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' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' Opposition Memorandum[1] again seeks to obscure the fatal justiciability flaws in their case in favor of rhetorical flourishes about a "fundamental constitutional dispute" between the Executive and the Legislative Branches, in which "the stability of the world and our standing in it" are at stake. Pls' Opp. at 1. In fact, as defendants have pointed out in their two previous memoranda, there is no constitutional crisis, or even a ripe dispute, between the two Branches because the United States Congress, as a body (as opposed to the individual Members who are plaintiffs here), has not opposed the President's decision to withdraw from the ABM Treaty. The case is also nonjusticiable because, as individual legislators, plaintiffs lack standing under Raines v. Byrd, 521 U.S. 811 (1997), and because the issue presented, that of the

[1] Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (filed Sept. 13, 2002) ("Plaintiffs' Opposition Memorandum" or "Pls' Opp.").

allocation of the treaty termination power between the two political Branches, is a political question.

For these reasons, the Court need never reach the merits on which plaintiffs focus, but, if it does, it will find that plaintiffs' discussion of the merits only confirms the points defendants have made previously – that the courts have recognized that the President has wide-ranging foreign affairs powers, that the nontextual evidence regarding the Framers' intent is sparse, contradictory, and hence inconclusive, and that the historical evidence reveals a diversity of circumstances under which treaties were terminated, including other instances of treaty termination by the President acting without formal congressional approval. Indeed, plaintiffs practically concede the foregoing points. In addition, consideration of the merits supports defendants' position on the non-justiciability of the case, in that it underlines that there are no "judicially discoverable and manageable standards" for easily resolving the issues put forward and that resolution of this complicated and politically charged issue is better left to the political branches.

Defendants will not here repeat the previous arguments they have made but will only address a few of the points made by plaintiffs in their Opposition Memorandum.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE

A. The Holding of Raines is Fully Applicable Here

In their previous memoranda, defendants argued that plaintiffs lack standing as individual legislators under Raines v. Byrd, 521 U.S. 811 (1997). Plaintiffs attempt to escape the inevitable dismissal of their suit under Raines by arguing that Raines' "underlying rationale" was based on

the "availability of an alternative remedy," which they claim they do not have here. Pls' Opp. at 1. Plaintiffs argue that, if the United States' position that the President has "plenary control over foreign affairs" is true, then they have no remedy, and that, in fact, defendants are being "self-contradictory" in arguing both that the suit should be dismissed under Raines *and* that the President has plenary control over foreign affairs. Id. at 1, 3-4.

Defendants have already pointed out that plaintiffs have a variety of political remedies here – including use of Congress' appropriations power – and that the Raines holding did not, in any event, rest exclusively or even principally on the availability of an alternative remedy. Defs' Opp.[2] at 9 & n.9. Indeed, the Raines Court expressly stated that it was not deciding "whether the case would be different" if Members of Congress did not have an alternative remedy. 521 U.S. at 829-30. Rather, the Court held that the existence of such alternative legislative remedies *further* obviates the need for judicial intervention. Id. at 829.

Plaintiffs respond by conceding "Congress' power of the purse" but contending that this power is ineffective if the President can still terminate a treaty at will because it "does not extend to the obligations assumed by the Soviet Union when the ABM Treaty came into force." Pls' Opp. at 5-6. In other words, they argue that they do not have an effective remedy because Congress cannot actually *prevent* the termination of a treaty and also cannot continue a treaty's obligations as to the other party. They further state that Congress's powerlessness in this area means that Congress can never "assert[] its constitutional authority" in such a manner as to create a ripe dispute with the Executive Branch, presumably thereby eliminating the need to establish

[2] Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (filed Sept. 13, 2002) ("Defs' Opp.").

ripeness in this action. Id. at 6.

Putting aside the significant question as to whether Congress has standing to raise, in court, issues regarding the compliance of *another* nation with treaty terms, plaintiffs' arguments ignore the reality that Congress, as a whole, made no attempt whatsoever to block the termination of the Treaty from taking effect – despite the six-month window between notice of the withdrawal and its effective date under the Treaty. If Congress had chosen formally to express its disapproval of the President's decision to withdraw from the Treaty, such as by adopting a joint resolution of disapproval, this might be a different case. Indeed, under those circumstances, it is mere supposition to suggest that the President would have acted directly to contravene Congressional disapproval without further negotiations or discussions with Congress. See Goldwater v. Carter, 617 F.2d 697, 715-16 (D.C. Cir.) (Wright, C.J., concurring) (noting that "[a] President is likely to pay heed to [Congress'] disapproval"), vacated, 444 U.S. 996 (1979). But, at least in that instance, Congress would have taken a formal, institutional position on the President's action. In the absence of Congressional action, this Court need not even consider the question posed by plaintiffs – whether Raines would require that Congress have the actual power to prevent treaty termination before an individual legislator could be denied standing – because the institution of Congress has suffered no injury here and hence there is no ripe dispute between Congress and the Executive Branch.[3]

