# Judicial Decisions*

**Mickey Edwards**
*Member of Congress, Oklahoma, et al., Appellants v.*

**James Earl Carter**
*President of the United States*
**No. 78-1166**
**United States Court of Appeals**
**for the District of Columbia Circuit**

Argued March 10, 1978
Decided April 6, 1978

Before: **Fahy, Senior Circuit Judge**, and
**McGowan** and **MacKinnon, Circuit Judges.**

*Opinion Per Curiam.*

*Dissenting Opinion filed by* **Circuit Judge MacKinnon.**

*Per Curiam:* This is an appeal from the District Court's dismissal of a challenge to appellee's use of the treaty power to convey to the Republic of Panama U.S properties, including the Panama Canal, located in the Panama Canal Zone.[1] Appellants, sixty members of the House of Representatives, sought a declaratory judgment that the exclusive means provided in the Constitution for disposal of United States property requires approval of both Houses of Congress, *see* Art. IV, § 3, cl. 2, and that therefore the Panama

*77-1471-Mickey Edwards v. James Earl Carter *cert. denied* 5/15/78.

[1]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 has now been ratified by the Senate, *see* note 2 *infra*. The Article conveying the Canal Zone properties to the Republic of Panama is contained in the Panama Canal Treaty.

Canal Zone may not be returned to Panama through the Treaty process, which invests the treaty-making power in the President by and with the advice and consent of two-thirds of the Senate, *see* Art. II, § 2, cl. 2. Appellee contends that the Constitution permits U.S. territory to be disposed of either through congressional legislation or through the treaty process, and that therefore the President's decision to proceed under the treaty power is constitutionally permissible.

The District Court did not reach the merits of this controversy; rather, it dismissed the complaint for lack of jurisdiction after concluding that appellants lacked standing because they had failed to demonstrate injury in fact from the President's invocation of the treaty process. A notice of appeal and a request for a preliminary injunction pending appeal were immediately filed with this court. Appellee has moved for summary affirmance of the District Court's judgment either on the jurisdictional grounds stated by the District Court or on the merits of appellants' contention; appellants have moved for summary reversal. We have heard oral argument and have considered the case on an expedited basis.[2] For the reasons appearing below, we affirm the dismissal of the complaint, not on the jurisdictional ground relied on by the District Court but for failure to state a claim on which relief may be granted.

## I.

In addition to its argument on the merits, appellee has presented several substantial and complex challenges to the jurisdiction of the federal courts to adjudicate the merits of the constitutional question presented in this case. We refer not only to the contentions as to lack of standing, but also to the arguments that appellants' action is both premature and presents a nonjusticiable political question. Deciding only the jurisdictional issue before us could result in this court, or the Supreme Court, remanding the case for further proceedings either on the merits or on jurisdictional issues. Because the merits of this controversy present a pure question of law, with no need of a hearing for fact development, because these merits are so clearly against the parties asserting jurisdiction, and because the judgment appealed from was based on only one of several asserted grounds of lack of jurisdiction, we believe it is appropriate to proceed directly to the merits of this case. This conclusion is bolstered when the time constraints imposed by the immediacy of Senate action on the treaties are considered. *See Adams v. Vance,* No. 77-1960 (D.C. Cir. Jan. 17, 1978), at 8, note 7 and cases cited therein.

[2]The Senate consented to the Neutrality Treaty on March 14, 1978. It is expected that the vote on the Panama Canal Treaty will occur in early April 1978.

Consequently, the precise question we address is whether the constitutional delegation found in Art. IV, § 3, cl. 2 is exclusive so as to prohibit the disposition of U.S. property by self-executing treaty—i.e., a treaty enacted in accordance with Art. II, § 2, cl. 2, which becomes effective without implementing legislation.

## II.

Article IV, § 3, cl. 2 of the Constitution states in its entirety:

> 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 of any particular State.

