ARTICLES


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The Framers of the Constitution believed that form was an important determinant of governmental performance, and they established in the first four articles of the Constitution an elaborate structure that gave the executive and legislative branches specific roles to fulfill. The Framers believed that this structure would promote life, liberty, and the pursuit of happiness.

Many modern students of government do not accept the political theories of the 18th century, particularly the idea that form is an important determinant of governmental performance. The modern student prefers to view government as a by-product of culture, political conflict, economic forces, or the accidents of history. This Article does not challenge the modern conception of government, but it does defend and support the political discoveries of the 18th century. Even today, the peculiar shape of United States government influences foreign and domestic policy, just as the Framers thought it would.

I. INTRODUCTION

In the summer of 1977 the constitutional calculations of the 18th century had a direct bearing on the conduct of foreign policy in the

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1 U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and
United States. The Constitution gave the President power to make treaties with the advice and consent of the Senate.\(^2\) Pursuant to this power, President Carter had proposed that the United States should make treaties that would transfer the Panama Canal to Panama in the year 2000.\(^3\) Although the citizens of the United States disliked this proposal,\(^4\) informed observers believed that the Senate would consent to the treaties after a period of resistance and deliberation.\(^5\) Thus, if the President and Senate possessed the constitutional authority to transfer the Canal by treaty, the transaction would probably go forward. On the other hand, the Constitution gave the House of Representatives, acting in concert with the Senate, power "to dispose" of territory of property belonging to the United States.\(^6\) If, as a constitutional matter, the President needed an act of Congress to transfer the Canal, the political outlook was grim. With congressional elections fast approaching, there was little likelihood that the House of Representatives would support a proposal so strongly opposed in the nation at large.\(^7\)

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\(^2\) U.S. Const. art. II, § 2, cl. 2.

\(^3\) President Carter announced the proposal formally and ceremoniously in Washington on September 7, 1977. At the largest gathering of foreign dignitaries since the funeral of President Eisenhower in 1969, he initiated two treaties that his negotiators had concluded with Panama. See N.Y. Times, Sept. 7, 1977, at A14, col. 1. These treaties, the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, called for the dismantling of the Panama Canal Zone, the eventual transfer of control of the Canal to Panama, and the establishment of a permanent regime of neutrality for the Canal. See 16 I.L.M. 1021-98.

\(^4\) Shortly after the announcement of President Carter's proposal, nationwide polls showed that an overwhelming majority of United States citizens disapproved of the plan to transfer control of the Panama Canal to Panama. See Senate Subcomm. on Separation of Powers, 95th Cong., 2d Sess., The Proposed Panama Canal Treaties: A Digest of Information 560-61 (Comm. Print 1978). Louis Harris also conducted a poll in October, 1977. He found that United States citizens in every section of the country rejected the Treaty by a wide margin. Id. at 576-77.

\(^5\) Vote counters within the Administration were not absolutely certain of victory in the Senate, but they believed that the opponents of the proposal did not, in September, have enough votes to defeat it. N.Y. Times, Sept. 9, 1977, at A3, col. 1. In September of 1977, James Reston, relying upon Washington sources, predicted that no more than 20 senators would vote against the proposal in the end. N.Y. Times, Sept. 11, 1977, at E17, col. 1.

\(^6\) U.S. Const. art. IV, § 3, cl. 2.

\(^7\) There is no official record of the sentiment in the House in the late summer of 1977, but subsequent events left no doubt that the House intensely disliked the President's proposal. In June and July of 1979, a full year after the Senate had
Thus, supporters and opponents of the President’s plan found themselves on opposite sides of a constitutional argument. The supporters contended that the President and Senate could dispose of the Canal by treaty, without an Act of Congress. The opponents argued that Congress alone had the power to authorize the transfer, and therefore, any action would require approval by the House. The fate of the Canal hung in the balance. United States policy in the Caribbean appeared to depend on the allocation of decision-making authority within our government, which in turn depended on the meaning and force of a framework of government designed two centuries ago.

The President eventually won the constitutional argument. The Senate consented to the treaties, and the transaction went forward as the President had proposed, in spite of House opposition. It was a textbook case, a classic illustration of the importance of form in American government. We will review the case in the paragraphs below, explain why the transaction developed as it did, and evaluate the outcome in light of the Framers’ design.

II. BACKGROUND

A. The Planning of the Panama Canal

The first attempts to build a canal across Panama came from Europe. Europeans recognized the need for a direct water route from the Atlantic to the Pacific through Central America, and at various times during the 17th, 18th, and 19th centuries, they made concrete plans for construction of such a waterway. These plans came to nothing. In 1879 Ferdinand de Lessups, the man of genius who built the Suez Canal, organized the last European effort. With the unqualified support of the French establishment, he formed a private company, raised millions of francs, and set about to construct a sea-level

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consented to ratification of the Panama Canal Treaty, a working majority of the House either (1) voted against implementing the Treaty, (2) said that they would have voted against the Treaty if they had been asked to approve it in the first instance, or (3) said that their colleagues should vote for implementation only because the ratified Treaty committed the United States to a course from which it could not honorably or easily withdraw. See infra notes 168-73.

canal through the Isthmus of Darien in Colombia (now Panama). This adventure ended in bankruptcy and scandal in 1889.\(^9\)

The problem was essentially logistical. To build a canal through the isthmus, it was necessary to settle a large number of people in an inhospitable wilderness, keep them alive, and move an enormous amount of equipment and earth in an efficient, predictable way. The French never solved these problems. But engineers in the United States had faced similar problems in building the transcontinental railroads and had succeeded in overcoming them. Moreover, during the Spanish-American War the Army Medical Corps had developed new techniques for preventing and controlling the tropical diseases that had plagued the French in Panama. By the end of the 19th century the United States possessed the knowledge necessary to build a canal through the isthmus. All that remained was the opportunity and the will to act.\(^10\)

At the turn of the century, several events conspired to stimulate a United States interest in construction of an isthmian canal.\(^11\) First, the Spanish-American War demonstrated the military need for a direct passage through the isthmus.\(^12\) Second, the acquisition by the United States of the Phillipines and the Hawaiian Islands made the need for a passageway even more pressing.\(^13\) Third, if the United States was to be a Pacific as well as an Atlantic power, it would need to move its forces from one hemisphere to the other. To accomplish this, it would need a path between the seas. Finally, an isthmian canal would serve the commercial interests of a nation seeking trading partners in the Orient. The clipper ships had been constructed to shorten the

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\(^9\) David McCullough has written an interesting account of the de Lesseps enterprise, from the formation of the Compagnie Universelle du Canal Interocéanique de Panama to the criminal prosecution of Ferdinand de Lesseps for fraud in 1893. See D. McCullough, supra note 8, at 45-241.

\(^10\) See D. McCullough, supra note 8, at 124-203, 405-26, 468-89.

\(^11\) See generally Baxter & Carroll, Working Paper: The Panama Canal, in The Panama Canal: Background Papers and Proceedings of the Sixth Hammer-skjold Forum 8-9 (L. Tondel ed. 1965) [hereinafter Baxter & Carroll]. Earlier in the 19th century, various United States citizens, including some within the government, had shown an interest in constructing an isthmian canal either through Panama or through Nicaragua. See D. McCullough, supra note 8, at 30-44.

\(^12\) The Oregon was in San Francisco bay when the Maine blew up in Havana harbor. She was ordered to proceed directly to the Caribbean. Because there was no water passage through the isthmus, she sailed 12,000 miles around the Horn, a journey that the nation followed through the newspapers with mounting interest. Sixty-seven days after leaving San Francisco she arrived off the coast of Florida in time to participate in the engagement at Santiago Bay. See D. McCullough, supra note 8, at 254-55.

\(^13\) Baxter & Carroll, supra note 11, at 9.
voyage from New York to China. A canal through the isthmus would make the voyage shorter still.

In 1902 and 1903, Secretary of State John Hay entered into negotiations with Tomas Herran, the Colombian Ambassador to the United States, to obtain the right to construct a canal through the remote Colombian province of Panama. In 1903 Hay and Herran signed a treaty calling for construction of such a canal (the Hay-Herran Treaty). This Treaty, while favorable to the United States, was unfavorable to Colombia. Although the United States Senate consented to its ratification, the Colombian Senate unanimously rejected it on August 12, 1903.

The United States did not lose interest in the project. In September and October of 1903, certain persons in Panama and Washington contrived to secure the secession of Panama from Colombia and to obtain for the United States the right to construct a canal across the isthmus. Surprisingly the principal architect of this plan was a Frenchman, M. Phillippe Bunau-Varilla. Bunau-Varilla had been an engineer for the failed de Lessups Company and was personally interested in the successful completion of an isthmian canal. With the help of William Nelson Cromwell, a New York lawyer, Bunau-Varilla had lobbied hard for passage of the Spooner Act and adoption of the Hay-Herran Treaty. When the Hay-Herran Treaty was rejected by the Colombian Senate, he set about to protect his interests through other means. On November 3, 1903, pursuant to his plan, a small number of Colombians living in Panama declared their independence from Colombia and seized facilities of the Colombian Government in Colon. On the same day, the United States gunboat Nashville arrived at Colon harbor and prevented the landing of Colombian

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14 The negotiation proceeded upon the assumption that the United States would purchase the assets of the French company that had succeeded to the interest of the defunct de Lessups company, together with the right that the Colombian government had granted to the French to construct a canal through Panama. Thus, the purchase would involve payments to the equity holders of the French company as well as to Colombia, which had authority to approve or disapprove any transfer of the French interest. See D. McCullough, supra note 8, at 331. The Spooner Act had authorized the purchase of the French interest in principle. See Act of June 28, 1902, ch. 1302, 32 Stat. 481 (1902).

15 D. McCullough, supra note 8, at 332.

16 Id.

17 Id. at 339.

18 See Act of June 28, 1902, ch. 1302, 32 Stat. 481 (1902). Bunau-Varilla held an equity position in the French firm that succeeded to the interest of the original de Lessups company after its liquidation, and he stood to gain from a United States buy-out. See D. McCullough, supra note 8, at 289-90.

troops sent by ship to reinforce the garrison in Panama. Three days later the United States recognized the new Republic of Panama. Twelve days after this formal recognition, John Hay and Bunau-Varilla signed a treaty (the Hay—Bunau-Varilla Treaty) in Washington granting the United States the right to construct an isthmian canal. Bunau-Varilla had drafted the Treaty himself, and he signed the Treaty on behalf of the Republic of Panama as its minister pleni-potentiary. This remarkable transaction, beginning with the rejection of the Hay-Herran Treaty on August 12, 1903, and culminating with the signing of the Hay—Bunau-Varilla Treaty on November 18, 1903, took only three months to complete.

B. The Canal and the Canal Zone under the Hay—Bunau-Varilla Treaty

To understand the issues presented by President Carter's proposal in 1977, one must understand the regime created by the Hay—Bunau-Varilla Treaty. In November, 1903, John Hay had offered to conclude a treaty with Panama on terms identical to those contained in the Hay-Herran Treaty. But Bunau-Varilla, in his desire to guarantee United States acceptance of the Treaty, drafted a document that was even more favorable to the United States. The Hay—Bunau-Varilla Treaty improved on the Hay-Herran Treaty in four important respects.

