No. 75, Original

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF IDAHO, ET AL., PLAINTIFFS

v.

CYRUS R. VANCE, ET AL.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE DEFENDANTS IN OPPOSITION

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JURISDICTION

On October 13, 1977, plaintiff states filed a motion for leave to file a complaint invoking this Court's original jurisdiction. The complaint names as defendants the President of the United States and the Secretary of State. It seeks a declaration that the entire Congress has exclusive constitutional authority to dispose of United States property in the Panama Canal Zone or, in the alternative, if the Executive and the Senate possess concurrent power under the Treaty Clause to dispose of such property, a declaration that such authority may not be exercised "in contravention of existing legislation, or so as to deprive citizens of the United States of their Constitutional and statutory recourse" (Complaint, p. 9). This Court's jurisdiction is invoked under Article III, Section 2, of the Constitution, which confers original jurisdiction in cases "in which a State shall be Party." As shown herein, however, the complaint fails to state any claim within this Court's original jurisdiction.

QUESTIONS PRESENTED

1. Whether the plaintiff states have any sovereign interest in the matters alleged and, if not, whether they may challenge actions of the federal government as *parens patriae* for their citizens.

2. Whether the complaint fails to state a claim upon which relief can be granted because congressional power to dispose of United States territory and property is not exclusive but, rather, is concurrent with the treaty making power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article II, Section 2, cl. 2:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties * * *.

United States Constitution, Article IV, Section 3, cl. 2:

> 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 * * *.

United States Constitution, Article III, Section 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and

between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * * * *

28 U.S.C. 1251:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

STATEMENT

The United States exercises certain rights in the Canal Zone by virtue of a 1903 treaty between the United States and the then newly formed Republic of Panama.[1] In that treaty Panama granted the United States "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of [a] Canal."[2] Panama also granted the United States "all the rights, power and authority * * * [in the Canal Zone] * * * which the United States would possess and exercise if it were the sovereign."[3] In accordance with this treaty, the United States undertook and eventually completed construction of the Panama Canal, which was opened for traffic in 1914. The 1903 treaty provides the basis for the current United States operation, maintenance and defense of the Canal.[4]

The 1903 treaty has been amended on two major occasions, in 1936 and 1955.[5] Despite these revisions, the 1903 treaty has remained a source of friction and conflict

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[1]Isthmian Canal Convention, November 18, 1903, 33 Stat. 2234, T.S. No. 431.

[2]*Id.*, at Art. 2.

[3]*Id.*, at Art. 3.

[4]The Congress has adopted a comprehensive civil and criminal code for the zone. Canal Zone Code, Pub. L. 87-845, 76A Stat. 1. The Secretary of the Army is the sole stockholder of the Panama Canal Company and is responsible to the President for the administration of the Canal Zone. 2 Canal Zone Code 31, 61, 62; 35 C.F.R. 3.1.

[5]General Treaty of Friendship and Cooperation, 53 Stat. 1807, T.S. No. 945, March 2, 1936, entered into force, July 27, 1939; and Treaty of Mutual Understanding and Cooperation, T.I.A.S. No. 3297, 6 U.S.T. 2273, January 25, 1955, entered into force, August 23, 1955.

between the United States and Panama. For example, on January 9, 1964, rioting broke out between Panamanians and Americans over the issue of flying the Panamanian flag in the Canal Zone. Those riots led to the deaths of 21 Panamanians and 3 Americans. They also led to a break in diplomatic relations and a decision by President Johnson to renegotiate the 1903 treaty.[6]

The negotiations continued for thirteen years and culminated on September 7, 1977, when President Carter, on behalf of the United States, signed two treaties designed to establish new arrangements for operating and defending the Panama Canal. These treaties, the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, abrogate prior treaties and establish a new relationship between the United States and Panama under which the United States will continue to operate the Canal until December 31, 1999. After that, Panama will assume control of Canal operations, with the United States sharing permanent responsibility for maintaining the Canal's neutrality.[7]

The treaties were transmitted to the Senate by the President for ratification on September 16, 1977. 123 Cong. Rec. S15144 (daily ed., September 16, 1977). The Senate, in turn, referred the treaties to its Committee on Foreign Relations, where they are currently pending. *Ibid.* The treaties enter into force six months from the date of exchange of instruments of ratification.

