IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE DENNIS KUCINICH, et al., Plaintiffs, v. GEORGE W. BUSH, President of the United States, et al., Defendants.	Civ. No. 02-1137 (JDB)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN (D.C. Bar No. 449197)
Deputy Assistant Attorney General

JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 27191)
CAROL FEDERIGHI
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel: (202) 514-1903
Fax: (202) 616-8460

Attorneys for Defendants

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INTRODUCTION

The termination of the Anti-Ballistic Missile Treaty ("the ABM Treaty")[1] by President Bush is not the first time that a President has decided to terminate a treaty without first obtaining the consent of Congress. In recent times, President Carter terminated the 1954 Mutual Defense Treaty Between the United States of America and the Republic of China, and President Reagan terminated the Treaty of Friendship, Commerce, and Navigation with Nicaragua. In both of these cases, as in the present one, Congress took no formal action to countermand or express disapproval of the President's decision. Indeed, in the present case, the President's decision to terminate the ABM Treaty was actually foreshadowed by congressional legislation advocating the development of an ABM system that would be inconsistent with the Treaty. See National Missile Defense Act of 1999, Pub. L. No. 106-38, 113 Stat. 205 (1999).

Against this background, plaintiffs' attempt, as individual legislators, to cast the President's decision to terminate the ABM Treaty as creating a constitutional crisis of the first order is not well founded. As plaintiffs' many failed attempts to pass resolutions disapproving of the President's decision demonstrate, there simply is no concrete dispute between the Executive Branch and the Legislative Branch as a whole regarding the President's decision. For this reason, as well as for several other reasons, plaintiffs' case fails to meet the basic requirements for justiciability by an Article III court and therefore should be dismissed.

In their Summary Judgment Memorandum,[2] plaintiffs give short shrift to the justiciability problems with their case, focusing instead on the merits. But the justiciability problems are

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[1] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435 (Exh. 1 to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment).

[2] Plaintiffs' Memorandum in Support of Motion For Summary Judgment ("Plaintiffs' Summary Judgment Memorandum" or "Pls' SJ Mem.").

insurmountable here and require dismissal of the case before the merits are reached. First, and most critically, plaintiffs fail to establish that they have standing to bring their claims. As defendants pointed out in their Summary Judgment Memorandum,[3] in Raines v. Byrd, 521 U.S. 811 (1997), the Supreme Court held squarely that individual legislators claiming only an injury to the institutional interests of Congress, such as plaintiffs do here, do not assert a sufficiently particularized and judicially cognizable interest to satisfy Article III's case or controversy requirement. Plaintiffs' attempts to distinguish Raines from the present case on the basis of minor factual differences are unpersuasive. Indeed, the D.C. Circuit's decision in Campbell v. Clinton, 203 F.3d 19 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000), where the court rejected a challenge to the President's exercise of his foreign relations power brought by a group of individual congressmen, is on all fours with this dispute and condemns plaintiffs' challenge.

Plaintiffs similarly fail to establish that the present dispute is ripe for judicial action, i.e., they fail to show that there is an actual live dispute between the Executive Branch and the Legislative Branch. Plaintiffs attempt to create such a ripe dispute by citing routine votes in both Houses of Congress against expedited consideration of particular resolutions opposing withdrawal from the ABM Treaty. Yet, these votes do not represent final action setting forth a formal position of the respective House. Indeed, neither House has shown a willingness even to vote on a resolution opposing Treaty termination. And, as indicated above, Congress had previously taken formal action that clearly contemplated either amendment or termination of the Treaty.

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[3] Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendants' Summary Judgment Memorandum" or "Defs' SJ Mem.").

The case law is also clear that the Court should decline to hear this case because it presents a nonjusticiable political question. Plaintiffs' contention that the political-question doctrine, set forth most classically in Baker v. Carr, 369 U.S. 186 (1962), is now "largely out of favor with the Supreme Court" is without support. In the alternative, plaintiffs contend that the traditional Baker criteria do not counsel judicial abstention when the question is one of the relative constitutional roles of the Executive and Legislative Branches. Plaintiffs are interpreting Baker too narrowly, however. Properly applied, the Baker factors overwhelmingly weigh in favor of a finding of nonjusticiability here.

Paying little attention to the serious justiciability problems with the cases, plaintiffs focus their motion instead on several points related to the merits, points which they have distilled from Judge MacKinnon's dissenting opinion in the Court of Appeals in Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979). First, plaintiffs argue that a "triad" of constitutional provisions, including the Supremacy Clause, requires that treaties be "equated, in every respect, to laws Congress enacts," including with regard to procedures for their termination. However, plaintiffs ignore that these provisions do not address the procedures by which treaties, or laws, may be terminated. Second, plaintiffs contend that the Framers intended that Congress have a role in treaty termination, based on one statement by Jefferson and one by Madison. But the clearest statement of the Framers' intent – the actual language and design of the Constitution – demonstrates that the President does have the unilateral authority to terminate a treaty. See Defs' SJ Mem. at 30-40. In any event, a more detailed examination of the non-textual evidence of the Framers' intent relied upon by plaintiffs is, at best, contradictory and inconclusive. Third, plaintiffs cite no convincing case law supporting their position. And,

finally, their attempt to argue that unilateral presidential termination of treaties is rare and confined to unimportant treaties is based on a misstatement of the historical record, as well as of the present circumstances. In sum, plaintiffs' arguments on the merits suffer from numerous fatal flaws and do not invalidate the President's withdrawal from the ABM Treaty. Thus, were this Court to reach the merits of this case, plaintiffs' claims should be rejected as inconsistent with the design of the Constitution.

