NOTES

PANAMA: THE PROPOSED TRANSFER OF THE CANAL AND CANAL ZONE BY TREATY

I. INTRODUCTION

On February 7, 1974, Secretary of State Henry Kissinger and Juan Antonio Tack, Minister of Foreign Affairs of Panama, announced a joint statement for the negotiation of a new Panama Canal treaty. The United States agreed to abrogate the Treaty of 1903 and its amendments, to eliminate the concept of perpetuity, to fix a termination date for the new treaty, to return the canal territory to the jurisdiction of Panama, to raise the benefits for Panama and to grant Panama a role in the administration of the Canal. In his address made

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1 70 DEP'T STATE BULL. 181 (1974).
2 Isthmian Canal Convention, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.
4 Supra note 1, at 184. The Principles are:
1. The treaty of 1903 and its amendments will be abrogated by the conclusion of an entirely new interoceanic canal treaty.
2. The concept of perpetuity will be eliminated. The new treaty concerning the lock canal shall have a fixed termination date.
3. Termination of United States jurisdiction over Panamanian territory shall take place promptly in accordance with terms specified in the treaty.
4. The Panamanian territory in which the canal is situated shall be returned to the jurisdiction of the Republic of Panama. The Republic of Panama, in its capacity as territorial sovereign, shall grant to the United States of America, for the duration of the new interoceanic canal treaty and in accordance with what that treaty states, the right to use the lands, waters and airspace which may be necessary for the operation, maintenance, protection and defense of the canal and the transit of ships.
5. The Republic of Panama shall have a just and equitable share of the benefits derived from the operation of the canal in its territory. It is recognized that the geographic position of its territory constitutes the principal resource of the Republic of Panama.
6. The Republic of Panama shall participate in the administration of the canal, in accordance with a procedure to be agreed upon in the treaty. The treaty shall also provide that Panama will assume total responsibility for the operation of the canal upon the termination of the treaty. The Republic of Panama shall grant to the United States of America the rights necessary to regulate the transit of ships through the canal and operate, maintain, protect and defend the canal, and to undertake any other specific activity related to those ends, as may be agreed upon in the treaty.
7. The Republic of Panama shall participate with the United States of America in the protection and defense of the canal in accordance with what is agreed upon in the new treaty.
8. The United States of America and the Republic of Panama, recognizing the important services rendered by the interoceanic Panama Canal to international maritime traffic, and bearing in mind the possibility that the present canal could become inadequate for said traffic, shall agree bilaterally on provisions for new projects which will enlarge canal capacity. Such provisions will be incorporated in the new treaty in accord with the concepts established in principle 2.
at the signing of the joint statement, Secretary Kissinger made it clear that the
purpose of the new treaty would be to "restore Panama's territorial sover-
eignty."5

Prior to the announcement by Secretary Kissinger, U.S. Representative
Daniel J. Flood called any proposed change by treaty in American sovereignty
over the Panama Canal, "an unconstitutional giveaway."6 A year earlier the
committee on Merchant Marine and Fisheries of the House of Representatives,
which oversees the Panama Canal, stated the position of the House that no
treaty could transfer property owned by the United States to Panama without
the approval of the House.7

The conflict is a constitutional controversy of the highest order. The House
relies primarily on Article IV of the United States Constitution. "Congress
shall have power to dispose of . . . the territory or other property belonging
to the United States."8 The language seems clear, but the State Department
argues that this is not an exclusive grant of power to dispose of U.S. property
interests.9 Rather, the executive has concurrent jurisdiction with Congress in
this area.10 It is argued that the enumeration of the power in Article IV (which
deals with state-federal and state-state relationships) shows the intent of the
framers that such disposal is not to be included among the exclusive powers of
Congress as laid forth in Article I, § 8 of the Constitution.11

The interest of the House in the proposed transfer of the Canal and Canal
Zone to Panama is both political and constitutional. The Merchant Marine and
Fisheries Committee of the House has the duty of insuring "the uninterrupted
and efficient operation of the Panama Canal."12 Some House members feel
that a change in the status of the Canal could lead to a disruption of its
operation resulting in a threat to national security.13 Perhaps more impor-

5 Id. at 182.
of the law, there is no question or equivocation—the authority of the U. S. House of Representa-
tives is required before real and other property paid for from appropriated funds is given up or
conveyed by treaty as the Executive Branch seeks to do in the proposed treaty with Panama."
8 U.S. Const. art. IV, § 3, cl. 2.
9 For an excellent treatment of the arguments on both sides see Hannifin, Disposal by Treaty
of U.S. Property in Hearings on Treaties Affecting the Operations of the Panama Canal Before
The Subcomm. on Panama Canal of the House Comm. on Merchant Marine and Fisheries, 92d
Cong., 2d Sess., ser. 30, at 101 (1972) and Killian, Cession of Realty to Panama; Limitations of
Constitution, Id. at 142. See also S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT
220 (2d ed. 1916).
10 "We believe, however that the consideration favoring the second alternative, for example, that
the legislative and treaty powers are concurrent in this field, are more convincing." Testimony of
Ralph E. Erickson, Deputy Assistant Attorney General, in Panama Canal. Panama Canal
Hearings, supra note 9, at 97.
11 Panama Canal Hearings, supra note 9.
tantly the House feels that the proposed transfer would be a serious and direct threat to the power and authority of the House under the Constitution.14

The interest of the State Department, on the other hand, is to be able to conduct foreign affairs with as little “interference” from the Congress as possible. Representatives of the Department of State maintain that the President and the Senate can, by the exercise of the treaty-making power, transfer United States property interests to Panama.15 This contention is based on the assertion that the treaty-making power16 is unlimited. Primary reliance is placed on Askura v. City of Seattle,17 where the Supreme Court said, “The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend ‘so far as to authorize what the Constitution forbids,’ it does extend to all proper subjects of negotiation between our government and other nations.”18 By this theory a self-executing treaty could exercise a power vested in Congress. However, treaties must conform to the principles of the Constitution.19 The Supreme Court in Geofroy v. Riggs20 stated the limitations in these terms:

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.21

Following this reasoning, a treaty which purported to exercise a power exclusively granted to Congress would require implementing legislation, as is the case when a treaty requires appropriations. But a constitutional grant of a power to Congress does not preclude a self-executing treaty from also exercising that power.22 For example, Congress has the power to regulate commerce,

14 "This duty [to uphold the authority of the Congress] transcends the treaty with Panama, as important as that is, and goes to the very core of the purpose and power of the House of Representatives." H. R. REP. No. 1629, supra note 7, at 21.
15 Testifying before the House Subcommittee on Panama Canal, Erickson, Deputy Assistant Attorney General, said, "... [I]t would be our best judgment that the transfer of property can be accomplished by the treaty through treaty power." Panama Canal Hearings, supra note 9, at 146. Chairman John M. Murphy said later, "Attorneys from both the State and Justice Departments were sent here to tell us that the United States can, by treaty, dispose of U.S. property rights without implementing legislation by the House of Representatives." Id. at 155.
16 U.S. CONST. art. II, § 2, cl. 2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."
17 265 U.S. 332 (1924).
18 Id. at 341.
19 Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870); Reid v. Covert, 354 U.S. 1 (1956); RESTATEMENT (SECOND) OF FOREIGN REL. LAW § 117 (1965).
20 133 U.S. 258 (1890).
21 Id. at 267.
while concurrently some self-executing treaties deal with foreign trade and commerce.\footnote{23} Both the House and the State Department speak of the Canal and Canal Zone as "property" owned by the United States.\footnote{24} However, Panama has long asserted that the United States does not "own" the Canal or the Zone, but rather that the presence of the United States in Panama is possible only because of the Treaty of 1903 and that the United States has no property rights, only treaty rights.\footnote{25} The controversy is usually couched in terms of sovereignty.\footnote{26} Very early Panama claimed to be sovereign within the Zone.\footnote{27} Since the signing of the treaty the United States has also asserted a claim of sovereignty.\footnote{28} However, the exact nature of the relationship of the Zone to the United States is unclear. For certain purposes (extradition, tax collection, narcotics laws) the Zone is treated as if it were a part of the United States,\footnote{29} but for other purposes (mail, import, citizenship by birth) it is treated as if it were a foreign nation.\footnote{30} In this Note the Canal and Canal Zone will be considered "property" owned by the United States.

II. A SHORT HISTORY OF THE PANAMA CANAL TREATIES

In order to fully understand the nature of the constitutional controversy, a brief historical overview of U.S./Panamanian treaty relations is necessary.

\footnote{23} Restatement, supra note 19, at 436. Henkin, supra note 22, at 149.
\footnote{24} Supra note 7 and Panama Canal Hearings, supra note 9.
\footnote{26} It is proper to remark that the zone has not been sold, transferred, or alienated by the Republic of Panama to the United States in full ownership. The wording of the treaty is very clear. That which was ceded is the use, occupation, and control of the zone for the specific needs of the construction, conservation, operation, sanitation, and protection of the canal. If the canal were abandoned by the United States, the United States would have no legal grounds for occupying the zone, title to which it has not acquired either by purchase, transfer, or conquest.
\footnote{27} See generally Note, Legal Aspects of the Panama Canal Zone—In Perspective, 45 Boston U. L. Rev. 64.
\footnote{28} Letter from Mr. de Obaldia to Mr. Hay, [1904] Foreign Rel. U.S. 598-99.
\footnote{29} See Letter from Mr. Hay to Mr. de Obaldia, [1904] Foreign Rel. U.S. 613.
\footnote{30} Statement by Assistant Secretary of State Holland in Hearings on the Treaty of Mutual Understanding and Cooperation with the Republic of Panama Before the Senate Committee on Foreign Relations, 84th Cong., 1st Sess. at 164 (1955).
When the United States first became interested in the possibility of completing the canal begun by De Lesseps' French canal company, Panama was still part of Columbia. The United States originally negotiated a treaty with Columbia (the Hay-Herran Treaty) for the construction of a canal through the isthmus, but the Columbian Senate rejected the Treaty on August 12, 1903. Less than three months later Panama successfully declared its independence from Columbia. This success was due, in no small degree, to the presence of the U.S.S. Nashville in the harbor of Colon, which prevented 400 Columbian reinforcements from reaching Panama. The United States recognized Panama's independence three days later.

The original Treaty of 1903 was signed for Panama by Frenchman M. Philippe Bunau-Varilla a scant fifteen days after Panama had declared its independence from Columbia. On December 2, 1903, Panama ratified a treaty much more favorable to the United States than the one rejected by Columbia. "The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the Zone . . . necessary convenient for the construction and maintenance of the Canal," and all the rights, power and authority " . . . which the United States would possess and exercise if it were the sovereign of the territory . . . " of the Zone. Additionally, the United States was granted the right to maintain public order when, in the judgment of the United States, Panama might be unable to do so. In return the United States promised to protect the independence of Panama, to pay any damages caused to private property owners by the grant, and to make annual payments of $250,000.

