Vanderbilt Journal of Transnational Law

Volume 12
Issue 2 *Spring 1979*

Article 11

1979

Recent Decisions

James A. Walker

Charles A. Daughtrey

A. Dale Wilson

RECENT DECISIONS

ADMINISTRATIVE LAW—PRESIDENT'S ATTEMPT UNDER EXECUTIVE ORDER TO REMOVE PRESIDENTIALLY APPROVED CAB ORDER FROM SCOPE OF THE WATERMAN DOCTRINE

I. FACTS AND HOLDING

Five domestic airlines[1] petitioned for judicial review of a Presidentially approved Civil Aeronautics Board (Board) decision awarding a new international airline route[2] to a domestic carrier. The Board, reversing an earlier administrative recommendation,[3] chose American Airlines, Inc., to service this new international route.[4] Pursuant to a statute[5] requiring Presidential affirmation of such Board orders, President Ford approved the Board's decision and added a disclaimer as required by Executive Order No.

1. The petitioners were: Braniff Airways, Inc.; Continental Airlines, Inc.; Allegheny Airlines, Inc.; Trans World Airlines, Inc.; and Ozark Airlines, Inc.

2. The United States and Canada agreed that, beginning on April 25, 1976, a United States airline would have the right to operate the Chicago-Montreal route, which was one of the new airline routes established by the two countries in an agreement made on May 5, 1974, amending the earlier bilateral Air Transport Agreement. Agreement Amending Air Transport Agreement, May 8, 1974, United States-Canada, 25 U.S.T. 748, T.I.A.S. No. 7824. *See* Air Transport Agreement, January 17, 1966, United States-Canada, 17 U.S.T. 201, T.I.A.S. No. 5972.

3. After amending the Air Transport Agreement, *see* note 2 *supra*, the Board, on June 11, 1975, started the Chicago-Montreal Route Proceeding to consider the need for such a route and, if needed, which carrier would receive the route. CAB Order 75-6-55, Docket 27932, Joint Appendix at 18, 21. An Administrative Law Judge recommended that the route be given to Trans World Airlines, Inc. Recommended Decision of Administrative Law Judge Frank M. Whiting, Docket 27932, Feb. 27, 1976, Joint Appendix at 108, 130, 149.

4. The Board's decision concerned the new Chicago-Montreal airline route. Chicago-Montreal Route Proceeding [1976] 2 Av. L. Rep. (CCH) ¶ 22, 224.

5. The statute, § 801 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1461(a) (Supp. V 1975), states that:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, . . . , shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

11,920.[6] Following the disclaimer procedure established by this Executive Order,[7] the President asserted that no defense or foreign policy implications affected his approval.[8] Petitioners then challenged the Board's order by petitioning the instant court for judicial review. Intervenor, American Airlines, Inc., moved to dismiss the petition by arguing that the *Waterman* doctrine[9] precluded judicial review on the merits of the Board's decision.[10] Petitioners responded that the Presidential disclaimer removed the *Waterman* impediment to the instant court's statutory review authority.[11] On petition to the United States Court of Appeals for the District of Columbia Circuit, *dismissed.*[12] *Held:* The *Waterman* doctrine precludes judicial review on the merits of a Presidentially approved order of the Civil Aeronautics Board despite an accompanying Presidential disclaimer of any underlying defense or foreign policy considerations, written according to the procedures established by an Executive Order to facilitate judicial review. *Braniff Airways, Inc. v. CAB* [Chicago-Montreal], 581 F.2d 846 (D.C. Cir. 1978).

---

6. Executive Order No. 11,920, 3 C.F.R. 121 (1977), establishes executive branch procedures to facilitate Presidential review of Board decisions submitted under 49 U.S.C. § 1461(a). President Ford approved the order on November 4, 1976 and the Board issued the order on November 8, 1976, with an effective date of January 7, 1977. Joint Appendix at 30, 47. On November 6, 1977, the Board issued a second order which denied requests for reconsideration of the decisions made in the order and refused to stay the order. Joint Appendix at 51, 70.

7. *See* notes 27-29 *infra,* and text accompanying notes 27-29 *infra.*

8. The President's approval order stated: "The issues presented in this proceeding are not affected by any substantial defense or foreign policy considerations, and no defense or foreign policy considerations underlie my decision." Joint Appendix at 50.

9. *See* text accompanying notes 13-18 *infra.*

10. *But see* Braniff Airways, Inc. v. CAB [Chicago-Montreal], 581 F.2d 846, 852, n.20 (D.C. Cir. 1978), where the instant court stated that American's pleading was styled as a motion to dismiss for lack of jurisdiction.

11. The instant court's alleged statutory authority is found in 49 U.S.C. § 1486(a) (1970), which states that:

> Any order, . . . , issued by the Board . . . under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, . . . , by any person disclosing a substantial interest in such order . . . .

12. *Braniff Airways, Inc. v. CAB [Chicago-Montreal],* 581 F.2d 846, 852 (D.C. Cir. 1978). Although American's pleading was styled as a motion to dismiss for lack of jurisdiction, the court based its holding on the fact that the merits of such orders are nonreviewable. *Id.* at 852, n.20.

II. LEGAL BACKGROUND

In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[13] the Court interpreted the language used in the exception clause of 49 U.S.C. § 1486(a) (1970).[14] The exception clause states that "[a]ny order, . . . , except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 1461 [(a)] of this title, shall be subject to review . . . ."[15] Section 1461(a)[16] presently provides that certificates issued by the Board authorizing an air carrier to engage in overseas or foreign air transportation shall be subject to Presidential approval. The Court in *Waterman* stated that the exception clause in Section 1486(a) includes Board orders concerning overseas or international air routes assigned to domestic air carriers subject to the President's approval under § 1461(a), in addition to foreign air carriers.[17] In the *Waterman* doctrine, the Court held that judicial review does not exist for such Board orders either before or after Presidential approval.[18] The Court reasoned that the judiciary could not review such orders since they involve political Executive decisions concerning foreign policy and "[t]he judiciary has neither aptitude, facilities, nor responsibility . . ." for such decisions.[19] The *Waterman* dissent, however, warned that the majority's broad holding would preclude judicial review of an unlawful action of the Board subsequently approved by the President.[20] Succeeding ap-

13. 333 U.S. 103 (1948). In *Waterman,* the Board, with the President's approval, issued an order denying the Waterman Steamship Corporation a certificate of convenience and necessity for overseas and foreign air routes and instead granted one to Chicago and Southern Air Lines, a rival applicant. *Id.* at 105.

14. At the time of the *Waterman* decision, § 1461(a) was part of § 1006 of the Civil Aeronautics Act, 49 U.S.C. § 646(a) (1946). The language in § 646(a) has not been significantly changed by § 1461(a). For full text of § 1461(a), *see* note 5 *supra.*

15. 49 U.S.C. § 1461(a) (Supp. V 1975).