Appellants contend that this clause gives Congress exclusive power to convey to foreign nations any property, such as the Panama Canal, owned by the United States.[3] We find such a construction to be at odds with the wording of this and similar grants of power to the Congress, and, most significantly, with the history of the constitutional debates.[4]

The grant of authority to Congress under the property clause states that "The Congress shall have Power . . .," not that only the Congress shall have power, or that the Congress shall have exclusive power. In this respect the property clause is parallel to Article I, § 8, which also states that "The Congress shall have Power. . . ." Many of the powers thereafter enumerated in § 8 involve matters that were at the time the Constitution was adopted and are at the present time also commonly the subject of treaties. The most prominent example of this is the regulation of commerce with foreign nations, Art. I, § 8, cl. 3, and appellants do not go so far as to contend that the treaty process is not a constitutionally allowable means for regulating foreign commerce. It thus seems to us that, on its face, the property clause is intended not to restrict the scope of the treaty clause, but, rather, is intended to permit Congress to ac-

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[3]In addressing the merits, we assume without deciding that the Panama Canal Zone real property which would be conveyed by the Panamal Canal Treaty is indeed property belonging to the United States. Appellee has not contended otherwise and neither party has briefed this issue.

[4]The Senate Foreign Relations Committee has thoroughly considered and rejected appellants' argument. That Committee reported the treaties with Panama to the full Senate by a 14 to 1 vote, and the one dissenting Senator did not dispute the power of the President, by and with the advice and consent of the Senate, to transfer United States property. *See* EXEC. REPT. No. 95-12 (95th Cong. 2d Sess., Feb. 3, 1978).

In addition to the American Law Institute's Restatement of Foreign Relations Law, *see infra,* other authorities in agreement with this conclusion include Professor Louis Henkin, *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 159-60 (1965); Dean Louis Pollalk, *see* 124 CONG. REC., No. 8, at 5729 (95th Cong., Jan. 30, 1978); Professor Covey Oliver, *see Hearings Before the Committee on Foreign Relations, Part IV,* at 95, 103, 112-13 (Jan. 19, 1978); and Professor John Norton Moore, *see id.* at 89, 93-94.

complish through legislation what may concurrently be accomplished through other means provided in the Constitution.

The American Law Institute's (ALI) Restatement of Foreign Relations, directly addressing this issue, comes to the same conclusion we reach:

> The mere fact, however, 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 OF FOREIGN RELATIONS LAW (2d), § 141, at 435 (1965). The section of the Restatement relied on by the dissent merely states that the treaty power, like all powers granted to the United States, is limited by other restraints found in the Constitution on the exercise of governmental power (Rest. For. Rel. § 117).[5] Of course the correctness of this proposition as a matter of constitutional law is clear. *See Reid v. Covert,* 354 U.S. 1 (1957); *Geofroy v. Riggs,* 132 U.S. 258 (1890); *Asakura v. Seattle,* 265 U.S. 332 (1924), also relied on by the dissent. To urge, as does the dissent, that the transfer of the Canal Zone property by treaty offends this well-settled principle—that the treaty power can only be exercised in a manner which conforms to the Constitution—begs the very question to be decided, namely, whether Art. IV, § 3, cl. 2 places in the Congress the *exclusive* authority to dispose of U.S. property.[6]

There are certain grants of authority to Congress which are, by their very terms, exclusive. In these areas, the treaty-making power and the power of Congress are not concurrent; rather, the only department of the federal government authorized to take action is the Congress . . . prohibit the use of the treaty power to impose taxes. . . .[7]

Thus it appears from the very language used in the property clause that this provision was not intended to preclude the availability of self-executing treaties as a means for disposing of U.S. property. The history of the drafting and ratification of that clause confirms this conclusion. The other clause in

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[5]Similarly, § 118(1) of the Restatement lends no support to the dissent's position because it is not even relevant to the issue before us. That section, consistent with Missouri v. Holland, 252 U.S. 416 (1920), indicates that the treaty power is broader than the power of Congress to enact legislation. The issue before us, on the other hand, is whether the treaty power extends to an area in which Congress, by virtue of Art. IV, § 3, cl. 2, does have power to enact legislation.

[6]It is important to understand the limited scope of this inquiry. If Art. IV, § 3, cl. 2 does in fact provide the exclusive means of property disposition, *i.e.,* by legislation, clearly a self-executing treaty would be a constitutionally impermissible alternative. As the dissent repeatedly indicates, the treaty power may not encroach on delegations made exclusively to Congress.

