

THE PRESIDENT, THE CONSTITUTION AND THE ABM TREATY

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The price we pay for the brevity of our constitution, which is one of its beauties, is that it does not cover all contingencies. But in return, the consideration of any gap in the constitutional framework leads of necessity back to an examination of the fundamental principles on which the Republic was founded and on which it subsists today.

So it was when 53 members of Congress on November 19, 1990, put to Judge Harold Greene of the DC District Court a question which had never been clearly answered by any court before: Could President Bush the Elder take this country to war in the Persian Gulf without violating Art. I, Section 8, Paragraph 11 of the Constitution, which allocates to the Congress the power to declare war? The answer given by Judge Greene, after careful scrutiny of the origins and role of the war clause, was that he could not.¹ In arriving at this conclusion, Judge Greene held that the Congressional plaintiffs had standing and that their complaint was not to be dismissed on political question grounds, but that their request for an order enjoining the President from engaging in offensive military action without Congressional consent was premature. Shortly thereafter, the Senate, by a narrow margin, gave the required consent.

President George W. Bush's announced intention to terminate the ABM treaty² without the consent of Congress presents a similar situation, with one important difference: President Carter's decision, in December 1978, to terminate the Mutual Defense Treaty of 1954 between the United States and Taiwan, did lead to a judicial consideration of his authority to do so without Congressional consent, which went all the way to the Supreme Court. It is generally believed that Congress "lost" this case, *Goldwater v. Carter*, precluding further challenges to unilateral Presidential treaty termination. But, as a number of commentators have pointed out,³ and as the following analysis will show, this is a vast oversimplification of an extraordinarily complex set of judicial rulings. In fact, Congress' role in treaty termination is still very much alive. As Chief Judge Wright of the D.C. Circuit, quoted with approval by Justice Rehnquist in the Supreme Court, said in the *Goldwater* case, "Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters."⁴

In the first stage of the constitutional debate between 24 members of Congress and President Carter, Judge Oliver Gasch of the District of Columbia District found that the plaintiffs had standing to invoke the aid of his court and that their suit was not barred by the political

¹ *Dellums v. Bush*, 752 F.Supp. 1141 (1990)

² Given by identical diplomatic notes to Russia, Belarus, Kazakhstan and Ukraine on December 13, 2001. See www.state.gov/r/pa/prs/ps/2001/6859.htm

³ Bruce Ackerman, "Treaties Don't Belong to Presidents Alone," NY Times Op-Ed, August 29, 2001 and "Bush Can't Operate as a One-Man Band," LA Times Op-Ed, December 16, 2001; Walter C. Clemens, Jr., "Missile Defense: Who Terminates a Treaty?," Bulletin of the Atomic Scientists, November-December 2001; "Termination of Treaties: A Presidential Decree is Not Enough," available from War and Law League, P.O. Box 42-7237, San Francisco, CA 94142, fax 415 564 2083

⁴ 444 U.S. 996, 1004, n. 1 (1979)

question doctrine. In approaching the substantive question of treaty termination authority, on which the Constitution is silent, Judge Gasch first reviewed the history of two centuries of treaty termination. He found that, while there had been some, apparently unchallenged, instances of unilateral termination by the President, most of these "involved commercial situations where the need for the treaty, or the efficacy of it, was no longer apparent."⁵ More significantly, he found that "The great majority of the historical precedents involve some form of mutual action, whereby the President's notice of termination receives the affirmative approval of the Senate or the entire Congress."⁶

The President invoked his foreign affairs power in support of his position, citing the famous – or infamous, depending on one's view – dictum in *Curtiss Wright* that he is "the sole organ of the federal government in the field of international relations."⁷ But that case involved an executive agreement, not a treaty, and Judge Gasch dismissed the argument in the following terms: "While the President may be the sole organ of communication with foreign governments, he is clearly not the sole maker of foreign policy. In short, the conduct of foreign relations is not a plenary executive power."⁸

In further support of the plaintiffs' position, Judge Gasch relied on the constitutional status of treaties as the supreme law of the land and the President's obligation to faithfully execute the laws. "The President," he said, referring to the treaty at issue, "cannot faithfully execute that treaty by abrogating it any more than he can faithfully execute by failing to administer. He alone cannot effect the repeal of a law of the land which was formed by joint action of the executive and legislative branches, whether that law be a statute or a treaty."⁹ And, in a prescient comment on what has come to be known in common parlance as the imperial presidency, he cited these words of Justice Frankfurter: "The accretion of dangerous power does not come in a day. It does come, however, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."¹⁰

In conclusion, based on two centuries of treaty termination practice, Judge Gasch held that "the President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for it to be effective under our Constitution."¹¹