ARGUMENT[4]

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

A. Plaintiffs Lack Standing

Plaintiffs fail to establish that they have standing to bring their claims. As defendants pointed out in their Summary Judgment Memorandum (pp. 14-23), the post-Goldwater case of Raines v. Byrd, 521 U.S. 811 (1997), holds squarely that individual legislators claiming only an injury to the institutional interests of Congress, such as plaintiffs do here, do not assert a sufficiently particularized and judicially cognizable interest to satisfy Article III's case or controversy requirement. See also Campbell v. Clinton, 203 F.3d 19 (D.C. Cir.) (holding that, pursuant to Raines, individual congressmen lack standing to challenge President's actions in Yugoslavia), cert. denied, 531 U.S. 815 (2000); Chenoweth v. Clinton, 181 F.3d 112, 116 (D.C. Cir. 1999) (holding that, pursuant to Raines, individual members of Congress lacked standing to challenge an Executive Order), cert. denied, 529 U.S. 1012 (2000). Plaintiffs acknowledge the

[4] For a discussion of the background of the case, the Court is referred to Defendants' Summary Judgment Memorandum at 4-12.

paramount position of Raines in this area.[5] Pls' SJ Mem. at 21. Although plaintiffs then attempt to distinguish Raines from the present case, none of the grounds plaintiffs cite provides a sound basis for doing so. As set forth in detail in Defendants' Summary Judgment Memorandum, the case must therefore be dismissed for lack of standing.

In Raines, plaintiff members of Congress had alleged that the Line Item Veto Act injured them in their institutional capacity by altering the balance of powers between the branches and by changing the effectiveness of their votes on appropriations bills. In their attempt to distinguish the present case from Raines, plaintiffs focus on certain minor factual differences between the two cases. Pls' SJ Mem. at 21-23. But these factual differences have little relevance to the holding in Raines. Plaintiffs cite the fact that, in Raines, the Senate and House had voted to pass the Line Item Veto Act, whereas "there is no indication of how either House did vote or would have voted" here on the treaty termination decision. Id. at 22. Similarly, plaintiffs point out that both Houses in Raines opposed the suit, whereas neither House has formally expressed its views here. Id. In focusing on these distinctions, plaintiffs appear to be trying to show that their claim to standing as individual legislators is greater here than in Raines because, unlike in Raines, there has been no official action by Congress either approving the President's termination decision or disapproving the lawsuit. But plaintiffs' claim here is even less convincing than the plaintiff-legislators' claim in Raines – where the real complaint was that the plaintiff-legislators "lost th[e] vote" against the Line Item Veto Act, 521 U.S. at 824. Plaintiffs here admit that they were

[5] Although conceding the preeminence of Raines, plaintiffs note that only two circuit court judges found a lack of standing in the course of the Goldwater case. Pls' SJ Mem. at 21. However, this fact is of little relevance, as Goldwater predated Raines and therefore did not have the benefit of its guidance.

unable to convince their colleagues even to bring to a vote on the floor of either House measures condemning the President's actions. In other words, plaintiffs' claims in this case stem from their wholesale failure to convince their legislative colleagues of the need for any legislative action regarding the ABM Treaty. Thus, rather than distinguishing this case from Raines, plaintiffs' failure to obtain passage of a measure opposing the President's decision to terminate the ABM Treaty further undermines their claim to standing.[6]

Moreover, as defendants have previously argued (Defs' SJ Mem. at 9, 14-15, 18), Congress' earlier passage of the National Missile Defense Act ("NMDA") provides further evidence of Congressional support for termination of the ABM Treaty. In 1999, Congress enacted the NMDA, which provided that

> [i]t is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack (whether accidental, unauthorized, or deliberate) . . . .

Public Law No. 106-38, § 2, 113 Stat. 205 (1999). In passing this Act, Congress fully recognized that it was endorsing a policy that contemplated amending or even withdrawing from the ABM Treaty. In the Senate Report accompanying S. 257, one of the precursor bills to Public Law 106-38, for example, the Committee on Armed Services noted that "[t]he Administration has

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[6] Plaintiffs attempt to distinguish this case from Raines on the grounds that Congress as a whole has not actively opposed the filing of this suit. But although the Raines Court attached "some importance" to the fact that "both Houses actively oppose[d]" the suit there, the important point was *not* the active opposition of both Houses, but rather, the fact that such opposition evidenced *lack of support for the suit by the majority of either House.* 521 U.S. at 829 (attaching importance to the "fact that appellees have not been authorized to represent their respective Houses of Congress in this action"). Here, as in Raines, neither House has authorized the filing of suit by the plaintiffs. Indeed, evidence of the opposition to this suit by other members is found in the *amicus curiae* brief filed by Senator Kyl and other members of the United States Senate.

acknowledged that it must amend or withdraw from the Anti-Ballistic Missile (ABM) Treaty of 1972 prior to deployment of an NMD [National Missile Defense] system." S. Rep. No. 106-4, at 4 (1999); see also H. Rep. No. 106-39, Pt. 1, at 3 (1999) ("[T]o provide an effective defense of all 50 states an NMD architecture would require revisions to the ABM Treaty. . . . [I]f such revisions cannot be negotiated, the U.S. has the legal right to withdraw from the ABM Treaty.").[7] Thus, Congress' official position, as represented by the NMDA, is consistent with the President's decision to terminate the Treaty.