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[6]See Department of State, Current Policy Statement No. 9, January 1977, and 70 Dept. of State Bull. 181 (1974).

[7]See State Dept. Sel. Docs. No. 6 for the text of the treaties. The terms of these treaties are implemented and supplemented by a number of separate agreements and other instruments between the United States and Panama. See State Dept. Sel. Docs. No. 6B.

ARGUMENT

I. THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED BECAUSE THE PLAINTIFF STATES HAVE NO SOVEREIGN INTEREST IN THE MATTERS ALLEGED AND MAY NOT AS *PARENS PATRIAE* CHALLENGE ACTIONS OF THE FEDERAL GOVERNMENT.

The states of Idaho, Iowa, Louisiana, and Nebraska seek leave to file a complaint essentially requesting this Court to declare the proper allocation of power between the legislative and executive branches of the federal government with respect to the disposal of United States property interests in the Panama Canal Zone.[8] The four states assert "their sovereign interest to preserve their proportionate voice in Congress and avoid a threatened burden on their commerce" (Motion for Leave to File Complaint in Original Action, p. 2). In challenging the actions of the President and the Secretary of State, the four states also purport to act as *parens patriae* on behalf of their citizens (*id.* at 3). Viewed from either perspective, this suit does not fall within the original jurisdiction of this Court. *Massachusetts* v. *Mellon*, 262 U.S. 447, 484-486; *Florida* v. *Mellon*, 273 U.S. 12, 17-18; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324; *Massachusetts* v. *Laird*, 400 U.S. 886. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 446-447.

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[8]Two prior actions have raised the same legal question. In *Helms* v. *Vance*, D. D.C., No. 77-83, decided March 23, 1977, affirmed, C.A. D.C., Nos. 77-1226 and 77-1295, decided May 3, 1977, certiorari denied, No. 76-1576, June 20, 1977, the district court denied plaintiffs' motion for a preliminary injunction to maintain the *status quo* in the Canal Zone and dismissed the case on the grounds that the action was premature, that plaintiffs lacked standing and that the issue raised was a political question. The court of appeals affirmed on the ground that the matters presented were not ripe for consideration

Article III, Section 2, of the Constitution confers original jurisdiction on this Court "[i]n all Cases * * * in which a State shall be Party."[9] In order to prevent excessive or improper use of this provision, however, the Court has consistently held that its original jurisdiction is not properly invoked merely because a state "elects to make itself * * * a party plaintiff." *Oklahoma* v. *Atchison, T. & Santa Fe Ry.*, 220 U.S. 277, 289. This Court has insisted that a prospective state plaintiff demonstrate a direct interest of its own. See *Oklahoma* v. *Cook*, 304 U.S. 387, 393-396. See also *Kansas* v. *United States*, 204 U.S. 331; *Georgia* v. *Pennsylvania R. Co, supra*; *Arkansas* v. *Texas*, 346 U.S. 368; *Pennsylvania* v. *West Virginia*, 262 U.S. 553.

In an original action between two states, or between a state and a citizen of another state, two kinds of "direct interest" have been recognized. A state may maintain such an action to protect its sovereign interest (*e.g., Rhode Island* v. *Massachusetts*, 12 Pet. 657, 726-727) or, as *parens patriae*, to vindicate the interests of all its citizens (*e.g., Georgia* v. *Pennsylvania R. Co., supra*; *Georgia* v.

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and this Court denied certiorari. In *Drummond* v. *Bunker*, D. C.Z., No. 76-0353-B, decided January 11, 1977, affirmed, 560 F. 2d 625 (C.A. 5), the court of appeals affirmed the order of the district court quashing service of process by mail on defendants not personally present in the Canal Zone.

On October 3, 1977, fifty-one members of the House of Representatives filed an action in the United States District Court for the District of Columbia seeking similar declaratory relief. *Edwards, et al.* v. *Carter*, Civil No. 77-1733 (D. D.C.).

[9]Under 28 U.S.C. 1251(b)(2) and (3) controversies between a state and the United States and actions by a state against citizens of another state are designated as being within the Court's original but not exclusive jurisdiction.

