occasion of my deposition. First, the Panama Canal treaties have not—I repeat, not—been ratified in international law, and they therefore did not go into effect on the 1st of October 1979, and are not in effect now.

The reason is very simple. In their respective instruments of ratification, the United States and Panama did not agree to the same text of the treaties. Instead, Panama first agreed to the treaties as the President of the United States had ratified them, pursuant to Senate advice and consent, and then added in both its instruments of ratification, unilaterally, something they called an understand-

ing, on which Panama made its agreement to the treaties contingent.

This Panamanian understanding—in reality, a counter-reservation to both treaties, three paragraphs long—would, had it been accepted by the United States, have nullified the so-called DeConcini reservation under which the United States has permanently—I repeat, permanently—the right to use independently—and I repeat, independently—without Panamanian consent, or even against Panamanian opposition, military force in Panama to keep the Canal open and operating. Since the United States has not accepted this Panamanian so-called understanding, there are no treaties in international law.

My second point is that the U.S. Constitution unequivocally bars the President of the United States from appointing Panamanians, nonresident aliens—and I repeat, nonresident aliens—as members, administrators or deputy administrators of the Panama Canal Commission, a U.S. Government agency. This unsurmountable bar is expressed by the Constitution in the same pithy way as, for example, for infants, requiring that all executive officers shall bind themselves by oath or affirmation to support the Constitution. That is article VI, section 3. A nonresident alien owing allegiance to Panama can obviously not swear that oath. Further, the Constitution provides that all civil officers can be removed from office on impeachment for and conviction of treason—article II, section 4 of the Constitution.

Again, it is obvious that a nonresident alien cannot commit treason against the United States, so these provisions of the Constitution alone are an absolute bar to the President appointing nonresident aliens as members—called directors, but they are members—administrators or deputy administrators of the Panama Canal Commission, a U.S. Government agency.

Now, let me go back to the nonratification of the treaties—an issue of international law. Here, I want to make it absolutely clear that if there is one thing that is beyond any argument in international law, it is that to ratify a bilateral—and again I stress, bilateral treaty—the parties must agree in their instruments of ratification to the same written text. Otherwise, there is no meeting of the minds, as required for ratification. There is no ratification if one party makes its agreement to the treaties contingent on any amendment, condition, understanding, interpretation, reservation, declaration, or whatever it wants to call it, that is not formally and verbatim accepted by the other party.

Now, the text of that Panamanian three-paragraph-long understanding in both Panamanian instruments of ratification is on pages 5 and 6 of my sworn deposition. Note that Panama specifically makes its agreement to the treaties contingent on that so-called understanding.

Now, in paragraph 2, this Panamanian counterreservation, is really a further proposed amendment to both treaties—it says in undisguised language that the DeConcini condition can be exercised in the spirit of cooperation with Panama only. That is, of course, the exact contrary of DeConcini, as Dr. Dodge has explained in more detail in his statement.

In paragraph 1, in the most camouflaged lawyer's language imaginable, Panama says flatly that the DeConcini reservation can be exercised only in self-defense, pursuant to article 18 of the OAS Charter. The catch, of course, is that Article 18 of the OAS Charter has been amended in a very limited way in United States-Panamanian relations only by the DeConcini reservation.

I fail to see how anyone could claim that the United States has accepted that Panamanian so-called understanding. Where, may I ask? It is even more preposterous to say that these three paragraphs are just a correct factual statement which does not need acceptance. Saying that is demeaning to Panama, in my view, because why then did they put these three paragraphs in in three different places?

It is demeaning to President Carter because if it were really a correct factual statement, the President could have just accepted it, maybe, in the protocol. It is an outright affront to the commonsense of anyone if—that is a very big "if"—he has a full record and, may I add, if he cannot be bluffed all that easily.

Now, on the constitutional issue, that is quite separate from nonratification. What it means is that the Panama Canal Treaty of 1977 cannot be implemented under the U.S. Constitution, first, because the President cannot appoint persons not owing allegiance to the United States as members or directors, administrators or deputy administrators of a U.S. Government agency, the Panama Canal Commission.

Second, the Constitution does not allow all American citizens to be excluded from some Federal offices on the grounds that they are not Panamanian nationals. The mere idea is repugnant and absurd and not admitted in any soveriegn country in the world.

Next—and this is a third insuperable constitutional obstacle—the treaty says the President should have no choice whatever but must appoint the nominees of Panama in a timely manner. This limitation of Presidential appointive power is excluded inter alia by the Supreme Court's decision in *Buckley* v. *Valeo.* Some choice, however small, must always be left to the President to appoint someone.

There has not been a word of congressional or executive branch testimony on the nonratification issue. On the constitutional issue, there was testimony by a Justice Department attorney on February 26, 1979, before the Panama Canal Subcommittee, the Honorable Carroll Hubbard, chairman.