In attempting to distinguish Raines, plaintiffs also note that the Line Item Veto Act provided procedures by which Congress could countermand the President's cancellation of a bill provision, whereas there are no such equivalent procedures giving Congress a voice here. Pls' SJ Mem. at 22. Plaintiffs further attempt to distinguish Campbell v. Clinton from the present case on similar grounds, contending that, unlike in Campbell, there is nothing Congress can do to change the President's mind here, even if it "collectively stood on its head." Pls' SJ Mem. at 23-24. But, the issue is not whether Congress has the power to "change the President's mind"; rather, it is whether Congress has a "legislative remedy" for what it perceives as Presidential action in excess of his authority. See Defs' SJ Mem. at 21-23.

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[7] See also H. Rep. No. 106-39, at 13 (statement of dissenting views by Rep. McKinney, one of the plaintiffs in this suit) ("[a]s presently conceived, the [NMD] system would be a clear violation of the U.S.-Russian Anti-Ballistic Missile Treaty of 1972") (quoting former U.S. Senator Dale Bumpers); 145 Cong. Rec. S2629 (daily ed. March 15, 1999) (statement of Senator Levin) ("Senate adoption of this bill effectively says we are going to deploy a national missile defense system in violation of" the treaty); id. at S2631 (noting that even a "limited national missile defense system probably will violate that treaty"); id. at S2635 (statement of Sen. Lieberman) ("[w]e understand that doing so [i.e., developing a national missile defense system] will compromise the ABM Treaty") .

Plaintiffs' argument here stems from a misreading of Coleman v. Miller, 307 U.S. 433 (1939), a case of questionable precedential value after Raines.[8] Plaintiffs read Coleman for the proposition that any time the President takes some action that deprives Congress of the alleged right to participate in the decision by voting on it, an individual member would have standing to challenge that action in court because it "nullifies" congressional prerogatives. But Raines clearly rejects such a broad reading of Coleman.

As the D.C. Circuit explained in Campbell, Coleman cannot be read for the proposition that the "President 'nullifies' a congressional vote and thus legislators have standing whenever the government does something Congress voted against, still less that congressman would have standing any time a President allegedly acts in excess of his statutory authority." 203 F.3d at 22. There, the court rejected an argument that members of Congress had standing to challenge the President's alleged decision to wage war by authorizing airstrikes in Yugoslavia without Congressional authorization, even though Congress was powerless to recall the armed forces deployed for such purposes. The Campbell court reasoned that, notwithstanding the claim that the President acted in excess of his authority and Congress had no direct way to countermand that decision, Congressional action was not "nullified," as in Coleman, because Congress retained the *effective power* to countermand the President's decision.

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[8] The Raines Court recognized that Coleman might be distinguished on several other grounds, including the fact that Coleman involved only state legislators and thus might not present the same separation of powers concerns as a suit by federal legislators. 521 U.S. at 824 n.8. However, the Court concluded that there was no need to distinguish the case further under the facts of Raines, since that case obviously did not involve complete nullification as contemplated by Coleman. Id.

So, too, here, Congress has the power to remedy plaintiffs' alleged harms. As in Campbell, Congress "certainly could have passed a law forbidding," for instance, development of ABM systems that would have violated the Treaty, at least until the President certified that the other party was taking actions that would have violated the Treaty. 203 F.3d at 23. And "Congress always retains appropriations authority and could have cut off funds" for development of ABM systems. Id. Indeed, Campbell goes so far as to suggest that, as long as Congress retains the power to impeach the President, it has sufficient available means to remedy such perceived wrongs. Id. As the language plaintiffs quote from Campbell concludes, "Congress has a broad range of legislative authority it can use," id., to countermand the President's treaty decisions, and therefore no "nullification" exists.[9]

In discussing Campbell, plaintiffs further point to language from the district court opinion, in which Judge Friedman suggested that legislative standing might exist where "the executive branch flouts the law" and "in the clearest cases of vote nullification and genuine impasse between the political branches." Pls' SJ Mem. at 24 (quoting Campbell v. Clinton, 52 F. Supp. 2d 34, 34 (D.D.C. 1999)). That standard is plainly inconsistent with the D.C. Circuit's subsequent reading of Raines on appeal in Campbell. See 203 F.3d at 23. But, even assuming that it is an appropriate standard, this is not such an unusual case. Given the Executive's constitutional powers with respect to treaty making, as well as past presidential practice with regard to termination of treaties, it cannot be said that the President "flouted" the law. And no

[9] In addition, the implication that the Raines holding depended on the existence of these alternative means is wrong. Although the Court noted the existence of these other avenues, it expressly stated that it was not deciding "[w]hether the case would be any different if any of these circumstances were different." 521 U.S. at 829-30.

vote nullification or genuine impasse exists where the Congress had the opportunity to vote on numerous bills or resolutions that, if passed, would have sought to prevent or disapprove the President's action but simply chose not to take that opportunity.

Plaintiffs also state that the Raines Court had noted that other non-congressional plaintiffs would have standing to sue, whereas here "it is difficult, if not impossible, to think of a non-congressional party who would have standing" in the present case. Pls' SJ Mem. at 23. That may well be the case. Even if true, however, it is no basis upon which to find standing where it otherwise does not exist. It is well established that "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1974).

