IN THE

Supreme Court of the United States

No. 75 Orig.

STATE OF IDAHO
STATE OF IOWA
STATE OF LOUISIANA
STATE OF NEBRASKA
Plaintiffs,

v.

CYRUS R. VANCE
and
JAMES E. CARTER, JR.,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT IN ORIGINAL ACTION

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Pursuant to Rule 9 of the Rules of this Court and the annexed brief in support hereof, the States plaintiff invoke the Court's jurisdiction under Art. III, Sec. 2, cl. 2 of the Constitution of the United States, and pray the Court's leave to file the attached complaint as an original action, upon the ground that the States which are parties to the

suit appear herein in support of their sovereign interest to preserve their proportionate voice in Congress and avoid a threatened burden on their commerce.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE ORIGINAL COMPLAINT

THE ISSUE

Four States are parties plaintiff and allege an injury to themselves and to their citizens in a matter affecting their sovereign interest. Directly, and in their *parens patriae* capacity, they invoke this Court's original jurisdiction under Art. III, Sec. 2, cl. 2 of the Constitution to pray a declaration that the federal officials named as defendants have exceeded the authority of the executive branch of government to the injury of the States and their people by the threatened loss of the votes of their delegation in the House of Representatives and an unreasonbly increased burden on their interstate and foreign commerce.

Defendants have asserted the existence of an implied Constitutional foreign affairs authority (Art. II, Sec. 2, cl. 2) to alienate United States property, pursuant to which they have executed and submitted to the Senate for ratification in the form of a treaty, a proposal which would dispose of the territorial rights and properties of the United States in the Canal Zone to the Republic of Panama and would cede civil and criminal jurisdiction over the United States citizens and nationals resident in the Zone from the courts established by Congress to the Panamanian courts.*

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* Although the desirability of this proposed arrangement is being sharply debated by these parties and the public in general, that is conceded to be a political issue which is not involved in this case.

Plaintiffs in opposition claim that the Canal, the Canal Zone, its structures and the rights exercisable by the United States in the Zone are properties of the United States which may only be disposed of by the whole Congress under the authority of the property Clause, Art. IV, Sec. 3, cl. 2. Further, plaintiffs say that if in law the concurrent disposal powers claimed by the executive branch should exist, the many enactments of Congress previously approved by the executive for the governance of the Zone have foreclosed any further exercise of such right since statutes in areas of specific Congressional authority under the Constitution may not be repealed by implication through a treaty which is inconsistent with their terms. Finally, plaintiffs argue that the executive's foreign affairs power would not in any event extend to the making of agreements with foreign nations which would deprive individual United States citizens of their rights under the Constitution.

The facts underlying this disagreement between the parties on the relative powers of the executive and legislative branches of government under the Constitution are set out in the attached complaint. Plaintiffs are not aware of any material dispute between the parties on these facts.

JURISDICTION

The original jurisdiction of this Court over States suing directly and as representatives of their citizens has been ruled on,

> "Our conclusion therefore is that the original jurisdiction vested by the Constitution in this court over controversies in which a state is a party is not affected by the question whether

> the state is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the state. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits."
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> *Minnesota v. Hitchcock,*
> 185 U.S. 373, 22 S.Ct. 650, 656 (1902)

> "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them."
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> *Missouri v. Illinois,*
> 180 U.S. 208, 21 S.Ct. 331, 344 (1901)

The jurisdiction of the Court over constitutional questions was spelled out by Mr. Justice Marshall in *Cohens v. Virginia,* 19 U.S. (6 Wheat) 264, 404, 5 L.Ed. 257, 291 (1821):

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may,

> avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. * * * "

Since *Marbury v. Madison,* 1 Cranch 137, 5 U.S. (L.Ed.) 60 (1803) one of the most important of those constitutional issues has been the duty of the judicial branch to hold executive officials, including the President, within the ambit of their Constitutional powers, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863 (1952), *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (CADC 1974).