The so-called Foy memo repudiated a previous State Department position contained in a letter to Senator Roth in May 1978, which I could make available to the committee if it wishes.

That letter said that the Congress or a treaty could prescribe any, I repeat, any qualifications for Federal office, even foreign allegiance. Nonsense, of course, but the letter admitted at least that the members of the Panama Canal Commission were Federal officers. For that reason, I ask that that State Department letter be inserted in the record.

Senator EAST. Without objection, so ordered.

[Material referred to follows:]

DEPARTMENT OF STATE

Washington, D.C. 20520

May 12, 1978

Dear Senator Roth:

This is in response to your letter of March 20 forwarding a copy of an address given by Mr. Charles H. Breecher. You have requested that I discuss the "citizenship" issues raised by Mr. Breecher. I regret the delay in responding.

Mr. Breecher notes that under paragraph 3(a) of Article III of the Panama Canal Treaty, four of the nine directors of the Panama Canal Commission are to be Panamanian nationals. Mr. Breecher questions whether this provision constitutes an impermissable limitation on the power of the President, with the advice and consent of the Senate, to appoint officers of the United States. It is clear that, in creating federal offices, Congress may prescribe qualifications which necessarily limit the scope of the President's appointment power. A common example is the limitation of the number of appointees to an independent regulatory agency who may be members of the same political party. Another illustration are statutes which require that directors of government corporations be drawn from designated interest groups. (eg. 22 U.S.C. 2193, OPIC). There is no basis for distinguishing between restrictions on the appointment power which have been imposed by statute from those imposed by Treaty. Both are equally permissable under Article II Section 2, Clause 2 of the Constitution.

Contrary to Mr. Breecher's implication, neither the Constitution nor applicable law precludes the employment of aliens by a United States Government agency. There are restrictions in the Civil Service Regulations concerning the employment of aliens in the competitive service, but these would have no application to the directors, deputy administrator or other employees of the Panama Canal Commission. It should be noted that the present Panama Canal Company employees a large number of Panamanian nationals. In the unlikely event that impeachment proceedings are initiated against an official of the Commission, the governing standard with regard to the crime of treason would differ if the official were a Panamanian national. This poses no constitutional obstacle to the Treaty, however.

Mr. Breecher further contends that limitation of four of the nine director positions and one of the two executive position to Panamanian nationals, and the system of hiring preference for Panamanian nationals may deprive United States citizens of rights under the 5th and 14th Amendments to the Constitution. The 14th Amendment applies only to the states. Even if we assume

that the right to employment as a director, executive or other employee of the Commission is a right protected under the 5th Amendment, the reservation of certain positions in an organization by Treaty to nationals of the other constracting state does not constitute an un-Constitutional deprivation of such a "right". The federal government may employ classifications based on nationality so long as such action serves to enhance federal interests substantially. Mow Sun Wong vs. Hampton 435 F. Supp 37, 44 (N.D. Cal. 1977) applying Hampton vs. Mow Sun Wong 426 US 88 (1976). There is no doubt that federal interests in foreign relations are advanced materially by these Treaty Provisions. The Treaty is thus not subject to attack under the 5th Amendment, even if we make the unlikely assumption that a protected right is involved.

Mr. Breecher questions the ability of the United States to control the Commission in view of the minority Panamanian representation. One of the principle objectives of the U.S. negotiators was to insure that the Canal would remain under U.S. control until the year 2000. Thus, the Treaty provides that the Commission will be a United States Agency constituted under United States law, and assures the United States of majority control of its Board. Steps will be taken to insure that the United States directors implement United States policy.

Finally, Mr. Breecher fears the prospect of litigation which would result in a declaration that the Panama Canal Treaty is unconstitutional. Although such litigation may be commenced, neither the "citizenship issues" on which you requested comment, nor any of the other issues raised by Mr. Breecher provide a basis for a well-founded constitutional challenge to the Treaty.

I hope these views are helpful to you. Again, I apologize for the delayed nature of my response.

With best regards,

Sincerely,

Douglas J. Bennet, Jr.
Assistant Secretary for
Congressional Relations

Dr. BREECHER. The Foy memo, getting back to this, admitted that only persons owing allegiance to the United States could be officers of the United States, whatever a treaty said. Foy then says, for that very reason, the Panamanian members of the Panama Canal Commission were not "officers in the constitutional sense," whatever that is, and therefore allegedly not subject to the U.S. Constitution for their Presidential appointment and for their removal.

I do not need to spend time on that completely illogical memo because it has been flatly rejected by the Panama Canal Subcommittee, and subsequently by the Congress in the Panama Canal Act

of 1979. That act, as concerns the Panama Canal Commission, follows almost totally my own testimony before the Panama Canal Subcommittee on March 7, 1979.

Let me just quote one sentence from the Merchant Marine and Fisheries Committee report of April 1979. "The nine," I repeat, "nine members of the Board of the Canal Commission are clearly officers of the Executive Branch." The Foy memo, moreover, does not even deal with the exclusion of all American citizens from certain offices, nor with the unconstitutional limitation of the President's appointive power to appoint where he has no choice at all.