Tennessee Copper Co., 206 U.S. 230). Acting as *parens patriae* for their citizens, states have been permitted to maintain actions against other states, or against citizens of other states, where the purpose of the plaintiff states was to protect the health and comfort of their inhabitants (*Missouri* v. *Illinois & Chicago District*, 180 U.S. 208; *Kansas* v. *Colorado*, 185 U.S. 125; *Georgia* v. *Tennessee Copper Co., supra*; *Pennsylvania* v. *West Virginia, supra*; *North Dakota* v. *Minnesota*, 263 U.S. 365) or to protect the economic well-being of their citizens (*Georgia* v. *Pennsylvania R. Co., supra*).

Where a state brings an action against the United States or its officers to challenge certain acts of the federal government, however, a state may not maintain such an action as *parens patriae* on behalf of its citizens. *Massachusetts* v. *Mellon, supra*; *Florida* v. *Mellon, supra*; *South Carolina* v. *Katzenbach, supra*; *Massachusetts* v. *Laird, supra*; *Commonwealth of Pennsylvania* v. *Kleppe*, 533 F. 2d 668, 673-679 (C.A. D.C.), certiorari denied *sub nom. Pennsylvania* v. *Kobelinski*, 429 U.S. 977. This limitation is based on the principle that the federal government itself—and not any state—is "the ultimate *parens patriae* of every American citizen." *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 324. As this Court observed in *Massachusetts* v. *Mellon, supra*, 262 U.S. at 485-486,

> [w]hile the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens * * *, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter,

they must look for such protective measures as flow from that status.[10]

The application of this doctrine is especially fitting here because at the heart of the states' complaint is the assertion that the President has usurped a power allegedly entrusted by the Constitution exclusively to Congress. At stake is the allocation of power between two coordinate branches of the federal government elected by the citizens of the United States. This is the special concern of the citizens of the United States, not of the states as representatives of their citizens. "[C]ourts have consistently regarded * * * the principle of the separation of powers *only as* [*a*] *protection*[ ] *for individual persons and private groups* * * *." *South Carolina* v. *Katzenbach, supra*, 383 U.S. at 324 (emphasis added).

The Panama Canal Treaties recently submitted to the United States Senate touch the lives of all the citizens of the United States, not merely those residing in the plaintiff states. The issues raised by the treaties, particularly those concerning the President's power to dispose of United States interests in the Canal Zone through the treaty process, have been the subject of intense debate and scrutiny by the citizens' elected representatives. See Hearings on Panama Canal Treaty (Disposition of United States Territory) before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977); testimony on Panama Canal Treaties at Hearings before the Senate Committee on Foreign Relations, 123 Cong. Rec. S15945-S15951 (daily ed., September 29, 1977). The

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[10]None of the cases which plaintiff states cite in support of their effort to bring this suit in a *parens patriae* capacity involved an original action between a state and the United States or its officers.

citizens of the United States have it within their political power, through their voice and vote, to shape the ultimate outcome on these issues. The states, acting on behalf of their citizens, may not invoke this Court's original jurisdiction in order to determine the proper allocation of power between the executive and legislative branches of the federal government.

The four states fail as well to present a claim in their sovereign capacity. To establish such a claim, a state must allege some injury to its own unique sovereign interest. See, *e.g., South Carolina* v. *Katzenbach, supra* (challenge under Fifteenth Amendment to federal law suspending or invalidating the state's otherwise valid voting laws); *California* v. *Latimer,* 305 U.S. 255 (suit to enjoin taxation of state-owned railroad); *Ohio* v. *Helvering*, 292 U.S. 360 (suit contesting taxation of state-owned liquor stores); *Wisconsin* v. *Lane,* 245 U.S. 427 (suit to establish state's title to lands). The plaintiff states, however, express no more than a generalized grievance shared by all who are incidentally affected by the use of the Panama Canal for the transportation of goods.

Specifically, the states assert as their sovereign interest the preservation of "their proportionate voice in Congress" and the avoidance of "a threatened burden on their commerce" (Motion for Leave to File Complaint in Original Action, p. 2). The states as separate entities, of course, do not have any elected representatives. On the contrary, the members of both houses of the United States Congress are elected by the citizens of the United States in each state and are responsible only to them. Thus, the states have no sovereign interest in this regard.