16. For a more complete text of § 1486(a), *see* note 11 *supra.*

17. *Waterman,* 333 U.S. at 114. Many writers feel that the language in § 1461(a) was not intended to be applied to anything more than foreign air carriers operating by permit. *See, e.g.,* Miller, *The Waterman Doctrine Revisited,* 54 GEORGETOWN LAW JOURNAL 5, 9 (1965). Congress has not, however, changed the language of § 1461(a), even when it added a new subsection, 1461(b), in 1975.

18. *Waterman,* 333 U.S. at 114.

19. *Id.* at 111. The court also reasoned that to revise or review an administrative decision before the decision reached the President for approval would be equivalent to rendering an improper advisory opinion. *Id.* at 113.

20. *Id.* at 117-18. The minority stated that: "Presidential approval cannot make valid invalid orders of the Board. His approval supplements rather than

pellate court decisions have generally followed the *Waterman* holding.[21] The post-*Waterman* cases offer guidance on three issues.[22] First, judicial review will not be given to claims of denials of procedural due process by the Board's actions.[23] Second, judicial review will not be given to questions of substantial evidence, and other related questions which apply to the merits of a Presidentially approved Board order.[24] Third, in *American Airlines v. CAB*,[25] the court created an exception to the *Waterman* doctrine by holding that judicial review will be given to questions concerning the statutory authority of the Board's actions, notwithstanding Presidential approval of the Board's order.[26] In 1977, the executive

supersedes Board action. Only when the Board has acted within the limits of its authority has the basis been laid for the issuance of certificates." *Id.* at 116.

21. The first case specifically following *Waterman* was Trans World Airlines, Inc. v. CAB, 184 F.2d 66, 71 (2d Cir. 1950), *cert. denied,* 340 U.S. 941 (1951), where the court held that since both the President and the Board had acted within their legal powers in making the order, the *Waterman* doctrine precluded judicial review of that order.

22. Miller, *supra* note 17, at 22.

23. This guideline was first expressed in the case of United States Overseas Airlines, Inc. v. CAB, 222 F.2d 303, 304 (D.C. Cir. 1955), where the court held that despite the petitioner's claims of procedural irregularity in the Board's decision, under the *Waterman* decision the court has no jurisdiction to review orders of the Board in matters which by statute are for the determination of the President.

24. American Airlines v. CAB, 348 F.2d 349, 352 (D.C. Cir. 1965).

25. *Id.* The court in *American Airlines* was asked to review whether the Board had the authority to revise its regulations governing charter flights in overseas and foreign air transportation to allow supplemental air carriers to operate split charters. *Id.* at 351. Split charters occur when one half of a plane's capacity is chartered to each of two eligible groups, neither of which can fill the entire aircraft. Miller, *supra* note 17.

26. The court reasoned that: "Clearly *Waterman* presupposes lawfully exercised congressional authority in the Board's action, in the first instance, as an indispensable predicate, without which there is nothing Presidential action can approve." *American Airlines,* 348 F.2d at 352.

The *American Airlines* holding had first been stated in dicta of British Overseas Airways Corp. v. CAB, 304 F.2d 952, 953 (D.C. Cir. 1962). In *British Overseas,* the court stated that despite its holding that *Waterman* did not authorize review in this case, such a holding did not preclude a judicial remedy for administrative or Presidential action beyond the scope of lawful authority, as defined by the Aviation Act. *Cf.* Alaska Airlines, Inc. v. Pan American World Airways, Inc., 321 F.2d 394, 396 (D.C. Cir. 1963) (court vacated as premature a declaratory judgment by the district court which held certain Board action to lack statutory authority).

See Pan American World Airways, Inc. v. CAB, 380 F.2d 770, 775 (2d Cir. 1967).

branch issued Executive Order No. 11,920,[27] establishing procedures for Presidential review of Board decisions submitted under § 1461, in order to silence criticism of the manner in which international airline route decisions had been previously handled by the executive branch.[28] According to the Executive Order, the President may include in his approval letter a disclaimer asserting that no foreign policy or defense considerations have entered into his decision.[29] The disclaimer's purpose is to enable the courts to have every opportunity under the law to review the merits of a Presidentially approved Board order.[30] Executive Order 11,920, coupled with the exception to the *Waterman* doctrine introduced by the *American Airlines* case, created the conflict with the *Waterman* doctrine which the instant court attempts to resolve.

III. THE INSTANT OPINION

In the instant decision, after initially determining that sections 1461(a) and 1486(a)[31] covered the Board's order in issue, the court analyzed petitioners' three arguments. First, petitioners argued that the instant court ought not follow the often criticized five-to-four vote *Waterman* decision.[32] The court answered by noting the many unsuccessful Congressional attempts to limit or overrule *Waterman*.[33] Second, petitioners argued that subsequent cases

See also Pan American World Airways, Inc. v. CAB, 392 F.2d 483, 493 (D.C. Cir. 1968) (when the Board acts outside its statutory authority with respect to a foreign, not domestic, air carrier, and the Board's order is approved by the President under § 1461(a), judicial review is expressly precluded by the language of § 1486(a), and thus is not covered by the *American Airlines* exception to the *Waterman* doctrine).

27. 3 C.F.R. 121 (1977).

28. Critics charged that domestic political and economic considerations, rather than national defense and foreign policy considerations had become dominant factors in most route selection approvals. *See* Whitney, *Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed by International Airline Route Awards,* 14 WM. & MARY L. REV. 787, 796-801 & n. 62 (1973); Note, *Section 801 of the Federal Aviation Act—The President & the Award of International Air Routes to Domestic Carriers: A Proposal for Change,* 45 N.Y.U.L. REV. 517, 523, 527-33 (1970).

29. 3 C.F.R. at 122.

30. *Id.* at 122-23.

31. *Braniff,* 581 F.2d at 849.

32. *Id. See* Miller, *supra* note 17; Hochman, *Judicial Review of Administrative Processes in Which the President Participates,* 74 HARV. L. REV. 684 (1961).

33. *Braniff,* 581 F.2d at 849 n.12. Despite the fact that the court's answer did not correlate in the text of the opinion to the petitioner's argument, the court felt

have limited and distinguished the scope of the *Waterman* decision.[34] The court replied that the instant case did not fit within the scope of the *American Airlines* exception[35] to the *Waterman* doctrine since the petitioners had attacked the merits of the Board's decision.[36] Third, addressing the main issue of the case, the petitioners argued[37] that the *Waterman* doctrine did not govern the instant case because the President had inserted a disclaimer in his approval of the Board's order.[38] The petitioners noted that, by disclaiming any underlying foreign policy or defense considerations relevant to his decision, the President had followed the procedures established in Executive Order 11,920, thereby entitling the judiciary to review the merits of his decision.[39] According to petitioners, the President's disclaimer removed any impediment to judicial review since the *Waterman* doctrine could be applied only to "[f]inal orders [that] embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate."[40] The instant court replied that the President cannot create judicial review authority[41] and, in the instant case, the President had im-

---

that if Congress had wanted to change the *Waterman* doctrine, such action would have been taken previously. Also, the court noted that in 1972 the Congress added a new subsection to Section 801 of the Federal Aviation Act, 49 U.S.C. § 1461(b) (Supp. V 1975). Section 1461(b) provides that the President may disapprove certain actions regarding rates, fares, and charges in foreign transportation only for the reasons of national defense or foreign policy. 49 U.S.C. § 1461(b) (Supp. V 1975). The court noted that the amendment left § 1461(a) untouched, which was the original language used as a statutory basis for the *Waterman* decision. *See Braniff,* 581 F.2d at 849 n.12.