[7]The dissent argues that because the power to declare war is exclusively reserved to Congress by Art. 1, § 8, so also must be the power to dispose of United States property, which power is granted to Congress in the same language as the war-making power. *Cf.* L. HENKIN, *supra,* at 160 n. 4 The *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, may place it apart from the other congressional powers enumerated in Art. 1, § 8 and in Art. IV, § 3, cl. 2.

Art. IV, § 3 concerns the procedures for admission of new states into the Union, and the debates at the Constitutional Convention clearly demonstrate that the property clause was intended to delineate the role to be played by the central government in the disposition of Western lands (U.S.) which were potential new states. Several individual states had made territorial claims to portions of these lands; and as finally enacted, the property clause, introduced in the midst of the Convention's consideration of the admission of new states, sought to preserve both federal claims and conflicting state claims to certain portions of the Western lands.[8]

The proceedings of the Virginia state ratifying convention provided further evidence of the limited scope of the property clause. During the debate in which the meaning of the clause was questioned, Mr. Grayson noted that the sole purpose for including this provision was to preserve the property rights of the states and the federal government to the western territory as these rights existed during the Confederation.[9]

This history demonstrates the limited concerns giving rise to the inclusion of Article IV, § 3, cl. 2 in the Constitution. Whether or not this historical perspective might serve as a basis for restricting the scope of congressional power under the property clause, we view it as persuasive evidence for rejecting the claim that Article IV is an express limitation on the treaty power, foreclosing the availability of that process as a constitutionally permissible means of disposing of American interests in the Panama Canal Zone.

## III.

The debates over the treaty clause at the Constitutional Convention and state ratifying conventions even more directly demonstrate the Framers' intent to permit the disposition of U.S. property by treaty without House approval. As originally reported to the Convention, authority to make treaties would have been entrusted to a majority of the Senate, without even Presidential participation.[10] However, this structure was thought to entrust too much power to the Senate, and the provision was subsequently amended to include an active Presidential role. Nonetheless, concern over the extensive scope of the power remained; particularly worrisome was the potential use of treaties as a means of effecting territorial cessions. Elbridge Gerry expressed this fear when he

[8]*See* H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826, 143-46 (1939); 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 461-66 (1937); 3 *id.* at 226-27.

[9]This issue arose in a debate over the treaty clause that was not unlike the controversy before this court. 3 ELLIOT'S DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADAPTION OF THE FEDERAL CONVENTION 504-05 (1907).

[10]The account in the text is from 2 FARRAND, *supra*, at 540-49.

noted that "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory, etc. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed than on any other occasion."[11]

Concern about the sweeping character of the treaty clause led to several proposed amendments aimed at limiting its exercise.

The Committee of Eleven, in whose hands this issue finally rested, rejected the proposed amendment for House participation. Instead, a provision requiring a two-thirds Senate vote for the passage of all treaties was adopted. This choice clearly indicates the Framers' satisfaction with a supermajoritarian requirement in the Senate, rather than House approval, to serve as a check upon the improvident cessation of U.S. territory.

That the two-thirds voting requirement did not affect the scope of the treaty power, but only made ratification of treaties more difficult, was clearly understood at the state ratifying conventions. An amendment proposed at the Virginia Convention provided that

> no treaty ceding, contracting, restraining, or suspending the territorial rights or claims of the United States . . . shall be made, but in case of the most urgent and extreme necessity; nor shall any such treaty be ratified without the concurrence of three fourths of the whole number of the members of both houses respectively.[12]

This, and a similar amendment offered at the North Carolina Convention,[13] evidence the broad interpretation given Article II, § 2, at the time of its inception.[14] As was true of the effort at the Constitutional Convention to introduce House participation in ratification of treaties, these state attempts to limit the treaty power as now contained in the Constitution also failed.

That those who framed and ratified the Constitution rejected several express attempts to limit the treaty power in the manner now urged by appellants greatly undermines the interpretation of that power they press upon us. From this evidence we conclude that the disposition of property pursuant to the treaty power and without the express approval of the House of Representatives was both contemplated and authorized by the makers of the Constitution.

## IV.

In view of the lack of ambiguity as to the intended effects of the treaty and property clauses, it may be surprising that judicial pronouncements over the

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[11] *Id.* at 541.