Soon after ratification Panama expressed its displeasure with the one-sided treaty. Subsequently the United States twice has agreed to amend it. The first amendment, called the General Treaty of Friendship and Cooperation with the

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32 Telegram from Mr. Beaupré to Mr. Hay, [1903] FOREIGN REL. U.S. 179 (1904).
33 PADELFDORI, supra note 31, at 22.
35 Telegram from Mr. Hay to Mr. Ehrman, [1903] FOREIGN REL. U.S. 233 (1904).
36 PADELFDORI, supra note 31, at 22.
38 Isthmian Canal Convention, supra note 2, art. II.
39 Id., art. III.
40 Id., art. VII, para. 3.
41 Id., art. I.
42 Id., art. VI.
43 Id., art. XIV.
44 On June 24, 1904, the United States by executive order extended its customs laws to the Canal Zone and created ports of entry. This interpretation of the treaty was protested immediately by Panama. Telegram from Mr. Barrett to Mr. Hay, [1904] FOREIGN REL. U.S. 586 (1905). In August 1904, Panama expressed its opinion that the treaty did not cede territory nor transfer sovereignty to the United States. Id. at 598-607.
Republic of Panama,\textsuperscript{45} was signed in 1936 and made several substantial changes. The United States raised the annuity,\textsuperscript{46} relinquished the right to intervene in Panama's internal affairs,\textsuperscript{47} relinquished the right of eminent domain over Panamanian property,\textsuperscript{48} and renounced the grant in perpetuity of the use and control of property outside the Zone.\textsuperscript{49}

In 1955 a second amendment was made, called the Treaty of Mutual Understanding and Cooperation with the Republic of Panama.\textsuperscript{50} Again the annuity was raised,\textsuperscript{51} and with the approval of Congress the United States further agreed to transfer $25,000,000 worth of property to Panama free of cost.\textsuperscript{52} Although the United States made minor concessions to Panama after 1955,\textsuperscript{53} a call for the scrapping of the 1903 treaty by the Panamanian National Assembly,\textsuperscript{54} coupled with anti-American riots erupting in 1964\textsuperscript{55} and the following break in diplomatic relations\textsuperscript{56} convinced President Johnson that a new treaty was necessary.\textsuperscript{57} Three treaties were proposed; none of which was ratified. One treaty was to govern the Canal and Canal Zone.\textsuperscript{58} This treaty would have abrogated the 1903, 1936 and 1955 treaties\textsuperscript{59} and transferred to Panama the Canal, the Zone and all property located therein on or before December 31, 2009.\textsuperscript{60} The United States also would have recognized Panama as the sovereign nation in the Canal Zone.\textsuperscript{61} A second treaty concerned the construction of a new sea-level canal.\textsuperscript{62} The third treaty dealt with the defense of the canal and any future Canal.\textsuperscript{63} The Senate never consented to the treaties, so ratification was not possible.

Nevertheless, the trend has been toward redefining the U.S./Panamanian relationship. The announcement by Secretary Kissinger of new negotiations with Panama marks a renewed effort toward transferring the Canal and Zone

\textsuperscript{45} Treaty of 1936, \textit{supra} note 3.
\textsuperscript{46} \textit{Id.}, art. VII.
\textsuperscript{47} \textit{Id.}, art. VI.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}, art. II.
\textsuperscript{50} Treaty of 1955, \textit{supra} note 3.
\textsuperscript{51} \textit{Id.}, art. I.
\textsuperscript{52} \textit{Id.}, art. V.
\textsuperscript{53} In 1960 President Eisenhower issued an executive order requiring the Panamanian flag to be flown with the American flag in Shaler Triangle in the Canal Zone. 43 \textit{DEP'T STATE BULL.} 558 (1960). In 1963 President Kennedy agreed to have the Panamanian flag flown with the American flag by civilian authorities in the Zone. 48 \textit{DEP'T STATE BULL.} 171 (1963).
\textsuperscript{54} The \textit{N.Y. Times}, Nov. 18, 1961, at 9, col. 2.
\textsuperscript{55} See \textit{generally} \textit{BAXTER & CARROLL}, \textit{supra} note 34, at 3-7.
\textsuperscript{56} \textit{Id.} at 3.
\textsuperscript{57} 51 \textit{DEP'T STATE BULL.} 887 (1964); 52 \textit{DEP'T STATE BULL.} 5 (1965).
\textsuperscript{58} 113 \textit{CONG. REC.} 18942-48 (1967).
\textsuperscript{59} \textit{Id.}, art. I.
\textsuperscript{60} \textit{Id.}, art. XXXIX and art. XLI.
\textsuperscript{61} \textit{Id.}, art. II.
\textsuperscript{62} \textit{Id.} at 19741-46 (1967).
\textsuperscript{63} \textit{Id.} at 18120-21 (1967).
to Panama. The question squarely presented is whether this transfer can be effectuated by treaty alone or whether it requires the consent of the House of Representatives. There are precedents of treaties being used to dispose of United States property, but in each case the House invariably took some action expressing its consent.44

III. Precedent for the Transfer of U.S. Property by Treaty

A. Indian Treaties

Many Indian treaties involved the exchange of land. The Supreme Court in *Worcester v. Georgia*65 upheld the validity of several treaties66 which specified boundaries for the hunting grounds of the Cherokee Indians.67 However, it was not a cession of unquestioned American territory, but rather the settlement of a boundary dispute. By treaties signed on May 6, 1828,68 and February 14, 1833,69 the United States agreed to guarantee the Cherokee 7,000,000 acres of land west of Arkansas in exchange for all their land east of the Mississippi. In 1830 Congress passed an act70 entitled, "An Act to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi," which authorized the President to ex-

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44 Although the first principle agreed upon by the United States and Panama calls for the conclusion of a new treaty, there still exists the possibility that the transfer could be attempted by executive agreement. See Hannifin, supra note 9. There is precedent for the disposal of United States property by executive agreement. For example, in 1940 by executive agreement President Roosevelt exchanged fifty American destroyers for a 99-year lease for bases in various British held colonies. 3 DEPT STATE BULL. 201 (1940). But for his authority, he relied on two statutes. Id. at 203-07. The United States frequently transfers property when it abandons foreign military bases. Generally the agreement establishing the base provides for the disposal of any United States property. *Panama Canal Hearings*, supra note 9, at 130. For example, the Dhahran Airfield is to become the property of Saudi Arabia when the agreement is terminated. Agreement with Saudi Arabia, June 18, 1951, 2 U.S.T. 1466, T.I.A.S. No. 2290. The Attorney General has expressed the opinion that the President can transfer proprietary interests in the lands in the Philippines at his discretion. 41 Op. ATT’Y GEN 143 (1953). But, his authority is derived from the Philippine Independence Act, ch. 84, 48 Stat. 456 (1934) and the Joint Resolution of June 29, 1944, ch. 322, 58 Stat. 625. Property has twice been conveyed to the Philippines by executive agreement. Agreement with the Philippines, December 7, 1959, 10 U.S.T. 2169, T.I.A.S. No. 4388; Agreement with the Philippines, December 22, 1965, 16 U.S.T. 1919, T.I.A.S. No. 5924. To dispose of United States property abroad the executive usually relies on either the Foreign Excess Property Act, ch. 288, 63 Stat. 397 (1949). "Each executive agency having foreign excess property shall be responsible for the disposal thereof. . . .", or, the Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 503, 75 Stat. 424.