If anyone wants a full critique of the Foy memo, of interest to me as a constitutional student, I refer you to the Congressional Record, pages S9541-45, July 16, 1979, remarks by Senator Roth of Delaware.

Now, allow me at the end, Mr. Chairman, to sum up in the simplest possible terms once more. What we have here on the documented record on nonratification is the worst fraud—I am very sorry, Mr. Chairman; I cannot use any other word, but if you wish, I shall substitute "swindle" or "hoax," in the words of another distinguished Senator—ever perpetrated on the U.S. Senate and on the American people.

That hoax was committed by pretending that in their respective instruments of ratification, the United States and Panama had agreed to the same treaty text, whereas, in reality, under the Panamanian instrument of ratification the United States could exercise the DeConcini reservation only in self defense, pursuant to article 18 of the OAS Charter, and in cooperation with Panama. That is, of course, the exact contrary of the DeConcini reservation, as contained in the U.S. ratification document of the neutrality treaty. Hence, no ratification, and the treaties never came into effect. It is as simple as that.

What is more—and I refer to this in my sworn deposition—we have three major published papers, what I call smoking guns, admitting U.S. executive branch complicity in the sorry affair: first, a speech by William D. Rogers, former Assistant Secretary for Latin American Affairs, before the American Society of International Law in 1979, which is part of my deposition; second, a letter by Ambassador David Popper, the man chiefly charged with the implementation of the Panama Canal treaties, which was addressed to Mr. Harman, I believe, in June 1982—Mr. Harman can tell you more about that letter, but in which Popper admits the whole business; and third, most startling, in President Carter's book at pages 172-74. Here, too, Mr. Harman, who read that book first and discovered it first, can give you in his statement more details on it.

So much for the nonratification issue, and I challenge anybody to make any kind of argument that these treaties have been ratified. This is nothing personal against the distinguished representative of the State Department, who is just doing his job, I believe, as the attorney for the executive branch.

On the appointment of nonresidents—and I stress, nonresident aliens—to U.S. civil offices by the President and, even worse, the exclusion of all U.S. citizens from certain offices of a U.S. Government agency—and I stress that the Panama Canal Commission is not a binational commission; it is a U.S. Government agency—this

is the worst imaginable violation of the U.S. Constitution and of the privileges and immunities of U.S. citizens, as I have outlined in some detail in my statement.

Now, this double fraud which stares you in the face on the record, if you only had the record—it is, of course, a big "if"; nobody has it except the bureaucracy and somebody who really wants to go after it—has been perpetuated to date by what I can only call stonewalling.

Mr. Chairman, may I commend you once again for calling these hearings to bring the legally pertinent facts to light. And, of course, may I repeat that great credit is due not so much to me, but to Senator Laxalt, who has insistently called for these hearings and who has supported me in this from the outset.

[The statement and deposition of Mr. Beecher follow:]

STATEMENT OF DR. CHARLES H. BREECHER

LEGALITY OF THE PANAMA CANAL TREATIES
SUBCOMMITTEE ON SEPARATION
OF POWERS
COMMITTEE ON THE JUDICIARY
U.S. SENATE
JUNE 23, 1983

(This statement is part of a sworn deposition made by the witness to the Subcommittee on Separation of Powers on March 17, 1983.)

Mr. Chairman, I make two flat assertions:

First, that the Panama Canal treaties have not, I repeat "not," been ratified in international law, and that they, therefore, did not go into effect on 1 October 1979. The reason is very simple: in their instruments of ratification the United States and Panama did not agree to the same text of the treaties. Instead Panama added in both its instruments of ratification unilaterally an "understanding" on which it made its agreement to the treaties contingent. This Panamanian "understanding," three paragraphs long, would, had it been accepted by the United States, have nullified the DeConcini reservation under which the United States has permanently the right to use independently, without Panamanian consent or even against Panamanian opposition, military force in Panama to keep the Canal open and operating. Since the United States has not accepted this Panamanian "understanding," which is a further amendment to the text of the treaties as amended by the President in the U.S. ratification documents, pursuant to Senate advice and consent, there are no Canal treaties in international law. This documented fact is beyond any dispute.

Second, that the U.S. Constitution unequivocally bars the President from appointing Panamanians, nonresident aliens, as members, administrators, or deputy administrators of the Panama Canal Commission, a United States Government agency. This unsurmountable bar is expressed by the Constitution in the same

pithy way as, e.g., for infants by requiring that all executive officers shall bind themselves by oath or affirmation to support the Constitution, Article VI, Section 3. A nonresident alien, owing allegiance to Panama, can obviously not swear that oath. Further, the Constitution provides that all civil officers can be removed from office on impeachment for, and conviction of, treason, Article II, Section 4.

