

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE DENNIS KUCINICH,
et al.,

Plaintiffs,

v.

GEORGE BUSH, President of the United
States, et al.,

Defendants.

Civ. No. 02-1137 (JDB)

**OPPOSITION TO MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE A
MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE**

Plaintiffs, Representative Dennis Kucinich, *et al.*, oppose the Motion of *Amici Curiae* Senator Jon Kyl, *et al.*, for Leave to File a Memorandum in Support of Defendants' Motion to Dismiss ("Memorandum"). Plaintiffs also move to strike the *Amici Curiae's* Memorandum for lack of a proper counsel of record. Local Rules 5.1 and 83.2(c)(1) require that at least one attorney filing such a pleading must be a member in good standing of this Court. *Amici's* counsel of record is not a member, therefore this Court should reject their filing. Additionally, *amici's* Memorandum will not guide the Court in considering the instant case. Two *amici*, Senators Strom Thurmond and Jesse Helms, were parties to Goldwater v. Carter, 444 U.S. 996 (1979), in which they espoused Plaintiffs' position in this case— the need for congressional authorization for treaty termination. This facile turnaround casts doubt on *amici's* argument.

ARGUMENT

I. *Amici* Must Join with a Member of this Court to File Their Motion and Memorandum.

This Court's rules require an attorney not a member of this Court's bar to join a member of this Court to file. LCvR 83.2(c)(1); LCvR 5.1. *Amici*, however, list only Senator Jon Kyl (R-AZ) as Counsel of Record. Memorandum of *Amici Curiae* at p. 20. The Clerk of this Court confirmed by telephone that Senator Kyl is not a member of this Court's Bar. Therefore, Senator Kyl cannot file pleadings in this Court.

The Local Rules also require that a member of the Court sign all pleadings submitted to the Court. LCvR 83.2(c)(1). Because *amici's* Memorandum does not have any such signature this Court should not accept it. See *Amici Curiae's* Memorandum, p. 20.

The Local Rules do permit government attorneys to practice in this Court. LCvR 83.2(e). Senator Kyl, however, does not fall into this exception because the United States has not retained him. Senator Kyl is not filing on behalf of the United States or an agency.

Local Rule 83.2 ensures that an attorney practicing before this Court is reasonably available to other counsel and the Court. No such guarantee of availability is present here. Senator Kyl does not have a local law office, and would likely be generally unavailable to counsel from either side. Given all of the above, this Court should require *Amici* to obtain local counsel.

II. The *Amici's* Memorandum Does Not Provide this Court with Guidance.

Amici have "request[ed] this Court's indulgence in allowing them to file" their memorandum based on their familiarity with the standard for repealing congressionally-enacted legislation. Motion of *Amici Curiae* for Leave to File a Memorandum in Support of Defendant's Motion to Dismiss, p. 1. *Amici* assert, based on this experience as legislators, "the history of our nation provides ample evidence that treaties have long been terminable at the discretion of the President." *Amici Curiae's* Memorandum, p. 18. *Amici's* memorandum

relies mainly on the decisions of the Supreme Court and District of Columbia Circuit in Goldwater v. Carter, 444 U.S. 996 (1979); 617 F.2d 697 (D.C. Cir. 1979).

The Senators requesting leave to file as *amici* include, among others, Senators Strom Thurmond (R-SC) and Jesse Helms (R-NC). Senators Thurmond and Helms were plaintiffs, along with Senator Barry Goldwater, in Goldwater v. Carter, in which they challenged President Jimmy Carter's authority to withdraw without Congress' consent from the Mutual Defense Treaty with the Republic of China. 1979 U.S. Briefs 856 at 856 (1979) (petition for writ of *Certiorari* appealing the decision of the District of Columbia Circuit). Now, when a Republican President unilaterally terminates a treaty, Senators Helms and Thurmond argue the exact opposite.