[12] *Id.* at 660.

[13] *See* S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 63 (2d Ed. 1916); 4 ELLIOT'S DEBATES, *supra,* at 115.

[14] James Madison stated that "I do not conceive that power is given to the President and Senate to dismember the empire, or to alienate any great, essential right." But he continued by noting "I do not think the whole legislative authority have this power. The exercise of the power must be consistent with the object of the delegation." 3 ELLIOT'S DEBATES, *supra,* at 514.

past two centuries relating to these constitutional provisions are somewhat vague and conflicting. However, none of the actual holdings in these cases addressed the precise issue before us—whether the property clause prohibits the transfer of U.S. property to foreign nations through self-executing treaties. While, therefore, neither the holdings nor the dicta of these previous cases are dispositive of the case before us, we believe that in the main they support the conclusions we have stated heretofore.

One line of cases, involving the property clause, has arisen in the context of the division of power between the federal government and the states.

Another line of cases, involving the treaty clause, has arisen in the context of conveyances by the federal government to Indian tribes. The leading case on the power to convey such land by self-executing treaty is *Holden v. Joy,* 84 U.S. 211 (1872). In quieting adverse claims to certain lands west of the Mississippi which had previously been conveyed to the Cherokee nation by treaty, the Court had to determine the validity of the original grant to the Indians. The Court noted that

> Still it is insisted that the President and Senate, in concluding [a treaty for the passage of property], could not lawfully convenant that a patent should issue to convey lands which belonged to the United States without the consent of Congress. . . . On the contrary, there are many authorities where it is held that a treaty may convey to a grantee good title to such lands without an act of Congress conferring it. . . . *Id.* at 247.

Because later congressional enactments repeatedly recognized the validity of the transfer, the Court found it unnecessary to rest its decision on this constitutional point. However, the principle espoused is repeated in subsequent Supreme Court decisions.

Supreme Court cases involving these cessions have provided dicta similar to that of *Holden v. Joy.* In *Jones v. Meehan,* 175 U.S. 1 (1899), the Court considered the nature of Indian property rights acquired by "reservation." There, Chief Moose Dung of the Chippewas had "reserved" a certain tract of land in a treaty ceding tribal territory to the United States. He subsequently leased some of that property to various individuals. A challenge was made questioning the Chief's authority to engage in that transaction. As framed by the Court, the issue for resolution was whether the treaty merely confirmed Chief Moose Dung's original right of occupancy in the reserved lands or whether the treaty granted a fee simple interest to the reservee.[15] In holding that a fee simple passed under the treaty the court noted that "[i]t is well settled that good title to

[15] *Jones v. Meehan* discussed and rejected as irreconcilable with later Supreme Court opinions the contrary views expressed by Attorney General Taney and Justice Nelson, which are also relied on by the dissent in the case before us. 175 U.S. at 12-14.

parts of the lands of an Indian tribe may be granted to individuals by treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States." 175 U.S. at 10. Thus the Court concluded that the treaty power alone was sufficient to transfer the underlying U.S. title in the reserved lands. In a similar situation the Court in *Francis v. Francis,* 203 U.S. 233, 241-42 (1906), stated that "this court and the highest court of Michigan concur in holding that a title in fee may pass by treaty without the aid of an act of Congress."

As is true of most of the cases in which the Supreme Court has addressed the scope of the treaty power, *Holden, Jones,* and *Francis* involved the federal government's interaction with Indian tribes. Because of the *sui generis* nature of the relationship between the Indian tribes and the federal government, it might be argued that these decisions are not dispositive.[16] We think, however, that they are persuasively supportive of the authority of the President and the Senate under the treaty clause.

## V.

While certain earlier judicial interpretations of the interplay between the property clause and the treaty clause may be somewhat confused and less than dispositive of the precise issue before us, past treaty practice is thoroughly consistent with the revealed intention of the Framers of these clauses. In addition to the treaties with Indian tribes upheld in the cases discussed above, there are many other instances of self-executing treaties with foreign nations, including Panama, which cede land or other property assertedly owned by the United States.[17] That some transfers have been effected through a congressional enactment instead of, or in addition to, a treaty signed by the President and ratified by two-thirds of the Senate lends no support to appellants' position in this case, because, as stated previously, self-executing treaties and congressional enactments are alternative, concurrent means provided in the Constitution for disposal of United States property.