Again, it is obvious that a nonresident alien cannot commit treason against the United States, so these provisions of the Constitution alone are an absolute bar to the President to appoint Panamanians, nonresident aliens, as members, called "directors," administrators, or deputy administrators of the Panama Canal Commission, a United States Government agency. They are also an absolute to the Congress to authorize any payments to them by virtue of these unconstitutional appointments, and there are no other major constitutional objections against the composition of the Panama Canal Commission which appears not subject to any refutation, as I shall outline.

Now concerning non-ratification of the treaties, an issue of international law, I want to make it absolutely clear that if there is one thing that is beyond any argument in international law, it is that to ratify a bilateral treaty, the parties must agree in their instruments of ratification to the same written text. Otherwise, there is no meeting of the minds as required for ratification. There is no ratification if one party makes its agreement to the treaties contingent on any amendment, condition, understanding, reservation, or whatever it wants to call it, that is not formally and verbatim accepted by the other party.

If one examines the Panamanian instruments of ratification for both the Panama Canal Treaty of 1977 and the

Neutrality Treaty, they start out perfectly correctly, in accordance with normal diplomatic practice, by repeating word for word the various U.S. amendments, reservations, conditions, and understandings added to the origional treaty texts by the U.S. Senate and incorporated in the U.S. instruments of ratification. If, after repeating these United States changes to the treaties signed in September 1977, the Republic of panama had said in its ratification documents: "I agree and ratify," or words to that effect, then there would, indeed, be treaties in international laws as of 1 October 1979, or at least their validity could not have been attacked prima facie on the grounds of non ratification. However, it can be seen that instead of agreeing to ratification, Panama said:

"The Republic of Panama agrees to the exchange of the instruments of ratification of the Panema Canal Treaty on the understanding that there are positive rules of public international law contained in multilateral treaties to which both the Republic of Panama and the United States of America are parties and which consequently both States are bound to implement in good faith, such as Article I, paragraph 2, and Article 2, paragraph 4, of the Charter of the United Nations and Articles 18 and 20 of the Charter of the Organization of American States."

"It is also the understanding of the Republic of Panama that the actions which either party may take in the exercise of its rights and the fulfillment of its duties in accordance with the aforesaid Panama Canal treaty, including measures to reopen the Canal or to restore its normal operation, if it should be interrupted or obstructed, will be effected in a manner consistent with the principles of mutual respect and cooperation on which the new relationship established by that treaty is based.

"The Republic of Panama declares that its political independence, territorial integrity, and self-determination are guaranteed by the unshakeable will of the Panamanian people. Therefore, the Republic of Panama will reject, in unity and with decisiveness and firmness, any attempt by any country to intervene in its internal or external affairs."

The same three paragraphs are in the Panamanian instrument of ratification of the Neutrality Treaty.

Mr. Chairman, this unilateral Panamanian understanding in the Panamanian instruments of ratification not accepted by the U.S. renders the ratification null and void ab initio. The one essential requirement for any bilateral treaty in order to be a treaty is that there be a meeting of minds expressed in writing, signed by competent authorities, Vienna 1969 Convention on the Law of Treaties.

The two parties must agree to the same piece of paper. If one party makes additions, through its instrument of ratification, to the original treaty text already signed, or amends it, strikes something out, interprets something and so on, then these changes, whatever their contents, must be formally and without counterreservation, accepted verbatim by the other party. That's so even if the change has no substantive meaning, although that's something governments usually just don't do in their instruments of ratification. But if unilateral additions of whatever kind are in the instruments of ratification as a condition to one party's agreement, then they must be accepted formally by the other party in a bilateral treaty, or else there is no ratification, just a counterproposal and the treaty negotiations still keep going on.

What I am saying here is a mere boilerplate in

international law, but I shall quote first the opinion of the Panamanians on that point, contained in a Communique of the Panamanian Foreign Ministry 25 April 1978 and put in the Congressional Record by Senator Helms, 6/5/1978:

"We can assert that, regardless of the term used, what matters is if the condition, reservation, amendment, or declaration made by one party to the other modifies or changes what has been agreed to by the plenipotentiaries. If that change has been made, it is unquestionable that the treaty has not been ratified but, rather, that a counter offer has been made which the other is at liberty to reject, modify, or approve. Only if it approves the counteroffer is the consent or perfecting (perfeccionamiento) of the wish of both parties to obligate themselves realized."

On the U.S. side, I quote Senator Sarbanes, one of the floor managers for the treaty in the Senate:

Mr. Sarbanes: "I am now quoting Charles G. Fenwick, International Law: 'Since the signature of a treaty represents a meeting of minds of the several parties upon specific provisions involving reciprocal obligations, any changes or amendments inserted by one party as a condition of ratification must be accepted by the other party if the treaty is to come into legal effect.''