67 See Treaty with the Cherokees, Nov. 28, 1785, art. IV, 7 Stat. 18.

68 Treaty with the Cherokees, May 6, 1828, 7 Stat. 311.


change lands with the Indians. This exchange was implemented by a treaty signed December 29, 1835, which by its own terms was made pursuant to the Act of Congress passed in 1830. The validity of this conveyance was upheld in *Holden v. Joy*. The Court explicitly held that the conveyance was made through the treaty-making power and not by virtue of authority granted the President by Congress. However, the treaty was not self-executing in that appropriations were needed and were passed by the Congress.

The Court in *Jones v. Meehan* sustained a treaty which ceded land to the United States from the Chippewa Indians, but granted homesteads to certain of the Indians. The House appropriated the necessary funds. The Court viewed the reservation as the equivalent of a grant in fee simple. Nevertheless, it was not a grant or cession of U.S. property, but rather a reservation.

It should be noted that in each of the Indian treaties cited, either Congress approved of the treaty by the appropriate implementing legislation, or the treaty did not involve unquestioned American property. However, the value of relying on Indian treaties as precedent for transferring United States property by treaty may have been diminished somewhat by the Indian Appropriations Act of 1871 which provided that no Indian tribe was to be regarded as an independent nation with whom the United States could make a treaty.

B. Treaties with Foreign Nations

There is some precedent for transferring United States property to foreign

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11 Id. at 411-12.
13 Article 3 begins, "The United States also agree that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the Act of May 28, 1830." Id. at 480.
14 84 U.S. (17 Wall.) 211 (1872).
15 Id. at 240-43.
16 An Act making further appropriations for carrying into effect certain Indian treaties, July 2, 1836, ch. 267, 5 Stat. 73.
17 175 U.S. 1 (1899).
19 Id. art. VIII and art. IX.
20 An Act making Appropriations for the Current and Contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian tribes for the year ending thirtieth June, eighteen hundred and sixty-seven, and for other Purposes, July 26, 1866, ch. 266, 14 Stat. 255.
21 Supra note 77, at 21: 

... [W]hen the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land... the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple... 

22 Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544.
23 Id. at 566.
nations by treaty. In 1819 the United States signed a treaty with Spain ceding certain territory west of the Sabine River in exchange for Florida. Congress subsequently authorized the President to take possession of Florida, and money was appropriated to execute the treaty. Arguably these acts could be called implementing legislation. In response to that treaty, Henry Clay introduced resolutions in the House stating that no treaty purporting to alienate United States territory would be valid without the concurrence of Congress.

In 1842 the United States signed the Webster-Ashburton Treaty which resolved disputes with Great Britain over the Northeast border. Congress, in effect, gave its approval to the treaty by appropriating the funds necessary to compensate Maine and Massachusetts for the territory lost in the exchange and by providing other requirements called for by the treaty. By the Oregon Treaty concluded with Great Britain in 1846, the United States gave up its claim to the territory north of the forty-ninth parallel. The claim relinquished was not undisputed American property. In 1843 an act of Congress provided for the organization and government of the Oregon Territory.

The Alaska Treaty signed in 1903, established an Alaskan Boundary Tribunal to settle certain boundary disputes with Great Britain. Of the four islands in the dispute, the tribunal awarded two to the United States and two to Canada. Congress appropriated funds to carry out the treaty in 1903.

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Id. art. 3.

Id. for carrying into execution the treaty between the United States and Spain, concluded at Washington on the twenty-second day of February, one thousand eight hundred and nineteen, ch. 39, 3 Stat. 637.

Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, June 15, 1846, 9 Stat. 869 (1854), T.S. No. 120.

Id. art. I.


United States and Mexico agreed by treaty in 1933 to exchange parcels of land in order to rectify boundary irregularities caused by a change in the course of the Rio Grande. The Congress has, on several occasions, enacted legislation to meet the financial obligations of the United States under this treaty.

A similar treaty, the Chamizal Convention, was entered into with Mexico in 1963. It provided for the relocation of the Rio Grande and for the transfer of lands affected by the relocation. However, Article 6 specifically provides that the transfer of property would require implementing legislation.

After this convention has entered into force and the necessary legislation has been enacted for carrying it out, the two Governments shall determine the period of time appropriate for the Government of the United States to complete the following:

(a) The acquisition, in conformity with its laws, of the lands to be transferred to Mexico.

Pursuant to the treaty, Congress in 1964 enacted legislation which authorized the Secretary of State, “to acquire by donation purchase, or condemnation, all lands required for transfer to Mexico as provided in said convention” and “to convey or exchange to Mexico properties acquired.”

C. Precedent for the Transfer of U.S. Property to Panama after Congressional Approval

Perhaps the strongest argument in favor of requiring Congressional approval before the Canal and the Canal Zone could be ceded to Panama can be made by reference to the two previous instances when the United States has transferred property to Panama. In 1942, by executive agreement, the United States promised to transfer to Panama free of cost the sewers and waterworks system of Colon and Panama and certain railroad lots. However, the agreement explicitly stated that Congress must give its approval before the transfer could be made. Congress authorized the transfer in 1943.