In Goldwater, these Senators argued that judicial intervention was necessary to protect Congress' role in the terminating of *any* treaty. Congressional approval, they claimed, is vital to the balance of power in our constitutional scheme:

“The Court of Appeals, in sustaining the President's authority to exclude Congress from participation in the decision to terminate a mutual defense treaty, has made an important and unprecedented allocation of constitutional powers between the Executive and Legislative branches of the Federal Government. No other president has claimed such authority. No other court has ever asserted that he possesses it. *The singular gravity of the question . . . cannot be swept under the rug by attempting . . . to restrict the scope of the opinion to this one treaty.*”

1979 U.S. Briefs 856 at 867 (emphasis added).

The *amici* here contend that our nation's history clearly vests the power to terminate treaties in the President alone. Yet in Goldwater, Senators Helms and Thurmond argued against this position. They asserted that granting the President unilateral treaty termination power would “expan[d] the concept of the President's Foreign Affairs power on an unprecedented scale.” Id. at 868.

Indeed, the Goldwater cert. position included a detailed analysis of why the Constitution, and our nation's history did not support such a grant of Presidential power. Id. at 868-886. Among other arguments, Senators Helms and Thurmond asserted:

“it was generally understood from past practice that termination of treaties . . . required approval of Congress, or at least the Senate. Furthermore, the absence in

the Constitution itself of a provision for treaty termination does not mean that the power consequently devolves upon the President . . . His power, if any, must stem either from an act of Congress or from the Constitution itself. It cannot stem from or be created out of a gap in the Constitution.”

Id. at 887 (internal quotations and citations omitted).

Senators Thurmond and Helms concluded in Goldwater that permitting the President to terminate a treaty without Congressional consent “would . . . let stand a dangerous precedent for Executive usurpation of Congress’ historically and constitutionally based powers.” Id. at 886.

The Senators’ conclusions in Goldwater concerning the Constitution’s delegation of the treaty termination power and Congress’ historical role in treaty termination directly contradict the arguments set out in the *amici curiae*’s memorandum. This contradiction establishes that no consensus exists among the *amici* on the role of the political branches concerning treaty termination. Certainly, then, no consensus exists in Congress as a whole, or, contrary to *amici*’s assertion, throughout our nation’s history on the matter. *Amici*’s views, while likely genuine, are not dispositive or even helpful to this Court in determining the constitutionality of President George W. Bush’s unilateral termination of the ABM treaty.

CONCLUSION

In light of the above, this Court should deny the Motion of *Amici Curiae* for Leave to File a Memorandum in Support of Defendants' Motion to Dismiss, and grant Plaintiffs' Motion to Strike.

Respectfully submitted,

KLIMASKI & GRILL, P.C.
1400 K Street NW
Suite 1000
Washington, DC 20005
(202) 296-5600

By _____
James R. Klimaski
DC Bar No. 243543

PETER WEISS
JOHN BURROUGHS
Lawyers' Committee on Nuclear Policy
211 East 43d Street, Suite 1204
New York, NY 10017
(212) 818-1861

BRUCE ACKERMAN
Sterling Professor of Law and Political Science
Yale Law School
127 Wall Street
New Haven CT 06520
(203) 432-0065

JEREMY MANNING
1 Broadway
New York, NY 10004-1050
(212) 908-6222

JULES LOBEL
MICHAEL RATNER
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430

EDWARD A. AGUILAR
Philadelphia Lawyers Alliance for World Security
1617 John F. Kennedy Boulevard
Suite 11520
Philadelphia, PA 19103-1815
(215) 988-9808

CERTIFICATE OF SERVICE

I hereby certify the foregoing Plaintiffs Opposition to Motion of Amici Curiae for Leave to File a Memorandum in Support of Defendants' Motion to Dismiss; and Plaintiff's Motion to Strike Memorandum of Amici Curiae in Support of Defendants' Motion to Dismiss was served by fax and first-class postage-prepaid mail on August 14, 2002, to:

James R. Klimaski
KLIMASKI & GRILL, P.C.