But that was not the end of the story. President Carter appealed, and the Court of Appeals for the District of Columbia Circuit reversed the opinion below in a divided but virtually unanimous *per curiam* opinion.¹² The court could not muster a majority to dispose of the case on lack of standing or political question. It is significant to note that, before proceeding to examine the merits, the court took pains to point out that, although the Taiwan treaty contained a termination clause, the Senate did not, in ratifying it, reserve to itself a role in its termination, nor had it, "since the giving of the notice of termination, purported to take any

⁵ 481 F.Supp.949, 959 n. 45 (1979)

⁶ Id. at 960

⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)

⁸ 481 F.Supp. 949, 961

⁹ Id. At 963

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952)

¹¹ 481 F.Supp. at 964

¹² 617 F.2d 697 (1979)

final or decisive action with respect to it, either by way of approval or disapproval."¹³ With respect to the first of these observations, the court cited no precedent of such a reservation clause, nor, it is believed, could it have. With respect to the second, there is at least a strong implication that, had the Senate taken a "final or decisive action" of disapproval, the result might have been different.¹⁴

The court then proceeds to buttress its acceptance of the President's unilateral termination power with a number of arguments, including

The Senate confirms ambassadors, but plays no role in their termination;

For purposes of the supremacy clause, a treaty is not the same kind of law as a statute;

The Senate's advice and consent power to treaty making is not to be "lightly extended" to treaty termination in the absence of constitutional language to that effect;

Conferring treaty termination power upon the Senate would leave the President at the mercy of one-third plus one of the Senate if he deemed termination desirable;

Treaties may be terminated in a variety of ways, *e.g.* material breach, impossibility of performance, *etc.*;

The termination of this particular treaty is intimately connected to the President's exclusive power to recognize a foreign government;

"Of central significance," this treaty contains a termination clause.

In conclusion, the majority states: "Viewing the issue before us so narrowly and in the circumstances of this treaty and its history to date, we see no reason which we could in good conscience invoke to refrain from judgment."¹⁵ In other words, having marched up the hill of general principles, the court then does an about face and cautions that its ruling is to be interpreted as applied to the particular facts of the case before it.

Chief Judge Wright, with Judge Tamm concurring, would have dismissed the complaint for lack of standing. They also invoked the principle of "judicial self-governance," stating that "if Congress wants to participate directly in a treaty termination it can find the means to do so."¹⁶

¹³ Id. at 699

¹⁴ In fact, shortly after the District Court issued its order, the Senate adopted, by a vote of 59 to 23, an amendment to a resolution providing "that it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." See 617 F.2d at 701. But the resolution itself was never voted on and it is, in any case, doubtful whether the amendment would have had retroactive effect. Nevertheless, the amendment stands as an expression of the Senate's view on the subject at the time.

¹⁵ Id. at 709

¹⁶ Id. at 715

Judge McKinnon, on the other hand, filed what can only be characterized as a thunderous dissent, chastising the majority for rendering "an obviously expedient decision" with which, he said, history would not deal kindly.¹⁷ Differing sharply from the majority's distinction between a treaty and an ordinary law, he cites Chief Justice Marshall to the effect that a treaty is "to be regarded in courts of justice, as equivalent to an act of the legislature,"¹⁸ and avers that the "necessary and proper" clause of the Constitution gives to the Congress all it needs to assert its right to participate in treaty termination. He then proceeds to examine the 200 year history of treaty termination at inordinate length – 12 printed pages – and concludes that reliance upon "miniscule precedent forcibly illustrates the great weakness in the President's claim to absolute power in the present circumstances."¹⁹ After refuting, point by point, the various rationales advanced by the majority for its decision to reverse, for example noting that under the treaty's termination clause that power belongs to the United States, not the President,²⁰ Judge McKinnon concludes that "Maintenance of a constitutional balance in treaty termination assumes even greater importance as our nation become increasingly oriented toward global affairs."²¹ And he goes on to add, in a passage particularly relevant to the contemporary state of affairs : "As modern communications, transportation, and military power increasingly bring the perils and problems of the entire globe into our daily consciousness, our national concerns become international. Foreign affairs become our national affairs. Hence, to the extent that we complacently grant to the President unbridled power in the international realm, we increase his power nationally, to an ever expanding degree."²²

The Supreme Court had the last word in the *Goldwater* case,²³ but it turned out to be a rather muffled one. It ordered the judgment of the Court of Appeals to be vacated and the case to be remanded to the District Court with directions to dismiss the complaint. This is what the individual justices had to say :

Justice Powell agreed with the result, but would have dismissed the case as not ripe for judicial review, disagreeing with Justice Rehnquist, with whom Chief Justice Burger and Justices Stewart and Stevens concurred, that the issue was, in any case, non-justiciable on political question grounds. On the contrary, said Powell, "If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue."²⁴

The Rehnquist opinion is grounded in the view that the case is "political" (his quotation marks) "and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations

¹⁷ Id. at 717

¹⁸ Id. at 719, citing *Foster v. Neilson*, 2 Pet. (27 U.S) 253, 314-15 (1829)

¹⁹ 617 F.2d at 734

²⁰ Id. at 737

²¹ Id. at 739

²² Id.