First, the Hay-Herran Treaty had granted the United States a right to construct a canal through a zone only ten kilometers wide, while the Hay—Bunau-Varilla Treaty granted the United States a right to construct a canal through a zone ten miles wide. Second, the Hay-Herran Treaty had imposed a term of 100 years on the rights and privileges granted to the United States under that Treaty. The Hay—Bunau-Varilla Treaty, however, granted those rights "in perpetuity." Third, the Hay-Herran treaty had expressly preserved the sovereignty

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21 See Baxter & Carroll, supra note 11, at 48 (remarks of Ambassador Joseph Farland).


of Colombia over the Canal Zone, but the Hay—Bunau-Varilla Treaty provided that within the Zone the United States would have the rights, power and authority that it "would possess and exercise if it were the sovereign of the territory." 24 Finally the Hay-Herran Treaty had provided that Colombia was to retain jurisdiction over various kinds of cases arising within the Zone. The Hay—Bunau-Varilla Treaty contained no such provision. 25

Bunau-Varilla's imaginative revision of the Hay-Herran Treaty created many benefits and difficulties for the United States over the next sixty years. The right to exercise sovereign power over a United States Zone in Panama was the peculiar feature of the arrangement. Although similar zones existed in other parts of the world, 26 the rights granted to the occupying countries often were usually limited to a term of years. 27 The creation of a perpetual United States Zone in Panama was unusual, and it raised a question about the essential character of the remarkable events of 1903.

In 1904 John Hay suggested that the Republic of Panama had retained "titular sovereignty" over the Canal Zone, even though the United States had acquired a right to exercise perpetual sovereign power within the Zone. 28 In 1936, in an effort to describe the relationship in a way that would not offend Panamanian sensibilities, the United States and Panama agreed that the Zone was the "territory of the Republic of Panama under the jurisdiction of the United States of America." 29 This formula was a triumph of diplomacy but did little to explain the true nature of the United States - Panama relationship. Teddy Roosevelt described the relationship in plain language. When called upon to explain what had happened in Panama in 1903, he said simply, "I took the Isthmus." 30

24 Id. at art. III.
25 See Baxter & Carroll, supra note 11, at 48.
26 European spheres of influence in China were legitimated in part by "lease" agreements that gave colonial powers the right to exercise sovereign authority within specified territories. See, e.g., Convention Respecting the Lease of Kiaochow, Mar. 6, 1898, Germany-China, 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA, 1894-1919 at 112 (MacMurray ed. 1921); see generally Baxter & Carroll, supra note 11, at 12.
27 Baxter & Carroll, supra note 11, at 12.
28 Id. at 13.
30 The President made this remark in an address given at the University of California at Berkeley in 1911. The remark is quoted and explained by David McCullough. See D. McCULLOUGH, supra note 8, at 383-84.
C. Growing Difficulties

The Republic of Panama was a poor country from the very beginning, and it had ceded its greatest natural resource to the United States under the Hay—Bunau-Varilla Treaty. The United States made annual payments to Panama in consideration of the Treaty, and many Panamanians earned their livings by working in the Zone; but as the national consciousness of Panama grew, the arrangement designed by Hay and Bunau-Varilla came under increasing scrutiny. The prosperity of the United States citizens living in the Zone evidenced the enormous advantages the United States enjoyed as a result of the Canal. This prosperity contrasted with the poverty of the surrounding countryside and was a source of embarrassment to Panamanians. In 1936 and 1955, in recognition of the need for change, Panama and the United States made various minor adjustments in their relationship, although the basic framework established by the Hay—Bunau-Varilla Treaty endured. It was only a question of time before a more fundamental change would become necessary.

In 1962, at a time when the principal objective of United States foreign policy in Latin America was to prevent "another Cuba," Panamanian President Chiari met with President Kennedy in Washington. The two leaders agreed that their countries would take a symbolic step to recognize Panama's residual sovereignty over the Canal: they agreed that the Panamanian flag would be flown "in an appropriate way in the Canal Zone."

United States citizens living in the Zone did not share President Kennedy's enthusiasm for promoting good relations with Panama, and they promptly challenged the flag agreement in court. United States authorities in the Canal Zone awaited the outcome of this litigation before implementing the agreement. The implementation which followed in January, 1964, pleased no one. Rather than di-

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32 Joint Communique of President Kennedy and President Chiari of Panama, June 13, 1962, 47 Dep't State Bull. 81 (1962).

recting that the Panamanian flag be flown beside the American flag, the governor of the Canal Zone ordered the American flag removed from certain locations, including Balboa High School. Students at the high school protested the decision and raised the American flag in front of the school in defiance of the ban. This action sparked a series of demonstrations and counter-demonstrations that eventually led to a major confrontation between the two countries.34

In response to the action of the American students, Panamanian students entered the Canal Zone on January 9, 1964, and attempted to raise their own flag beside the American flag in front of the school.35 A riot ensued, and for the next three days violent disturbances occurred in the Canal Zone and in Panama involving civilian and military personnel from both countries.36 The violence resulted in substantial property damage and a loss of life on both sides.37 The Government of Panama promptly recalled its ambassador to Washington, charged the United States with an “unprovoked armed attack” against Panama and its people,38 and demanded emergency meetings of the Organization of American States under Article 6 and 9(a) of the 1947 Rio de Janeiro Pact,39 and of the Security Council of the United Nations under Articles 34 and 35 of the United Nations Charter.40 Thereafter, Presidents Johnson and Chiari conferred by telephone and agreed to use the good offices of the Inter-American Peace Committee to resolve the crisis.41

Over the next three months, through various diplomatic means, the two countries attempted to restore normal relations. Panama insisted that restoration of normal relations would require a commitment by the United States to negotiate a new treaty. Although the United States refused to meet this demand, it did signal a willingness to “discuss” pertinent issues.42 Eventually the two countries

34 The entire incident was described in meticulous detail in a report issued by a committee of the International Commission of Jurists, which investigated the incident at the request of the National Bar Association of Panama. Baxter & Carroll, supra note 11, at 60-91.
35 Id. at 69.
36 Id. at 71-82.
37 Id.
38 Id. at 4.
41 Baxter & Carroll, supra note 11, at 4.
42 Id.
agreed to begin a process of reconciliation, and on April 3, 1964, issued a joint declaration to that effect.\textsuperscript{43} This declaration marked the beginning of protracted negotiations between the two countries which spanned the administrations of Presidents Johnson, Nixon, and Ford, and culminated in President Carter's 1977 proposal.

D. Issues Involved in the Negotiation

From the Panamanian point of view, three major issues confronted the two countries in the mid-1960s: money, dignity, and sovereignty.\textsuperscript{44} Panama received only $1.9 million annually from the operation of the Canal,\textsuperscript{45} an inadequate sum by any standard. Moreover, the United States was using the Panama Canal Company to dominate most of the subsidiary businesses operating within the Zone. Although the two nations had agreed to open markets in the Zone to Panamanian businesses, progress along these lines was slow.\textsuperscript{46} Individual Panamanians seeking employment within the Zone encountered similar difficulties. In previous years the treatment of non-American workers in the Zone was discriminatory as a result of official policy. In the wake of the Treaty of 1955, however, many of the old practices were eliminated. Nevertheless, Panamanians still complained that official

\textsuperscript{43} The declaration reads as follows:

In accordance with the friendly declarations of the President of the United States of America and of the Republic of Panama of the 21st and 24th of March, 1964, respectively, annexed hereto, which are in agreement in a sincere desire to resolve favorably all the differences between the two countries;

Meeting under the chairmanship of the President of the Council and recognizing the important cooperation offered by the Organization of American States through the Inter-American Peace Committee and the delegation of the General Committee of the Organ of Consultation, the representatives of both Governments have agreed:

1. To re-establish diplomatic relations.
2. To designate without delay special Ambassadors with sufficient powers to seek the prompt elimination of the causes of conflict between the two countries without limitations or preconditions of any kind.
3. That therefore, the Ambassadors designated will begin immediately the necessary procedures with the objective of reaching a just and fair agreement which would be subject to the constitutional process of each country.


\textsuperscript{44} For a concise contemporaneous description of the issues involved in the negotiation, see Baxter & Carroll, supra note 11, at 26-31.


\textsuperscript{46} Baxter & Carroll, supra note 11, at 28-30.
policy reserved the best jobs in the Zone for United States citizens.\textsuperscript{47} Finally, the Hay—Bunau-Varilla Treaty provided for perpetual United States dominion over an American colony in the center of Panama. This issue lay at the very heart of the negotiations since no Panamanian political leader could afford to support the continuation of the existing arrangement.\textsuperscript{48}

The United States viewed the negotiations in a different light. Recent events had proved that the old treaty arrangement was problematical from the standpoint of United States foreign policy in Latin America. The essential question was whether modification of the old arrangement would improve the Panamanian situation and serve the interests of the United States. The United States needed stability in Latin America, the ability to use and defend the Canal in time of war, and assurance that the Canal would continue to be an efficient and inexpensive instrument of international commerce in time of peace. In light of these interests, negotiators for the United States had to determine the extent to which the United States could prudently accede Panamanian demands for increased control.

The joint declaration of April 3, 1964, stated that the objective of the negotiations was to reach a "just and fair agreement . . . subject to the constitutional process of each country."	extsuperscript{49} This statement reflected an understanding by both nations that any agreement reached by the negotiators was provisional, reserving the ultimate question of implementation or rejection for each nation in accordance with its own constitutional process.

The Constitution of the United States establishes an elaborate process for the approval and implementation of international agreements. Although the proper resolution of the policy issues depends on the expertise and wisdom of the negotiators, the implementation of any new agreement depends on the operation of this constitutional process within the United States. The following paragraphs will review this process and show how the structure established by the Framers determined the fate of the Panama Canal.

III. THE STRUCTURE OF POWER UNDER THE CONSTITUTION

In plain, unqualified phrases the Constitution defines governmental powers and assigns them to certain bodies and officers, creating a

\textsuperscript{47} Id. at 27-28.
\textsuperscript{48} Id. at 30-31.
\textsuperscript{49} N. Y. Times, Apr. 4, 1964, at 2, col. 4.
political structure that has lasted longer than any comparable structure since the middle ages. In general, the provisions dealing with foreign relations grant certain powers to Congress, certain powers to the President, and certain powers to both the President and Senate. These provisions are discussed briefly in the paragraphs below.

A. Powers Granted to Congress

The Constitution grants various powers to Congress that bear directly on the conduct of foreign affairs.50 Among these powers, article IV, section 3, of the Constitution expressly provides that 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."51 No one has ever questioned the applicability of this provision to international transactions involving the disposition of United States territory or property. For this reason, article IV, section 3, played an important role in the controversy surrounding the Panama Canal transaction.52

On the face of the constitutional text, the authority of Congress in the field of foreign affairs is enormous. The powers described in article I, section 8, are impressive in themselves; and the general power conferred by the "necessary and proper" clause exhausts the field. Under this clause, if the government of the United States has power to take any action in the field of foreign affairs, Congress has authority to make a law carrying that power into execution. In 1914 the United States negotiated a treaty with Great Britain to protect migratory birds.53 Subsequently, Congress passed a statute to

50 U.S. Const. art. 1, § 8. Under article I, section 8, Congress has power (1) to lay and collect duties, imposts, and excises, id. at cl. 1; (2) to regulate commerce with foreign nations, id. at cl. 3; (3) to establish a uniform rule of naturalization, id. at cl. 4; (4) to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, id. at cl. 10; (5) to declare war, id. at cl. 11; (6) to grant letters of marque and reprisal, id.; (7) to make rules concerning captures on water, id.; (8) to raise and support armies, id. at cl. 12; (9) to provide and maintain a navy, id. at cl. 13; (10) to make rules for the government and regulation of the land and naval forces, id. at cl. 14; (11) to provide for calling forth the militia to repel invasions, id. at cl. 15; and (12) to make all laws that are "necessary and proper" for carrying into execution the foregoing powers or any other power vested by the Constitution in any department or officer of the United States, id. at cl. 18.