"I ought to point out that ever since 1922 the technique which the Senate has used to alter the legal effect of provisions contained in a treaty, in exercising its advice-and-consent function, or the primary technique, has been through amendments to the articles of ratification as reflected in reservations. These, of course, then have to be agreed to, or accepted by the other party to the treaty if, in fact, there is to be a treaty."

Congressional Record, Senate, 3/15/78, also inserted there 6/5/78 by Senator Helms.

The use of the word "understanding" in that Panamanian counterreservation makes no difference whatever. Panama could have just as well have called it an "interpretation," "nuance," or whatever. If it is in the instrument of ratification of a bilateral treaty, it's still a reservation, the equivalent of an amendment to the treaty text.

In addition to the U.S. and Panamanian statements quoted above, here's Article 2.1(d), 1969 Vienna Convention on the Law of Treaties:

Article 2.1(d). "'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State,"

And as a matter of course, in the case of a bilateral treaty, such as the Canal treaties, such a reservation in the instrument of ratification of one State must be approved specifically and explicitly by the other State.

At the risk of overkill, I'll quote on that point also Article 20, 2, of the 1969 Vienna Convention on the Law of Treaties:

Article 20.2. "When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to

be found by the treaty, a reservation requires acceptance by all the parties."

The rules are somewhat different in the case of multilateral treaties according to the 1969 Vienna Convention, but this does not concern us here. Surely no one would want to argue that the Canal treaties are not bilateral treaties, or that the U.S. intended to consent to the treaties if the DeConcini reservation was not purely and simply accepted by Panama, along with the other changes in the treaty text mandated by the Senate as a condition for its advice and consent.

It follows that the Canal treaties are not ratified unless one of two things happens: either the Panamanians formally and in writing withdraw their three-paragraph-long "understanding" or the President of the United States, with the advice and consent of two-thirds of the Senate, approves the Panamanian "understanding" in writing.

At this point, I also quote a letter from Herbert J. Hansell, State Department Legal Adviser, concerning the procedure to be followed if Panama were to adopt a substantive amendment or reservation to the treaties after the Senate had given its advice and consent:

"This will confirm our previous advice to you"-- i.e., Senator John J. Sparkman, then chairman, Senate Foreign Relations Committee -- "that under United States law substantive amendments and reservations to the Panama Canal treaties put forth by Panama that would affect United States rights or obligations under the treaties cannot be accepted by the United States unless approved by the President and the Senate."

"The American Law Institute, in the Restatement of the

Law (Second) of the United States Foreign Relations Law, at page 23, states:

"'If the other state has made a reservation at signature or at ratification prior to the President's transmittal of the treaty to the Senate, in all likelihood the Senate will have official notice of the reservation in the message of transmittal and take it fully into account in acting on the treaty. The situation may arise, however, in which the Senate has given its consent to the treaty before the other state makes its reservation. In such a case Senate consent to the acceptance of the reservation is required." Section 5735, 18 April 1978, also page 641, American Journal of International Law, Volume 72.

I stress that even a nonsubstantive amendment in an instrument of ratification must be formally accepted by the other party or there's no ratification. Otherwise, there could be endless argument if the amendment is substantive or nonsubstantive. But in theory, the President could agree to a clearly nonsubstantive amendment, condition, understanding, et cetera, with Senate consent not required.

Of course, no responsible State has, to my knowledge, ever put a nonsubstantive amendment, under whatever name, unilaterally in its instrument of ratification. What on earth for? Nobody reads instruments of ratification unless for some reason pushed to do so, or unless he needs them to justify himself at some future date or occasion. So instruments of ratification are no place to put propoganda statements and thereby nullify treaties a party wants to go into effect.

There is no precedent known to me where states entered into a bilateral treaty and where one state made a unilateral understanding a condition to its ratification. It is most

regrettable, to put it mildly, that this quite unusual fact was not called to the attention of the Senate and the American people by the Department of State in the case of the Canal treaties.

Now allow me to go back to the substance of the Panamanian understanding. It can be seen most clearly from the second paragraph which says that measures to reopen the Canal or restore its normal operation will be effected "in a manner consistent with the principles of mutual respect and cooperation on which the new relationship established by the treaty is based." But that means the United States could not exercise independently military force in Panama to keep the Canal open and operating, against Panama or against Panamanians without the agreement of Panama. That nullifies, of course, the whole purpose of the DeConcini reservation. How can one take military action independently against Panama, say in case of the closing of the Canal through a strike incited by the Panamanian Government itself in cooperation with Panama?

Now to the first paragraph, which is clever lawyers' obfuscation at its worst, in my opinion, and utterly misleading and wrong. The fact that the United States and Panama have both adhered to the Charter of the United Nations and the OAS, multilateral treaties, does not prevent the U.S. and Panama to make a later treaty among themselves in partial derogation of the provisions of the OAS treaty only. And that is exactly what the DeConcini reservation is -- a very limited exception, applicable to the U.S. and Panama only under special circumstances, only to Article 18 of the OAS Charter which reads:

"Article 18. The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof."