Finally, plaintiffs also contend that two post-Raines decisions, Federal Election Commission v. Akins, 524 U.S. 11 (1998), and Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2000), have kept the door open to a finding of Article III standing based on the assertion of "generalized grievances." Pls' Mem. at 25-26. Neither decision has any applicability here, however. Akins involved the question of *informational* standing on the part of voters (and not legislative standing). The Akins Court held that this informational injury was not a "generalized grievance" but rather was sufficiently "concrete and particular," even though "widely shared," to satisfy Article III. 524 U.S. at 21-25. The Court did not mention Raines or legislative standing, and nothing in the Akins decision suggests that the Court intended to qualify that decision in any regard. And Vermont Agency addressed the unique, and here inapplicable, question of relator standing in a qui tam suit, which the Court found to be a form of "representational standing." The decisions in Akins and Vermont Agency simply do not inform

or alter the concept of legislative standing as now articulated in Raines.

B. The Dispute Is Not Ripe

As defendants argued in their opening memorandum (pp. 23-25), a further bar to the Court's jurisdiction is the lack of ripeness. Specifically, the present dispute is not ripe for judicial action because the Legislative Branch has not taken definitive action "asserting its constitutional authority" in a manner inconsistent with that of the Executive Branch. Goldwater, 444 U.S. at 997 (Powell, J., concurring). In an attempt to create a "constitutional impasse" between the Branches that would render this case ripe, plaintiffs cite two events – first, the House's vote against *consideration of* Representative Kucinich's resolution as a question of privilege on June 7, 2002; and second, the failure of a resolution by Senator Feingold to "receive unanimous consent" *for consideration* by the Senate on June 10, 2002. Pls' SJ Mem. at 26. Neither of these events creates a ripe conflict between the two Branches, however, because neither represents definitive action by either House in direct conflict with the Executive's action, as even plaintiffs agree. See Pls' SJ Mem. at 26 ("Neither event signified anything about either House's position on termination of the ABM Treaty . . . ."). To the contrary, these were simply *routine votes against expedited consideration* of particular resolutions that *might* have created an impasse with the President. In essence, both represent choices by the respective House *not* to proceed along lines that might have created a constitutional conflict with the President.

Plaintiffs also complain that, by the defeat of these resolutions, "each House was deprived thereby of its ability to consider and state its position," Pls' SJ Mem. at 26, suggesting that "complete nullification" had therefore occurred. This description of the situation is inaccurate, however. Each House at all times retained all its authority to pass bills or resolutions addressing

the United States' continued participation in the ABM Treaty. The failure (or tabling) of the cited resolutions merely reflects the result of the normal give-and-take of the legislative process. That plaintiffs were unable to muster sufficient support for their resolutions does not mean that the Congress was "deprived . . . of its ability to consider and state its position." Indeed, Congress continues to have "ample legislative power" to take action that it views as countermanding the President's decision, such as by denying appropriations for ABM systems. Neither House has been deprived of anything.

C. Plaintiffs' Claims Present a Nonjusticiable Political Question

The case law is also clear that the Court should decline to hear this case because it presents a nonjusticiable political question. See Defs' SJ Mem. at 26-30. In response, plaintiffs contend that the political-question doctrine is now "largely out of favor with the Supreme Court." Pls' SJ Mem. at 20 (quoting Bederman, Treaty Rights as Political Questions, 70 U. Colo. L. Rev. 1439, 1441 (1999)). Aside from the speculations of a few academics as to where the Supreme Court is headed, however, there is no support for such a contention. The Supreme Court has not acted to overrule the political-question doctrine. On the contrary, as recently as 1997 the Supreme Court recited the black-letter law from Baker v. Carr, 369 U.S. 186, 217 (1962), regarding the nonjusticiability of political questions. Clinton v. Jones, 520 U.S. 681, 700 n.34 (1997); see also Nixon v. United States, 506 U.S. 224, 238 (1993) (holding that challenge to Senate's conduct of impeachment proceedings was nonjusticiable political question).

This Court is bound to follow the Supreme Court's decisions until that Court itself overrules them. See Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("it is not the province of this court to determine when a prior decision of the Supreme Court has

outlived its usefulness") (citing Agostini v. Felton, 521 U.S. 203, 237 (1997)), other portions modified, 293 F.3d 537 (2002); see also United States v. Marquez, 291 F.3d 23, 28 (D.C. Cir. 2002) (court required to apply Supreme Court doctrine despite fact "[i]ts ongoing vitality is far from assured"), petition for cert. filed (July 5, 2002) (No. 02-5739). Thus, in the absence of *some* concrete indication from the Supreme Court that Baker is not good law, plaintiffs' speculation that the Supreme Court might *in the future* be inclined to alter or do away with the political-question doctrine is irrelevant here. Nor do plaintiffs' speculations about the effect of the change in makeup of the Supreme Court (Pls' SJ Mem. at 19) have any pertinence. See United States v. Echavarria-Escobar, 270 F.3d 1265, 1271 (9th Cir. 2001) ("we cannot ignore Supreme Court authority based on speculation as to possibly evolving individual views of the Supreme Court Justices"), cert. denied, 122 S.Ct. 1943 (2002).

Moreover, the political-question doctrine remains good law in this Circuit. People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (holding that question of whether organization threatened the national security of the United States was a nonjusticiable political question), cert. denied, 529 U.S. 1104 (2000); National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (listing "the political question doctrine" as one of the "principles termed 'justiciability doctrines'"). This Court is "obligated to follow controlling circuit precedent until either [the Court of Appeals], sitting en banc, or the Supreme Court, overrule[s] it." United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1997); see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) ("decisions [of the circuit courts of appeal], nevertheless, bind the circuit 'unless and until overturned by the court en banc or by Higher Authority'") (citation omitted).