51 Id. at art. IV, § 3, cl. 2.

52 See infra notes 180, 184-85 and accompanying text.

enforce the treaty within the United States.\textsuperscript{54} Because the Constitution did not state that Congress had power to make laws protecting migratory birds, the statute was challenged on the ground that it exceeded the power of Congress under article I, section 8. But the Supreme Court, in \textit{Missouri v. Holland},\textsuperscript{55} found the treaty to be a sensible measure dealing with a natural subject of negotiation between nations. Therefore, as a constitutional matter, since the treaty was within the authority of the United States Government, Congress had the power to enforce that treaty by statute under the necessary and proper clause of the Constitution.\textsuperscript{56}

Judicial decisions and congressional practice have enlarged the powers conferred upon Congress by the Constitution. For example, the courts have held that Congress, in the exercise of legislative jurisdiction over international transactions, need not make the necessary legislative judgments itself. Instead, it may delegate its legislative power to the President or to executive officers, who may then make rules or orders carrying the force of law.\textsuperscript{57} Vast bodies of federal legislation depend upon this principle. Moreover, the courts have said that Congress, by statute, may authorize the President or other executive officers to enter into binding agreements with foreign nations.\textsuperscript{58} This interesting proposition suggests that a majority of the House and Senate, with the President's approval, may accomplish by legislation what two-thirds of the Senate and the President may accomplish under the treaty clause.\textsuperscript{59}

\textsuperscript{54} Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918).
\textsuperscript{55} Missouri v. Holland, 252 U.S. 416, 432 (1920).
\textsuperscript{56} Id.
\textsuperscript{58} See, e.g., Cotzhausen v. Nazro, 107 U.S. 215 (1883) (postal conventions); see also B. Altman & Co. v. United States, 224 U.S. 583 (1912) (congressionally authorized international agreement a "treaty" within meaning of statute).
\textsuperscript{59} Professor Henkin asserts that an international agreement authorized by a simple majority of both houses of Congress is "a complete alternative to a treaty." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 175 (1972). He notes that such agreements avoid the potential "veto" of one-third of the Senate under the treaty clause. Id. He further asserts that the constitutionality of such agreements is "established." Id. at 176.
There are certain limitations on congressional authority in the field of foreign affairs. Congress may declare war,\(^60\) but it may not forbid speech criticizing war.\(^61\) Congress may regulate foreign trade,\(^62\) but it may not authorize unreasonable searches and seizures to enforce the regulation.\(^63\) In short, Congress may not use its powers to do anything that the Constitution forbids. Moreover, Congress has no authority to exercise powers that only the President or the President and the Senate may exercise. Thus, Congress may pass a law creating a foreign service, but it has no power to pass a law appointing an ambassador to the Court of St. James. The Constitution vests the power of appointment in the President and the Senate.\(^64\) Although the Constitution does not expressly deny the power of appointment to Congress, the express grant to the President and the Senate implicitly excludes Congress.

Finally, when Congress exercises power in the field of foreign affairs, its actions must assume a form appropriate to the legislative function. Perhaps this is the most important limitation on congressional competence in the field. Congress may (1) pass laws, (2) make declarations, (3) appropriate money, (4) delegate authority, and (5) gather information necessary to fulfill its legislative function. But Congress may not extend its authority beyond these legislative functions. In particular, Congress may not negotiate with foreigners, an essential function in the conduct of foreign affairs.\(^65\) As a matter of constitutional principle, only the President, the President’s ambassadors, and other executive officers of the United States may represent the United States in its dealings with foreign nations.

**B. Powers Granted to the President**

The President is the “sole organ” of the United States in the conduct of foreign affairs.\(^66\) He and his executive officers are the

\(^{60}\) See U.S. Const. art. I, § 8, cl. 11.

\(^{61}\) See id. at amend. I.

\(^{62}\) See id. at art. I, § 8, cl. 3.

\(^{63}\) See id. at amend. IV.

\(^{64}\) See id. at art. II, § 2, cl. 2.

\(^{65}\) See L. Henkin, supra note 59, at 174.

\(^{66}\) See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (quoting John Marshall, as a member of Congress, 10 Annals of Cong. 613 (1800)). For an extended discussion of the “sole organ” concept, see L. Henkin, supra note 59, at 45-50. The Constitution also provides that the President shall be commander-in-chief of the army and navy of the United States, U.S. Const. art. II, § 2, cl.
only persons entitled to speak and act for the United States in
diplomatic matters. This principle is implicit in a constitutional struc-
ture which separates executive and legislative power. Moreover, the
Constitution does not require the President and his ministers to retain
the confidence of the legislative branch as they speak and act for
the United States in diplomatic matters. During the President’s term
they enjoy a measure of independence unknown in other western
democracies. This unique constitutional status places an enormous
burden upon these officers, since the conduct of foreign policy is the
most important responsibility of the federal government.

Like Congress, the President cannot do anything forbidden by the
Constitution, and his competence to act in the field of foreign affairs
is limited by the character of his office. He is the Chief Executive,
and his actions must assume a form appropriate to the executive
function. The President can execute the laws of the United States,
but he cannot make the laws. He can spend money, but he cannot
appropriate money. He can wage war, but he cannot declare war.
Similarly, he alone cannot make treaties. Here we come to the last
and most important point.

C. Powers Granted to the President and the Senate Together

The Constitution provides that the President shall have power to
appoint ambassadors, consuls, and other officers of the United States,
and to make treaties, with the advice and consent of the Senate.\textsuperscript{67}
The second power, the treaty power, is the one that concerns us here.
It was the legal foundation for the Panama Canal transaction, and
from an historical standpoint, it is the most interesting and revealing
power created by the Constitution. During the 1770s and 1780s, replacing
the government of Great Britain with a new United States government
was the central political problem facing this country. To solve this
problem, as between the perils of monarchy on the one hand and
the perils of pure democracy on the other, the Framers chose a
republic, a middle course. This political design is most evident in the
treaty clause.

\textsuperscript{1} that he shall receive the ambassadors and public ministers of foreign nations, \textit{id.}
at \S 3; that he shall from time to time give Congress information on the state of
the Union and recommend useful legislation, \textit{id.}; and that he shall “take care that
the laws of the United States are faithfully executed.” \textit{Id.}

\textsuperscript{67} U.S. Const. art. II, \S 2, cl. 2.
1. Exclusion of the House of Representatives from the Treaty Power

The Articles of Confederation gave Congress the power to make treaties for the United States\(^68\) and forbade individual states to make treaties without congressional consent.\(^69\) Under the Articles, Congress was composed of a single house containing delegates appointed for various terms by the state legislatures. Each state delegation had one vote.\(^70\) Under this arrangement the United States made various treaties, including the Treaty of Paris of 1783, which recognized the political independence of the United States from Great Britain.\(^71\) The disposition of the treaty power under the Articles reflected the political realities of the times. The United States, under the Articles, was a confederation of states which had banded together to deal with the American Revolution and had consented to the creation of certain joint governmental powers. The Articles vested these powers, legislative and executive, in Congress, which exercised them in accordance with the votes of the state delegations.

For reasons largely unrelated to the conduct of foreign policy, the Articles of Confederation proved to be unworkable. In the summer of 1787, twelve of the thirteen states sent special representatives to Philadelphia to revise the Articles. These fifty-five delegates worked in secrecy through the summer and drafted a new and enduring document, the Constitution.

The delegates did not engage in full discussion of the treaty power until late in their deliberations. The debate began with consideration of a committee draft which stated that "the Senate of the United States shall have power to make treaties,"\(^72\) and that such treaties were "laws" of the United States.\(^73\) Some delegates, Colonel George Mason in particular, had expressed reservations on the question of giving the Senate power to make treaties.\(^74\) Moreover, John Francis Mercer had suggested that a treaty should not become a law until

\(^68\) Arts. of Confed. art. IX, cl. 1.
\(^69\) Id. at art. VI, cl. 1.
\(^70\) Id. at art. V, cl. 1-4.
\(^71\) Treaty of Peace, Sept. 3, 1783, United States-Great Britain, 8 Stat. 80, T.S. No. 104.
\(^72\) 2 The Records of the Federal Convention of 1787 at 392 (M. Farrand ed. 1911). The draft had been prepared by the Committee of Detail. See id. at 177, 183.
\(^73\) See id. at 183.
\(^74\) Id. at 297-98.
"ratified by legislative authority." 75 Therefore, the delegates had to decide whether to give the treaty power to the Senate or to the Senate and House of Representatives together.

After expressing doubt that the Senate should play any role at all in the treaty-making process, Gouverneur Morris proposed that if the Senate were to have this power, no treaty should be binding on the United States unless ratified by a bill passed by both houses and approved by the President. 76 James Wilson observed that this proposal was consistent with the treaty practice of Great Britain, where treaties were subject to the approval of Parliament. 77 James Madison corrected Wilson on this point 78 and went on to make two proposals of his own. First, he proposed that the President should be involved in the treaty-making process. 79 Second, he proposed that the Constitution should distinguish between two categories of treaties: those requiring full legislative approval and those requiring only the approval of the President and the Senate. 80 After hearing these objections and proposals, the convention voted on August 23, 1787, to recommit the first draft of the treaty clause. 81

Thereafter, the committee revised the draft to state that "[t]he President, by and with the advice and consent of the Senate, shall have power to make treaties . . . . But no Treaty shall be made without the consent of two thirds of the members present." 82 When the convention took up the revised draft, James Wilson proposed that the words "and the House of Representatives" be included after the word "Senate." 83 Following a brief debate, the delegates rejected Wilson's motion. 84 By the end of the day, the delegates approved the revised committee draft of the treaty clause in its entirety. 85

The records of the convention do not explain why the delegates excluded the House from the treaty-making process. Madison and McHenry recorded only a portion of the relevant debate, primarily

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75 Id. at 297. Gouverneur Morris, in a later debate, made a similar proposal. Id. at 392.
76 Id.
77 Id. at 393.
78 Id. at 395.
79 Id. at 392.
80 Id. at 394.
81 Id.
82 Id. at 498-99, 538-40.
83 Id. at 538.
84 Id.
85 Id. at 550.
the remarks of the delegates who opposed the formula eventually adopted. As for the majority, the record is largely silent. Thus, there is little direct evidence of the majority’s purpose and intention. What speaks loudest in the record are the votes of the states. The treaty clause was not a controversial provision, and on the issue of House exclusion, the majority prevailed by a margin of ten states to one.\(^{86}\)

It is likely that two reasons swayed the minds of the majority. First, the exclusion of the House made sense in terms of the internal politics of the convention. The delegates were all Americans, but they did not feel bound to one another by common citizenship, common laws, or even a common culture. They represented twelve separate and diverse states, and each state wanted to protect its interests. The essential problem was to establish and preserve a balance of power between the large and small states. This problem loomed large in virtually all of the deliberations in Philadelphia, and it obviously was involved in the competing proposals concerning the treaty clause. The original proposal gave the treaty-making power to the Senate, assuring each state an equal voice in the formulation of United States foreign policy. Wilson’s proposal to include the House of Representatives in the treaty-making process would have given large states a greater voice in the process to the detriment of small states. A desire to preserve the principle of equal representation for each state in the conduct of foreign affairs probably motivated the decision to exclude the House of Representatives from the treaty-making process.\(^{87}\)

Second, the political theories of the 18th century contributed to the exclusion of the House. The Framers thought that governmental structure would influence governmental performance. Thus, because they believed that structural independence would encourage impartial judgment, they gave the judicial power to a separate branch of government and decreed that federal judges should hold office for life during good behavior.\(^{88}\) Similarly, they gave the power of the purse to the House of Representatives, the body closest and most responsive to the people.\(^{89}\) The people could be trusted to hold reliable opinions concerning the purse, and a body elected directly by the people could be trusted to make sound financial decisions. Finally, the Framers gave the treaty power to the President and the Senate.