34. *Id.* at 849.

35. *See* text accompanying notes 24 to 26 *supra.*

36. *Braniff,* 581 F.2d at 849-50. The instant court also restated the lines in *American Airlines,* 348 F.2d at 352, which echoed the *Waterman* holding: "[t]he President must be free to consider broad 'evidentiary' policy factors not involved, and indeed not relevant, in Board proceedings and . . . the President must be free to exercise unreviewable discretion as to the weight to be given to such extrajudicial factors." *Braniff,* 581 F.2d at 850.

37. The petitioners were joined in this argument by the United States as an intervenor.

38. *Braniff,* 581 F.2d at 850.

39. Executive Order 11,920, 3 C.F.R. at 122, requires agencies to forward to the White House reports stating the defense or foreign policy considerations of the Board decision under review, in order that the President might consider including in his letter of approval a disclaimer such as is presented in the instant case.

40. *Waterman,* 333 U.S. at 114.

41. The court, in making the reply, cited the *American Airlines* case, 348 F.2d at 351.

properly attempted to create such authority.[42] Moreover, the court reasoned that a judicial decision on the merits of the instant case would result in an impermissible advisory opinion. The advisory opinion results from a subsequent remand to the Board[43] and then, pursuant to § 1461(a), Presidential consideration of the Board's subsequent decision. Also, the instant court felt that the potential for political abuse remained since the Executive Order had no procedure *requiring* the President to issue a disclaimer in *all* cases devoid of foreign policy or defense considerations.[44] The potential for political abuse remained as long as the President's choice of attaching a disclaimer determined the allowability of judicial review.[45] The court also expressed its skepticism that any award of an international air route could be entirely free of foreign policy and defense considerations. Thus, according to the court, the President's disclaimer had no basis in fact.[46] In addition, the court stated that notice should be taken of Congress' potentially opposite view of the President's belief concerning the absence of underlying foreign policy or defense considerations because Congress had originally granted the President's special authority to review the Board's award of international air routes.[47] Consequently, the instant court dismissed the petitions for review and granted the intervenor's motion to dismiss[48] because the *Waterman* doctrine precludes judicial review despite a Presidential disclaimer issued according to Executive Order No. 11,920.

---

42. *Braniff,* 581 F.2d at 850-51.

43. *Id.* The instant court cited *Hayburn's Case,* 2 U.S. 409, 411 (1792).

44. The court examined Executive Order No. 11,920, and found the following appended statement:

> In a case involving a "routine" approval of an order with respect to a foreign or overseas certificate of a U.S. carrier, *i.e.,* one not based on any foreign policy or defense objectives, the President *may* indicate that he would have no objection to judicial review of the CAB decision and proceeding.

Braniff, 581 F.2d at 851-52 (quoting from Joint Appendix at 961, 962) (emphasis added). *See* text accompanying note 29 *supra.*

45. *Braniff,* 581 F.2d at 852.

46. *Id.*

47. *Id.* The court quoted extensively from sections of President Ford's approval letter, and interpreted his words as implicitly showing that general foreign policy considerations, including both balance of payments and competitive opportunity, had been relevant to each of the stages leading to the ultimate award. Moreover, the court found a variation of the above theme in a letter from President Carter to the Board Chairman dated April 22, 1977. *Id.*

48. *Id.*

IV. COMMENT

The instant result follows the line of cases prior to the *American Airlines* exception, which consistently employed the *Waterman* doctrine to preclude judicial review of Board orders submitted to the President under § 1461(a).[49] Prior to the instant case, the rationale of the *Waterman* doctrine indicated that such Board orders contained foreign policy and defense considerations which the courts lacked competence to review.[50] The instant result ostensibly expands the scope of the *Waterman* doctrine to include a prohibition of judicial review of a Board order despite a Presidential disclaimer asserting that no foreign policy or defense considerations underlie the decision. The instant court's reasoning,[51] however, does not justify the expansion of the *Waterman* doctrine in this manner. When President Ford stated in his approval letter that no foreign policy or defense considerations affected his decision to approve the Board's order,[52] the instant case no longer truly fit within the *Waterman* doctrine.[53] By skeptically questioning the *absence* of such considerations[54] underlying the award of an international air route, the instant court clearly substitutes its opinion on such matters for that of the President. Moreover, the instant court's prohibition of review on the basis that Congress may differ with the President's opinion concerning justifications for the use of the disclaimer[55] rests upon a weak foundation. Congress can rescind its statutory delegation of Presidential review authority given by § 1461(a) should Congress disagree with the President's decision to use the disclaimer. The instant court, though, despite its faulty reasoning, achieved the correct result because a contrary holding would have given the President freedom to personally select judicially reviewable cases.[56] This unchecked freedom of choice

49. *See* text accompanying notes 12 to 26 *supra.*

50. *Waterman,* 333 U.S. at 111. *See* text accompanying note 19 *supra.*

51. *See* text accompanying notes 27 to 48 *supra.*

52. *See* note 8 *supra* for the text of the disclaimer in the approval letter.

53. *See* note 22 to 26 *supra.*

The President has the power to change the Board's order after the order has been submitted to him for approval under § 1461(a). *Waterman,* 333 U.S. at 109. This is one of the few instances where the President and his aides expressly determine, rather than coordinate an agency's decisionmaking procedure. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 137-38 (6th ed. 1974).

54. *Braniff,* 581 F.2d at 852.

55. *Id.*

56. *Id.* at 851.

results from the executive order's procedures which state that the President *may* include a disclaimer in cases lacking foreign policy or defense considerations.[57] Possibilities of political corruption exist with the freedom of choice given to the President by the Executive Order.[58] Furthermore, such a choice will allow the President to personally create judicial review authority.[59] Also, the instant court correctly states that judicial review given after the President has allowed the review would result in an impermissible advisory decision.[60] The court's decision becomes advisory because the case will again go back to the Board and to the President. Therefore, the instant court could have written a stronger opinion by justifying the instant holding solely on the ground of the unchecked freedom of choice given to the President by Executive Order 11,920.[61] By amending Executive Order 11,920 to *require* the issuance of a disclaimer should the President find no foreign policy or defense considerations present in the Board's order, judicial review authority will exist under the *Waterman* doctrine as the scope of the doctrine existed prior to the instant case. In spite of the instant court's holding, future courts may still have judicial review authority because of the faulty reasoning used by the instant court. Courts in future cases under an amended Executive Order can balance the competing policy arguments concerning the propriety of expanding the scope of the *Waterman* doctrine to cover cases involving Presidentially approved Board orders lacking foreign policy or defense considerations.