As to the states' interest in avoiding a burden on their commerce, plaintiffs assert that goods are shipped from their states to other states and overseas, and that shipping

costs will rise because the proposed payments to the Republic of Panama will cause an increase in the tolls now charged.[11] Additionally, they allege that increased tolls will burden anticipated shipments of oil from states other than plaintiffs, and will cause diminished use of southern refineries and shipping facilities in seacoast ports.[12] In essence, therefore, the four states allege that as a consequence of the President's exercise of his treaty powers they may suffer certain adverse economic effects. But decisions made by the Executive Branch concerning the allocation of resources in any important federal program may produce similar consequences in varying degree. If the states were able to invoke the original jurisdiction of this Court through general allegations of indirect economic harm, then many important federal programs could be challenged by the states in original actions before this Court. Accordingly, such incidental alleged "injuries" have properly been deemed insufficient to justify an exercise of the original jurisdiction of this Court, at least in suits against the federal government or its officers. *Massachusetts* v. *Mellon, supra*; *Florida* v. *Mellon, supra*; *South Carolina* v. *Katzenbach, supra.* See also *Georgia* v. *Pennsylvania R. Co., supra.* Indeed, these general allegations merely confirm that the four states are suing primarily as *parens patriae,* alleging certain adverse consequences of the treaties which will be borne by some or all of the states' citizens but only indirectly by the states themselves.[13]

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[11]Complaint, paras. 2 and 17. Plaintiff states do not specify whether they themselves ship goods or whether they are merely asserting such an injury on behalf of their citizens who engage in such commerce.

[12]Complaint, para. 18.

[13]Although the Motion for Leave to File Complaint names as plaintiffs only the states of Idaho, Iowa, Louisiana, and Nebraska, the complaint itself joins as plaintiffs four United States Senators,

II. THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Where, as here, a state seeks leave to invoke the original jurisdiction of this Court in a case in which that jurisdiction is not exclusive, but concurrent under 28 U.S.C. 1251(b) with the jurisdiction of the federal district courts, this Court may, in its discretion, decline to exercise that jurisdiction in recognition of "the diminished societal concern in [its] function as a court of original jurisdiction and the enhanced importance of [its] role as the final federal appellate court." *Ohio* v. *Wyandotte Chemicals Corporation,* 401 U.S. 493, 499. See also *Illinois* v. *City of Milwaukee,* 406 U.S. 91. Here, the constitutional question which plaintiffs seek to raise is insubstantial. It has long been recognized that the grant of power to Congress contained in the Property Clause, Article IV, Section 3, cl. 2, is not exclusive, but rather is concurrent with the treaty making power entrusted to the Executive. Moreover, if the question presented by this case were otherwise justiciable, no jurisdictional impediment would bar its resolution in the first instance in federal district court. 28 U.S.C. 1331. In these circumstances, the motion for leave to file should be denied.

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one member of Congress, the Attorney General of the state of Indiana acting pursuant to concurrent resolution of the Indiana legislature, and a United States citizen and employee residing in the Canal Zone. The complaint thereby seeks to join in this action a variety of individuals who could not invoke this Court's original jurisdiction. These individuals have not filed a motion for leave to intervene in this action. See Rule 9(2), Supreme Court Rules; Rule 24, Fed. R. Civ. P. Accordingly, their names should be stricken from the complaint.

Article II, Section 2, cl. 2, of the Constitution provides that the President shall have the power to make treaties, "by and with the Advice and Consent of the Senate * * * provided two-thirds of the Senators present concur." This Court has held that the treaty power extends to "all proper subjects of negotiation between our government and other nations." *Asakura* v. *City of Seattle,* 265 U.S. 332, 341. Plaintiffs assert, however, that Article IV, Section 3, cl. 2, of the Constitution gives Congress *exclusive* authority over the disposition of properties of the United States (Complaint, para. 21). It follows, plaintiffs contend, that any presidential authority to dispose of United States property must be derived from an Act of Congress. Were this argument correct, however, the President's treaty making power— and thus his power effectively to conduct foreign relations—would be severely restricted. On several occasions, this Court has taken an expansive view of congressional power under the Property Clause. See, *e.g., Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 330-337; *Kleppe* v. *New Mexico,* 426 U.S. 529, 539-541, and cases there cited. If the congressional power to dispose of United States property, as thus broadly construed, were an exclusive power, the President would be subject to serious and undesirable limitations in the kinds of valuable consideration, if any, he would be empowered to offer in treaty negotiations.