[3] Indeed, plaintiffs concede that there is no "impasse" between the two Branches as to "whether this or that treaty may or should be terminated." Pls' Opp. at 6. Instead, plaintiffs attempt to create a ripe dispute by citing an impasse as to "whether unilateral treaty termination by the President is consistent with the language and spirit of the Constitution." Id. But this sort of abstract question is precisely the type of question which Article III prohibits the courts from adjudging.

This fundamental flaw in plaintiffs' claims is one significant ground on which this case can be distinguished from Coleman v. Miller, the principal decision upon which they rely.[4] As the Supreme Court reasoned in Raines, there may be little left of the rule of Coleman in modern jurisprudence. 521 U.S. at 824 n.8. However, even assuming Coleman retains validity today, the Raines Court reasoned that the case only applies where, at a minimum, a group of legislators whose votes would have been sufficient to effect the relief sought in the lawsuit (there, the non-ratification of a constitutional amendment) sue *as a group* to obtain judicial relief. Id. at 822-23. Coleman thus is limited to circumstances where, accepting the plaintiffs' view of the merits of the dispute, their votes to take appropriate legislative action "were deprived of all validity." 521 U.S. at 822. Here, however, even if the Court were to accept the plaintiffs' claims that the President cannot act without approval of one or both Houses of Congress, this lawsuit, brought by a handful of House members who failed to convince their colleagues of the need for legislative action, falls well short of the limited Coleman rule.

In any event, defendants have explained before that, if, acting as a whole, it had disapproved of the President's action, "Congress possesse[d] ample powers under the Constitution . . . , should Congress choose to exercise them," to delay or prevent his decision. Ange v. Bush, 752 F. Supp. 509, 514-15 (D.D.C. 1990) (concluding that the "[r]esolution of the war powers dispute lies in the responsible exercise of existing powers *already belonging* to the

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[4]As we have discussed, even were this Court to find this threshold injury standard satisfied, Coleman is distinguishable on numerous other grounds, including on the ground that Coleman arose in state court and involved state legislators and hence did not present any separation-of-powers concerns. See Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, at 22 n.8 (filed Aug. 5, 2002) ("Defs' SJ Mem."); Defs' Opp. at 8 & n.8.

political branches") (emphasis supplied). This case is indistinguishable from Campbell v. Clinton, 203 F.3d 19, 23 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000), in which the Court found that Congress' ability to pass legislation or to use its appropriations authority were adequate remedies to offset the President's decision to launch airstrikes overseas, an otherwise irreversible decision. At the extreme, if Congress believes that the President is violating the Constitution, it may "even impeach the President." Id.; see also Ange, 752 F. Supp. at 514. These remedies are more than sufficient to satisfy any requirement of Raines that a finding of lack of standing depends on the existence of alternative remedies. Defendants' arguments on the merits – that the President has the authority to terminate a treaty without congressional approval – and defendants' position that plaintiffs lack standing under Raines are hence perfectly consistent.[5]

B. Plaintiffs' Arguments Highlight That This Case Presents a Non-Justiciable Political Question

Recognition of the foregoing practical powers available to Congress to address the President's decision further confirms that this case presents a non-justiciable political question. In arguing that the political-question doctrine should not apply here, plaintiffs contend that the Judicial Branch must step in to "restore the proper balance between the other two branches" because Congress is powerless to address the Executive Branch's "seizure . . . of a power that should be shared between them." Pls' Opp. Mem. at 7-8. Given the political avenues that are available to Congress, as discussed above, Congress is not "powerless" and this argument has no

[5] Indeed, defendants' analysis is also consistent with the analysis required by this Circuit's standing law, which requires that "[a]t the standing stage we must take as correct [plaintiffs'] claim that the President violated the Constitution" by unilaterally withdrawing from the ABM Treaty. Campbell, 203 F.2d at 23-24.

merit.