\(^{86}\) Id. at 538.
\(^{87}\) See id. at 393 (remarks of John Dickinson).
\(^{88}\) U.S. Const. art. III, § 1.
\(^{89}\) Id. at art. I, § 7.
Foreign policy was a delicate matter, requiring discretion, expertise, detachment, judgment, and constancy of purpose. The people and their representatives in the House would not possess these qualities; the Senate would possess them, because of its structure. Therefore, the Senate was a safe repository for the treaty power. The Framers explained and defended this theory, not in the record of their debates during the convention, but in *The Federalist*.  

90 The relevant essays are Number 10 (by James Madison), 62 and 63 (probably by Madison), and 64 (by John Jay). In these four short pieces, Madison and Jay, both distinguished lawyers, explain their basic theory of republican government, their conception of the Senate and its special place in the constitutional system, their view of the treaty power, and the reasons for giving that power to the President and the Senate.

In essay Number 10, Madison explains the difference between pure democracy and the republican form of government envisioned in the Constitution. Pure democracy, which places governmental decision-making power with the people, is susceptible to numerous maladies. *The Federalist* No. 10, at 69-72 (J. Madison) (C. Beard ed. 1948). It encourages party conflict, a combative spirit among the people, and legislation by special interests. *Id.* at 69-71. A pure democracy sacrifices the public good to the interests of powerful groups. By contrast, the Constitution establishes a government in which a system of representation expresses the interests and views of the people. *Id.* at 72-73. This system, according to Madison does the following:

refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interests of the country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representaives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

*Id.* at 73. For a helpful analysis of Madison’s theory of representation, see G. Wills, *Explaining America: The Federalists* 179-264 (1981).

According to Madison’s thesis in Numbers 62 and 63, the Senate, an unrepresentative body, plays a crucial role within this system of representation. The Senate, because of its relatively small size, the length of the terms of its members, and the manner of their election, acquires expertise unattainable by the House, whose members are “called” for the most part from pursuits of a private nature, [and] continued in appointment for a short period. *The Federalist* No. 62, at 264 (J. Madison) (C. Beard ed. 1948). Moreover, the Senate provides stability and continuity in government. *Id.* at 264-65. Stability is a precondition to domestic tranquility, economic prosperity, and the esteem of foreign powers. *Id.* at 265. Finally, and most importantly, the Senate protects United States citizens from their own occasional delusions. Madison wrote:

To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add, that such an institution (i.e., the Senate) may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, ultimately prevail over
Although *The Federalist* does not provide conclusive or even sufficient answers to many constitutional questions, it helps us understand the Constitution. It explains what the Framers thought about the Constitution and the relationships it sought to establish. With regard to the treaty clause, *The Federalist* teaches that the exclusion of the House of Representatives from the treaty-making process was a conscious decision rooted in a theory of government. The Framers wanted to establish a republic, not a pure democracy, to serve public interests through a system of representation that would enable the government to pursue prudent policies in the face of occasional public opposition. Within this system they reserved delicate and difficult foreign policy decisions for the Senate, the body best suited to deal with them.

2. *Legal Significance of the Exclusion of the House of Representatives*

The legal conclusion to be drawn from history is simply that the President and two-thirds of the Senate have power to make treaties, the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. *In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice and truth can regain their authority over the public mind?* Id. (emphasis added).

In essay Number 64 John Jay relied upon these arguments to defend the treaty clause, an "unexceptionable" clause in his view. *The Federalist* No. 64, at 272 (C. Beard ed. 1948). Jay argued that treaty-making called for expertise, experience, independent judgment, and stability. Because of these requirements, the Constitution wisely gave the treaty power to the Senate, not to the House.

They who wish to commit the power under the consideration [the treaty power] to a popular assembly [i.e., the House of Representatives], composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. *It was wise, therefore, for the convention [the Convention of 1787] to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place of a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of time.* Id. at 273 (emphasis added).
which are laws of the United States, binding on the national and state governments and all United States citizens. Treaties are decisions of the United States Government and are as authoritative as acts of Congress. Moreover, treaties do not need the approval of the House. They are federal legislation by other means. If the approval of the House were required, the Framers' careful republican plans would have come to nothing.

Chief Justice John Marshall authored the first Supreme Court decision recognizing this principle. The case, United States v. The Schooner Peggy,91 arose during the undeclared naval war with France. Congress enacted a statute providing that if a duly commissioned

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91 United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). The detailed facts of the case are as follows. The French were allies of colonial America during the Revolution, and for many years they were loved by many United States citizens, particularly those on the political left. During John Adams' Administration, however, the French, angered over John Jay's treaty with Great Britain, Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105, became hostile and demanding in their dealings with the United States. French hostility prompted the New Republic, led by the Federalists, to prepare for war. These preparations produced the Alien and Sedition Acts, Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596, the Virginia and Kentucky Resolutions, see I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 460-71 (1950), and a statute authorizing the President to commission privateers to seize French vessels on the high seas, Act of July 19, 1798, ch. 68, 1 Stat. 578. The statute stated that any French vessel captured by a duly commissioned privateer would be forfeited and, "on due condemnation," distributed to the owners, officers, and crew of the privateer. Id. § 5, 1 Stat. 579. In April of 1800, in reliance upon this statute, encouraged no doubt by patriotic sentiment as well as by the prospect of private gain, the officers and men of the United States ship Trumbull fell upon a French ship, the schooner Peggy, ran her to ground near Port au Prince, brought her to the State of Connecticut, and obtained a judgment of condemnation against her in the Circuit Court for the District of Connecticut. The Schooner Peggy, 5 U.S. (1 Cranch) at 103-06. The court directed both ship and cargo to be sold and divided, under the statute, between the United States and the officers and men of the Trumbull. Following this judgment, the owners of the Peggy appealed. Id. at 103.

Seven days after entry of judgment, while the appeal was pending, the United States plenipotentiary in Paris, William Vans Murray, signed a convention with France in which both nations agreed to terminate the undeclared war. Convention of Friendship and Commerce, Sept. 30, 1800, United States-France, 8 Stat. 178, T.S. No. 85. Article 4 of this Convention provided that all ships seized during the hostilities but not yet "definitely condemned" should be restored to their owners. Id. at art. IV. The Convention was ratified by the President with the advice and consent of two-thirds of the Senate during the following year. Thus, when the case of the schooner Peggy came before the Supreme Court on writ of error, the issue concerned the legal effect of the Convention. The Schooner Peggy, 5 U.S. (1 Cranch) at 108.
privateer of the United States captured a French vessel, a court of
the United States could condemn the captured vessel and distribute
the ship and cargo to the crew of the privateer. Following one such
condemnation and distribution, the French owners appealed. While
the appeal was pending, the United States and France signed the
Convention of 1800 officially ending the hostilities. The Convention
provided that all ships seized during the hostilities, but not officially
condemned, should be returned to their owners.

The case reached the Supreme Court following ratification of the
Convention. Marshall’s opinion noted simply that the Constitution
declared treaties to be laws of the land.92 As such, they were binding
upon executive and judicial officers of the United States. During the
pendency of the appeal, the Peggy’s fate had remained in controversy.
She had not yet been “definitively condemned.” Therefore, as the
Convention provided, she had to be restored to her owners. Under
the law of the land as it then stood, the judgment of condemnation
could not be sustained.93

Whether the House of Representatives would have agreed to the
terms of the Convention of 1800 is a question that history does not
answer. The approval of the House was simply not required. Even
in the face of a valid congressional enactment to the contrary,94 the
Convention of 1800, ratified by the President with the advice and
consent of two-thirds of the Senate, was fully effective as the law
of the United States in accordance with the Framers’ design. Nu-
merous subsequent decisions have recognized the underlying princi-
ple.95

In discussing the legal effect of treaties under the Constitution,
learned writers sometimes refer to two categories of treaties: “self-
executing” treaties and “nonself-executing” treaties.96 “Self-executing”
treaties require no further legislative action to secure their imple-
mentation by executive officers. “Nonself-executing” treaties require
implementing legislation, usually in the form of an act of Congress.

92 The Schooner Peggy, 5 U.S. (1 Cranch) at 109.
93 Id. at 109-10.
94 See Act of July 19, 1798, ch. 68, 1 Stat. 578.
95 See, e.g., Cook v. United States, 288 U.S. 102 (1933); Thomas v. Gay, 169
U.S. 264 (1898); Ward v. Race Horse, 163 U.S. 504 (1896); Boudinot v. United
States, 78 U.S. (11 Wall.) 616 (1870); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314
(1829).
96 See L. Henkin, supra note 59, at 156-62.
This traditional nomenclature is useful, but it must be used with care. Treaties are laws of the United States and must be enforced in accordance with their terms. If a treaty provides that it will not be fully effective absent implementing legislation, it must be given effect in accordance with its terms. Conversely, if a treaty purports to be self-executing, it will be fully effective upon ratification of the contracting parties. The contracting parties, as a matter of strategy, discretion, or convenience, may determine which form the treaty will take. The President and Senate may elect to make a treaty that will depend for its operation upon legislation enacted by Congress in the same way Congress may elect to enact a statute that will depend for its operation on administrative rules to be promulgated under the statute. The decision to draft, approve, and ratify a "nonself-executing" treaty can be seen as a delegation of authority by the President and Senate to Congress. The constitutionality of this delegation has never been questioned.

3. **Scope of the Treaty Power**

The treaty-making power is unlike any other legislative power created by the Constitution. The political realities of 1787 explain its unique position. As noted earlier, the Framers looked upon themselves as citizens of thirteen separate states. Although they wanted to strengthen the national government, they did not want to abolish the states or curtail the general governmental functions of the states. Their task was to identify the specific powers necessary for the

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97 Professor Henkin asserts that "[n]ot all treaties ... are in fact law of the land of their own accord." *Id.* at 157. This statement illustrates the problem. Professor Henkin's point is that some treaties do not create rules of decision for the courts, absent implementing legislation. In support of this proposition he cites Chief Justice Marshall's language in Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829): "But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." At the risk of making too much of a small point, we note that Chief Justice Marshall's language does not support Professor Henkin's assertion. Marshall said that a non self-executing treaty was not a "rule for the Court." He did not say that it was not a "law." With deference to Professor Henkin, a non self-executing treaty, addressing itself to the political branches, is as much a "law" of the United States as, for example, the Guaranty Clause of the Constitution, see U.S. Const. art. IV, § 4, which is not a rule for the Court; or § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1982), which would have little or no force in the judicial branch absent implementation by administrative rule.
national government and to preserve all other powers for the states. Given this political imperative, they produced a document that specified various federal legislative powers by subject matter and confined federal legislative authority to these subjects. As a result, the Constitution created a national government with limited legislative powers in the domestic field and preserved the general legislative authority for the states.98

But in the field of foreign affairs the Framers organized legislative power in a fundamentally different way. Within this field the states were to have no authority, and the national government was to be preeminent.99 Accordingly, the Framers conferred the treaty power upon the President and the Senate in general terms. They did not specify the subjects to which the treaty power would extend, because the power would extend to all proper subjects of negotiation between our nation and others.100 Thus, the treaty power is unique in that it is the only plenary legislative power belonging to the national gov-

98 See U.S. CONST. amend. X.
99 Congressman John Calhoun recognized this point as early as 1816:
  The limits of [domestic legislative authority] are exactly marked; it was necessary to prevent collision with similar co-existing state powers. This country is divided into many distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative power in the Constitution has relation, then, not to the treaty power, but to the powers of the States. In our relation to the rest of the world the case is reversed. Here the States disappear. Divided within, we present the exterior of undivided sovereignty . . . . Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution. 29 ANNALS OF CONG. 530-31 (1816) (emphasis added).
100 Justice Field drafted the classic statement of the rule:
  The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. Geofoy v. Riggs, 133 U.S. 258, 267 (1889) (emphasis added). See also Asakura v. Seattle, 265 U.S. 332, 341 (1924); Missouri v. Holland, 252 U.S. 416 (1920); In re Ross, 140 U.S. 453, 463 (1891).
ernment which is subject to no express or implied limitations arising from the reserved legislative powers of the several states.