The UN Charter provisions quoted and Article 20 of the OAS treaty are quite irrelevant and a smokescreen, in my view. I'll quote just Article 1, paragraph 2, of the UN Charter to demonstrate this:

"Article 1, paragraph 2: The purposes of the United Nations are:"

"2 To develop friendly relations among nations based on the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

What, may I ask, has this fine provision got to do with the Canal treaties?

I could go on at length on that paragraph one, the meaning of "positive," the effect if the OAS treaty were really "positive international law," et cetera, and shall be glad to do so, if the Chair or members of the committee wish to ask questions for clarification. However, to save time, I merely quote here a decisive and formal statement by President Carter as my supporting authority, from his exchange of letters with Senator Brooke (R-Mass), at S-5756, 18 April 1978:

Brooke: "Under the so-called DeConcini condition, does the United States reserve itself the option to take whatever actions are necessary, including the unilateral decision to use military force on the territory of Panama, if necessary, to ensure the Canal will be available for the passage of U.S. vessels, regardless of whether the threat to the Canal comes from any source external to Panama or from some source within Panama?"

Carter: "The answer to that question is affirmative."

"Thus, the provisions of the Neutrality Treaty are clearly consistent with our existing international obligations concerning nonintervention."

One last word concerning the third paragraph of that Panamanian "understanding." It puts the U.S. and the Panamanian people on notice that Panama will react with force against any United States military force being used in Panama without Panamanian cooperation, and that Panama reserves the right to do so because it would regard an independent U.S. decision an interference in Panama's internal and external affairs. This has been the consistent Panamanian position ever since the adoption of the DeConcini reservation by the Senate. Again, it appears unnecessary to cite all the details, but I shall be glad to document my statement fully if the committee desires.

To sum up, if the patently false argument should be made that any nonsubstantive unilateral "understandings" in instruments of ratification need not be accepted by the other party, the decisive reply is first that every such "understanding," or whatever it is called, must be verbatim and formally accepted by the other party, without inquiry whether it is substantive or not, or else there is no ratification. The correct procedure can be seen from the ratification documents themselves, the Panamanians accepting some clearly nonsubstantive amendments like the requirement that the President shall include in the U.S. instruments of ratification what the Senate said in the Senate ratification resolutions. Since the President has already done this, that's nonsubstantive.

But the second, even more decisive, answer is that the Panamanian "understanding" fundamentally modifies the DeConcini reservation and is, therefore, the most substantive change in the text of the treaty that can be imagined, from every realistic

point of view. That's apparently the reason why the Panamanians put their "understanding" in full into their ratification instruments for both treaties, whereas the DeConcini reservation is in the Neutrality Treaty only on the U.S. side. Then the Panamanains put that "understanding" unilaterally into the Protocol as well. And for both treaties, Panama said it agreed to the exchange of ratification documents only on that "understanding." One can't get any more formal or explicit, in my view, if Panama wanted to make clear that it did not agree to the U.S. using independently military force in Panama pursuant to the DeConcini reservation. Deliberate failure to disclose these facts seems reprehensible.

Mr. Chairman, I have taken much time to set out what is something every FSO-8 should know about international law. I can only call it boilerplate. I have done so because so much attention has been focused on treaties which the Department of State knew, or should have known from the record plus a rudimentary understanding of admittedly specialized rules of international law, have not been ratified and which cannot come into effect unless one of two things happens: either the Panamanians formally withdraw their unilateral "understanding" or else the President and the Senate, by a two-thirds vote, accept that Panamanian three-paragraph-long "understanding" verbatim, and thereby make any future U.S. actions under the DeConcini reservation contingent on Panama's consent in each case.

Now to the constitutional issue. It is just as simple, and requires not a specialized knowledge of international law, but only a knowledge of what the texts are plus some knowledge of the Constitution of the United States, nothing at all complicated or profound.

The Panama Canal Commission is a United States

Government agency. As such, it has officers, all appointed by the President: the nine co-equal members of the Commission, called "directors," the administrator, and the deputy administrator, and the chief engineer, added by the implementing legislation. All of these hold U.S. civil offices, as defined by the Supreme Court in Buckley v. Valeo, 424 US 1 (1976), with incumbents exercising a significant amount of U.S. governmental authority. These people, appointed by the President, are U.S. civil officers, not -- I repeat "not" -- U.S. employees, and the Commission is not -- I repeat "not" -- a "bilateral commission," which is a quite different animal. It is a U.S. Government agency.

So there should be no doubt that these presidential appointees all hold Federal offices. I refer to the section-by-section analysis of the Panama Canal Act of 1979, pages 39-42. This lays out in detail that the Panamanian appointees hold Federal offices and that the U.S. Constitution, therefore, requires that they serve at the pleasure of the President, even though the Panama Canal treaty says the exact contrary.