While Article IV, Section 3, cl. 2, of the Constitution contains an affirmative grant of power to the Congress, that grant is not exclusive. Many affirmative grants of power to Congress in Article I of the Constitution bear upon matters commonly subjected to the treaty power. For example, pursuant to Article I, Section 8, Congress has power to regulate foreign trade, to provide for the protection of rights in useful inventions, to make rules governing captures on land and water, to establish a

uniform rule for naturalization, and to punish offenses against the law of nations. However, "[t]he mere fact * * * that a Congressional power exists does not mean that the power is exclusive so as to preclude the making of a self-executing treaty within the area of that power." ALI, *Restatement (Second) of Foreign Relations Law of the United States*, § 141, p. 435 (1965). It is now well-established that in such areas the treaty power is concurrent with the legislative power of Congress when the subject matter is appropriate for international negotiations. See, *e.g., United States* v. *Schooner Peggy*, 1 Cranch 103 (the capture of vessels); *Hijo* v. *United States,* 194 U.S. 315 (claims against the United States); *Cook* v. *United States*, 288 U.S. 102 (customs inspections); *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (trademarks).

Thus, plaintiffs cannot argue at this late date that, as a general principle, the treaty power stops where the power of Congress begins. Instead, plaintiffs contend that with regard to a particular power, property disposal, the grant of authority to Congress is exclusive. Plaintiffs' argument is refuted by the language of the Constitution, the location of the property disposal clause in the Constitution, the history of that clause and the treaty making clause, past decisions of this Court, and previous treaty practice.

First, the non-exclusionary character of the grant of power to Congress contained in Article IV, Section 3, cl. 2, is apparent from the language of the Constitution. Article IV provides that Congress "shall have power" to dispose of territory or property belonging to the United States. The quoted phrase is identical to that used in Article I, Section 8, which provides that Congress "shall have power", *inter alia*, to regulate foreign commerce and to define and punish offenses against the law of nations. As noted above, where the powers conferred upon

Congress by Article I, Section 8, concern subjects appropriate for international negotiation, those powers may also be exercised by the President and the Senate through self-executing treaties. Similarly, the power conferred upon Congress in Article IV, Section 3, cl. 2, is not exclusive, but may be exercised by the President and the Senate pursuant to their treaty-making power. Like Article I, Section 8, Article IV contains no express statement that the power it confers—the power to dispose of territory or property—shall reside in Congress alone.[14]

Second, Article IV, Section 3, cl. 2, is included in a portion of the Constitution which deals with relationships among the states and between the states and the federal government. The placement of the property disposal clause at this point in the Constitution strongly suggests that the provision was intended to indicate the proper distribution of power between the state and federal governments, rather than among the three branches of the federal government.[15] It is also significant that Article IV,

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[14]The framers of the Constitution certainly knew how to indicate an exclusive power when they so desired. For example, the wording of the appropriations and revenue clauses stands in sharp contrast to the language of other Article I clauses and the language of Article IV. Article I, Section 9, cl. 7, states that "*No* money shall be drawn from the Treasury, but in Consequence of Appropriations by law." Article I, Section 7, cl. 1, states that "*All* bills for raising Revenue shall originate in the House of Representatives." (Emphasis added.)

[15]Plaintiffs cite a line of cases in which the courts, relying upon Article IV, have declared that Congress enjoys exclusive power to dispose of property in the public domain. Motion for Leave to File Complaint in Original Action, p. 10. These cases chiefly involve disputes implicating the proper distribution of power between the federal and state governments. They do not even mention the treaty power; much less do they draw any conclusions concerning the proper relationship between that power and the congressional power to dispose of United States property or territory pursuant to the Property Clause.