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99 Id. art. VII.
102 Id. art. 1.
103 Id. art. 3 and art. 4.
104 Id. art. 6.
106 Id. § 1, b. (1).
107 Id. § 1, c. (3).
109 When the authority of the Congress of the United States shall have been obtained therefor, the Government of the United States will transfer to the Government of the
In the Treaty of 1955 the United States agreed to convey $24,000,000 worth of property to Panama, but again, this transfer is explicitly made subject to the approval of Congress.\textsuperscript{111} Appearing before the Senate Foreign Relations Committee, which was considering the treaty, a State Department representative acknowledged that implementing legislation would be required to transfer lands and improvements to Panama.\textsuperscript{112} Congress subsequently authorized the transfer.\textsuperscript{113}

Continuing this practice of requesting Congressional approval for transfers of property to Panama, President Nixon announced on December 23, 1973, that he intended to submit legislation to the Congress to effect delivery of the title and jurisdiction over two unused airfields to Panama.\textsuperscript{114}

IV. HOW COULD THE IMPLEMENTATION OF THE PROPOSED TREATY BE CHALLENGED?

From the foregoing discussion it seems clear that whenever there has been a treaty purporting to transfer United States property, Congress has given its approval by appropriating funds called for under the treaty. In the case of transfers of property to Panama, the executive branch has always looked to Congress for authorization in addition to a request for appropriations. Although the Congress has generally cooperated in these matters, the announcement by Kissinger denotes a departure from this spirit of cooperation. The principles he signed contain no provision for requiring House approval before the transfer becomes effective.\textsuperscript{115} Indeed, Secretary Kissinger was probably aware of the opposition in the House to such a transfer and consciously sought to avoid the need for any House approval.\textsuperscript{116} In the month following the signing by Kissinger of the principles for the negotiation of a new treaty, no fewer than fifteen resolutions were introduced in the House of Representatives supporting

Republic of Panama free of cost all of its rights, title and interest in the system of sewers and waterworks in the cities of Panamá and Colón.

\textsuperscript{59} Stat. 1289.
\textsuperscript{110} Act of May 3, 1943, ch. 92, 57 Stat. 74.
\textsuperscript{111} The United States of America agrees that, subject to the enactment of legislation by the Congress, there shall be conveyed to the Republic of Panama free of cost all the right, title and interest held by the United States of America or its agencies in and to certain lands and improvements. . . . Treaty of 1955, supra note 3, at 2278.
\textsuperscript{112} Hearings on the Treaty of Mutual Understandings and Cooperation with the Republic of Panama Before the Senate Committee on Foreign Relations, 84th Cong., 1st Sess., at 60-61 (1955).
\textsuperscript{114} 70 DEP'T STATE BULL. 456 (1974).
\textsuperscript{115} Principles, supra note 4.
\textsuperscript{116} See supra notes 6, 7, 12, 13 and 14 and accompanying text. At the signing of the Principles, Kissinger made the following remark: "While we have taken a great stride forward, we must still travel a difficult distance to our goal. There is opposition in both our countries to a reasonable resolution of our differences. Old slogans are often more comforting than changes that reflect new realities." 70 DEP'T STATE BULL. 182 (1974).
the continued exercise of American sovereignty and jurisdiction over the Canal Zone. Additionally, the Subcommittee on the Panama Canal of the House Committee on Merchant Marine and Fisheries has stated that it believes that no such treaty will be signed without providing for the approval of the House.

Assuming that a treaty transferring the Canal and the Canal Zone is negotiated, consented to by the Senate and ratified by the President, without the approval of the House, the question necessarily arises as to how the implementation of such a treaty could be challenged?

A. Refusal to Appropriate any Necessary Funds

Perhaps the most powerful tool the House possesses is the power of the purse. The Treaties of 1903, 1936 and 1955 all obligate the United States to pay Panama an annual sum. It is not clear whether the annuity will be continued under the new treaty. If the annuity is continued, even for a limited time, the House will have to appropriate the funds necessary to make the annual payments. Whereas, the principles make no mention of the need for any enabling legislation, the fifth principle does specifically provide that Panama


118 H. R. REP. No. 1629, supra note 7, at 21: “Accordingly, it is the firm conviction of the Subcommittee that no treaty involving the appropriation of United States monies or the transferral of territory or other property owned by the United States will be effected without due consideration of the jurisdiction of the House over these matters.”

119 It should be noted here that another constitutional question raised by the principles signed by Secretary Kissinger is whether the President and the Senate can abrogate a treaty as called for in the first principle. The Constitution does not say who has the power to terminate a treaty, but the question is treated at length in: Riesenfield, The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions, 25 CALIF. L. REV. 643 (1937); Nelson, The Termination of Treaties and Executive Agreements by the United States, 42 MINN. L. REV. 879 (1957-58).

120 U.S. CONST. art. I, § 7, cl. 1. “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.”

121 The annuity has been raised from $250,000 to $1,930,000. Supra notes 43, 46 and 51.

122 A representative of the State Department testified before the House Sub-Committee on Inter-American Affairs that, “a great deal of enabling legislation will be required from the House [before the new treaty can be implemented].” Testimony of Robert A. Hurwitch in Hearings before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 93d Cong., 1st Sess. at 8 (1973). This testimony was given a year before Secretary Kissinger's announcement and therefore it may not represent the current State Department position. It is not clear whether the new treaty will require any enabling legislation. There is no mention of such a requirement in Kissinger's speech or in the Principles. Indeed, given that the State Department maintains that the transfer can be accomplished without the consent of the House, it is doubtful that the new treaty will specify the need for any enabling legislation. However, if the treaty does require action by Congress, the House could refuse to act, but unless the treaty specifically provided otherwise, the action by the House would not prevent the treaty from taking effect. CRANDALL, supra note 9, at 181; 2 C. HYDE, INTERNATIONAL LAW 1402 (1951); LORD McNAIR, THE LAW OF TREATIES 80 (1961).