Regarding the applicability of the traditional Baker criteria, plaintiffs contend that these criteria do not counsel judicial abstention when the question is one of the allocation of constitutional power between the Executive and Legislative Branches. Pls' SJ Mem. at 19-20.[10] Plaintiffs are interpreting Baker too narrowly, however. In fact, the Baker factors[11] weigh heavily in favor of a finding of nonjusticiability here.

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[10] The four cases cited by plaintiffs on this point are unhelpful. See Pls' SJ Mem. at 20-21. Three of the cases do not even mention the political-question doctrine. See Bush v. Gore, 531 U.S. 98 (2000) (holding that Florida Supreme Court violated Equal Protection Clause in counting votes for electors for President); United States v. Morrison, 529 U.S. 598 (2000) (striking down civil remedy provision of the Violence Against Women Act as violating the Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990, also on Commerce Clause grounds). In the fourth case, the issue at bar was whether the Secretary of Commerce had complied with statutory provisions directing him to certify other nations' compliance with an international agreement. As such, the issue involved was "a purely legal question of statutory interpretation . . . which calls for applying no more than the traditional rules of statutory construction" and therefore did not present a nonjusticiable political question despite the connection between the issue and the "Nation's foreign relations." Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986). Plaintiffs' attempt to equate this straightforward issue of statutory interpretation with the issues in the present case involving constitutional interpretation (Pls' SJ Mem. at 20-21) must fail, and, therefore, the latter case is also irrelevant here.

[11] These factors are as follows:

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

Baker v. Carr, 369 U.S. at 217 (emphasis added).

First, there exists a "textually demonstrable commitment of the issue to a coordinate political department." Baker v. Carr, 369 U.S. at 217 (first factor). As defendants explained in their opening Memorandum (pp. 30-40), the Constitution entrusts foreign policy matters to the two political branches, the Executive and the Legislative, and gives the Judicial Branch no role in such matters. See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (decisions regarding foreign policy "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"). Plaintiffs contend that this commitment does not deprive the Judicial Branch of the authority to decide on the proper *allocation* of the foreign affairs power between the two Branches, the issue at bar here. But even such an issue has been held to be a nonjusticiable political question. See Greenberg v. Bush, 150 F. Supp. 2d 447, 453 (E.D.N.Y. 2001).

Second, the courts lack "judicially discoverable and manageable standards" for determining the precise allocation of the treaty powers between the Congress and the Executive. Baker v. Carr, 369 U.S. at 217 (second factor); see Nixon v. United States, 506 U.S. at 228 ("the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it"). As this Circuit has explained, "[m]eddling by the judicial branch in determining the allocation of constitutional powers where the text of the Constitution appears ambiguous as to the allocation of those powers 'extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power'" and would require the court "to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore." Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) (quoting Riegle v. Federal Open Market Comm., 656 F.2d 873,

881 (D.C. Cir. 1981)).[12] Here, the constitutional text is silent as to the allocation of the treaty *termination* power, and thus provides little in the way of "judicially discoverable and manageable standards" to apply to resolving the issue at bar. See Nixon v. United States, 506 U.S. at 238 (holding that "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate"). Any attempt by the Court to resolve the issue would be an unwarranted invasion of the prerogatives of the other two Branches to determine the issue between themselves.

Indeed, history emphatically confirms that the political branches have been able "to resolve the dispute themselves." Ange, 752 F. Supp. at 514. "For over 200 years, through bargaining, compromise, and accommodation, the[] popularly elected branches of our government have in fact shared the task [of treaty termination], without the help or need of the courts." Goldwater, 617 F.2d at 715-16 (Wright, C.J., concurring). Given the two Branches' evident ability to resolve this issue without provoking a constitutional confrontation, a formal judicial resolution is unnecessary. The courts should defer to the expertise and experience of the two political branches gained through this long history, in an area (foreign policy) in which the Judiciary has no constitutional role, no experience, and serious practical limitations. Moreover, given this history, were the Judiciary to intervene now, "setting in concrete a particular constitutionally acceptable arrangement" by which a treaty should be terminated, such an action

[12] The Ange court also noted that, although the Judiciary was ill-equipped to determine the constitutionality of the President's actions in the Persian Gulf, that fact "by no means permits the President to interpret the executive's powers as he sees fit, nor does it mean that the legislative branch is helpless without the assistance of the judicial branch. Congress possesses ample powers under the Constitution to prevent Presidential overreaching, should Congress choose to exercise them." 752 F. Supp. at 514.

would show "a lack of respect due coordinate branches of government." Baker v. Carr, 369 U.S. at 217 (fourth factor).