Although the federal government has plenary treaty-making power, it may not enact a treaty that violates the Constitution. *Reid v. Covert* 101 illustrates the point. A military court of the United States tried and convicted a woman of the murder of her husband, a serviceman stationed in Great Britain. The woman, a civilian, claimed a constitutional right to be tried in a court of law and challenged the jurisdiction of the military court on that basis. 102 In support of the conviction, the government argued that the military trial, under the Code of Military Justice, was a necessary and proper means of implementing a status of forces agreement between the United States and Great Britain. This agreement provided that the United States military courts would exercise exclusive jurisdiction over offenses committed in Great Britain by United States servicemen and their dependents. 103 The Supreme Court rejected the government's argument and upheld the constitutional right of a civilian to be tried in a court of law. In holding that no treaty or other international agreement could authorize what the Constitution forbids, the Supreme Court stated that “[t]he prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined [under the treaty clause].” 104

Therefore, while a treaty can deal with proper subjects of negotiation, it cannot repeal the first amendment, deny a state a republican form of government, 105 or deprive a United States citizen of liberty without due process of law. 106 Similarly, because the Constitution provides that “all bills for raising revenue shall originate in the House of Representatives,” 107 a treaty cannot lay a tax, nor authorize an expenditure of money from the treasury. 108 The important point to remember is that the constitutional limitations on the treaty power are not specific to the treaty power. The limitations apply to all branches of the national government including the President and

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102 *Id.* at 4.
103 *Id.* at 16, 20.
104 *Id.* at 17.
105 *See* U.S. *Const.* art. IV, § 4.
106 *See id.* at amend. V.
107 *Id.* at art. I, § 7, cl. 1.
108 *Id.* § 9, cl. 7.
Congress, as well as the President and Senate acting together under the treaty clause. If the Constitution limits the treaty power, it limits the authority of the government generally.

Some critics have argued that the Constitution imposes implicit limitations on the treaty power. In the manual he prepared for his own use as President of the Senate during John Adams' Administration, Thomas Jefferson suggested that the treaty power might be subject to special limitations implicit in the constitutional fabric. He reasoned that the scope of the treaty power might be limited by the specific grants of legislative authority to Congress. For example, since article I, section 8, gives Congress power to regulate commerce with foreign nations, the Constitution might implicitly preclude the President and Senate from legislating on that subject under the treaty clause. Under Jefferson's view the President, with the consent of the Senate, could negotiate a treaty dealing with foreign commerce, but such a treaty could not operate as a final, authoritative act of the United States Government absent implementing legislation. According to this theory, a treaty dealing with a matter within the legislative competence of Congress could not be "self-executing."

Mr. Jefferson did not attend the Convention of 1787 and thus did not participate in the debates concerning the treaty clause. He was far more democratic than most of the political leaders of his day. He was the leader of a political party that favored popular democracy and opposed the policies of the Federalists, who controlled the Presidency and the Senate during the early years of the Republic. Moreover, he wrote his manual in 1797 and 1798, at the height of the bitter controversy between the Anti-Federalists and the Federalists, on the eve of the undeclared naval war with France. Jefferson's implicit limitation proposal, however, did not persuade Chief Justice Marshall who had the last word on the treaty issue. As noted above, Marshall's view was that the President and Senate could make treaties

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110 Id. at 110.
111 Mr. Jefferson observed that the question of the scope of the treaty power was one as to which there was no general agreement. He carefully noted that there was a difference of opinion as to the specific question under discussion here. Some of his colleagues thought that the treaty power did not extend to subjects of legislation in which the Constitution "gave a participation to the House of Representatives." Id. Others denied this exception "on the ground that it would leave very little matter for the treaty power to work on." Id.
that were fully effective as law, even when such treaties dealt with subjects within the legislative competence of Congress.112

John Marshall's judgment was both binding and correct. In the domestic field the powers of Congress are so extensive that virtually no subject is beyond its competence. Therefore, as Jefferson himself conceded, if these broad legislative powers implicitly limited the treaty power, the treaty power would become little more than a tool of negotiation, with the power of ratification residing ultimately in Congress in almost every case. The President and Senate acting alone would have almost no power to make treaties that would be fully operative as law. This result would be inconsistent with the plain meaning of the constitutional text and with the logic of the Framers' decision to exclude the House from the treaty-making process. The Framers wanted to put the treaty power in the hands of the President and the Senate.113 If the effectiveness of a treaty depended on the approval of the House, the Framers' plan would be defeated.

IV. THE CONSTITUTION AND THE PanAMA CANAL

Following extended negotiations during four presidencies, negotiators for the United States concluded that our nation could strengthen its position in the Caribbean by changing the basic arrangement established by the Hay—Bunau-Varilla Treaty of 1903. The old arrangement had become a liability. A new arrangement could eliminate the controversial American Zone and still protect United States interests. Notwithstanding the absence of an American Zone, United States military presence in the Caribbean, coupled with a neutrality arrangement for the Canal, would continue to protect United States strategic and commercial interests in Panama. Considering these factors, it made sense to dismantle the Zone and transfer the Canal to Panama.

But the negotiators had no authority to bind the United States. Thus, as the negotiation neared a conclusion, they faced a basic constitutional question: who, within the United States Government, had the power to authorize a transfer of the Canal to Panama? In the following paragraphs we will discuss that question, explain its significance, and describe how the Carter Administration ultimately resolved it.

112 See supra text accompanying notes 92-95.
113 See supra text accompanying notes 68-90.
A. The Power to Decide

1. Possibilities

The power to transfer the Canal to Panama lay somewhere within the federal government. How was it to be exercised? In theory, three possibilities existed. First, acting under article IV, section 3 of the Constitution, Congress might pass a statute dismantling the Zone and transferring the Canal to Panama. Second, the President and two-thirds of the Senate, acting under the treaty clause, might conclude a nonself-executing treaty with Panama contemplating a transfer but requiring congressional action to complete the transfer. Finally, the President and two-thirds of the Senate might conclude a self-executing treaty dismantling the Zone and disposing of the Canal without an act of Congress, if they had power to do so under the Constitution.

In the summer of 1977, the Carter Administration had to decide which of these three courses to pursue.

2. Political Dimensions of the Choice

From a political standpoint important differences existed among these three procedures. A statute authorizing the President to transfer the Canal to Panama would require the approval of a majority of both houses (51 votes in the Senate and 218 votes in the House). A nonself-executing treaty would require the approval of two-thirds of the Senate (67 votes). In addition, implementing legislation authorizing the transfer under the nonself-executing treaty would require majority approval by both houses. Finally, a self-executing treaty would require only the approval of two-thirds of the Senate. Thus, from the Administration’s standpoint, the nonself-executing treaty, requiring implementing legislation, was the most demanding and least attractive of the three procedures. As between the other two, the trade-off was intriguing. A statute would require the approval of a simple majority in both houses; a self-executing treaty would require the approval of an extraordinary majority in the Senate, but no votes in the House. Where did the advantage lie?

In the summer of 1977, the political calculation was much the same as it had been in the summer of 1787. United States citizens would oppose any proposal to transfer the Canal to Panama. The House

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114 See supra note 59.
115 See supra text accompanying notes 96-97.
116 See supra note 3.
of Representatives was close to the people, and if the proposal were submitted to the House, the members would be forced to vote on it in an election year. The chance of a favorable vote in the House was very small indeed.\textsuperscript{117} In contrast, the Senate was a peculiar institution, in which two-thirds of the members were always at least three to four years away from the next election. The Senate, like the House, was attentive to public opinion, but senators took pride in their detachment, their judgment, and their expertise in the field of foreign affairs. In the case of the Panama Canal, the clear political choice was to find sixteen additional votes in the Senate and thereby avoid submitting the proposal to the House in an election year. The only question was whether the Constitution permitted the President and Senate to dispose of the Canal by treaty, without House approval. In July, 1977, prior to the conclusion of the negotiation and the announcement of any proposal concerning the Canal, Secretary of State Cyrus Vance requested the opinion of the Attorney General on this issue.\textsuperscript{118}

3. \textit{The Opinion-Giving Function of the Attorney General}

The most important administrative duty expressly described in the Constitution is the President's duty to take care that the laws of the land are faithfully executed.\textsuperscript{119} The clearest implication of this duty is that the President must often decide legal questions. Although the President is responsible for deciding momentous policy questions, he must do so within the framework established by law. Consequently, before the President can formulate policy on any matter, he must decide what the law requires and what it permits.\textsuperscript{120}

The President's comprehensive responsibility for both law and policy creates a difficult problem for the executive branch. The courts are concerned almost solely with law. Congress is concerned primarily with policy. The Executive must be concerned with law and policy without allowing its duty to the one to detract from its duty to the other. How the Executive deals with this dilemma is the most important single measure of its performance in a government under law.

In an effort to assist the President in deciding legal questions, Congress created the office of the Attorney General in the Judiciary

\textsuperscript{117} See supra note 7.


\textsuperscript{119} U.S. Const. art. II, § 3.

\textsuperscript{120} The President swears to follow the laws of the land when he takes the oath of office. Id. at § 1, cl. 7.
Act of 1789.\textsuperscript{121} In the beginning the Attorney General had no administrative responsibilities, and although he was a member of the President’s cabinet, he had no official policy-making function. Under the statute the Attorney General’s primary responsibility was to advise the President and the heads of the departments on questions of law.\textsuperscript{122} Although the office has changed greatly over the years, the Attorney General is still charged with the duty of advising the executive branch on legal questions.

Different conceptions exist concerning the advice-giving function of the Attorney General. Some have argued that the Attorney General is simply a lawyer who gives legal advice in confidence and then defends the administration’s position in the same way that a private lawyer advises and defends his clients.\textsuperscript{123} Others have argued that the Attorney General should exercise independent judgment on legal questions.\textsuperscript{124} The second view is the better one by far. It serves the true interests of the Executive in a government under law. Of all the cabinet members, the Attorney General is the one who is least concerned with policy and most concerned with law. He is therefore the one in the best position to provide the Executive with legal advice unclouded by policy concerns. In the performance of his constitutional duty to see that the laws are faithfully executed, the President is well served by an Attorney General who remains aloof from politics and renders independent opinions on legal questions which the President may then accept or reject. Questions such as the one raised by the Secretary of State concerning the disposition of the Panama Canal should be considered and resolved by the Attorney General in that light.

4. The Merits of the Question

When the Panama question arose in July, 1977, the Supreme Court had not yet decided whether the President and Senate had the authority to make a self-executing treaty transferring to a foreign power

\textsuperscript{121} Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93.
\textsuperscript{122} Id. The best history of the office of the Attorney General is H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE (1937).
\textsuperscript{123} See Staff of Senate Subcomm. on Separation of Powers 95th Cong., 2d Sess., The Panama Canal Treaty and the Congressional Power to Dispose of United States Property 38 (Comm. Print 1978) (statement of Professor Raoul Berger).
a possession as large and as valuable as the Panama Canal. Thus, there was no short or easy answer to the Secretary of State's question. The absence of definitive precedent meant that the Attorney General's opinion would turn upon general constitutional principles and his reading of the relevant historical materials.

As noted above, the basic constitutional principle governing the treaty-making power is that a self-executing treaty becomes fully effective as law upon ratification, notwithstanding the absence of approval of the House of Representatives. Moreover, the treaty power extends to all proper subjects for negotiation between our nation and others,\textsuperscript{125} subject to the rule in \textit{Reid v. Covert} that the President and Senate may not, by treaty, do anything prohibited by the Constitution.\textsuperscript{126} The disposition of the Panama Canal was obviously a proper subject for negotiation between our nation and the Republic of Panama. Therefore, the President and Senate had the authority to dispose of the Canal by treaty, unless the Constitution prohibited them from doing so. Because the Constitution did not expressly forbid a disposition by treaty, only an implied prohibition could have prevented the transfer of the Canal.