James A. Walker

57. *See* text accompanying notes 27-29 *supra.*
58. *Braniff,* 581 F. 2d at 852.
59. *Id.* at 851-52.
60. *Id.* at 851.
61. *Id.*

EUROPEAN COMMUNITIES—TRADEMARK RIGHTS—COURT OF JUSTICE PREVENTS THIRD PARTY FROM AFFIXING TRADEMARK TO GOODS SOLD UNDER ANOTHER MARK

I. FACTS AND HOLDING

Pending resolution of a trademark dispute between two pharmaceutical manufacturers, the Rotterdam District Court[1] requested a ruling by the Court of Justice of the European Economic Communities (Court)[2] interpreting article 36 of the European Economic Community Treaty (EEC Treaty).[3] Plaintiff[4] had petitioned[5] the district court for a ruling that it was entitled to market a drug[6] in the Netherlands under defendant's Benelux[7] trademark, although the drug was initially sold by defendant in the United Kingdom under a different mark. Defendant marketed[8] the drug[9] in the

1. The Arrondissementsrechtbank at Rotterdam, Netherlands.

2. The Court may decide all issues arising under the EEC Treaty, including disputes between member states about their duties under that treaty. A. ROBERTSON, EUROPEAN INSTITUTIONS 188-91 (3d ed. 1973).

3. Article 36 provides:

> The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public moraltiy, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Treaty Establishing the European Economic Community, Mar. 25, 1957, [1958] 298 U.N.T.S. 11, 29 [hereinafter cited as EEC Treaty].

4. Plaintiff, Centrafarm B.V., is a Netherlands corporation which manufactures and markets pharmaceutical products.

5. Plaintiff sought a declaratory opinion that its marketing plan was lawful. Defendant counterclaimed that plaintiff had infringed the trademark rights of the defendant. Centrafarm B.V. v. American Home Products Corp., [1978-8] E. Comm. Ct. J. Rep. 1823, 1825, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8475, at 8581.

6. The drug oxazepamum is classified in the Benelux trademark register as a tranquilizing, sedative and antispasmodic preparation. *Id.* at 1825, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) at 8580.

7. The Benelux is an economic union of Belgium, Luxembourg and the Netherlands, formed pursuant to the Treaty Instituting the Benelux Economic Union, Feb. 3, 1958, [1960] 381 U.N.T.S. 165.

8. Defendant, American Home Products Corporation, is the United States parent corporation of John Wyeth & Brothers Ltd. Wyeth actually manufactures

United Kingdom under the trademark Serenid D and in the Netherlands under the trademark Seresta. Defendant counterclaimed for trademark infringement maintaining in part[10] that Benelux law did not sanction the unauthorized alteration of another's mark. Plaintiff contended that the use of separate marks for virtually identical products artificially partitioned[11] the market between member states in violation of article 36. The District Court temporarily enjoined further marketing of the repackaged drug and referred[12] the EEC Treaty issue to the Court. *Held*: The proprietor of a trademark may prevent an unauthorized third party from repackaging under that mark the same product sold by the proprietor under another mark, unless the proprietor markets his product under separate marks for the purpose of artificially partitioning the market. *Centrafarm B.V. v. American Home Products Corporation*, [1978-8] E. Comm. Ct. J. Rep. 1823, [1977-78 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8475.

II. LEGAL BACKGROUND

The conflict between the free movement of goods among the

---

and sells oxazepamum in the United Kingdom under the defendant's trademark [1978-8] E. Comm. Ct. J. Rep. at 1825, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) at 8580.

9. Oxazepamum is the active constituent of each of defendant's two trademarked compounds. Each compound has an identical therapeutic effect, but they differ in taste and composition. Medical preparations are not considered to be different unless the therapeutic effect differs. Preliminary Ruling, *Ex parte* Adriaan de Peijper, [1976] E. Comm. Ct. J. Rep. 613, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8353. For this reason, the Court considered this case as involving a single drug compound.

10. Defendant also charged plaintiff with affixing the defendant's mark to oxazepamum not manufactured by the defendant. The Court, however, accepted the plaintiff's version of the facts. Centrafarm B.V. v. American Home Products Corp., [1978-8] E. Comm. Ct. J. Rep. at 1825, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) at 8581.

11. The market is partitioned when the proprietor of a trademark exercises his right in a manner resulting in different prices in different countries for the same product. This practice frustrates the basic policy of the EEC Treaty: to create a single market free of artificial barriers to trade. *See* Commission of European Communities v. Ger. (W.), [1975] E. Comm. Ct. J. Rep. 181, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8293.

12. Under article 177 of the EEC Treaty, the courts of member states may refer treaty interpretation questions to the Court for a ruling. The national court then decides the case in light of the ruling. EEC Treaty, *supra* note 3, at 76-77.

member states of the Common Market[13] and the protection of trademark, copyright and patent rights has provided a continuing source of litigation in the Court. Article 30 of the EEC Treaty prohibits all quantitative restrictions on imports[14] except those prohibitions or restrictions specifically allowed.[15] In *Parke, Davis & Co. v. Centrafarm*,[16] the Court held that the assertion of a commercial or industrial property right did not violate the EEC Treaty, which permits justifiable import restrictions necessary to protect the specific subject matter of the property.[17] The Court in *Parke* analyzed the right asserted and allowed enforcement consistent with the policies[18] which the right was designed to effectuate. Thus, in *Centrafarm v. Winthrop*,[19] the Court prevented the holder of a Dutch trademark from blocking importation into the Netherlands of goods legally trademarked and sold in England because such a practice would not promote the trademark policy of assuring the consumer of the product's origin.[20] The *Winthrop* Court asserted that protecting the proprietor of the mark would artifi-

13. The terms "Common Market" and "Market" are used interchangeably with the term "EEC."

14. EEC Treaty, article 30, provides: "Quantitative restrictions on importation and all measures with equivalent effect shall . . . be prohibited between Member States." EEC Treaty, *supra* note 3, at 26.

15. *Id.* at 26-30.

16. [1978] E. Comm. Ct. J. Rep. 81, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8054.

17. *See* Centrafarm B.V. v. Sterling Drug Inc., Preliminary Ruling, [1974] E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8246; Van Zuylen Freres v. Hag A.G., Preliminary Ruling, [1974] E. Comm. Ct. J. Rep. 731, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8230.

18. Patent rights are designed to reward the creative effort of the inventor by preventing unauthorized parties from misappropriating the inventor's product. Centrafarm B.V. v. Sterling Drug Inc., Preliminary Ruling, [1974] E. Comm. Ct. J. Rep. 731, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8236. Trademark rights are designed to similarly protect the holder of the trademark and to protect the consumer by assuring him of the product's origin. Hoffman-La Roche & Co. v. Centrafarm, Preliminary Ruling, [1978] E. Comm. Ct. J. Rep. 1139, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8466.