123 Principles, supra note 4.
is to have a fair share of the benefits derived from the operation of the Canal.\textsuperscript{123}

The House plays a decisive role in determining the distribution of these canal benefits. In order to fully understand the fiscal operation of the Canal, a brief discussion of the Canal Zone Code\textsuperscript{124} is necessary. The Code was enacted in 1962, and it provided for the reorganization of the Panama Canal enterprise so that two separate, yet closely related agencies are responsible for the operation of the Canal and the Canal Zone.

The Canal Zone Government is an independent agency administered by a Governor of the Canal Zone, who is appointed by the President.\textsuperscript{125} It is charged with performing the duties of the civil government of the Zone.\textsuperscript{126} The Panama Canal Company is a corporate instrumentality of the United States.\textsuperscript{127} The President or his designate is the sole stockholder.\textsuperscript{128} The company was created to operate and maintain the Panama Canal,\textsuperscript{129} and it is to continue to exist until dissolved by an act of Congress.\textsuperscript{130} After recovering all costs for the operation of the Canal, the company is to use the surplus from tolls collected to pay the United States Treasury interest on the net direct investment of the Government,\textsuperscript{131} to reimburse the Treasury for the annuity payments made to Panama pursuant to the treaty, and to reimburse the Treasury for the net costs of the operation of the Canal Zone Government.\textsuperscript{132} Any excess funds remaining after all the payments have been made are paid over to the Treasury as dividends and are applied as offsets against directly contributed capital.\textsuperscript{133}

Prior to 1953 Congress made annual appropriations of $430,000 for Panama as the annuity required under the Treaty of 1936.\textsuperscript{134} In 1953 Congress passed an act by which the Secretary of the Treasury is directed to automatically make the payments out of funds not otherwise appropriated.\textsuperscript{135} After the Treaty of 1955 was ratified, Congress made the same provision for annual payments which were increased to $1,930,000 under the Treaty.\textsuperscript{136} It is clear therefore, that the Congress has always been cooperative in meeting the obligations of the United States under the Panama treaties. However, it is possible that enough House members could be swayed to refuse to appropriate the funds necessitated by any new treaty (or to repeal the statute providing for automatic payments to Panama).

\textsuperscript{124} Id. § 32.
\textsuperscript{125} Id. § 31.
\textsuperscript{126} Id. § 61(a).
\textsuperscript{127} Id. § 62(b).
\textsuperscript{128} Id. § 61(a).
\textsuperscript{129} Id. § 61(b).
\textsuperscript{130} Id. § 62(e).
\textsuperscript{131} Id. § 62(g)(2).
\textsuperscript{132} Id. § 62(f).
\textsuperscript{134} Act of August 5, 1953, ch. 328, 67 Stat. 367.
\textsuperscript{135} Act of August 4, 1955, ch. 541, 69 Stat. 450.
There is authority for the proposition that the Congress could refuse to make such appropriations. As early as 1796 Congress asserted that it could choose not to implement a treaty. The Jay Treaty\textsuperscript{137} called for the appropriation of funds.\textsuperscript{138} An appropriations bill was passed,\textsuperscript{139} but the House also adopted the Blount Resolution,\textsuperscript{140} which stated that if a treaty requires the passage of a law, the House can refuse to act.\textsuperscript{141} On at least one occasion the House has refused to implement a treaty by not passing the laws necessary to carry the treaty into effect. The Commercial Convention with Mexico\textsuperscript{142} dealt with the admission of certain imported articles free of duty\textsuperscript{143} and required the passage of certain laws.\textsuperscript{144} Congress refused to pass the necessary legislation.\textsuperscript{145} In addition, section 597 of the Rules of the House of Representatives states that the Executive cannot “conclude a treaty affecting the revenue without the assent of the House.”\textsuperscript{146} The proposed treaty would directly affect the revenue.

If the House were to refuse to meet the treaty obligations of the United States, what effect would it have on the treaty relationship between the United States and Panama? One court spoke in these terms:

[The treaty] is not, however, and cannot be the supreme law of the land, where the concurrence of congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of

\textsuperscript{138} Treaty of Amity, Commerce and Navigation with His Britannic Majesty, Nov. 19, 1794, 8 Stat. 116, T.S. No. 105.
\textsuperscript{139} Id. art. VI.
\textsuperscript{140} Act of May 6, 1796, ch. 17, 1 Stat. 459 [obsolete].
\textsuperscript{141} 5 ANNALS OF CONG. 771-72 (1796) [1789-1824].
\textsuperscript{142} The resolution reads:
Resolved, That, it being declared by the second section of the second article of the Constitution, that the President shall have power, by and with the advice of the Senate, to make Treaties, provided two-thirds of the Senate present concur, the House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulation, or a law of laws to be passed by Congress. And it is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good. Resolved, That it is not necessary to the propriety of any application from this House to the Executive, for information desired by them, and which may relate to any Constitutional functions of the House, that the purpose for which such information may be wanted, or to which the same may be applied, should be stated in the application.
\textsuperscript{143} Commercial Convention with Mexico, Jan. 20, 1883 [1884] 24 Stat. 975, T.S. No. 223.
\textsuperscript{144} Id. art. I and art. II.
\textsuperscript{145} Id. art. IV.
\textsuperscript{146} CRANDALL, supra note 9, at 193.
\textsuperscript{147} Panama Canal Hearings, supra note 9, at 99.
the constitution, as money cannot be appropriated by the treaty-

making power.148

There is authority for the proposition that should the House choose not to
appropriate the necessary funds, that action would have no effect on the valid-

ity of the treaty.149 Under general principles of international law the treaty
would be effective to pass title to the Canal and the Canal Zone to Panama,
and the action of the House in refusing to appropriate the necessary funds
would simply be a breach entitling Panama to take one of several courses of
action.150

B. Passage of Repealing Legislation

A second, but rather unrealistic, method by which the House could assail a
new treaty would be for the Congress to pass legislation abrogating the treaty.
There are court holdings151 and legislation152 supporting the position that Con-
gress can repeal a treaty. This approach is unrealistic, for when two-thirds of
the Senators consent to the treaty, it is not probable that a majority could be
mustered to pass the necessary legislation. It is not evident that such legislation
would have the effect of reviving the Treaty of 1903. Actually, it is doubtful
that the legislation could have an extra-territorial effect.