At bottom, the doctrine of legislator standing recognizes that inter-branch disputes such as this are best resolved by the give and take of the political process . As this Circuit has explained, our constitutional system embodies "the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. . . . [E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." United States v. ATT, 567 F.2d 121, 127 (D.C. Cir. 1977); see also Goldwater v. Carter, 617 F.2d at 708 ("Treaty termination is a political act, but political acts are not customarily taken without political support.").

Such "dynamic compromises" and "optimal accommodations" are to be preferred to judicial resolution of disputes. United States v. ATT, 567 F.2d at 127; see also Goldwater v. Carter, 617 F.2d at 715-16 (Wright, C.J., concurring) (noting that "[a] President is likely to pay heed to [Congress'] disapproval, *in which event no court need intervene*") (emphasis supplied). As the Supreme Court has said, the Framers "'did not make the judiciary the overseer of our government.'" Dames & Moore v. Regan, 453 U.S. 654, 660 (1981) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)). In fact, the very purpose of the standing doctrine and other justiciability doctrines is to "help to ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent the Judiciary from encroaching into areas reserved for the other Branches by extending judicial power to matters beyond those disputes

'traditionally thought to be capable of resolution through the judicial process.'" Mistretta v. United States, 488 U.S. 361, 385 (1989) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)). Here, the political branches have reached a "dynamic compromise" concerning the termination of the ABM Treaty that has avoided producing a direct conflict between the two Branches, and the Judicial Branch should therefore decline to intervene.

C. Plaintiffs Lack Standing Because They Do Not Have Authority To Represent the Official Position of Congress or of the House

In addition to the above problems, at a bare minimum, plaintiffs lack standing because they have not obtained the authority to represent the official position of Congress or of the House. Plaintiffs are members of Congress, and the Constitution requires them to act pursuant to the rules of that body, which means acting according to the will of a majority of the two Houses. See Raines, 521 U.S. at 829 n. 10, and cases cited therein. In particular, congressional procedures require legislators to get permission from Congress before representing Congress in litigation. The Court found that such approval was what gave the House standing in one of the cases on which plaintiffs rely, United States House of Representatives v. United States Department of Commerce, 11 F. Supp. 2d 76 (D.D.C. 1998), appeal dismissed, 525 U.S. 316 (1999). The Court found that the House had "been granted authority by statute to prosecute this suit." Id. (citing Pub. L. No. 105-119, § 209(g), 111 Stat. at 2482-83 (1997)).

To pursue the present litigation, therefore, the proper procedure would have been for plaintiffs to get formal authorization from both Houses of Congress that would have permitted them to sue on behalf of Congress as a whole. Plaintiffs may not leapfrog past these procedures and obtain a hearing in court based on their own *personal* generalized disagreement with the President's policies. Plaintiffs' failure to obtain authorization from their colleagues makes this

case like Raines and unlike United States House of Representatives and provides a further reason to defeat their claim to standing.[6]

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

A. Plaintiffs Do Not Dispute That the President Has Wide-Ranging Foreign Affairs Powers

With regard to the merits, plaintiffs first contest defendants' position that the President has "plenary power" in the foreign affairs area, principally criticizing the use of the word "plenary." Plaintiffs cite a 1978 definition of "plenary" as "complete or absolute" and argue that the President's power cannot be "exclusive" if defendants agree that the Legislative Branch possesses some enumerated foreign affairs powers. Pls' Opp. at 11-13. However, nowhere have defendants taken the position that the President's foreign affairs powers are "absolute" or "exclusive." Defendants used plenary in the sense of "full[,] complete[,] entire." See Black's Law Dictionary 1175 (7th ed. 1999). In this sense, "plenary" can be used even for powers that have some limitations but are complete within those limitations. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 376 (2000) (referring to "the plenitude of Executive authority" even though Congress had imposed certain conditions on that authority). Indeed, from the outset, defendants have freely admitted that the President shares some foreign affairs authority with Congress. Defs' SJ Mem. at 32-35.

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[6] Defendants do not concede that United States House of Representatives was correctly decided (in dismissing the appeal, the Supreme Court did not reach the standing issue) or that the present case would meet all the requirements of justiciability if plaintiffs had congressional authorization to proceed. Even if Congress had authorized the suit, this case might well present the type of injury that is never cognizable in court, for the reasons defendants have set forth above and in their prior memoranda. However, this issue need not be decided or even briefed here.