19. Preliminary Ruling, [1974] E. Comm. Ct. J. Rep. 1183, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8247.

20. The *Winthrop* Court said in dicta that the trademark right allowed the proprietor to prevent a third party from affixing the mark to another product without authorization. *Id.* at 1194-95, [1974 Transfer Binder] COMM. MKT. REP. (CCH) at 9151-66. The Court construed the product origin guarantee as meaning that the consumer was assured that all products bearing the mark were produced by the same manufacturer.

cially partition the market[21] without adequately preserving the trademark from illegal infringement.[22] This result is consistent with a line of cases defining the scope of commercial and industrial property rights according to a "consumer injury" standard.[23] In *Commission v. Germany*,[24] the Court held that the article 30 prohibition applies unless necessary "to ensure that the producer and consumer are protected against fraudulent commercial practices."[25] This consumer injury standard arises from article 86 of the EEC Treaty[26] which prohibits the abuse of a dominant market position when such abuse affects trade between EEC member states.[27] The examples of abuse listed in article 86[28] show that the EEC Treaty was designed to stop those practices adversely affect-

21. *See* note 11 *supra*.

22. *See generally* Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co., Preliminary Ruling, [1976] E. Comm. Ct. J. Rep. 1039, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8362.

23. Hoffman-La Roche & Co. v. Centrafarm, Preliminary Ruling, [1978] E. Comm. Ct. J. Rep. 1139, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8466; ICI v. Commission of European Communities, [1974] E. Comm. Ct. J. Rep. 223, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209; Europemballage Corp. v. Commission of European Communities, [1973] E. Comm. Ct. J. Rep. 215, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

24. [1975] E. Comm. Ct. J. Rep. 181, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8293.

25. *Id.* at 191, [1975 Transfer Binder] COMM. MKT. REP. (CCH) at 7392.

26. Article 86 provides:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EEC Treaty, *supra* note 3, at 48-49.

27. Europemballage Corp. v. Commission of European Communities, [1973] E. Comm. Ct J. Rep. 215, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

28. *See* note 26 *supra*.

ing the market and injuring consumers and trading partners.[29] Thus, in *Van Zuylen v. Hag*,[30] the Court refused to enforce a trademark right because enforcement would not necessarily assure the consumer of the product's origin. In *Hoffman-La Roche v. Centrafarm*,[31] the defendant satisfied this product origin guarantee when he reaffixed the plaintiff's trademark to a repackaged product initially marketed by the plaintiff.[32] The Court acknowledged the plaintiff's right to prevent any use of the trademark likely to impair the guarantee of origin, but held that the assertion of the right under the circumstances[33] constituted a disguised restriction of trade.[34] As such, the plaintiff's marketing scheme failed to meet the consumer protection standard used by the Court to assess the specific subject matter of the right asserted.[35] The erosion of trademark and other commercial rights thus continued as the Court promoted the free movement of goods without indicating the circumstances in which the protection of commercial property rights would control.

III. THE INSTANT OPINION

After determining that the two marks had been applied to a

29. ICI v. Commission of European Communities, [1974] E. Comm. Ct. J. Rep. 223, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209; Europemballage Corp. v. Commission of European Communities, [1973] E. Comm. Ct. J. Rep. 215, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8171.

30. [1974] E. Comm. Ct. J. Rep. 731, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8230.

31. [1978] E. Comm. Ct. J. Rep. 1139, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8466.

32. The plaintiff in *Hoffman-La Roche* had marketed the drug valium in the United Kingdom and the Netherlands at prices that differed substantially. The defendant purchased the drug in the United Kingdom, repackaged it under the original mark and sold it in the Netherlands at a price substantially lower than the price charged by the plaintiff in the latter country.

33. The Court in *Hoffman-La Roche* noted that the exercise of the trademark right would tend to partition the market, that repackaging did not adversely affect the condition of the product, that the proprietor of the trademark was notified of the repackaging and that the new package stated that the product had been repackaged by the defendant.

34. *See* note 11 *supra*.

35. The Court also considered whether *Hoffman-La Roche* had abused its dominant position in the market, *see* note 22 *supra*, holding that the exercise of a right in conformity with article 36 is not contrary to article 86 if the right asserted is not used to abuse a dominant position in the market.

single product,[36] the Court considered the effect of article 36 on rights conferred by the trademark law of the importing nation. The Court stated that the article 30 prohibition on import restrictions does not preclude the protection of industrial and commercial property rights.[37] In addition, the Court noted that the article 36 exceptions apply only as justified to safeguard the specific subject matter of the right asserted.[38] The Court then stated that the purpose of a trademark is to guarantee the exclusive use of the mark to the proprietor when he initially sells the product.[39] This right must be applied according to the essential function of the trademark, which is to assure the identity of origin to the consumer.[40] The instant Court construed this guarantee of origin to mean that only the proprietor of the mark may determine the identity of the product.[41] The Court then found that plaintiff's unauthorized use of the trademark abridged defendant's right to make that determination. Accordingly, the Court held that the defendant, as proprietor of the mark, could, under the first sentence of article 36, justifiably prevent plaintiff from affixing defendant's mark to goods lawfully sold by defendant under another mark. Fearing that the use of separate trademarks for the same product might artificially partition the market,[42] the Court remanded the case to the Rotterdam district court for consideration of whether defendant had intended to create such a partition.[43]

---

36. This determination was based upon the lack of therapeutic differences between the two drugs. Centrafarm B.V. v. American Home Products Corp., [1978-8] E. Comm. Ct. J. Rep. 1823, [1977-1978 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8475. *See* note 9 *supra*.

37. *See* Centrafarm B.V. v. Sterling Drug Inc., Preliminary Ruling, [1974] E. Comm. Ct. J. Rep. 1147, [1974 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8246.

38. *See* Commission of European Communities v. Ger. (W.), [1975] E. Comm. Ct. J. Rep. 181, [1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8293.

39. This guarantee protects the proprietor from persons who might illegally affix the protected mark to other products to take advantage of the reputation of the trademark.

40. *See* note 20 *supra*.

41. The Court reasoned that allowing a third party to affix the mark would jeopardize the guarantee of origin. *But see* Hoffman-La Roche & Co. v. Centrafarm, [1975] E. Comm. Ct. J. Rep. at 1139, [1978-1979 Transfer Binder] COMM. MKT. REP. 1 (CCH) ¶ 8466.

42. *See* note 11 *supra*.