C. Litigation

A third line of attack by the House might be to argue that since the treaty
was made in direct violation of the Constitution, it is void and the purported
transfer of the Canal and the Canal Zone is ineffective. This argument was
made by Chairman Murphy of the Subcommittee on the Panama Canal: “It

1852).

149 HYDE, supra note 122, at 1402. CRANDALL, supra note 9, at 181. LORD McNAIR, supra note
122, at 80.

150 The Vienna Convention on the Law of Treaties defines a material breach as:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose
of the treaty.

A material breach entitles the other party to suspend or terminate the treaty in whole or in part.

151 The Supreme Court said in the Head Money Cases, 112 U.S. 580, 599 (1884): “In short, we
are of opinion that, so far as a treaty made by the United States with any foreign nation can become
the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress
may pass for its enforcement, modification, or repeal.” And later in La Abra Silver Mining Co.
v. United States, 175 U.S. 423, 460 (1899) the Court said: “... Congress by legislation, and so
far as the people and authorities of the United States are concerned, could abrogate a treaty...”
See also, Pigeon River Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934); The Chinese
Exclusion Case, 130 U.S. 581, 600 (1899).

152 Congress by the Act of July 7, 1798, ch. 67, 1 Stat. 578 (1845), terminated all treaties
heretofore concluded with France.
is my firm conviction that any purported treaty [conveying property to Panama] shall be null and void unless it provides for approval by Congress (or at the very least contains a provision therein that the same shall not be effective unless and until approval by Congress)." This proposition finds support in at least two Supreme Court decisions. However, the better view is that a treaty may be declared unconstitutional as a matter of domestic, or internal law, but still be binding on the United States as an obligation under international law, thus the transfer would be effective.

Article 46 of the Vienna Convention on the Law of Treaties provides,

"A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

One commentator has stated the proposition this way,

"It seems more reasonable . . . to say that in concluding a treaty if one party produces an instrument 'complete and regular on the face of it,' (to borrow an expression from another department of law) though in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to the obligations of the treaty."

If the negotiators for the United States assure the Panamanians that the property can be transferred by treaty (without authorization from the Congress), the Panamanians could reasonably rely on such assurances. On occasions, the United States has acknowledged that it has a responsibility to the other contracting country to perform under an unconstitutional treaty. If the negotiators for the United States assure the Panamanians that the property can be transferred by treaty (without authorization from the Congress), the Panamanians could reasonably rely on such assurances. On occasions, the United States has acknowledged that it has a responsibility to the other contracting country to perform under an unconstitutional treaty.

It is, of course, possible that a private citizen, a Congressman, or the House itself might want to pursue the argument in the courts that the Treaty is void because it is unconstitutional. There is abundant case authority supporting the contention that only Congress has the power to dispose of the property of the United States. The Supreme Court has stated that this grant of power precludes the exercise of that power by other elements of government:

153 Panama Canal Hearings, supra note 9, at 2.
154 "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870). "Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void." Downes v. Bidwell, 182 U.S. 244, 370 (1901).
155 Bishop, Unconstitutional Treaties, 42 MINN. L. REV. 773 (1957-58).
156 Vienna Convention, supra note 150, at 890.
157 ARNOLD, TREATY-MAKING PROCEDURE 6 (1933), reprinted (in part) in W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 114 (1971). McNair, supra note 122, at 100-01.
159 "No appropriation of public land can be made for any purpose, but by authority of Congress." United States v. Bank of the Metropolis, 40 U.S. (15 Pet.) 377, 420 (1841). "Congress has
The settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress [to dispose of United States property] is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. 180

A major problem, however, would be in finding a forum which would entertain such a suit. The validity of the treaty could not be tested in the International Court of Justice because only states can be parties in cases before the Court, 181 and it is unreasonable to believe that the State Department, as representative of the United States in these matters, would want to test the validity of its own treaty.

The prospective litigant could seek relief in a federal district court which, under the Constitution, has jurisdiction to hear cases arising under treaties. 182 The Supreme Court has said, "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation." 183 It follows then that a treaty can be declared unconstitutional in the same manner as a statute. 184 Although such a pronouncement is theoretically possible, no treaty has been invalidated by the Supreme Court because it was found to be beyond the power of the federal government. 185

The Supreme Court has created several obstacles which would impede the bringing of a suit in which a court is asked to review an action taken by another branch of the government. In Frothingham v. Mellon 186 the Court dismissed the suit on the ground that the plaintiff lacked "standing" 187 to challenge the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made." Gibson v. Chouteaie, 80 U.S. (13 Wall.) 92, 99 (1871); Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1885).

"The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." Wisconsin Cent. R.R. Co. v. Price County, 133 U.S. 496, 504 (1890). "No grant of United States property may be made except by virtue of Congressional authorization. . . ." Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944). "Congress is given exclusive power by the Constitution to regulate and dispose of property belonging to the United States [citing cases]. Officers of the Government cannot dispose of Government property unless authorized to do so by Congress." United States v. Caylor, 159 F. Supp. 410, 413 (E.D. Tenn. 1958). "The power to dispose permanently of the public lands and public property in Puerto Rico rests in Congress, and in the absence of a statute conferring such power, can not be exercised by the Executive Department of the Government." 22 Of. ATT'Y GEN. 545 (1899).