What's more, for the directors of the Panama Canal Commission, the Panama Canal Act of 1979 says over and over that they hold a Federal office. I quote from Section 1102 of the Act:

"Three members of the Board shall hold no other office..." and "Each member of the Board shall hold office at the pleasure of the President, and before assuming the duties of such office, shall take an oath to discharge faithfully the duties of his office."

So if anyone should say that the Panamanian members of the Panama Canal Commission have not been appointed to Federal

offices, he is challenging both the Supreme Court and the Congress.

But the U.S. Constitution unequivocally bars nonresident aliens, owing allegiance to their Government and not the United States, from becoming U.S. civil officers, and the President may not appoint them to civil officers, and the President may not appoint them to civil offices without violating the Constitution. Thsi unsurmountable bar is expressed by the Constitution in the same way as, e.g., for infants, by requiring that all executive officers shall bind themselves by oath or affirmation to support the Constitution, Article VI, Section 3.

A nonresident alien owing allegiance to Panama can obviously not swear that oath. Further, the Constitution provides that all executive officers can be removed from office on impeachment for, and conviction of, treason, Article II, Section 4.

Again, it is obvious that a nonresident alien cannot commit treason against the U.S., so these provisions of the Constitution alone are an absolute bar to the President to appoint Panamanians, nonresident aliens, as members, administrators, or deputy administrators of the Panama Canal Commission. They are also an absolute bar to Congress to authorize any payments to them by virtue of these unconstitutional appointments. Panama Canal Subcommittee Chairman Carroll Hubbard advised the President along these lines 7 April 1981, sending him my sworn testimony 3/26/81. I ask your consent to make Congressman Hubbard's letter part of the record.

Here I want to draw attention to an "admission against interest": The Department of Justice has admitted "Article II (of the U.S. Constitution) appears to contemplate that officers

of the United States will be person who 'owe allegiance' to the United States under our law," and "the basic point still holds: Article II appears to contemplate that officers of the United States will be persons whose basic loyalty is to this country...."

The foregoing quotations are from the so-called Foy Memorandum, submitted to the House Panama Canal Subcommittee 28 February 1979.

There are other major constitutional objections which appear not to subject to any refutation. First, foreign nationality cannot under the Constitution be a mandatory qualification to hold certain U.S. civil offices and thereby exclude all 225 million American citizens from these offices on the grounds that they are American citizens. The mere idea is repugnant and absurd, and not admitted in any sovereign country I know of.

No nonresident alien has, to my knowledge, ever been appointed to an office under the United States by the President, so obviously the Supreme Court could not rule on this issue directly. Nor do I know of any precedent in countries that were not protectorates. While Soviet Marshall Rokossovski was appointed Defense Minister of Poland, 1949-56, Poland was hardly fully independent then and Rokossovski, born in Poland, held dual citizenship, however much of a sham his "free appointment" by the Polish Government was.

However, the U.S. Supreme Court has laid down the rule, "The right to govern is reserved to citizens," thus, even excluding resident aliens. These are the words of Chief Justice Warren Burger, speaking for the Court in Foley v. Connelie, 98 S.Ct. 1067 (1978)

And the Supreme Court's dicta in the Slaughterhouse cases, 16 Wall. 36, 1873, and in Crandall v. Nevada, 6 Wall. 24, 1868, make it perfectly clear that it considers the right of U.S. citizens "to share the offices of the U.S. Government, to engage in administering its function" as enshrined in the privileges and immunities of U.S. citizens implicitly guaranteed to citizens by the Constitution as one of the rights "which of right belong to the citizens of all free governments, without other restraints as equally affects all persons," Justice Field in the Slaughterhouse cases. These dicta have never been attacked or overruled, to my knowledge.

Next, the President has no choice whatever but to appoint the nominees of the Panamanian Government in a timely manner. This limitation of presidential power is excluded by the Supreme Court's decision in Buckley v. Valeo. Some choice, however small, but left to the President; his power of appointment cannot effectively be usurped by anyone else.

Further, Senate confirmation of all nine members of the Panama Canal Commission under Section 2, Article III, of the Constitution cannot be excluded for four of them because they are all co-equal "superior officers," not "inferior officers." The provisions of the Panama Canal Act of 1979 requiring that only the U.S. members are subject to Senate advice and consent are not only with precedent, but cannot be carried out without violation of the U.S. Constitution.

I note, of course, that the Panama Canal Act merely says that "at least five" of the nine Commission members must be U.S. citizens, thus leaving it to the President to violate the Constitution by appointing Panamanians without requiring him to do so.

However, while these further constitutional objections could appear to be each sufficient to bar the Panamanian appointees, it may not be necessary to go into them at length because the very first objection I outlined appears so overwhelming.