43. The element of intent was not considered in previous cases which focused instead upon whether or not a partition was created by the exercise of a particular right. *See generally* Hoffman-La Roche, [1978] E. Comm. Ct. J. Rep. at 1139,

IV. COMMENT

The instant decision curtailed the *Hoffman-La Roche* expansion of free movement principles and deemphasized the role of the consumer protection standard in assessing trademark rights. The instant case is factually consistent with prior cases allowing an importer great latitude in marketing goods under original trademark.[44] Thus, the Court probably will approve any marketing scheme which uses the original trademark as long as the product remains undamaged.[45] The instant Court's rationale, however, departs from the *Hoffman-La Roche* principle that the trademark operates primarily to enable the consumer to distinguish a given product from products of different origin. The Court incorrectly applied the consumer protection standard because, when the two products in question are identical[46] and are manufactured by the same company, there is no danger of consumer confusion.[47] A better approach would be to examine the differences in the price and composition of the drug compounds and determine whether the marketing plan injures or benefits the ultimate consumer. Such an approach comports with earlier cases which held that trademark rights were designed primarily to protect the consumers from fraudulent commercial practices.[48] The instant Court indirectly considered this consumer protection issue when it found that the defendant's marketing arrangement might constitute a disguised restriction of trade if the defendant intended to partition the market;[49] however, by allowing an importer to claim inadvertence and thereby escape liability, the protection previously given the consumer has been weakened in favor of more expansive trademark rights. Therefore, this case gives notice that the rights of trademark holders will be protected in the EEC. This protection may have a long-range consumer benefit of encouraging research and development of new products; however, the Court should pay more

---

[1978-1979 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8466.

44. *See* note 23 *supra*. *Cf.* Terrapin v. Terranova, [1976] E. Comm. Ct. J. Rep. 1039, [1976 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8209 (prohibiting the importation of goods bearing a trademark similar to the mark registered to the plaintiff).

45. *See* note 33 *supra*.

46. *See* notes 9 & 36 *supra* & accompanying text.

47. As such, the dangers of confusion which the Court addressed in *Terranova* seem non-existent.

48. *See* text accompanying note 23 *supra*.

49. *See* note 11 *supra*.

attention to ensuring that the return on these products is gathered equally from all consumers in the Common Market.

Charles Anthony Daughtrey

THE TREATY POWER—THE PROPERTY CLAUSE PERMITS THE TRANSFER OF UNITED STATES PROPERTY THROUGH SELF-EXECUTING TREATY

I. FACTS AND HOLDING

Appellants, sixty members of the House of Representatives, brought suit in federal district court seeking an order preventing the transfer of United States properties, including the Panama Canal, to the Republic of Panama through self-executing treaty.[1] Appellants contended that Congress has exclusive authority under the property clause[2] to dispose of United States property. Appellee[3] challenged the jurisdiction of federal courts to decide the case and contended, in the alternative, that the Constitution permits United States property to be disposed of by self-executing treaty. The United States District Court for the District of Columbia dismissed the complaint for lack of jurisdiction, concluding appellants lacked standing because they failed to demonstrate injury in fact from appellee's invocation of the treaty process. On appeal to the United States Court of Appeals, District of Columbia Circuit, *affirmed.*[4] *Held:* The property clause of the Constitution is not the

1. Article II, § 2 of the Constitution of the United States provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to Make Treaties, provided two-thirds of the Senators present concur"; a self-executing treaty becomes law without enacting legislation. Sometimes treaties are drafted so that they require congressional action before they become legally effective. Whether or not a given treaty is self-executing or requires enacting legislation depends upon its terms. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 167-68 (1978).

Two treaties, signed by the chief executives of Panama and the United States, were presented to the Senate for ratification: the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, and the Panama Canal Treaty, which contains the article conveying the Canal Zone properties to the Republic of Panama. The Senate consented to the Neutrality Treaty on March 16, 1978; 124 CONG. REC. S3857 (daily ed. March 16, 1978). The Panama Canal Treaty was approved on April 18, 1978; 124 CONG. REC. S5796 (daily ed. April 18, 1978).

2. The property clause of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or any particular State." U.S. CONST. art. IV, § 3, cl. 2.

3. James Earl Carter, President of the United States.

4. The court decided the case on the merits without deciding jurisdictional issues raised by appellee. *See* note 19 *infra.*

exclusive method for disposing of federal property and does not prohibit the transfer of federal property to foreign nations through self-executing treaty. *Edwards v. Carter,* 580 F.2d 1055 (D.C. Cir.), *cert. denied,* 98 S. Ct. 2240 (1978).

II. LEGAL BACKGROUND

The United States Constitution grants to the President the power to make treaties, subject to approval by two-thirds of the Senate.[5] The treaty power, although granted in broad terms, is limited. The Supreme Court's recognition that a treaty must deal with questions properly the subject of negotiations with a foreign nation[6] indicates that there are some restrictions inherent in the treaty power. The treaty power, however, is more significantly limited by express constitutional restraints.[7] Although the extent of these constitutional limitations is unclear, it is generally recognized that a treaty may not exercise a power granted exclusively to Congress.[8] No express exclusive power is granted to Congress in the property clause,[9] but the selection of one branch to exercise the power implies an exclusion of that power by the other two branches. The records of the Constitutional Convention and state ratifying conventions nevertheless indicate that at least some of the delegates thought this power could be exercised through the treaty process. During a debate at the Virginia state ratifying con-

5. *See* note 1 *supra.*

6. This principle was recognized by the Supreme Court in Geofroy v. Riggs, 133 U.S. 258 (1890). In discussing the scope of the treaty power, the Court stated:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent . . . . But with these exceptions, it is not perceived that there &is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Id.* at 267 (citation omitted).

7. *See* Asakura v. Seattle, 265 U.S. 332 (1924); Geofroy v. Riggs, 133 U.S. 258 (1890); note 6 *supra;* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 117, Comment d at 372 (1965); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 94-96 (1972).

8. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 141(3) comment f at 435 (1965).

9. U.S. Const. art. IV, § 3, cl. 2, *reprinted at* note 2 *supra.*

vention, a delegate stated that the sole purpose of the clause was to define the role of the central government in the disposition of unsettled Western lands, and that it could not be construed as a limitation on the treaty power.[10] Several amendments were offered during the conventions which would have restricted the treaty power by establishing special requirements for treaties ceding certain property rights.[11] The records of the conventions do not show, however, whether these proposals were rejected because the requirement of a concurrence by two-thirds of the Senate was deemed sufficient to protect United States property rights, or because the property clause was interpreted as prohibiting such cessions. The courts have taken the position, in a variety of contexts, that Congress has exclusive authority to dispose of federal property. This has been especially true in cases involving the division of power between the federal government and the states. In determining that United States property is not subject to state taxation, the Supreme Court stated in *Wisconsin Cent. R.R. Co. v. Price County*[12] that "[Article IV] implies an exclusion of all other authority over the property which could interfere with this right [of disposition] or obstruct its exercise."[13] In contexts other than

10. *See* 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 504-05 (1907).

11. As originally reported to the Convention, authority to make treaties would have been entrusted to a majority of the Senate without Presidential participation. By September 4, 1787, the working draft of the Constitution provided: "The President by and with the advice and consent of the Senate shall have power to make Treaties"—"But no treaty shall be made without the consent of two thirds of the members present." On September 7, the Convention approved an amendment adding the words "(except treaties of Peace)" after the word "Treaty," and rejected a proposal authorizing a concurrence of the President. On the same day an amendment was proposed that would have required that "no Treaty of Peace shall be entered into, whereby the United States shall be deprived of any of their present Territory or rights without the concurrence of two thirds of the Members of the Senate present." This amendment was defeated by adjournment without discussion. Later, a proposal that would have provided for House participation in such treaties was rejected. Similar amendments were offered and rejected in the various state ratifying conventions. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 533-34, 540-49 (M. Farrand ed. 1937); 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 500, 660 (1907); 4 *id.* at 115.