Section 3, cl. 2, closely links "the power to dispose of" United States territory and property with "the power to make all needful rules and regulations" respecting that territory and property. Since these two aspects of congressional power stand in such a close textual relationship, their respective interactions with the treaty power should be similar or identical. This Court has long ago determined that the treaty power can be used to make rules and regulations governing territory belonging to the United States. *Geofroy* v. *Riggs*, 133 U.S. 258; *United States* v. *Percheman,* 7 Pet. 51.

Third, the record of the proceedings during the Constitutional Convention supports the interpretation suggested by the language of the property disposal clause and its location in the Constitution. The clause was adopted during a general discussion of the role that the central government should play in connection with the territorial claims that had been asserted by the several states with respect to the western lands. In the course of that discussion there was no hint whatever that the purpose or effect of the clause was to give Congress exclusive power to authorize or implement international agreements disposing of property or territory. See 2 Farrand, *The Records of the Federal Convention of 1787,* 457-459, 461-466 (rev. ed. 1937) (hereinafter cited as "Farrand").

The history of the treaty clause is even more conclusive. During the course of the convention several proposals were advanced. One would have required every treaty to be approved by two-thirds of the Senate and the House of Representatives. 2 Farrand, *supra*, at 538. That proposal was rejected. Another would have required two-thirds of the Senate to concur in treaties, but would have exempted peace treaties from that requirement, except for peace

treaties depriving the United States of territory or territorial rights. 2 Farrand, *supra,* at 495, 533-534, 543. That proposal was also rejected. In its place, the convention adopted a proposal that required two-thirds of the Senate to concur in *all* treaties, including peace treaties involving cessions of territory. Thus, the convention records demonstrate that the framers of the Constitution contemplated the transfer of United States territory and property by treaty. The significance of this history is further enhanced by the fact that the drafting of the treaty clause followed the adoption of Article IV, which plaintiffs here erroneously contend granted to Congress the exclusive power to dispose of United States territory and property.

Fourth, prior judicial decisions concerning the disposition of United States property by treaty have uniformly held that the United States can convey title by way of self-executing treaty and that no implementing legislation is necessary. For example, in *Holden* v. *Joy,* 17 Wall. 211, 247, the Court stated that the United States could, by treaty, transfer lands to the Cherokee Indians in exchange for lands held by the Cherokees. The Court considered the transfer a sale, properly made by a treaty. See also *Jones* v. *Meehan,* 175 U.S. 1, 10; *United States* v. *Brooks,* 10 How. 442; *New York Indians* v. *United States,* 170 U.S. 1.[16]

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[16]These cases all involved treaties with Indian nations. Until the abolition in 1871 of the power of the Indian tribes to conclude treaties with the United States, the treaty power of the United States with respect to the Indian tribes was coextensive with its treaty power in dealings with foreign nations. See *United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 197.

Finally, past treaty practice provides many precedents supporting the authority of the President to dispose of property of the United States by treaty without statutory implementation. In addition to the Indian treaties discussed above, which were upheld by this Court on several occasions, a number of important treaties with foreign countries have ceded rights to lands claimed by the United States.[17]

The foregoing principles do not mean that the United States cannot dispose of property rights by a combination of treaty and implementing legislation, but only that the Constitution does not require utilization of that method.[18] In the present instance, while only the Senate will vote on

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[17]For example, the Florida Treaty with Spain in 1819, 8 Stat. 252, 256 (in which the United States agreed to "cede * * * and renounce forever, all their rights, claims, and pretensions * * *" to territories beyond the Sabine River in return for the territories of East and West Florida); the Webster-Ashburton Treaty with Great Britain of 1842, 8 Stat. 572 (where the United States ceded certain territory to Great Britain in resolution of a dispute over the location of the Northeast border); the Oregon Treaty with Great Britain of 1846, 9 Stat. 869 (wherein the United States receded from its former claim to all land south of the 54° 40' line and accepted the 49th parallel as its boundary with Great Britain). See Opinion of the Attorney General to the Secretary of State, dated October 11, 1977, pp. 16-17. See also Hearings on Panama Canal Treaty (Disposition of United States Territory) before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. 6-7 (1977).