Mr. Chairman, I pose the direct question: "What is the counterargument? Indeed, has anyone made a counterargument? Does the Executive Branch challenge the congressional finding, supported by every legal authority I know of, that members, administrators, and deputy administrators of the Panama Commission, a United States Government agency, appointed by the President, are civil officers of the United States? Does the Executive Branch challenge the Various Supreme Court decisions I have cited?

I certainly trust in that connection that it is not contended by anyone that a treaty, and a non-self-executing treaty at that, allows the Congress to pass legislation which is free from constraints imposed on the Congress by the Constitution. Such an argument would again be a direct challenge to a Supreme Court decision, Reid v. Covert, 354 US 1 (1957): "No agreement with a foreign nation can confer power on the Congress, or on any branch of Government, which is free from the restraints of the Constitution."

Mr. Chairman, at this point I want to recall the utterly misleading statement made again and again by the Carter administration in 1978/79 that the Canal treaties are allegedly the "supreme law of the land."

Now that's simply untrue. First, the Constitution is the supreme law, not a treaty. But, second, the quotation from the Constitution, Article VI, refers only to self-executing

treaties. Few treaties are self-executing, and the Panama Canal treaties are most certainly not. The reason is that their key provisions, like paying Panama a lot of money or setting up the Panama Canal Commission, a U.S. Government agency, require legislation.

Accordingly, the treaties as such, even had they been ratified and were also otherwise valid in international law, could not become "the law of the land" and a rule for our courts without the passage of implementing legislation which under our Constitution the Congress was free to enact or not to enact.

To show you how the Congress has been bluffed on this point, let me quote to you the basic decision of the Supreme Court on this point which has stood up over 150 years now. Speaking for the Court, Chief Justice John Marshall said in Foster v. Nielson, 2 Pet. 253 (1829):

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provisions. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department and the legislature must execute the contract before it can become a rule for the court."

The so-called Foy Memo of February 1979, squarely rejected first by the Panama Canal Subcommittee and then by the full Congress in the Panama Canal Act of 1979, hinted that the Supreme Court had upheld the constitutionality of presidential appointments of nonresident aliens as officers of the Panama Canal Commission, a U.S. Government agency, in Edwards v. Carter,

1978. Not so, of course. The citizenship issue is neither mentioned in the suit nor in the judgment of the appeals court.

And it is outright absurd to contend that what is admittedly a Federal office becomes "not a Federal office in the constitutional sense" if the President, in violation of the U.S. Constitution, appoints pursuant to the Panama Canal treaty Panamanians to that office.

To illustrate, in 1990, without any change of functions whatever, the office of the Administrator of the Panama Canal Commission becomes allegedly something other than a U.S. Federal office, and therefore supposedly not subject to the provisions of the Constitution. The reverse curious metamorphosis is supposed to take place for the office of the Deputy Administrator, as the President appoints first a Panamanian and then a U.S. citizen to that office. That thesis is simply preposterous.

There is, of course, another decisive and fundamental objection to bring up the Canal treaties at all. As I have outlined and documented at length already, they have not been ratified and are, therefore, prima facie nonexistent in international law.

It deserves mentioning at this point that in international law there are other strong reasons to consider the Panama Canal treaties void. They are listed in the Congressional Record, S-9544, 7/16/1979, remarks by Senator William V. Roth (R-Del). For instance, Panama President Torrijos' threat to use force unless the Senate agreed to the treaties renders them void under Article 52 of the 1969 Vienna Convention. However, it seemed unnecessary to expound on these issues when nonratification and, thus, nonexistence of the Canal treaties is so clear from the record.

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Mr. Chairman, I rest my case, but I want to stress in conclusion that the constitutional principle involved here is of the most fundamental importance for our free institutions. If these presidential appointments of nonresident aliens, owing no allegiance to the United States but instead to their own country, are allowed to stand, then we have a precedent that the President and the Congress could make the U.S. a protectorate, for example, under the UN, with the United Nations in actual fact appointing many or even all our executive officers and the President merely executing the UN nominations of specific persons. To me, and I believe to the vast majority of Americans, the very idea is simply absurd and repugnant under the U.S. Constitution. If upheld as constitutional, this process could make the United States the only country in the world where a written Constitution gives the Executive and Legislative Branches the power to abridge the right of the citizens of the country to self government. And if anyone should say that's fantasy, the President and the Congress would never do this, well, they have just done that very thing, albeit unwittingly.

In consequence, as a knowledgable private citizen, I believe it is my repeatedly sworn duty to support and defend the Constitution by insisting, to the best of my ability, that either a respectable legal argument be made to show that, contrary to every one of my arguments, the Constitution may -- and I repeat "may" -- after all allow the appointments I have challenged, or else that these appointments of Panamanians to a U.S. Government agency be revoked from their inception as null and void.

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Deposition of CHARLES H. BEECHER, before Joseph J. Gimelli, a Notary Public in and for the District of Columbia, by Samuel T. Francis, Counsel, Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, on Thursday, March 17, 1983, at 1654 - 32nd Street, N.W., Washington, D.C.

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