For instance, the Treaty with Panama of 1955, 6 U.S.T. 2273, transferred certain property (a strip of water and other sites within the Canal Zone) to

[16]Although this unique relationship has often been cited as a basis for distinguishing "Indian cases," we question the applicability of the distinction to this case. This *sui generis* relationship is traditionally found in the context of individual rights, and it does not seem directly relevant to the scope of the treaty power vis-a-vis other sources of federal power. The Supreme Court long ago noted that "the power to make treaties with the Indian tribes is as we have seen, coextensive with that to make treaties with foreign nations." United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876).

[17]*See, e.g.,* Florida Treaty with Spain of 1819, 8 Stat. 252 (256); Treaty Between the United States and Great Britain (Webster-Ashburton Treaty, 1842); 12 Bevans 82, Treaty between the United States and Japan (June 17, 1971), 23 U.S.T. 447, citations in note 22 *infra.*

Panama without concurring legislation by the Congress, while transfer of other property (owned by the United States but within the jurisdiction of Panama) was, under the terms of the treaty itself, dependent upon concurring legislation by the Congress. The decision to cast some but not all of the articles of conveyance in non-self-executing form was a policy choice; it was not required by the Constitution.

The transfer of property contemplated in the current instance is part of a broader effort in the conduct of our foreign affairs to strengthen relations with another country, and indeed with the whole of Latin America. The Framers in their wisdom have made the treaty power available to the President, the chief executant of foreign relations under our constitutional scheme, by and with the advice and consent of two-thirds of the members of the Senate present, as a means of accomplishing these public purposes. We do not think it is relevant that many previous treaties couched in self-executing terms have been different in scope, dealing with boundary issues or otherwise ceding land which was claimed both by the United States and by a foreign nation.[18] We note first that it is hardly surprising that land transfers often involve boundaries or other disputed territory; indeed, it is in these situations that the decision to dispose of land would most often be made.

Second, the grant of power to Congress in the property clause is not predicated on the territory disposed of being on a boundary or being the subject of conflicting claims. Thus, we do not understand the basis for appellant's argument that, even if that clause does not provide the exclusive means of disposing of disputed or boundary lands, it is the exclusive source of power for disposing of land concededly owned by the United States. If the status of the land has any bearing on whether it may be conveyed without congressional enactment under the property clause,[19] it would seem to cut in a direction contrary to that urged by appellants, for the Western lands that were the focus of the property clause were the subject of conflicting claims by the states and the federal government.

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It is important to the correct resolution of the legal issue now before us not to confuse what the Constitution permits with what it prohibits. In deciding

[18] *See, e.g.,* The Treaty with Mexico of 1933 (Rectification of the Rio Grande), 9 Bevans 976; The Treaty with Mexico of 1963 (Solution of the Chamizal Problem), 15 U.S.T. 21; The Treaty with Mexico of 1970 (changing position of Rio Grande to maintain boundary), 23 U.S.T. 371; Florida Treaty with Spain, *supra* note 21.

[19] It is exceedingly difficult to understand why the constitutionality of utilization of the treaty process should depend on whether the nation to whom the land is conveyed has previously "claimed" such land.

that Article IV, Section 3, clause 2 is not the exclusive method contemplated by the Constitution for disposing of federal property, we hold that the United States is not prohibited from employing an alternative means constitutionally authorized.[20] Our judicial function in deciding this lawsuit is confined to assessing the merits of the claim of appellants that in the conduct of foreign relations in this matter, involving, *inter alia,* the transfer of property of the United States, the treaty power as contained in Article II, Section 2, Clause 2, was not legally available to the President. We hold, contrarily, that this choice of procedure was clearly consonant with the Constitution.