The most powerful argument to be made in support of an implied prohibition was the Jeffersonian argument. Article IV, section 3 of the Constitution expressly gave Congress power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."\textsuperscript{127} If the President and the Senate could use the treaty power to dispose of territory or property belonging to the United States, they could subvert the authority of the House under article IV. Therefore, article IV should be read to exclude the treaty power by implication.\textsuperscript{128}

But the Jeffersonian argument proved too much. The Constitution expressly gave numerous powers to Congress. If these express powers implicitly limited the treaty power, the treaty clause would become a dead letter. As a general proposition, express congressional powers did not limit the treaty power by implication. Thus, the decisive issue was whether the power of disposition differed from other congressional powers in this respect. The Attorney General reviewed the authorities and found no basis for a distinction. All relevant materials

\textsuperscript{125} Geoffroy v. Riggs, 133 U.S. 258, 267 (1890).
\textsuperscript{126} Id.
\textsuperscript{127} U.S. Const. art. IV, § 3, cl. 2.
\textsuperscript{128} See \textit{supra} text accompanying notes 109-11.
suggested that the President and Senate had authority to dispose of territory or property under the treaty clause.

a. History

The records of the Convention of 1787 indicated that the Framers actually discussed the issue whether the treaty power could be used to dispose of the territory or property of the United States. Various delegates in the Convention argued that the treaty power might be used to cede territory or property to foreign nations.\textsuperscript{129} In considering whether the concurrence of two-thirds of the Senate should be required in the making of treaties, Hugh Williamson and Richard Dobbs Spaight moved that no treaty of peace affecting "territorial rights" should be made without the concurrence of two-thirds of the Senate.\textsuperscript{130} The delegates eventually decided to require the concurrence of two-thirds of the Senate in the making of \textit{all} treaties. Because the delegates recognized the property disposition issue and rejected specific proposals to require the concurrence of the House in the making of treaties,\textsuperscript{131} they probably understood that the treaty power could be used to cede territory or property without the approval of the House.

Furthermore, nothing in the drafting history of article IV, section 3, supported a contrary view. The Framers drafted the territory and property clause to deal with the problem of settling the conflicting claims of various states to the unsettled western lands the United States acquired as a result of the Treaty of Paris.\textsuperscript{132} The Framers wanted to assure that the Constitution would not prejudice these claims and that Congress would have power to deal with the claims following adoption of the Constitution. Thus, the territory and property clause stated in its entirety, that: "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or property belonging to the United States, \textit{and nothing in this Constitution shall be so construed as to prejudice the claims of the United States, or of any particular State.}"\textsuperscript{133} The words in

\textsuperscript{129} See, \textit{e.g.}, 2 The \textbf{Records of the Federal Convention of 1787}, supra note 72, at 297 (Mason: the Senate could "sell the whole Country by means of Treaties"); \textit{id.} at 297-98 (Mason: "Senate by means of treaty might alienate territory, etc. without legislative sanction. . . . [T]he Senate might by treaty dismember the Union").

\textsuperscript{130} \textit{Id.} at 543.

\textsuperscript{131} See \textit{supra} text accompanying notes 82-85.

\textsuperscript{132} See 2 \textbf{The Records of the Federal Convention of 1787}, supra note 72, at 392.

\textsuperscript{133} U.S. \textbf{Const.} art. IV, § 3, cl. 2 (emphasis added).
italics referred to claims concerning the western lands. Therefore, the record of the Framers' deliberations on this subject did not suggest that the purpose or the effect of this clause was to preclude self-executing treaties disposing of territory or property belonging to the United States.

Finally, the issue concerning the disposition of territory through the treaty power surfaced in debates over the Constitution in the state ratifying conventions of 1788 and 1789. Some opponents of the Constitution feared that the treaty power could be used to compromise territorial claims to the detriment of particular states, primarily those interested in the free navigation of the Mississippi River. The Virginia and North Carolina ratifying conventions proposed amendments to the Constitution requiring that every treaty ceding or compromising rights or claims of United States territory be approved by three-fourths of the members of both houses of Congress.134 These proposals indicated that the Framers were aware of the relationship between the treaty clause and the disposition of territory or property belonging to the United States.

b. Judicial Decisions

Although the Supreme Court had never directly addressed the property disposition issue as it was presented in the Panama Canal case, the Court had decided a number of cases involving Indian treaties which did lend support to the view that the power of disposition could be exercised by the President and Senate under the treaty clause.135 For most of the 19th century, the federal government treated the Indian tribes as foreign nations, dealing with the tribes by treaty.136 Under these treaties questions sometimes arose concerning property rights.

134 The North Carolina ratifying convention proposed the following provision:

[No treaty, ceding, contracting, or restraining or suspending the territorial rights or claims of the United States, . . . shall be made, but in cases of the most urgent and extreme necessity, nor shall any treaty be ratified without the concurrence of three-fourths of the whole number of the members of both houses respectively.

2 Documentary History of the Constitution of the United States of America 271 (1894). This proposal also was offered by the Virginia ratifying convention. Id. at 382. See generally S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 220-21 (2d ed. 1916).


136 This practice came to an abrupt halt in 1871 when Congress declared that henceforth no Indian tribe would be recognized as an independent nation "with whom the United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566.
In general, the United States claimed Indian territory by right of conquest, subject to the Indians' right to occupy and use the land. Thus, according to common law principles, the United States held legal title to the land, subject to an equitable Indian title. Occasionally a tribe would cede its equitable right to the United States by treaty, while reserving certain territory for its continued use and enjoyment, thereby creating an Indian "reservation." The legal issue that arose in such a case was whether the tribe retained only an equitable title to the reservation or whether it acquired full legal title to the reservation as a result of the treaty. The Court held uniformly that the transaction conveyed full legal title to the tribe. Because the treaty conveyed the title, an act of Congress was not required.\(^{137}\)

The Indian treaty cases obviously involved a special situation. Moreover, there was an important practical difference between the creation of an Indian reservation within the boundaries of the United States and an actual cession of territory or property of the United States to a foreign power. On the other hand, the Indian treaty cases were consistent with the theory of concurrent power. While Congress had power to convey property to the Indians by statute, the Indian treaty cases held that the President and Senate had similar power under the treaty clause.

c. Treaty Practice

Finally, the historical treaty practice of the United States suggested that the President and Senate had the power to transfer territory or property to foreign nations by treaty. It was a mixed practice, to be sure. In some situations the President and Senate disposed of territory or compromised territorial claims by self-executing treaty.\(^{138}\) At other times the President and Senate made treaties that required imple-

\(^{137}\) See cases cited in supra note 135.

\(^{138}\) The disposition of territory or property is a natural subject for negotiation between nations. It is not surprising that some of the most famous treaties in the history of the United States have involved territory or territorial claims, and some of these have, of their own force, compromised territorial claims or disposed of territory or property belonging to the United States. See, e.g., Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States - Spain, 8 Stat. 252, T.S. No. 327 (whereby the United States acquired Florida and ceded Texas to Spain); Treaty to Settle and Define Boundaries, Aug. 9, 1842, United States - Great Britain, 8 Stat. 572, T.S. No. 119 (Webster-Ashburton Treaty); Treaty in Regard to Limits Westward of the Rocky Mountains, June 15, 1846, United States - Great Britain, 9 Stat. 869, T.S. No. 120 (Oregon Treaty).
menting legislation authorizing the disposition.\textsuperscript{139} Occasionally Congress had acted alone, without a treaty, to authorize a disposition of territory or property.\textsuperscript{140} Taken as a whole, the treaty practice was consistent with the proposition that the power of disposition did not reside exclusively in one authority but was possessed by the legislative and executive branches concurrently.

5. \textit{The Administration's Decision and the Resulting Controversy}

The Constitution and the relevant historical and judicial materials suggested that the President and Senate had power to transfer the Panama Canal to the Republic of Panama by self-executing treaty, without the approval of the House of Representatives. The Constitution did not require the President and Senate to use this procedure, but it permitted them to do so. The Carter Administration took this view in the summer of 1977,\textsuperscript{141} and when the negotiators concluded their work, the final draft of the Treaty purported to be self-executing as to the basic question. The Treaty provided that the United States would dismantle the Canal Zone within six months following the exchange of the ratification instruments, and that the United States would transfer the Canal and its appurtenant facilities to Panama in the year 2000 without congressional approval.\textsuperscript{142} The Administration had chosen to cast its lot with the Senate and to exclude the House from the decision. In effect, the Administration was gambling that the Framers were correct and that two-thirds of the Senate possessed, in this instance, wisdom and detachment that would be inaccessible to Congress as a whole.

\textsuperscript{139} One such treaty involved the Canal Zone. \textit{See} Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, United States - Panama, art. V, 6 U.S.T. 2273, 2278, T.I.A.S. No. 3297.

\textsuperscript{140} Absent treaty authorization, numerous statutes and joint resolutions have authorized the sale or transfer of various kinds of property to foreign powers. In recent years the sale or transfer of military equipment has proceeded largely upon this basis. \textit{See} 22 U.S.C. §§ 2751-68 (1982 & Supp. II 1984). On occasion Congress has authorized the transfer of real estate. Some of these transactions have involved Panama. \textit{See}, e.g., Joint Resolution of May 3, 1943, ch. 92, 57 Stat. 74.


The basic question presented by the proposed treaty was one of policy: was it wise to dismantle the Canal Zone and transfer the Canal to Panama? But the legal question quickly became an important issue in the general debate. The opponents of the treaty, relying upon article IV, section 3 of the Constitution, argued that the disposition could occur only pursuant to an act of Congress. Supporters of the Treaty argued that the approval of the President and two-thirds of the Senate would suffice. The appropriate committees in both houses of Congress held hearings to consider the issue. The witnesses at these hearings, some of them distinguished constitutional authorities, expressed a wide range of views on the merits.

The arguments opposing the Administration's position included those outlined above: (1) the express grant of power to Congress under article IV, section 3, implicitly limited the treaty power; and (2) the issue was debatable in any event, since no definitive judicial

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145 See, e.g., The Relationship Between the Treaty Power and the Power of Congress to Dispose of U.S. Territory and Property Under Article IV, Section 3, Clause 2 of the Constitution; and the Relationship Between the Treaty Power and the Power of Congress to Make Appropriations Under Article I, Section 9 of the Constitution: Hearings Before the House Comm. on Merchant Marine and Fisheries, 95th Cong., 1st Sess. 129 (1978) (testimony of Professor Raoul Berger to the effect that Congress alone had power to dispose of the Canal); id. at 157 (testimony of Professor Charles Rice to the same effect); id. at 175 (testimony and statement of Professor Scot Powe expressing some doubt on the point). See also Staff of the Senate Subcomm. on Separation of Powers, 95th Cong., 2d Sess., Panama Canal Treaties [United States Senate Debate] 1977-78, 811-15 (Comm. Print 1978) (testimony of Professor John N. Moore to the effect that the President and Senate had power to transfer the Canal under the treaty clause); id. at 815-20 (testimony of Professor Covey Oliver to the same effect).