Next, a Court declaration that the President must rescind his decision to withdraw from the ABM Treaty would ignore an "unusual need for unquestioning adherence to a political decision already made" and would create "multifarious pronouncements" about United States foreign policy. Baker v. Carr, 369 U.S. at 217 (fifth and sixth factors). It is beyond peradventure, and a long-established bedrock principle of constitutional law, that the Executive conducts the foreign affairs of the United States. See DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 291 (D.C. Cir. 1989) (area of "foreign affairs" is where "the Executive receives its greatest deference, and in which we must recognize the necessity for the nation to speak with a single voice"). The necessity that the United States speak with one voice is especially critical with regard to treaties. Moreover, "[i]t is wholly inappropriate for the judicial branch to question 'a political decision already made.'" Greenberg v. Bush, 150 F. Supp. 2d at 454 n.4 (quoting Baker v. Carr, 369 U.S. at 217). Given that the President has already given notice of his decision to withdraw from the ABM Treaty, that the notice has been communicated to the other countries concerned, and that the decision has taken effect, a decision by this Court to accept jurisdiction and proceed to the merits of plaintiffs' claims could create confusion about the future course of United States actions with respect to the ABM Treaty and has the potential to embarrass the United States in its dealing with other countries as well.

Finally, plaintiffs themselves tacitly acknowledge the essentially political nature of the questions at issue. Thus, plaintiffs write that "there is more to a treaty than the prohibitions which it contains. A treaty relationship is a long-term, legally binding framework that promotes

predictability, transparency, and compliance, and that builds political confidence going beyond the terms of the treaty." Pls' SJ Mem. at 25. If it is true that, as plaintiffs assert, "Congress cannot alone create such a relationship," id., neither can the *Court* create – or, by its actions, extend – such a relationship.[13]

For all of these reasons, this case presents a political question over which this Court lacks jurisdiction.

D. Goldwater Requires a Finding That the Claims Are Not Justiciable

Even in the absence of the superseding decision in Raines, the Supreme Court's decision in Goldwater would control the disposition of this case. As discussed in defendants' opening memorandum, the plurality in Goldwater (Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens) held that the case was nonjusticiable because it presented a political question. These four Justices were joined by Justice Powell, who found that the case was not ripe for judicial consideration, and by Justice Marshall, who did not file a separate opinion. Despite the apparent confusion engendered by these separate opinions, however, it is not true, as plaintiffs contend, that the decision provides "no guidance to future contestants." Pls' SJ Mem. at 17.

In fact, as set forth in defendants' Summary Judgment Memorandum, independent of the reasoning involved, the *result* in Goldwater is binding. Under the principle of "result stare decisis," two cases that are factually "substantially identical" are required to have the same result. See Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994) (if case is "substantially identical" to previous case producing "splintered opinions" "we are still, at a minimum, bound by

[13] For this reason, namely the Court's inability to grant effective relief, this case is also moot. See Defs' SJ Mem. at 25 n.9.

its result"). The substantial similarity between this case and Goldwater therefore requires the same result, namely, dismissal of this case on justiciability grounds. See Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1198-99 (D. Mass. 1986) (regarding Goldwater as binding), aff'd on other grounds, 814 F.2d 1 (1st Cir. 1987).

II. THE PRESIDENT'S DECISION TO WITHDRAW FROM THE ABM TREATY ACCORDING TO ITS TERMS IS CONSTITUTIONAL

In their Summary Judgment Memorandum, defendants have shown that analysis of the constitutional text, case law, and historical practice establish that the President's authority to withdraw from a treaty with a foreign country, pursuant to the terms of the treaty but without the concurrence of Congress, is beyond question. Defs' SJ Mem. at 30-42. First, the Constitution grants the President plenary control over the conduct of foreign affairs, including over treaty matters. Second, the courts have endorsed this view, allowing the President to take a leading role in many foreign affairs and treaty-related matters where the need for discretion and speed of action are often required. And, where courts (ignoring any justiciability problems) have reached the merits of the question of authority to terminate treaties, they have concluded that the Constitution affords the President the authority to terminate treaties, acting alone. See Goldwater v. Carter, 617 F.2d at 697, vacated, 444 U.S. 996 (1979); Goldwater v. Carter, 444 U.S. at 996 (Brennan, J., concurring) (holding that President could terminate treaty in exercise of his constitutional authority to recognize, and withdraw recognition from, foreign governments); Beacon Prods. Corp. v. Reagan, 633 F. Supp. at 1198-99. Finally, historical practice demonstrates that the President has on numerous occasions acted unilaterally to terminate or suspend treaties, without significant objection by Congress. As discussed further below, plaintiffs' attempts to rebut these arguments and to show that the President has acted

unconstitutionally in terminating the ABM Treaty are unavailing.

A. Neither the Supremacy Clause Nor Any Other Constitutional Provision Requires That Treaties be Terminated by the Same Procedures Applicable to Repeal of Statutes

Plaintiffs rely on a "triad" of constitutional provisions for the proposition that treaties may only be terminated with the concurrence of Congress – the Supremacy Clause, the "Take Care" Clause, and the Necessary and Proper Clause. Pls' Mem. at 33-34. None of these provisions supports plaintiffs' position, however.

The Supremacy Clause provides that treaties as well as "the laws of the United States" are "the supreme law of the land." U.S. Const. Art. VI, § 2. As defendants set forth in their Summary Judgment Memorandum (pp. 39-40), although this Clause grants treaties the same *status* as statutes, it does not provide any insight into the procedures required either to enact or terminate either statutes or treaties. Hence, the Clause says nothing about whether treaties can be terminated only by the same procedures by which statutes may be repealed, namely, by action of a majority of both Houses of Congress. See Michael J. Glennon, Constitutional Diplomacy 150 (1990) ("That [the Supremacy Clause] assigns the same status – supreme law of the land – to each of the instruments denominated does not mean that it commands that the same procedure be followed in their termination."). Indeed, as defendants pointed out, requiring the same procedure for treaties would produce a result completely at odds with the text and structure of the Constitution, which gives the House of Representatives *no* role in treaty affairs.