12. 133 U.S. 496 (1890).

13. *Id.* at 504. More recently the Court has stated that "The power of Congress to dispose of any kind of property belonging to the United States is 'vested in Congress without limitation.'" Alabama v. Texas, 347 U.S. 272, 273 (1954). *See also* United States v. City and County of San Francisco, 310 U.S. 16 (1940); Inter-

state-federal relations, the courts also have indicated that the power of Congress to dispose of property is unlimited.[14] No cases, however, address the validity of a conveyance of United States property to a foreign nation through a self-executing treaty. One line of cases involving conveyances by the federal government to Indian tribes suggests that United States property may be conveyed by treaty without congressional consent. In determining the validity of a conveyance by treaty to a Cherokee tribe, the Supreme Court noted in *Holden v. Joy*[15] that a treaty may convey good title to such lands without an act of Congress.[16] Similarly, in *Jones v. Meehan,*[17] the Court stated that "[i]t is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States."[18] The courts have concluded that United States property rights were in fact conveyed, instead of merely recognizing existing property rights of Indians.[19] In *Jones,*

Island Co. v. Hawaii, 305 U.S. 306 (1938); United States v. Celestine, 215 U.S. 278 (1909); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92 (1871); Griffin v. United States, 168 F.2d 457 (8th Cir. 1948).

14. *See* United States v. Gratiot, 39 U.S. 459, 468-69, 14 Pet. 526, 536-37, 647 (1840) (stating "congress has the same power over it as over any other property belonging to the United States; and this power is vested in congress without limitation; and has been considered the foundation upon which the territorial governments rest."); Sierra Club v. Hickel, 433 F.2d 24, 28 (9th Cir. 1970) (stating: "Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited." *See also* United States v. Fitzgerald, 40 U.S. (15 Pet.) 407 (1841).

15. 84 U.S. (17 Wall.) 211 (1872).

16. The Supreme Court, however, did not use this constitutional ground for the basis of its holding. The Court held, in effect, that Congress had ratified the treaty since it had been effectuated and congressional enactments had repeatedly recognized its validity. *Id.* at 247.

17. 175 U.S. 1 (1899).

18. *Id.* at 10. *See also* Francis v. Francis, 203 U.S. 233, 241 (1906) (The Supreme Court stated "this court and the highest court of Michigan concur in holding that a title in fee may pass by a treaty without the aid of an act of Congress."

19. Defendant's counsel in *Jones* relied on an opinion of Attorney General Taney, dated September 20, 1833, which stated: "these reservations are excepted out of the grant made by the treaty, and did not therefore pass by it; consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title." 175 U.S. at 12. *See also* Gaines v. Nicholson, 50 U.S. 379, 388, 9 How. 356, 364 (1850). (Justice Nelson,

the Supreme Court considered the nature of Indian property rights by reservation. The Court considered whether the treaty conveyed rights or recognized rights, and concluded that the treaty operated to pass a fee simple title to the reservee.[20] These cases, however, may be of limited relevance to treaty conveyances to foreign nations because of the unique nature of Indian treaties.[21] Until the instant case, the question of whether the property clause precludes the transfer of United States property to a foreign nation by means of a self-executing treaty had never been addressed.

III. THE INSTANT OPINION

In the instant case, without deciding jurisdictional issues,[22] the court of appeals determined that the property clause does not prohibit the transfer of United States property to foreign nations through self-executing treaties. The court determined that the wording of the property clause, the history of its drafting and ratification, the debates over the treaty clause at the Constitutional

in referring to a grant by reservation, stated that "it was so much carved out of the Territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, . . . not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation.")

20. *See also* Francis v. Francis, 203 U.S. 233 (1906); Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872); United States v. Brooks, 51 U.S. 464, 10 How. 442 (1850); Johnson v. McIntosh, 21 U.S. 240, 8 Wheat. 543 (1823).

21. This appears true although it has been recognized that the power to make treaties with Indian tribes is constitutionally coextensive with the power to make treaties with foreign nations. Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); Worcester v. Georgia, 31 U.S. 350, 378, 6 Pet., 515, 557 (1832).

A rider to an 1871 Indian appropriation act provided that "No Indian nation or tribe within the territory of the United States" would thereafter "be acknowledged . . . as an independent nation . . . with whom the United States may contract by treaty." Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1976)).

22. In addition to challenging Appellants' standing, Appellee argued that the action was both premature and presented a nonjusticiable political question. Edwards v. Carter, 580 F.2d 1055, 1056 (D.C. Cir. 1978). The court determined, however, that it would be appropriate to proceed directly to the merits after noting that deciding only the jurisdictional issue could result in the present court, or in the Supreme Court, remanding the case for further proceedings either on the merits or on jurisdictonal grounds. *Id.* The court also considered that the case presented a pure question of law, with no need for fact development; that the merits were completely against the parties asserting jurisdiction; that the judgment appealed from was based on only one of several asserted grounds of lack of jurisdiction; and that time restraints were imposed by the immediacy of Senate action. *Id.* at 1057.

Convention and state ratifying conventions, case precedent, and prior treaty practice support their holding. The court noted that the property clause does not expressly grant exclusive power to Congress and in this respect parallels article I, section 8 of the Constitution.[23] Article I, section 8 enumerates powers granted to Congress, many of which involve matters traditionally the subject of treaties.[24] After contrasting the expressly exclusive grants of authority to Congress with the property clause grant,[25] the court concluded that the property clause is not intended to restrict the scope of the treaty clause, but is instead intended to permit Congress to accomplish through legislation that which may also be accomplished by other means.[26] The court stated that the history and purpose of the property clause confirm this conclusion.[27] The court also noted that the debates over the treaty clause at the Constitutional Convention and state ratifying conventions even more directly demonstrate the Framer's intent to permit the disposition of United States property by treaty without House approval.[28] The court viewed the proposals of amendments that would have placed restrictions upon treaties disposing of United States territory as evidence that the Framers recognized that federal property could be disposed of by self-executing treaty.[29] The court stated that the rejection of these amendments and the adoption of a provision requiring a two-thirds vote for the passage of all treaties clearly demonstrates the Framers' satisfaction with a supermajoritarian requirement in the Senate, rather than House approval, to serve as a check upon the improvident cession of United States territory.[30] The court also contended that property clause cases arising in the context of state-federal relations, which

23. *Id.* at 1057.

24. The court cited the regulation of commerce with foreign nations as the most prominent example of a power granted to Congress which is commonly the subject of treaties. *Id.* at 1058. *See* U.S. CONST. art. I, § 8, cl. 3.