For the foregoing reasons, the judgment of the District Court dismissing the complaint is

*Affirmed.*

MACKINNON, *Circuit Judge,* dissenting: The United States Constitution in Article IV, § 3, cl. 2 provides that "The *Congress* shall have power *to dispose* of . . . *property* belonging to the United States . . ." (emphasis added). Because of this specific constitutional provision, it is my opinion that the treaty clause does not authorize the President to dispose of the large property interests of the United States in the Panama Canal Agreement without the approval of *Congress* to the transfer of the *property* involved. Yet the pending treaty with the Republic of Panama would violate the Constitution and disenfranchise the 435 members of the House of Representatives from voting as members of "the Congress" upon the proposal to "dispose of" 8 billion dollars worth of Canal "property belonging to the United States." Since we are supposedly a participatory democracy, where the right and duty of the entire Congress to participate in that decision is clearly stated in the Constitution, and has been recognized by prior Presidents, it is almost impossible to understand the motivation for excluding the House of Representatives from exercising its constitutional authority.

In my opinion, Senator Connally of Texas, when he was Chairman of the Senate Committee on Foreign Relations, correctly interpreted the Constitution when he stated in the Senate debate on the procedure to be followed in authorizing a transfer of United States property to Panama:

> The House of Representatives has a *right* to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise. 88 CONG. REC. 9267 (December 3, 1942) (emphasis added).

[20]The dissent tends to obscure the distinction between the treaty power and presidential power asserted to be inherent in his authority to conduct our foreign relations. There is no doubt that the latter is more restricted than the former. L. HENKIN, *supra* at 94-96 (1972).

Recognizing that the House of Representatives has a vote on the disposition of the Panama Canal does not operate as a restriction on the "treaty" power. The *Per Curiam* opinion is in error in treating this as a matter of "power" when it is merely a question of ratification procedure. 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 . . . territory or property belonging to the United States . . ." and it is ratified by the Senate, Art. IV of the Constitution still requires the concurrence of the House of Representatives to "carry out the obligation *by the enactment of legislation.*" *Id.*, Senator Connally, 88 CONG. REC. 9270 (December 3, 1942) (emphasis added). In the transfer to Panama that was the subject of Senator Connally's remarks, the Senate by its vote acquiesced in that procedure and the House joined the Senate in voting to authorize the transfer of the property to Panama before the agreement was executed.

The net result is that unless it is previously approved by the "Congress," *i.e.*, the Senate *and the House of Representatives,* the Constitution prohibits the effectuation of a self-executing agreement transferring the property in the Canal Zone belonging to the United States. The *Per Curiam* opinion reaches a different conclusion, but to my mind does not satisfactorily explain why this enormous disposition of property to the Republic of Panama should not recognize the proper role of Congress in such transfer as was followed in all prior transfers where the value of the property was infinitesimal compared to what is involved here. From its conclusion I thus respectfully dissent . . .

**The Exclusive Power to Dispose of Property Belonging to the United States**

No contention is advanced by this opinion that "Article II treaty power stops where the power of Congress begins," (Appellee Br., p. 12) but it is contended that in any international agreement the ratification or authorization procedure must conform to *specific* constitutional provisions. Therefore, the specific provisions of the Constitution outside of Art. I, § 8, which designate "Congress" as the body to levy taxes (Art. I, § 7), appropriate money (Art. I, § 9), and dispose of Government *property* (Art. IV, § 3, cl. 2) require that international agreements that transgress into these areas can only become effective by enactments of Congress. The President cannot violate any of these provisions under the claimed need or desire for a self-executing treaty.

The issue we are confronted with at the outset concerns the proposal in the Panama Canal treaty (see Appendix) which would immediately replace the interest *in perpetuity* of the United States in the Panama Canal to act "as though it were sovereign" with a mere 21-year operational right, would immediately

transfer the entire Panama Railroad and certain other valuable structures (Appendix, Art. XIII), and would eventually provide for the *automatic* transfer on December 31, 1999, of whatever interest the United States still retained in the entire Panama Canal. Apellee claims all this can be accomplished by the pending Carter-Torrijos treaty with nothing more than Senate approval; and that the participation of the House in those parts of the agreement that dispose of property belonging to the United States is not required and will not be sought. Such construction conflicts directly with the above-quoted provision of the Constitution and with past practices. A number of Supreme Court decisions also contain statements which recognize the exclusive power of *Congress* under Art. IV, § 3, cl. 2 to dispose of United States territory and property.*

***Editor's Note:** The remainder of Judge MacKinnon's lengthy opinion contains an extended discussion of precedents in this area.