[18]Historically, determination of the method to be employed in the disposition by treaty of particular rights or claims of the United States to property or territory has been committed to the sound discretion of the Executive Branch (acting with the advice and consent of the Senate). Judicial interference in such a determination would require a court to involve itself improperly in the resolution of a nonjusticiable political question. This Court, in *Baker* v. *Carr,* 369 U.S. 186, 217, described a political question as one which cannot be resolved according to "judicially discoverable and manageable standards." Such standards are manifestly lacking with respect to the choice between a self-executing treaty and a treaty in combination

the treaties in accordance with constitutional procedures, the entire Congress will certainly play a role in creating the new relationship with the Republic of Panama called for in the treaties. Substantial implementing legislation covering a wide variety of subjects is currently being prepared for submission to Congress in the near future. See Statement of Herbert J. Hansell, Legal Adviser, Department of State, to the Senate Committee of Foreign Relations concerning Panama Canal Treaties, 123 Cong. Rec. S15947 (daily ed., September 29, 1977).

The alternative relief sought by plaintiffs is equally unsupportable. Plaintiffs request a declaration that in the event the Executive does possess concurrent authority to dispose of property under the treaty clause, then such power cannot be exercised in contravention of existing legislation or so as to deprive United States citizens of their constitutional or statutory recourse. The decisions of this Court leave little doubt, however, that an Act of Congress may supersede a prior treaty and, likewise, a treaty may supersede a prior Act of Congress. *Head Money Cases*, 112 U.S. 580, 599; *Cook* v. *United States,* 288 U.S. 102. Moreover, the rights and privileges of

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with implementing legislation. That choice is a delicate one, implicating numerous factors likely to be subjects of negotiation between the United States and other nations. In many instances the negotiators would need to consider the likely consequences of postponing a treaty's operation until after the passage of implementing legislation in all participating countries. Judicial review of such matters would necessarily involve the courts in the exercise of the foreign affairs powers vested exclusively in the Executive Branch by the Constitution. Article II, Section 2, cls. 1-2; Article II, Section 3. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. See also *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537, 542; *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109; *United States* v. *Pink,* 315 U.S. 203, 222-223, 229-230; *United States* v. *Belmont.* 301 U.S. 324, 330.

In terms, plaintiffs' proposed complaint does not ask this Court to review defendants' discretionary decision to utilize a self-executing treaty in connection with the disposition of United States property in

United States citizens in the Canal Zone, having been created by statutes implementing previous treaties, are necessarily subject to modification by treaty as proposed here.

Finally, the new treaty provides significant safeguards to insure that the rights of United States citizens in Panama will be respected. For example, with respect to crimes committed by United States citizens, employees of the Canal Commission, and their dependents, Panama will, as a matter of general policy, waive jurisdiction to the United States at its request.[19] Consequently, plaintiffs' claim for alternative relief is without foundation.

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the Panama Canal Zone. Rather, plaintiffs seek, *inter alia,* a declaration that this alternative impermissibly infringes upon the power granted to Congress in the Property Clause. While judicial resolution of disputes concerning the proper allocation of power among the branches of the federal government is appropriate in some circumstances (see, *e.g., Buckley* v. *Valeo,* 424 U.S. 1, 123-124; *Youngstown Sheet & Tube* v. *Sawyer,* 343 U.S. 579, 587-589), adjudication of the claims presented here would inevitably engage the courts in an assessment of the comparative wisdom of alternative methods of disposition by treaty of United States property or territory—precisely the sort of delicate foreign policy question whose resolution the Constitution vests in the political branches rather than the judiciary.

[19]Agreed Minute to Agreement in Implementation of Article III (Paragraph 5), State Dept. Sel. Docs. No. 6B. See also Agreement in Implementation of Article III (Article XIX (4)-(5)); Agreement in Implementation of Article IV (Article VI (5)-(6)); Annex C of the Agreement in Implementation of Article III; Annex D of the Agreement in Implementation of Article IV, State Dept. Sel. Docs. No. 6B.

CONCLUSION

For the foregoing reasons, the motion for leave to file the complaint should be denied.

Respectfully submitted.

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DECEMBER 1977.