25. 580 F.2d at 1058. The court noted that because of restrictive language used in the granting clauses, the treaty power may not be used to appropriate money or impose taxes. *Id.* U.S. CONST. art. I, § 9, cl. 7 provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 7, cl. 1 provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills."

26. 580 F.2d 1058.

27. *Id.* at 1059.

28. *Id.* at 1060.

29. *Id.* at 1060-61. *See* note 11 *supra* & accompanying text.

30. *Id.* at 1060.

hold that congressional power under the property clause is unlimited, should be controlling with regard to state-federal questions.[31] According to the court, the cases approving treaty conveyances by the federal government to Indian tribes upheld treaties that clearly disposed of United States property interests.[32] The court noted that in addition to treaties with Indian tribes, there are many other instances of self-executing treaties with foreign nations which cede land or property assertedly owned by the United States.[33] For these reasons, the court affirmed dismissal of the complaint on the grounds of failure to state a claim on which relief may be granted, rather than on lack of jurisdiction.[34]

The dissent would have held that those provisions of the treaty which dispose of property could not go into effect under the Constitution until approved by Congress.[35] Cases stating that the power granted to Congress by the property clause is unlimited were cited as recognizing that Congress has exclusive power to dispose of United States property.[36] According to the dissent, a comparison of the power to dispose of property with the appropriations and taxing powers demonstrates that Congress has exclusive power to dispose of federal property.[37] The dissent found no evidence that the Framers intended that the powers to dispose of property and appropriate money should be treated differently.[38] In addition, the dissent noted that it is significant that the power to declare war is granted to Congress in terms similar to those of the property clause, and that the United States cannot declare war by treaty.[39] The dissent disagreed with the conclusion that the power to dis-

31. *Id.* at 1061.
32. *Id.* at 1062-63.
33. *Id.* at 1063.
34. *Id.* at 1064.
35. *Id.* at 1065 (MacKinnon, J. dissenting). The dissent viewed the requirement that the House have a vote on the disposition of United States property as not operating as a restriction on the treaty power, but rather as merely a matter of ratification procedure. According to the dissent, treaties may still be entered into by the President upon all subjects that are amenable to international agreement, and to become effective, the treaty provisions must be ratified by two-thirds of the Senate. But if any treaty attempts to dispose of United States property, and is ratified by the Senate, article IV still requires the concurrence of the House to carry out the obligations by the enactment of legislaton. *Id.*
36. *Id.* at 1067-68.
37. *Id.* at 1069.
38. *Id.* at 1071.
39. *Id.* at 1070. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159-60 (1965).

pose of property must be concurrent, stating that the property clause does not use exclusive terms and is located in article IV, which deals with state-federal relations.[40] The dissent stressed that by naming the specific branch which was to exercise the power, the Framers went further than necessary to define the relation between the states and the federal government.[41] Also, the dissent noted that the specific grant of the power to Congress implicitly operates to deny that the power vests elsewhere.[42] The dissent argued that both established state department procedures[43] and past treaty practices[44] support its conclusion. Also, the dissent asserted that the rejection by the Framers of amendments to the proposed treaty clause with respect to territorial rights does not support the court's

40. 580 F.2d at 1076.

41. *Id.* at 1077.

42. *Id.*

43. *See* DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL § 700 *et seq.* (Oct. 25, 1974).

44. The dissent analyzed the following eleven treaties which had been offered by Appellee in support of its contention that United States property had frequently been disposed of by self-executing treaties: Treaty with the Cherokees, Dec. 29, 1835, United States-Cherokee Nation, 7 Stat. 478; Treaty with the Chippewa Indians, Oct. 2, 1863, United States-The Redlake and Pembina Bands of Chippewa Indians, 13 Stat. 667; Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, 8 Stat. 252; Webster-Asburton Treaty, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572; Treaty with Great Britain, June 15, 1846, United States-Great Britain, 9 Stat. 869; Treaty with Mexico, Feb. 1, 1933, United States-Mexico, 48 Stat. 1621, T.S. No. 861; Convention on the Problem of the Chamizal, Aug. 29, 1963, United States-Mexico, 15 U.S.T. 21, T.I.A.S. No. 5515; Treaty Resolving Boundary Differences, Nov. 23, 1970, United States-Mexico, 23 U.S.T. 371, T.I.A.S. No. 7313; Treaty on the Swan Islands, Nov. 22, 1971, United States-Honduras, 23 U.S.T. 2630, T.I.A.S. No. 7453; Reversion to Japan of Islands, June 17, 1971, United States-Japan, 23 U.S.T. 447, T.I.A.S. No. 7314; and Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, United States-Panama, 6 U.S.T. 2273, T.I.A.S. 3297. The dissent noted that the Indian treaties did not support Appellee's position because of their peculiar nature; that the treaties with Spain and Great Britain were inapplicable because they merely settled boundary disputes; that two of the three treaties with Mexico specifically recognized the need for congressional legislation and the third implicitly recognized such a necessity; that the Honduras treaty involved very minimal amounts of property; that the Japan treaty had statutory authority to transfer surplus war property and otherwise merely relinquish our temporary right of military occupation; and, the 1955 Panamanian treaty specifically recognized that legislation by Congress was necessary for the transfer of United States property. Thus, the dissent concluded that none of the treaties provided substantial support for Appellee's contention. 580 F.2d at 1094-99.

holding.[45] The dissent found no evidence that the proposers of the amendments took cognizance of the property clause, or that the majority rejected the amendments because it interpreted the property clause as prohibiting transfers of property by treaty.

IV. COMMENT

The instant case is the first to consider whether the property clause prohibits the transfer of United States property to foreign nations through self-executing treaties. The Constitution does not intimate whether the Framers intended the property clause to grant exclusive power to Congress.[46] The court therefore argued that the Founders must have intended the grant of power to be concurrent. The selection of Congress to exercise the power to regulate and dispose of property could, however, imply an exclusion of that power in other branches. The records of the Constitutional Convention and state ratifying conventions also fail to clarify the intent of the Founders. They do show at least some of the delegates perceived that the treaty power encompasses the power to dispose of property. The records do not indicate, however, that the amendments were rejected because the property clause would prohibit property transfers by self-executing treaties. According to the records, the primary, if not sole, purpose of the property clause was to define state-federal relations in the disposition of United States territory.[47] It would not have been necessary to grant exclusive authority to Congress in order to achieve this objective. For these reasons, the records do indicate, although by no means conclusively, that the Framers intended that the treaty power encompass the power to dispose of federal property. Although there is no definitive answer to the question presented in the instant case, the effect of the court's holding is evident: the self-executing treaty power may be used to convey United States property to a foreign nation. Therefore, by means of the self-executing teaty process the House of Representatives may be effectively precluded from participating in such dispositions.

A. Dale Wilson

45. 580 F.2d at 1089. For a discussion of the proposed amendments see note 11 *supra* & accompanying text.

46. *See* notes 1 & 2 *supra.*

47. *See* note 11 *supra* & accompanying text.