Plaintiffs also ignore that the ABM Treaty itself provides for its own termination, and that the President acted pursuant to this provision. This defect also infects plaintiffs' argument that the clause directing the President to "take Care that the Laws be faithfully Executed," U.S. Const.

Art. II, Sec. 3, forbids his termination decision here. The President's assumption of authority under the termination provision of the Treaty is not a question of violation of his duty to faithfully execute the law.

The Necessary and Proper Clause provides that Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any other Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18. Plaintiffs argue that the powers provided to Congress by this clause include treaty termination powers. However, the Necessary and Proper Clause is not an independent grant of authority, but merely an extension of otherwise enumerated powers in the Constitution. The Necessary and Proper Clause

> is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted "foregoing" powers of § 8 and "all other Powers vested by this Constitution. . . ." As James Madison explained, the Necessary and Proper Clause is "but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant." VI Writings of James Madison, edited by Gaillard Hunt, 383.

Kinsella v. Singleton, 361 U.S. 234, 247 (1960); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Necessary and Proper Clause confers upon Congress authority only to legislate through "means . . . which are not prohibited, but consist[ent] with the letter and spirit of the constitution . . . ."). Citing the Clause here thus begs the question as to how the Constitution allocates the treaty power. The Necessary and Proper Clause cannot be used to allow Congress to usurp powers that the Constitution otherwise grants to the President. See Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (Necessary and Proper Clause does not authorize Congress to violate Presidential powers under the Appointments Clause); see also Printz v.

United States, 521 U.S. 898, 923-24 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . , it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'") (emphasis and square brackets in original, citation omitted). As the defendants have elsewhere explained, the Constitution does not grant Congress *any* enumerated powers relating to treaties except for the power of the Senate to give its advice and consent and to concur in ratification. Granting Congress the power to terminate treaties is therefore not "necessary and proper" to the exercise of an "otherwise granted" power.

Finally, plaintiffs' concern that allowing the President to terminate treaties will somehow lower their status vis-a-vis "congressional-executive agreements" (Pls' SJ Mem. at 29-32) is beside the point. As plaintiffs use the term, "congressional-executive agreements" are those that the President negotiates (as with treaties) and which he then submits to both houses of Congress for approval, possibly along with implementing legislation. See Pls' SJ Mem. at 30; John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 765-66 (2001) (defining three different types of congressional-executive agreements, of which plaintiffs are referring to the third). Plaintiffs' attempt to cast these agreements as lower in the "hierarchy of international agreements" than more "solemn agreements" such as treaties and therefore as meriting different termination procedures makes no sense, however. First, plaintiffs do not explain on what basis agreements are ranked in this "hierarchy." Second, although plaintiffs suggest that the ranking is based on the "importance" of the agreements, there is no necessary correlation between the "importance" of an international

agreement and the choice of instrument in which it is embodied (treaty, congressional-executive agreement, sole executive agreement). In fact, some of our most significant recent international agreements, such as NAFTA and WTO, have been congressional-executive agreements. Third, plaintiffs cite no authority (other than the Supremacy Clause argument addressed above) for the proposition that the President *cannot* unilaterally terminate congressional-executive agreements.

B. Non-Textual Evidence Regarding the Framers' Intent is Inconclusive

Plaintiffs attempt to argue that the intent of the Framers supports their position. Pls' SJ Mem. at 34-35. But, as set forth on pages 30-40 of defendants' opening brief, the best evidence of the Framers' understanding – the text and structure of the Constitution – clearly demonstrates that the President's termination authority is unqualified. And non-textual evidence regarding the Framers' intent with regard to the authority to terminate treaties is, at best, sparse and inconclusive. The issue of treaty termination was not discussed during the Constitutional Convention. David Gray Adler, The Constitution and the Termination of Treaties 84 (1986) [hereinafter "The Constitution and the Termination of Treaties"]. Although it was mentioned on a few occasions in subsequent debates by the Framers, no conclusion can be drawn from these references. Thus, as plaintiffs note, James Madison expressed the view that "the same authority" must be used "in annulling as in making a treaty." Pls' SJ Mem. at 35. Yet, plaintiffs neglect to mention that, in a debate with Madison over precisely this issue, Alexander Hamilton took the contrary position that "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone." Alexander Hamilton, Pacificus No. 1 (1793), in 15 The Papers of Alexander Hamilton 33, 39 (Harold C. Syrett et al. eds., 1969) (emphasis in original).

Plaintiffs also rely on a statement by Thomas Jefferson to the effect that treaties, "being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them to be infringed or rescinded." Pls' SJ Mem. at 1 (citation omitted). However, elsewhere, Jefferson wrote, "[t]he transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. *Exceptions are to be construed strictly.*" Thomas Jefferson, Opinion on the Powers of the Senate (1790), reprinted in 5 The Writings of Thomas Jefferson 161 (Paul Leicester Ford ed., 1895) (emphasis added). In sum, as these contradictory statements by Thomas Jefferson illustrate, the non-textual evidence regarding the Framers' intent on this issue is sparse, contradictory, and ultimately inconclusive.