146 See, e.g., Staff of Senate Subcomm. on Separation of Powers, 95th Cong., 2d Sess., The Panama Canal Treaty and the Congressional Power to Dispose of United States Property 11-29 (Comm. Print 1978).
decision existed on the subject.\textsuperscript{147} Moreover, those in opposition to the Treaty argued that the Administration's legal position simply could not be trusted.\textsuperscript{148} The reasoning behind this third argument was that legal representatives of the executive branch were merely attorneys for a client, providing a defense for a position taken for reasons of policy;\textsuperscript{149} therefore, it was doubtful whether these representatives had considered the issue carefully.\textsuperscript{150} This was the argument \textit{ad hominem}, which is usually a sign of a weak case. Cicero explained the strategy over two thousand years ago: if the law is on your side, argue the law; if the facts are on your side, argue the facts; if neither the law nor the facts are on your side, attack the opposing attorney.\textsuperscript{151}

6. \textit{The Resolution of the Controversy}

The President's decision to submit a self-executing treaty to the Senate resolved the property disposition issue insofar as the executive branch was concerned. Predictably, however, the opponents of the Treaty instituted litigation to disrupt the ratification process and to seek review of the Executive's internal decision. In \textit{Edwards v. Carter},\textsuperscript{152} various members of the House of Representatives challenged the Treaty on the ground that they, as members of the House, had a constitutional right to vote on the question of the disposition of the Panama Canal. They asserted that the President and Senate were attempting to deprive them of this right by making a treaty that would dispose of the Canal without House approval.\textsuperscript{153} The District Court for the District of Columbia dismissed the complaint, holding that the congressmen lacked "standing to sue."\textsuperscript{154} On the ensuing


\textsuperscript{148} \textsc{staff of senate subcomm. on separation of powers, 95th cong., 2d sess., the panama canal treaty and the congressional power to dispose of united states property 7 (comm. print 1978)}.

\textsuperscript{149} Id. at 38 (statement of Professor Raoul Berger).

\textsuperscript{150} Id. at 7.


\textsuperscript{153} Id. at 1280.

appeal, the Circuit Court of Appeals for the District of Columbia decided the case on the merits.\textsuperscript{155} In a decision handed down only a few days before the Senate vote on ratification, the court of appeals upheld the Administration's position by a two-to-one vote.\textsuperscript{156}

The \textit{per curiam} opinion, in which Judges Fahy and McGowan joined, reviewed the relevant authorities and concluded that the power of disposition, although expressly given to Congress in article IV, also was given to the President and Senate under the treaty clause. In a forceful dissent, Judge McKinnon argued that the House of Representatives should be consulted in a matter as important as the disposition of the Panama Canal.\textsuperscript{157} George Mason, Gouverneur Morris, John Francis Mercer, and James Wilson would have agreed with Judge McKinnon,\textsuperscript{158} but for better or worse they lost that argument two centuries ago. The disappointed plaintiffs petitioned for \textit{certiorari}. The Supreme Court denied this petition on May 15, 1978.\textsuperscript{159}

7. The Decisive Vote and the Aftermath

On April 18, 1978, shortly after the decision of the court of appeals, the Senate voted on ratification of the Panama Canal Treaty. The outcome was by no means certain.\textsuperscript{160} The opposition needed only thirty-four votes to defeat the Treaty, and as John Hay had said, one third of the Senate would vote against the Sermon on the Mount.\textsuperscript{161} Fifty to sixty senators openly supported the treaty, but the swing votes, numbers sixty to sixty-seven, remained in doubt.

To strengthen its position with some of the undecided senators, the Administration had agreed to accept certain reservations to the

\textsuperscript{155} \textit{Id.} at 1064.
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.} at 1064-1103.
\textsuperscript{158} See supra notes 75-83 and accompanying text.
\textsuperscript{159} The \textit{New York Times} reported that the outcome was in doubt up to the final vote. N.Y. Times, Apr. 19, 1978, at A1, col. 6.
\textsuperscript{161} No Secretary of State before or since has entertained a lower opinion of the Senate. Here are a few of the things John Hay said about the Senate: "[T]here will always be 34\% of the Senate on the blackguard side of every question that comes before them." 2 W. THAYER, \textit{THE LIFE AND LETTERS OF JOHN HAY} 254 (1915). "[N]o treaty on which discussion was possible, no treaty that gave room for a difference of opinion, could ever pass the Senate." \textit{Id.} at 273. "A treaty entering the Senate is like a bull going into an arena: no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive." \textit{Id.} at 393.
Treaty,\textsuperscript{162} but the Administration had held firm on the basic procedural point. As proposed to the Senate, the Treaty would dismantle the Canal Zone and transfer the Canal to Panama in accordance with the schedule contained therein, without further legislative action. Thus, the senators had a clear and final choice to make. Although they had made other difficult choices since the conclusion of the war in Southeast Asia, none had been more problematical from a political standpoint, and none had called more clearly for the exercise of the peculiar senatorial virtues in which the Framers had placed their hopes. The roll call vote came late in the afternoon: sixty-eight senators for ratification, thirty-two against.\textsuperscript{163} President Carter signed the instrument of ratification two months later, on June 15, 1978,\textsuperscript{164} and the Treaty entered into force on October 1, 1979.

The Panama Canal Treaty was not self-executing in all respects. It provided for a gradual transition from United States to Panamanian control over a twenty-one year period. During that period the United States would retain administrative responsibility for the Canal.\textsuperscript{165} The United States would control the Canal through a new agency of the United States Government, the Panama Canal Commission.\textsuperscript{166} The Treaty, however, did not create this Commission. Moreover, administration of the Canal over the next two decades would require numerous governmental decisions, many of which could not or should not be taken except pursuant to statute.\textsuperscript{167} Therefore, to enable the United States to control the Canal during the transitional period, the Administration sought implementing legislation from Congress.

But the Administration had gambled and won. The ratified Treaty, self-executing as to the question of disposition, presented the House with a \textit{fait accompli}. Most members were opposed to the “giveaway” of the Canal, but the only question before them was whether the House would preserve the advantages of the Treaty by enacting legislation to manage the transition.\textsuperscript{168} Because they recognized that

\textsuperscript{162} See 17 I.L.M. 820-22.
\textsuperscript{163} 124 CONG. REC. 10,541 (1978).
\textsuperscript{164} 17 I.L.M. 824-25.
\textsuperscript{166} Id. at art. III, 3.
\textsuperscript{167} See infra text accompanying notes 174-80.
\textsuperscript{168} The following colloquy between Congressmen Toby Roth, a Republican from Wisconsin who opposed the implementing legislation, and Congressman David Bowen, a courageous Democrat from Mississippi who reluctantly supported it, epitomized
the Treaty would enter into force regardless of the implementing legislation, many opponents of the Treaty were able to support the implementing legislation on the theory that it preserved all possible advantages for the United States. Even so, the margin of approval in the House was uncomfortably close.

the debate. Congressman Bowen's remark reflected the resignation of all those in the House who realized that the basic policy decision already had been made:

Mr. Roth: The question is, you know we cannot put the onions on the courts or on the Senate. The onion is here. We have our responsibility. As I see it, our responsibility is to the American people.
I have heard so many speakers talk today and I have not heard one of them ask yet what do the American people want. What do the people want we are supposed to be representing. Mr. Bowen: I have asked my people the same thing you have. When I get these little white cards in the mail that say, "Dear Congressman: Please vote to keep our Panama Canal and vote against the implementing legislation," I write them back and say, "Thank you so much. I want to do both things. Unfortunately, I can do but one. I will be very happy to vote against the implementing legislation and give the Canal to Panama this year. Or I will vote for the implementing legislation and keep the Canal until the end of the century. You just tell me which one you would like to me to to," and I promise you, invariably they say let us keep the Canal until the end of the century, no giveaway in 1979.

125 CONG. REC. 15,764 (1979). Other participants in the debate readily acknowledged that the only issue was whether Congress would enact legislation to manage the transaction, not whether the Canal would be transferred. See 125 CONG. REC. 11,963 (1979) (remarks of Rep. Prichard); id. at 15,754 (remarks of Rep. Peysert); id. (remarks of Rep. Fish); id. at 15,774 (remarks of Rep. Frenzel); id. at 15,781-82 (remarks of Rep. Boland); id. at 15,764-65 (remarks of Rep. Bauman); id. at 16,016 (remarks of Rep. Buchanan); id. at 26,328-29 (remarks of Rep. Derwinski); id. at 26,332-33 (remarks of Rep. Boquard); id. at 26,328 (remarks of Rep. Broomfield).

Among the opponents of the Treaty was John Murphy of New York, the Chairman of the House Committee on Merchant Marine and Fisheries, who sponsored bill H.R. 111 that eventually passed the House. See 125 CONG. REC. 15,756-57 (1979); id. at 26,326 (treaty "ill-conceived"). Other opponents voting for the implementing legislation included Elliott Levitas, see id. at 16,014; David Bowen, see id. at 15,762-64; John Dingell, see id. at 11,963-64; Dan Mica, see id. at 26,652-53; Edward Derwinski, see id. at 15,998; Charles Pashayan, see id. at 16,022; Edwin Bethune, see id. at 16,011-12; Bill Frenzel, see id. at 15,774-75; William Broomfield, see id. at 26,328; John Buchanan, see id. at 16,016; Marilyn Boquard, see id. at 26,332-33. Even the determined leader of the Republican resistance, Robert Bauman of Maryland, tacitly endorsed the implementing legislation in the end and encouraged his colleagues to vote for the legislation. Nothing more could be gained by expressing opposition to a fait accompli, and legislation was needed to make the best of a bad situation. 37 CONG. Q. WEEKLY REP. 2119 (Sept. 29, 1979).

There were several crucial votes in the troubled history of H.R. 111. The best running tally and explanation of these votes can be found, of course, in the Congressional Quarterly Weekly Report. An early indication that H.R. 111 was in trouble came on the vote to approve the rule setting guidelines for debate. The rule passed
The Framers believed that the exclusion of the House from the treaty-making process would make a difference in the formulation of United States foreign policy. The Framers, who were practical politicians, would have found evidence to support their theory in the events surrounding the making and the ratification of the Panama Canal Treaty. The opponents of the Treaty pressed hard for House participation in the basic policy decision, thinking the House would derail the measure. The supporters of the Treaty steadfastly resisted these efforts and persuaded two-thirds of the Senate to vote for ratification. The House narrowly approved the implementing legislation, but only with the support of a hostile majority, who objected to the situation in which the President, the Senate, and the Constitution had placed them. Considering the mood of the House, it

the House by a margin of only two votes (200 to 198). Most of the opposition came from Republicans and Southern Democrats. See 37 Cong. Q. Weekly Rep. 990 (May 19, 1979). Thereafter, when the bill was under consideration in June, the House leadership had to postpone at least one important vote after it became clear that the bill might not survive. See 37 Cong. Q. Weekly Rep. 1202 (June 16, 1979). In late June the bill survived close votes on two killer amendments, one offered by Representative Sonny Montgomery (213 votes against the amendment, 210 for), see 125 Cong. Rec. 16,010-12 (1979), and one offered by Representative George Hansen, (220 votes against the amendment, 200 for), see id. at 15,773. The defeat of the Montgomery amendment by only three votes represented the strength of the opposition at high water. H.R. 111 eventually passed the House by a 22-vote margin on June 21, 1979. See id. at 16,022; see also 37 Cong. Q. Weekly Rep. 1207-09 (June 23, 1979). The fight, however, was not over. The House conferees met with their Senate counterparts and agreed to a conference report that softened some of the tough provisions of the House bill, but the House then rejected the compromise plan. See 125 Cong. Rec. 25,551 (1979). Only in late September, after the leader of the opposition conceded that implementing legislation was necessary in view of the impending effective date of the Treaty, did the House approve the conference report. Final approval came on September 26, 1979, only five days before the treaty entered into force. See id. at 26,336; see also 37 Cong. Q. Weekly Rep. 2119 (Sept. 29, 1979).