181 I.C.J. STAT. art. 34, para. 1.
182 U.S. CONST. art. III, § 2, cl. 1.
184 Supra note 154. See also HENKIN, supra note 22, at 137: "It is now settled, however, that treaties are subject to the constitutional limitations that apply to all exercises of federal power principally the prohibitions of the Bill of Rights."
185 HENKIN, supra note 22, at 137.
186 262 U.S. 447 (1923).
187 See generally, Lewis, Constitutional Rights and the Misuse of Standing, 14 STAN. L. REV.
constitutionality of an appropriation of funds for the reduction of maternal and infant mortality. The Court articulated the following test to determine standing:

[The plaintiff] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.\(^{148}\)

_Frothingham_ was modified somewhat in _Flast v. Cohen\(^{149}\)_ where the Court allowed a suit challenging the constitutionality of spending federal funds to support religious schools. A distinction is made between a case in which the plaintiff seeks to show that Congress has exceeded "specific constitutional limitations" and a case in which the plaintiff alleges that "the enactment is generally beyond the powers delegated the Congress."\(^{170}\) In the former case a plaintiff would have standing; in the later he would not. Following the analysis, a plaintiff in a suit challenging the constitutionality of a treaty transferring property would probably not have standing. There is no "specific constitutional limitation" on the treaty-making power which prohibits a transfer of property. There is merely a grant of that power to Congress. The plaintiff would also have a difficult task in meeting the _Frothingham_ requirement that his injury be direct and not merely a "common suffering" with other taxpayers. A resident of the Zone could argue that the transfer would infringe on his constitutionally protected right to travel.\(^{171}\) Realistically, the success of such an effort is doubtful.

The other instance in which the Supreme Court has historically refused to exercise jurisdiction is in cases which dealt with the area labeled "political question."\(^{172}\) This doctrine is invoked in cases involving foreign relations law, that is, "questions of international and domestic law which immediately concern the political or military interactions of the United States with foreign states."\(^{173}\) The courts have traditionally been reluctant to enter into the sphere of foreign affairs.\(^{174}\) The most extreme interpretation of that limitation is stated

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\(^{148}\) 262 U.S. 447, 448 (1923).

\(^{149}\) 392 U.S. 83 (1968).

\(^{170}\) Id. at 102.


\(^{173}\) Scharpf, _supra_ note 172, at 596.

\(^{174}\) Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918):
in the majority opinion in *United States v. Curtiss-Wright Export Corp.* which goes so far as to suggest that the foreign relations power may not be subject to constitutional limitations because it inheres in "sovereignty."

In *Baker v. Carr* the Court enumerated several criteria for determining whether to apply the "political question" doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case . . . there should be no dismissal for non-justiciability on the ground of a political question's presence.

A suit challenging the constitutionality of the proposed transfer would arguably be a "political question" under the *Baker* test. The issue is one committed to a coordinate political department. For a court to undertake to pass on the question could be viewed as an expression of lack of respect for the other two branches of government. A decision adverse to the State Department might undermine the position of the United States Government when dealing with other countries in that the other countries would be less willing to rely on assurances of the State Department that it is acting within its powers.

The issue under discussion here is perhaps most closely analogous to those cases which sought to challenge the President's power to involve the United States in the Vietnam War. The theory was that because the power to declare war is granted to Congress under the Constitution, the President could not, on his own, order American troops into battle. The courts consistently held the issue to be a "political question" and refused to hear the challenges.

Even though a plaintiff could show that he had standing and that the issue was not a "political question," and should the court subsequently hand down

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The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

175 299 U.S. 304 (1936).


177 Id. at 217.


179 Id.
a favorable decision, it is doubtful that such a decision would have extra-
territorial effect so as to bind Panama. On the other hand, one commentator
has suggested that foreign nations are presumed to know that our Supreme
Court has the power to declare a treaty unconstitutional, and that if such a
decision were rendered, the treaty would be "without value."180

V. Conclusion

The significance of Kissinger's announcement is not necessarily that it marks
"the advent of a new era in the history of our hemisphere,"181 as he proclaimed.
The treaties proposed under the Johnson Administration would have achieved
much the same results.182 It is possible that the signing of the principles was no
more than a goodwill gesture made in contemplation of the meeting of the
Foreign Ministers in Mexico City two weeks later,183 and the meeting of the
Organization of American States in Atlanta, Georgia, the next month.184 The
announcement was significant because it came on the heels of an extensive
House investigation which concluded that such a treaty, signed without the
approval of the House, would be unconstitutional185 and a threat to the power
of the House.186 Secretary Kissinger chose to ignore a very important element
of the American governmental system. By so doing he emphasized the present
decline in the importance of the Congress in the area of foreign affairs.

Even if one accepts the proposition that only the Congress can transfer
United States property under the Constitution, the inevitable conclusion is that
there is no way the House can prevent the President and the Senate from
transferring the Canal and the Canal Zone to Panama once the decision is
made to make such a transfer. The House has a right but no means of enforcing
that right.

Perhaps the most reasonable and effective course for the House to pursue is
to strongly voice its opposition to the proposed treaty by the passage of a joint,
concurrent or simple resolution or through some other legislative means. If the
treaty is nevertheless negotiated, members of the House could lobby with Sena-
tors to prevent the two-thirds majority necessary for consent. In any event it

180 HYDE, supra note 122, at 1384:

Nevertheless, in negotiating with a State where the final and authoritative decision as
to the constitutionality of a treaty must await the conclusion of the highest domestic
tribunal as is true in the case of the United States, and where that fact must be presumed
to be known to foreign contracting powers, there is brought home to them ample
warning that that tribunal may in fact find occasion to pronounce a consummated treaty
unconstitutional and that if it does, the arrangement must be deemed to be without
value.

182 Supra notes 58-63.
183 70 DEPT STATE BULL. 182 (1974).
184 Id. at 509.
185 Supra notes 6, 7 and 9.
186 Supra note 14.
is hoped that the executive branch would not enter into a treaty to which a large number of Representatives were opposed without submitting the treaty to the orderly constitutional process.

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