C. The Cases Cited by Plaintiffs Are Unpersuasive

In support of their position that the President must obtain the concurrence of the Senate or of Congress in terminating a treaty, plaintiffs rely on one Supreme Court majority opinion (In re The Amiable Isabella), one district court opinion (Teti v. Consolidated Coal Co.), one Supreme Court concurring and dissenting opinion (Judge Iredell's opinion in Ware v. Hylton), and the dissenting opinion filed by Judge MacKinnon in the Court of Appeals in Goldwater. Pls' SJ Mem. at 35-36. None of these authorities is persuasive, however. First, aside from Goldwater, none of the cases involved the issue of termination of a treaty, and the language plaintiffs cite is therefore only dicta. See In re The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821) (issue was whether seized ship was properly documented as Spanish ship under provisions of applicable treaty with Spain); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260-61 (1796) (Iredell, J., concurring in

part and dissenting in part) (issue was whether treaty trumped state law); Teti v. Consolidated Coal Co., 217 F. 443, 450 (N.D.N.Y. 1914) (issue was "meaning of the words" of a provision of the 1871 Treaty of Commerce and Navigation with Italy). And Judge MacKinnon's dissent in the Court of Appeals in Goldwater (appended to an opinion that has since been vacated) has no precedential value. See Association of Bituminous Contractors, Inc., v. Apfel, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998).

D. History Shows That Presidents Have On Numerous Occasions Terminated Treaties In Circumstances Similar to Those Present Here

In light of the fact that historical evidence has been held to be relevant in resolving issues of constitutional interpretation, defendants showed in their Summary Judgment Memorandum (pp. 40-41) that on numerous occasions treaties have been terminated by the President acting alone, in addition to by a variety of other methods. In response, plaintiffs attempt to show that unilateral termination by the President has been rare and has not involved "a treaty of the importance of the ABM Treaty" and that "the overwhelming mode of treaty termination since the first in 1798 has been conjoint action by the legislative and executive branches." Pls' SJ Mem. at 27-29, 36. These statements misstate the history, however.

First, plaintiffs do not attempt to define what they mean by an "important" treaty; in fact, it is impossible to conceive how treaties could be "ranked" in order of importance. And such a task is surely outside of the judicial ken. In any event, there is no support in the Constitution for assigning different termination procedures to treaties based on their perceived importance. Thus, the mere fact that the ABM Treaty is a treaty that deals with national security issues (as did the treaty at issue in Goldwater) should not make it subject to different procedures for termination. In any event, in recent times, two indisputably significant treaties were terminated by Presidents

Carter and Reagan without first obtaining the concurrence of Congress – the 1954 Mutual Defense Treaty Between the United States of America and the Republic of China (the treaty at issue in Goldwater), and the Treaty of Friendship, Commerce, and Navigation with Nicaragua (the treaty at issue in Beacon).[14]

Second, plaintiffs (relying on Judge MacKinnon's dissent in Goldwater) describe certain treaty terminations as involving "conjoint action by the legislative and executive branches." In fact, the circumstances surrounding those treaty terminations were little different from those present here. In the case of the ABM Treaty, congressional passage of the NMDA clearly encouraged and contemplated the President taking action inconsistent with the ABM Treaty, though it did not by its terms require him to do so. Similarly, President Roosevelt's termination of the 1927 Multilateral Tariff Convention occurred after Congress passed the National Industrial Recovery Act, with which the Convention impliedly "conflicted," The Constitution and the Termination of Treaties at 184, although the Act did not "require[] U.S. withdrawal from the 1927 Convention." Appendix to Hansel Mem. at 174. And President Roosevelt's termination of the 1827 Treaty of Commerce and Navigation with Italy occurred after passage of the Trade Agreements Act of 1934. Again, the Treaty was "contrary to the objectives set forth in

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[14] Other treaties of arguably substantial magnitude that have been terminated by the Executive without the concurrence of Congress include the 1925 Smuggling Treaty with Mexico, the 1911 Treaty of Commerce with Japan, and the 1927 Multilateral Tariff Convention. See The Constitution and the Termination of Treaties at 183-87; Appendix to Memorandum from Herbert J. Hansel, The Legal Adviser, United States Dep't of State, to the Secretary of State, President's Power to Give Notice of Termination of US-ROC Mutual Defense Treaty (Dec. 15, 1078), reprinted in Treaty Termination: Hearings on S. Res. 15 Before the Sen. Comm. on Foreign Relations, 96th Cong. 147, 172-76, 179-82 (1979) [hereinafter Appendix to Hansel Mem.]; Congressional Research Service, Library of Congress, Treaties and Other International Agreements: The Role of the United States Senate, Sen. Print No. 106-71, at 206 (Comm. Print 2001).

the Trade Agreements Act," The Constitution and the Termination of Treaties at 185, although the legislation "did not necessary override or conflict with the earlier treaty." Appendix to Hansel Mem. at 178. Similarly, in the present case, continued participation in the ABM Treaty would have been "contrary to the objectives" of the NMDA, bringing the present case in line with these cases from the past.[15]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, Plaintiffs' Motion for Summary Judgment should be denied.

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Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

ROSCOE C. HOWARD, JR.
United States Attorney

SHANNEN W. COFFIN (D.C. Bar No. 449197)
Deputy Assistant Attorney General

[15] Even if Congress had *not* passed the NMDA, defendants would still contend that the President had the authority to withdraw from the Treaty without first obtaining Congress' concurrence. However, the fact that Congress passed the NMDA vitiates any argument that the President has acted completely without the tacit approval or acquiescence of Congress.

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JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 27191)
CAROL FEDERIGHI
U.S. Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

Tel: (202) 514-1903
Fax: (202) 616-8460

Attorneys for Defendants