Nor is it an objection that such questions most often arise in the context of heated public debate. As Mr. Justice Frankfurter pointed out in his concurrence in *Youngstown,* (343 U.S. at 596, 72 S.Ct. at 890),

> " * * * To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwill-

> ingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340."

A determination of the property rights of the United States under a conflict between statute and treaty is a proper question for the exercise of this Court's original jurisdiction, *United States v. State of Maine, et al.*, 420 U.S. 515, 95 S.Ct. 1155 (1975). This principle has been many times reiterated with respect to the claims of the States to undersea lands.

> "It is contended that since Texas was admitted to the Union with its maritime boundary not yet settled, United States foreign policy on the extent of territorial waters, to which Texas was admittedly subject from the moment of admission, automatically upon admission operated to fix its seaward boundary at three miles. This contention must be rejected. As we have noted, the boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new States and to define the extent of their territory, not by virtue of the Executive power to determine this country's obligations *vis-a-vis* foreign nations. 363 U.S. at pages 30-36, 80 S.Ct. at pages 979-982. It may indeed be that the Executive, in the exercise of its power, can limit the enjoyment of certain incidents of a Congressionally conferred boundary, but it does not fix that boundary.
>
> . . . the dealings of the Executive with other nations cannot affect the State's rights in any

way as a domestic matter."

United States v. States of Louisiana, etc.
363 U.S. 1, 51, 64-5, 80 S.Ct. 961, 990, 997 (1960)

"It cannot be ignored that the application of the Convention to Texas here would allow Texas, unlike all other States except Florida, to expand its own state boundaries beyond the congressional limitation simply because of a rule governing the relationships between maritime nations of the world. This is a domestic dispute which must be governed by the congressional grant. There is no reason why an international treaty should be applied when it simply works to take away land from the United States in order to give to Texas more land than it ever claimed historically. We cannot believe that Congress intended such a result."

United States v. State of Louisiana
389 U.S. 155, 160-1, 88 S.Ct. 367, 370 (1967)

FORM OF ACTION

The parties having standing and the subject matter being one within the Court's proper cognizance, the principal question is whether the relief prayed is appropriate to the case. Basic authority arises under 28 U.S.C. § 2201 which provides that declaratory judgments may be issued by " . . . any court of the United States, . . .". The factors to be considered in exercising this jurisdiction were set out in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941).

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 239-42, 57 S.Ct. 461, 463, 464, 81 L.Ed. 617, 108 A.L.R. 1000."

This analysis has been repeated in many cases, *Golden v. Zwickler,* 394 U.S. 103, 89 S.Ct. 956 (1969), *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209 (1974), *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 712 (1973), *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967), *State of Florida v. Weinberger,* 492 F.2d 488 (5 Cir. 1974) and is concurred in by the writers, 3 *Davis* Adm. Law Tr. c. 21 (1958), *Jaffe* Judicial Control of Administrative Action, c. 10 (1965).

The question raised by the complaint is substantial in law. Apart from the property interest of the United States in the Canal, and supporting structures, housing areas, railroads, government buildings and the like, this Court in *Wilson v. Shaw,* 204 U.S. 24, 33, 27 S.Ct. 233, 235 (1907) held that the Zone is itself a possession of the United States, the 1903 treaty being described in 1948 as a lease "extending until agreement for abrogation or unilateral abandonment by the United States", *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 383-4, 69 S.Ct. 140, 144, *Acc. U.S. v. Husband R.* (Roach), 453 F.2d 1054 (5 Cir. 1971) *cert. den.* 396 U.S. 935 (1972), *Lucas v. Lucas,* 232 F.Supp. 466 (D.C.C.Z., 1964) *Huasteca Petroleum Co. v. United States,* 14 F.2d 495, (E.D. N.Y. 1926), 26 Op. A.G. 376 (1907). Starting at least