171 See supra text accompanying note 90.
172 Two of the most responsible members of the House, Edward Derwinski and Hamilton Fish, who supported the implementing legislation, admitted that if the House had participated in the original Treaty decision, there might have been no Treaty at all. 125 Cong. Rec. 26,328-29 (1979) (remarks of Rep. Derwinski); id. at 15,574 (remarks of Rep. Fish).
173 H.R. 111 survived in the House by margins of 20, 3, and 22 votes. See supra note 170. A change in position by as few as two or as many as 12 members would have altered the outcome of these votes. If one can trust what the members actually said about the issue, it is virtually certain that in each instance the swing votes came from Republicans and Southern and Western Democrats who would not have approved the Treaty in the first instance, but who voted for the implementing legislation because they believed that the President and the Senate had committed the nation, and that there was no other responsible course to pursue. See supra notes 168-69.
seems likely that the Treaty would have been rejected if the House had participated in the basic decision.

B. The Constitution and the Transfer Mechanism

The influence of the Framers' design on the Panama Canal transaction did not end with ratification of the Panama Canal Treaty. The Treaty provided for a continuing United States presence in Panama during the transition period, and the transfer mechanism presented interesting constitutional issues. The following paragraphs discuss two of these issues.

1. The Canal and the Power of the Purse

The English king could demand the allegiance of his subjects, but he was not entitled to take their property without their consent. The authority of the House of Commons over fiscal matters depended on this principle. The Framers of the Constitution had the English constitution in mind when they gave the House of Representatives preeminent authority in all matters involving public fiscal policy. Two aspects of the Panama Canal transaction involved public fiscal policy. First, under the Panama Canal Treaty, United States administration of the Canal during the transition period involved both the collection of revenue, primarily in the form of tolls, and

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174 The idea that fundamental principles restricted the just authority of human government originated thousands of years ago. In the early modern period, the English came to believe that the limitations on the authority of their government arose, not from the laws of God or nature, but from the customary arrangements established by Englishmen to regulate their own affairs. Among these arrangements, none was more important than the basic principle of public finance. Thus, if the English King wished to tax the kingdom to raise funds for the treasury, he was obliged to ask for his subjects' consent in advance. He did this by convoking Parliament — which is to say, the House of Commons — where all free persons of the realm were virtually, if not actually, represented. The consent of Parliament was the consent of every person, and in matters involving property the consent of every person was required.

The authority of the House of Commons in financial matters was a central principle of English government long before the American Revolution, and during the 17th century, it was one of the weapons in the arsenal of the parliamentary party. A principle identified so closely with Parliament's victory over the Stewart kings was sure to appeal to the Framers, who won a similar victory over George III. Indeed, they carefully preserved the principle in their new Constitution by establishing the House of Representatives as the United States analogue of the House of Commons. See J. Gough, Fundamental Law in English Constitutional History 70 (1955).

175 See U.S. Const. art. 1, § 7, cl. 1; id. § 9, cl. 7.
the expenditure of funds to cover the costs of operating the Canal. Second, the Treaty called for various payments to be made to the Republic of Panama.\textsuperscript{176} The Treaty itself did not and could not authorize these financial transactions.\textsuperscript{177} Instead, the implementing legislation that created the Panama Canal Commission,\textsuperscript{178} and subsequent congressional actions appropriating funds for the operation and maintenance of the Canal, provided the necessary authorization.\textsuperscript{179} Thus, the Treaty upheld the Framers’ design by preserving the authority of the House of Representatives over Canal revenues and expenditures.\textsuperscript{180}

Some people argue that the power of the purse gives the House of Representatives a financial veto over all governmental operations, including those in the field of foreign affairs. This argument contains an element of truth. Most governmental operations do involve taxing or spending at some point. The financial veto, however, is an unreliable weapon. In each session of Congress, scores of representatives vote to fund programs which they do not favor. They do this because the programs already are in place, and because there is no other practical or responsible course to pursue under the circumstances. In general, there is an enormous political difference between voting to commit the nation to a particular program or policy and voting to fund the decision, once the commitment has been made. For this reason, the power of the purse is not a political solvent that draws


\textsuperscript{177} One of the reservations attached by the Senate to the Treaty dealt with this point: "(3) Notwithstanding any provision of the Treaty, no funds may be drawn from the Treasury of the United States of America for payments under paragraph 4 of Article XIII without statutory authorization." United States Instrument of Ratification with Reservations and Understanding to the Panama Canal Treaty, June 15, 1978, 17 I.L.M. 820, 821.


\textsuperscript{180} It is worth noting that the question of the self-executing effect of the Panama Canal Treaty on the revenues of the country has been debated in an interesting line of tax cases in which United States employees of the Panama Canal Commission have argued that article XV of the Agreement in Implementation of article III of the Panama Canal Treaty, see ___ U.S.T. ____, T.I.A.S. No. 10,031, at 1, 40, exempts their earnings from taxation by the United States. See, e.g., Harris v. United States, 768 F.2d 1240 (11th Cir. 1985) (upholding taxpayers’ claim), Swearingen v. United States, 565 F. Supp. 1019 (D. Colo. 1983) (denying taxpayers’ claim on ground that a treaty altering a revenue measure would be unconstitutional).
all governmental authority ultimately to the House. The case of the Panama Canal powerfully illustrates this point.

2. The Composition of the Panama Canal Commission

The second constitutional issue presented by the transfer mechanism involved the composition of the Panama Canal Commission. The Treaty expressly provided that the Commission would be an “agency” of the United States,\(^{181}\) that the Commission would operate the Canal during the transition period,\(^ {182}\) and that a nine-member board appointed by the United States would govern the Commission.\(^ {183}\) Five of the board members would be nationals of the United States.\(^ {184}\) The other four would be nationals of Panama, selected by the Panamanian Government for appointment by the United States.\(^ {185}\) The nationals of Panama would be removable either by Panama, or by the United States with Panama’s concurrence.\(^ {186}\)

The Treaty also contained provisions dealing with the principal executive officers of the Commission. It provided for an Administrator and a Deputy Administrator.\(^ {187}\) Initially, the Administrator would be a national of the United States, and the Deputy Administrator would be a national of Panama.\(^ {188}\) Beginning in 1990, however, the Administrator would be a national of Panama and the Deputy Administrator would be a national of the United States.\(^ {189}\) Finally, the Treaty contained numerous provisions governing the personnel practices of the Commission. These provisions called for the establishment of a personnel system that would give preferential treatment to Panamanians. Under the Treaty the people actually running the Canal during the transition period would be Panamanians to the greatest extent possible.\(^ {190}\) By participating in the management of the Canal during the transition period, the Panamanians would be in a position to assume full responsibility in the year 2000.

\(^{182}\) Id. at 1, 3.
\(^{183}\) Id. at 3(a).
\(^{184}\) Id.
\(^{185}\) Id.
\(^{186}\) Id. at 3(b).
\(^{187}\) Id. at 3(c).
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) Id. at art. III, 3(c), art. X.
The administrative arrangement established by the Treaty was sensible, but unique. The Treaty proposed that the governing board of the Commission would include members nominated by a foreign government; that the foreign government could request the removal of these members; that the foreign government could eventually nominate the principal administrative officer of the Commission; and that the subordinate employees of the Commission would be foreign nationals. No other United States agency was headed and staffed by nominees of a foreign power. Was the Commission constitutional?

Article II of the Constitution contains the provisions that establish the requirements for the internal organization of the executive branch. It provides that the President shall nominate, and with the advice and consent of the Senate, appoint ministers, consuls, judges, and other "officers of the United States," and that Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. Beyond this, article II has little to say concerning the officers of the United States. It provides only that the President may require the written opinion of the principal officer of each executive department upon any subject relating to his duties, and that the President, Vice-President, and all civil officers of the United States "shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The President's power of appointment under article II is one of the great instruments of his office. It permits him to establish his administration and staff the government with people of his own choosing. The Constitution implicitly forbids Congress or any other authority to exercise or curtail the President's power of appointment. Thus, Congress could not enact a statute requiring the President to

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191 Article II, § 2, cl. 2 provides:
[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges and the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Hands of Departments.
U.S. Const. art. II, § 2, cl. 2.
192 Id.
193 Id. at cl. 3.
194 Id. § 4.
appoint a particular person to a particular office, nor could it require him to appoint persons nominated or recommended by someone else. Moreover, apart from the power of appointment, the Constitution contemplates that the President will be responsible for the execution of federal law, and thus the Constitution implicitly confers upon him a power to remove subordinate executive officers in whom he does not have full confidence. Without such a power of removal, the President could not discharge his constitutional duty to see that the laws are faithfully executed. Finally, and most importantly, the Constitution contemplates that the officers of the United States will owe allegiance to the United States. The allegiance requirement arises implicitly from article II, section 4, which provides that the officers of the United States shall be removed from office on impeachment for, and conviction of "treason."

The provisions of the Treaty requiring Panamanian participation on the Commission during the transition period obviously did not comport with the implicit constitutional principles governing the appointment, removal, and allegiance of officers of the United States. Persons who are nominated to the governing board of a federal agency by a foreign power and are removable at the request of that power are not "officers of the United States" in the constitutional sense. Therefore, this feature of the Treaty raised the question whether it was constitutional to allow persons who were not "officers of the United States" to have a voice in the operation of the Canal during the transition period.

Although the Supreme Court had not addressed this question as of 1977, the analysis was straightforward. The Constitution did not forbid the transfer of the Canal to Panama. Ultimately, it permitted the United States to transfer control of the Canal to persons who

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197 See U.S. Const. art. II, § 3.
199 A person cannot commit "treason" unless he owes allegiance to the sovereign against whom the "treason" is committed. Young v. United States, 97 U.S. 39 (1877).
were not "officers of the United States" in the constitutional sense.\textsuperscript{200} If the Treaty had given Panama a right to appoint and remove the Secretary of State, it would have been unconstitutional. As John Calhoun observed two centuries ago, no treaty could alter the fabric of our government.\textsuperscript{201} But the Canal was not part of the fabric of our government, and the United States could transfer control of the Canal to Panama. Moreover, the transfer mechanism, which gave Panamanians a voice in the operation of the Canal during the transition period, was a reasonable means of accomplishing that objective. The arrangement was unique, but in the Administration's view, the arrangement was constitutional.\textsuperscript{202} To date, the Administration's position has stood the test of time.

V. CONCLUSION

Shortly after the ratification of the Hay—Bunau-Varilla Treaty of 1903, President Roosevelt asked his Attorney General, Philander Knox, to construct a legal defense of the entire Panamanian affair. The Attorney General responded, "[O]h, Mr. President, do not let so great an achievement suffer from any taint of legality."\textsuperscript{203} This story is so appealing that it should be true, if it is not. On the other hand, the United States is a nation under law, and one hopes that it always will be a nation under law. The rule of law is the only practical way to promote life, liberty, and the pursuit of happiness, the proper objectives of all government, according to Mr. Jefferson.

We do not know what Attorney General Knox would have said of the new Panama Canal Treaty or of the passing of the old regime. But from the standpoint of the rule of law, the demise of the old Treaty was surely more becoming than its birth. In the case of the Panama Canal Treaty, the constitutional machinery worked precisely as the Framers thought it would. A democratic government, because of its peculiar 18th century design, was able to make an unpopular decision to advance the public good.

Was the decision wise? The procedure itself was some guarantee of wisdom. Any proposal that survives four administrations and


\textsuperscript{201} 10 ANNALS OF CONG. 531 (1816) (remarks of Rep. Calhoun).


\textsuperscript{203} D. McCULLOUGH, supra note 8, at 383.
receives the approval of two-thirds of the Senate must be a very sound proposal indeed. History sometimes deals unkindly with even the wisest plans. Many years will pass before a final verdict can be rendered in the case of the Panama Canal. But the results thus far have been encouraging. In light of the Canal Zone riots of 1964 and the recent events in Nicaragua, one is inclined to believe that our position in the Caribbean would be far less secure today if the President and Senate had not taken the politically difficult course in 1977 and 1978. James Madison and John Jay believed that the President and Senate would be far-sighted in the conduct of foreign policy. The case of the Panama Canal suggests that Madison and Jay were correct.