Plaintiffs' focus on the word "plenary" is therefore a red herring. In fact, plaintiffs do not contend that the President does *not* have broad powers in foreign policy matters (whether or not described as "plenary"), arguing only that "the President's control over foreign affairs does not *exclude* a role for Congress" (which defendants do not dispute). Pls' Opp. at 11 (heading, emphasis added). For the most part, plaintiffs do not address the large number of cases cited by defendants in which the courts have acknowledged the President's broad powers and deferred to his decisions in this area. See Defs' SJ Mem. at 30-36. Instead of addressing these cases, plaintiffs focus on academic criticism of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), which they call "an old horse on its last legs." Pls' Opp. at 12. However, as they did with the political-question doctrine in their opening memorandum, plaintiffs are improperly treating a case as overruled before the Supreme Court has actually done so itself. The Supreme Court has never disavowed the holdings of Curtiss-Wright, and, indeed, continues to cite Curtiss-Wright's statements regarding the President's foreign affairs powers. See Sale v. Haitian Centers Council, 509 U.S. 155, 188 (1993) (citing Curtiss-Wright for proposition that "the President has unique responsibility" for foreign and military affairs); Dames & Moore, 453 U.S. at 661. Since the Supreme Court has not overruled this important precedent, this Court remains bound by it. See Defs' Opp. at 12-13. Curtiss-Wright's statements regarding the breadth of the President's foreign affairs powers, as well as the holdings in the other cases defendants have cited, remain good law.

B. The Nontextual Evidence Regarding the Framers' Intent Does Not Overcome the Evidence Derived From the Text and Structure of the Constitution

Plaintiffs continue to try to read meaning into the Constitution that is not in the text itself, arguing that the Constitution's grant of the treaty *making* power to the President "by and with the Advice and Consent of the Senate" "represents a decision that the treaty *power* [presumably] including more than just treaty making] would be shared." Pls' Opp. at 13 (emphasis added). In doing so, plaintiffs rely principally on sources outside the text of the Constitution itself. However, the language of the [C]onstitution . . . constitutes the best evidence of original intention." Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 377 (1981). With regard to "treaty powers," the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const., Art. 2, § 2, cl. 2. The Constitution is silent as to the allocation as between the President and Congress of the power to *terminate* a treaty. However, the broad grant of the "executive power" to the President and the placement of the Treaty Clause in Article 2 (dealing with President's powers) is strong *structural* evidence that the Framers intended that such a nonenumerated treaty power belong to the President.

As for the nontextual sources, defendants have previously shown that these sources are sparse and contradictory. Indeed, even plaintiffs concede that "[t]here is no definitive evidence from debates at the Constitution or arguments made in support of ratification of clear intent of the framers or ratifiers concerning the proper mechanism or mechanisms for treaty termination." Pls' Opp. at 15. These "unclear" and "undefinitive" nontextual sources are not sufficient to overcome the actual textual and structural evidence derived from the Constitution itself.

That the President has broad powers in the foreign affairs arena that go beyond what is expressly set out in the Constitution is further illustrated by the case law addressing the issue of the constitutionality of "executive agreements." Executive agreements are international agreements that are not considered treaties and are not submitted to the Senate for its approval. The Supreme Court long ago recognized that the President has the power to make "international compact[s] which do not require the participation of the Senate." United States v. Pink, 315 U.S. 203, 228 (1942); see also United States v. Belmont, 301 U.S. 324 (1937). The source for this power derives from "the power over foreign relations accorded to the President by the Constitution." United States v. Walczak, 783 F.2d 852, 855 (9th Cir. 1986); see also id. at 856 ("The Supreme Court has never held an executive agreement *ultra vires* for lack of Senate consent."). Similarly, this same source of power grants to the President the authority to terminate treaties without the participation of Congress.

C. History Reveals Congressional and Presidential Acceptance of a Wide Variety of Means for Terminating Treaties

Regardless of how one groups or categorizes the various incidents, the history produced by plaintiffs and defendants can be summed up as demonstrating that, over the course of United States history, a wide variety of means have been used for terminating treaties, including by unilateral action by the President. Indeed, even plaintiffs admit that "treaties have been terminated . . . 'by the President alone.'" Pls' Opp. at 20. Congress as a body has never acted to set limits on the procedures to be used or to preclude unilateral presidential action. This congressional acquiescence is important here.

In Youngstown, Justice Jackson laid out a framework for determining the scope of presidential power. For cases, such as this one, where "the President acts in the absence of either

a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." 343 U.S. at 635-637; see also Dames & Moore v. Regan, 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'") (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)). Here, congressional acquiescence in a wide variety of treaty termination practices, including termination by the President acting alone, creates a presumption that Congress has consented to those practices, and further vitiates plaintiffs' attempt to argue that the President's termination of the ABM Treaty is unconstitutional.

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,

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