with *United States v. Fitzgerald,* 40 U.S. 785, 15 Pet. 407, 421 (1841), it has many times been held that the power to dispose of property of the United States is exclusively in the competence of Congress under the property clause, *Osborne v. United States,* 145 F.2d 892 (9 Cir. 1944), *Alabama v. Texas,* 347 U.S. 272, 74 S.Ct. 481 (1951), *Tugade v. Hoy,* 265 F.2d 63 (9 Cir. 1959). The power so given to Congress is "unlimited", *Sierra Club v. Hickel,* 433 F.2d 24, 28 (9 Cir. 1970) *aff'd.* 405 U.S. 727, 92 S.Ct. 1361 (1972) and includes authority to prescribe the times, conditions, and mode of transfer and selection of the recipient, *Gibson v. Chouteau,* 13 Wall. 92, 99 (1872), *Irvine v. Marshall,* 20 How. 558 (1858), *Emblen v. Lincoln Land Co.,* 184 U.S. 660, 664, 22 S.Ct. 523, 525 (1902).

As the allegations of the attached complaint show, the controversy is also substantial in a factual sense, in that it involves the rights of the United States in approximately three hundred and twenty-five square miles of land, title to improvements who replacement value is estimated to be in excess of three and a half billion dollars, the repeal by implication of the Canal Zone Code and other statutes which provide the laws for the Zone, the existence of its courts and the complex administrative organization which has heretofore been created by the Congress, and any Constitutional recourse by more than 3500 citizens resident in the Zone who will be involuntarily transferred to Panamanian jurisdiction.

The issue also involves adverse legal interests in that question necessarily presents a choice between mutually incompatible interpretations of Constitutional authority by the branches of government represented by the parties plaintiff and defendant. Plaintiffs assert an exclusive Con-

stitutional disposal power in Congress. The defendants assert a concurrent Constitutional disposal power in the Executive, offering in principal support a summarization of authorities in an opinion of the current Attorney General, _____ Op. A.G. ___, August 11, 1977* to that effect. Of greater practical importance, however, to the question of adverse legal interests, is that the agreement with Panama has now been signed by the President and has been sent to the Senate for ratification as a treaty.

The final question is whether the current situation is also one of sufficient immediacy and reality to warrant the issuance of a declaratory judgment at this time? Admittedly, three months ago it was judicially held that it was not. A prior action raised the same legal question in the United States District Court for the District of Columbia following President Carter's announcement that a treaty proposal to deliver the Canal and its citizenry to the Republic of Panama would be completed and presented to the Senate by June, 1977 (Civ. No. 77-0083). The District Court denied an injunction to maintain the *status quo* and dismissed the case without reaching the merits, holding that the action was premature, the non-state plaintiffs lacked standing, and the issue was probably a political question. On appeal (Nos. 77-1226 and 77-1295) the District Court was affirmed on the stated ground that the matters presented were not ripe for consideration. On June 20, 1977, this Court declined review (No. 76-1576). The decisions of the lower courts are reprinted in that petition.

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* *Contra,* 34 Op. A.G. 320, 322, (1924).

The situation has now matured and the former areas of doubt have been resolved by publication of the proposed treaty language, (State Dept. Sel.Docs. Nos. 6, 6A, 6B). The signed agreement is now before the Senate for ratification, and that body has referred it to its Committee on Foreign Relations for review (123 Cong.Rec.S.15144, Sept. 16, 1977). The adverse positions of the parties have therefore been defined and the Senate is preparing to act on a treaty proposal which – if plaintiffs' contentions are valid – would be Constitutionally void regardless of ratification or rejection.

Nor is it an objection to ripeness at this time that the proposed agreement does not become effective until six months after an exchange of ratifications. In a similar situation, as this Court pointed out in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), ripeness exists where an "all but certain exercise" of authority can be shown, 96 S.Ct. at 681.

CONCLUSION

A proper case for the exercise of the Court's original jurisdiction is presented. The interest of the States is sovereign in character, the issues are defined, the problem is immediate, the subject matter is justiciable and substantial, and the relief prayed is a traditionally appropriate judicial method of resolving the question. Leave to file the complaint under the Court's original jurisdiction should be granted.

Respectfully submitted,

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