²³ 444 U.S. 996

²⁴ Id. at 1002

and the extent to which the Senate or the Congress is authorized to negate the action of the President."²⁵

Justice Blackmun, joined by Justice White, held that it was indefensible for the Court to have decided the case without briefing and oral argument; they would have set it for oral argument and given it "the plenary consideration it so obviously deserves."²⁶

Justice Brennan, accusing Justice Rehnquist of profoundly misapprehending the political question principle as applied to foreign relations, would have affirmed the "prudently narrow" judgment of the Court of Appeals solely on the ground that the power to recognize and withdraw recognition from foreign regimes is the President's alone.²⁷

Justice Marshall concurred in the result, without joining the statements of any of his brethren or issuing one of his own.

What can we deduce from this complex history of the *Goldwater* case that might be relevant to an attempt to challenge President Bush's announced intention to unilaterally terminate the ABM Treaty? Not much, actually. Of the four Supreme Court Justices who considered the question generically political, only two, Rehnquist and Stevens, remain on the Court. Given the fact-based but divergent opinions of Powell and Brennan, the non-substantive opinions of Blackmun and White and the Sphinx-like silence of Marshall, it is impossible to extract from the judgment a majority rule that would provide guidance to a court seized of a new challenge to Presidential termination with different facts.

The majority opinion of the Court of Appeals might provide such guidance, in a negative sense, were it not for the fact that it was presented by the court as narrowly fact-based and, more importantly, that it was vacated by the Supreme Court and is thus, at least technically, without precedential value.²⁸

On the positive side of the ledger, for advocates of Congressional participation, are the strong and well documented opinions of Judge Gasch in the District and Judge McKinnon in the Circuit, the first reversed and the second vacated, as well as the theme running throughout the entire exercise that, given a clearly delineated controversy between one or both chambers of Congress and the President, the courts would find it difficult to abstain from entering the fray and might well do so on the side of Congress.

Another question, but one more appropriate for the Congress or the International Court of Justice than a US tribunal, is whether the United States has met the condition for termination contained in the ABM Treaty, *i.e.* the occurrence of extraordinary events which

²⁵ Id.

²⁶ Id. at 1006

²⁷ Id. at 1007

²⁸ In support of the Supreme Court's decision to vacate the decision of the Court of Appeals, Justice Rehnquist said that it was "imperative that this Court invoke this procedure to ensure that the resolution of a 'political question', which should not have been decided by a lower court, does not 'spawn any legal consequences'." Id. at 1005.

have jeopardized its supreme interests.²⁹ It is worth noting, in this connection, that, while President Bush's remarks on the occasion of the announcement of his termination decision were couched largely in terms of the impact of the events of September 11,³⁰ his desire to terminate the treaty became clear long before that awful day.³¹

Many have questioned the wisdom of terminating the ABM treaty, both within the Congress³² and in the community at large.³³ In these days of ever closer relationship between international and national affairs, Congress has a duty to examine not only the substance of the issue but also its constitutional procedural aspects, lest "the accretion of dangerous power" take another giant step forward.

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²⁹ See John Burroughs and Robert Boehm, "Congress and the Fate of the ABM Treaty", *Bombs Away!*, Newsletter of the Lawyers' Committee on Nuclear Policy, Fall 2001, www.lcnp.org/pubs/Bombsaway01/article%206.htm

³⁰ See www.whitehouse.gov/news/releases/2001/12/20011213-4.html

³¹ E.g., in his May 1, 2001 speech at National Defense University; see http://www.armscontrol.org/act/2001_06/docjun01.asp

³² Cf. H.Res.313 by Rep. Woolsey with 28 co-sponsors; Statement of Dec. 12, 2001 by Senator Daschle; Statement of Dec. 13, 2001 by Senator Levin; Statement of Senator Biden, 147 Cong. Rec. S12,998

³³ Cf. James Galbraith, "The Dangers of National Missile Defense," *Boston Globe*, May 16, 2001; William Hartung, "Ballistic Missile Defense in the Bush Defense Review," available at <http://www.foreignpolicy-infocus.org/media/0105briefingbook/hartung01.html>